

CAT upholds Ping's fine: lessons on online sales bans

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On August 24, 2017, the UK's Competition and Markets Authority ("CMA") [fined Ping Europe Limited \("Ping"\) £1.45 million](#) for breaching UK and EU competition law by instituting a ban on online sales of Ping golf clubs. Ping challenged the CMA's decision before the Competition Appeal Tribunal ("CAT"). On September 7, 2018, [the CAT dismissed the appeal](#), but reduced Ping's fine.

Facts and CMA decision

Ping operates a selective distribution network under which it supplies approved retailers. In the UK, Ping had authorized two retailers to sell Ping golf products, but prohibited them from selling Ping's products online. Ping took the position that, while this practice may have restricted competition, it was justified because Ping was pursuing the legitimate aims of:

1. promoting custom fitting of golf clubs;
2. preserving Ping's brand image as manufacturer of customized clubs; and
3. preventing free riding.

While the CMA rejected the 'free rider' argument, it accepted that the promotion of custom fitting (together with the preservation of 'brand image') was a *genuinely held commercial concern*. However, the CMA found that the online sales ban was disproportionate, because Ping had the option of using less restrictive alternatives to achieve these goals. As a result, the CMA concluded that the object of the online sales ban was to prevent, restrict or distort competition.

On October 24, 2017, Ping appealed the CMA's decision to the CAT on a number of grounds, including that: (1) the online sales ban was not a restriction by object as it pursued a legitimate aim; and (2) the ban was not disproportionate. On September 7, 2018, the CAT handed down its judgment.

CAT judgment

The CAT dismissed Ping's appeal, finding that the CMA had correctly found that the online sales ban was a restriction of competition by object. However, the CAT concluded that the CMA had applied

the wrong legal test in reaching this conclusion.

The CMA had conducted a fully-fledged proportionality test, assessing whether the ban pursued a legitimate objective and was proportionate. The CAT held that objective justification and proportionality are not relevant to assess whether an agreement is an infringement by object. Those considerations are only relevant to assess whether a restrictive agreement can benefit from the exemption under Article 101(3) TFEU (see below).

The CAT found that, to determine whether an agreement is restrictive by object, it is only necessary to analyze whether it reveals sufficient harm to competition “irrespective of the actual, subjective aims of the parties involved, even if those aims are legitimate”. The CAT considered that the ban revealed sufficient harm to competition, given that: (1) there was consumer demand for online sales of Ping golf clubs; (2) the ban *de facto* impeded intra-brand competition, as distributors could not sell outside their catchment area; and (3) the ban limited the ability of consumers to compare prices online.

The CAT then examined whether the ban could be exempted under Article 101(3) TFEU on the basis that it led to efficiencies benefiting consumers. While the CAT ruled that custom fitting creates efficiencies benefiting consumers and that the ban did not risk the total elimination of competition, it held that the policy was not proportionate because it was not indispensable and did not generate benefits that outweigh its disadvantages.

Finally, the CAT did reduce the fine (from £1.45 million to £1.25 million) on the basis that the CMA had wrongfully treated the involvement of a director as an aggravating factor.

Analysis

Guidance on bans regarding online sales in selective distribution systems has already been provided by the Court of Justice of the EU (“CJEU”) in [Pierre Fabre](#) and [Coty](#):

- In **Pierre Fabre**, the Court held that a contractual clause requiring that cosmetics and personal care products be sold in a physical space in which a qualified pharmacist is present, resulting in a total ban on online sales, was a restriction by object.
- In **Coty**, it found that a supplier of luxury goods can prevent authorized retailers from using, in a discernible/visible manner, third-party platforms for online sales, in order to preserve the luxury image of those goods (see [Covington blog](#) on this case).

As in **Pierre Fabre**, Ping was seeking to impose a total ban on online sales. The CAT’s conclusion is consistent with the CJEU practice concerning restrictions that restrict competition by object. Further, consistent with **Coty**, the CAT (and the CMA) also highlighted that not all online sales bans should be automatically treated as object restrictions.

However, the legal test applied by the CAT may not entirely reflect the Court’s case law. The CJEU explained both in **Coty** and in **Pierre Fabre** that an agreement can fall outside the prohibition of Article 101(1) TFEU if it pursues a legitimate objective and does not contain restrictions that are not necessary to attain that objective.

Whether the assessment of an agreement’s aim should be made under Article 101(1) TFEU or under Article 101(3) TFEU has important implications for the burden of proof. The burden of proving a competition law infringement under Article 101(1) TFEU rests on the competition authority. In

contrast, the burden of proving that a restrictive agreement can be exempted under Article 101(3) TFEU rests on the undertaking seeking the exemption. If the assessment of whether an agreement pursues a legitimate objective and is proportionate must only be done under Article 101(3) TFEU, it is for the undertaking to prove that it meets these conditions, rather than for the competition authority to prove that it does not.

Outside these lawyerly considerations, the judgment provides additional guidance regarding restrictions on online sales:

1. Absolute bans on online sales should be avoided, as they will most likely be considered to amount to restrictions of competition.
2. Other types of bans – such as a prohibition of sales on certain third-party platforms – may be allowed, if they do not significantly reduce intra-brand competition.

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