On 21 January 2020 the Court of Appeal confirmed that the online sales restriction imposed by golf manufacturer Ping on its approved retailers under its internet sales policy (ISP) was a restriction of competition ‘by object’, the most serious type of competition law infringement that does not require the competition authorities to carry out a detailed analysis of the effect of the restriction on competition.

This is the first UK court case to examine prohibitions on online sales under competition law, and the Court of Appeal’s ruling is based on the European Commission’s Guidance on vertical restraints and the European Court of Justice’s (CJEU) case law (Pierre Fabre and Coty). It concludes that there is now a body of case law and decisional practice that shows that, for the purposes of Article 101 TFEU, the imposition by a supplier of an absolute ban on internet sales by authorised dealers in a selective distribution network reveals a sufficient degree of harm to competition and is a restriction of competition by object.
In the context of online sales the CMA has also focused its enforcement practice on online resale price maintenance, with a number of fines imposed in a range of sectors (bathroom fittings, light fittings, catering equipment and musical instruments). Most recently, on the day after the Court of Appeal ruling in Ping, it imposed a fine of £4.5 million on Fender Musical instruments for engaging in online resale price maintenance of its guitars.

**PRACTICAL IMPLICATIONS**

- The ruling confirms the strict approach under EU competition law to online sales restrictions imposed on resellers. The starting point under EU competition law, (which is set out in paragraph 52 of the Commission’s Guidance on vertical restraints), is that every distributor must be permitted to use the internet to sell the products supplied for distribution. This was confirmed by the CJEU in the Pierre Fabre case (where a requirement that cosmetic brands be sold only in a physical space, with a qualified pharmacist present to advise on the use of the products, was held to be an absolute ban on online sales and thereby a restriction by object).

- Suppliers will therefore need to be careful when they seek to restrict online sales by their distributors. Whereas it may be possible to impose quality standards on the design of a distributor’s internet site, or certain restrictions on the use of third party platforms to distribute the contract goods, an absolute ban on online sales is highly likely to amount to a serious restriction on competition and will be very difficult to justify.

- As a result of Brexit, once the transition period that is currently set to end on 31 December 2020 is completed, UK competition law may start diverging from EU competition law (the extent to which this is possible will depend on whether or not continuing alignment of competition rules is agreed as part of a future relationship). Countries where market integration is not a policy objective of competition law (as it is the in the EU common market) tend to take a more liberal approach to online sales restrictions. In the US for example, suppliers can justify online sales restrictions in order to avoid free-riding issues, to protect brand image or to otherwise improve intra-brand competition. Post-Brexit, the UK may be able to take a similar approach should the competition authorities and UK courts think this appropriate.

**BACKGROUND TO THE CASE**
In August 2017 golf club manufacturer Ping was fined £1.45 million by the Competition and Markets Authority (CMA) for banning UK retailers from selling its golf clubs online. The aim of Ping’s online sales ban was to promote in-store custom fitting for its golf clubs. Although the CMA accepted that this was a legitimate commercial strategy, it concluded that alternative and less restrictive measures were available to Ping which would achieve the same outcome.

Ping appealed the CMA’s decision before the Competition Appeal Tribunal (CAT) which upheld the CMA’s decision in its ruling of 7 September 2018 (see our briefing here). The CAT concluded that Ping’s online sales ban constituted a restriction of competition by object under EU and UK competition law. It held that the ban was by its very nature liable to restrict competition between retailers through an important sales channel, both within the UK and across the EU more generally. In particular, retailers could not attract consumers located outside their physical catchment areas to buy Ping golf clubs online by offering better prices or quality online service. The online sales ban also prevented a consumer’s ability to make use of price comparison tools in order to find the best available Ping deals.

As to the fine imposed, the CAT held that the CMA was not justified in imposing an uplift of 10% on its penalty for director involvement, because Ping considered that its policy was legitimate and ultimately benefitted consumers. The infringement was therefore negligent rather than deliberate and could not have occurred without director-level knowledge (due to its public nature). The CAT held that uplifts for director involvement should be reserved for more reprehensible behaviour such as secret cartels. While not ruling out that director-level negligence could, in certain circumstances, constitute an aggravating factor justifying an uplift, the CAT held that the uplift in Ping’s case was unwarranted. It therefore ordered the fine to be reduced from £1.45 million to £1.25 million.

Ping appealed the CAT’s ruling on two grounds:

- It challenged the CAT’s approach to its finding that the ISP was a restriction ‘by object’ within the meaning of Article 101(1) TFEU; and

- In relation to the fine imposed, it challenged the CAT’s finding that the infringement had been committed negligently and that Ping ‘ought to have known’ that its conduct was unlawful, and argued that therefore only a nominal fine should have been imposed.

**COURT OF APPEAL RULING**

**On the CAT’s finding that the ISP was a restriction by object**

Much of the Court of Appeal’s judgment is focused on the approach to identifying ‘by object’ infringements. Its analysis of the ISP follows the framework set out by Advocate General Wahl in the Cartes Bancaires case, considering content, objective and context of the restriction.
As a preliminary issue the Court of Appeal reviewed the CAT’s conclusion that the CMA erred in law in addressing the issues of objective justification and proportionality in the context of its analysis whether the ISP was a restriction by object or effect. According to the CAT these issues were relevant only to the first stage, when considering whether the Metro criteria were met and the online sales ban therefore fell outside the scope of Article 101(1) TFEU, or to the third stage in the context of considering an exemption under Article 101(3) TFEU (as opposed to the second stage, when deciding on the object/effect distinction). Although the Court of Appeal recognises that the CMA decision could have been clearer in explaining how the issue of ‘objective justification’ fitted into the overall structure of its analysis, it accepts that the CMA was not necessarily wrong to address these issues under the umbrella of applying Article 101(1) TFEU. The Court of Appeal acknowledged that there is no bright line between these three stages of analysis, but that it was not for a domestic court to tidy up this area of EU competition law that has been “frustratingly untidy” for so long. Instead, this is a task for the EU courts.

Content of the ISP and EU guidance and case law

The Court of Appeal endorsed the CMA and CAT’s findings that the online sales prohibition set out in the ISP restricts competition. The ISP limits the ability of retailers within the network to sell to customers who are outside the geographic range of their premises. This in turn restricts competition on price, as customers are unable to buy from the cheapest authorised dealer but are instead limited to those dealers whose shops they can visit.

The Commission’s Guidance on vertical restraints address the issue of online sales restrictions. The Commission recognises the internet is a powerful tool to reach a greater number and variety of customers and every distributor must be allowed to use the internet to sell its products. Online sales are considered as passive sales (where the customer approaches the distributor for a sale), restriction of which amounts to a hardcore restriction under the vertical agreements block exemption Regulation (VABER). The CJEU in Pierre Fabre held that the practice of prohibiting online sales was equivalent to a ban on passive sales and a similar approach was followed in Coty, with a different outcome reached based on the facts. The CJEU’s case law on free movement of goods also demonstrate the importance attached by the Court to internet sales as a channel for competition between retailers in different Member States.

The Court of Appeal concluded that there is now a clear body of case law and decisional practice that shows that a prohibition on online sales imposed by a supplier on its distributors results in a sufficient degree of harm to competition and that such a restriction is a restriction by object.

Role of Ping’s wider objective in imposing the ISP
According to Ping, the objective of the ISP - to promote customer fitting - ultimately improved the quality of the product purchased by the customer, and cannot therefore qualify as an object restriction. Counsel for the CMA argued that the CJEU has consistently held that a restriction can amount to an object restriction even if it pursues other legitimate objectives. In *Cartes Bancaires* the CJEU stated that the parties’ intention is not a necessary factor in determining whether an agreement is restrictive. In his opinion in that case Advocate General Wahl held that the “objective aims” that are relevant at this stage must be clear from the measures at issue, and should not be confused with the subjective intentions of whether or not to restrict competition, or with any legitimate objectives pursued by the undertakings in question.

The Court of Appeal concluded that the fact that Ping hopes, or genuinely believes, that the ISP has a greater impact on improving competition based on quality does not prevent it from being an object restriction.

*The legal and economic context of the ISP*

It is clear from the EU case law (*Cartes Bancaires*) that the economic and legal context of the operation of a restriction must be examined before deciding whether or not it is a restriction by object. Ping argued that the CAT had failed to take into account the context of the selective distribution network as an important feature of the legal and economic context in which the ISP operates, and that its agreements were found in breach simply because they reduce intra-brand price competition, which is inherent to any selective distribution network (and which the CJEU’s case law accepts as, on balance, is outweighed by the enhancement of non-price competition).

The Court of Appeal rejected Ping’s argument and found that the CAT had addressed the correct issue, which was whether the ISP went beyond what was generally regarded as a necessary and legitimate restriction of intra-brand competition. It had concluded, based on existing guidance and case law, that the ISP did restrict competition in such a way as to qualify as an object infringement, and the Court saw no basis for challenging this conclusion. The CAT was right to conclude that there was nothing in the economic or legal context in which the ISP operated that changed the conclusion that the ISP amounted to a restriction by object.

*On the penalty*

The Court of Appeal held that the CAT was right to uphold the imposition of the penalty on the basis that the infringement had been committed negligently. During the period of the infringement, the CJEU’s judgment in *Pierre Fabre* and the Commission’s Guidance on vertical restraints were available and should at least have made it clear to Ping that a total ban on online sales was very likely to amount to an infringement of the competition rules.
Ping also challenged the level of the penalty and criticised the CAT for its failure to reduce the fine to reflect its finding that the infringement was negligent rather than intentional. The Court of Appeal dismissed this argument and concluded that the CAT was entitled to take a view of the fine “in the round”. The fact that it did not expressly refer back to its finding that the infringement had been negligent rather than intentional is no basis for saying that its overall decision on the appropriate level of the fine was flawed.

Ping’ appeal, both as to liability and level of fine, was therefore dismissed.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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