CAT upholds CMA Decision: Ping out of bounds

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On 7 September 2018, the CAT upheld the CMA's 2017 infringement decision in which it fined golf club manufacturer Ping £1.45m for breaching the EU and UK competition law prohibitions on anti-competitive agreements by preventing UK retailers from selling Ping golf clubs online. As part of its judgment, the CAT confirmed that the CMA was correct to characterise the online ban as a 'by object' infringement of the prohibitions. This was despite accepting that Ping had been pursuing a legitimate commercial aim (of promoting custom fit golf clubs to the benefit of consumers) and that such an aim could, in the abstract, be regarded as pro-competitive.

The 'by object' classification – a concept still in the rough?

In this judgment, the Competition Appeal Tribunal (the "CAT") has revisited the much discussed and contentious issue of identifying a 'by object' infringement of the prohibitions on anti-competitive agreements (under Article 101 of the Treaty on the Functioning of the European Union ("Article 101") and Chapter I of the Competition Act 1998 ("Chapter I")). These laws prohibit agreements and concerted practices which have as their 'object' or 'effect' the prevention, restriction or distortion of competition.

Although the distinction between 'object' and 'effect' has been the subject of significant debate, in principle a 'by object' restriction denotes conduct that is deemed to be intrinsically (obviously) anti-competitive. In short, such a restriction is considered presumptively anti-competitive – making it easier for competition authorities and litigants to establish an infringement.

By contrast, where an agreement is not evidently anti-competitive to the extent that it is a 'by object' infringement, a more detailed examination is required of the agreement in its market context in order to ascertain whether it will actually generate anti-competitive 'effects'.

Not the fairway to sell

Although Ping achieved a small reduction in the size of the fine imposed by the Competition and Markets Authority (the "CMA"), the other six grounds of its appeal were all dismissed.

The CAT first considered whether the CMA had breached Ping's human rights by requiring Ping to sell a product (ie non-custom fit golf clubs) that it did not want to sell. On this issue the CAT was satisfied that the CMA had acted appropriately, noting that, according to Ping's own figures, Ping already sells non-custom fit clubs (10-20% of Ping's sales); that it does not have an online sales ban in the USA; and that selling online does not prevent Ping from continuing to promote custom fit clubs.

Of most interest from a competition law perspective, the CAT then upheld the CMA's finding that the online sales ban was a restriction of competition 'by object'. This was despite the Tribunal noting significant flaws in the methodology adopted by the CMA and otherwise accepting that

Ping was pursuing a legitimate commercial aim.

The CAT was also satisfied with the CMA's determination that the online ban was disproportionate (primarily on the basis that there were other, less restrictive means available to promote custom fitting) and that the policy was not objectively justified (because it was not necessary to implement the ban in order to preserve non-price competition).

Furthermore, and since the CAT had already established that the ban was not necessary to promote custom fitting, Ping's suggestion that the ban was an ancillary restraint (ie necessary to achieve that pro-competitive aim) was also dismissed by the Tribunal.

Finally, Ping was no more successful in its attempts to persuade the CAT that the ban met the criteria for exemption under Article 101(3) and the Chapter I equivalent. While the CAT conceded that the ban led to a small increase in the custom fitting rate of Ping's clubs, and that this amounted to an 'efficiency', it found that the ban was not necessary to prevent free riding (customers would not be able to get fitted in a physical store and then use the specifications to buy online as the custom fitter could simply withhold the specifications from the customer) and there were less restrictive means to promote custom fitting. These factors meant that the online ban was not indispensable to the efficiency achieved. Further, consumers did not receive a fair share of the benefit since the downsides of the policy (inconvenience for consumers, reduced ability to price compare, reduced ability for retailers to compete outside their geographic catchment areas) significantly outweighed the slight increase in the custom fitting rate of Ping clubs.

However, there was a small silver lining for Ping as it succeeded in persuading the CAT to reduce the fine levied by the CMA. The Tribunal found that the involvement of a Ping director in the online ban should not have been treated as an aggravating factor. Taking this into account, and considering the overall fairness and proportionality of the penalty, the CAT reduced the fine from £1.45m to £1.25m.

Teed up for appeal?

This was a closely watched case in an area of the law which continues to evolve. Whilst the outcome was not a complete surprise, the judgment has caused a degree of controversy, most notably in its consideration of the 'by object' assessment. The CAT seems to have wrestled hard with the issue describing it as "*not, in the Tribunal's view, entirely straightforward*" and acknowledging that it was "*counterintuitive*" that Ping's legitimate aim (of improving the consumer experience) had been classed as a 'by object' restriction resulting in a "*quasi-criminal fine*".

Pierre Fabre – a tough one to read

The CAT criticised the CMA for considering the issue as to whether the ban was objectively justified (and whether it was proportionate) as part of its 'by object' assessment under the Article 101 and Chapter I prohibitions. The CAT held that, instead, objective justification should only be considered when determining whether the criteria established in the seminal *Metro* [1] case apply (which take the restrictions in a selective distribution system outside of the reach of the prohibitions altogether) or when applying the criteria for exemption from the prohibitions.

Many would say that this is a sensible interpretation of the law, although it should be acknowledged that it is somewhat difficult to reconcile with the 2011 European Court of Justice ("ECJ") ruling in *Pierre Fabre* [2] which seems to state (at paragraph 47 of the judgment) that a ban on internet sales is a 'by object' restriction unless it is "*objectively justified*". However, the CAT was at pains to emphasise (as the ECJ

had been in its subsequent *Coty*[3] ruling) that the judgment in *Pierre Fabre* was specific to the facts of that case.

Further, in a somewhat strained interpretation, the CAT stated that it understood the objective justification reference at paragraph 47 in *Pierre Fabre* to apply to the *Metro* criteria, and not (as the text, on its face, seems to indicate) to the 'by object' assessment.

Regardless, the CMA's error in law was not sufficient to quash the decision – the CAT upheld the CMA's finding that the online ban was in fact a restriction 'by object'.

The importance of your aim

Ping argued that the concept of a 'by object' restriction should be interpreted narrowly and can only apply where there is no "*plausibly pro-competitive rationale*" for the agreement. This approach was commended by some commentators as the most sensible way to cut through the thicket of (often somewhat inconsistent) case law on the subject and, as such, suggested as the methodology that the CAT should have taken in deciding this case.

However, the CAT viewed things differently, referring more closely to the ECJ ruling in *Carte Bancaires*[4] – now the leading case on the approach to the 'by object' assessment. While the judgment in that case makes clear that the concept of a 'by object' restriction should be interpreted narrowly (applying only where an agreement "*reveals a sufficient degree of harm to competition*"), there is no mention in it of a requirement that the agreement lack a plausibly pro-competitive rationale.

Instead, *Cartes Bancaires* confirms and restates the test for a 'by object' assessment. The provisions of the agreement should be objectively analysed in the relevant legal and economic context to determine the object of the agreement. The subjective intention of the parties may be taken into account, but it is not determinative and need not form part of the assessment.

Therefore, the CAT held, it is not the presence of a plausibly pro-competitive rationale which is required to escape a 'by object' classification; rather, it is the absence of an anti- competitive object flowing from the agreement. As the CAT noted, this was the same analysis applied by the ECJ in its review of the *BIDS*[5] cartel case in which a 'crisis cartel' emerged to deal with overcapacity in the market. The market participants agreed that certain competitors would exit the market (and be compensated for doing so) to return the market capacity to an efficient level. The subjective intention of the parties was pro-competitive but, reading the provisions in their legal and economic context, the object of the agreement was market sharing and so amounted to a restriction 'by object'. That the ECJ's judgment in the *BIDS* case is one of the shortest that it has ever issued, appears to reflect the certainty of its views on the issues in hand.

In the *Ping* case, the CAT confirmed that the CMA had correctly analysed the legal and economic context, determining that in the context in question such a ban, by its very nature, revealed a sufficient degree of harm to competition to be classed as a 'by object' restriction. Ping's legitimate commercial aim was not relevant to this assessment – any benefits to the consumer should only be considered under the exemption criteria (which on the facts here were not satisfied). As such, the 'by object' classification was upheld.

Time for another round?

Whether Ping will accept this judgment remains to be seen; a further appeal by it would not be at all surprising. However, what is without doubt is that any manufacturer continuing to operate an absolute ban on internet sales must be willing to tolerate a significant risk of competition law enforcement action, however well justified the manufacturer may believe the ban to be.

[1] Case 26/76 *Metro SB-Großmärkte v Commission* EU:C:1977:167

[2] Case C-439/09 *Pierre Fabre Dermo-Cosmétique* EU:C:2011:649

[3] Case C-230/16 *Coty Germany GmbH v Parfumerie Akzente* GmbH EU:C:2017:603

[4] Case C-67/13 P *Groupment des Cartes Bancaires v Commission* EU:C:2014:2204

[5] Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd* EU:C:2008:643

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