SQUIRE PATTON BOGGS

Competition Appeal Tribunal Clarifies Rules Regarding Restrictions on Online Sales and Clearance Sales

UK – January 2025

The judgment of the UK Competition Appeal Tribunal (CAT) in *Up & Running (UK) Limited v. Deckers UK Limited*, which was handed down in late 2024, provides important clarifications of the law regarding restrictions on online sales and restrictions on the sale of discounted products in clearance channels.[1]

Relevant for both brands and retailers, the key takeaways from the judgment are:

- A brand's selective distribution system will be open to challenge if it is not based on objective and transparent criteria, which are recorded clearly and uniformly and applied consistently.
- Preventing a retailer from making clearance sales through a secondary website – for example, to sell out-of-season apparel or footwear – can constitute an unlawful restriction on online sales.
- Limiting a retailer's ability to sell clearance products at a deep discount can also constitute an unlawful restriction on the retailer's freedom to set its own prices.

The Facts

Deckers is a designer and distributor of branded clothing and footwear, including the HOKA brand of running shoes. Deckers sells its products both to consumers directly through its own website and to authorised third-party resellers.

Up & Running is an established retailer of sports shoes, apparel and accessories, which operates a chain of bricks-and-mortar stores and a website (upandrunning.co.uk). Deckers had supplied Up & Running with HOKA running shoes, for sale in stores and online, since 2016.

In 2020, due to the impact of COVID-19, Up & Running was faced with a large volume of unsold stock – especially old and out-of-season stock, as HOKA released new ranges of running shoes twice per year (spring/summer and autumn/winter). Up & Running was unable to sell this stock in its bricks-and-mortar stores, which were affected by COVID-19 lockdowns, and did not want to sell the stock at a deep discount on its website alongside in-season stock at full prices.

Up & Running was concerned that doing so would risk "undercutting [our] own stores" – making it harder to maintain premium prices for in-season stock – and cause issues with "customers demanding refunds and creating mistrust".[2]

To avoid these problems, Up & Running decided to create a second website (runningshoes.co.uk) that would only sell surplus stock at clearance prices.

Deckers' terms and conditions allowed retailers to make online sales, but only on a website that complied with its requirements and that had received its approval. Up & Running accordingly asked for permission to sell HOKA products on its new, clearance website. Deckers refused, stating that the runningshoes.co.uk website was incompatible with its brand strategy. When Up & Running went ahead and sold out-of-season HOKA shoes on the clearance website in any event, Deckers terminated its agreement and removed Up & Running from its distribution system altogether.

Up & Running then brought a claim before the CAT arguing that Deckers' terms and conditions breached Chapter I of the Competition Act 1998, which prohibits anticompetitive agreements, on the grounds that they unduly restricted Up & Running's ability to sell online and prevented Up & Running from selling HOKA products at a discount, which amounted to illegal resale price maintenance.

Deckers argued in response that it was operating a selective distribution system that fell outside the Chapter I prohibition because it satisfied the criteria established in the *Metro* case[3] – namely:

- Retailers were chosen on the basis of objective, qualitative criteria.
- Those criteria were laid down uniformly for all potential retailers and were applied in a nondiscriminatory manner.
- The characteristics of its products necessitated the use of a selective distribution system.
- The criteria did not go beyond what was necessary for the selective distribution system to operate.

Deckers argued in the alternative that, even if the *Metro* criteria were not satisfied, its agreement with Up & Running fell within the safe harbour of the EU Vertical Agreements Block Exemption Regulation (VABER) and the UK Vertical Agreements Block Exemption Order (VABEO), which protected it from prohibition.

The Judgment

As a starting point, the CAT found that Deckers' selective distribution system did not satisfy the *Metro* criteria and as such it could be challenged under competition law. Specifically, the CAT found that Deckers' criteria for admission to or ejection from its system were unclear, subjective, and applied in an arbitrary manner.

1 *Up & Running (UK) Limited v. Deckers UK Limited* [2024] CAT 61 (*Deckers*).

2 *Deckers*, para. 81.

3 Case 26/76 *Metro v Commission* [1977] ECLI:EU:C:1977:167 (*Metro*).

Indeed, cross-examination of Deckers' management showed that the company did not have any recorded set of criteria at the time of its dispute with Up & Running. Therefore, Deckers' selective distribution system failed to satisfy at least the first and second *Metro* criteria.

The CAT went on to find that Deckers' terms and conditions could not be exempted from the Chapter I prohibition under the VABER or VABEO – although the parties' market shares were below the applicable thresholds for exemption – because they included "hardcore" restrictions of competition. The CAT considered that Deckers' refusal to allow Up & Running to sell HOKA running shoes on a secondary website had two purposes, both of which had the object of restricting competition:

- Deckers sought to restrict sales in the clearance channel – i.e. online sales of discounted out-of-season stock – in order to discriminate in favour of its own discounted sales, and to allow Deckers to determine when and in what volumes HOKA products were sold through that channel.
- Deckers sought to limit retailers to only selling HOKA products through their main retail channel in order to inhibit them from discounting on a clearance basis, and thereby prevent them from setting prices as they wished.

In its defence, Deckers had cited what it claimed were legitimate concerns about Up & Running's creditworthiness and its ability to manage the logistics of running two websites, both of which the CAT dismissed. Deckers had also argued that it imposed a "signposting requirement" – requiring retailers to only sell products on a website with a domain name that matched or closely resembled the name of their bricks-and-mortar stores – in order to prevent customers from being confused or misled. The CAT, however, found that this justification had been "constructed after the event": Deckers referred to the signposting requirement for the first time after it had already refused Up & Running's request to use the runningshoes.co.uk website.[4] Deckers had also allowed other retailers to sell its products on websites with names different from those of their offline stores.

Crucially, the CAT also held that Deckers could not argue that its restrictions on online clearance sales were necessary in order to protect the brand image of HOKA, as Deckers sold discounted surplus stock through its own clearance website and supplied certain third-party clearance websites. This, in the CAT's view, demonstrated that Deckers did not have genuine concerns that the presence of HOKA products on clearance websites would damage the brand.

In conclusion, the CAT held that Deckers' application of its terms and conditions had given rise to two breaches of the Chapter I prohibition of anticompetitive agreements, namely:

- A by-object restriction on Up & Running's ability to make online sales.
- A by-object restriction on Up & Running's freedom to set its own prices.

The CAT ruled that Deckers should be liable to pay Up & Running damages, subject to a separate trial to determine their amount. It declined to order an injunction compelling Deckers to resume supplies to Up & Running, noting that relations between the two companies (and the individuals involved) had deteriorated to such an extent that there was no prospect of a normal trading relationship being restored.

Key Takeaways

This judgment is significant as it adds to the relatively limited body of caselaw on online sales restrictions, and restrictions in vertical agreements more generally. The *Ping* judgment in 2020 established that it is illegal for a brand to impose an outright ban on retailers selling its products online.[5] What has not previously been considered by the courts or the CAT is whether a brand can operate a selective distribution system that limits retailers to selling from only one website, or from only pre-approved websites.

The judgment in *Deckers* does not rule out the possibility that a brand could legitimately impose such restrictions. The CAT's objection in this case was to Deckers restricting online sales based on a system that lacked transparency, had no clear and pre-determined criteria, and gave Deckers unfettered discretion to decide whether or not to permit such sales.

The judgment therefore highlights that for brands that operate a selective distribution system – whether for online sales, offline sales or both – it is essential to have a record of the criteria they will apply when determining whether to admit a new retailer or a new sales channel, or to eject an existing retailer from the system. Such criteria must be objective, transparent, and applied consistently and without discrimination (including discrimination in favour of the brand itself).

The judgment also draws attention to the dangers for a brand of restricting retailers from selling products at a discount through clearance channels. This is particularly relevant for brands and retailers that sell products that are updated or replaced on a periodic or seasonal basis, such as fashion, apparel and footwear, or electronic goods such as mobile devices.

Again, the CAT did not rule out that a brand might be able to limit such sales if it has legitimate concerns that they could harm the brand's image; however, such an argument will fail if – like Deckers – the brand itself makes clearance sales or permits some third parties to do so. In the absence of any justification, a restriction on clearance sales will be considered a restriction on discounting, and hence a form of illegal resale price maintenance.

In conclusion, the judgment should not be seen as a message to brands that they cannot restrict retailers' online sales or clearance sales, but it is an important reminder of how careful they must be if they do so. To use the concluding words of the CAT's judgment: "Compliance is … a matter of ensuring that there is a discernible business strategy pursuing a legitimate aim, on the one hand, and that there is a clear, identifiable link between this strategy and a set of well-designed vertical restraints imposed on resellers, on the other."[6]

4 *Deckers*, para. 133.

5 *Ping Europe Limited v CMA* [2020] EWCA Civ 13 (*Ping*).

6 *Deckers*, para. 238.

Contacts

Diarmuid Ryan
Partner, London | Brussels | Dublin
T +44 20 7655 1310 | T +32 2 627 1117
T +353 1662 4578
E diarmuid.ryan@squirepb.com

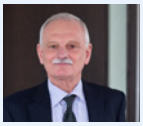
Erling Estellon
Partner, Paris | London
T +33 1 5383 7060 | T +44 20 7655 1180
E erling.estellon@squirepb.com

Oliver Geiss
Partner, Brussels | Frankfurt
T +32 2 627 1112 | T +49 69 17392 400
E oliver.geiss@squirepb.com

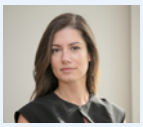
Brian Hartnett
Senior Partner, Brussels
T +32 2 627 1101
E brian.hartnett@squirepb.com

Francesco Liberatore
Partner, London | Brussels | Milan
T +44 20 7655 1505 | T +32 2 627 1111
T +39 02 72 74 2001
E francesco.liberatore@squirepb.com

Gorka Navea
Partner Brussels | Madrid
T +34 91 426 4805
E gorka.navea@squirepb.com



Martin Rees
Partner, London | Brussels
T +44 20 7655 1137 | T +32 2 627 1111
E martin.rees@squirepb.com



Tatiana Siakka
Partner, London | Brussels
T +44 20 7655 1692 | T +32 2 627 1117
E tatiana.siakka@squirepb.com

Will Sparks
Partner, Brussels
T +32 2 627 7610
E william.sparks@squirepb.com