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UK Competition Appeal Tribunal Confirms Ban on Online Sales Is Inherently Restrictive of Competition

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On 7 September 2018, the UK's Competition Appeal Tribunal (CAT) upheld the August 2017 decision of the Competition and Markets Authority (CMA) ruling that Ping Europe Limited (Ping) had infringed EU and UK competition law by preventing online sales of its custom golf clubs in the UK.

In its **judgment**, the CAT agreed with the CMA that Ping's online sales ban was a 'by object' restriction of competition, meaning that it infringed the Chapter I prohibition of the UK Competition Act 1998 (CA98) and Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) "by its very nature". Although the CAT accepted that the Internet ban pursued the legitimate commercial objective of promoting custom fitting of clubs in-store, it found that Ping could have used other, less restrictive measures to achieve the same outcome. The CAT also noted that all other major brands allow online sales of custom fitted clubs and that Ping itself permits online sales in the US. Consequently, the CAT dismissed Ping's appeal. Ping's fine was, however, slightly reduced.

The CMA applied both EU and UK competition law in this case, as it is required to do as a National Competition Authority of a Member State. As long as the UK remains a Member State of the EU, the CAT is obliged to apply both EU law and the CA98 in a manner that is consistent with EU case law. Since the Court of Justice of the EU (CJEU) made it clear in its 2011 ***Pierre Fabre* judgment** that outright online sales bans are an 'object infringement' of Article 101, and so inherently unlawful, the CAT's ruling is ultimately unsurprising. The judgment is nevertheless interesting as it marks the first time that a UK court has examined the status of blanket bans on Internet sales under EU and UK competition law. The Tribunal's close analysis of the arguments raised by Ping to justify its policy also help clarify the boundary between agreements that are inherently unlawful and those that may be unlawful in particular circumstances.

Background facts

Ping is a manufacturer and distributor of golf clubs, golf accessories and clothing. It was a pioneer in custom fitting clubs, which consists of retailers conducting an initial customer interview, followed by a static measurement, a dynamic swing test and a ball flight analysis. Apart from the interview, which may be conducted by telephone, all steps are carried out 'face to face' in the retailer's premises.

Ping supplies its products to UK consumers via a selective distribution network of authorised retailers (referred to by Ping as 'account holders'), who must meet qualifying criteria before being admitted and to remain members. Starting in May 2000, Ping prohibited its UK account holders from selling custom fitted clubs over the Internet, on the grounds that online selling was inconsistent with face-to-face customer fitting. Noting that a "face to face dynamic fitting interaction" was the desired approach for all sales of clubs, at a minimum Ping required a "personal conversation" between the account holder and consumer, to convey the benefits of face to face custom fitting. While the personal conversation could take place over the telephone, execution of the sale via the Internet was expressly ruled out.

Acting on a complaint from an aggrieved retailer, the CMA launched an antitrust investigation in November 2015. It issued its infringement **decision** against Ping on 24 August 2017, fining the company £1.45 million. This was the first time that the CMA had penalised a straight ban on online sales, as opposed to combating restrictions on online pricing. Ping subsequently appealed, with the CAT hearing the appeal over two weeks in May.

The CAT's judgment

The fundamental issue on appeal in this case was whether Ping's sales policy was inherently unlawful (i.e. an object infringement, roughly equivalent to *per se* illegality in US law) or was objectively justified and hence lawful (in the sense of falling outside the CA98 Chapter I prohibition and Article 101(1) TFEU altogether). While there was some discussion during the trial of whether the policy met the formal requirements for exemption from the relevant prohibitions under s.9 CA98 and Article 101(3) TFEU, respectively, this aspect of the case appears to have been accorded less weight on appeal.

The CAT found that the issue of whether Ping's Internet ban was a 'by object' infringement was not entirely straightforward. Recent EU case law has at times blurred the dividing line between such cases, where conduct will always be viewed as anticompetitive, and situations where a restriction of competition needs to be proved by reference to the facts of a particular case. The essential difficulty is that, while the 'object' category is largely reserved for conduct that inherently lacks any pro-competitive rationale, such as price-fixing cartels (and is in principle therefore easy to identify), the single market objective underpinning much of EU competition law means that the category also includes vertical agreements that unduly restrict cross-border trade, even if they have pro-competitive aspects. Because online sales bans are viewed in EU law as a form of cross-border sales restriction, they are caught by this categorisation, notwithstanding the fact that manufacturers may have a business interest in limiting online sales that is unrelated to customer location. The desire of authorities to maintain flexibility when categorising 'obviously problematic' agreements has also contributed to the legal uncertainty.

It is nevertheless unsurprising that, applying the case law of the CJEU, the CAT concluded that the CMA was correct to find that Ping's Internet ban revealed a sufficient degree of harm to competition by its nature to constitute a 'by object' infringement, irrespective of Ping's legitimate aim of maximising custom fitting. The CAT rejected Ping's submission that the presence or absence of a 'plausibly pro-competitive rationale' was the key to identifying an object infringement. Consistent with EU case law, the CAT approached the issue by noting that an agreement may be deemed to infringe 'by object' in light of its likely harm to competition, regardless of the actual, subjective aims of the parties involved, even if those aims were in some way legitimate. Referring to the Court of Justice's judgment in *Case C-209/07 Competition Authority v Beef Industry Development Society Ltd*, the CAT stressed that the fact that the impugned measure may have a pro-competitive purpose was "irrelevant" to the assessment of whether it constituted an 'object' restriction for the purposes of Article 101(1).

The CAT observed that the CMA had carried out a detailed assessment of the outline sales ban's harm to competition by reference to its content, objectives and legal and economic context. In particular, it noted that the ban significantly restricted consumers from accessing Ping golf club retailers outside their local area and from comparing prices. The ban also significantly reduced the ability of, and incentives for, retailers to compete for business using the Internet. Noting the existence of significant and growing customer demand for online sales of custom fit clubs, the CAT therefore agreed with the CMA's finding and conclusion that the Internet ban was a 'by object' infringement.

Ping argued that the CMA was wrong to find that Ping's policy was disproportionate and hence not objectively justified. Although the CAT considered that the CMA was wrong to carry out a detailed proportionality analysis when assessing whether the policy was caught by the competition law prohibitions, it ruled that the CMA's ultimate conclusion that the Internet ban was not objectively justified was correct. In the CAT's view, Ping could still compete on non-price parameters (e.g. quality and innovation) against other manufacturers without the ban.

In addition, the CAT agreed with the CMA that there were suitable and appropriate alternative measures available to Ping to achieve its aim of promoting custom fitting, which were less restrictive than the Internet ban. This meant that the policy could not be exempted, as a ban on Internet sales was not 'indispensable' to achieving this objective.

Although the CAT found that the fine of £1.45 million imposed on Ping was "within the correct ballpark figure" for an infringement of this nature, it ruled that the CMA was wrong to impose an uplift of 10% on its penalty for director involvement in the policy (director involvement in an infringement being an aggravating factor for penalty purposes). In an interesting passage of the judgment, the CAT explained that director level involvement in an infringement can be seen as an aggravating factor when setting the level of fine because it shows that an intention to restrict competition extends to the top of a company. While this would be the case in a secret cartel, for example, it was not the case here, where the policy was public and, at least in Ping's view, a legitimate business practice that benefited customers. While the policy was ultimately found to be unlawful, the CAT stressed that the infringement was negligent rather than intentional. As a result, the uplift was not appropriate in this case and the CAT reduced the fine from £1.45 million to £1.25 million.

Comment

Although this has been described by the CMA as a "**landmark case**", the outcome itself is ultimately not surprising, given the clear position since the CJEU's *Pierre Fabre* judgment. What is perhaps more interesting is the aspects that were not controversial in this case. In common with many consumer goods manufacturers, Ping sells its clubs through selective distribution. The operation of selective distribution in an online environment is currently one of the most hotly contested areas of EU competition law. A particular area of controversy has been the status of bans on the use of third party marketplaces. While that was largely resolved by the CJEU in its ***Coty* judgment**, which ruled that such bans are lawful in a selective distribution environment, arguments continue over whether that finding is limited to luxury products or of general application. Although Ping's Internet sales policy did include a marketplace sales ban, this was ultimately incidental in the case as it formed simply one aspect of Ping's total ban on online sales.

The CJEU case law is clear that an online sales ban is qualitatively different from a marketplace ban. While the former is inherently unlawful, the latter is not. Since Ping operated a total ban on online sales, its related prohibition of marketplace use was not addressed by the CAT. Similarly, the fact that Ping's products are at the 'luxury' end of gold clubs did not save its policy, just as the high quality of Pierre Fabre's cosmetics did not save its requirement that they had to be sold in a pharmacy from being ruled unlawful.

The CAT's judgment confirms the position that, apart from a narrow category of products where online sales are genuinely impossible or contrary to the public interest, any ban will be contrary to EU law as well as the laws of the Member States. Whether this position shifts in the UK once domestic courts are no longer bound to follow EU precedent remains to be seen.