UK'S SPECIALIST COMPETITION TRIBUNAL ISSUES RARE GUIDANCE FOR BRANDS—BACK TO THE BASICS ON SELECTIVE DISTRIBUTION, RPM AND ONLINE SALES BANS

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Judgments providing actual guidance for consumer goods brands are like a good action film—rare, but totally worth the wait. The UK Competition Appeal Tribunal's (the CAT) recent decision in *Up and Running v Deckers*[1] is definitely worthy of a spot on the hall of fame reserved for the most useful legal precedents in the verticals space. The CAT's tribunal unanimously delivered a 102-page legal script that is interesting, informative, to the point and touches on some of the most pertinent legal issues that consumer brands face today when designing and operating their distribution strategies (in particular, selective distribution and resale price maintenance (RPM)).

SO WHAT IS THE STORY LINE?

Up & Running is a UK retailer selling specialist running shoes. Deckers supplied HOKA-branded running shoes to Up & Running on a wholesale basis. When COVID-19-related restrictions struck, Up & Running applied for permission to launch a new website on which excess stock, including HOKA products, would be sold at a discount. This proposal was not accepted by Deckers. Up & Running nevertheless commenced selling HOKA products on the new website; this resulted in Deckers ultimately ceasing to supply the products to Up & Running, largely arguing that the new website did not meet Deckers' selective distribution criteria (and hence, could not be treated as an authorised point of sale).

Up & Running brought a stand-alone claim before the CAT alleging that:

- Its ability to sell HOKA products online such that it could make effective use of the Internet as a sales channel for the HOKA products was restricted.
- The termination of Up & Running's account was effectively aimed at preventing it from running a discounting strategy, thus forcing Up & Running to maintain higher resale prices.

The CAT agreed with Up & Running in relation to both claims.

WHAT DOES THE JUDGMENT TEACH US?

This case is the perfect illustration that investing in a robust, well thought-through and well-executed go-to-market strategy will enable you to exercise legitimate brand control and reap the benefits over time.

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The key lessons from the CAT's judgment can be grouped under two key headings:

Selective Distribution

Selective distribution refers to a go-to-market strategy whereby a brand is legally permitted to work only with those resellers who meet and comply with the brand's criteria, to the exclusion of all other (unauthorised) resellers.

- First, perhaps it was fine for Professor Dumbledore to treat Harry Potter as his favourite pupil, but the same rule simply has no place in the context of a properly designed selective distribution system. The CAT stressed that, in order to benefit from the special safe harbour specifically designed for selective distribution systems (as set out in Case C-26/76 *Metro v Commission*), the brand's selective distribution criteria must be transparent or visible to existing or potential resellers and, importantly, they should not be applied in a discriminatory or inconsistent fashion. Accordingly, any evidence of discriminatory treatment in allowing some resellers not to comply with the criteria could jeopardise the availability of the Metro safe harbour.
- Second, the CAT also clarified that, where the resellers are themselves unaware of the existence of the selective distribution programme, and where the criteria merely boil down to broad requirements that allow for the exercise of individual judgements by the brand's account managers, the system is unlikely to have the necessary level of objectivity to be per se exempted from competition law. Subjective discretion is not only unwelcome when exercised by Slytherin's Professor Umbridge, it is also not suitable for selective distribution.
- Third, it is not going to be enough for a brand to have a set of properly drafted criteria without being able to show that it actually applies them. Thus, if a brand receives an application to authorise a new website but rejects it as incompatible with the selective distribution system without any evidence of having actually reviewed the online point of sale (e.g., because the website has not gone live yet), such a decision would not be compatible with a properly run selective distribution programme. For example, it would arguably be more appropriate to consider a prospective, not-yet-live website by reference to a business plan or a website design plan.
- Finally, selective distribution cannot be a ruse which seeks to cover up an actual (anti-competitive) objective, such as the desire to prevent the emergence of competing business models or sales channels. For selective distribution to stay on the right side of competition law, it must plausibly pursue a legitimate aim, such as the protection of a manufacturer's brand image and quality expectations, or addressing free riding by resellers.

RPM

Setting minimum resale prices, fixing resale prices or restricting discounting practices are all examples of RPM which UK and EU competition laws treat as a “hardcore” restriction. In accepting Up & Running's RPM allegations, the CAT made the following key observations:

- If a brand seeks to restrict the ability of its retail partners to sell products on clearance sites (where a greater degree of discounting would inevitably take place), as a matter of competition law, that amounts to a restriction of price competition between retailers and an illegal attempt to indirectly fix selling prices.

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- Even in the context of selective distribution, such a strategy is not going to be permissible. On the one hand, selective distribution clearly allows a brand operating such a distribution system to reject a clearance/discount website because it does not meet the required objective quality standards required from all online points of sale. On the other hand, where the rejection decision is merely an attempt to use the contractual provisions to force a reseller to stop selling the branded product on a discounted basis, this is likely to amount to illegal RPM. This is, in particular, the case when there is no alternative plausible explanation or legitimate aim behind the rejection decision (e.g., because the brand has not even reviewed/assessed the website in question).
- Finally, and very interestingly, the CAT opined that it is conceivable under competition law that a brand, which is genuinely concerned about the brand image of its products, could design its distribution strategy in such a way as to ensure that clearance/discount sales do not undermine its overall strategy (e.g., through a legitimate selective distribution system—see paragraphs 175–176). This, however, must be supported by actual legitimate objectives, such as protection of the brand or the image of its products (the CAT discusses this, in particular, in paragraphs 171–173).

CONCLUSION

The CAT's informative judgment confirms that selective distribution can be a very powerful and highly effective tool to build a network of like-minded and high-quality resellers (and to reject others). However, it requires brands to be like Monica in “Friends”—pedantic, organized and living by their own rules. Successful selective distribution programmes require clear and transparent criteria which are applied objectively and with a view to protecting the image of the brand and its products. Selective distribution generally, and selective distribution criteria specifically, will not work well as an afterthought to explain an otherwise restrictive practice.

Getting this balance wrong and underinvesting in a competition law-compliant go-to-market strategy can have pretty severe consequences later on. In *Up and Running*, for example, the CAT ruled that Up & Running can claim damages sustained as a result of the competition law breaches (to be determined in a separate trial). In another recent UK case where the brand (Dar Lighting) operated a selective distribution system, it was established that the discouraging of discounting amounted to a type of illegal RPM. The brand accordingly received a fine of £1.5 million (see our alert here).

FOOTNOTES

[1] Case No 1615/5/7/23 Up and Running (UK) Limited v Deckers UK Limited [2024] CAT 61.

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