SLAUGHTER AND MAY

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CAT hits absolute bans on internet sales out of bounds

On 7 September 2018 the Competition Appeal Tribunal (CAT) upheld the Competition and Markets Authority's (CMA) decision finding that Ping's online sales ban amounted to an illegal object restriction, despite recognition of Ping's legitimate commercial aim in adopting the sales policy.[1]

Ping Europe Limited, a manufacturer of high-end golfing equipment, had prohibited its UK retailers from selling any of its products online in order to encourage custom-fitting of golf clubs and, consequently, to preserve the brand's image by ensuring the best product performance.

This **judgment** follows in the wake of the European Court of Justice (CJ) judgment in *Coty*,[2] which held that a ban on sales through third party internet platforms was justified as part of a selective distribution system designed to protect a brand's luxury image and encourage non-price competition. Coty, in turn, followed the CJ's judgment in Pierre Fabre *Dermo-Cosmétique*[3] which found that a total internet sales ban could not be objectively justified and amounted to a by object infringement of Article 101 of the Treaty on the Functioning of the European Union (TFEU).

The CAT's decision therefore raises the question as to how companies, in particular those who wish to preserve the high quality or luxury image of their goods, can find the putting green of *Coty* whilst avoiding the bunker of *Ping*.

The CJ's judgment in *Coty*

The CJ in *Coty* determined that a ban on distributors within a selective distribution system from selling on third party platforms was objectively justified by the aim of preserving the luxury image of *Coty's* goods and

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[1] *Ping Europe Limited* v *Competition and Markets Authority*, [2018] CAT 13, judgment of 7 September 2018.

[2] Case C-230/16 - *Coty Germany GmbH* v *Parfumerie Akzente GmbH*, judgment of 6 December 2017 as reported in a **previous edition** of this publication.

[3] Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS* v. *Président de l'Autorité de la concurrence, Ministre de l'Économie, de l'Industrie et de l'Emploi*, judgment of 13 October 2011 as reported in a **previous edition** of this publication.

accordingly would fall outside of Article 101(1).[4] In particular, the CJ held that the prohibition did not appear to go beyond what is necessary to preserve the luxury image of the goods: as *Coty* would have no contractual relationship with third party platforms it could not require those platforms to comply with the quality criteria which it imposed on its authorised distributors.[5] Moreover, an authorisation for those distributors to use such platforms subject to their compliance with pre-defined quality conditions could not be regarded as being as effective as the prohibition. The CJ held further that even if the restriction did fall within Article 101(1) it could benefit from the exemption under the vertical block exemption regulation as it did not amount to the hard core restriction of a ban on passive sales.[6] [7]

The CJ's judgment in *Pierre Fabre*

Coty followed *Pierre Fabre* in which the CJ held that that a total internet sales ban could not be objectively justified by the need to provide individualised advice or to maintain the prestigious image of the products, and amounted to a by object infringement of Article 101. Moreover, a total internet sales ban could not benefit from the vertical block exemption as it constitutes a ban on passive sales.

The CAT's judgment

The CAT assessed the relevant EU case law and set out the framework for assessing a potential restriction: (i) can it be objectively justified such that it falls outside of Article 101; (ii) if not is it an infringement by object or effect; (iii) if it is can it benefit from an individual exemption under Article 101(3). [8] [9]

The CAT went on to conclude: (i) that the total internet sales ban was not objectively justified as an absolute online sales ban was not necessary for *Ping* to compete on non-price parameters;[10] (ii) that the absolute sales ban amounted to an infringement by object as it was capable of restricting intra-brand

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[4] A selective distribution system will be permitted where (i) it pursues a legitimate aim which supports non-price competition; (ii) resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion; and (iii) the criteria laid down must not go beyond what is necessary.

[5] *Coty*, para 56.

[6] Similarly, AG Wahl in his opinion considered that even on the assumption that the platform ban was caught by Article 101(1) it would not amount to a restriction by object as it was not capable of a sufficient degree of harm to competition to render an examination of effects unnecessary (Opinion of Advocate General Wahl, para 117, delivered on 26 July 2017).

[7] *Coty*, para 69.

[8] In doing so it made the following clarifications: (i) that the assessment of objective justification and whether a restriction amounts to an infringement by object or effect does not require a detailed balancing of pro- and anti-competitive effects or a detailed assessment of proportionality – such balancing should be made under Article 101(3) only; (ii) that key to whether a restriction could be objectively justified is whether the restriction is necessary to achieve the legitimate aim; and (iii) that an assessment of whether an infringement is an infringement by object entails an assessment of whether it is capable of restricting competition (i.e. is inherently damaging) – the legitimate aim is irrelevant to this assessment.

[9] *Ping*, para 94.

[10] *Ping*, para 201.

competition and causing "real and material harm to consumers"[11] and that the legitimate purpose was irrelevant to this conclusion; and (iii) the restriction did not meet the criteria to be exempted under Article 101(3) as *Ping's* internet ban was not indispensable to the achievement of the objective of increasing custom fitting rates.[12]

Finding the putting green

It is clear that a total ban on internet sales will likely remain very difficult to objectively justify (i.e. unlikely to be necessary for any legitimate aim); will amount to an infringement by object; will be unable to take advantage of the block exemption regulation as it would amount to a "hard core" restriction on passive sales; and will be very difficult to exempt under Article 101(3).

However, courts and regulators may tolerate less absolute restrictions where it can be clearly demonstrated that the restriction is necessary to obtain the relevant legitimate aim and it is applied in a non-discriminatory manner.

In *Coty*, the CJ considered that there was no other alternative to preventing the harm to the luxury image of the brand than a platform ban. Accordingly, this was necessary to promote this aspect of non-price competition such that the platform ban fell outside of Article 101. A restriction whereby online sales can be made only by selective distributors in an otherwise compliant selective distribution system, whilst requiring an individual assessment, is likely to fall the right side of the line.

In *Ping*, by contrast, there were several viable alternatives to obtaining the legitimate aim of encouraging custom fitting to ensure optimal performance of the clubs and thereby protect the brand. These included contractual requirements that: retailers should be able to demonstrate an ability to promote custom-fitting online; retailers must promote custom-fitting online by displaying a recommendation that customers take advantage of custom-fitting; retailers' websites provide customers with all custom-fitting options; retailers' websites provide a "live-chat" service to provide personalised advice on fitting; retailers' websites have a mandatory tick-box for customers to confirm that they understand the importance of custom-fitting and the risks of purchasing without a fitting.[13] [14]

Accordingly, it remains possible for companies to take proportionate and non-discriminatory steps to regulate online sales activities of their retailers; however, absolute internet sales bans are very likely to infringe Article 101. It will also be necessary to test carefully the necessity of any less absolute sales ban, as well as whether less restrictive measures could achieve the same outcome, before implementing it.

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[11] *Ping*, para 148. The ban would restrict the ability of (i) consumers to compare prices and access retailers beyond their local retailers and (ii) retailers to compete.

[12] *Ping*, paras 211 – 212. Whilst customers would receive a benefit, the scale of the benefit was considered to be limited as the ban was not a particularly effective means of achieving the objective and alternative measures were available.

[13] Moreover, the necessity of the requirement was also undermined by the availability of telephone sales. The total ban was also unable to benefit from exemption under Article 101(3) in particular given the very limited impact on custom fit rates when compared with the considerable harm to intra-brand competition.

[14] *Ping*, para 172.

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Antitrust

CCCS fines 13 chicken distributors record SGD 27 million for cartel conduct

On 12 September 2018 the Competition and Consumer Commission of Singapore (CCCS) issued an **Infringement Decision** against 13 fresh chicken distributors for engaging in price-fixing and market sharing agreements. The CCCS imposed a fine of SGD 26.9 million (approximately £15 million) on the distributors, the highest total financial penalty in a single case to date imposed by the CCCS.

The CCCS initiated its investigations against the distributors in March 2014 after receiving information from an ex-employee of one of the distributors. The investigations revealed that the distributors had engaged in price-fixing and market sharing agreements for at least seven years (from September 2007 to August 2014). During that period, the distributors coordinated the amount and timing of price increases of their products and agreed not to compete for each other's customers.

In addition, the distributors used the Poultry Merchants' Association of Singapore (PMAS) as a platform for the anti-competitive activities. For example, the distributors (through PMAS) decided that no slaughtering of live chickens should be carried out on Labour Day in 2013, thus ensuring that no distributor would have fresh chicken for sale that day. As a result, in addition to the financial penalty, the CCCS also directed the distributors to provide a written undertaking not to use the PMAS, or other industry association, as a platform for anti-competitive activities.

The CCCS explained in the Infringement Decision that in determining the fines, it would consider the turnover of the relevant undertakings; the nature, duration and seriousness of the infringement; and aggravating and mitigating factors (for example, whether a party had cooperated with the CCCS). The fact that chicken is the most consumed meat in Singapore (30kg per person annually, almost double the consumption of other meats), the long duration of the cartel conduct and the high market shares of the distributors (over 90 per cent) contributed to the CCCS imposing the record fine. The fine could have been even higher but for the leniency applications of five of the distributors.

Toh Han Li, Chief Executive of the CCCS, said in an associated **media release** that the CCCS will continue to take strong enforcement action against price-fixing and market sharing, which it considers to be some of the most harmful types of anti-competitive activities.

State aid

European Commission finds that Luxembourg did not give selective tax treatment to McDonald's

On 19 September 2018 the European Commission announced the result of its in-depth investigation into Luxembourg's treatment of McDonald's Europe Franchising. The Commission concluded that the non-taxation of McDonald's' profits is not illegal State aid, as it is in line with national tax laws and the Luxembourg-United States Double Taxation Treaty. The Commission concluded that Luxembourg did not give special tax treatment to McDonald's in two 2009 rulings that exempted McDonald's from corporate taxation in Luxembourg due to the possibility of the company's profits being taxed in the US under the Treaty. The Treaty exempted income from tax in Luxembourg if it was also subject to tax in the US, if the business had a "permanent establishment" in the US. However, "permanent establishment" was defined differently under US and Luxembourg tax laws, meaning that while McDonald's' presence in the US was enough for them to be a permanent establishment in the US under Luxembourg law, and therefore exempt from tax in Luxembourg, McDonald's also did not qualify for permanent establishment for the purposes of US law.

While national direct tax systems are not usually a matter for EU competence, if tax laws are applied selectively to give advantage to certain companies then this can amount to unlawful State aid. The investigation focused on the rulings by Luxembourg's tax authorities (which held that the relevant test for permanent establishment in the US was under Luxembourg law, rather than US law) to determine if they had incorrectly or inconsistently applied the terms of the Treaty in concluding that McDonald's was not subject to tax in Luxembourg. The Commission concluded that the Treaty had been correctly applied, and that McDonald's' tax status was available to any competitor – meaning that there had been no selective treatment, and therefore no unlawful State aid.

EU Competition Commissioner Margrethe Vestager made a statement regarding the finding, indicating that selective application of tax laws by national authorities has been a focus of her tenure, most notably forcing Ireland to recover €13.1 billion in taxes from Apple, as well as €1.2 billion in interest.

General competition

European Commission publishes new guidance for ending unjustified geo-blocking

On 20 September 2018 the European Commission issued updated guidance for ending unjustified geo-blocking in light of the new Geo-blocking Regulation which will come into force on 3 December 2018. The Commission also published new questions and answers on geo-blocking which aim to provide practical assistance to businesses, consumers, and regulators.

Geo-blocking occurs when a customer in one EU Member State is unable to buy goods and services from a business located in another Member State, for reasons related to the customer's nationality, place of residence or place of establishment. The document contains questions and answers on the substantive

provisions of the Regulation and goes into detail on rights and obligations for traders and consumers (Section 2), as well as on the tools provided for enforcement (Section 3). This guidance expands upon answers already provided in the Q&A document published on 23 March 2018. Furthermore, the Q&A provides additional information on some issues relevant to e-commerce but not directly covered or modified by the Regulation (Section 4).

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