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Van Bael & Bellis

Deckers v. Up & Running: English Court of Appeal confirms brands' ability to control online sales without infringing competition law

- The Court of Appeal's judgment makes it clear that, before condemning a restriction on online sales as an infringement of competition law 'by object' (the more serious category of infringement, for which an effect on competition is presumed), it is essential to consider the provision's content, objectives and legal and economic context.
- Even if a restriction has the objective of limiting price competition, up to and including resale price maintenance, this is insufficient in itself to give rise to an infringement by object. Analysis of the context is always required.
- The mere fact that a selective distribution system falls outside the so-called Metro safe harbour (which protects certain forms of selective distribution from competition law challenge) does not render it unlawful as a restriction by object.
- Brands operating a selective distribution system are entitled to retain a material degree of discretion in applying their contractual restrictions, without infringing competition law, provided that they exercise that discretion in a compliant manner.
- The concept of object restriction must be interpreted strictly and narrowly, particularly in the case of vertical agreements, and should not interfere with parties' contractual freedom, unless there is a need to interfere. Courts and competition authorities should therefore be cautious about intervening to override contractual bargains.
- Prohibiting a retailer from selling on an anonymised website is not a hardcore restriction under the Vertical Agreements Block Exemption.
- EU and UK competition law regimes remain closely intertwined, with UK courts and authorities being 'presumptively bound' by pre-Brexit European Court judgments and entitled to 'consider and have regard to' post-Brexit EU case law.

On 8 May 2026, the Court of Appeal for England and Wales handed down its keenly awaited judgment in *Deckers UK Limited v Up & Running (UK) Limited*, on an appeal from a judgment of the UK's specialist Competition Appeal Tribunal ("CAT") from October 2024. At the heart of the case was the question of how far a brand can limit the ability of its authorised retailers to sell its products online without infringing competition law.

The case arose from a commercial dispute between Deckers UK Limited ("Deckers"), which supplies HOKA-branded running shoes in the UK, and Up & Running UK Limited ("Up & Running"), a UK running retailer that was a member of Deckers' selective distribution system. In order to sell excess stocks at a discount, Up & Running had breached a contractual ban on selling Deckers' HOKA-brand running shoes from a website that did not contain the retailer's trading name. The key question was whether, following the breach of contract, Deckers was entitled to eject Up & Running from its selective distribution system, or whether this amounted to an infringement of competition law, as a de facto restriction of Up & Running's freedom to discount its retail prices and sell online.

Upholding Deckers' appeal, the Court of Appeal found that the CAT: had wrongly categorised Deckers' conduct as amounting to unlawful resale price maintenance ("RPM") and an undue restriction on passive online sales; had applied the wrong legal test in determining that the conduct restricted competition by-object (a crucial categorisation, since object restrictions are presumed to appreciably restrict competition, without any need to demonstrate an anti-competitive effect, and are hence more likely to be held to be unlawful); and had wrongly concluded that the contractual provision on which Deckers relied was not

Background

Up & Running, a specialist running shoe retailer, was admitted to Deckers' selective distribution network in 2016. It was a term of membership of that network that retailers must obtain permission from Deckers before selling its HOKA brand products online. No doubt mindful of the fact that brands cannot generally prevent online sales altogether under EU and UK competition law, Deckers specified that member retailers were free to sell HOKA products on their own websites, provided that the site's domain name was identical or similar to the name under which the retailer operated its brick and mortar stores. Retailers wishing to sell HOKA products from a site with a different name were required to seek permission from Deckers.

In July 2020, Up & Running asked Deckers for permission to sell HOKA products from a new website, "runningshoes.co.uk". According to the judgment, it intended to use the site to sell excess and residual stock that it had accumulated as a result of the Covid-19 pandemic, and wished to sell such stocks at a discount through a separate site to avoid harm to the more premium presentation in its main website and stores. Up & Running indicated that it intended to operate the website on an ongoing basis as an online clearance channel. Deckers refused to grant the necessary permission, initially citing brand strategy considerations and later relying on the contractual clause noted above. Up & Running nevertheless went ahead and listed HOKA products on the website. In December 2020, Deckers gave notice that it would cease to supply Up & Running due to the breach of its supply terms. Up & Running responded by launching legal proceedings for damages at the CAT.

The judgment of the CAT

The CAT found that Deckers' refusal to permit sales of HOKA shoes on runningshoes.co.uk, and subsequent termination of supplies, was motivated by a desire to restrict entry by 'main channel' retailers into the secondary clearance channel and thereby prevent aggressive discounting (on the basis that retailers would be reluctant to discount heavily on their main retail websites). In the CAT's view, the website restriction imposed by Deckers had "no plausible material objective other than the restriction of intra-brand competition". This anti-competitive objective manifested as an attempt by Deckers to implement RPM, which constituted a by-object restriction, as well as being a hardcore restriction under the VBER. In addition, the policy amounted to a hardcore restriction of passive sales. The CAT also objected to the fact that Deckers had apparently exercised its contractual right to approve websites in an "inconsistent and discriminatory" manner.

Given its finding that the restriction had an anti-competitive object, the CAT gave relatively little weight to Deckers' brand protection justification or the legal and economic context, including the relatively limited presence of HOKA on the running shoes market and the small volume of sales affected by the restriction. Due to the hardcore characterisation of the contractual provision, the VBER was not available to protect it, even though Deckers' market share was well below 30%. As a result, Deckers' ejection of Up & Running from its network for breach amounted to an infringement of section 2 of the Competition Act 1998 (the UK equivalent to Article 101 TFEU) and was unlawful. In the CAT's view, this conclusion was both "obvious" and "inescapable". The CAT declined to require Deckers to restore supplies to Up & Running, while the question of damages was not resolved, due to Deckers appealing the judgment to the Court of Appeal.

The judgment of the Court of Appeal

The Court of Appeal overturned the CAT's findings. In a closely reasoned judgment written by the Court's leading competition law judge, who formerly practised for many years as a barrister specialising in the field, it found that the CAT misapplied the test for identifying a by-object restriction. Rather than focusing solely on the objective behind the restriction in question, the Court of Appeal undertook a close analysis of the relevant European Court of Justice case law to establish that, when identifying an object infringement, it was necessary to consider: (i) the content of the agreement's provisions (for example, the scope of the restriction); (ii) its objectives; (iii) the legal context; and (iv) the economic context, including the nature and intensity of inter-brand competition and the market shares of the parties. In the Court of Appeal's view, the CAT had failed to do this since, once it had identified what it viewed as an anti-

competitive objective, it had not proceeded to consider any of the other elements. This was a fundamental error of law.

In assessing the restriction under all four limbs, the Court of Appeal found that it only affected a small proportion of the market (narrow scope of the restriction, small market shares, limited volume of inventory involved, and only intra-brand competition impacted) and could not therefore pose a sufficient degree of harm to competition to be qualified as an object restriction. The Court emphasised that the restriction should be viewed in the legal context of selective distribution, which is intended to facilitate the sale of branded products through high quality, specialist outlets. Viewed in this context, it was important to recognise that the fact that a restriction may have "a muting effect upon price competition does not, for that reason alone, render the restriction … incompatible with competition law". In this respect, the approach taken by the Court was similar to that undertaken by the European Court of Justice in Coty, where that court found a prohibition on sales via third party online marketplaces to be a partial (and legitimate) restriction on online sales that contrasted with the absolute ban that was condemned by the same court in *Pierre Fabre*.

In another key passage, the Court of Appeal noted that the concept of object restriction must be interpreted strictly and narrowly and should not interfere with parties' contractual freedom, unless there is a need to interfere. Applying competition law too restrictively, as the CAT had done, could hinder effective competition by undermining legal certainty and "taking away from suppliers the contractual levels and mechanisms they rely upon to compete". As the Court stressed, it was "not the function of competition law to save parties from bad bargains, or deals they come to regret." The Court also disagreed with the CAT's interpretation of the European Court of Justice's judgment in *Superleague*, concluding that there was nothing in that judgment to support the CAT's finding that a discretionary contractual power was in and of itself objectionable, simply because it lacked transparency and could be used for an anti-competitive purpose

The Court of Appeal also found that the CAT had incorrectly concluded that the categorisation of certain conduct as hardcore in the VBER was sufficient to establish the existence of a by-object restriction. This confirms, based on the European Court of Justice's approach in Super Bock, that a categorisation of a restriction as hardcore for the purpose of the VBER does not create a presumption that it amounts to a by-object restriction, as the two tests are distinct and serve different functions. Even RPM is not "of itself" a restriction by object and has to be assessed in its proper context.

Finally, the Court of Appeal held that the VBER applied to the agreement during the period in question (which predated the point at which EU law ceased to apply in the UK due to Brexit), since resale prices and passive sales were not restricted, meaning the restrictions could not be qualified as hardcore. The Court thus concluded that Deckers' termination of supply did not breach section 2 of the Competition Act 1998 and hence was lawful.

Key takeaways

The Court of Appeal's judgment reasserts the scope for brand owners operating a selective distribution system to maintain tight control over the sale of their products, as long as it remains possible for retailers to sell those products online and (should they wish) at a discount. Since both actions were available to Deckers' appointed retailers, the restrictions imposed concerning the manner in which retailers operated their websites were lawful.

The judgment makes it clear that, before condemning a restriction, all surrounding factors must be considered, and a mere intent to limit price competition is insufficient. The assessment should include the market positions of the supplier and its competitors, with a focus on the degree of inter-brand competition. While this approach is consistent with long-standing European case law upholding selective distribution as a valid distribution model, notwithstanding its inevitable dampening effect on price competition, the force of the Court of Appeal's reasoning in this case in overruling the judgment of a specialist competition tribunal is striking. As such, this judgment clearly demonstrates the wider trend away from a form-based approach in competition law, in favour of more nuanced, contextual analysis. Even though this can make it harder for competition authorities to bring cases, it is notable that the UK Competition and Markets Authority intervened in this case in support of Deckers' position.

The Court of Appeal also provided further useful clarifications on the legal status of selective distribution agreements. Specifically, it confirmed that the mere fact that a selective distribution system falls outside the so-called *Metro* safe harbour does not render it unlawful as a restriction by object, in circumstances where the VBER safe harbour is not available and the conditions for individual exemption are not met. In addition, the Court's dismissal of the CAT's interpretation of *Superleague* confirms that brands operating a

selective distribution system may retain a material degree of discretion in applying their contractual restrictions. This is an important point, with wider application.

Finally, the judgment serves as a reminder that the EU and UK competition law regimes remain closely intertwined, despite now being formally separate as a result of Brexit. In reaching its conclusions, the Court of Appeal applied both pre- and post-Brexit case law of the European Court of Justice, on the basis that, while UK courts remain 'presumptively bound' by pre-Brexit judgments emanating from Luxembourg, they are also legally entitled to 'consider and have regard to' new judgments. The flow is not one way, however, and the national competition authorities and domestic courts of the EU will no doubt be studying this judgment closely. (It is notable in this context that the Amsterdam District Court drew heavily on the CAT's judgment in this case in a recent judgment on the legality of HP's distribution contracts. See, VBB on Competition Law 2026, No. 3) Similar issues also arise in a new preliminary reference (Case C-50/26) from a Dutch appeals court to the European Court of Justice, which relates to an investigation by the Dutch competition authority of Samsung's distribution arrangements. It will be interesting to see if the Court of Justice follows the same approach as the Court of Appeal by giving particular weight to the economic context, including the extent of inter-brand competition, in determining in what circumstances a restriction in a vertical agreement can qualify as an object restriction.

Key contacts

Andrzej Kmiecik
Partner
akmiecik@vbb.com

Becket McGrath
Partner
bmcgrath@vbb.com

Brussels
Glaverbel Building
Chaussée de La Hulpe 166
B-1170 Brussels
Belgium

+32 (0)2 647 73 50

Geneva
2 Chemin des Mines
CH-1202
Geneva
Switzerland

+41 (0)22 320 90 20

London
Holborn Gate
330 High Holborn
London, WC1V 7QH
United Kingdom

+44 (0)20 7406 1471

www.vbb.com