



Neutral Citation Number: [2026] EWCA Civ 553

Case No: CA-2024-002716

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM COMPETITION APPEAL TRIBUNAL
Ben Tidswell (Chair), Keith Derbyshire & Professor Pablo Ibáñez Colomo
[2024] CAT 61

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/05/2026

Before :

LORD JUSTICE GREEN
LORD JUSTICE SNOWDEN
and
LORD JUSTICE ZACAROLI

Between :

| | |
|--|--------------------------|
| Deckers UK Limited | <u>Appellant</u> |
| - and - | |
| Up & Running (UK) Limited | <u>Respondent</u> |
| - and - | |
| Competition and Markets Authority | <u>Intervener</u> |

Marie Demetriou KC & Alison Berridge (instructed by **Addleshaw Goddard LLP**) for the **Appellant**

Nicholas Khan KC (instructed by **Nexa Law Limited**) for the **Respondent**

Michael Armitage (instructed by **Competition and Markets Authority**) for the **Intervener**

Hearing dates: Tuesday 3rd & Wednesday 4th February 2026

Approved Judgment

This judgment was handed down remotely at 11.30am on Friday 8th May 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Green :

A. Introduction: The issue

The appeal

1. This is an appeal by Deckers UK Limited (“*Deckers*”) against the Judgment of the Competition Appeal Tribunal (“*the CAT*”) dated 31st October 2024 (“*the Judgment*”) in which it was found that Deckers had infringed section 2 Competition Act 1998 (“*CA 1998*”) which prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade within the United Kingdom, and which have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom. Such agreements are prohibited unless they are exempt in accordance with the Act. It will be noted that object and effect are alternative tests.
2. The appeal raises the issue, of significance to suppliers of luxury, fashion and consumer goods, of when restrictive steps taken by suppliers to control the outlets through which goods are sold and which have the effect of muting price competition in a selective distribution system, amount to an unlawful restriction on competition by object. In this case the distribution system concerned the “*HOKA*” brand of specialist running shoes.
3. The CAT held that when a supplier’s practice had an objective or purpose of muting price competition it was to be categorised as resale price maintenance (“*RPM*”), which was a “*hardcore*” restriction of competition such that absent some plausible, legitimate, justification, such as the need to protect brand or prevent free-riding, it was without more contrary section 2 CA 1998. This was so even if it also had a legitimate objective, such as protecting the integrity of the selective distribution system.
4. The appellant, Deckers, says that the CAT applied the wrong test in law. It wrongly categorised what happened on the facts as a case of “*hardcore*” RPM. But even if it had been correctly classified Deckers argues that determining whether any commercial practice, including RPM, is an object restriction entails not only an examination of its purpose or objective but also of the possibility, in a real and material sense, of that practice actually harming competition in the market to a sufficient degree. Deckers argues that because the CAT got the test wrong it did not carry out any such inquiry. It says that on the facts found by the CAT it is impossible to conclude that its practice could ever, in any real life sense, sufficiently harm competition so as to engage competition law.
5. The Competition and Markets Authority (“*CMA*”) applied to be admitted as an intervener. That application was granted. The CMA supports the appellant in arguing that the CAT erred in its formulation of the legal test to be applied.

An outline of the case

6. Deckers operates a selective distribution system for its HOKA branded running shoes whereby it selects who it will appoint to distribute its shoes. As of the date of the Judgment, it had a network of distributors spread across the UK. HOKA products are also sold directly to consumers via the website hoka.com. These sales are made by the

appellant's sister company, Deckers Europe Limited. Deckers also makes some sales directly to consumers through bricks and mortar retail premises in the UK. The appellant and Deckers Europe are part of a single undertaking wholly owned by Deckers Outdoor Corporation, based in California.

7. The respondent, Up & Running (“U&R”), is a UK incorporated business. Since 1992 it has operated a retail business selling specialist running shoes and accessories. It sells primarily at the retail level through bricks and mortar stores. It also sells through its website, upandrinning.co.uk. As of the date of the Judgment, it had 29 retail outlets in the UK. Deckers supplied HOKA branded running shoes to U&R from 2016 until the end of the Autumn/Winter 2021 season.
8. Under the terms and conditions imposed by Deckers upon its distributors (“*the T&Cs*”) distributors are restricted from supplying shoes to anyone other than consumers i.e. they cannot supply other retailers whether within or without the network. Clause 15 of the T&Cs (“*Clause 15*”) also required distributors to obtain Deckers’s permission if they wished to sell shoes via a website, in addition to through bricks and mortar premises. Clause 15 provided:

“Retailer may only sell Products on a website it owns and/or operates if Retailer has been granted permission to make on-line sales of Products and the website is fully compliant with the Company’s website requirements as are communicated from time to time by the Company, and the contents of the website have been approved in writing by the Company.”

9. On 10th July 2019 Deckers sent an email to its retailers in the following terms:

“The purpose of this email is to confirm to all HOKA customers Deckers’ policy with regard to the on-line sale of HOKA products. All accounts are free to sell HOKA on their own websites, which should have a domain name identical or similar to the name under which its bricks and mortar shop(s), if any exist, operate. If you wish to sell HOKA from a website with a different name please notify us. It is essential that we have a complete list of all authorised websites selling HOKA. It is strictly against Deckers’ policy for any HOKA customer to sell HOKA products through internet auction/consignment site(s) or any internet mall/market place(s) (e.g. Amazon, Bol, Ebay). Please refer to section 14 of the attached Terms & Conditions. Any customer who is currently selling HOKA products in this manner must immediately cease and notify us that this step has been taken. Deckers is aware of which customers are currently offering HOKA products for sale in this manner.”

10. U&R alleges that, in July 2020, it presented a business proposal to Deckers involving the launch of a new website. This would not use U&R’s name but would instead use an anonymised, generic, name, “*runningshoes.co.uk*”. It intended to use the site to sell, at discounted rates, excess stock built up over the Covid period, which it could not readily sell in its bricks and mortar store or via its branded internet site. The new

anonymised site would then be retained for the sale of other clearance stock from time to time. The proposal was declined by Deckers as inconsistent with the “*fundamental principles of [their] brand strategy*” and subsequently by reference to Clause 15. U&R nevertheless set up the website and sold running shoes, including HOKA products. On 14th December 2020, Deckers informed U&R that Deckers had decided to terminate its contract with U&R for breach of Clause 15, with 12 months’ notice.

11. U&R brought proceedings for damages before the CAT upon the basis that the termination was an unlawful act in breach of section 2 CA 1998. Before the CAT, U&R alleged that Deckers’s Terms and Conditions were unlawful by object (not effect), in two closely intertwined ways:
 - (i) They imposed a restriction on U&R’s ability to market and sell HOKA products online and otherwise make effective use of the internet as a sales channel (“*the Online Sales Restriction*”); and/or,
 - (ii) The attempt to prevent U&R selling HOKA branded shoes on its website was an attempt to engage in retail price maintenance (“*RPM*”) and the decision to apply Clause 15 to cease supply of HOKA products was motivated by the intention to foreclose a website, with the intention of maintaining higher prices for HOKA products (“*the RPM Restriction*”).
12. An agreement or concerted practice *prima facie* caught by section 2(1) CA 1998, whether by object or effect, can escape the prohibition if it is exempted. To be exempt the agreement or concerted practice must either (i) meet the test for individual exemption in section 9 CA 1998 or (ii) be in conformity with a formal block exemption under section 6 CA 1998. In the present case Deckers does not claim an individual exemption under section 9 but argues that its conduct was exempt by virtue of the EU Vertical Block Exemption set out in Commission Regulation (EU) 330/2010 (“*the VBE*”), which, it is common ground, was the measure in force at the time and the relevant instrument for analysis.
13. After a trial the CAT found for U&R upon both bases set out above. It found as a fact that the objective or purpose behind the termination included an intention to prevent undue discounting of HOKA branded shoes via U&R’s anonymised website. This was a form of RPM to be treated, without more, as a hardcore, prohibited, form of agreement contrary to section 2 CA 1998 which the VBE did not exempt.
14. Before addressing the substance of the appeal, I would make one point clear. On one view the act of termination which is at the heart of this litigation constituted a unilateral act which fell outside the scope of the prohibition in section 2 CA 1998 which requires an agreement or concerted practice. However, it is now long established that an otherwise unilateral act can nonetheless fall within the scope of the prohibition where it is taken within the context of the rules and arrangements governing a selective distribution system. This is common ground between the parties and the statement to this effect in Judgment paragraph [32] is not challenged. It follows that the act of termination is capable of being measured by reference to the requirements of section 2 CA 1998. In this judgement when I therefore refer to the agreement or restriction which is challenged this is a reference to the disputed act of termination pursuant to Clause 15 and the policy set out in the email of July 2019.

B. Grounds of Appeal

15. Deckers appeals with leave of this Court. It argues that the CAT:
- (i) Mischaracterised Deckers's conduct as involving hardcore RPM.
 - (ii) Failed, in any event, to apply the correct test in law because it held that the test for an object restriction under section 2 CA 1998 was limited to a determination of the objective or purpose of the impugned restriction such that: (i) if the purpose was a hardcore restriction and (ii) there was no other plausible explanation other than the pursuit of a restriction of competition, then the impugned conduct (i.e. the act of termination) was prohibited.
 - (iii) Failed properly to apply the correct law to the facts. Had it applied the correct test to the facts as found, which entailed examining whether the restriction gave rise to a sufficient restriction of competition having regard to its content and legal and economic context, as well as to its objective or purpose, it would have been bound to conclude that the act of termination was incapable of exerting any sufficient impact upon competition.
 - (iv) Failed properly to apply the VBE. Had it applied the correct test it would have been bound to conclude, again on the facts as found, that the act of termination was exempted even if it was otherwise, prima face, a restriction of competition by objective within the scope of section 2 CA 1998.

C. The Judgment of the CAT

16. The appeal concerns the correct test in law to be applied. In the opening paragraphs of its careful Judgment the CAT recognised that whilst in some respects the issues arising were "*conventional*" in other respects the proceedings were unusual. The case raised "*...a number of legal issues which, while not novel, are yet to be fully explored in case law*".

The key facts found by the CAT

17. Initially Deckers challenged a number of findings of fact made by the CAT. However, during the appeal Ms Demetriou KC, for Deckers, confirmed that they would take the findings of the CAT as found. This was sensible since the jurisdiction of this Court is limited to points of law and the threshold for the court treating a dispute about evidence as a point of law is high and not one, upon the facts set out in the judgment, I would have found to have been surmounted. Accordingly, I take the facts as found by the CAT.
18. These findings are important: (i) as to whether Deckers is correct in arguing that the CAT wrongly classified what happened as an instance of hardcore RPM; (ii) as the starting point for any assessment of the effects of Deckers's conduct and whether, applying the correct test in law, it could ever have exerted any "*sufficient*" adverse effect upon competition so as to engage the prohibition in section 2 CA 1998; and, (iii) as the relevant factual context for application of the VBE.
19. I set out the CAT's fact finding below.

20. The termination was to protect Deckers's selective distribution model for bricks and mortar distribution. Deckers needed to control the establishment of new anonymised websites. In paragraph [133], the CAT held:

"... we find that the real reason for the refusal of permission was to protect the selective distribution model for the Main Retail Channel which Deckers had in place and in particular to prevent the establishment of a new clearance website in the Clearance Channel, over which Deckers would have less control than it had over the specialist retailers it had appointed in the channel."

21. A similar finding was made in paragraph [139(1)]: "... *the requirement for website names which were identical to or similar to a retailer's bricks and mortar operations recognised that the retailer would be unwilling to pursue an online business model which was inconsistent with the selective distribution model using the same name*".

22. In paragraph [139(2)] the CAT found that the linking of the requirement for a retailer to use named websites was connected to preserving the integrity of the network as a whole: "... *the naming requirement was an effective way of constraining retailers from pursuing strategies which were inconsistent with the selective distribution system which they were all signed up to. Having set up the selective distribution system, Deckers were keen to preserve its integrity by controlling the emergence of inconsistent channels of distribution.*"

23. The CAT also found that there was a connection to a desire to protect the network from undue levels of discounting. In paragraph [142], the CAT held:

"Deckers's actions in seeking to terminate the supply arrangements with Up & Running were an attempt to discipline Up & Running, to prevent it from entering the Clearance Channel and thus pricing HOKA product at the lower levels it wished to (in the same way that Deckers and other retailers in the Clearance Channel were doing at the time)."

24. The CAT made findings as to the source of the stock that U&R wished to sell on the anonymised website. This was surplus, out of season stock it had accumulated over the Covid period. This stockpile created an incentive to depart from the approach by which it (and other retailers) had historically priced residual stock so as not to undermine the positioning of new seasons stock as a premium product: Judgment paragraph [202].

25. The CAT was however careful to explain the limits of Deckers's action. It was not to curb discounting across the bricks and mortar and/or branded online network:

"143. A number of the Deckers witnesses made a point of telling us that they knew that they were not entitled to interfere with the way in which retailers set prices, and we were given examples of where Deckers declined to intervene with retailers pricing below recommended retail prices, following complaints from retailers in their distribution network (including

complaints from Up & Running about the pricing of other retailers). We accept that evidence, which is substantiated by the contemporaneous documents and the compliance training given to the sales teams.”

26. Based upon these facts, and notwithstanding the very limited nature of the restriction, the CAT held that even this incursion into price freedom was an “*obvious infringement*”:

“144. However, this does not (in our view) prove that the decision by Deckers to threaten and then to terminate supply to Up & Running was not made to prevent Up & Running discounting HOKA shoes. Direct interference with a retailer’s pricing typically amounts to an obvious infringement and it is not surprising that it was seen as unacceptable conduct. Furthermore, Deckers could rely on the alignment of interests to reduce the extent to which discounting would take place in retailer stores (and on associated websites).

146 ... the prospect of significant discounting of HOKA product on the Running Shoes website was a matter of real concern to Deckers and was a material motivation in Deckers threatening to terminate and then terminating the contractual relationship with Up & Running: (1) It is obvious that the establishment and operation of a clearance website would lead to greater discounting of product than would take place within the established channel of the selective distribution system.”

27. In paragraph [147], the CAT summarised its conclusion:

“147 We therefore find that Deckers was, at least in material part, employing a strategy of using what appeared to be a legitimate reason to cease to supply Up & Running, in order to prevent entry in the Clearance Channel and thus (i) interfere with the levels at which Up & Running was pricing HOKA product on the Running Shoes website and (ii) prevent discounting of HOKA product on that website.”

28. A summary of the facts relevant to this appeal, as found by the CAT, is as follows:

- (i) Retailers were allowed to sell Deckers’s running shoes from their bricks and mortar stores and via their own branded websites.
- (ii) Deckers disseminated recommended resale prices to retailers.
- (iii) Retailers were free to sell either in their bricks and mortar stores or via their branded online websites at or below the recommended resale price.
- (iv) Deckers did not take enforcement action against retailers who did sell below the recommended resale price either from their stores or their own branded

online websites, even when confronted with evidence of below recommended price discounting following complaints by other retailers.

- (v) U&R had excess stock following Covid which it wished to sell.
- (vi) U&R was free to sell that stock at any price it saw fit in its bricks and mortar stores or via its branded website, but it did not wish to do this.
- (vii) U&R wished to sell this tranche of stock via an unbranded, generically named, website.
- (viii) U&R needed the consent of Deckers to do this under Clause 15 and pursuant to Deckers's policy as set out in the email of 10th July 2019.
- (ix) Deckers refused U&R the right to sell these surplus shoes via the new anonymised website.
- (x) This was due to a concern on the part of Deckers: (a) to preserve the integrity of the selective distribution system by controlling the emergence of inconsistent channels of distribution; and (b), that U&R would discount the shoes at price levels which were materially below those being offered via physical stores or branded websites.

The test in law applied by the CAT

- 29. The CAT discussed the test to be applied in paragraphs [20]-[53]. I summarise the CAT's reasoning as follows.
 - *The difference between object and effects restrictions*
- 30. Object and effect are alternative, not cumulative, conditions for breach under section 2 CA 1998. The nature of the legal inquiry is different in each. In an effects case evidence of actual effects is required: Judgment paragraph [21]
- 31. Establishing the restrictive object of a practice does not require the sort of assessment required in an effects case. There is no requirement to establish that a restriction has "significant" or "appreciable" effects upon competition once it is determined that it is an object infringement. Assertions about the absence of actual effects are not therefore sufficient to avoid a finding of a "by object" infringement "...once the object of a practice has been proved to the requisite legal standard." (Judgment paragraphs [21] and [22]). An effect on trade must be established (Judgment paragraph [23]).
 - *The Metro safe harbour*
- 32. There is a safe harbour for selective distribution agreements which meet certain specified criteria. If met the agreement is deemed to fall outside the prohibition. This is known as the "Metro" exception. This arises from the judgment in Case 26/76 *Metro SB-Großmärkte v Commission* [1977] ECR 1875 ("Metro"), paragraph [20] as later confirmed in Case 31/80 *L'Oréal* [1980] ECR 3775 ("*L'Oréal*") paragraphs [15] and [16], and Case 107/82 *AEG-Telefunken v Commission* [1983] ECR 3151 ("*AEG*") at paragraph [33].

33. These cases recognise that selective distribution systems, because they are based upon selectivity and a need for distributors to afford potentially high cost structures, justify various restrictions which tend to keep prices up. These can include restrictions on the types of outlet that the goods can be sold through (outlet restrictions); limitations on authorised distributors supplying anyone outside of the network (to prevent free-riding); and, limitations upon the number of distributors appointed so as to constrain intra-brand competition on a regional basis. These restrictions have consequential effects upon price. However, such systems are consistent with workable and open competition. In paragraph [34] of the Judgment the CAT said:

“The criteria to be met in order to take advantage of the “safe harbour” provided by Metro are therefore that: (i) resellers are chosen on the basis of objective criteria of a qualitative nature; (ii) the criteria are laid down uniformly for all potential resellers and not applied in a discriminatory fashion; (iii) the characteristics of the product in question necessitate such a network; and (iv) the criteria laid down do not go beyond what is necessary.”

- *The centrality of objective as the determinant of unlawfulness*

34. On the facts of the case the *Metro* safe harbour did not apply. There is no appeal by Deckers against that conclusion. In paragraphs [37]-[41] the CAT considered the position of agreements outside the *Metro* safe harbour. It stated (Judgment paragraph [37]): “*There is... also some lack of clarity about the consequences for a contractual provision in a selective distribution system which falls short of the Metro requirements.*” The CAT interpreted the judgment of the CJEU in *AEG* paragraph [42] as showing that a “*a failure*” to meet the *Metro* test indicated that “*there may well be*” a by object restriction.
35. In paragraph [42(1) – (6)] the CAT summarised the law on object restrictions. The key question was whether the measure in question presented a “*sufficient*” degree of harm to competition. The law was to be construed restrictively and strictly. It applied to both vertical and horizontal agreements but, by their nature, vertical agreements were less likely to restrict competition by object than horizontal agreements. The law took a generally lenient approach to vertical agreements “*... provided that there is sufficient inter-brand competition which is measured by reference to the parties market shares in the relevant markets in which they operate*”.
36. The key reasoning challenged by the appellant is found in Judgment paragraphs [42(7)] - [48] which concerns RPM. Emphasis is placed there by the CAT upon paragraph [33] of *Case C-211/22 Super Bock Bebidas SA v Autoridade da Concorrência* [42(7)] (“*Super Bock*”) and paragraphs [87]-[89] of *Case C-307/18 Generics (UK) Ltd v CMA*. These led the CAT to conclude (Judgment paragraphs [46]-[48]) that an assessment of objective or purpose was the sole test for an object restriction. There was no need for any wider economic assessment.
37. Given the centrality of paragraphs [42(7)] – [48] to the CAT’s conclusions I set them out in full below though particular criticism is targeted by Deckers at paragraphs [42(7) and (8)], [46] and [48]:

“42 ...

(7) Resale price maintenance, a vertical restraint, is understood to be restrictive by object in many, if not in almost all circumstances. This is clear from the recent decision of the CJEU in *Super Bock*, which contains a useful summary of EU law as of June 2023. After noting the authorities to the effect that vertical agreements are, by their nature less damaging to competition, but that they are understood to have a particularly significant restrictive potential, the Court said (at [37] and [38]):

‘37 It follows from that case-law that, in order to determine whether a vertical agreement fixing minimum resale prices involves the ‘restriction of competition by object’, within the meaning of Article 101(1) TFEU, it is for the referring court to ascertain whether that agreement presents a sufficient degree of harm for competition in the light of the criteria recalled in paragraphs 35 and 36 of this judgment.

38 When it makes that assessment, the referring court must also take into account the fact, which it has itself pointed to, that a vertical agreement fixing minimum resale prices may fall within the category of ‘hardcore restrictions’ for the purposes of Article 4(a) of Regulations Nos 2790/1999 and 330/2010, as an element of the legal context.’

(8) The fact that resale price maintenance is seen as generally restrictive of competition does not mean that its lawfulness is examined in accordance with different criteria. The above passages from *Super Bock* reinforce the point already made above that, irrespective of the behaviour, it is always necessary to determine whether the contractual provision presents a sufficient degree of harm to competition, in light, in particular, of the relevant legal and economic context. See also Case C32/11 *Allianz Hungaria v Gazdasági Versenyhivatal* at [46].

43. Turning to the assessment of the objective of the contractual provision, a question may arise as to whether the restriction pursues a legitimate aim which is not inherently anti-competitive. That issue arose in Case C-307/18 *Generics (UK) Ltd v CMA* (“*Generics*”). In those proceedings, the Competition and Markets Authority (“CMA”) found that various pharmaceutical companies had “paid for delay” in the marketing of a drug called Paroxetine, by engaging in agreements to settle patent litigation. The pharmaceutical companies appealed the CMA decision to the Competition Appeal Tribunal, which made a reference to the CJEU, resulting in a preliminary ruling on 30 January 2020.

44. The Court considered the issue of the characterisation of a restriction “by object” in [59] to [111] of its judgment, noting that the CAT (as the referring court in the proceedings) sought to ascertain whether a settlement agreement not to enter the market in return for transfers of value constituted a “by object” infringement, especially given the difficulty of determining whether the value transferred represented a commercial outcome from the underlying litigation.

45. After rehearsing the case law on the distinction between “by object” and “by effect” infringements, the CJEU addressed the central question, which is how the referring court should go about deciding whether the objective of the restriction could be said to be other than to agree not to engage in competition on the merits. After observing that it might be possible for the parties to such an agreement to establish that the transfers of value were “appropriate and strictly necessary having regard to the legitimate objectives of the parties to the agreement”, the Court said:

“87 However, such a characterisation as a ‘restriction by object’ must be adopted when it is plain from the analysis of the settlement agreement concerned that the transfers of value provided for by it cannot have any explanation other than the commercial interest of both the holder of the patent and the party allegedly infringing the patent not to engage in competition on the merits.

88 As stated by the Advocate General in point 114 of her Opinion, the conclusion of an agreement under which a competitor of the patent holder undertakes not to enter the market and to cease its challenge to the patent in exchange for payment of a substantial sum, the sole consideration for which is that undertaking, amounts precisely to ensuring protection for that patent holder against actions seeking the revocation of its patent and to establishing a presumption that the products which may be put on the market by its competitor are unlawful. Therefore, it cannot be maintained that entering into such an agreement falls within the exercise, by the patent holder, of its prerogatives stemming from the object of the patent. That is all the more the case when it is for public authorities and not private undertakings to ensure compliance with statutory requirements.

89 Accordingly, it cannot be asserted that the conclusion of such an agreement represents, on the part of the manufacturers of generic medicines, no more than their recognition of patent rights, presumed to be valid, of the holder of that patent. If the patent holder makes, in their favour, a significant transfer of value, the sole consideration for which is their undertaking not to enter the market and no

longer to challenge the patent, that indicates, in the absence of any other plausible explanation, that it is not their perception of the patent's strength, but the prospect of that transfer of value which has induced them to refrain from entering the market and challenging the patent.'

46. Following *Generics* (which is binding on us, having been delivered on the very day that the UK left the EU, and a few days after *Ping*), it is therefore clear that a provision restricts competition by object where, having regard to its content and the relevant economic and legal context, it does not plausibly pursue a legitimate aim (and its only plausible aim is therefore a restrictive one).

47. This case law is fully applicable to vertical restraints. The precedents cited above are consistent with the approach followed by the CJEU in *Generics*. Vertical restraints in general, and selective distribution systems in particular, can pursue legitimate, not inherently restrictive, aims, such as the protection of a manufacturers' brand image and addressing "free riding" by resellers.

48. Where the only plausible objective the provision pursues is the restriction of competition, it necessarily falls within the scope of Article 101(1) TFEU as a "by object" infringement. This is the point made by the Court in *Pierre Fabre*, at [39], which was then fleshed out in *Generics*. The absence of a legitimate aim provides the least contentious and most straightforward scenario of a "by object" breach of Article 101(1) TFEU."

- *Contractual discretions*

38. Paragraphs [51] and [52] of the Judgment focus upon the position where a clause (such as Clause 15) confers a discretion upon a supplier. These paragraphs, as drafted, contain an ambiguity. The start of paragraph [51] assumes that the agreement in which the challenged discretion or power sits is an "*infringing agreement*" i.e. has already been found to be prohibited. However, the remainder of the text, and also paragraphs [193] and [204], takes a broader view and treats the existence of a discretion as, itself, creating a breach, not merely supplementing the infringing effect of an agreement already determined to be unlawful. This is, according to the CAT, because it has the ability to be restrictive ("... *may be used to achieve restrictive aims*").
39. In paragraphs [183]-[197] the CAT addressed the use of the power to terminate in order to restrict entry into a clearance channel (i.e. in this case the anonymised website). This did not pursue a legitimate aim and lacked any "*plausible explanation*" other than to create a restriction on intra-brand competition (Judgment paragraph [190]). In paragraph [193], the CAT said:

“The issue is not whether allowing a retailer only one website of certain quality is an infringement. Instead, it is whether a system that: arbitrarily denies entry into a clearance channel; gives unfettered discretion to the supplier; and lacks transparency and discriminates (in favour of Deckers’s retail arm and against third-party resellers) has a restrictive object. For the reasons set out above, the inescapable answer, in our judgment, is that it does.”

40. In paragraph [203], the CAT held:

“203. It was therefore inevitable that if Up & Running were permitted to sell residual stock on a clearance basis, it would do so at prices which were materially lower than in its own stores or on the upandrinning.co.uk website. That must have been obvious to Deckers.”

41. The conclusion that the termination was unlawful was reinforced by the finding of the CAT that the right to terminate for breach of Clause 15 was “*inconsistent and discriminatory*” (Judgment paragraphs [52], [194]). Such a broad power was by its “*very nature*” objectionable:

“204. Where an agreement gives a party wide discretion to decide whether to pursue an anti-competitive objective or a pro-competitive one instead, it is open to the court to find a restriction by the very nature of the breadth of discretion. That is because the existence of the discretion undermines the argument about pro-competitive purpose which meaningfully constrained (or non-existent) discretion might support.”

42. I read the Judgment as endorsing the broader test namely that a discretion in and of itself can render an agreement an unlawful object agreement without that agreement having *already* been found to be infringing. This is clear from paragraphs [51]-[52]:

“51. ... where an infringing agreement confers discretion on a party, the absence of a framework for the proper exercise of that discretion will reveal a sufficient degree of harm so as to point to a “by object” infringement. This point is fully consistent with the case law that has already been discussed. Where a party to an agreement enjoys discretion, this discretion may be used to achieve restrictive aims (such as collusion or exclusion). The agreement in issue in AEG Telefunken, for instance, was found to restrict competition, among other things, because of the arbitrary way in which the criteria for admission into the system were administered by the supplier (see AEG-Telefunken at [78]). Discretion featured prominently in the case law that followed, embedding the point and making it more explicit.

52. ... This subsequent case law includes Case C-124/21 P International Skating Union v Commission and Case 333/21

European Superleague v FIFA (“*Superleague*”). In the latter, the CJEU considered the application of Article 101 TFEU to rules on the prior approval of interclub football competitions and on the participation of clubs and of sportspersons in those competitions, and examined whether those rules constituted a decision which had as its object the restriction of competition. The CJEU noted:

“178 For all of the foregoing reasons, the Court finds that, where there is no framework providing for substantive criteria and detailed procedural rules suitable for ensuring that they are transparent, objective, precise, non-discriminatory and proportionate, such as those referred to in paragraph 151 of the present judgment, rules on prior approval, participation and sanctions such as those at issue in the main proceedings reveal, by their very nature, a sufficient degree of harm to competition and thus have as their object the prevention thereof. They accordingly come within the scope of the prohibition laid down in Article 101(1) TFEU, without its being necessary to examine their actual or potential effects.”

- *Summary of CAT understanding of the relevant test*

43. The CAT’s reasoning as to the applicable test can be summarised as follows:

- In the light of the case law (in particular *Generics* paragraphs [87] and [88]) determining the objective behind a measure is the “*central question*”.
- This is determined by asking whether the objective of the measure could be said to be *other than* to agree not to engage in competition on the merits. This involves asking whether the alleged restriction pursues a legitimate aim? If the objective of an agreement is not competition upon the merits, that is the end of the analysis. There is a restriction by object. It is “*clear*” that:

“48. ... Where the only plausible objective the provision pursues is the restriction of competition, it necessarily falls within the scope of Article 101(1) TFEU as a “by object” infringement.... The absence of a legitimate aim provides the least contentious and most straightforward scenario of a “by object” breach of Article 101(1) TFEU.”

- A selective distribution system that does not fall within the *Metro* safe harbour will almost invariably give rise to a restriction by object.
- RPM is restrictive by object in many if not in almost all circumstances following the CJEU in *Super Bock (ibid)* paragraphs [37] and [38].
- Because RPM is a hardcore restriction under the VBE this also indicates that it is a restriction by object.

- The absence of a framework for the proper exercise of a contractual discretion (such as that found in Clause 15) would, in and of itself, reveal a sufficient degree of harm so as to point to a “*by object*” infringement.

Application of the test to the facts

44. The CAT considered the application of this test to the facts between paragraphs [131] and [216]. The most relevant facts are set out at paragraphs [17]-[27] above and summarised at paragraph [28]. The CAT found that notwithstanding that the termination was in part to protect the network and its integrity and that there was no attempt to regulate prices through stores or branded websites, section 2 CA 1998 was still engaged because any intention to curb price competition was a hardcore prohibited restriction. The fact that it was also to protect the integrity of the brand was not a justification.
45. On the facts the contractual power had been used to curb excessive discounting. There was no alternative plausible explanation or legitimate aim for the clause save the control of price. This was “...*restrictive of competition by its very nature in the absence of a legitimate aim*” (Judgment paragraph [214], see also paragraphs [215] and [216]).
46. The VBE did not apply for two reasons. First, because the case concerned RPM which was a hardcore restriction and was excluded by virtue of Article 4(a). Secondly, because the restriction was also a limitation on passive sales excluded by virtue of Article 4(c). In paragraph [219(1)] the CAT held that under Article 4(a) VBE a restriction on a buyer’s ability to set prices was considered to be a hardcore restriction and that the act of termination was such a restriction. In paragraphs [196] – [197] the CAT held in relation to Article 4(c) VBE:

“196. The restriction of entry into the Clearance Channel in our view falls comfortably into the type of hardcore restriction which is described in Article 4(c) of the VBE:

“(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;”

197. It is therefore not a novel form of “by object” infringement, but instead a type of restriction which has long been recognised in the case law (from Metro and AEG-Telefunken to Pierre Fabre and Ping) and is identified as a hardcore restriction under the terms of the VBE.”

D. Issue I: The test in law

The appellant’s criticisms

47. The overarching criticism advanced by Deckers is that the CAT wrongly conflated objective with other freestanding components of a long settled test. The objective of

an agreement is one, and only one, part of this test. Deckers argues that the CAT erred:

- (i) In categorising the very limited restriction in the present case as a hardcore fixing of minimum resale prices (RPM), as defined under the VBE, and as giving rise to a restriction by object.
- (ii) In failing to apply the settled four-stage test reflected in case law whereby the decision maker is required to consider: content; objective; legal context; and, economic context.
- (iii) In failing to recognise that this test applied to all sorts of agreements, whether horizontal or vertical, including selective distribution agreements which involve some limitation on use of websites and/or price control and RPM.
- (iv) In ignoring key pieces of evidence relating to, for example, product market and market shares.
- (v) In holding that a clause (such as Clause 15) conferring a discretion was, in itself, a restriction by object because it could, in theory, be used for a restrictive purpose.

The CMA's submissions

48. The CMA intervenes because it considers it important for there to be clarity about the test to be applied to the concept of a restriction by object. An incorrect interpretation of the law could deleteriously hinder the use of contract as a normal commercial tool, in particular in distribution systems. In his helpful written and oral submission to the Court Mr Michael Armitage for the CMA agreed with the appellant that the CAT erred in its formulation of the test. A short summary of the CMA's submissions is as follows:

- (i) The CAT erred in both paragraphs [46] and [48]. These are “...*not correct statements of the law*”. It is only where the examination of an agreement reveals a sufficient degree of harm to competition that the agreement can be characterised as a “*by object*” infringement. This can only be determined by reference to a full analysis including of the economic context. The CAT wrongly elevated one relevant factor (objective) into the whole legal test.
- (ii) An agreement may constitute a restriction of competition by object even if it pursues a legitimate objective. The converse is also true. An agreement which does not pursue a plausible legitimate objective may nevertheless, depending on the facts, not amount to a restriction of competition by object. Whether that is the case depends not only on the objective pursued by the provision but also other factors, including economic and legal context.
- (iii) In relation to selective distribution a consideration of relevant economic context includes the market position of the supplier and its competitors. A loss of intra-brand competition is only problematic where inter-brand competition is limited. Market power was always relevant. The “...*critical*”

point is that the relevant legal and economic context must be examined before it can be concluded that there is a sufficient degree of harm to competition for the agreement in question to be characterised as a restriction of competition by object. The fact that an agreement does not pursue a legitimate aim, while very relevant to the assessment, is insufficient, without more, for such a conclusion to be reached.”

- (iv) The case law of the CJEU supported this analysis. There was no reason for this Court not to follow that case law.
- (v) The error is also apparent from the Commission’s decision dated 17th December 2018 in Case AT.40428 – Guess (“*Guess*”), concerning the lawfulness of restrictions imposed by Guess on its authorised distributors’ use of online sales advertising. The decision applies CJEU case law. The CAT relied on *Guess* at Judgment paragraph [49] where it noted that the Commission had concluded that the objective aim of the relevant provision was not legitimate. However, the Commission did not regard this as dispositive since it remained “*necessary to determine ... whether the online search advertising reveals a sufficient degree of harm to competition that it may be considered a restriction of competition “by object” ...or whether its effects need to be examined*”. The Commission concluded that there was a restriction by object but only having taken into account all the facts including economic context.
- (vi) The CMA referred to two sets of EC Commission guidelines: (i) *Guidelines on Vertical Restraints* (2022/C248/01) issued on 30th June 2022; and (ii) the earlier *Guidelines on Vertical Restraints* (2010/C130/01) issued on 19th May 2010. It is unnecessary to go into detail. Needless to say, both support the overall submission of the CMA as to the approach in law to be adopted and both emphasise that when considering the economic context to vertical restraints an assessment of inter-brand competition was important.

The respondent’s submissions

49. In his detailed submissions on behalf of U&R, Mr Nicholas Khan KC argued as follows:
- (i) The restriction in question was to be classified as hardcore RPM. It was directly intended to prevent U&R from selling its surplus stock at levels below those prevailing elsewhere in the Deckers’s selective distribution system.
 - (ii) Such a restriction was a restriction of competition by object. This was confirmed by the treatment of such conduct as a “severe” restriction of competition in the VBE and as falling outside the scope of the block exemption.
 - (iii) To the extent that various Advocates General in their opinions in CJEU proceedings had suggested that substance always prevailed over form so that, for instance, even a price fixing agreement entered into between parties with

tiny market shares might, at least in principle, fall outside of the prohibition, they were wrong in law.

- (iv) The finding of the CAT that Deckers termination amounted to a restriction by object was justified on the facts as found. Once it was found as a fact that there was no objective justification for the conduct the inexorable conclusion had to be that the termination was to undermine price competition.
- (v) Market share is not, in law, a relevant factor when considering economic context so that, it follows, the finding of the CAT that the market shares of Deckers were unlikely to be significant, was immaterial. Although the CAT's findings could have been better expressed, they did in their substance justify the conclusion of breach of section 2 CA 1998.

The approach to be adopted to the case law

50. The answer to the first ground of appeal lies in an analysis of relevant case law. I examine below the authorities referred to by the parties and the CAT. The conclusion to this analysis is that the appellant and the CMA are correct in their submission that the CAT erred in law in the test it applied. It was common ground between the parties that the proper approach to take to this case law was as follows:

- (i) Section 60A CA 1998 governs how courts and tribunals in the UK should treat European Court decisions in competition law cases subsequent to the departure of the UK from the European Union.
- (ii) Under section 60A courts must seek to avoid inconsistency between their decisions on competition questions, and the principles and decisions laid down by the Treaty on the Functioning of the European Union and the European Court of Justice before IP completion day (31st December 2020). These older European Court cases are “presumptively binding” on UK courts.
- (iii) Courts may depart from such precedents where appropriate based upon the factors in section 60A(7) CA 1998 which include: differences between UK and EU law provisions; market differences; developments in economic activity; accepted competition principles; post-IP completion day European Court decisions; and, circumstances relating to the case.
- (iv) In the present appeal no party argued that the Court should depart from these precedents and I agree that there is an important emphasis to be laid upon consistency of approach as enhancing legal certainty for businesses. The parties submitted: “Old cases – presumptively bind; new cases – may consider and have regard to”. This is the approach I have adopted to the analysis of the decisional jurisprudence.
- (v) Section 60A clarifies that the obligation to avoid inconsistency does not apply if a principle or decision is excluded from UK law after IP completion day or if the court is bound by a domestic court decision requiring a different approach.

- (vi) Judgments of the European Court made after IP completion day are not covered by the binding effect of Section 60A. However, section 6 Withdrawal Act 2018 (“WA 2018”) permits UK courts to have regard to such decisions, meaning they may consider, but are not bound by, them.
- (vii) The Competition (Amendment etc.) (EU Exit) Regulations 2019/93, Schedule 4, paragraph 17, specifically addresses claims arising from domestic competition infringements occurring before IP completion day, including those continuing after that date. It confirms that section 60A applies to such claims in proceedings before UK courts or tribunals.
- (viii) During the hearing two pieces of European Commission guidance were referred to. As to their status, section 60A(3) CA 1998 has the effect that any court or tribunal applying the Chapter I prohibition must “... have regard to any relevant decision or statement of the European Commission made before IP completion day and not withdrawn”. The two pieces of guidance were as follows:
- a) The current Commission Guidance on Vertical Restraints (2022/C 248/01) (“*the 2022 Guidelines*”) issued 30th June 2022. These post-date IP completion day. Courts and tribunals are not hence required to have regard to this guidance under section 60A(3) CA 1998 but may do so under section 6(2) WA 2018.
 - b) The earlier Commission Guidance on Vertical Restraints (2010/C 130/01) issued on 19th May 2010. These therefore pre-date IP completion day but have now been replaced by the 2022 Guidelines. Since they have been withdrawn, courts and tribunals are not obliged to have regard to them under section 60A(3) CA 1998 but may do so under section 6(2) WA 2018.

The Case Law

(a) *Case C-439/09 Pierre Fabre Dermo-Cosmétique SAS v Président de l’Autorité de la concurrence (13th October 2011)* (“*Pierre Fabre*”)

51. The CAT cited paragraph [39] of this judgment as authority for the proposition that where the only plausible objective of a provision was a restriction of competition it was “*necessarily*” prohibited, and analysis of broader market factors was not required. With respect I do not agree.
52. This is a relatively old case. The Court gave sparsely drafted answers to a narrow question posed by the Cour d’appel de Paris. Pierre Fabre manufactures and markets cosmetics and personal care products through subsidiaries in France and across the EU. The products were not classified as medicines and were not covered by the pharmacist’s monopoly laid down by the Public Health Code. At the relevant time Pierre Fabre had 20% of the French market for those products. Agreements with distributors stipulated that sales had to be exclusively from a physical space in which a qualified pharmacist was present. The effect was a *de facto* prohibition on all sales via the internet. An investigation by the domestic competition authority found that the prohibition on sales via the internet amounted to a restriction on choice for

consumers. Because the agreements affected trade between the Member States the authority found an infringement of both domestic and EU competition law. On appeal, the Cour d'appel made a reference to the CJEU asking a single, limited, question:

“Does a general and absolute ban on selling contract goods to end-users via the internet, imposed on authorised distributors in the context of a selective distribution network, in fact constitute a “hardcore” restriction of competition by object for the purposes of Article 81(1) EC [Article 101(1) TFEU] which is not covered by the block exemption provided for by Regulation No 2790/1999 but which is potentially eligible for an individual exemption under Article 81(3) EC [Article 101(3) TFEU][?]”

53. In paragraph [34], the CJEU recalled that object and effect were alternative bases for a finding of infringement. It was not, in an object case, necessary to consider actual “effects”. It was however necessary to consider the “*precise purpose of the agreement, in the economic context in which it is to be applied*”. In paragraph [35], the Court recited the (even then) well-established rubric that “*...regard must be had to the content of the clause, the objectives it seeks to attain and the economic and legal context of which it forms a part...*”.
54. In answering the question posed by the national court, the CJEU acknowledged that in selective distribution systems there were legitimate requirements which justified a reduction in price competition in favour of competition relating to factors other than price. Such systems were, in principle, consistent with competition law. A prohibition on all internet sales could amount to a restriction of competition by object but it was for the national court to determine whether that prohibition could be justified by a legitimate aim.
55. In paragraph [39], the text relied upon by the CAT, the CEJU observed:

“As regards agreements constituting a selective distribution system, the Court has already stated that such agreements necessarily affect competition in the common market (Case 107/82 *AEG-Telefunken v Commission* [1983] ECR 3151, paragraph 33). Such agreements are to be considered, in the absence of objective justification, as ‘restrictions by object’.”

But, in paragraphs [40]-[47] the CJEU made clear that in determining whether a ban on use of the internet lacked justification an analysis of content, objective and legal and economic circumstances was required:

“47. In the light of the foregoing considerations, the answer to the first part of the question referred for a preliminary ruling is that 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.”

(b) Case C-67/13P Groupement des Cartes bancaires (CB) v European Commission (11th September 2014) (“Cartes Bancaires”)

56. The CAT correctly identified paragraph [53] of this judgment as important (Judgment paragraph [42(i)]) but, then, did not apply it. The appeal concerned a horizontal agreement involving virtually all the main banks in France. In 1984 they formed an economic interest grouping governed by French law the object of which was to achieve the interoperability of the systems for payment and withdrawal by bank cards (“CB cards”) issued by its members (“*the CB system*”). Such interoperability enabled a CB card issued by a group member to be used to make payments to all traders affiliated to the CB system through any other member of the grouping and/or to make withdrawals from automatic teller machines (ATMs) operated by all other members. In 2007 there were 148 members of the agreement including BNP Paribas, BPCE and Société Générale SA.
57. The Commission, following notification of the agreement for individual exemption, issued a Statement of Objection and in due course a decision refusing exemption. The Commission found that: (i) the relevant market was the market for the issue of payment cards in France; (ii) the measures in issue constituted a decision by an association of undertakings; and (iii), the measures had an anti-competitive object namely to impede competition from new entrants and to penalise them, safeguard the main members’ revenue, and, limit price reductions for bank cards. An unsuccessful appeal was made to the General Court during which it was argued that the Commission had failed properly to apply the law on object restrictions. A further appeal to the CJEU prevailed. That Court found that the General Court erred in two respects:
- (i) In failing to establish that there was a “*sufficient*” degree of harm to competition caused by the measures in question (Judgment paragraph [57]).
 - (ii) In failing to find that the concept of a restriction by object had to be interpreted “*restrictively*” (Judgment paragraph [58]). A strict approach was necessary because: “... *The concept of restriction of competition ‘by object’ can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects, 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. The fact that the types of agreements covered by Article 81(1) EC do not constitute an exhaustive list of prohibited collusion is, in that regard, irrelevant.*”

The above errors were material on the facts because they resulted in the General Court failing properly to analyse important arguments and evidence (see paragraphs [59]-[92]).

58. The CJEU reiterated existing case law on object restrictions. It addressed how the law applied to large scale horizontal coordination (paragraphs [49]-[51]). It referred to case-law establishing that certain types of horizontal coordination between competing undertakings could be regarded “*by their very nature*” as revealing such a degree of harm to competition that there was no need to examine “*actual*” effects (paragraph [50]). Collusive horizontal price-fixing by cartels was an example of an object restriction because they were “*so likely*” to have negative effects, in particular on the price, quantity or quality of goods and services affected, that it could be considered “*redundant*”, for the purposes of applying Article 81(1) EC, to prove *actual* market effects. Experience showed that such behaviour resulted in falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers.
59. In paragraphs [52]-[54] the Court considered, by reference to established case law, what had to be proven if an examination of *actual* effects was not required i.e. in an object case. Paragraph [53] is important because in later case law (e.g. *Generics* - see paragraphs [69]-[78] below) it has been cited as an accurate description of the test to be applied:
- “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 81(1) EC, 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...”
60. In paragraph [54], the CJEU addressed the relevance of intention or purpose. It confirmed established case law confirming that the existence of a restrictive intention or purpose was not a necessary ingredient of an unlawful object restriction (because the test was based primarily upon legal and economic context) but was something that could be taken into account:
- “... although the parties’ intention is not a necessary factor in determining whether an agreement between undertakings is restrictive, there is nothing prohibiting the competition authorities, the national courts or the Courts of the European Union from taking that factor into account (see judgment in *Allianz Hungária Biztosító and Others* (EU:C:2013:160), paragraph 37 and the case-law cited).”

The reference to paragraph [37] of *Allianz Hungária Biztosító* is to be seen in the context of paragraph [36] of that judgment which recapitulates the test for object restriction as based upon the four components of: content, objective, legal context, and, economic context. It is unnecessary to follow the trail of case law cited by the

Court for this proposition. Needless to say, the position is long established in the jurisprudence.

61. The phraseology “...*the content of its provisions, its objectives and the economic and legal context of which it forms a part*”, makes clear, not least because of the conjunctive “*and*” between “*objectives*” and “*economic and legal context*”, that an assessment of objectives is but one part of a wider test. Economic context includes matters such as the nature of the goods or services affected and the real conditions of the functioning and structure of the market or markets in question. This approach applies as much to horizontal coordination as it does to other potentially less restrictive agreements or conduct. This was confirmed by Advocate General Wahl in his opinion who described in detail the logical and jurisprudential basis for concluding that agreements by object were always to be viewed in their legal and economic context. He illustrated the point in paragraphs [41] and [42] by reference to collusive price fixing:

“41. In this regard, the Court made clear, at a very early stage, that the examination of the question whether a contract had a restrictive object could not be divorced from the economic and legal context in the light of which it was concluded by the parties. It then held, and has ruled in settled case-law, that the clauses of the agreements in question had in fact to be examined in the light of their context, the underlying idea being that, in examining the compatibility of conduct with the provisions of the treaty with regard to agreements, decisions and concerted practices, purely theoretical and abstract considerations are difficult to defend.

42. To illustrate my remarks, I would refer to the example of an infringement which, in the light of experience, is presumed to cause one of the most serious restrictions of competition, namely a horizontal agreement concerning the price of certain goods. Whilst it is established that in general such a restrictive agreement is highly harmful for competition, that conclusion is not inevitable where, for example, the undertakings concerned hold only a tiny share of the market concerned.”

62. The same point is made later by the Court at paragraph [78], in the part of the judgment addressing whether the two identified errors were material. The CJEU reiterated that in determining whether an agreement was “*by nature*” harmful to competition the analysis embraced all the matters set out in paragraph [53].

“78. In order to assess whether coordination between undertakings is by nature harmful to the proper functioning of normal competition, it is necessary, in accordance with the case-law referred to in paragraph 53 above, to take into consideration all relevant aspects – having regard, in particular, to the nature of the services at issue, as well as the real conditions of the functioning and structure of the markets – of the economic or legal context in which that coordination takes

place, it being immaterial whether or not such an aspect relates to the relevant market.”

(c) *Ping Europe Limited v CMA [2020] EWCA Civ 13 (21st January 2020)* (“*Ping*”)

63. This case concerned the supply of specialist golf clubs. Ping makes and distributes top of the range golf clubs and other golfing equipment and clothing. Ping was the sole licensee of the Ping brand in the UK, Europe, the Middle East and South Africa. It operated a selective distribution network of 1,200 authorised dealers throughout the UK with premises located on golf courses and in the High Street. It specialised in “*custom fitting*”. When customers are custom fitted, they are assessed so that the golf clubs they purchase are of a specification suited to their particular measurements, golf swing, and other attributes. Ping considered that steering potential customers towards a custom fitting before they purchased ensured that the customer acquired the most suitable club to enhance their game. In 2005 Ping wrote to distributors indicating that to protect the brand and the consumer and to ensure that custom fitting remained at the heart of the sale of the product, distributors would not be allowed to execute sales via the internet.
64. The CMA conducted an investigation and found that the policy of prohibiting internet sales was a restriction of competition by object. Ping appealed to the CAT which upheld the CMA decision. Ping then appealed to the Court of Appeal which upheld the CAT judgment endorsing the CMA decision.
65. In paragraphs [30ff] the Court considered the law relating to restrictions of competition by object. The Court cited the opinion of Advocate General Wahl in *Cartes Bancaires* (see above paragraph [61]) who observed that, in case law, there was a blurred distinction between the factors relevant to object and effects. The Court of Appeal noted that the CJEU had agreed with the Advocate General (judgment paragraph [37]). Lady Justice Rose also commented that the divide between object and effects was “*elusive*” (paragraph [74]) and that there was no “*bright line*” (paragraph [76]).
66. Nonetheless, the Court (paragraph [79]) endorsed the multi-stage test laid down by the CJEU in *Cartes Bancaires* paragraph [53] (see paragraph [59] above).
67. In relation to the standard of proof, this was considered at paragraphs [111]-[116], in a section entitled “*The seriousness and likelihood of harm*”. There it was held that the test of causality or probability of harm flowing from an agreement said to be a restriction by object was not “*a real (non-fanciful) potential or capacity to restrict competition*”. Rather, it was a higher threshold of whether the impugned measure “*revealed a sufficient degree of harm, not just that a sufficient degree of harm was a likely or non-fanciful consequence*” (paragraph [116]).
68. The Court of Appeal observed that, in light of the evidence, the CAT had assessed the potential impact of Ping’s policy as “*real and material*” and as “*significantly restricting access*” to Ping’s goods (paragraph [116]). The Court noted, when considering economic context, various factors the CMA and CAT had identified as relevant. These included: the substantial market share of Ping on the relevant market (up to 30% and with similar market shares in a number of major EU states – see CMA Decision paragraphs [4.174]); the fact that the restriction was applicable to all use of

the internet; that the prohibition applied across the entire UK network of 1,200 distributors/retailers; and, the economic importance of the internet to sales of this type of product. The Court noted that the CMA and CAT had balanced these (negative) economic factors against the arguments of Ping about need to secure custom fittings and the benefits of such to the consumer.

(d) Case C-307/18 Generics (UK) Ltd v CMA ECLI:EU:C:2020:52 (22nd January 2020) (“Generics”)

69. The CAT cited paragraphs [87] and [88] of this judgment (see paragraphs [77] and [78] below) as laying down a test for object restrictions focusing exclusively upon the purpose behind the challenged restriction and whether it had a legitimate justification. With respect, this mischaracterises the judgment.
70. The case concerned a horizontal agreement relating to the drug Paroxetine, a prescription-only, anti-depressant medicine. It was marketed in the United Kingdom by GSK which had manufactured the originator medicine under the brand name ‘Seroxat’. In January 1999 GSK’s patent for the active ingredient of that originator medicine expired and in December 2000 the period of “data exclusivity” in relation to that active ingredient, also expired. During this period GSK obtained a number of secondary patents which covered four polymorphs of the active ingredient and the process to produce them. The patent, issued in 1997, was declared partially invalid by the Patents Court and the remaining, valid, patent expired in 2016.
71. From about 2000 GSK was faced with the possibility that rival manufacturers would seek marketing authorisations (“MA”), using an abridged procedure, for their own generic substitutes. It learned that several manufacturers of generic medicines, including IVAX, GUK and Alpharma, were contemplating entering the UK market offering generic versions of paroxetine. GSK’s response was a combination of litigation and contract. It entered three linked agreements with these undertakings:
 - The GSK/IVAX agreement: This was entered into with IVAX on 3rd October 2001 expiring 29th June 2004. It appointed IVAX as the ‘sole distributor’ in the UK, of 20 mg paroxetine hydrochloride, to a maximum volume of 770 000 packs of 30 tablets, to be sold as an authorised generic medicine, in return for an annual “promotional allowance” of £3.2 million paid by GSK.
 - The GSK/GUK agreement: This was entered into with GUK on 13th March 2002 expiring 1st July 2004. It followed various revocation and injunction proceedings involving BASF and GUK. On 13th March 2002, the day proceedings brought by BASF against GSK were due to commence, GSK and GUK concluded a settlement agreement. This discharged various earlier court orders (an injunction and a cross-undertaking in damages given by GSK), waived all claims to damages, and stayed proceedings. Under the settlement GSK agreed: to purchase all GUK’s stock of generic paroxetine intended for sale in the UK for US\$12.5m; to pay 50% of GUK’s legal costs up to a specified maximum; and, to pay GUK an annual marketing allowance of £1.65 million. For its part GUK undertook: to enter a sub-distribution agreement with IVAX for 750 000 x 20 mg packs of paroxetine at an indexed price; and (in common with all the companies in the Merck group), not to

make, import or supply paroxetine hydrochloride in the UK during the currency of the supply agreement between IVAX and GUK.

- The GSK/Alpharma agreement: This was entered with Alpharma on 12 November 2002 expiring 13th February 2004. It was concluded following an indication given by a court during infringement proceedings brought by GSK against Alpharma that relief was likely to be granted. This led to Alpharma to give an undertaking to the court on 1st August 2002 not to sell paroxetine in the UK pending final judgment. GSK gave a cross-undertaking in damages. On 12th November 2002 a drop-hands settlement agreement was concluded. It provided that Alpharma would enter a sub-distribution agreement with IVAX for the supply of various quantities of 20 mg paroxetine packs and GSK would pay Alpharma: £0.5m towards its costs; £3m in respect of the production and preparation cost for launch in the UK market by Alpharma of paroxetine; and, £100,000 per month for 12 months, as a “marketing allowance”. GSK further provided to Alpharma an option to purchase products that GSK might sell in other therapeutic areas. For its part, Alpharma undertook not to make, import or supply in the UK any paroxetine hydrochloride other than what it would purchase from IVAX or what would be manufactured by GSK. Alpharma had the right to terminate the agreement on one month’s notice in the event of the formation of a generic market or on the demise “whether by invalidation, surrender, abandonment, or otherwise” of the process claim in the Anhydrate patent. Alpharma exercised that right following delivery of the judgment on 5th December 2003 in a parallel case that permitted manufacturers of generic medicines to enter the market, and Alpharma then entered the paroxetine market in February 2004.
72. On 12th February 2016 the CMA issued a decision finding that by virtue of the above agreements: (i) GSK had abused a dominant position in the market for paroxetine; and (ii), IVAX, GUK and Alpharma had infringed section 2 CA1998. Total financial penalties of £44.99 million were imposed. The undertakings appealed to the CAT.
73. The CAT considered that to give a ruling it needed to determine whether the parties were potential competitors with respect to the supply of paroxetine in the UK and whether the agreements amounted to restrictions of competition by object and/or by effect. The CAT also considered that it had to define the product market on which GSK supplied paroxetine to ascertain whether GSK held a dominant position and whether it had abused that position. A lengthy series of question was sent to the CJEU. For present purposes only Questions 3-5, on the test for an object restriction, are relevant:

“3. Restriction by object

When there are pending court proceedings concerning the validity of a patent for a pharmaceutical drug and whether a generic product infringes that patent, and it is not possible to determine the likelihood of either party succeeding in those proceedings, is there a restriction of competition “by object” for the purpose of Article 101(1) [TFEU] when the parties make an agreement to settle that litigation whereby:

- the generic company agrees not to enter the market with its generic product and not to continue its challenge to the patent for the duration of the agreement (which is no longer than the unexpired period of the patent), and
- the patent holder agrees to make a transfer of value to the generic company in an amount substantially greater than the avoided litigation costs (including management time and disruption) and which does not constitute payment for any goods or services supplied to the patent holder?

4. Does the answer to Question 3 differ if:

- the scope of the restriction on the generic company does not go beyond the scope of the patent in dispute; and/or
- the amount of the value transfer to the generic company may be less than the profit it would have made if it had instead succeeded in the patent litigation and entered the market with an independent generic product?

5. Do the answers to Questions 3 and 4 differ if the agreement provides for the supply by the patent holder to the generic company of significant but limited volumes of authorised generic product and that agreement:

- does not give rise to any meaningful competitive constraint on the prices charged by the patent holder; but
- brings some benefits to consumers which would not have occurred if the patent holder had succeeded in the litigation, but which are significantly less than the full competitive benefits resulting from independent generic entry which would have occurred if the generic company had succeeded in the litigation, or is this relevant only to assessment under Article 101(3) [TFEU]?”

74. I start with the Court’s conclusions on the approach to be adopted in an object case. This reflected established case law including the test set out in *Cartes Bancaires* paragraph [53]. A summary is as follows:

- (i) There is a clear distinction between the concept of restriction by object and the concept of restriction by effect. In an object case there is no requirement to investigate or establish *actual* effects and the evidence needed may therefore be different to that needed for an effects case: paragraphs [63],[64].
- (ii) What must be shown is that the agreement can “*in fact*” be classified as a restriction by object; “*mere unsubstantiated allegations are not ... sufficient*”: paragraph [65].
- (iii) Where the anticompetitive object of an agreement is not established, it is necessary to examine effects in order to prove that competition has in fact

been prevented or restricted or distorted to an appreciable extent: paragraph [66].

(iv) The concept of a restriction by object must be interpreted “*strictly*”: paragraph [67].

(v) The concept of a restriction by object can be applied “*only*” to certain concerted practises “... *which reveal both in themselves and having regard to the content of their provisions, their objectives and the economic and legal context in which they form part*”, harm to competition: paragraph [67].

(vi) When determining economic context, it is necessary to take into account the nature of the goods affected as well as “... *the real conditions of the functioning and structure of the market or markets in question*: paragraph [68] (citing with approval *Cartes Bancaires* paragraph [53]).

(vii) For the prohibition to apply the degree of harm to competition must be “*sufficient*”: paragraphs [67], [99]. In making this determination the decision maker must take into account any pro-competitive effect: paragraph [107].

75. In paragraphs [69]-[111] the Court applied these principles to patent litigation settlement agreements. The discussion demonstrates the fact sensitivity of the analysis, even in a case which, one might have thought, was relatively plain sailing given that, as the Court observed: the agreement involved one party which was a monopolist; where the other parties were substantial potential entrants; where the upshot of the agreements in dispute was that potential inter-brand competition would be curtailed; and, where this would likely have led to a reduction in price competition and higher prices (than would otherwise be the case).

76. The following summarises the economic factors treated by the Court as relevant to the inquiry whether the agreements displayed “...*a sufficient degree of harm to competition*” (paragraph [71]):

(i) The pharmaceutical sector was a market characterised by “*strong barriers to entry*” due to regulatory limitations upon introduction of new products onto the market: paragraphs [40], [47] and [69].

(ii) Generic entry should lead to “... *a very appreciable fall in the sale price of medicines...*”: paragraph [69].

(iii) Both originator and generic manufacturers “... *cannot be unaware*” that “... *the medicine sector is particularly sensitive to a delay in the market entry...*” of generic substitutes: paragraph [70].

(iv) Delays in new entry lead to the maintenance of “*monopoly*” prices which are “*appreciably higher*” than the price at which generic versions would be sold: paragraph [70].

(v) Such delays have “...*considerable financial consequences, if not for the final consumer, at least for social security authorities*”: paragraph [70].

77. Between paragraphs [71] and [111] the Court analysed the disputed patent settlement agreements in the context of these conclusions. The Court addressed factual and evidential issues such as: the strength (or otherwise) of the patents; how the domestic court might have resolved the litigation had it not been settled; how the sums paid under the agreement related to the costs of the litigation; what the impact of prices would have been on the market but for the agreements; whether there were any countervailing, pro-competitive, benefits flowing from the agreement, etc. The approach to the type of horizontal agreement in issue is also important:
- (i) Agreements whereby parties agree not to challenge a rival's intellectual property (no-challenge clauses) were capable of having the object of restricting competition but still had to be considered in their legal and economic context: paragraphs [82].
 - (ii) Not every settlement agreement had the object of restricting competition because it might be based upon a legitimate analysis of the parties' litigation chances: paragraph [84].
 - (iii) Not every transfer of value amounted to a restriction by object since the transfer might be objectively justified: paragraphs [85] and [86].
 - (iv) Nonetheless, there may be cases where it was "*plain*" from the "*analysis of the settlement agreement*" that its object could not be otherwise than a reduction of competition on the merits: paragraph [87].
78. The paragraphs relied upon by the CAT are paragraphs [87]-[89]. These concern a very particular point and must not be taken out of context. They address, and reject, the defendants' argument that their agreements did no more than reflect the scope of existing intellectual property rights and therefore could not, in law, amount to restrictions of competition by object. The Court endorsed the observation of Advocate General Kokott in her opinion where in paragraphs [110ff] she set this out clearly. Paragraph [88] of the CJEU judgment is a cut and paste from paragraph [114] of her opinion. The context is very different to the present case where no justification is advanced by Deckers based upon intellectual or other property rights. Nothing in these paragraphs suggests that objective is the only test. To the contrary the structure and reasoning of the judgment as a whole makes plain that objective is one factor amongst others to be taken into account.
- (e) Case C-112/22 Super Bock Bebidas SA v Autoridade de Concorencia (29th June 2023) ("Super Bock")*
79. The CAT treats paragraphs [37] and [38] of this judgment as establishing that RPM was a restriction by object "... *in many if not almost all circumstances*", and that RPM was a hardcore restriction under the VBE which meant that it was a restriction by object: paragraph [42(7)]. With respect I do not agree that *Super Bock* supports these conclusions.
80. The judgment concerned a vertical (distribution) agreement whereby the supplier imposed and enforced fixed minimum resale prices. This is RPM in its traditional and most inflexible form. The judgment confirms that whilst a defendant's objective is relevant an analysis of broader legal and economic context is still mandatory,

including in the case of traditional RPM. The CJEU confirmed that there were no special rules or presumptions which applied to RPM, even though it was treated as a restriction which resulted in disapplication of the block exemption

81. Super Bock imposed minimum resale prices on its distribution network of exclusive retailers and distributors. It was investigated and fined by the domestic competition authority whose decision was upheld on appeal. On a further appeal the Tribunal da Relação de Lisboa (Court of Appeal, Lisbon) referred a series of questions to the CJEU on the approach to be applied to RPM.
82. Some of the questions concern the evidence relevant to establishing the existence of an agreement or concerted practice. Questions 1 and 4 bear directly upon the conclusions of the CAT about the presumptive or deemed classification of RPM as amounting to an object restriction. Question 1 asked whether RPM was an object restriction “*in and of itself*”. Question 4 asked whether, even if not, it was “*presumed*” to be an object restriction because it was an excluded restriction under (*inter alia*) the VBE:

“(1) Does the vertical fixing of minimum prices constitute in and of itself an infringement by object which does not require a prior analysis of whether that agreement is sufficiently harmful?

...

(4) In the light of Article 101(1)(a) TFEU, Article 4(a) of Regulation No 330/2010, the European Commission’s Guidelines on Vertical Restraints and the case-law of the European Union, can an agreement between a supplier and its distributors which (vertically) fixes minimum prices and other terms of business applicable to resale be presumed to be sufficiently harmful to competition, without prejudice to an analysis of any positive economic effects arising from such a practice, within the meaning of Article 101(3) TFEU?”

83. The Court held that RPM was not “*of itself*” a restriction by object nor was it to be presumed to be an object restriction simply because it was classified as a hardcore restriction under the VBE.
84. In paragraphs [30] and [31] the Court restated that the requirements of object or effect were alternative tests. In paragraph [32] the Court held that the concept of an infringement by object had to be “*interpreted restrictively*”. The concept applied “*only*” to certain types of coordination between undertakings which revealed such a “*sufficient*” degree of harm to competition that there was then no need to examine actual effects.
85. In paragraph [33] the Court reiterated that vertical (intra-brand) restraints were inherently “... *by their nature often less damaging to competition*” than horizontal, inter-brand, restrictions. Though, the Court also acknowledged that “*in some cases*” even vertical restrictions could have “*significant restrictive potential*”.

86. In paragraph [34] the Court held that the “...*essential legal criterion*” was whether the agreement involved presented “*a sufficient degree of harm*” to competition. In paragraph [35] the Court then repeated the overarching multipartite test:

“35. In order to determine whether that criterion is met, 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 actual conditions of the functioning and structure of the market or markets in question...”

87. In paragraph [36] the Court accepted that parties could defend an agreement upon the basis of “*procompetitive effects*” provided that they were “... *relevant, intrinsic to the agreement concerned and sufficiently significant.*” If they were, then they might “... *give rise to reasonable doubt as to whether the agreement concerned caused a sufficient degree of harm to competition*”. In support of this proposition the Court cited *Generics (ibid)* paragraphs [103], [105] and [107].

88. The Court then applied these principles to the practice of vertical RPM. It made clear in paragraph [37] that the overarching principles set out in paragraphs [35] and [36] applied and included a need to establish that a challenged practice, which included RPM, presented a “*sufficient*” degree of harm to competition.

89. The Court then turned to the point which influenced the CAT, namely that RPM was a “*hardcore*” restriction in the VBE which indicated to the CAT that it was “*generally*” restrictive of competition. In paragraph [38], the CJEU said only that the categorisation of RPM as a hardcore restriction was relevant to “*legal context*”, not economic context. The CJEU went on to hold that there was no relevance in the fact that it was categorised as a hardcore restriction under the VBE and there was no presumption that RPM actually restricted competition. In paragraph [39] the Court confirmed that even if a clause was identified as hardcore that did not imply that the assessing court could avoid evaluating whether the RPM actually exerted a “*sufficient*” degree of harm to competition. This was because, the Court then explained in paragraphs [40] and [41], the block exemption did not specify whether a clause identified as hardcore was treated as a restriction by object or effect and the Court endorsed an observation of the Commission in its written submissions before the Court that:

“... the concepts of ‘hardcore restrictions’ and of ‘restriction by object’ are not conceptually interchangeable and do not necessarily overlap. It is therefore necessary to examine restrictions falling outside that exemption, on a case by case basis, with regard to Article 101(1) TFEU.”

Then, in paragraph [42], the Court warned against any predisposition that vertical RPM be assumed or deemed to be a restriction by object:

“42 It follows that the referring court cannot dispense with carrying out the assessment referred to in paragraph 37 of this judgment on the ground that a vertical agreement fixing

minimum resale prices constitutes on any hypothesis or is deemed to constitute such a restriction by object.”

(f) Case c-333/21 European Superleague v FIFA (21st December 2023) (“Superleague”)

90. In Judgment paragraph [52] the CAT cited paragraph [178] of *Superleague* in support of its conclusion (in paragraph [51] in relation to Clause 15 conferring a discretion upon Deckers to refuse consent to the use of websites by distributors) that “... *the absence of a framework for the proper exercise of that discretion will reveal a sufficient degree of harm so as to point to a “by object” infringement*”. I do not agree.
91. The judgment was delivered pursuant to a reference made by the Juzgado de lo Mercantil n.º 17 de Madrid (Commercial Court, Madrid, Spain) in proceedings where, the Fédération Internationale de Football Association (“*FIFA*”) and the Union of European Football Associations (“*UEFA*”), were defendants. European Superleague Company SL (“*ESLC*”) was the claimant/plaintiff, a company seeking to organise and market a new European football competition that would be an alternative or competitor to those organised and marketed by FIFA and UEFA. Under their governing rules those organisations refused to authorise that new competition and warned that any player or club participating in it would be expelled from UEFA and FIFA competitions and potentially subject to sanctions.
92. The judgment confirms the approach laid down in earlier case law emphasising the requirement for an evaluation taking into account legal and economic context.
93. The case concerned a root and branch challenge to the rules of FIFA and UEFA to regulate international football upon the basis that they amounted to an abuse of dominance, and, restrictions upon competition both by object and effect by decisions of associations of undertakings.
94. In paragraphs [161]-[166] the Court summarised the test for an object infringement. The test had to be “*interpreted strictly*” (paragraph [161]). Following *Cartes Bancaires* certain types of horizontal agreement, such as collusive price fixing, revealed such a sufficient degree of harm to competition that it was “...*not necessary to assess their effects. Indeed, certain types of coordination between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition*”. In such cases the test set out in paragraph [53] of *Cartes Bancaires* still applied. In paragraphs [165] and [166] it held that even in such a case it was “*necessary*” to take into consideration the nature of the products or services concerned, as well as the real conditions of the structure and functioning of the sectors or markets in question. An assessment of objective or purpose was an objective exercise the purpose of which was to determine “... *the objective aims which that conduct seeks to achieve from a competition standpoint*”. Even if an undertaking acted without having a subjective intention to prevent, restrict or distort competition and even if it pursued certain legitimate objectives, that was not decisive (paragraph [167] and cases cited thereat).
95. In paragraph [168] the Court held that any judgment of the domestic court finding a restriction by object must “...*show the precise reasons why the conduct in question*

reveals a sufficient degree of harm to competition such as to justify a finding that it has as its object the prevention, restriction or distortion of competition”, citing Cartes Bancaires (paragraph [69]) as authority.

96. A core objection to the UEFA and FIFA rules was that they conferred huge discretion upon those governing bodies to regulate not just football but associated economic activity on an EU (and world) wide scale. The rules were decisions of associations of undertakings engaged in horizontal arrangements which governed the conditions of entry and participation into the European and world markets, not just for football but for related economic activity. The conclusion of the CJEU in paragraph [178], which was relied upon by the CAT, was the culmination of the prior reasoning in paragraphs [171]-[177] which itself cross-referred to paragraph [151]:

“178 For all of the foregoing reasons, the Court finds that, where there is no framework providing for substantive criteria and detailed procedural rules suitable for ensuring that they are transparent, objective, precise, non-discriminatory and proportionate, such as those referred to in paragraph 151 of the present judgment, rules on prior approval, participation and sanctions such as those at issue in the main proceedings reveal, by their very nature, a sufficient degree of harm to competition and thus have as their object the prevention thereof. They accordingly come within the scope of the prohibition laid down in Article 101(1) TFEU, without its being necessary to examine their actual or potential effects.”

97. The “*foregoing reasons*” referred to in the introductory words to paragraph [178] relate to those in paragraphs [171]-[177]. Reference is also made (in paragraph [174]) to paragraphs [151] which must be read in the context of paragraphs [142]-[149]. These explain why, from the perspective of economic context, the absence of transparent and objective criteria in the UEFA and FIFA rules had an obvious capacity to restrict competition. They focus upon the dominant market power UEFA and FIFA held over international football (paragraph [149]) spanning the entirety of the EU which covered not only all new competitions but also all clubs and all players, and which enabled UEFA and FIFA to use their rules, including the power to impose potentially disproportionate sanctions, to protect their own competitions and to create entry barriers to the market. This was the context in which the Court condemned the power in the rules unconstrained as they were by any transparent, objective, non-discriminatory criteria. Paragraph [177] is of particular interest. It explains how the absence of such criteria was linked to the perpetuation of entry barriers to this important EU wide market:

“Moreover, in so far as the rules on prior approval for international interclub football competitions contain rules on the participation of professional football clubs and players in those competitions, and the sanctions to which that participation is liable to give rise, it should be added that they appear, *prima facie*, liable to reinforce the anticompetitive object inherent in any prior approval mechanism that is not subject to restrictions, obligations and review suitable for ensuring that it is transparent, objective, precise and non-

discriminatory. Indeed, they reinforce the barrier to entry resulting from such a mechanism, by preventing any undertaking organising a potentially competing competition from calling, in a meaningful way, on the resources available in the market, namely clubs and players, the latter being vulnerable – if they participate in a competition that has not had the prior approval of FIFA and UEFA – to sanctions for which, as observed in paragraphs 148 of the present judgment, there is no framework providing for substantive criteria or detailed procedural rules suitable for ensuring that they are transparent, objective, precise, non-discriminatory and proportionate.”

98. The CAT (Judgment paragraph [52]) held that a contractual power was objectionable because it “... *may be used for an anticompetitive purpose*”. The analysis was not, it is said, governed or affected by the wider economic context. The reasoning of the CJEU in *Superleague* does not support the proposition that, in the abstract and divorced from economic context, unfettered contractual discretion in a selective distribution system must be viewed necessarily as a restriction by object simply because, in theory, it could be used for an improper purpose. Such a proposition cannot, sensibly, be correct. If it were otherwise, applying the CAT’s test in the strict manner in which it is formulated, any contractual power becomes unlawful, even in an otherwise innocuous vertical agreement and/or even if universally exercised in a benign manner.

(g) *Case C-298/22 Banco BPN/BIC Português SA and others v Autoridade de Concorrência BNP (29th July 2024) (“BNP”)*

99. This case concerned a decision of the Portuguese Competition Authority which imposed a fine upon certain credit institutions for having exchanged information applicable to their credit businesses, and in particular current and future credit spreads and risk variables including individual production figures. The six largest credit institutions in Portugal participated in the exchange of information. In 2013 they managed 83% of all banking assets in the Portuguese banking sector. An appeal was launched before the *Tribunal da Concorrência Regulação e Supervisão* (the Competition Regulation and Supervision Court). A reference was made to the CJEU which included questions about the test for an object restriction.
100. In paragraph [58] the CJEU confirmed that to make an assessment of object it was necessary to take into account not only the nature of the information exchanged but also the economic context in which the exchange occurred. In the dispositif it is made clear that the key economic context was the oligopolistic nature of the market
101. The judgment also exemplifies the now settled position that the amount of evidence required to establish an object restriction will be fact and context specific. In the case of a horizontal agreement between oligopolists in a market protected by barriers to entry where the parties exchanged sensitive, otherwise confidential, data and information relevant to their ability to compete with each other, not much, if any, evidence beyond such bare facts, might be needed.
102. On those facts the Court took into account that reasonably active and economically rational undertakings would follow the same course of conduct if, having regard to the

context to the agreement, they did not have to fear the reaction of their current and potential competitors and of consumers. That would be the case where the exchange occurred between the main players in an oligopolistic or highly concentrated market and where there were barriers to entry.

103. In paragraph [64] the Court endorsed an observation of the Advocate General in paragraph [70] of his opinion. This was to the effect that certain agreements, which included horizontal exchanges of information between competitors, could on limited evidence be found to amount to restrictions by object. For this to be the case there had to be “*sufficiently reliable and robust experience*”.
104. The Advocate General, in his opinion at paragraph [44], when summarising the position in the more recent case law, observed that:

“The examination of the legal and economic context seeks to avoid the risk of ‘false positives’ which may stem from a form-based analysis of an agreement, which is detached from the ‘economic reality’ and the legal and legislative landscape in which it occurs. The object of an agreement must be assessed not in the abstract but in the circumstances of the individual case and in the light of the actual conditions in which the market functions, having regard to all relevant factors. That approach reflects, more specifically, the development of the courts case law and the move from a broad and formalistic interpretation of the concept of restriction of competition by object to a more restrictive interpretation of that concept based on logic and experience.”

A summary of the case law

105. From case law the principles relevant to the appeal can be summarised as follows:
- (i) Object and effect: Object and effect are alternatives. The test is whether the agreement can “*in fact*” be classified as a restriction by object. The question is whether the agreement or practice in issue presents “*a sufficient degree of harm*” to competition. Any adverse effect upon competition must be weighed against any pro-competitive effects raised by the parties. In an object case there is no need to investigate or establish “*actual*” effects.
 - (ii) Standard of proof: The standard of proof is whether the impugned agreement or measure “*revealed a sufficient degree of harm*”. The standard is not the lower “*...that a sufficient degree of harm was a likely or non-fanciful consequence*”, or, “*...a real (non-fanciful) potential or capacity to restrict competition*”. The test is to be applied strictly and restrictively. Unsubstantiated allegations or assertions will not suffice.
 - (iii) The four-part test: In relation to an impugned measure it is necessary to examine its: (a) content; (b) objectives; (c) legal context; and (d), economic context. These four components are cumulative although, obviously, the relevance of each in a given case will be fact and context specific. The four-part test applies to horizontal and vertical agreements.

- (iv) Content: As to content, this involves an assessment of the actual scope of the restriction or agreement in question and might involve drawing conclusions about the legal scope of a contract or drawing conclusions of fact about, say, the extent of a concerted practice.
- (v) Objective/purpose: As to the objective or purpose of the restriction in question, the analysis is objective, not subjective, though, where evidence of subjective intention exists, it can be taken into account but is not dispositive. A subjective anticompetitive intent or purpose does not make a restriction unlawful by object if, upon application of the broader test taking into account economic effect, it would not have a sufficient adverse impact upon competition. Conversely, the fact that an undertaking does not intend sufficient harm to competition does not preclude application of the prohibition if, upon application of the relevant test, there is sufficient harm.
- (vi) Legal context: Legal context may be related to economic context. It would include such matters as: decisional practice as revealed in jurisprudence; whether the agreement is horizontal or vertical; and, whether there are legal or regulatory barriers to entry.
- (vii) Economic context: Economic context includes the nature of the goods or services affected and the actual conditions of the functioning and structure of the market or markets in question, which will include the nature and extent of inter-brand competition. Market shares will be important.
- (viii) The relevance of decisional practice: Whilst in all cases the overarching (four-part) test applies, in practice the nature and amount of evidence required will be affected by the decisional practice which is evident from the jurisprudence. It is well established that vertical agreements present, in principle, a lower risk to competition than horizontal agreements. RPM in the context of a selective distribution system is a vertical agreement. In a collusive, horizontal, agreement such as an agreement between oligopolists the amount of evidence required to show an infringement might be far less than in relation to a vertical selective distribution agreement.
- (ix) The relevance of categorisation for the purposes of block exemptions: There is no principle that because an agreement or practice is categorised as a hardcore restriction in a block exemption it is to be treated as or presumed to be a restriction by object.

Conclusion on Issue I

- 106. At base the CAT adopted an approach to the determination of object which differs from that in case law. This was to elide objective or purpose with the other components of the test.
- 107. The case law on objective is clear. It is one component of the test out of four. If a restrictive intent or objective can be established, it is admissible and can be part of the evidence mix relevant to a decision on object restriction. But the mere existence of a restrictive objective does not make an agreement an object restriction if, but for that purpose, the agreement does not exert a sufficient degree of harm to competition: See

Cartes Bancaires paragraph [57] citing *Allianz Hungária Biztosító* EU:C:2013:160, paragraph [37] and the case-law cited thereat; *Ping* paragraphs [94],[95].

108. In the light of this, with respect, I consider that the CAT erred in concluding that:
- (i) The test for object was based upon a determination of the objective or purpose of the measure and that, absent a plausible legitimate justification, a clause found to have a restrictive purpose (such as an RPM agreement) necessarily constituted in law a restriction by object.
 - (ii) Other factors were subsumed into an analysis of objective or were otherwise irrelevant.
 - (iii) A selective distribution agreement falling outside the *Metro* safe-harbour amounted to, or was very likely to amount to, a restriction by object.
 - (iv) If a clause was a “hardcore” restriction as defined in the VBE that sufficed to classify a clause as a restriction by object.
 - (v) A clause conferring an unfettered power (such as Clause 15) was, in itself, a restriction by object because it had the potential, as a matter of contract, to be used for an unlawful, restrictive, purpose.

E. Issue II: The test as applied to the facts.

Deckers’s arguments on the evidence

109. In their second ground of appeal Deckers argues that by reference to the facts as found, and in the light of the relevant law, its actions in terminating U&R for breach of Clause 15, could never exert any or any sufficient impact upon competition and, for this reason, could never amount to a restriction by object. Deckers argues that:
- (i) The CAT failed to perform any analysis of the content of the measure in the context of relevant legal and economic factors.
 - (ii) The content or scope of the actual challenged restriction was narrow being: based upon a one-off tranche of clearance stock, not all stock; targeted at U&R only, not other retailers who were allowed to discount all stock; and, concerned use of an anonymised website only, not all websites. The volume of trade affected by the restriction was therefore *de minimis* in the context of the total number of pairs of shoes in the relevant product market(s) as a whole.
 - (iii) The most important economic context issue was product and market share because this indicated the degree of inter-brand competition. Upon the basis of the parties’ market share figures in the relevant product market, which the CAT held were unlikely to be significant, there was no possibility for the restriction to have an actual or real capacity to harm competition either at all or to a sufficient degree.

- (iv) Deckers was the 6th largest supplier in the market and was subject to rigorous inter-brand competition. If Deckers sought supra-competitive prices “...*the inevitable consequence would be loss of sales to other brands*”.
- (v) There was no evidence of any wider desire by distributors to use anonymised websites and the effect of preventing U&R from using an anonymised website to reduce prices “*was negligible*”.

The approach to be applied

- 110. Case law mandates that: the content of the agreement; its objective; its legal context; and its economic context, must all be considered. These are not hermetically sealed categorisations and may overlap so should not be applied mechanically. For instance, in *Generics (ibid)* the Court referred to the legal context of governmental regulation and legal patents as amounting to entry barriers and factors tending to lead to high prices, both of which can reasonably be described as economic context.

Weighing the evidence

- 111. In terms of the approach to the evidence I would make five points.
- 112. First, the standard of proof is that set out in *Ping*: See paragraphs [67]-[68] above. Case law indicates that:
 - (i) An analysis of actual effects is not mandated (though if they exist, they will be admissible).
 - (ii) The test is to be applied restrictively and strictly.
 - (iii) Mere assertions or allegations will not suffice.
 - (iv) The analysis must proceed upon the basis of real-life evidence
 - (v) The evidence must show that any potential effect is “*sufficient*”; a mere possibility will not suffice.
- 113. Secondly, the amount of evidence needed will be context specific and is affected by the decisional practice of decision makers. For example, in a collusive horizontal price fixing agreement, consistent judicial practice makes clear that once the primary facts are found, not a great deal of additional evidence might be needed. At the other end of the spectrum, in a vertical distribution agreement in a busy consumer market, where the risk of harm to competition is commensurately lower, significantly more evidence of harm to competition will be needed. Ms Demetriou KC for Deckers said that from case law one could identify a sliding scale of seriousness of different types of case with, say, pricing fixing at one end, and vertical restraints in selective distribution at the other end. The multipartite test applied in all such cases, but the intensity of its application would be calibrated accordingly. That in my view is a fair summary of the case law.
- 114. Thirdly, relevant evidence might be readily accessible. In *Generics* the Court referred in broad and unspecific terms to: the structure of the pharmaceutical market; its well-known regulatory and legal constraints and their impact upon barriers to entry; and

the impact of generic entry upon pricing, almost as a matter of common knowledge. In *Superleague* the Court referred to the market power of UEFA and FIFA over the EU market and the ability of their rules to create barriers to entry into those markets at all levels of the sport, as if they were incontrovertible facts (which they no doubt were). In *BNP* the Court considered a horizontal agreement between undertakings holding over 80% of the market who exchanged data of a type that, in decades of case law, the Courts have held must be held confidential, one rival from another.

115. Fourthly, the law on restriction by object is to be interpreted strictly and restrictively. The policy point made by Advocate General Wahl in his opinion in *Cartes Bancaires* at paragraphs [36ff], cited with approval in *Ping* (paragraphs [32]-[34]), is important. Competition law should not interfere unless there is a need to interfere. There is a public interest detriment in false positives which may be especially acute in object cases. This is because if there is no clear cut restriction by object there is always the effects based prohibition to fall back upon, which can ride to the rescue of a market if needs be. Many suppliers, in particular of consumer and fashion goods, operate distribution networks in crowded and busy market places. Their ability to succeed may depend upon how innovative they are and the solutions alighted upon might be reflected in contract. Competition law, where it applies, renders contractual provisions void and unenforceable. If applied well, competition law can promote competitive market forces; but if applied ill-advisedly it can hinder effective competition by undermining legal certainty and taking away from suppliers the contractual levers and mechanisms they need and rely upon to compete. This is an important explanation for the oft repeated judicial insistence that the law on object restrictions be interpreted strictly and restrictively.
116. Fifthly, it has to be recalled that as a matter of analysis, because of its penal nature, competition law has been classified as quasi-criminal for Article 6 ECHR purposes (see the discussion of case law in *Phenytoin* [2020] EWCA Civ 399 at paragraph [115]). A finding of breach should not be arrived at lightly without a proper evidential base.

Content

117. The first component of the test concerns content. This can be equated with scope. Determining content or scope may involve an exercise in interpretation or construction of an instrument such as a contract, but also (as in the present case) making findings of fact about how, say, a discretion is exercised which might involve an assessment of other matters such as internal emails or oral witness evidence. The broader the content of a measure the greater will be its capacity to harm competition and, by the same token, the narrower the content the smaller its ability to exert harm. In the present case the CAT made clear findings about the narrow scope or content of the restriction: see paragraphs [24]-[25] above which are relevant when considering the economic context of the restrictions.

Objective / purpose

118. The starting point is that the CEJU in consistent case law has made clear that proof of a restrictive objective or intention is not a necessary component of an object restriction but may, where it exists and is evidenced, be taken into account: See paragraph [60] above. As noted, the CAT therefore erred in treating objective or

purpose as not only a necessary part of the test, but as *the* test. That conclusion is inconsistent with the settled position in law.

119. As to the facts relating to objective or purpose I accept the CAT's findings, set out and summarised at paragraphs [20] – [28] above:

- *Concern to protect the integrity of the network:* The termination was to protect the integrity of Deckers selective distribution model. It needed to control the establishment of new anonymised websites. In paragraph [139(1)] the CAT held "... *the requirement for website names which were identical to or similar to a retailer's bricks and mortar operations recognised that the retailer would be unwilling to pursue an online business model which was inconsistent with the selective distribution model using the same name*". In paragraph [139(2)] it held: "... *the naming requirement was an effective way of constraining retailers from pursuing strategies which were inconsistent with the selective distribution system which they were all signed up to. Having set up the selective distribution system, Deckers were keen to preserve its integrity by controlling the emergence of inconsistent channels of distribution.*"
- *Concern over pricing by U&R via an anonymised website:* The desire to protect network integrity was linked to the level of price discount U&R intended to offer Covid stock at. In paragraph [142] the CAT held: "*Deckers's actions in seeking to terminate the supply arrangements with Up & Running were an attempt to discipline Up & Running, to prevent it from entering the Clearance Channel and thus pricing HOKA product at the lower levels it wished to (in the same way that Deckers and other retailers in the Clearance Channel were doing at the time).*"
- *No concern over pricing via physical stores and branded websites:* It was no part of Decker's objective or purpose to curb discounting to any degree via bricks and mortar outlets and/or via branded websites: Judgment paragraph [144].

Legal context

120. The next component of the test is "*legal context*". Case law suggests that legal and economic contexts are two sides of the same coin. Often this might be true. Nonetheless, it is worthwhile considering "*legal*" context separately recognising that any conclusion might translate into economic context.

121. I take "*legal context*" as including such matters as: the decisional practices of relevant authorities; the classification in case law of different types of contract clause which might have a muting impact upon price competition; whether the impugned measure is classified as a hardcore restriction under a relevant block exemption; the existence of legal or regulatory barriers to entry (as in *Generics*). In relation to decisional practice and case law I would make the following points:

- (i) First, there is the general case law which addresses the approach to be taken in law to ostensibly restrictive clauses in selective distribution agreements. This acknowledges that for a selective distribution system to operate

effectively there will be restrictions inherent in the system, and thereby non-infringing, which by their nature mute price competition: See e.g. *AEG* paragraph [42]; *Metro* paragraph [40]; *Ping* paragraph [44]. It is understood that there is a legitimate advantage to consumers in goods being marketed from high quality, specialist, outlets and that for this to happen the retailer must invest in what might be relatively costly infrastructure and staff. If authorised dealers are to maintain such standards they must be able to sell the products at prices enabling those costs to be defrayed. Accordingly, the fact that a clause in the supplier/retailer agreement might have a muting effect upon price competition does not, for that reason alone, render the restriction which gives rise to the muting effect incompatible with competition law. There is no dispute between any of the parties to this appeal about this case law and it was acknowledged as such by the CAT: see e.g. Judgment paragraph [33] and the case law cited thereat. An obvious example would be a restriction upon authorised dealers selling to a market stall vendor for resale. Selling a luxury brand from a market stall would plainly undermine the integrity of the distribution strategy and this would include because the product might be sold at knock-down prices from a stall which had no connection to the authorised dealer or brand owner.

- (ii) Secondly, there is the more specific case law concerning restrictions on internet sales which makes clear that restrictions on the use of the internet are not, without more, to be seen as object restrictions. The CJEU in *Case C-230/16 Coty Germany GmbH v Parfümerie Akzente GmbH* (“*Coty*”) made clear that a clause prohibiting use by authorised distributors in a selective distribution network of particular types of internet sales outlets was not, without more, a restriction of competition by object. In particular the Court emphasised that where such a restriction was designed to ensure that the products were exclusively associated with the authorised dealer and/or was appropriate for preserving the luxury image of the goods, then these amounted to legitimate restrictions to impose which were integral to a system of selective distribution: see judgment paragraphs [37]-[58]. This case is discussed in greater detail below at paragraphs [145]-[153]. In Judgment paragraph [139] the CAT accepted that the requirement in Clause 15 and in the 2019 email, that online sales outlet use names identical or similar to that used for the bricks and mortar operation, was an effective way of constraining retailers from pursuing strategies which were inconsistent with the selective distribution system to which they had all signed up to. In sub-paragraph (2) it observed that Deckers was keen to preserve its integrity by controlling the emergence of inconsistent channels of distribution and in sub-paragraph (3) the CAT held that this was “... *perfectly consistent with the theory behind standard selective distribution arrangements, which is to concentrate intra-brand competition amongst a select few, all operating on essentially the same basis.*” It is correct that the CJEU in *Coty* did not address the propensity for use of external websites to lead to excessive discounting (though this seems to have been an obvious possibility). But for present purposes the finding of fact made by the CAT that Clause 15 and the July 2019 email were *legitimately* designed to protect the integrity of Deckers’s system was a relevant matter the CAT needed to factor into account *alongside* its conclusion that the termination was *also* due to a concern about undue levels of discounting.

Because the CAT held that the latter concern was decisive to the exclusion of all else, it did not do this.

(iii) Thirdly, there is the case law addressing how the classification of a restriction type under the VBE relates to the general application of the law on object or effect. As to this even if Deckers's conduct was to be classified as "hardcore" RPM under the VBE this does *not*, of itself, indicate in law that RPM operated by Deckers is to be treated as a restriction by object since the concepts of a hard-core restriction under the VBE and a restriction by object are not co-extensive. There is no predisposition or presumption that RPM restricts competition at all or sufficiently. The ordinary legal and economic contextual analysis must still be applied as it would to other types of impugned conduct or practice. This was made clear by the CJEU in *Super Bock* (see paragraphs [79]-[89] above).

122. Next, no one suggests that there are legal barriers to entry such as existed in *Generics* in relation to intellectual property and regulatory constraints.
123. Finally, Mr Nicholas Khan KC, for the respondent, advanced two additional points of law and legal context. First, that it was contrary to the overarching policy of competition law to exclude from the prohibition a restriction on price such as that in issue in the present case. Secondly, that the approach of Deckers throughout had been "*cloth eared*" and had failed to take into account the acute commercial dilemma facing U&R following Covid when it was in possession of costly excess stock which, for liquidity reason, it badly needed to sell. I do not accept that either point sounds as a matter of law. The propositional argument that the law should not countenance this form of price restriction begs the question to be answered. Whether such a restriction is prohibited depends upon the application of the test. If, applying the test, the clause is prohibited then so be it; but if it is not then it is contrary to the purpose of competition law to nonetheless prohibit it. As to the criticism that Deckers was "*cloth eared*" this mischaracterises the role of competition law which is not to unravel an otherwise freely entered into contract which, because of unforeseen circumstances, turns out to be adverse. It is not the function of competition law to save parties from bad bargains, or deals they come to regret.

Economic context

124. I turn to the final limb of the test. The case law refers to "*the nature of the goods or services affected and the actual conditions of the functioning and structure of the market or markets in question*" which very importantly includes an analysis of inter-brand competition. The CMA in submissions to the Court referred to their own Guidance "*Vertical Agreements Block Exemption Order*" (12th July 2022) at paragraph [10.93] as support for the same proposition. Issues to consider include: whether the agreement is horizontal or vertical; product market definition; parties' markets share in the relevant product market; the number of other competitors in the relevant market and their relative sizes/market shares; legal and other barriers to entry; the strength of inter-brand competition including switching and price competition; and, the scope of the agreement and its real life ability to harm competition in the relevant product market.

- *The expert evidence before the CAT*

125. In the text below I consider these factors in the light of the CAT's findings, including about the relevant product market and the parties' market share. These findings were based upon expert evidence adduced by Deckers (from Dr Adrian Majumdar) and U&R (from Mr Chris Makin). This was limited to analysis of the relevant product market and the parties' market shares both in themselves and in relative terms. There was significant agreement between the experts. The CAT treated the expert evidence as "*unchallenged*": Judgment paragraph [114]. In paragraphs [148]-[158] the CAT explained that it accepted the market share analysis of Dr Majumdar and why.

- *Product market and the position of parties in the product market*

126. The CAT set out the position of the experts on product market: Judgment paragraphs [148]-[158]. The following markets were potentially relevant: (a) The wholesale supply of specialised running shoes in the UK; (b) the purchase of specialised running shoes by retailers from wholesalers (or manufacturers) in the UK; and (c), the retail supply of specialised running shoes in the UK (potentially split by sales in-store and sales online).

127. The CAT held (paragraph [158]), that "... *the share of the parties in any relevant market are unlikely to be significant*". It stated that it relied upon the market share figures as part of the legal and economic context. There is however no further analysis of this because, as explained above, the Judgment (paragraphs [182]-[212]) focused exclusively upon the objective behind the challenged conduct, not economic context.

128. In paragraph [150] the CAT did not rule out the possibility that the relevant product markets were wider than specialised running shoes and extended to "*fashion*" and other "*more general training shoes*" which might be viewed as substitutable by consumers. The CAT did not consider it necessary to resolve the precise product dimensions of the market. For present purposes this means that the conclusion of the CAT that the parties market shares were unlikely to be significant was a safe and conservative conclusion, in favour of the Claimant, U&R. Had the product market been widened the parties' market shares would have been commensurately reduced.

129. Dr Majumdar in his report explained the premise behind product market definition. There was a connection between the definition of a product market and the ability of a customer to switch. If, for example, a retailer increased prices by 5-10% and this caused customers to switch to a retailer of a rival brand, this would indicate that those retailers and brands were competing in the same product market. Given that the evidence indicated that there were a significant number of competing suppliers in the market, all with roughly comparable market shares, this indicates that the market is price competitive¹. On the basis of numbers of models of shoes offered for sale

1. As an experiment the Court carried out its own, informal, assessment of switching or substitutability by conducting quick web based/AI searches using phrases such as "*running shoes*", "*reviews of running shoes*" "*prices of running shoes*". The Court revealed this to the parties during the appeal. I do not rely upon this as part of my reasoning but it does help as a sense check of the arguments about economic context. As to the results of this exercise the most cursory search generated, more or less instantaneously, a huge amount of information about running shoes providing advice and information on: the best shoes for daily jogging or training; the best cushioned shoes; the best race shoes, the best shoes for post run recovery; the best shoes for those with long, wide or narrow feet; levels of bounce or softness; the advantages of having forefoot rockers or heel strikers or shaved down heel bevels to promote smoother transitions; the best mesh; whether gutted wing tongue wraps fitted snugly with just the right amount of padding; lacing systems and different types of eyelets, etc. There are specialist

Deckers was equal 6th (along with Saucony) and three other suppliers had offerings just a little below Deckers. In broad terms the evidence was that about 10 suppliers shared approximately 70% of the market.

- *Classification of agreement as vertical or horizontal*

130. The agreement is vertical, not horizontal, and as such by its nature presents a systemically lower risk to competition than does a horizontal agreement. Any restriction of competition is thus intra-brand, and not inter-brand, such that where inter-brand competition is strong – which the evidence suggests it is – then by definition there is far less of a concern about the impact of the restriction upon intra-brand competition.

- *Market structure and barriers to entry*

131. No one suggests that there are (legal or non-legal) barriers to entry of any materiality into the product market. There is indeed no analysis in the present case of entry conditions. The substantial number of suppliers who have entered the market is evidence pointing against a conclusion that there are barriers to entry which could protect incumbents or limit price competition.

- *The content or scope of the restriction and its real life capacity to harm competition to a sufficient degree*

132. The content or scope of an agreement or practice indicates the maximum capacity or ability of a disputed measure to harm competition. Here the stock U&R wished to sell via the anonymised website was surplus Covid stock. Ms Demetriou KC for Deckers described this as a “*niche*” and “*one off*” tranche of stock. The Judgment does not examine the number of pairs of shoes affected or compare that number against either the total supplied by Deckers (or U&R), or the much wider total product market. We know that Deckers’s market share was modest and we know that the total number of pairs of shoes that the restrictions related to would be a small subset of the market shares of both U&R and Deckers in the relevant product markets. It follows, as a matter of logic and common sense, that the shoes affected by the restrictions would be a very small proportion of the market share of both U&R and Deckers and a very much smaller proportion of the total product market, which is the relevant legal benchmark against which an alleged restriction of competition must be measured, to answer the relevant question - does the restriction sufficiently harm competition in the relevant product market?

Conclusion on application of the test to the facts

133. Because the CAT decided the case upon a particular and limited analytical basis it did not consider the implications of the facts that it found to exist. This was a point Ms Demetriou KC, for Deckers, especially focused upon. She said that the CAT had the relevant information before it but because it focused exclusively upon objective and purpose it failed to draw the inevitable inference that Deckers’s conduct (howsoever it

review sites where runners test different types of shoe in different conditions and report back. There is extensive information about sales policies and prices so brands can be compared and contrasted with ease.

was labelled) was incapable of exerting a sufficient adverse effect upon competition in the defined product market so as to qualify as an object restriction. She also argued, drawing upon the case law, that the most important information needed to come to a firm conclusion was the nature and scale of the restriction and the market share figures. The findings of the CAT in these respects were more than sufficient, she argued, to draw a conclusion about the potential for the restriction to exert a sufficient adverse impact upon competition.

134. Having concluded that the CAT did apply the wrong test in law, I have considered whether the proper course is to remit the issue to the CAT. However, on the basis of case law, and taking as my starting point (based upon decisional practice and jurisprudence) that a selective distribution agreement is a vertical agreement of a type that sits at the least problematic end of the spectrum, I agree that the CAT's findings provide a solid platform upon which to draw a conclusion of law.
135. In my judgment, on the facts as found, for the reasons given above in paragraphs [124] – [132], there was no basis upon which the CAT could have drawn the conclusion that Deckers's act of termination had the object of restricting competition contrary to section 2 CA 1998 when viewed in its proper legal and economic context and taking into account its content or scope.

F. Issue III: The VBE

The CAT's findings

136. The next ground of appeal concerns the conclusion of the CAT that the VBE did not apply to exempt the restriction in issue. The issue arises only if the act of termination *prima facie* amounted to a prohibited restriction by object. Notwithstanding my conclusion above, I will address the issue. The CAT found that the restriction in issue fell foul of Article 4(a) and 4(c) of the VBE: see paragraph [46] above.

The VBE

137. The VBE is found in Commission Regulation (EU) No 330/2010 of 20th April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices. As observed although this measure is no longer in force it applied at the time of the facts in dispute and it is common ground that it is the measure that has to be construed for the purpose of this appeal. The relevant recitals, which are a guide to construction of the substantive provisions, say:

“(6) Certain types of vertical agreements can improve economic efficiency within a chain of production or distribution by facilitating better coordination between the participating undertakings. In particular, they can lead to a reduction in the transaction and distribution costs of the parties and to an optimisation of their sales and investment levels.

(7) The likelihood that such efficiency-enhancing effects will outweigh any anti-competitive effects due to restrictions contained in vertical agreements depends on the degree of

market power of the parties to the agreement and, therefore, on the extent to which those undertakings face competition from other suppliers of goods or services regarded by their customers as interchangeable or substitutable for one another, by reason of the products' characteristics, their prices and their intended use.

(8) It can be presumed that, where the market share held by each of the undertakings party to the agreement on the relevant market does not exceed 30 %, vertical agreements which do not contain certain types of severe restrictions of competition generally lead to an improvement in production or distribution and allow consumers a fair share of the resulting benefits.

(9) Above the market share threshold of 30 %, there can be no presumption that vertical agreements falling within the scope of Article 101(1) of the Treaty will usually give rise to objective advantages of such a character and size as to compensate for the disadvantages which they create for competition. At the same time, there is no presumption that those vertical agreements are either caught by Article 101(1) of the Treaty or that they fail to satisfy the conditions of Article 101(3) of the Treaty.

(10) This Regulation should not exempt vertical agreements containing restrictions which are likely to restrict competition and harm consumers or which are not indispensable to the attainment of the efficiency-enhancing effects. In particular, vertical agreements containing certain types of severe restrictions of competition such as minimum and fixed resale-prices, as well as certain types of territorial protection, should be excluded from the benefit of the block exemption established by this Regulation irrespective of the market share of the undertakings concerned.

...

(12) The market-share limitation, the non-exemption of certain vertical agreements and the conditions provided for in this Regulation normally ensure that the agreements to which the block exemption applies do not enable the participating undertakings to eliminate competition in respect of a substantial part of the products in question.”

138. Article 1 defines a vertical agreement as:

“(a) ‘vertical agreement’ means an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which

the parties may purchase, sell or resell certain goods or services...”

139. Article 2(1) lays down the basic exemption:

“Pursuant to Article 101(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 101(1) of the Treaty shall not apply to vertical agreements.”

140. Article 3 lays down a market share threshold of 30% below which a vertical agreement is automatically exempt unless it contains restrictions of the types out in Article 4:

“The exemption provided for in Article 2 shall apply on condition that the market share held by the supplier does not exceed 30 % of the relevant market on which it sells the contract goods or services and the market share held by the buyer does not exceed 30 % of the relevant market on which it purchases the contract goods or services.”

141. Article 4 sets out the exceptions; subparagraphs (a) and (c) are relevant for the purpose of the appeal:

“Article 4 Restrictions that remove the benefit of the block exemption — hardcore restrictions

The exemption provided for in Article 2 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

(a) the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;

...

(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...”

The appellant's submissions

142. Deckers argues that the CAT found as a fact that its market share was below the 30% threshold. This meant that *prima facie* its selective distribution system was block exempt even if it otherwise fell within the scope of the prohibition in section 2 CA 1998. The CAT however erred in describing the restrictions as either hardcore RPM

excluded from the block exemption by Article 4(a) or as a restriction upon passive sales excluded by Article 4(c).

143. As to Article 4(a) Deckers argued that the restriction on use of an anonymised website, even if it had the intended effect of muting price competition, was not within the category of restriction referred to in Article 4(a). Under that provision a supplier was entitled to set “*a maximum sale price or recommend a sale price*”. In contradistinction, recital 10 identified as the “*severe*” restriction of competition, which was not exempt, “*minimum and fixed resale-prices*”. The language in Article 4(a) also referred to “*a fixed or minimum sale price*” whether brought about by contractual language or indirect pressure. Deckers relied upon the CAT’s fact finding that Deckers did impose recommended resale prices but did not enforce them, directly or indirectly, so as to turn them into “*fixed*” prices, which was the express, and only, vice identified in Article 4(a). Any distributor, including U&R in relation to its surplus Covid stock, could discount in any way it pleased through that dealer’s bricks and mortar outlets or their own branded websites. As such, and howsoever one described the restriction in the present case, it was not remotely close to that covered by Article 4(a).
144. As to Article 4(c), Ms Demetriou KC pointed that on the facts there was no restriction on use of the internet and there was no “*restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade*”. The high water mark of the restriction was on the use of an unbranded, anonymised, website for a strictly limited tranche of old stock. But this did not undermine the basic or default position which was that consumers could obtain HOKA running shoes through an multiplicity of retail websites and/or stores including those provided by U&R.
145. Ms Demetriou KC placed reliance upon the caveat to the preclusion in Article 4(c) flowing from the words: “*... without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment*”. This made clear that a supplier could regulate the types of outlet that a distributor sold from. She accepted that on their face the words “*an unauthorised place of establishment*” might not refer to an internet, virtual, establishment but she argued that the judgment of the CJEU in *Coty (ibid)* provided important guidance on how Article 4 generally should be construed. That case concerned Article 4(b) and (c); it did not concern Article 4(a). But it was argued that it provided strong guidance as to how Article 4 generally, therefore including Article 4(a), should be interpreted. She argued that the judgment showed that the applicability of Article 4(a) and 4(c) were conditional upon a factual question which was whether *in reality* retailers were restricted in the ways described in those sub-paragraphs.
146. To understand *Coty* it is helpful to start with the judgment of the CJEU in *Pierre Fabre (ibid)* which the CJEU in *Coty* purported to apply and follow. There the CEJU was asked to consider whether an absolute ban on all sales via the internet was consistent with the block exemption. It held not: See paragraphs [48]-[59]. In paragraph [53] the Court held:

“... it follows from Article 4(c) of Regulation No 2790/1999 that the exemption is not to apply to vertical agreements which directly or indirectly, in isolation or in combination with other

factors under the control of the parties, have as their object 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.”

In paragraph [57] the CJEU said that it should not give a “*broad*” interpretation to the exemption since it was always possible for an agreement not automatically exempted to be subject to an individual exemption.

147. In *Coty* a reference was made by the national court in a dispute between Coty Germany GmbH, a supplier of luxury cosmetics established in Germany, and its authorised distributor Parfümerie Akzente GmbH (“*PA*”). The CJEU confirmed *Pierre Fabre* but introduced a significant qualification. *Pierre Fabre* concerned an absolute ban on use of the internet. In *Coty* the restriction was partial, and the Court made clear that, depending on the facts, partial restrictions were not necessarily precluded by Article 4 from the exemption in Article 2 VBE.
148. The restriction in question bears similarities to that in the present case. It permitted retailers to offer and sell products on the internet provided that the internet sale was conducted through an electronic shop window of the authorised store. The supplier prohibited the use of a different business name and also the “*recognisable engagement of a third party undertaking*” which was not an authorised distributor of the supplier. The restriction prohibited retailers from collaborating with third parties where the collaboration was directed at the operation of the website and was implemented in a manner that was discernible to the public: see the description of the contract in question in the opinion of the Advocate General at paragraphs [23]-[24]. *PA* sold Coty goods via its brick-and-mortar outlets and over the internet which took place partly through its own online store and partly via the platform “*amazon.de*”. Coty objected to *PA* selling via *amazon.de*.
149. Questions 3 and 4 asked whether a restriction on sales via third party websites could benefit from exemption under the VBE. The CJEU pointed out that the exemption did not apply to certain types of restriction that were liable to have severely anticompetitive effects regardless of their market share. These were the “*hardcore*” restrictions in Article 4. The Court framed the questions to be answered as follows:

“62. ... the referring court asks, in essence, whether Article 4 of Regulation No 330/2010 must be interpreted as meaning that, in circumstances such as those in the main proceedings, the prohibition imposed on the members of a selective distribution system for luxury goods, which operate as distributors at the retail level of trade, of making use, in a discernible manner, of third-party undertakings for internet sales constitutes a restriction of their customers, within the meaning of Article 4(b) of that regulation, or a restriction of passive sales to end users, within the meaning of Article 4(c) of that regulation.”
150. The CEJU distinguished the facts from those in *Pierre Fabre* which concerned a total ban on internet sales. The Court focused upon the limited nature of the actual

restriction (paragraphs [52], [53], [66]). The central question was: “*whether a contractual clause such as that at issue in the main proceedings restricts the customers to whom authorised distributors can sell the luxury goods at issue or whether it restricts authorised distributors’ passive sales to end users*” (paragraph [64]).

151. In paragraph [67] the Court answered this by posing a factual question: whether customers were “*usually able to find the online offer of authorised distributors by using such engines*”. The reference to “*usually*” is a reference to the normal or default position. In paragraph [68] the Court concluded on the facts:

“... even if it restricts a specific kind of internet sale, a prohibition such as that at issue in the main proceedings does not amount to a restriction of the customers of distributors, within the meaning of Article 4(b) of Regulation No 330/2010, or a restriction of authorised distributors’ passive sales to end users, within the meaning of Article 4(c) of that regulation.”

152. The Court cited with approval paragraph [147] of the Advocate General’s Opinion. There it was pointed out that on the facts, the restriction did not prevent authorised distributors from working with third parties for advertising purposes on the internet and nor did it prevent those online distributors from being referenced on the internet and as such their potential customers were still able to access via the internet the offer of the authorised distributors, for example by using search engines.

153. In paragraph [69] the Court concluded that on those facts:

“...the prohibition imposed on the members of a selective distribution system for luxury goods, which operate as distributors at the retail level of trade, of making use, in a discernible manner, of third-party undertakings for internet sales does not constitute a restriction of customers, within the meaning of Article 4(b) of that regulation, or a restriction of passive sales to end users, within the meaning of Article 4(c) of that regulation.”

154. In the light of this Deckers argues that the key to determining the scope of Article 4(a) and 4(c) is whether the *practical* (or usual) effect of the impugned restriction is that: (i) retailers can still discount at will through their stores and/or via their own branded websites; and (ii) consumers can still access the goods passively or actively via online websites. If so then the exemption in Article 2 applies and is not disapplied by Article 4(a) and/or Article 4(c).

155. Put another way, it is argued that the very limited restriction which arose on the present facts out of the application of Clause 15 and the July 2019 email to U&R, did not undermine the basic, usual, reality which was that retailers could price freely at or below recommended resale prices through their physical stores or branded websites; and consumers could freely, whether passively or actively, access HOKA goods through the same physical and online outlets. U&R also had these freedoms under its agreement with Deckers and it was at liberty to sell the surplus Covid stock at any price it wished from its stores or via its branded website. Ms Demetriou KC pointed

out the strong resemblance between the clause in dispute in this case (Clause 15 and the July 2019 email – see paragraphs [88]-[9] above) with that which the CEJU in *Coty* considered to be within the scope of the VBE.

Analysis

156. In my judgment the judgment in *Coty* identifies the approach to be taken. It involves: (i) an examination of the scope of the restriction in dispute followed by; (ii), an examination of whether in a real and practical (“*usual*”) sense retailers could discount freely (in relation to Article 4(a)) and customers could access the goods passively or actively (in relation to Article 4(c)).
157. The findings of fact made by the CAT enable one to determine the scope of the restriction and provide an answer to the consequential question. As to scope the default position in the present case is that dealers can sell at whatever price they please and consumers can buy actively and passively from dealers’ branded websites and through bricks and mortar stores. The restriction in issue is not a “*hardcore*” restriction as that term is used in the VBE. Such is the broad scope of the usual or default position and the narrow scope of the restriction in no real sense can it be said that retailers were restricted on price and/or that customers were denied access actively or passively.
158. In my view, applying the CAT’s fact finding and also for the reasons given by Deckers and set out above at paragraphs [142] – [155], with which I agree, Articles 4(a) and 4(c) VBE do not serve to preclude the challenged conduct from block exemption.

G. Disposition

159. For the above reasons I would allow the appeal. The act of termination did not, on the facts as found, amount to a restriction by object under section 2 CA 1998. But in any event it would have been exempt under Article 2 VBE.

Lord Justice Snowden :

160. I agree

Lord Justice Zacaroli :

161. I also agree