Neutral Citation Number: [2020] EWCA Civ 13

Case No: C3/2018/2863

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
(Andrew Lenon QC, Prof John Beath OBE, Eamonn Doran)
[2018] CAT 13

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/01/2020

Before:

SIR GEOFFREY VOS, CHANCELLOR OF THE HIGH COURT
LORD JUSTICE FLAUX
and
LADY JUSTICE ROSE

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Between:

PING EUROPE LIMITED	**Appellant**
- and -	
COMPETITION AND MARKETS AUTHORITY	**Respondent**

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Mr Robert O'Donoghue QC, Mr David Scannell and **Mr Tim Johnston** (instructed by K&L Gates LLP) appeared on behalf of the Appellant

Ms Marie Demetriou QC and **Mr Ben Lask** (instructed by the CMA Legal) appeared on behalf of the Respondent

Hearing dates: 6 and 7 November 2019

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Approved Judgment

Lady Justice Rose:

1. The Appellant, Ping Europe Ltd ('Ping'), makes and distributes top of the range golf clubs and other golfing equipment and clothing. Ping is the sole licensee of the Ping brand in the UK, Europe, the Middle East and South Africa. It had a turnover of £52.7 million in the financial year ended 31 December 2016. It operates a selective distribution network of 1,200 authorised dealers throughout the United Kingdom some with premises located on golf courses and some on the high street. Since the foundation of the Ping brand by the American engineer Karsten Solheim in 1959, Ping has pioneered the importance of what is called "custom fitting". When customers are custom fitted for a golf club, they are carefully assessed so that the golf clubs they buy are of a specification suited to their particular measurements, golf swing and other attributes. Ping believes that the practice of steering potential customers firmly towards a custom fitting before they buy ensures that the customer acquires the most suitable club to enhance their game. The authorised dealers admitted to Ping's network, referred to in the proceedings as Account Holders, must meet certain qualitative criteria. These require them, amongst other things, to invest in the equipment and expertise needed to provide the custom fitting service to their customers.

2. In 2006 Ping considered how to respond to the growing popularity of sales of all kinds of consumer goods over the internet. Ping regarded online sales as anathema to its focus on custom fitting. It therefore introduced an internet sales policy ('the ISP') which prohibited its UK authorised dealers from offering Ping products for sale on the dealers' website. In 2012 this policy was modified to allow online sales of Ping products other than golf clubs but was maintained and strictly enforced for the sale of Ping golf clubs.

3. On 24 August 2017 the Respondent, the Competition and Markets Authority ('the CMA'), adopted a decision called "Online Sales Ban in the Golf Equipment Sector" ('the Decision'). The CMA found that Ping's ISP as incorporated into its contractual agreements with its authorised dealers amounted to a restriction of competition "by object" contrary to both Article 101 of the Treaty on the Functioning of the European Union ('Article 101') and the prohibition in section 2(1) Competition Act 1998. Having found that the ISP was an object restriction, the CMA did not consider the effects of the policy on the relevant market which it defined as the market for the sale of golf clubs in the United Kingdom. The CMA found further that the policy did not satisfy the criteria for exemption under Article 101(3). The CMA directed that Ping revise its policy to allow authorised dealers to sell Ping golf clubs on their websites. The CMA held further that Ping's infringement had been committed intentionally, or at least negligently, and imposed a fine on Ping of £1,450,000.

4. Ping appealed against the Decision to the Competition Appeal Tribunal ('the CAT'). In a judgment dated 7 September 2018 [2018] CAT 13 (Andrew Lenon QC, Prof John Beath OBE and Eamonn Doran), the CAT upheld the finding that the ISP amounted to a restriction of competition by object. The CAT reduced the penalty imposed by £200,000.

5. Ping now appeals to this court against the CAT's judgment. The principal ground of appeal is that the CAT erred in finding that Ping's ISP was a restriction of

competition by object. Its secondary ground of appeal is that if the infringement decision is upheld, the penalty imposed should be significantly reduced.

1. Background

(a) Golf, golf clubs and custom fitting

6. The CMA described golf as one of the most popular sports in the UK. It cited a 2015 survey which found that 3.3 million adults played on a full length golf course in 2015 including 1.5 million golfers who play at least 12 times a year. The total value of UK consumer expenditure on golf equipment and clothing was £340 million in 2014 and the value of retail sales of golf clubs alone in 2015 was between £150 – 160 million. Between 60 to 70 per cent of UK golfers had bought golf equipment in the previous 12 months. The average expenditure by UK golfers on clubs in 2015 was £203 on drivers, £153 on fairway woods, £439 on a set of irons, £126 on hybrids and £101 on wedges.

7. There are a number of competing golf club manufacturers, all of which provide a range of accessories and clothes as well as clubs. Market share data derived from different industry sources was set out in the Decision in tables at paras. 3.12 and 3.13, each table listing about 7 or 8 manufacturers including Ping. According to those data, in 2015 Ping was the leading manufacturer of some kinds of clubs and had a significant market presence in relation to other kinds. Ping was the market leader by revenue in that year.

8. Golf clubs must conform to the specifications set out by the Royal & Ancient which decides whether a design of club is contrary to the rules of the game. The leading manufacturers across all main categories of clubs supply custom fit clubs, allowing a golfer to specify variables including shaft type, shaft length, clubface lie angle, grip type and grip thickness based on the golfer's personal measurements and other requirements. According to Ping, those competitors introduced their own custom fitting service in response to Ping's success and to customer demand. The custom fitting of a customer in the retail premises takes about 30 – 90 minutes. The same service is carried out in the shop regardless of the brand being fitted; a consumer may try several brands of golf club to work out which one suits them best. The service generally involves the following steps:

   i) there is an initial interview at which a fitter will discuss the golfer's current game – for example whether they tend to play on a links or parkland course, the equipment they need and what they want to achieve;

   ii) basic measurements are taken including the golfer's wrist to floor measurement and height;

   iii) based on that information, the fitter identifies potential shafts and specifications for the golfer;

   iv) a swing test is carried out to assess how the golfer is hitting the ball. A launch monitor placed at floor level records and analyses the golfer's swing and displays data such as clubhead speed, the ball's launch angle, trajectory, speed and spin. This enables the fitter to fine tune the different variables that need to be taken into account such as the length, flex, torque and weight of the club.

v) the fitter then advises the golfer on the brand and specifications which would best suit their play. The fitter might also advise on which golf clubs the player should buy to make up a full set.

9. The CMA recorded Ping's evidence about the investment that its Account Holders make in the promotion of custom fitting: para. 3.71. This includes the allocation of space for a driving range with a substantial proportion of Account Holders having a dedicated fitting studio. The majority of Account Holders who responded to Ping's survey have invested in a launch monitor which costs between £5,000 for a basic model to £17,500 for a more sophisticated model. Ping also invests in this process by providing fitting clubs to Account Holders supplied solely for the purpose of the custom fitting process. Ping also organises a fitting education programme for the employees of Account Holders and fitting demonstration days at its own fitting centre at Gainsborough.

10. The CMA recorded at para. 3.30 that the number of golfers who have a custom fitting for clubs has been increasing over recent years, indicating, the CMA said, an increased understanding amongst consumers of the benefits of custom fitting. There are high levels of satisfaction recorded by those who have a custom fitting. About 30 to 40% of Ping's Account Holders provide the custom fitting service free of charge. Some of those who do charge a fee then deduct the fee from the cost of any purchase made. The fee is modest compared to the cost of the clubs.

11. Some Ping golf clubs are made on a made-to-order basis i.e the particular golfer's measurements taken during the dynamic custom fitting session are passed on to Ping and the golf club is then made bespoke for that customer. There are some clubs which are supplied to retailers in standard fits to ensure that the brand achieves appropriate visibility in the retail stores. Then the appropriate club will be supplied to the customer after the dynamic custom fitting has taken place, if it has the right measurements for that golfer. The price of the club for the customer is the same whether he buys one which the shop happens to have in stock or one that has been custom made. Each Ping club bears a serial number allowing Ping to replicate the club.

12. If a new golfer comes into the shop and resists all the retailer's efforts to persuade him of the merits of custom fitting then Ping accepts that it cannot insist that the retailer actually refuses to sell the customer a golf club. Ping does not monitor the rates of custom fitting of its Account Holders. However, it is a contractual requirement that everything possible should be done by the Account Holder to ensure that a sale only takes place after a custom fitting.

(b) Ping and its ISP

13. Ping first communicated the ISP to Account Holders in a letter sent out in May 2000. The letter told Account Holders that they had concerns that Ping products were being depicted on websites in a manner inconsistent with the brand image and at 'loss leader' prices. The letter said that conducting transactions over the internet would not

enhance Ping brand value because it was inconsistent with the policy of individual custom-fitting.

14. In January 2005, Ping again wrote to Account Holders having carried out a review of internet selling. The letter said that "in order to protect the brand and the consumer and to ensure that custom-fitting remains at the heart of the sale of Ping Golf Clubs we have decided to issue a new policy which will not allow account holders to execute sales transactions with consumers on the Internet." The rationale given to Account Holders for the introduction of the ISP was:

> "We believe it is fundamental to the process of selling Ping Golf Clubs that the consumer is custom-fitted to ensure they receive clubs that are custom-built to their own specifications. We want to ensure that a personal conversation takes place between the account holder and the consumer so that the account holder can fully explain the benefits of Ping custom-fitting and make appropriate arrangements to arrange an appointment to fit the customer. This process cannot take place during an Internet transaction and it is for this reason we believe that Ping Golf Clubs should not be sold on the Internet."

15. Account Holders offering operational websites were given until 15 February 2005 to stop selling Ping clubs online and were warned that if they breached the policy after that date, Ping would close their account. Ping does not discourage its retailers from marketing and displaying clubs and club prices online. The restriction is that Ping clubs cannot be 'clicked to basket' by the consumer on the retailer's website.

16. In September 2006 Ping issued a new set of terms and conditions for its Account Holders incorporating the ISP. The new terms and conditions made clear that the policy prohibited not only sales from the Account Holders' own website but sales of Ping products using any third-party internet sites including internet auction sites.

17. In May 2009 Ping introduced its "Dynamic Face to Face Custom Fitting Policy". This provided financial incentives for retailers who achieved a set percentage of their sales from face to face interaction with the customer. Ping acknowledged in its letter to Account Holders:

> "To some of you this may sound restrictive in these difficult times and will result in fewer sales for Ping. However, it emphasises our commitment to our core philosophies and demonstrates that the quality of what we do is more important than the quantity. It is a commitment for the long-term strength of the brand and we believe that the vast majority of our customers understand and support these policies, and we thank you for this support."

18. In the Decision, the CMA recorded that generally Account Holders have complied with the policy: see para. 3.105. The CMA found that the ISP was actively enforced and a number of Account Holders who failed to comply with it had their accounts closed by Ping. Ping was also aware that some of its UK Account Holders had set up

website domains specifically to advertise products and target consumers in other EU Member States in their own language and quoting prices in the local currency. The CMA quoted from correspondence from authorised retailers in other Member States complaining to Ping about the lower prices being offered by these UK retailers for sales from their websites.

19. The CMA recorded that Account Holders complained at the limitations the ISP placed on their sales. One said that "in a small town there is only so much bricks and mortar retail a company can do" and that the policy was imposing a barrier on the growth of their business: para 3.58. At the hearing before the CAT there were a number of retailer witnesses, some supporting Ping and some opposing Ping as they want to be able to sell online: see paras 50 and 51 of the CAT judgment. No other manufacturer of golf clubs in the United Kingdom prevents its dealers from selling their clubs online.

2. The law

(a) An overview

20. Article 101 provides:

> "1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
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> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
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> (b) limit or control production, markets, technical development, or investment;
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> (c) share markets or sources of supply;
>
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

21. Article 101(2) provides that prohibited agreements are void. Article 101(3) provides that the prohibition in Article 101(1) can be declared inapplicable to agreements which fulfil certain criteria, in particular that they contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit. To benefit from

Article 101(3), an agreement must not impose restrictions which are not indispensable to the attainment of the pro-competitive objectives.

22. The prohibition on anti-competitive agreements in section 2 of the Competition Act 1998 is in similar terms except that reference to trade between Member States is replaced by a reference to trade within the United Kingdom. That prohibition is to be interpreted in accordance with the case law relating to Article 101(1): see section 60. I do not need, in the light of that, to refer any further to the Competition Act provisions as regards the issues that arise on liability in this appeal.

23. The Court of Justice of the European Union ('the CJEU' or 'the Court') established early on in its jurisprudence that the requirement that an agreement have "the object or effect" of restricting competition is disjunctive; if an agreement amounts to a restriction by object there is no need to go further and consider the effect of the restriction on competition in the market before determining that an infringement has been committed: see for example Case C-219/95P *Ferrière Nord v Commission* EU:C:1997:375, paras. 14-15. Restrictions which have been regarded as restrictions by object include agreements at a horizontal level between manufacturers or other undertakings at the same level in the distribution chain such as price-fixing or market sharing cartels.

24. Vertical agreements raise different competition issues from horizontal agreements and have generally not been regarded as restricting competition to the same serious degree. However, the CJEU has established that some vertical restrictions such as retail price maintenance and bans on exports between Member States will in almost all circumstances amount to restrictions of competition by object. By contrast, some restrictions on the ability of a retailer to sell the goods supplied by the manufacturer may enable the manufacturer to compete better with manufacturers of competing goods (inter-brand competition) even though they limit the ability of the retailers to compete in their sales of the same manufacturer's goods (intra-brand competition). That is the case with selective distribution agreements, such as the one operated by Ping, where the manufacturer limits supplies to dealers which meet certain qualitative criteria. In Case 26/76 *Metro v Commission (No 1)* [1977] ECR 1875, EU:C:1977:167, the CJEU considered the legality of a policy adopted by a manufacturer of electrical products to exclude a 'cash and carry' outlet from its dealer network. The CJEU held that where a selective distribution network is appropriate because of the nature of the goods, then even though restricting sales to certain outlets might reduce price competition to some extent, it was justified because it enhances competition by other means. The kinds of goods which have been held to justify the operation of a selective distribution network include luxury goods where the dealers admitted to the network have to have premises which maintain "an aura of luxury" and high tech products where the dealers may be required to have trained staff and offer adequate servicing arrangements before they are allowed to stock the goods: see paras. 7.098 – 7.100, Bellamy & Child *European Union Law of Competition* 8th ed (2018).

25. Some restrictions have to be imposed on retailers in order for the selective distribution network to work. Such restrictions are described as meeting the *Metro* criteria if they do not exceed the objective in view, that is the objective of maintaining a channel of distribution in which resellers are chosen on the basis of relevant, qualitative criteria. Restrictions that are necessary to maintain that network will not constitute restrictions

on competition and will fall outside Article 101(1). In particular a prohibition on authorised retailers selling the goods to retailers outside the network is regarded as a corollary of the principal obligation and contributes to its fulfilment. Other restrictions, for example quantitative restrictions on the number of retailers authorised to sell the goods within a particular geographic area, are not regarded as essential to the existence of the network and so are likely to fall within Article 101(1). They may or may not then be exempted under Article 101(3).

26. This case law is reflected in the block exemption regulation adopted by the Commission in 2010, Regulation 330/2010 (OJ 2010 L102/1) and the Vertical Restraints Guidelines issued by the Commission to assist with the interpretation of the Regulation, OJ 2010 C130/1 ('the Vertical Guidelines'). Broadly, Regulation 330/2010 provides that an agreement will qualify for exemption if the market shares of the supplier and the dealer do not exceed a specified level. However, according to Article 4 of the Regulation, the block exemption will not apply to an agreement that directly or indirectly has the object of imposing any of the restrictions set out in that article, referred to as "hardcore restrictions".

27. Several of the hardcore restrictions listed in Article 4 are specific to selective distribution systems. The one most relevant for our purposes is that in Article 4(c):

> "the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment."

28. The distinction between active and passive sales referred to there is a distinction between sales that occur when the retailer actively seeks out customers (for example by establishing a branch in a particular location or sending out direct mail or unsolicited emails) and sales which occur where the retailer merely responds to unsolicited orders from customers.

29. To say that a restriction is a hardcore restriction for the purposes of Regulation 330/2010 is not the same as saying that it is a restriction by object for the purposes of Article 101(1). The presence of the hardcore restriction simply means that the agreement as a whole does not benefit from block exemption. It must then be examined individually to determine whether it has the object or effect of restricting competition and if so whether it can benefit individually from the application of Article 101(3). The CJEU has stated that there are no agreements which are incapable of exemption under Article 101(3) – in theory agreements containing hardcore restrictions or object restrictions can satisfy the four criteria in Article 101(3): see Case T-17/93 *Matra Hachette v Commission* [1994] ECR II-595, EU:T:1994:89, para. 85. However, it is very unlikely that an object restriction will meet the four criteria set for exemption.

(b) Case law on restrictions of competition by object

30. Both parties to this appeal accepted that the leading authority on when a restriction amounts to a restriction of competition by object is Case C-67/13P *Groupement des Cartes Bancaires v European Commission* EU:C:2014:2204 ('*Cartes Bancaires*').

The appellant in that case was a Group created by the main French banking institutions. It was established to achieve the interoperability of systems for payment and money withdrawal so that holders of cards issued by any of the banks could withdraw money at any ATM installed in a retail premises by any member. The problem perceived by the members of the Group was that it was much easier for banks to issue cards to their account holders than it was for them to persuade retailers to install an ATM. The Group therefore wanted to encourage its members to acquire traders for the system as well as simply issuing cards. The element of the rules that came under particular scrutiny was a device known as 'MERFA' which, the Group said, aimed to encourage members who had a poor ratio of card issuing to trade acquisition to expand their acquiring activities by making them pay a levy to those other members of the group whose ratio of trader acquiring to card issuing was the other way round. The levy paid was then distributed to those members with a higher ratio of acquisition business.

31. The Commission found that the arrangements adopted by Cartes Bancaires had an anti-competitive object: (COMP/D1/38606 – *Groupement des cartes bancaires*). It found that the real objective of the measures was to discourage competition and to penalise new entrants. The imposition of the levy would increase a new entrant's costs, thereby safeguarding the main members' revenue and limiting price reduction for the cards. Cartes Bancaires' appeal was dismissed by the General Court and Cartes Bancaires appealed to the CJEU.

32. Advocate General Wahl's opinion was delivered on 27 March 2014 (ECLI:EU:C:2014:1958). He noted at the start of his Opinion that the case gave the Court "another opportunity to refine its much debated case-law on the concept of 'restriction by object' within the meaning of [Article 101(1)]": para. 3. He described the advantages for a competition authority of being able to condemn restrictions by prohibiting "conduct which is generally considered, on the basis of economic analysis, to have harmful effects on competition": para. 29. Such an approach also provides predictability and therefore legal certainty for businesses as well as having a deterrent effect and so helping to prevent anti-competitive conduct. It furthers procedural economy because it enables the competition authority to establish the anti-competitive impact of the conduct without conducting the often complex and time-consuming examination of the potential or actual effects on the market concerned. However, he said, "such advantages materialise only if recourse to the concept of restriction by object is clearly defined, failing which this could encompass conduct whose harmful effects on competition are not clearly established.": para. 36.

33. Having considered the Court's case law, he described the importance of analysing the object of the agreement in the economic context in which it operates but also of clearly distinguishing that exercise from the examination of the actual or potential effects of the conduct of the undertakings concerned. He gave as one example of relevant economic context a situation where the parties to the agreement held only a tiny share of the relevant market. A consideration of context could either reinforce or neutralise the examination of the actual terms of the purported restrictive agreement. But that consideration could not lead to the classification as an object restriction of an agreement whose terms do not appear to be harmful to competition.

34. Advocate General Wahl acknowledged that the case law of the Luxembourg courts may in the past have blurred the distinction between the factors relevant to an

examination of the anti-competitive object on the one hand and an effects-based analysis on the other. He said that it was only when experience based on economic analysis shows that a restriction is consistently prohibited that it seems reasonable to penalise it directly for the sake of procedural economy. Thus:

> "56. Only conduct whose harmful nature is proven and easily identifiable, in the light of experience and economics, should therefore be regarded as a restriction of competition by object, and not agreements which, having regard to their context, have ambivalent effects on the market or which produce ancillary restrictive effects necessary for the pursuit of a main objective which does not restrict competition."

35. The reference to 'experience and economics' there was, the Advocate General said, a "perfectly relevant point of reference". Experience in this context was, he said (para. 79):

> "what can traditionally be seen to follow from economic analysis, as confirmed by the competition authorities and supported, if necessary, by case-law."

36. The Advocate General structured his analysis of the *Cartes Bancaires* restrictions in three parts; an examination of the *content* of the measures in question; an examination of the *objective* of the measures; and an examination of the *context* of the measures. His conclusion was that the restrictions in the agreement were not object restrictions.

37. The CJEU arrived at the same conclusion as the Advocate General. The Court expressed the test for whether a restriction is a restriction by object as follows: (citation of authorities omitted)

> "49. In that regard, it is apparent from the Court's case-law that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects (…).
>
> 50 That case-law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition (…).
>
> 51 Consequently, it is established that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article [101(1)], to prove that they have actual effects on the market (…). Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers.

> 52 Where the analysis of a type of coordination between undertakings does not reveal a sufficient degree of harm to competition, the effects of the coordination should, on the other hand, be considered and, for it to be caught by the prohibition, it is necessary to find that factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent (…).
>
> 53 According to the case-law of the Court, in order to determine whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition that it may be considered a restriction of competition 'by object' within the meaning of Article [101(1)] regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question (…)."

38. The Court held that the General Court had failed to refer to the settled case law of the CJEU and had thereby failed to have regard to the essential legal criterion which is the finding that "such coordination reveals in itself a sufficient degree of harm to competition": para. 57. The CJEU held that the concept of restriction by object must be interpreted restrictively "otherwise the Commission would be exempted from the obligation to prove the actual effects on the market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of normal competition": para. 58.

(c) Vertical agreements restricting online sales

39. I referred earlier to Regulation 330/2010 and the Commission's Vertical Guidelines. The distinction drawn in the Regulation between active and passive sales by members of a distribution network was established early in the CJEU's analysis of vertical agreements but is difficult to transpose to online sales. The Vertical Guidelines address this issue in paras. 52 onwards. The Commission states:

> "The internet is a powerful tool to reach a greater number and variety of customers than by more traditional sales methods, which explains why certain restrictions on the use of the internet are dealt with as (re)sales restrictions. In principle, every distributor must be allowed to use the internet to sell products. In general, where a distributor uses a website to sell products, that is considered a form of passive selling, since it is a reasonable way to allow customers to reach the distributor. The use of a website may have effects that extend beyond the distributor's own territory and customer group; however, such effects result from the technology allowing easy access from everywhere. If a customer visits the web site of a distributor and contacts the distributor and if such contact leads to a sale,

> including delivery, then that is considered passive selling. The same is true if a customer opts to be kept (automatically) informed by the distributor and it leads to a sale. Offering different language options on the website does not, of itself, change the passive character of such selling."

40. The Vertical Guidelines then turn to consider the hardcore restrictions in Article 4 of Regulation 330/2010 in the context of online sales by distributors. The Commission states:

> "(54) However, under the Block Exemption the supplier may require quality standards for the use of the internet site to resell its goods, just as the supplier may require quality standards for a shop or for selling by catalogue or for advertising and promotion in general. This may be relevant in particular for selective distribution. Under the Block Exemption, the supplier may, for example, require that its distributors have one or more brick and mortar shops or showrooms as a condition for becoming a member of its distribution system. Subsequent changes to such a condition are also possible under the Block Exemption, except where those changes have as their object to directly or indirectly limit the online sales by the distributors. Similarly, a supplier may require that its distributors use third party platforms to distribute the contract products only in accordance with the standards and conditions agreed between the supplier and its distributors for the distributors' use of the internet. For instance, where the distributor's website is hosted by a third party platform, the supplier may require that customers do not visit the distributor's website through a site carrying the name or logo of the third party platform."

41. The Vertical Guidelines then refer specifically to internet restrictions on the dealers in a selective distribution agreement and how the definition of the hardcore restriction in Article 4(c) applies in that context. What counts as an impermissible restriction on the ability of dealers in a selective distribution agreement to make active and passive sales to end-users so far as online sales are concerned? The Commission states:

> "(56) … Within a selective distribution system the dealers should be free to sell, both actively and passively, to all end-users, also with the help of the internet. Therefore, the Commission considers any obligations which dissuade appointed dealers from using the internet to reach a greater number and variety of customers by imposing criteria for online sales which are not overall equivalent to the criteria imposed for the sales from the brick and mortar shop as a hardcore restriction."

42. The Vertical Guidelines therefore make it clear that the Commission regards a restriction of online sales as a kind of restriction on active and passive sales to end-users and that it therefore constitutes a hardcore restriction within Article 4(c) of Regulation 330/2010.

43. The issue came before the CJEU in Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la Concurrence and another* [2011] ECR I-9419, ECLI:EU:C:2011:649 ('*Pierre Fabre*'). This was a preliminary reference made in an appeal by Pierre Fabre against an infringement decision by the French competition authority. Pierre Fabre markets a range of pharmaceutical, homeopathic and para-pharmaceutical products. Its contracts with its authorised retailers stipulated that sales of certain cosmetic and personal care products must be made in a physical space and that a qualified pharmacist must be present. It was common ground that this excluded all forms of selling via the internet.

44. Advocate General Mazák in his Opinion of 3 March 2011 (ECLI:EU:C:2011:113) referred to the firm line taken in the earlier case law against restrictions which are aimed at prohibiting or limiting parallel trade between Member States. He recognised that selective distribution agreements necessarily affect competition by limiting price competition and hindering parallel trade because distributors may sell only to other authorised distributors or end-users. But his conclusion at para. 57 was very clear:

> "I therefore consider that a general and absolute ban on selling goods to end-users via the internet imposed on authorised distributors in the context of a selective distribution network which prevents or restricts parallel trade more extensively than such restrictions inherent to any selective distribution agreement and which goes beyond what is objectively necessary in order to distribute those goods in an appropriate manner in the light not only of their material qualities but also their aura or image, has the object of restricting competition for the purposes of [Article 101(1)]."

45. The Advocate General considered various factors under the heading 'Objective justification'. He rejected the arguments put forward by Pierre Fabre on public health and safety grounds because they were objectively unfounded, given the nature of the products. He considered in this context also whether the threat of counterfeit goods or the risk of free-riding were valid concerns in the context of the selective distribution network. Such concerns were unfounded in that case.

46. The CJEU took an equally firm line. It held that the practice of prohibiting internet selling was equivalent to a ban on passive sales. The CJEU reiterated the need to have regard "to the content of the clause, the objectives it seeks to attain and the economic and legal context of which it forms a part": para. 35. The CJEU had no difficulty in arriving at the conclusion that this was a restriction by object:

> "47. … Article 101(1) TFEU must be interpreted as meaning that, in the context of a selective distribution system, a contractual clause requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be present, resulting in a ban on the use of the internet for those sales, amounts to a restriction by object within the meaning of that provision where, following an individual and specific examination of the content and objective of that contractual clause and the legal and economic context of which it forms a part, it is apparent that, having

> regard to the properties of the products at issue, that clause is not objectively justified."

47. The CJEU did not provide much further assistance as to what kinds of objectives or which features of the legal and economic context might lead the referring court to conclude that the clause was objectively justified. Instead, the CJEU moved directly to consider the possibility of exemption under Article 101(3). Considering first whether the ban was a hardcore restriction for the purposes of the block exemption, the CJEU held that: (para. 54)

> "prohibiting *de facto* the internet as a method of marketing, at the very least has as its object the restriction of passive sales to end users wishing to purchase online and located outside the physical trading area of the relevant member of the selective distribution system."

48. The Court considered Pierre Fabre's argument that the ban was equivalent to a prohibition on the dealer "operating out of an unauthorised establishment" which falls outside the hardcore restriction described in Article 4(c) of Regulation 330/2010. The Court rejected that argument. The agreement did not therefore benefit from the block exemption because it contained a hardcore restriction, although it might nonetheless have benefited on an individual basis from the application of Article 101(3). That was a matter for the referring court to determine.

49. The legality of restrictions on online sales in the context of a selective distribution network came before the CJEU again in Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* ECLI:EU:C:2017:941 ('*Coty*'). Coty supplied luxury cosmetics to its authorised distributors under terms which required the dealers to highlight and promote the luxury character of Coty's brands through the selection of goods, advertising and sales presentation in their stores. Internet sales were permitted but were limited to sales through an electronic shop window of the authorised store and subject to the requirement that the website reflect the luxury character of the products. The contract therefore prohibited the use by dealers of third-party internet sales sites in circumstances where it would be apparent to the customer that a third party site was being used.

50. The CJEU in *Coty* restated the *Metro* criteria, confirming that a selective distribution system designed primarily to preserve the luxury image of the goods, complies with Article 101(1) to the extent that resellers are chosen on the basis of qualitative criteria applied uniformly and in a non-discriminatory fashion and that the criteria do not go beyond what is necessary: para. 36. Was the restriction imposed by Coty proportionate in the light of that objective or did it go beyond what was necessary to achieve that objective? The CJEU held that it was proportionate. The rules governing online sales were in effect the same as the rules governing sales from the brick and mortar shop. That was justified by the luxury nature of the goods, particularly as Coty had no control over how the goods would be presented to customers on a third party platform. The Court distinguished Coty's agreements from the internet ban in *Pierre Fabre* because there was no absolute ban. Coty's restriction did not go beyond what was necessary to preserve the luxury image of the goods and did not fall within Article 101(1).

51. In his Opinion in *Coty* (ECLI:EU:C:2017:603), Advocate General Wahl also considered the restriction in the Coty agreements to be justified. He approved the statement in paragraph 54 of the Vertical Guidelines that a supplier may require quality standards for the use of the internet to resell its goods, just as a supplier may require quality standards for a shop or for selling by catalogue or by advertising and promotion in general. The Advocate General went on to consider whether, if he was wrong and the restriction did fall within Article 101(1), was it a restriction by object? He concluded that it did not reveal a sufficient degree of harm in the same way as the absolute ban in *Pierre Fabre*.

3. The Decision and the Judgment

(a) The CMA's Decision

52. The CMA's investigation was triggered by a complaint from a dealer. The Decision focused on the ISP incorporated in two specific agreements with named dealers. Both those Account Holders operated brick and mortar shops and sold Ping goods other than clubs, and clubs other than Ping clubs from their websites. They both therefore adhered to the ISP.

53. The CMA addressed whether the ISP was a restriction by object in paras. 4.27 onwards. It cited *Cartes Bancaires* as setting out the relevant test, namely that regard must be had to the content, objectives and legal and economic context of the restriction. As well as referring to *Pierre Fabre* and *Coty*, the CMA cited at footnote 341, a decision of the French competition authority that a restriction of online sales of hi fi and home cinema equipment was an object restriction and a decision of the Austrian competition authority that an online sales restriction in the coffee machine sector was a restriction by object.

54. At paras. 4.44 onwards, the CMA set out its legal assessment on the object infringement point. There was no dispute about the content of the restriction. As regards the objective of the policy, the CMA found that the clear written expression of the policy was to prohibit any sales on the internet of Ping golf clubs by Account Holders. This was, the CMA found, by its very nature liable to restrict competition between Account Holders through an important sales channel both within the UK and across the EU more generally. As to how precisely the policy restricted competition, the CMA concluded: (footnotes omitted)

> "4.54 The Online Sales Ban is liable to restrict competition because it reduces the ability of Account Holders to sell Ping golf clubs to customers outside their local geographic areas and restricts consumers from accessing a greater number of Ping golf club retailers. The inability to complete a sales transaction online also limits a consumer's ability to make use of comparison tools in order to find the best available Ping deals …. The CMA finds that restricting such passive sales to those consumers therefore inherently reduces the ability/incentive to compete for customers who want to buy Ping golf clubs."

55. The CMA stated that Ping had submitted that its subjective intention, to increase custom fitting, should be taken into account. The CMA rejected this for two reasons;

first such a subjective intention did not affect the restrictiveness of the agreement and secondly that the CJEU has held that agreements can contain object restrictions "even though at the same time they envisaged pursuing objectives that were perfectly legitimate" (para. 4.56).

56. Turning to the legal and economic context of the restriction, the CMA considered that the following factors were relevant: (paras. 4.59 onwards)

i) Ping operated a selective distribution network which limited intra-brand competition; other golf club manufacturers also operated networks of authorised dealers.

ii) The prohibition was a long-standing contractual term that was enforced by Ping and applied to all authorised dealers.

iii) Ping was the leading manufacturer of irons and woods in the UK with a significant market share. This showed that some consumers preferred Ping brand clubs so that the ability to sell Ping golf clubs was important for a large number of retailers.

iv) Custom fitting of clubs did provide benefits but those benefits were the same for the competing manufacturers; there was nothing about Ping clubs which meant that there were greater benefits of custom fitting for them as compared with other clubs.

v) Some customers may not need to undergo custom fitting in order to purchase a club and may be able to purchase a club off the shelf from the retailer's stock if their requirements match the most popular variables.

vi) There was significant consumer demand to buy clubs online and online sales were an important and established channel for golf equipment generally. The policy restricted passive sales for Ping golf clubs notwithstanding that advertising the availability and price of the clubs and making telephone sales were not prohibited. Price comparison was hampered by the absence of Ping clubs on price comparison websites. It restricted the ability of Account Holders to make out of territory sales.

57. The CMA concluded at para. 4.81 that the nature of the ISP, assessed in its legal and economic context, was to restrict the ability of Account Holders to compete for 'out of territory' sales or to make passive sales via the internet. In the absence of an objective justification, that constituted a restriction of competition by object.

58. The CMA then moved on to consider objective justification. It set out Ping's arguments about the importance of custom fitting and the role of the ISP in promoting that as a legitimate aim. It referred to Ping's argument about the risk of a consumer buying an incorrectly fitted club and the adverse effect that would have on the Ping brand. The CMA said that four questions were relevant to the proportionality of the ban: (i) does the ISP pursue a legitimate aim; (ii) is it suitable or appropriate to pursue that aim; (iii) is it necessary to pursue that aim or are there less restrictive and realistic alternatives; and (iv) is the burden imposed by the ISP disproportionate to the benefits secured. Answering those questions, the CMA decided that promoting a custom

fitting service in the distribution of a high-quality or high-technology product such as a custom fit club in principle constituted a legitimate aim: para. 4.99. However, the ISP had only a limited effect in increasing the proportion of customers having a face to face custom fitting and even if the percentage was higher, this was not necessarily the result of the ISP: paras. 4.106 and 4.113. The CMA also concluded that the ISP was not necessary to pursue the aim of promoting custom fitting.

59. As regards the last point, the CMA suggested various other less restrictive ways that could be used such as requiring the Account Holder to promote custom fitting on its online sales channel by displaying a clear notice on its website saying that custom fitting is preferable. The CMA also indicated that it would be permissible for Ping to require Account Holders to have an appropriate website with drop-down boxes enabling the customer to choose a certain range of relevant Ping custom fit options. This could form part of the quality standard to be met before the Account Holder was permitted to sell over the internet. It would then be for Account Holders to decide whether this was an investment they wanted to make. Other suggestions made in the Decision were that Account Holders could be required to offer a 'live chat' facility on their site and to ask customers to tick a box to confirm that they understand the benefits of custom fitting.

60. These were measures, the CMA found, by which Ping could both ensure that the customer got the best possible fit and that they did not blame the Ping brand if the clubs did not improve their game as much as they had hoped. The CMA concluded the additional conditions that Ping could lawfully impose on Account Holders were "technically feasible, commercially viable and appropriate to promote Custom Fitting". These conditions would also, clearly be less restrictive of competition than the outright prohibition currently in place.

61. The CMA having found that the ISP was an infringement by object, and that it did not qualify for exemption under Article 101(3), directed that Ping bring the infringement to an end by reissuing its terms and conditions revised to remove the ISP. The CMA imposed a penalty as I describe later in relation to Ground 2.

(b) The CAT's judgment

62. The CAT conducted a full merits review of the CMA's decision. Under the heading "The Tribunal's approach" in the section called "Legal Framework", the CAT set out the questions to be addressed in three stages: (at para. 94)

i) Does the ISP satisfy the criteria in the *Metro* case and so fall outside Article 101(1)?

ii) If not, does the restriction reveal a sufficient degree of harm to competition to be considered a restriction 'by object' within Article 101(1)?

iii) If it is restrictive of competition by object, can it nevertheless be exempted under Article 101(3)?

63. The CAT dealt with the interrelationship of the three stages in paras. 95 onwards. It held that the assessment of whether the ISP satisfies the *Metro* criteria "is a binary assessment and not a balancing exercise". The tribunal is not weighing up the likely

pro-and anti-competitive effects of the restriction but considering whether a restriction is strictly necessary for non-price competition to exist. If it is not strictly necessary then the clause may nevertheless benefit from individual exemption. The CAT stated at para 96 that the assessment of whether a restriction satisfies the *Metro* criteria is conceptually distinct from that of whether the restriction is capable of being redeemed under Article 101(3). The proper place to weigh up the pros and cons of a measure is in the framework of Article 101(3).

64. The CAT therefore criticised the CMA's approach to the question of objective justification as being bound up with the question of whether the policy constituted a 'by object' restriction. The CMA had been wrong, the CAT held, to undertake a detailed enquiry into the proportionality and effectiveness of the ISP in that context. If correct, the CMA's approach to the law might risk the assessment under Article 101(3) "being emptied of any real substance": para. 97.

65. The CAT went on however to consider whether this error in law was a material error. The Decision would only need to be quashed if it could not stand in the light of that error and could not be supported on some other basis. The CAT concluded that the error made no difference to the overall conclusions reached by the CMA and was not a ground for quashing the decision.

66. The CAT discussed the concept of object infringement in the general legal framework section. At para 105 the CAT said that it approached the issue on the basis that "an agreement revealing a sufficient degree of harm to competition may be deemed to be a restriction of competition "by object" irrespective of the actual, subjective aims of the parties involved, even if those aims are legitimate". The CAT upheld the CMA's finding that the ISP did constitute a restriction by object. The reasoning was set out in paras. 135 onwards:

i) The internet is an increasingly important sales channel for the sale of golf clubs and there is a significant and growing demand from customers for online sales of custom fit golf clubs.

ii) The ISP has the potential significantly to restrict intra-brand competition because it restricts the ability of Account Holders to compete with each other for sales outside their local catchment area or to make passive sales to end-users.

iii) There is only limited price comparison information available online in relation to Ping clubs. This is because they are excluded from some comparison websites which require a retailer to offer a "click to basket" facility before being able to advertise on the platform.

iv) The ISP was a more significant restriction than the restriction discussed in *Coty*.

v) The CAT rejected the arguments that there would be damage to consumers if the ISP were lifted because they might end up with wrongly fitted golf clubs. They also rejected the argument that there would be damage to Ping's brand or a significant free riding problem. They said that arguments as to whether the negative impact of the ISP is outweighed by countervailing benefits were appropriately considered in the context of Article 101(3).

67. The CAT concluded at para. 147 that the issue of whether the ISP was an object infringement was not "entirely straightforward". Notwithstanding that the outcome was, the CAT felt, counterintuitive, they came to the clear view that, consistent with the case law:

> "148. … the CMA was correct to find that the ban reveals in itself a sufficient degree of harm to competition to constitute an object restriction, notwithstanding Ping's legitimate aim. The potential impact of the ban on consumers and retailers is real and material. It significantly restricts consumers from accessing Ping golf club retailers outside their local area and from comparing prices and it significantly reduces the ability of, and incentives for, retailers to compete for business using the Internet."

68. The following section of the Judgment then dealt with the topic called "The proportionality of the internet policy". This straddled two legal issues: first whether the *Metro* criteria were satisfied and second whether Ping was entitled to individual exemption under Article 101(3). The CAT examined in this context whether there were other measures which Ping could have adopted which were less restrictive of competition than the ISP and which would equally promote Ping's objective of maximising custom fitting sales. The CAT concluded that the alternative measures which the CMA proposed would have been adequate and would not unacceptably compromise Ping's objective of promoting custom fitting.

69. The subsequent sections of the judgment then dealt with other issues including "objective justification" which was said by the CAT to be relevant to the question whether the ISP satisfied the *Metro* criteria and therefore fell entirely outside the scope of Article 101(1). They held the policy was not objectively justified. There has been no appeal against that; indeed, Ping told us that they had never relied on the *Metro* criteria as taking the ISP outside the scope of Article 101(1). The CAT also found that the ISP could not benefit from individual exemption under Article 101(3). There is no appeal from that conclusion.

4. Ground 1: is Ping's ISP a restriction of competition by object?

70. Ping's first ground of appeal raises the issue whether or not the ISP was an object restriction within the meaning of Article 101(1). There are three main errors alleged in challenging the CAT's findings:

Error 1: The CAT erred in its application of the test laid down in the CJEU's case law when considering whether the ISP amounted to an object restriction;

Error 2: The CAT erred in leaving out of account when considering whether the ISP was an object restriction the context of the restriction namely that it was part of Ping's selective distribution network. This led the CAT to ignore the benefits of the policy for inter-brand competition by focusing on the reduction in intra-brand competition, particularly on price competition among retailers.

Error 3: The CAT erred in applying too low a threshold for the likelihood of harm arising from the ISP.

(a) The CAT's finding of an error of approach by the CMA

71. Before considering the substance of this ground, there are two preliminary matters to consider. The first is the CAT's decision that the CMA erred in law in addressing issues of objective justification and proportionality in the context of the object/effect analysis. The CAT held that those issues were not relevant to the object/effect stage of analysis but relevant only to the prior stage of considering whether the *Metro* criteria were met or to the later stage of exemption under Article 101(3). The CAT said:

> "98. We accept Ping's submission that objective justification and proportionality are not in themselves relevant to an assessment of whether an agreement is an infringement by object. The law on 'object' is set out authoritatively by the Court of Justice in *Cartes Bancaires* which makes no reference to proportionality. We should emphasise that we do not see any contradiction between *Pierre Fabre* and *Cartes Bancaires*. In particular, we do not consider that it was the intention of the Court of Justice in *Pierre Fabre* to devise a special form of 'by object' assessment which incorporates proportionality considerations specifically for internet sales bans. On the contrary, it can be seen that the Court of Justice conducted a standard (albeit brief) assessment of the nature of the restriction in its relevant context at paras 35-38 of the judgment. The Court of Justice then went on to consider the separate question of 'objective justification' in paras 39-44 and concluded that the internet sales ban was unlikely to be proportionate. The reference to "objective justification" at para 47 of the *Pierre Fabre* decision is, in our view, best understood as a reference back to the *Metro* criteria, compliance with which would take the internet sales ban outside the prohibition in Article 101(1).
>
> 99. We therefore consider that the CMA erred in law by conducting a full proportionality analysis as part of its assessment under Article 101(1) of whether Ping's internet policy was "objectively justified". An assessment of this type properly forms a part of the assessment under Article 101(3) and is necessary if - and only if - it has first been established that the impugned provision constitutes a restriction of competition 'by object' or 'by effect'."

72. As appears from the Decision and the Judgment, it is often straightforward to identify what issues need to be addressed in a case but more difficult to decide at which stage those factual issues fall to be considered or whether they are relevant at more than one stage. At some point in the Decision the CMA had to deal with two important questions on which Ping's defence was founded: whether it was true that the ISP increased the proportion of sales made by Ping after a custom fitting as compared with other manufacturers who do not restrict online sales and whether Ping was right to say that the ISP was important to protect its brand image from damage arising from golfers avoiding a custom fitting and then complaining to their fellow golfers about their Ping clubs. The CAT, having rejected the CMA's approach, dealt with those

questions as being relevant to the issue of whether the ISP satisfied the *Metro* criteria, even though it was not part of Ping's case before the CAT that the policy did meet those criteria. It then cross-referred to that material in a short discussion of Article 101(3).

73. It is true that the Decision could have been clearer in explaining how the issue of "Objective Justification" fitted in to the overall structure of its analysis. As it is, that section came after the discussion of the legal and economic context of the agreement but before the section setting out the CMA's conclusions on the application of Article 101(1). I do not, however, share the CAT's confidence that the CMA was wrong to address these issues under the umbrella of applying Article 101(1). There is no doubt that the key paragraph in *Pierre Fabre*, para 47, says that an online sales ban will be a restriction by object if it is apparent that the clause is not objectively justified. I agree with the CAT that the CJEU was not setting some new test for establishing object restrictions in the context of internet sales bans. It may be, as the CAT concluded, that that was a reference only to the *Metro* criteria. However, Advocate General Mazák in *Pierre Fabre* certainly dealt with the topic of "objective justification" under the general heading of "Anticompetitive object" in the course of considering the anti-competitive object of the ban. He stated at para. 38 of that Opinion that the threat of counterfeiting and the risk of free-riding were valid concerns in that regard, though in fact they were unfounded in relation to Pierre Fabre's products. Although the CJEU did not refer to proportionality in *Cartes Bancaires* it does appear at para. 75 of that judgment to have regarded the fact that combatting free riding was a legitimate objective as relevant to the question whether the MERFA was a restriction by object. Advocate General Wahl in *Cartes Bancaires* said only that a legitimate objective pursued by the restriction "is not directly relevant in determining the existence of a restriction of competition by object" and that the General Court had not been 'wholly mistaken' in concluding that it could be taken into account under Article 101(3) rather than Article 101(1): paras. 122-123.

74. There is a risk that an examination of proportionality and alternative measures crosses the elusive line between what counts as the 'economic context' of the agreement which the case law makes part of the object/effect dichotomy and what amounts to an analysis of either the effects of the restriction for the purposes of Article 101(1) or of the application of Article 101(3). Although Advocate General Wahl in *Cartes Bancaires* stressed the importance of maintaining the distinction and gave some examples of factors which count as 'economic context', he acknowledged the undoubted truth that the CJEU's jurisprudence has not yet settled a clear dividing line between the three different stages set out at para 94 of the Judgment and indicated what factors are relevant at which stage. This was more recently echoed by Advocate General Bobek in Case C-228/18 *Gazdasági Versenyhivatal v Budapest Bank Nyrt* (ECLI:EU:C:2019:678) ('*Budapest Bank*') in which the judgment of the CJEU is pending. This was a preliminary reference from the Supreme Court of Hungary concerning the much litigated issue of interchange fees in payment card systems and the characterisation of them as object restrictions. In his introductory paragraphs Advocate General Bobek said:

> "1. From the early days of EU competition law, much ink has been spilled on the dichotomy between restriction of competition by object and restriction by effect. It may thus

> come as a surprise that this distinction, stemming from the very wording of the prohibition in (what is now) Article 101 TFEU, still requires interpretation by the Court.
>
> 2. The distinction is relatively easy to make in theory. Its practical operation is nonetheless somewhat more complex. It is also fair to say that the case-law of the EU Courts has not always been crystal clear on the subject. Indeed, a number of decisions given by the EU Courts have been criticised in legal scholarship for blurring the distinction between the two concepts."

75. He concluded at para. 49:

> "It is impossible to (or at least I am unable to) draw, in abstract terms, a bright line between (the second step of) an object analysis and an effects analysis."

76. In my judgment there is as yet no bright line between the three stages of analysis that the CAT described in para. 94 of the Judgment. If, by identifying the error in the CMA's Decision, the CAT was itself drawing a bright line then that went further than the current state of the case law justifies. Tempting though it is for a domestic court or tribunal to try to tidy up an area of the law that has been frustratingly untidy for so long, that task remains one for the Luxembourg courts.

(b) Free riding

77. The second preliminary issue is that, although there has been much reference to free-riding in this case, there is no possible free-riding problem here to which any restriction can legitimately be addressed. I have set out above the measures that the CMA proposed as promoting custom fitting but being less restrictive than the ISP. That shows that the CMA was not challenging the fact that the nature of Ping's golf clubs meant that Ping was entitled to restrict admission to its network to retailers prepared to make the investment in and commitment to dynamic custom fitting. It shows further that, following Advocate General Wahl's Opinion in *Coty*, the CMA recognised that Ping was entitled to restrict internet sales to the transactional websites of those Account Holders and to require them to promote custom fitting on their websites. The CAT did not take a different view. There can be no danger that retailers who are not Account Holders and who have not made the necessary investment in custom fitting will in future be selling Ping golf clubs from their websites.

78. At the hearing Mr Robert O'Donoghue QC, appearing for Ping, raised a different point about the need to support small retailers operating at golf courses and selling fewer than ten sets of clubs a year. That cannot be a justification for the ISP. If Ping wishes to support such businesses there are plenty of ways in which it can do so without preventing larger authorised dealers from competing with them on price.

79. I turn then to consider whether the ISP is a restriction of competition by object. The three stage approach of Advocate General Wahl in *Cartes Bancaires* – content, objective and context – provides a convenient entry to an analysis of the ISP.

(c) The content of the ISP

80. There was nothing covert about the ISP and it has never been asserted that there was some collateral, unspoken but additional restriction operating beyond that set out expressly in Ping's terms and conditions with its Account Holders.

81. In what way does a prohibition on retailers selling over the internet restrict competition? I agree with the analysis of the CMA at para. 4.54 of the Decision and of the CAT at paras. 147 and 148 of the Judgment. The restriction is twofold. If Account Holders can sell online, then the market in which they compete against each other for sales of Ping clubs is expanded to cover any customer in the United Kingdom or beyond and is no longer limited to those who happen to be in the locality of their shop. The ISP stops this and limits the ability of retailers within the network to sell to customers who are outside the geographic range of their premises. Secondly, and as a result of the limitation on the ability of a retailer to compete for sales to customers beyond their geographic range, there is a diminution in price competition. The customer is unable to buy from the cheapest authorised dealer but is limited to the prices charged by those dealers whose shops he can visit. Authorised dealers do not have to worry about lower prices being charged by dealers elsewhere in the country or in the rest of the EU because the customer cannot readily buy clubs from those dealers.

82. Having identified the restriction on competition inherent in the ISP, the next question is to look at what Advocate General Wahl described as "experience". What does the decisional practice of the Commission and the case law of the CJEU say about what follows from an economic analysis of the degree of harm that arises from a total prohibition on internet sales? Advocate General Bobek in *Budapest Bank* expressed the relevant question at this stage as "Is there a reliable and robust wealth of experience regarding agreements such as the one at issue?" (see para. 63 of his Opinion).

83. I have already described the Commission's response to prohibitions on internet sales in Regulation 330/2010 and the Vertical Guidelines. The Commission regards such a prohibition as a ban on passive sales to end-users and so to amount to a hardcore restriction depriving the agreement of the benefit of the block exemption. That does not of itself mean that the restriction is an object restriction. The CJEU took that further step in *Pierre Fabre* and then confirmed that analysis in *Coty*.

84. I do not accept Mr O'Donoghue's submission that the underlying reason for the CJEU's decision in *Pierre Fabre* was a sense that the products concerned did not merit a selective distribution agreement at all because they were not medicines and did not really require the supervision of a pharmacist. That was not part of the question referred by the domestic court and it was not the basis of the Court's judgment. The judgment establishes that a restriction on online sales should not go further than the restrictions that are permitted on sales from the bricks and mortar shop. The supplier is not allowed to restrict sales to particular groups of end-users by the dealer from the shop and cannot impose such a restriction in respect of online sales either. I also reject Mr O'Donoghue's submission that *Coty* marks a retreat from the position adopted by the Court in *Pierre Fabre* as regards the restrictive nature of prohibitions on online sales. The reasoning is common to both and reflects the existing jurisprudence about transposing what is allowed for brick and mortar shops to

the internet. On the facts *Coty* clearly fell on one side of the line and *Pierre Fabre* on the other.

85. In my judgment this body of authority or "experience" establishes that, so far as the content of Ping's ISP is concerned, it causes a sufficient degree of harm to merit being classified as an object restriction.

86. I acknowledge Ping's argument that the CJEU has expressed the need for caution in expanding the class of object restrictions. The failure of the General Court to adopt a narrow interpretation of the concept of restriction by object was held by the CJEU to have been an error of law in *Cartes Bancaires*. Mr O'Donoghue also drew our attention to a recent decision of this court in *Gascoigne Halman Ltd v Agents' Mutual Ltd* [2019] EWCA Civ 24. In that case the Court of Appeal upheld a decision of the CAT that the restriction at issue there was not anti-competitive by object. At para. 55 the Court confirmed that the CAT was right to construe the concept of restriction of competition by object restrictively, although it would have been wrong to proceed on the basis that there was an absolute bar to hitherto untainted categories of conduct being considered object restrictions. Here, the ISP is not a hitherto untainted category of conduct; it has been held by the CJEU to amount to an object restriction.

87. The attitude of the CJEU to restrictions on internet sales is also apparent from two cases on free movement of goods. In Case C-322/01 *Deutscher Apothekerverband eV* EU:C:2003:664 the CJEU considered a preliminary reference concerning whether a prohibition imposed by German legislation on the import of medicines bought over the internet from a licensed pharmacy in the Netherlands was a measure having equivalent effect to a quantitative restriction contrary to what are now Articles 34 and 36 TFEU. The Court held that insofar as the ban prohibited the sale of non-prescription medicines over the internet it was not justified. The CJEU rejected arguments based on the need for adequate advice and information to be provided to the customer, suggesting other ways by which that service could be provided online. Further, the Court highlighted the advantages that internet buying may have, such as the ability to place the order from home or the office, without the need to go out, and to have time to think about the questions to ask the pharmacist: para. 113.

88. Similarly, in Case C-108/09 *Ker-Optika BT* EU:C:2010:725, Hungarian legislation authorised the sale of contact lenses only in shops which specialise in the sale of medical devices and therefore prohibited their sale via the internet. The Court had no difficulty in holding that the prohibition deprived traders from other Member States "of a particularly effective means of selling those products" and significantly impeded access of those traders to the market of the Member State concerned: para. 54. In arguments similar to those advanced by Ping in this case, the Hungarian government maintained that it was necessary to require customers to take delivery of contact lenses in specialist shops because they must have access to an optician who can carry out the necessary physical examinations, undertake checks and give those customers instructions on the wearing of the lenses. The Court, however, noted that the legislation in question did not require that an optician must make every supply of lenses dependent on a precautionary examination or on medical advice. The examination and the advice were optional and it was the responsibility of each contact lens customer to make use of them. The Court suggested other ways that the customer could be advised as part of the process of online selling such as by means of

interactive features on the website concerned - the website could be set up so that the customer had to use the interactive feature before purchasing the lenses.

89. One cannot press the analogy between cases under Article 101(1) and free movement cases too far because the range of factors which can be used to justify restrictions under the different regimes are not the same. But those cases show, in my judgment, the importance that the CJEU attaches to internet sales as a channel for competition between retailers in different Member States. They also show the importance of looking for ways of meeting any quality concerns by adopting measures that are less restrictive than an outright ban.

90. Mr O'Donoghue argued that, when considering the content of the restriction, the CAT only looked at part of the wording of Ping's ISP, focusing on the prohibition imposed on the retailers but airbrushing out the parts of the contract that contained the detailed explanation as to why the policy had been adopted. I do not agree that simply incorporating the rationale on which Ping relies into the contract can make any difference to the analysis of the restriction. The analysis must focus on the parties' contractual obligations.

91. On this point, I consider that there is now a body of case law and decisional practice that shows that, for the purposes of Article 101, the imposition by a supplier of a prohibition on internet sales by authorised dealers in a selective distribution network does, at this first stage of the analysis, reveal a sufficient degree of harm to competition and is a restriction by object.

(d) The objectives of the ISP

92. The parties disagreed about the role that the supplier's wider objective in imposing the restriction plays in the object/effect dichotomy. Ping's line of argument is clear: the objective of the ISP is to promote dynamic custom fitting of golf clubs; dynamic custom fitting ensures that the customer gets the most suitable club to optimise his game; the ISP causes Ping's rate of custom fitting to be higher than that of its rivals, therefore the ISP improves the quality of the product that the customer buys – the very antithesis, Ping say, of an object restriction. They refer to the evidence that customers are not able to assess their own requirements in the way that a trained fitter can and that a properly fitted club can enhance the performance of both amateur and professional golfers. There was, Ping argues, an objectively legitimate and pro-competitive aim, as well as a finding of an actual or concrete pro-competitive effect.

93. Ms Marie Demetriou QC, appearing for the CMA, took issue with the assertion that the CMA made a finding that the ISP resulted in higher custom fitting rates for Ping clubs than for competing clubs made by suppliers who also promote custom fitting but whose dealers sell clubs on the internet. She drew our attention to the CMA's statement that there was "considerable uncertainty" about the reliability of the estimates comparing the percentage of Ping customers who buy after a custom fitting with the percentage of competing suppliers' customers: see the discussion at paras. 4.103 onwards. The CMA's conclusion at para 4.113 was that although the ISP was a suitable means to promote custom fitting, it was likely to have only a limited effect in increasing the rate of custom fitting by Ping's Account Holders. On appeal, the CAT discussed the effectiveness of the ISP at paras. 163 onwards of the Judgment and agreed with the CMA that evidence as to the rates of custom fitting adduced by Ping

was unreliable. The data showed that the rate of Ping clubs sold following a custom fit was "somewhat higher" than the aggregated rates for other brands but the differential was a modest one and the evidence did not rule out that some rivals might in fact achieve higher rates than Ping. The CAT also agreed with the CMA that the evidence did not establish the extent to which the difference between Ping's rates and those of its competitors was attributable to the ISP. Other causes might be the speed at which Ping could produce a bespoke club and the training given by Ping to fitters working at its dealers' premises.

94. In any event, Ms Demetriou argued that the CJEU has consistently held that a restriction can amount to an object infringement even if it pursues other legitimate objectives. In Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd* EU:C:2008:643 ('*BIDS*') the CJEU held that the beef producers' aim of rationalising the beef industry by reducing production overcapacity was irrelevant to the question of whether the crisis arrangements for the orderly exit of producers from the market were an object restriction. The Court said at para. 21 that:

> " … even supposing it to be established that the parties to an agreement acted without any subjective intention of restricting competition, but with the objective of remedying the effects of the crisis in their sector, such considerations are irrelevant for the purposes of applying [Article 101(1)]. Indeed, an agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives."

95. This was repeated in *Cartes Bancaires* where the Court included in its judgment the often repeated statement that, although the parties' intention is not a necessary factor in determining whether an agreement is restrictive, there is nothing prohibiting the courts from taking that factor into account: see para. 54. Advocate General Wahl in his opinion in *Cartes Bancaires* said that the "objective aims" that are relevant at this stage of the analysis 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: see para. 117.

96. In the light of the case law I cannot accept Ping's submission that the CAT erred in focusing too much on Ping's subjective intentions and ignored the CMA's findings that the ISP objectively and actually improved competition based on quality. Neither the CMA nor the CAT was convinced that there was a material difference between the percentage of sales following a custom fitting comparing Ping with its rivals or that any small difference was the result of the ISP rather than attributable to other factors. The fact that Ping hopes, or genuinely believes, that the ISP has a greater impact does not prevent it from being an object restriction. The CAT was entitled to find that any such small difference as might arise from the ISP did not mean that the objective of the ISP was something other than the restriction of competition.

(e) The legal and economic context of the ISP

97. The case law I have cited establishes that one must examine the economic and legal context of the operation of the clause before deciding whether it is an object restriction or not. In *Budapest Bank* Advocate General Bobek explained why some

analysis of the legal and economic context of the restriction is required at all when an agreement appears to constitute a restriction by object:

> "45. … The reason is that a purely formal assessment of an agreement, completely detached from reality, could lead to condemning innocuous or procompetitive agreements. There would be no legal or economic justification for prohibiting an agreement that, despite conforming to a category of agreements that is usually considered anticompetitive, is nonetheless, because of some specific circumstances, outright incapable of producing any deleterious effect in the marketplace, or is even procompetitive.
>
> 46. That is why the Court's case-law has always been consistent on this point: the assessment of a practice under EU competition rules cannot be made in the abstract, but requires an examination of that practice in the light of the legal and economic conditions prevailing on the markets concerned. The importance of this principle is confirmed by the fact that it has been found to be valid with regard to both Article 101(1) TFEU and Article 102 TFEU. Not even when dealing with forms of conduct like price fixing, market sharing or export bans, which are generally recognised to be particularly harmful to competition, can the economic and legal context be totally ignored."

98. Mr O'Donoghue submitted that the difference between the stage when the object/effect dichotomy is considered and an effects-based analysis is that at the former stage one looks at the pro-competitive and anti-competitive aspects of the restriction treating them as "high level inputs". If the restriction is partly anti-competitive (in this case to stop internet sales) but partly pro-competitive (in this case to improve the quality of the product by promoting dynamic custom fitting) that is sufficient to take the restriction out of the "object box". The competition authority must then carry out an effects analysis to see whether the overall positive effect on quality outweighs the negative effects on price and availability. He argued that there is no balancing of pro-and anti-competitive elements at the object/effect stage. Rather the identification of credible, pro-competitive effects is enough to establish that the restriction is not a restriction by object. In Ping's case, he argued, it was accepted that the ISP enhanced competition based on quality. Once those high-level uncontested considerations were included in the object consideration, it was impossible to conclude that the restriction properly belonged in the object restriction box.

99. The high point of Mr O'Donoghue's case on this point was a passage in Advocate General Bobek's opinion in *Budapest Bank* following the passage I have just cited. Advocate General Bobek described the legal and economic context aspect of the by object restriction as being "a basic reality check", though he conceded at para. 49 that the complexity of that check depends on all the relevant circumstances of the case. He asked the same question in another way: (his emphasis):

> "Thus, *at first sight* can the proposition concerning the generally harmful nature of such an agreement reasonably be challenged in the context of the individual case?".

100. The yardstick should, he said, be "that of a countervailing hypothesis that is not implausible at first sight and that challenges, in the context of the individual case, the general conventional wisdom." In the passage on which Ping particularly relies, the Advocate General discussed the kinds of factors that might fall to be assessed:

> "80. In that regard, it might be added that the Court has long recognised that agreements that pursue a 'legitimate objective' are not necessarily caught by Article 101(1) TFEU. This means that agreements that have both procompetitive and anticompetitive effects are caught by the prohibition of Article 101(1) TFEU only where the latter prevail. For example, a reduction of price competition may be acceptable when it is a means to increase competition in relation to factors other than price. More generally, agreements that, despite being restrictive of the parties' freedom of action, pursue the objective of, for example, opening up a market or creating a new one, or allowing new competitors to access a market, may be procompetitive. It equally follows from settled case-law that, under certain conditions, restrictions which are directly related and necessary to the implementation of a main operation, which is in itself not anticompetitive, do not constitute restrictions of competition within the meaning of Article 101(1) TFEU.
>
> 81. Accordingly, any time an agreement appears to have ambivalent effects on the market, an effects analysis is required. In other words, when a possible procompetitive economic rationale for an agreement cannot be ruled out without looking at the actual effects on the market, that agreement cannot be classified as restrictive 'by object'. …"

101. Mr O'Donoghue described that analysis as devastating for the CAT's judgment because it fully supported his contention that the existence of a credible, pro-competitive effect resulting from the ISP meant that the restriction could not be an object restriction.

102. Advocate General Bobek in that Opinion is certainly putting forward one way in which one could distinguish between the 'legal and economic context' stage of the *Cartes Bancaires* test and a full effects-based analysis of a restriction. It remains to be seen whether the CJEU endorses that approach, suggests a different approach or decides the case without venturing into that territory. I do not agree with Mr O'Donoghue's submission that the Advocate General was simply describing the effect of existing case law, and in particular the effect of the judgment in *Cartes Bancaires*. In the earlier case, the CJEU recorded Cartes Bancaires' submission that the General Court had erred in declining to assess the legitimacy of the objective of fighting free riding in the light of Article 101(1): see para. 29. However, that was not the basis on which the General Court's judgment was overturned. The error found by the CJEU was the failure of the General Court to spell out why the wording of the agreement

restricted competition in the first place. The CJEU stated that the General Court was correct to say that the fact that the measures in issue pursued the legitimate objective of combatting free-riding did not preclude them being regarded as having the object of restricting competition. The General Court and the Commission fell at the earlier hurdle of establishing any restrictive object: para. 70. The CJEU went on to criticise the Commission and the General Court for failing to consider the interactions between the two sides of the payment system market, a complication that does not exist in Ping's case.

103. Further, I do not see that a 'basic reality check' approach would assist Ping in this case. There is nothing about the basic reality here that casts doubt on the conclusion arrived at from looking at the content and objective of the restriction itself. When it came to examining the legal and economic context, the factors that the CMA and the CAT took into account are those I have described at paras. 56 and 66 above. Those appear to me to set the relevant context in which Ping's ISP operates.

104. Ping argued that if one combines the different market figures set out in the CMA's Decision as accepted by the CAT then it indicates that only a very small number of Ping customers buy on the internet. There are a number of answers to this point. The obvious one is that the figures reflect the current position on a market where the ISP has prohibited online sales of Ping clubs for many years. There is no doubt that some authorised dealers of Ping clubs want to sell the clubs from their internet websites. The CMA's investigation was triggered by a complaint from such a dealer. In addition to that complainant, two other authorised dealers appeared as witnesses before the CAT on behalf of the CMA. Those members of the network must have invested in installing in their premises the equipment and the professional personnel to offer dynamic custom fitting to customers as required by Ping before they can become Account Holders. They must realise that there is a risk that if online sales are permitted, a customer who comes into their shop and takes advantage of their investment and expertise might leave the shop without making a purchase and instead buy a set of clubs from a different authorised retailer who is offering them for sale more cheaply online. Yet those retailers considered that the best interests of their business lay in being able to sell Ping clubs online. The second answer is that Ping has never put forward a defence based on lack of appreciable effect on trade, relying on the well-established case law under Article 101(1). Its substantial market share would clearly make any such argument unsustainable.

105. Ping asserts that the second error it has identified in the Judgment was that the CAT 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. Mr O'Donoghue submitted that Ping's agreements were condemned simply because they bring about the diminution in intra-brand competition that is inherent in any selective distribution network. This is inconsistent with the CJEU's case law which accepts that that disadvantage of the network is outweighed by the enhancement of non-price competitive factors.

106. In my judgment there is no basis for any such criticism. The fact of Ping's selective distribution network and the legitimacy of that network given the nature of Ping clubs underlies the CAT's reasoning at every stage. The CAT was fully aware of the fact that a certain degree of intra-brand restriction is inherent in a selective distribution network as recognised by the CJEU in *Metro* and by the Commission in Regulation

330/2010 and the Vertical Guidelines. The Judgment does not condemn the ISP simply on the basis of the restriction of intra-brand competition that is inherent in the operation of a legitimate selective distribution network. On the contrary, the CAT at para. 139 referred expressly to the effect of the ISP on intra-brand competition and noted further at para. 141 that the policy went further than the prohibition in *Coty*. The problem with the ISP is that price competition is prevented not merely as between authorised dealers and dealers outside the network but as among authorised dealers themselves, including among authorised dealers in different Member States. Consumers can properly be prevented from buying from the sports goods equivalent of the 'cash and carry' outlet in *Metro* because such an outlet can legitimately be excluded from the network. That is why any restrictions on the ability of authorised dealers to sell to each other and to end-users whether by active or passive sales are considered so detrimental to competition. The CAT addressed the correct issue which was whether the ISP went beyond what was generally regarded as a necessary and legitimate diminution of intra-brand competition to restrict competition in a way which experience and economics have established reveals in itself a sufficient degree of harm to merit being regarded as an object infringement. They concluded that it did and I see no basis for challenging that conclusion.

(f) Conclusion on object restriction

107. The CAT was right to conclude that there was nothing in the economic or legal context in which the ISP operated that negated the conclusion that the ISP revealed a sufficient degree of harm to justify being regarded as an object restriction.

108. I do not doubt the genuineness of Ping's disappointment and indignation at finding themselves the subject of an infringement decision and penalty. They believe that they know best how to market their own product and that the ISP promotes dynamic custom fitting for the benefit of their customers – according to Ping's managing director it is "part of Ping's DNA". The CJEU's case law has always acknowledged the advantages of selective distribution networks for luxury or highly technical goods. In that way, competition law allows the manufacturer to control the way its products are presented to the consumer in order to maximise their sales in competition with other manufacturers' competing products. Advocate General Wahl in *Coty* described how a supplier with a selective distribution network will recognise that the stricter the selection criteria it imposes, the greater the risk of loss of market and of customers. In the absence of market power the supplier will in principle, he said, "self-regulate its conduct in a way that conforms to the competition rules": para.44.

109. For this reason EU competition rules have respected to some extent a manufacturer's choices as to how best to promote its product: but only to some extent. The CJEU has never been content to rely only on the kind of 'self-regulation' to which Advocate General Wahl referred to ensure that competition is not restricted. As Ms Demetriou reminded us, the application of Article 101(1) to restrictions on intra-brand competition was considered by the Court at a very early stage, in the seminal case of Case C-56/64 *Consten and Grundig* EU:C:1966:41. That judgment established that the Court does not regard inter-brand competition as sufficient to bring about the optimal use of resources. The competition rules do not rely on suppliers 'self-regulating' by leaving them free to set the terms on which undertakings further down the distribution chain market their goods to the ultimate consumer. The retailer also has a commercial interest and expertise in marketing the goods successfully. Since

Consten and Grundig, the dividing line between what it is legitimate for the manufacturer to decide and what must be left to the choice of the retailer has been carefully drawn. The detailed provisions of Regulation 330/2010 and the Vertical Guidelines show the drawing of boundaries between active and passive sales in exclusive distribution networks, between resale price maintenance and recommended or maximum pricing, and now between outright bans on internet sales and restrictions which replicate more precisely the boundaries already established for permissible restrictions imposed on authorised dealers' bricks and mortar shops. The argument underlying Ping's case – that it should be allowed to decide for itself how best dealers should market its goods in competition with other manufacturers – is not an argument that has found favour in EU competition cases and it cannot succeed here.

110. It may turn out that sales of Ping clubs over the internet will remain a minority of Ping's overall sales for the foreseeable future. There is nothing in the Decision or in the judgments of the CAT or of this court which prevents Ping from continuing to insist that its Account Holders invest in custom fitting apparatus and do their best to persuade golf club consumers of the benefits of dynamic custom fitting. As the CMA made clear in its Decision, this policy can be reflected in requirements that Ping is entitled to impose on its Account Holders as regards their website design. No doubt Ping's authorised retailers are highly skilled at closing the transaction with a customer who has a dynamic custom fitting. No individual dealer is obliged to offer Ping clubs for sale on its website if it does not want to, once it is made clear to him that he is free to do so. The possibility of such an outcome does not, in my view, prevent the ISP being a restriction by object. If, after the ISP is adapted to comply with the CAT's judgment and this court's judgment, dynamic custom fitting in the future remains an important channel through which Ping clubs are sold, that will be the result of the market determining by the operation of ordinary competitive forces that dealers and consumers have chosen that sales route. It will not be the result of a policy imposed by Ping.

(g) The seriousness and likelihood of harm

111. The third error that Ping identifies in the Judgment is at para. 142 where the CAT expressed the degree of likelihood necessary to establish that a restriction was an object infringement. The CAT said that "the internet policy has a real (non-fanciful) *potential or capacity* to restrict competition" (emphasis in the original). The CAT then cited the CJEU's decision in Case C-32/11 *Allianz Hungária Biztositó ZRT v Gazdasági Versenyhivatal* ECLI:EU:C:2013:160. That was a ruling on a preliminary reference in proceedings where a number of Hungarian car insurers agreed with repair shops the conditions and rates applicable to repair services payable by the insurer in the case of accidents involving insured vehicles. The Hungarian competition authority found that the agreements had as their object the restriction of competition in the car insurance contract market and the car repair services market. It imposed substantial fines. On the issue of whether the arrangements imposed restrictions by object the CJEU said:

> "38. The Court has, moreover, already held that, in order for the agreement to be regarded as having an anti-competitive object, it is sufficient that it has the potential to have a negative impact on competition, that is to say, that it be capable in an individual case of resulting in the prevention, restriction or

> distortion of competition within the internal market. Whether and to what extent, in fact, such an effect results can only be of relevance for determining the amount of any fine and assessing any claim for damages …"

112. Turning to the alleged restriction in question, the CJEU said:

> "48. Furthermore, those agreements would also amount to a restriction of competition by object in the event that the referring court found that it is likely that, having regard to the economic context, competition on that market would be eliminated or seriously weakened following the conclusion of those agreements. In order to determine the likelihood of such a result, that court should in particular take into consideration the structure of that market, the existence of alternative distribution channels and their respective importance and the market power of the companies concerned."

113. The Court therefore answered the question referred to it by the Hungarian court by saying that the restriction could be an object restriction where:

> "following a concrete and individual examination of the wording and aim of those agreements and of the economic and legal context of which they form apart, it is apparent that they are, by their very nature, injurious to the proper functioning of normal competition on one of the two markets concerned."

114. The question raised by this part of Ping's appeal is whether the CJEU was saying anything about the standard of proof required in either para. 38 where it referred to the agreement being *capable* of resulting in the prevention, restriction or distortion of competition or in para. 48 where it referred to competition on the relevant market being eliminated or seriously weakened.

115. In my judgment it was not. Para. 38 of *Allianz Hungária* is simply confirming the point that where a restriction is a restriction by object there is no need to consider the effects of the agreement in order to establish the infringement. At para. 48 of *Allianz Hungária* the CJEU was envisaging one of a number of scenarios that might emerge from the subsequent investigation by the domestic court. The Court was not laying down a requirement that a restriction is only an infringement by object if it will lead to the elimination or serious weakening of competition on the relevant market. None of the cases in which object restrictions have been found to exist refer to the need to establish a substantial weakening or elimination of competition. To set the threshold for object restrictions so high, even if only for vertical agreements, would be inconsistent with the application of Article 101(1) which does not depend on market power of the undertakings concerned. I note that the CJEU concluded by confirming that it must be 'apparent' that the restrictions are by their very nature injurious to competition.

116. It is not clear to me where the phrase "a real (non-fanciful) *potential or capacity* to restrict competition" used by the CAT at para. 142 comes from. If the CAT had applied a test along the lines that the ISP would be an object restriction if there was a

non-fanciful possibility of the policy causing a sufficient degree of harm, then that would be an error of law. However, I do not accept that that is the test that the CAT in fact applied. The CAT correctly recorded at para. 143 that the conclusion of the CMA was that the ISP "revealed" a sufficient degree of harm, not just that a sufficient degree of harm was a likely or non-fanciful consequence. The relevant question which the CAT said it needed to address was the correct question namely: does the agreement reveal a sufficient degree of harm to be considered a restriction by object: see para. 94(2). The degree of likelihood of harm was not identified by the CAT as one of the issues in the appeal: para. 124. There is a discussion of the burden of proof and the presumption of innocence at para. 108 but no discussion of the standard of proof to indicate that the CAT was applying some test other than that set down in the CJEU case law it cites. On the contrary, the key paras. 147 and 148 setting out the CAT's conclusions describe the potential impact of the ISP as real and material and as significantly restricting access to Ping's goods. I am satisfied that these show that the CAT applied the correct test and that there was no error of law in the CAT's approach to the standard of proof.

5. Ground 2: Penalty

(a) Intentional or negligent infringement

117. According to section 36(1) of the Competition Act 1998 as amended, the CMA is empowered to impose a penalty when making a decision that an agreement has infringed the prohibition in section 2 of that Act or the prohibition in Article 101(1). Section 36(3) provides that a penalty can be imposed only if the CMA is satisfied that the infringement has been committed intentionally or negligently by the undertaking. An infringement is committed intentionally for this purpose if the undertaking must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition: see *Argos Limited and Littlewoods Ltd v Office of Fair Trading* [2005] CAT 13, para. 221. An infringement is committed negligently if the undertaking ought to have known that its conduct would result in a restriction of competition. Ignorance or mistake of law does not prevent a finding of intentional infringement: see Case C-681/11 *Bundeswettbewerbsbehörde v Schenker & Co AG* EU:C:2013:204, para 38.

118. The CMA found in the Decision that Ping would have been aware, or could not have been unaware, that the consequences of the infringement was that Account Holders would be unable to compete online. Ping is a well-resourced company with experienced external legal advisers. The legal principles of this case "are not novel", at least since the CJEU handed down its judgment in *Pierre Fabre*: para. 5.27. There was, moreover, evidence in the exchanges between Ping and its Account Holders that it had some awareness of the key principles of EU competition law. The CMA's conclusion at para. 5.39 was that Ping had committed the infringement "intentionally or, at the very least, negligently".

119. On appeal, the CAT overturned the finding that Ping had intentionally restricted competition and held that Ping had been negligent when it committed the object infringement: para. 228. Ping should have realised that there was an obvious, significant risk that the ISP would be considered to infringe competition law by object. Ping nevertheless failed to take reasonable steps to satisfy itself that its policy

could be objectively justified or individually exempted. The CAT also rejected Ping's submission that only a nominal fine should have been imposed: para. 232.

120. Ping's first challenge in this appeal to the penalty imposed is to the CAT's finding that Ping 'ought to have known' that its conduct was unlawful. Ping argues that the CAT failed to recognise that the legal basis of Ping's infringement had been rationalised by the CMA on at least three different grounds. Even if this Court rejected the appeal on liability, in light of the complex conclusions reached in the Decision and the Judgment, it was not reasonable to expect Ping to anticipate that outcome.

121. I consider that the CAT was right to uphold the imposition of the penalty on the basis that the infringement had been committed negligently. The penalty related to the five-year period before the adoption of the Decision in August 2017. The whole of that period therefore post-dates both the CJEU's judgment in *Pierre Fabre* and the publication of the Vertical Guidelines. Ping was on notice that the prohibition of all online sales by its authorised dealers was, at the least, very likely to amount to an infringement of the competition rules. There is no basis for interfering with the CAT's decision on this point. The fact that the CMA's approach to the infringement in the Statement of Objections differed from that taken in the Decision does not, in my view, indicate that Ping could not have foreseen the outcome of the investigation. Neither does the fact that the CAT did not agree with every element of the Decision.

122. I do not accept that the situation here is similar to that in the cases on which Ping relies. In Case T-86/95 *Compagnie Générale Maritime v Commission* EU:T:2002:50, the Commission had itself decided to impose only nominal fines of ECU 10,000 in the light of mitigating factors. The General Court noted that the infringement found by the Commission dated back to a period before the Commission had itself defined its views on the application of the rules to maritime transport. The Commission had by its conduct led the applicants to believe that their agreement was not unlawful: see paras. 483 and 485. That is not the position here. In COMP/38.096 *Clearstream (clearing and settlement)* (decn of 2 June 2004) the Commission said that there was no EU decisional practice or case law relating to the complex area of clearing and settlement services so that the decision was the first time the issue of market definition had been considered. That was why it decided not to impose a fine despite finding that Clearstream's tariff amounted to an abuse of its dominant position: para. (344). Again, as I have described, this case is not the first time that internet sales prohibitions in selective distribution networks have been considered by a competition authority. Finally, Ping rely on IV/31.906 *Italian flat glass* (decn 7 December 1988) where the Commission did not impose a fine for the abuse of the collective dominant position. However, the Commission did impose substantial fines for the same conduct when characterised as a breach of Article 101. None of those cases lends any support to Ping's assertion that a nominal fine was appropriate in this case.

(b) Computation of the penalty

123. Ping also challenges the amount of the penalty, arguing that the CAT should have made a specific reduction to the level of penalty to reflect the finding that the infringement was negligent rather than intentional. The CAT said that overturning the finding of intention may be relevant to whether the penalty should be reduced but then did not make any reduction to reflect this.

124. According to section 38 of the Competition Act, the CMA must publish guidance, approved by the Secretary of State, as to the appropriate amount of any penalty. The relevant guidance is *Guidance as to the appropriate amount of a Penalty* (OFT 423, September 2012) adopted by the CMA Board when the CMA took over the functions of the OFT ('the Penalty Guidance'). The CMA followed the six step process set out in the Penalty Guidance:

i) the starting point having regard to the seriousness of the infringement was 12% (the effective maximum for the most egregious forms of infringement being 30%). This was applied to Ping's turnover in the relevant market in the financial year ended 31 December 2016.

ii) a multiplier of 5 was applied to reflect the duration of the infringement: para. 5.68.

iii) the CMA held that the involvement of Ping's managing director in the infringement was an aggravating factor and imposed an uplift of 10% for this factor: para 5.72. No adjustment was made for mitigating factors.

iv) A substantial reduction was made at step 4 to prevent the penalty from being disproportionate or excessive. This reduction reflected the CMA's findings that the policy had only a minor impact on the market given that other brands are available online and that Ping genuinely wanted to promote custom fitting: para 5.92. The penalty at the end of step 4 was £1,477,789.

v) No further adjustment was made for leniency so that the final amount of the penalty was £1,477,789.

125. On appeal the CAT rejected each of Ping's challenges to the computation except the CAT held that the uplift to reflect the involvement of Ping's managing director was not appropriate on the particular facts of the case: para. 247. The CAT then considered the overall fairness and proportionality of the fine. The CAT concluded:

> "254. … The Decision imposed on Ping a fine of £1.45 million. This equates to a fine of £290,000 per year of the infringement. In our view, this is within the correct ballpark figure for an infringement of this nature, taking into account the specific circumstances of the infringement including Ping's financial position and its genuinely held intention to promote custom fitting. We note our finding that the CMA erred in treating Ping's managing director's involvement as an 'aggravating factor' justifying an uplift in the penalty at step 3 of its penalty calculation. We have also considered whether the CMA effectively 'remedied' this error in step 4 of its calculation by substantially reducing the fine amount produced by the first three steps of the calculation. In our view, however, the fine imposed is slightly too high and a further small reduction is therefore appropriate. Rather than mechanistically applying a 10% reduction to the fine we will take a view in the round. On consideration, we consider that a fair and proportionate fine, taking into account that it was not an 'aggravated'

infringement, should be £1.25 million. This equates to a fine of £250,000 in each year of the infringement."

126. Ping criticises the CAT for failing to make a specific reduction to reflect the fact that it overturned the CMA's finding that the infringement had been intentional and substituted a finding that it had been negligent only. In my judgment, however, the CAT was entitled to take a view of the fine "in the round" as it did in para. 254. Although it did not expressly refer back to its finding that the infringement had been negligent rather than intentional, that is no basis for saying that its overall decision on the appropriate level of the fine was flawed.

127. I would therefore dismiss Ping's challenges to the level of the fine.

Disposition

128. I would therefore dismiss Ping's appeal both as to liability and as to the level of the penalty.

Lord Justice Flaux:

129. I agree with both judgments.

The Chancellor of the High Court:

130. I entirely agree with Lady Justice Rose's judgment.

131. As anyone who has ever played a round of golf will be able to attest, the clubs that are used can hugely affect the quality of the game played. As Ping's ISP states, it believes that it is fundamental to the process of selling its clubs that the consumer is "custom-fitted to ensure they receive clubs that are custom-built to their own specifications". It does not, however, follow in my view that that desirable objective requires the imposition of a complete ban on internet sales. Some customers may, for example, already know their personal specifications after a recent dynamic custom fitting and wish to buy a second or third set of clubs online. Others may wish to buy a set of Ping clubs as a gift for someone whose essential data are known. There are many ways in which Ping's objective can be substantially fulfilled without imposing a blanket ban on internet sales.

132. Moreover, I do not think that the growing popularity of the internet as a sales medium can be minimised. It may be that, when the CMA reached its decision, relatively few customers actually bought their golf clubs online. But the speed of the internet is increasing and we are living in an age of technological innovation. It would, I think, be inappropriate in this context for us to accept that the ISP did not reveal a sufficient degree of harm to competition to be considered a restriction of competition by object within the meaning of Article 101(1). Applying paragraph 47 of the CJEU's decision in *Pierre Fabre*, Article 101(1) must, in my view, be interpreted as meaning that, in the context of this selective distribution system, a contractual clause requiring sales of golf clubs after a dynamic custom fitting effectively in physical premises, and banning any type of internet sales of such clubs, amounts to a restriction by object. I reach that conclusion having paid full regard to the content and objective of the ISP and the legal and economic context in which it is set. Put simply, having regard to all

the properties of golf clubs, the ISP is not, as the CMA decided and the CAT held, objectively justified.