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Case No: 1615/5/7/23

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

31 October 2024

Before:

BEN TIDSWELL
(Chair)
KEITH DERBYSHIRE
PROFESSOR PABLO IBÁÑEZ COLOMO

Sitting as a Tribunal in England and Wales

BETWEEN:

UP & RUNNING (UK) LIMITED

Claimant

- v -

DECKERS UK LIMITED

Defendant

Heard at Salisbury Square House on 20-25 July 2024

JUDGMENT

APPEARANCES

Alison Berridge and Jenn Lawrence (instructed by Stobbs) appeared on behalf of the Defendant.

Dennis Macfarlane (litigant in person) appeared on behalf of the Claimant.

Note: Excisions in this Judgment (marked "[…][✂]") relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002.

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A. INTRODUCTION

1. This matter is in some respects a conventional one, involving questions of: the application of selective distribution arrangements in the distribution of specialised running shoes (in particular, shoes manufactured under the HOKA brand and distributed by the Defendant, Deckers UK Ltd, ("Deckers")); access to online sales channels; the influence suppliers may have on retailer pricing; and the basis on which supply can properly be terminated.

2. In other respects, it is an unusual proceeding. It is one of a handful of cases tried by the Tribunal under the fast-track procedure established by Rule 58 of the Competition Appeal Tribunal Rules 2015 ("the Rules"). The case has been prosecuted by a litigant in person, in the form of the Managing Director of the Claimant, Up & Running (UK) Limited ("Up & Running"). The facts, as they emerged at trial, are somewhat unusual, including features that distinguish the matter from other cases. The case also raises a number of legal issues which, while not novel, are yet to be fully explored in case law.

3. While we hope that this judgment will be of assistance to those implementing and advising on selective distribution arrangements, we should emphasise that, ultimately, the outcome of the case turns on its particular facts.

B. BACKGROUND

(1) Summary of the claim

4. Up & Running brings this claim under section 47A of the Competition Act 1998 ("the Act"). Up & Running alleges that Deckers has infringed the prohibition contained in section 2 of the Act (the "Chapter I Prohibition").

5. Up & Running is a company incorporated in the United Kingdom and, since 1992, has operated a retail business selling specialist running shoes and accessories. Up & Running primarily sells products at the retail level through bricks and mortar stores, although it also makes sales on its website, upandrunning.co.uk. Deckers supplied HOKA branded running shoes to Up &

Running on a wholesale basis from 2016 until the end of the Autumn/Winter 2021 season.

6. Up & Running alleges that, in July of 2020, it presented a business proposal to Deckers involving the launch of a new website, runningshoes.co.uk (the "Running Shoes website"), on which excess stock would be sold at a discount. The motivation to commence supply on the Running Shoes website was in part driven by Up & Running's desire to dispose of significant volumes of unsold stock that it had accumulated during the COVID-19 pandemic, which it was unable to sell through its bricks and mortar stores. However, it was also intended to be a permanent channel for Up & Running to dispose of unsold stock from time to time.[1] The proposal was declined by Deckers, initially because it went against the "fundamental principles of [their] brand strategy" and subsequently (after taking legal advice) with reference to Clause 15 of the terms and conditions (the "Terms and Conditions") governing its contract with Up & Running, which required retailers to seek approval for websites on which they wished to sell HOKA products. Up & Running nevertheless set up the Running Shoes website and began selling running shoes, including HOKA products, on it.

7. Up & Running alleges that, in November 2020, Deckers warned Up & Running that if HOKA products were not removed from the Running Shoes website, Deckers would refuse to supply HOKA products in the future and would terminate Up & Running's account. Up & Running continued to sell HOKA products on the Running Shoes website. In December 2020, Deckers informed Up & Running that it would no longer supply HOKA products following the Autumn/Winter 2021 season and subsequently ceased supply in reliance on the right to terminate contained in the Terms and Conditions.

8. Up & Running alleges that the Terms and Conditions are an agreement that contravenes the Chapter I Prohibition because:

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[1] We will refer to unsold, out of season or old stock generally as "residual stock" hereafter. There is an explanation in [120(5)] of the nature of this residual stock.

(1) they impose a restriction on Up & Running'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

(2) the attempt to prevent Up & Running from selling HOKA products on the Running Shoes website was an attempt to engage in retail price maintenance ("RPM") and the decision to apply the Terms and Conditions to cease supply of HOKA products was driven by a desire to foreclose a website, with the intention of maintaining higher prices for HOKA products (the RPM Restriction).

9. In its Second Amended Claim Form, Up & Running seeks the following substantive relief:

(1) damages arising from the alleged contraventions of the Chapter I Prohibition; and

(2) an injunction requiring Deckers to recommence supply of HOKA products to Up & Running on the same terms as previously existed.

(2) Summary of the Defence

10. Deckers denies these allegations. While it admits that it refused to approve sales of HOKA by Up & Running via the Running Shoes website, and then terminated Up & Running's account, Deckers claims that it could legitimately rely on Clause 15 of the Terms and Conditions which stated:

> "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."

11. Deckers contends that the agreement between Deckers and Up & Running, including Clause 15, must be viewed within the context of a selective distribution system operated by Deckers. Deckers claims that, in this context, it did not contravene the Chapter I Prohibition because:

(1) there has been no breach of the Chapter I Prohibition;

(2) its selective distribution system meets the criteria set out in the *Metro* line of authorities, which effectively provides Deckers with a safe harbour;[2]

(3) even if Deckers's selective distribution system does not meet the *Metro* criteria, it nevertheless does not constitute a "by object" infringement and no effects case has been pleaded or run by Up & Running; and

(4) its selective distribution system is exempt from the Chapter I Prohibition by virtue of Commission Regulation (EU) 330/2010 (the "VBE") and the Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 (the "VBEO").

12. Deckers's selective distribution system was described in its Defence as having the aim of building credibility for the HOKA brand with UK runners, with a view to enabling sustainable growth in the long term rather than chasing higher short-term sales. The selective distribution arrangement was said to be given effect to by way of the approval (or refusal) of retail partners based on the following criteria:

(1) In relation to retail premises: factors such as the physical appearance of the store, whether the retailer sells an assortment and depth of running shoe brands/products, having a sufficient number of fully trained in-store staff and a dedicated area for consumers to try products on, a high standard of in-store, delivery and after sales customer service and the retailer's reputation within the running community.

(2) In relation to websites: sufficient assortment and depth of running shoe brands/products, sufficient information on the benefits of each style of HOKA footwear, a degree of online customer service and a domain name that is identical or very similar to the retailer's name or other clear

[2] Case C-26/76 *Metro v Commission ("Metro").*

indications that one is buying HOKA products from the approved retailer.

13. Deckers argues that neither its agreement with Up & Running nor the way in which it was applied restrict retail competition because all retailers have complete freedom to sell HOKA products on their own branded sites, or sites which make their connection with the physical stores clear. It contends that the agreement pursues a legitimate aim, goes no further than required to achieve that aim, and is applied objectively and consistently. Deckers states that the allegation that its true concern with the Running Shoes website was that it would be a discount website is not supported by the evidence.

14. Deckers also argues that Up & Running is not entitled to relief, either by way of an injunction or damages.

(3) Procedural history

15. The claim was filed with the Tribunal on 25 October 2023. The Claim Form alleged infringements of the Chapter I Prohibition and the prohibition contained in section 18 of the Act (the "Chapter II Prohibition").

16. At a case management conference ("CMC") held on 1 December 2023, the Tribunal determined that the case was suitable for allocation to the fast-track procedure available under the Rules. That part of the claim alleging that the Chapter II Prohibition had been breached was, and remains, stayed until further order.

17. A further CMC was held on 18 January 2024, at which the Tribunal heard submissions from the parties on an application by Deckers to remove the case from the fast-track procedure. The Tribunal refused the application on 6 February 2024 ([2024] CAT 9), and ordered that the matter proceed by way of a split trial in the following format:

(1) Trial 1 to deal with questions of liability under the Chapter I Prohibition, injunctive relief and causation.

(2) Trial 2 to deal with questions of the assessment of loss or damage suffered by Up & Running, if it were to be successful in Trial 1.

18. The Tribunal ordered on 20 February 2024 that the amount of recoverable costs in the proceedings would be capped at £150,000.

C. KEY LEGAL PRINCIPLES

19. Insofar as is relevant, Section 2 of the Act provides as follows:

> "2 Agreements etc. preventing, restricting or distorting competition.
>
> (1) Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which–
>
> (a) may affect trade within the United Kingdom, and
>
> (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,
>
> are prohibited unless they are exempt in accordance with the provisions of this Part.
>
> (2) Subsection (1) applies, in particular, to agreements, decisions or practices which–
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
>
> (b) limit or control production, markets, technical development or investment;
>
> (c) share markets or sources of supply;
>
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

(1) Overview of analytical approach

20. It is well established that the assessment of whether an agreement has "the object or effect" of restricting competition is disjunctive. That means that a positive finding that an agreement is a restriction "by object" means that there

is no need to go on to consider the effect of the agreement on competition before concluding that an infringement has been committed. See, for example, *Ping Europe Limited v CMA* [2020] EWCA Civ 13 ("*Ping*") at [23].

21. The fact that object and effect are alternative, and not cumulative, conditions means that the nature of the legal inquiry is fundamentally different at each stage. Establishing the restrictive object of a practice does not strictly require the definition of the relevant market or an evaluation of its impact on competition – that is, the sort of assessment that is necessary to show its restrictive effects.

22. Similarly, assertions about the absence of effects are not sufficient to avoid a finding of a "by object" infringement. The Court of Justice of the European Union ("CJEU")[3] has consistently dismissed arguments in this respect as irrelevant once the object of a practice has been proved to the requisite legal standard.[4]

23. It is also clear that there is no requirement to establish that a restriction has "significant" or "appreciable" effects on competition once one has determined that it is a "by object" infringement. All that is required to engage Section 2(1) is that there is an effect on trade, as required by Section 2(1)(a) of the Act.[5]

24. *Ping* concerned vertical arrangements for the distribution of sophisticated sports products. The facts of that case are quite different from the facts in this case, but the approach to the necessary analysis is instructive and the Court of Appeal's judgment provides a convenient overview of that exercise, which we respectfully adopt:

> "24. Vertical agreements raise different competition issues from horizontal agreements and have generally not been regarded as restricting competition to the same serious degree. However, the CJEU has established that some vertical restrictions such as retail price maintenance and bans on exports between

[3] For the avoidance of doubt, and unless otherwise specified, references in this judgment to CJEU case law is to that law as incorporated into UK law as a consequence of the European Union (Withdrawal) Act 2018.

[4] Case C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, at [31] and Case C-286/13 P *Dole Food Company, Inc. and Dole Fresh Fruit Europe v Commission*, at [127].

[5] See Case C-266/11, *Expedia v Autorite de la Concurrence* at [35]

Member States will in almost all circumstances amount to restrictions of competition by object. By contrast, some restrictions on the ability of a retailer to sell the goods supplied by the manufacturer may enable the manufacturer to compete better with manufacturers of competing goods (inter-brand competition) even though they limit the ability of the retailers to compete in their sales of the same manufacturer's goods (intra-brand competition). That is the case with selective distribution agreements, such as the one operated by Ping, where the manufacturer limits supplies to dealers which meet certain qualitative criteria. In Case 26/76 *Metro v Commission (No1) [1977] ECR 1875, EU:C:1977:167*, the CJEU considered the legality of a policy adopted by a manufacturer of electrical products to exclude a 'cash and carry' outlet from its dealer network. The CJEU held that where a selective distribution network is appropriate because of the nature of the goods, then even though restricting sales to certain outlets might reduce price competition to some extent, it was justified because it enhances competition by other means. The kinds of goods which have been held to justify the operation of a selective distribution network include luxury goods where the dealers admitted to the network have to have premises which maintain "an aura of luxury" and high tech products where the dealers may be required to have trained staff and offer adequate servicing arrangements before they are allowed to stock the goods: see paras. 7.098 – 7.100, Bellamy & Child *European Union Law of Competition* 8th ed (2018).

25. Some restrictions have to be imposed on retailers in order for the selective distribution network to work. Such restrictions are described as meeting the *Metro* criteria if they do not exceed the objective in view, that is the objective of maintaining a channel of distribution in which resellers are chosen on the basis of relevant, qualitative criteria. Restrictions that are necessary to maintain that network will not constitute restrictions on competition and will fall outside Article 101(1). In particular a prohibition on authorised retailers selling the goods to retailers outside the network is regarded as a corollary of the principal obligation and contributes to its fulfilment. Other restrictions, for example quantitative restrictions on the number of retailers authorised to sell the goods within a particular geographic area, are not regarded as essential to the existence of the network and so are likely to fall within Article 101(1). They may or may not then be exempted under Article 101(3).

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

25. In relation to the correct approach to analysing the question of infringement in a vertical context, Lady Justice Rose (as she was then) endorsed the approach taken at first instance by the Tribunal in *Ping*:[6]

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[6] See *Ping* at [62]. We have made appropriate adjustments to the wording to align with this case.

> "i) Does the [provision] satisfy the criteria in the *Metro* case and so fall outside [Section 2]?
>
> ii) If not, does the restriction reveal a sufficient degree of harm to competition to be considered a restriction 'by object 'within [Section 2(1)]?
>
> iii) If it is restrictive of competition by object, can it nevertheless be exempted under [Section 9]?"

26. We should note that in the present case the question of individual exemption does not arise, as it is not pleaded and was not argued for by Deckers. Instead, we are concerned with the application, pursuant to Section 6 of the Act, of the VBE, to which we will return shortly.[7] The VBE is generally viewed as a "safe harbour" as and when a selective distribution arrangement fails to meet the test set out in *Metro*. It logically falls for analysis after consideration of whether a restriction is "by object", not least because (as we will see in due course) certain types of "by object" infringements fall outside the VBE's protection.

27. We should also note that there are potential further stages to the analysis described in *Ping*. For example, there might be a need to analyse the effect of an infringement (the second limb of Section 2(1)(b) of the Act), although this rarely arises, as in most cases the "safe harbour" in the VBE will resolve the question of infringement. Up & Running does not advance an "effects" case in these proceedings.

28. In some cases, an alleged infringer might also argue that the offending provision was objectively necessary in order to obtain a legitimate aim. There was a hint of this in Deckers's Defence,[8] but it was not developed in the evidence or in submissions, beyond reliance on the implicit acceptance of that doctrine in the *Metro* line of cases.

(2) Is there an agreement or concerted practice?

29. It is necessary to identify an agreement or concerted practice before the Chapter I Prohibition can be said to apply to a restriction. A unilateral act by one

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[7] It is common ground between the parties that Up & Running's claim is based solely on Chapter I (and not Article 101 TFEU) and also that the relevant block exemption is the VBE, and not the VBEO, given that the events in question occurred before the UK exited the EU.

[8] See Amended Defence at [93(3)(b)(iii)].

contracting party which can be carried out without the assistance of another is not an agreement. See Case C-2/01 and C-3/01 *BAI and Commission v Bayer* ("*Bayer*") at [101].

30. However, a concerted practice or agreement can be reached by way of tacit acceptance.[9] This can be inferred from indicia and coincidences, provided they are consistent and objective.

31. In Case C-74/14 *Eturas v Lietuvos Respublikos* ("*Eturas*"), travel agents who used an online travel booking system argued that they were not parties to an agreement by which the administrator of the system, Eturas, encouraged the travel agencies to vote on a reduction of an online discount rate. The Lithuanian Competition Council decided that the travel agencies were liable for an infringement, as they could infer that other agencies were aware of the proposal to limit rates and had indirectly – by implied or tacit assent – expressed a common intention to act in that way. The CJEU held that an infringement of EU competition law may be proven not only by direct evidence, but also through indicia, in the absence of another plausible explanation, provided they are objective and consistent.[10]

32. It is therefore possible for the alignment of interests which arise from a wider agreement between parties (for example, a selective distribution system) to give rise to tacit acceptance of the implementation of a particular provision that might not have been expressly agreed and might otherwise appear to be a unilateral act.

(3) The *Metro* doctrine

33. In considering the application of *Metro*, it is helpful to look at the decision of the CJEU in Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence* ("*Pierre Fabre*"), which summarises the rationale behind the approach in *Metro*:[11]

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[9] See *Bayer* at [102].
[10] See in particular [36].
[11] See *Pierre Fabre* at [39] to [41].

"39. 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'.

40. However, it has always been recognised in the case-law of the Court that there are legitimate requirements, such as the maintenance of a specialist trade capable of providing specific services as regards high-quality and high-technology products, which may justify a reduction of price competition in favour of competition relating to factors other than price. Systems of selective distribution, in so far as they aim at the attainment of a legitimate goal capable of improving competition in relation to factors other than price, therefore constitute an element of competition which is in conformity with Article 101(1) TFEU (*AEG-Telefunken v Commission*, paragraph 33).

41. In that regard, the Court has already pointed out that the organisation of such a network is not prohibited by Article 101(1) TFEU, to the extent that resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion, that the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use and, finally, that the criteria laid down do not go beyond what is necessary (Case 26/76 *Metro SB-Großmärkte v Commission* [1977] ECR 1875, paragraph 20, and Case 31/80 *L'Oréal* [1980] ECR 3775, paragraphs 15 and 16)."

34. 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.

35. While there will inevitably be a focus on the contractual provision in question, the CJEU has consistently held that it is necessary to look at whether the whole selective distribution system meets the *Metro* criteria, not just the contractual provision at issue. See not only *Pierre Fabre* at [41], cited above, but also, for

example, Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* ("*Coty*") at [40] (our emphasis):

> "In the context of such a system, a specific contractual clause designed to preserve the luxury image of the goods at issue is lawful under Article 101(1) TFEU provided that the criteria mentioned in paragraph 36 of the present judgment are met."

36. *Coty* concerned luxury goods (perfumes), while *Pierre Fabre* was about cosmetic and personal care products, which were said to require support at the point of sale from someone trained in the technical and scientific characteristics of the product (which were not found by the CJEU to fall within the *Metro* safe harbour). It is not yet clear from the case law (including case law in EU member states which is not necessarily consistent) which type of products will satisfy requirement (iii) listed above. For example, what qualifies as a luxury good, in the *Coty* sense? And how might the "luxury" aspect interact with the need for specialist advice? What are the non-luxury items, if any, that satisfy the *Metro* conditions? It appears that there are different approaches adopted by various courts and authorities on this question. We will return to this point when we consider the application of the *Metro* doctrine to this case.

(4) "By Object" - outside the *Metro* "safe harbour"

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. In Case 107/82 *AEG Telefunken AG v Commission*, ("*AEG-Telefunken*") the CJEU said this at [33] and [34]:

> "33 It is common ground that agreements constituting a selective system necessarily affect competition in the common market. However, it has always been recognized in the case-law of the Court that there are legitimate requirements, such as the maintenance of a specialist trade capable of providing specific services as regards high-quality and high-technology products, which may justify a reduction of price competition in favour of competition relating to factors other than price. Systems of selective distribution, in so far as they aim at the attainment of a legitimate goal capable of improving competition in relation to factors other than price, therefore constitute an element of competition which is in conformity with Article 85 (1).
>
> 34 The limitations inherent in a selective distribution system are however acceptable only on condition that their aim is in fact an improvement in competition in the sense above mentioned. Otherwise they would have no

justification inasmuch as their sole effect would be to reduce price competition."

38. After referring to *Metro*, the Court then said at [36]:

> "36 It follows that the operation of a selective distribution system based on criteria other than those mentioned above constitutes an infringement of Article 85(1). The position is the same where a system which is in principle in conformity with Community law is applied in practice in a manner incompatible therewith."

39. The Court then considered the argument advanced by AEG Telefunken that higher prices were justifiable for the survival of the specialist trade (the case concerned the admission to a selective distribution system for specialist electronic goods, where retailers were required to agree certain pricing policies). It rejected that argument in [42]:

> "42 A restriction of price competition must however be regarded as being inherent in any selective distribution system in view of the fact that prices charged by specialist traders necessarily remain within a much narrower span than that which might be envisaged in the case of competition between specialist and non-specialist traders. That restriction is counterbalanced by competition as regards the quality of the services supplied to customers, which would not normally be possible in the absence of an appropriate profit margin making it possible to support the higher expenses connected with those services. The maintenance of a certain level of prices is therefore lawful, but only to the extent to which it is strictly justified by the requirements of a system within which competition must continue to perform the functions assigned to it by the Treaty. In fact the object of such a system is solely the improvement of competition in so far as it relates to factors other than prices and not the guarantee of a high profit margin for approved re-sellers."

40. The point was repeated by the Court in *Pierre Fabre* at [39] and [40].

41. It has therefore been suggested by some commentators[12] that if a selective distribution system fails to meet the requirements of *Metro* then it will be a "by object" restriction. In our view, there is no presumption to that effect. Our understanding of the law is as follows:

    (1) A restriction of price competition is inherent in any selective distribution system. See *AEG-Telefunken* at [42].

[12] See for example Whish and Bailey, *Competition Law* (10th ed. Oxford University Press) at page 135.

(2) Consequently, a failure by a selective distribution system to meet the *Metro* requirements suggests that there may well be a "by object" restriction. See *Pierre Fabre* at [39].

(3) There is now a well-established approach to determining whether or not a contractual provision is a "by object" restriction. See the summary of the case law in Case C-211/22 *Super Bock Bebidas SA v Autoridade da Concorrência* ("*Super Bock",* to which we will return). That requires an assessment of the nature of the provision, the objective aims it pursues and the legal and economic context of which it is a part.

(4) In our view, that assessment is indispensable in reaching any conclusion on the question of whether the provision is a "by object" infringement. That is consistent, we consider, with the approach taken in *Ping*. It is also consistent with the opinion delivered by Advocate General Wahl in *Coty* at [116]:

> "116. Even on the assumption that it might be concluded in the present case that the clause at issue could be caught by Article 101(1) TFEU, owing in particular to failure to comply with the Metro criteria, it will still be necessary to examine whether the clause has an effect restrictive of competition, and in particular to determine whether it amounts to a restriction 'by object' within the meaning of that provision."

(5) This analytical framework is also consistent with the approach the Court took in *AEG-Telefunken*, as it did go on (in [40] and following) to consider whether the objective of the contractual provision in question could be considered legitimate.

(5) The correct approach to the "by object" assessment

42. As noted above, there is now a considerable degree of clarity about the framework in which the court should determine whether or not a restriction is a "by object" infringement:

(1) The key question is to determine whether the contractual provision presents a sufficient degree of harm for competition. In determining this question, it is necessary to consider the content of the relevant provision,

the objective aim it pursues and the legal and economic context of which it is a part (Case C-67/13 *Groupement des Cartes Bancaires v Commission* ("*Cartes Bancaires")* at [53]).

(2) The corollary to the preceding point is that establishing the object of a practice is a context-specific inquiry that must consider the distinctive aspects of the case. It would be incorrect to think of "by object" infringements as abstract categories, or as a finite "off-the-shelf" list from which one cannot deviate. The fact that a particular practice is, generally speaking, beneficial for competition does not mean that it cannot be found to restrict competition by object in a particular economic and legal context (*Ping* at [102]).

(3) In that context, the notion of restriction by object is to be interpreted 'restrictively' or 'strictly' (*Cartes Bancaires* at [58] and Case C-201/19 P *Servier SAS and Others v European Commission* [75]).

(4) Both the inter-brand and intra-brand dimensions of competition are relevant when assessing whether a contractual provision presents a sufficient degree of harm and is therefore restrictive by object. It is sufficient that an agreement has the object of restricting one of these two dimensions of competition to establish an infringement to the requisite legal standard (Joined Cases C-56/64 and C-58/64 *Consten and Grundig* v *Commission* [1966] ECR 299).

(5) Vertical restraints are less likely to restrict competition by object, even though they may do so in some circumstances, including those in issue in *Ping*. This principle is mirrored in the VBE, which takes a generally lenient approach to these 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 (*Ping* at [24] to [26]).

(6) The case law provides examples showing that, notwithstanding the point above, vertical restraints sometimes restrict competition by object. As

already pointed out, in *Pierre Fabre* the CJEU explained that there may be circumstances where selective distribution systems amount to a "by object" infringement. More precisely, it held at [39] that "such agreements necessarily affect competition in the common market" and "are to be considered, in the absence of objective justification, as 'restrictions by object'".

(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.[13] 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

[13] This decision post-dates the departure of the UK from the EU. It is therefore not binding on any UK court, and we do not treat it as so. We are entitled, pursuant to section 6(2) of the European Union (Withdrawal) Act 2018, to have regard to it if it is relevant to a matter before us. In the event, we think that nothing material in this case turns on the precise findings of the CJEU in *Super Bock* and we refer to it only as a convenient summary of pre-Brexit case law.

particular, of the relevant legal and economic context. See also Case C-32/11 *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 patent 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[14] 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

[14] At [85].

> 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.

49. An example of a set of vertical restraints that were found to restrict competition by object is provided by the European Commission's decision in C-AT. 40428 *Guess* of 17 December 2018. That decision concerned practices aimed at restricting Guess's authorised distributors in its selective distribution system for branded fashion clothing from using Guess trademarks for the purpose of online search advertising and from selling online without specific authorisation from Guess. The European Commission concluded that the objective aim of a contractual provision imposing online search advertising restraints was not legitimate, in the sense that its purpose was to restrict intra-brand competition (and, more precisely "to reduce competitive pressure by authorised retailers on Guess's own online retail activities and to keep down its own advertising costs").[15]

50. There are two further points which are of relevance in this case to the legal context in the assessment of whether there is a "by object" infringement.

51. First, 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,

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[15] See *Guess* Decision, at [118].

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. [16] 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.”

53. Secondly, as the passage in [38] of Super Bock already quoted indicates, the legal context will include whether the contractual provision may fall within the category of “hardcore restrictions” for the purpose of the VBE, as explained in [59] below.

(6) The VBE

54. On and prior to 30 December 2020, section 10(2) of the Act provided that an agreement was exempt from the Chapter I Prohibition if it did not affect trade

[16] As with *Super Bock*, this decision post-dates the departure of the UK from the EU. It is therefore not binding on any UK court, and we do not treat it as so. We are entitled, pursuant to section 6(2) of the European Union (Withdrawal) Act 2018, to have regard to it if it is relevant to a matter before us. We find the reasoning persuasive and we do have regard to the decision in respect of the point referred to in [51], namely the relevance in a “by object” assessment of the absence of a framework for the exercise of a discretion.

between Member States but otherwise fell within a category of agreement which was exempt from the European Union prohibition by virtue of a Regulation.

55. The VBE was therefore in force at the time of Deckers's refusal of the Running Shoes website and cancellation of Up & Running's account. It exempted certain vertical agreements from Article 101(1) of the TFEU (the equivalent EU prohibition to the Chapter I Prohibition).

56. Article 1 of the VBE defines a "selective distribution system" as a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system.

57. Articles 2 to 4 of the VBE exempt vertical agreements from Article 101(1) where the market share held by each of the supplier/buyer does not exceed 30% of the relevant market on which it sells/purchases the contract goods or services, save in relation to hardcore restrictions.

58. Where vertical agreements are entered into between competing undertakings, Article 2(4)(a) of the VBE provides that the exemption only applies to non-reciprocal vertical agreements where the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level.

59. Hardcore restrictions, as defined in Article 4, do not benefit from the exemption. These are identified as 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;

(b) the restriction of the territory into which or of the customers to whom a buyer party to the agreement, without prejudice to a restriction on its place of establishment, may sell the contract goods or services, except…

…

(iii) the restriction of sales by the members of a selective distribution system to unauthorised distributors within the territory reserved by the supplier to operate that system;…

(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."

60. The Commission Guidelines on Vertical Restraints (2010/C 130/01) ("the Commission Guidelines") set out the principles for the assessment of vertical agreements under Article 101 TFEU.

61. The Commission Guidelines note (at [25(a)]) that the VBE applies to agreements and concerted practices, not unilateral conduct. In cases where there is no explicit agreement expressing the concurrence of wills, it is necessary to prove that the unilateral policy of one party receives the acquiescence of the other party – for example, where one party requires the cooperation of another party for the implementation of a unilateral policy and the second party complies with that requirement by implementing the policy.

62. The hardcore restriction described in Article 4(a) of the VBE concerns RPM; agreements or concerted practices with the direct or indirect object of establishing a fixed or minimum resale price. The Commission Guidelines note at [48] that RPM can be achieved through indirect means, such as fixing the maximum level of discount the distributor can grant from a prescribed price level, threats, intimidation, warnings, penalties, delay or suspension of deliveries or contract terminations in relation to observance of a given price level.

63. The Commission Guidelines note at [52]-[56] that, in principle, every distributor must be allowed to use the internet to sell products. Within a selective distribution system dealers should be free to sell to all end users, with the help of the internet. However, under the VBE, suppliers may require quality

standards for the use of internet sites to resell goods. For example, selective distribution systems may require that distributors have one or more bricks and mortar shops as a condition for becoming a member. Any obligation which dissuades appointed dealers from using the internet to reach a greater number and variety of customers by imposing criteria for online sales which are not overall equivalent to the criteria imposed for the sales from the bricks and mortar shop is a hardcore restriction. This means that criteria imposed for online sales should pursue the same objectives and achieve comparable results as those for offline sales, and the difference between the criteria must be justified by the different nature of the two distribution modes.

64. The Commission Guidelines state that, to assess the possible anti-competitive effects of selective distribution under Article 101(1), a distinction needs to be made between purely qualitative selective distribution (citing *Metro*) and quantitative selective distribution, which adds further criteria for selection that limits the potential number of dealers by, for instance, requiring minimum or maximum sales or fixing the number of dealers (at [175]). The Commission Guidelines note that where the characteristics of the product do not require selective distribution or do not require the applied criteria, such a distribution system will not generally bring about sufficient efficiency enhancing effects to counterbalance a significant reduction in intra-brand competition (see [176]).

D. CHRONOLOGY OF MAIN EVENTS

65. Deckers began to supply HOKA branded running shoes to Up & Running on a wholesale basis from 2016.

66. On 10 July 2019, Mr Hagger sent an email (the "2019 email") to all retailers supplied by Deckers stating:

> "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."

67. The closure of bricks and mortar stores during COVID-19 lockdowns left Up & Running with significant volumes of residual stock, which was becoming out of date as new season stock was released. In order to clear this stock, Up & Running sought to create a separate business unit, effected online by the Running Shoes website. The new website was to be based on a different proposition from the Up & Running stores and existing online presence; it would carry residual stock, to be sold at a significant discount.

68. On or about 23 July 2020, Jonathan Midwood (then a General Manager for Up & Running) met with Carl Hagger and Steve Yates (respectively Deckers's National Sales Manager/Head of Sales for HOKA UK, and the Strategic Account Manager responsible for managing Up & Running's account). Mr Midwood put forward the proposal for the Running Shoes website. This amounted to a request for permission under Clause 15 of Deckers's Terms and Conditions and both parties treated it as such.

69. Permission was refused in an email from Mr Yates to Mr Midwood dated 14 August 2020. The email stated:

> "Firstly, thanks very much for taking the time to explain your proposal for Runningshoes.co.uk, however, it is with regret that HOKA must decline to be a part of this new venture.
>
> The proposition of Runningshoes.co.uk goes against the fundamental principles of our brand strategy."

70. Between 14 August and 15 September 2020, Up & Running appeared to accept the refusal of permission. However, from 15 September, Up & Running began to challenge that decision. An email from Mr Hagger to Alex Henderson, in-house legal counsel for Deckers, dated 15 September 2020 records a telephone conversation earlier that day between Mr Hagger and Mr Macfarlane. In the email, Mr Hagger said: "We told them that what they have presented goes

against our brand strategy, and as per our T&C's we wouldn't open a store fascia with an existing customer that does not clearly state to the consumer who they are buying from." The email records that Mr Macfarlane expressed his dissatisfaction in strong terms.

71. On or around 11 November 2020, the Running Shoes website went live, selling HOKA stock which Up & Running had previously purchased from Deckers. The website contained a reference to Up & Running ownership in its terms and conditions section, but there was otherwise no overt indication of the linkage between the Running Shoes website and Up & Running.

72. On 24 November 2020, Mr Hagger became aware that HOKA products were being sold on the Running Shoes website. There were angry exchanges between Mr Hagger and Mr Macfarlane, who refused to remove the HOKA products from the website. Screenshots from that date show that the Running Shoes website was discounting the Spring/Summer season HOKA shoes by 30% (while also selling some Autumn/Winter shoes at full price).

73. Mr Hagger informed Mr Macfarlane by telephone on 14 December 2020 that Deckers had decided to terminate Up & Running's account, with 12 months' notice.

74. In around February 2021, Up & Running added the words "powered by Up & Running" to the Running Shoes website, but otherwise Up & Running did not change its approach and it continued to sell HOKA product on the Running Shoes website. By that stage, the relationship between Up & Running and Deckers had deteriorated badly.

75. In July 2022 Deckers brought a claim against Up & Running in the County Court for unpaid invoices. Up & Running attempted to amend its Defence and raise a cross claim alleging an infringement of competition law but was not permitted to do so. In the County Court proceedings:

(1) Mr Henderson provided a witness statement in which he described the reasons for refusal of permission, citing Mr Hagger who stated "in large

part", it was due to the website's URL which bore no relation to the Up & Running name. That statement also drew the distinction between the stock for sale on the respective websites (saying, "To the best of our knowledge the Running Shoes website would only offer for sale goods from previous selling seasons, whereas upandrunning.co.uk primarily sold shoes from the current selling season"). These "and other differences between the two websites" were described as the primary reasons why the Running Shoes website had not been authorised.

(2) Mr Hagger provided a witness statement stating that Deckers's reasons for deciding not to authorise sales of HOKA through the Running Shoes website "include[ed] the fact that it would not be clear to consumers that the [Running Shoes] website was owned and operated by [Up & Running]. Deckers's view was that the goodwill and brand recognition which [Up & Running] had generated with dedicated running consumers through the operation of its bricks and mortar stores would not be present on the [Running Shoes] website as it was on the www.upandrunning.co.uk website".

E. THE EVIDENCE

(1) Factual witnesses

76. Mr Macfarlane, the Managing Director of Up & Running, was the sole witness of fact for Up & Running at trial. Mr Hagger, Mr Henderson and Mr Yates gave evidence for Deckers.

(a) Dennis Macfarlane

77. In his witness statement, Mr Macfarlane described Up & Running's business model, the trading relationship between Up & Running and Deckers, the context in which the Running Shoes website was launched, and his recollection of the refusal by Deckers to approve the website and eventual cancellation of Up & Running's HOKA account.

78. Mr Macfarlane's witness statement explained that Up & Running, founded in 1992, is one of only two specialist running retailers in the UK operating over 30 stores. Seven of Up & Running's retail stores are franchises.

79. In his witness statement, Mr Macfarlane explained that HOKA had been a focus brand for Up & Running because the shoes are well cushioned and provide effective support and injury prevention. Up & Running had started selling HOKA shoes in 2016, and Mr Macfarlane described the historic trading relationship between Up & Running and Deckers as "very good".

80. Mr Macfarlane stated that he was not aware of any formal agreements, including any selective distribution agreement, underpinning the trading relationship between Up & Running and Deckers. He stated that Deckers's policy only to allow retailers to sell HOKA via one website came as a "surprise", "out of the blue".

81. Describing Up & Running's business model, Mr Macfarlane's witness statement outlined that, while internet retail now plays an important part in the business, it was not a major focus until the COVID-19 pandemic in 2020. "Bricks and mortar" retail underlies Up & Running's customer service ethos which is based on bespoke fittings and gait analysis, while internet retail is price driven and can undercut bricks and mortar stores. The witness statement explained that old/cheaper models of shoes would typically not be kept instore on shelves, because customers will buy the old model (assuming only the colour has been updated) at a discount, reducing store profits. There was a similar problem with discounting on upandrunning.co.uk, the website associated with the stores. As Mr Macfarlane put it: "the challenges of undercutting your own stores causes issues with customers demanding refunds and creating mistrust". The Running Shoes website was set up to avoid these problems.

82. Mr Macfarlane's witness statement explained that, while Deckers was told that the Running Shoes website would be a discount website, and suppliers were sent the business plan for the website, no templates of the website were available to third parties before the site was launched in early November 2020.

83. When he gave oral evidence, Mr Macfarlane sought to suggest that Deckers could not have known at the time permission was refused that customers would not know whether the site was owned or operated by Up & Running. However, this conflicts with his own evidence that the rationale underpinning the new website was that the Up & Running bricks and mortar stores should not be compromised by a perception that customers could obtain cheaper prices online. The intention (and reality) of the Running Shoes website as proposed and initially launched was that consumers would not easily have identified the link between the different business units.

84. Mr Macfarlane's passion for Up & Running was clear through his oral evidence, and the events described above have clearly had an impact on him. The Tribunal observed a tendency on his part to "bluff", and state as fact something which, when pushed, he accepted to be no more than a belief. Apart from that, however, he gave evidence in a straightforward manner. As it happens, his evidence is not material to the significant factual issues in the case (which largely turn on the evidence of the Deckers witnesses).

(b) Carl Hagger

85. Mr Hagger has been the National Sales Manager/Head of Sales for HOKA UK and Ireland since 2016. In his first witness statement for these proceedings, Mr Hagger described the relationship between Deckers and Up & Running since 2016, including in relation to the appointment of Up & Running as a customer of Deckers, discussions relating to the Running Shoes website, and his recollection of the events surrounding the termination of Up & Running's retail relationship with Deckers.

86. The witness statement explained that Deckers guards its distribution carefully to ensure HOKA products are sold "in the right environment, with the right level of service". Deckers assigns its retail customers to categories within its distribution "ecosystem" which determines which products it supplies to them based on the relevance of the product to the consumer base that the retailer targets and the retailer's ability to service/sell to the customer proficiently. Mr Hagger described the criteria applied by Deckers in assessing retailers'

suitability to sell HOKA and stated that the system employed by Deckers was more informal than in his previous roles at other wholesalers. Deckers's decision as to whether to supply a retailer was in part based on:

> "the 'service' they offer (e.g. expertise of sales staff in advising potential customers on the benefits of HOKA, the fitting and testing areas), the 'presentation' of goods (e.g. retailers must present HOKA in premises with a modern look and feel, with a designated footwear area and an area for consumers to try products on) and the range of a retailer's 'offering' (which means they have an appropriate assortment of goods for different requirements and different brands)."

87. The statement noted that if a retailer was not approved, Deckers would usually provide a general response rather than specific feedback, to preserve relationships with retailers who may become suitable in the future.

88. In his statement, Mr Hagger recounted the meeting at which the Running Shoes website was proposed. His concerns about the website were described as follows:

    (1) He was sceptical about Up & Running's logistical capabilities, and whether it had the warehousing facilities to store and ship the stock efficiently.

    (2) He did not believe Up & Running had the financial means to agree to a "Return to Vendor" agreement in return for an order of three to five times the size.

    (3) Up & Running was already being extended around £90,000 of credit by Hoka, despite a third-party credit profiler having recommended a credit limit of £[…][✂]. Mr Hagger said that Deckers could not stretch Up & Running's credit limit any further to fund the venture.

    (4) The Running Shoes website did not comply with Deckers's criteria requiring online stores to have a domain name that was identical or highly similar to the retailer's bricks and mortar store. This was referred to at trial as the "signposting" requirement.

(5) Up & Running's strength lay in its expertise in bricks and mortar retail and it did not have the credibility or infrastructure for Deckers to be inclined to be involved. Deckers considered Up & Running should focus on the development of its online offering via its existing website, which held all of its existing brand integrity and reputation.

89. For these reasons, Mr Hagger's witness statement explained, Deckers was immediately against HOKA being sold on the Running Shoes website. The statement recorded that Mr Hagger and Mr Yates subsequently discussed the proposal with Mr Henderson (in his role as a legal adviser) and Cameron Black (a sales director for Deckers) and decided they did not want to be part of the venture. That group agreed the wording of the email from Mr Yates on 14 August 2020 in which this message was communicated to Up & Running.

90. Mr Hagger's written evidence was that there was categorically no discussion within Deckers about the fact that the Running Shoes website offered products at a discount, and this was never a factor in it being rejected from the HOKA distribution network. Mr Hagger also stated that the deliberate lack of signposting back to the Up & Running brand was key in Deckers's decision to decline to authorise the Running Shoes website in line with its terms and conditions.

91. Following the launch of the Running Shoes website, outlined above, Mr Hagger's written evidence is that the group referred to above decided that terminating Up & Running's account was the only logical solution given that Up & Running was refusing to remove HOKA shoes from the Running Shoes website. Up & Running was served with 12 months' notice of Deckers's decision to terminate, in the hope that Up & Running would change its approach and that HOKA product would be removed from sale on the Running Shoes website, so that the parties could return to their original trading arrangements.

92. In his witness statement, Mr Hagger described the relationship between Deckers and Mr Macfarlane as volatile but, prior to August 2020, workable.

93. Mr Hagger provided a second witness statement by way of reply evidence and in order to correct an error in his first statement about the extent of his involvement in the selection of Up & Running as a retailer. Mr Hagger responded to factual assertions contained within Mr Macfarlane's witness statement about the extent to which Deckers had visited Up & Running premises. Mr Hagger stated that Deckers carried out a holistic appraisal of both the bricks and mortar and online offerings of a new retailer at the time of selection and that, while he was not responsible for Up & Running's initial appointment, he was aware of the retailer and its reputation at the time and considered it complied with Deckers's distribution criteria.

94. For reasons expanded upon below, the Tribunal did not find Mr Hagger's oral evidence to be convincing. Although "signposting" was advanced as a primary reason behind Deckers's refusal to approve the Running Shoes website, Mr Hagger's position conflicted with various other evidence, both from other Deckers witnesses and in the documentary record. We were left with the impression that Mr Hagger was working hard to maintain an edifice that had been created to justify the refusal of permission, rather than being straightforward and open with us.

(c) Alex Henderson

95. Mr Henderson has worked as European Legal Counsel, then Senior European Legal Counsel and Company Director for the Defendant since 2013. His witness statement provided an overview of the HOKA business, sales figures and channels, and brand awareness.

96. He provided a summary of the Terms and Conditions, which he understood included wording designed to allow Deckers to enforce standards for its retailers.

97. In relation to Deckers's pricing policy, Mr Henderson explained that Deckers provides a recommended retail price by way of guidance, and that the retailer ultimately decides the price that goods are sold to end consumers.

98. To the extent that Mr Henderson was involved in the refusal of permission for the Running Shoes website or the termination of Up & Running's account with Deckers, his written evidence was that he agreed with Mr Hagger's recollection as set out in Mr Hagger's first statement. He stated that, while he was not involved in the commercial merits of the decision to terminate, he advised on how to do so in a legally permissible way.

99. In his oral evidence, Mr Henderson appeared to be a careful witness who seemed clear on the chronology of his involvement in the decision to refuse permission for the Running Shoes website.

100. We were surprised that Mr Henderson had not set out more fully his recollection of crucial meetings in his witness statement, preferring instead simply to endorse the account of Mr Hagger. When pressed on certain points, Mr Henderson in fact departed from alignment with Mr Hagger, sometimes to a surprising degree. Our assessment is that Mr Henderson wished to be truthful but had also set out to say as little as possible. It seemed to us that he sought to avoid being put in a position where he was unable to defend Deckers's position in the case.

101. Mr Henderson was responsible for the timing of a communication sent to Deckers's employees to require them to preserve documents in light of the litigation commenced by Up & Running. This communication was sent on 1 December 2023. That seems to us to be an unreasonably late date on which to take this step, given that Mr Macfarlane had first threatened litigation in a text message of 15 September 2020 and wrote that he "welcomed a legal battle" on 25 November 2020. While Mr Henderson dismissed these threats as not credible, which may be arguable, we do not think that can be said about threats of litigation made in an email of 8 April 2021, where Mr Macfarlane said "I am putting you on notice that I shall pursue Deckers through all legal channel" (in that instance under the Unfair Contract Terms Act 1977). Further, and putting the matter beyond any argument, there were County Court proceedings underway in June 2022, in which Up & Running had sought to introduce a cross claim under the Act. Given that Deckers operated a document retention policy which automatically deleted documents on Deckers's IT system after one year,

unless the document was saved in a protected space, that delay seems all the more egregious. He was unable to give us a satisfactory reason for the delay.

(d) Steve Yates

102. Mr Yates has been a Strategic Account Manager with Deckers since 2019.

103. Mr Yates stated in his witness statement his understanding that Deckers only worked with retailers who met certain standards (around presentation of products, in-store standards, staff training etc) in order to present HOKA as a premium brand. Strategic accounts were classified primarily with reference to turnover/revenue, as well as strategic considerations such as opportunities for growth. These accounts represented a significant proportion of the wholesaling of HOKA product in the UK.

104. Up & Running was a strategic account within Mr Yates's portfolio. His witness statement explained that he was involved in the running and subsequent termination of the account but did not comment on that because his recollection was the same as Mr Hagger's in relation to the discussions covered in Mr Hagger's statement.

105. Mr Yates confirmed in oral evidence that the reasons for refusing permission were essentially the protection of the selective distribution model through adherence to the brand strategy of Deckers and in particular:

    (1) The desire to concentrate supply through strategic partners (like the Up & Running business).

    (2) The desire to continue to ensure promotion of new season stock as a prestige product.

    (3) The desire to maintain the current approach to clearance, which took place by way of separate distribution by specific online retailers appointed by Deckers for that purpose and through Deckers's own online direct to customer sales.

106. Mr Yates confirmed that the signposting concept was introduced after the initial refusal and that the real reason for the refusal given on 14 August was that it went against Deckers's strategy, as described above.

107. It was unfortunate that the brand strategy had not been mentioned by any previous Deckers witnesses (Mr Yates gave evidence last). In fact, the earlier witnesses (Mr Hagger and Mr Henderson) had both been asked about the thinking behind Deckers's selective distribution system and had failed to mention the brand strategy at all, despite its obvious relevance. It was even more unfortunate that there are in existence documents which illustrate this brand strategy (consistent with Mr Yates's explanation), but they had not been disclosed despite falling squarely within the Tribunal's directions for the disclosure exercise to be carried out by Deckers. As far as we were able to identify, having pressed Deckers on the matter, this was due to poor instruction and oversight on the part of Deckers's solicitors, rather than any deliberate concealment.

108. Mr Yates confirmed in oral evidence that the decision to terminate Up & Running's account was "above his paygrade". However, he provided a detailed and cohesive description of Deckers's brand strategy which went further than any evidence previously put before the Tribunal, and an explanation of the key reasons the Running Shoes website had not aligned with that strategy. The Tribunal considered Mr Yates to be a straightforward and honest witness, and indeed the only Deckers witness who was willing to tell us what the real position was, rather than seeking to support what appeared to be a construct by which Deckers sought to justify their actions.

(e) Dean Tiller

109. Dean Tiller provided a witness statement about Deckers's email retention policy. He was not required for cross-examination, and his witness statement was taken as his evidence.

(2) Expert evidence

110. The expert evidence in this case is largely relevant to market definition, market shares and whether the exemptions, including the VBE, are engaged. In this context, by a Reasoned Order of the Tribunal made on 2 April 2024, Deckers was granted permission to adduce expert evidence concerning:

    (1) identification of the relevant markets;

    (2) the products that are likely to comprise those markets; and

    (3) the market shares of the parties on the markets identified.

    Up & Running was granted permission to adduce expert evidence in response.

111. Deckers instructed Adrian Majumdar, a professional economist with expertise in competition matters, who produced an expert report dated 24 May 2024 concerning each of the matters identified above. Up & Running instructed Chris Makin, a chartered accountant, to produce an expert report in response, which was filed on 23 June 2024. As Mr Makin does not have relevant professional experience in competition matters, his report was confined to the veracity of the declared turnover for both parties, from which the market shares of the parties on the markets were calculated. Dr Majumdar also produced a further supplementary report dated 21 June 2024 concerning the veracity of the revenue figures provided to him by Deckers and the steps that he took to verify these figures.

112. Ahead of the trial, the experts produced a joint expert statement dated 28 June 2024 and updated on 12 July 2024, which outlined a significant degree of agreement between the experts on the issues identified.

113. Mr Makin was not required for cross examination, so his expert report was taken as his evidence.

114. Dr Majumdar was called to give evidence but was only asked two clarificatory questions in cross-examination. The answers to those questions are not contentious. We are accordingly left with the written reports of the experts and the joint expert statement as the unchallenged corpus of expert evidence.

F. KEY FINDINGS OF FACT

115. We start by making some general observations about the factual evidence and some of the difficulties which arise from the way that evidence was presented:

(1) Ms Berridge urged us to rely on contemporaneous documentation in preference to witness recollection, relying on the observations of Leggat J (as he then was) in *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 ("*Gestmin*") at [15] to [22], to the effect that witness recollection is often flawed. That well known and well-respected passage is of course powerful guidance.

(2) In this case, the position is complicated by the document destruction policy implemented by Deckers, together with the delay by Mr Henderson in advising the business to preserve documents despite threats of litigation. That means that there are gaps in the documentary evidence, most notably between July and December 2020, when many of the key events occurred and key decisions were taken. For example, there are no internal emails preceding Mr Yates's 14 August 2020 email, which we might expect to exist for the purposes of the relevant Deckers executives agreeing on the wording of the email (Mr Yates said in his email that the proposal "required conversations with various departments and senior management and Mr Hagger's evidence was that there had been discussions between executives at Deckers before the 14 August email was sent, although we have doubts about the detail of Mr Hagger's evidence in this respect).

(3) A further complication is that, of the witnesses called by Deckers, only Mr Hagger set out in his witness statement any detail of his recollection of events during this crucial period. In their witness statements, Mr

Henderson and Mr Yates referred to Mr Hagger's account in his witness statement and generally agreed with it. However, under questioning, both advanced versions of events which conflicted with Mr Hagger's. That tends to support the observations in *Gestmin* referred to above, but leaves us in the difficult position of reconciling conflicting evidence from Deckers's own witnesses, without the benefit of a full documentary record.

(4) In addition, it became apparent at the end of the oral evidence of Deckers's witnesses that there were defects in Deckers's disclosure, with important documents relating to brand strategy not having been disclosed properly.

(5) Finally on this subject, Up & Running was not represented by counsel. Mr Macfarlane, as a litigant in person, conducted his cross examinations remarkably well, but they were not (with no disrespect to him intended) a substitute for skilled cross examination by experienced counsel. The Tribunal sought where appropriate to address this by drawing out evidence to fill obvious gaps, but there were natural limitations to that exercise. As a result, the evidential record is not as full as one might like.

116. All of this is particularly important because of the conflict of evidence between the Deckers witnesses, which we need to resolve. This conflict involves what is probably the central factual point in the case, which is the reason why Deckers refused permission for the sale of HOKA shoes on the Running Shoes website, as communicated by Mr Yates's email of 14 August 2020. We have had to piece together a variety of items of documentary and oral evidence, as well as using our judgment to assess the credibility of witnesses and to apply a degree of common sense to the submissions made to us.

117. First, however, we will record our findings in relation to the selective distribution system which was being operated by Deckers, as well as the separate channel for clearance of residual Deckers stock.

(1) Our findings about the selective distribution system and the channel for clearance of Deckers's surplus stock

118. We preface this section by observing that Deckers was in our judgment operating a two-channel distribution strategy:

(1) One channel being the sale of seasonal HOKA product through a network of retailers operating bricks and mortar and/or online stores (the "Main Retail Channel").

(2) The second being the sale of residual, out of season HOKA product through a group of online retailers appointed specifically to operate on a clearance or outlet basis (the "Clearance Channel") and through Deckers's own direct to customer online sales.

119. By August 2020, Deckers had in place a form of selective distribution system for the Main Retail Channel, reflected in documentary form in:

(1) Clauses 5 and 6 of the Terms and Conditions in relation to bricks and mortar retail operations.

(2) Clause 15 of the Terms and Conditions in relation to online sales, supplemented by the 2019 email.

(3) Various other retailer classification and strategy documents.

120. Some of the key features of the selective distribution system for the Main Retail Channel were as follows:

(1) HOKA likes to position itself as a premium, specialist brand that sells high-quality shoes that cater to various categories of runners. They became successful on the back of an innovative proposition in the design of the shoe.

(2) Retailers are selected in accordance with this positioning strategy. There are various tiers of retailers, but it is apparent that they are categorised

for the purposes of determining what type of product in the range they will be offered based on, among other things, their reputation, the look and feel of their premises and their ability to provide pre-sales advice.

(3) The criteria for the selection of retailers are not transparent and are not applied in a uniform manner. It is far from straightforward to tease out what they are. It became apparent during the trial that some criteria are never communicated to the retailer, that other criteria are not applied in a consistent manner and that Deckers maintained considerable discretion about how they would be applied.

(4) The range of products that retailers offer to consumers is an element of the positioning strategy. The (at least) tacit understanding between the retailer and the members of the distribution network is that the latter will offer and promote as a prestige product each new season's range of shoes (even though nothing prevents them from selling out of season products).

(5) In relation to older stock (being the residual stock), the unwritten expectation was that it would be disposed of in a way that did not unduly threaten the premium positioning and sales of new season product (for example, by progressively discounting residual stock in advance of the arrival of new season stock, rather than displaying large quantities of heavily discounted residual stock alongside new season's stock).

(6) This approach largely aligns the interests of Deckers and the retailers. Both wish to see as much of their new season stock displayed and sold at as full a price as possible. As the season progresses, retailers will begin appropriate discounting to avoid an overhang of the prior season residual stock affecting the new season positioning and price.

(7) There are, at least to some extent, quantitative criteria that are taken into consideration in Deckers's approach to approval of retailers. Several Deckers's witnesses made it clear that whether to authorise a new retailer in a particular location would depend in part on how many other

retailers there already were in that location.[17] There is, in addition, a deliberate and explicit internal policy (in the brand strategy) aimed at reducing the number of retailers (at least in the sense of a desire to focus on strategic accounts) and the evidence before us demonstrated that the total number of retailers to whom Deckers supplied was falling.

(8) Retailers sometimes have run separate business units and Deckers treat them as separate accounts with different identities. Shoefit and Precious Soles is one example of this and was discussed with Mr Hagger during his evidence.[18]

121. The selective distribution arrangements for the Main Retail Channel were agreed to by retailers by reason of agreement to the Terms and Conditions, but also by way of tacit acceptance of the approach to the allocation of stock, the provision by retailers of certain levels of service and other practical considerations about the way HOKA products were displayed and sold.

122. Up & Running was a retailer that contributed to the 'core' distribution strategy for the Main Retail Channel. It had a well-established presence and a reputation for providing the sort of pre-sales advice in which Deckers was interested. It had agreed to the Terms and Conditions through the approval process to be supplied with HOKA shoes and by way of course of conduct and, for the most part, it tacitly accepted the approach to the positioning of new season's stock.

123. Prior to COVID-19, it appears that these arrangements were viewed by Up & Running (and presumably other, similar retailers) as mutually beneficial, as it was in the interests of Up & Running to ensure that new season stock was displayed and sold as a premium product.[19]

124. However, the selective distribution system operated by Deckers suffered from a number of flaws:

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[17] See for example Day 3, page 21, line 15 to page 22, line 5 and Mr Hagger's first statement at [51].
[18] See Day 3, page 23, lines 8 to 20.
[19] See oral evidence of Mr Macfarlane, day 2, page 63, line 1 to page 66 line 13.

(1) There are provisions in the Terms and Conditions which contain elements of what one would expect to see in a selective distribution system. For example:

> "5. Company shall sell Products only to retailers which have been approved by Company. Products may only be sold through Retailer's specific individual retail premises which have been approved in advance by Company. Retailer shall provide a minimum of thirty (30) days written notice to Company prior to any planned change of ownership or intended relocation of premises. Company shall be under no obligation to continue to sell Products to Retailer following a change of ownership of that Retailer or relocation of Retailer's premises.
>
> 6. Each of Retailer's approved retail premises must have a sufficient number of fully trained in-store staff to provide consumers with information and usage advice regarding the Products, and a designated area for consumers to try on Products that is properly maintained in a clean and tidy condition."

(2) However, beyond these provisions (which included Clause 15 and the 2019 email), we were not at any stage shown any document that purported to set out in one place the basis on which Deckers operated its selective distribution system. We were told by Mr Hagger that attempts were made in early 2020 to set up a system of account classification and Mr Hagger set out at some length in his first witness statement how the account classification worked. In referring to a set of slides which dated from around April 2020, Mr Hagger's evidence was as follows:[20]

> **MR TIDSWELL:** Okay. Thank you. So that's helpful. Can you help us with before this document was created am I right in thinking that there was nothing like it? In other words, this is the first attempt to create as far as you are aware any sort of account classification?
>
> **A.** There was some work I had done prior to this leading to up to that brainstorming meeting and I thought that was also available in here, which is why I was checking those pages, because I thought it was in here, but this was that work was taken from work that we had done at Asics. So it is a very similar way that other brands work is my understanding.
>
> **MR TIDSWELL:** Yes. Okay. Thank you. That's helpful, but I suppose the question is, perhaps to put it a slightly different way, if we are thinking about what do we need to consider by way of account classification for the purposes of selective distribution.
>
> **A.** Yes.

[20] Day 3, page 13, line 21 to page 14, line 11.

MR TIDSWELL: This is the thing to be looking at? There is nothing else we should be thinking of that you are aware of?

A. No.

(3) The account classification material was largely focused on the type of offering the retailer presented to consumers and therefore what the most appropriate stock would be to supply to them. There were references to "consumer experience" attributes, such as "service", "presentation" and "offer". For example, "presentation" was explained in the April 2020 slides as follows:

> "In-store:
>
> • Modern Look/Feel
>
> • Floor Size
>
> • Layout
>
> • Footfall
>
> Applicable to Multi Destinations:
>
> Designated Footwear Area (Running and/or Hike) with min. 20% weight instore by category"

(4) However, we understand these to be a statement of desirable attributes, and in our judgment they fall well short of a description of what a retailer needed to be able to demonstrate in order to be admitted to the selective distribution system. As a consequence, it was unclear what the specific features of the Deckers selective distribution system were.

(5) It follows that it was also unclear what the criteria were for decisions made under that system, for example to admit or refuse retailers admission to the system. Again, we asked Mr Hagger about this:[21]

> "**MR TIDSWELL:** Thank you. That is very helpful. Can I ask you about what happens if a new retailer turns up?
>
> **A.** Yes.
>
> **MR TIDSWELL:** And asks to be supplied, it might be helpful to distinguish whether it is purely bricks and mortar, if it is hybrid with bricks

[21] Day 3, page 17, line 9 to page 19, line 16.

and mortar and a website or if it is purely online. Can I ask you how you would use these criteria to make a decision – would you use these criteria to make a decision about whether you supplied them or would you use something else?

A. Yes, we would. Preferably we would visit the store. Unless it is a completely brand new customer that's just opened up, typically the team would already know the account. So they would be familiar and have experience of them anyway.

MR TIDSWELL: Sorry to interrupt. I think we are talking here about someone brand new –

A. Brand new.

MR TIDSWELL: - walking in the door and saying "I have just set up a distribution retail network and I would like you to supply me"?

A. Then I would put them in touch with – that would typically come through customer service and then be forwarded to me. We would establish where they are based geographically. I could send the new customer questions, which I believe are in evidence somewhere as well to get, firstly, an overview of the kind of customer they are, whether it is a running store. If it is a lifestyle store it would be a separate team now. They would then get in touch with the customer, arrange a visit to go and see the store, talk to them and find out more.

MR TIDSWELL: And then when you made a decision about whether you wanted them as a customer or not.

A. Yes.

MR TIDSWELL: Do you use this document when you make those sort of decisions?

A. Yes.

MR TIDSWELL: Specifically you would get this document out, or at least a version of it and apply the questions of service, presentation and offer. Would you do that?

A. I don't think they would – again, my team have been around for a number of years now. So I don't think they would be referring back to this specifically, but they understand what it is about.

MR TIDSWELL: And would you actually formally categorise them as pinnacle, premium or core?

A. Yes.

MR TIDSWELL: You do actually do that exercise?

A. Yes, we do.

MR TIDSWELL: I think you are saying your team would reach a conclusion based on their general knowledge and experience?

> **A.** We have a database and every customer is tracked, ranked within that ecosystem account classification and consumer experience.
>
> **MR TIDSWELL:** Yes. Okay. That's helpful. What would the applicant be told about any of that? Again, would they be told anything about those criteria?
>
> **A.** They wouldn't be told any of this with these words, no.
>
> **MR TIDSWELL:** They would get the questions?
>
> **A.** They would know (inaudible) retailer, obviously.
>
> **MR TIDSWELL:** They would get the questions and know what the questions might disclose?
>
> **A.** Yes.
>
> **Q.** Obviously they would presumably know that you would be interested in (inaudible) for example?
>
> **A.** Yes.
>
> **MR TIDSWELL:** But they wouldn't know precisely what aspects of service you were interested in?
>
> **A.** No, but like I say, I think this is fairly typical for the industries so I wouldn't be at all surprised that they understood roughly where they were within our distribution, because they would be in a similar distribution for other brands and have a similar level of product available to them."

(6) It was therefore apparent that admission or rejection decisions were being made with general reference to the account classification principles (which only came into existence in early 2020) and otherwise on the judgment of the relevant account managers and their line managers. Mr Hagger gave some examples in his first witness statement of the rejection by Deckers of retailers who applied to join the system. As an example, a retailer was rejected because:[22]

> "We didn't feel that this sports retailer could offer anything above what our existing retailer offers and our view is that the existing retailer does a better job at marketing the products comprehensively. Although this retailer has a bricks & mortar store, it's in close proximity to existing partners and we chose to continue to support those retailers rather than open a direct competitor on their doorstep."

[22] Hagger 1 at [43(d)].

(7) There were, in effect, no criteria for these types of decisions. The significance of this to the dispute in this case is apparent from the following exchange, in which we asked Mr Hagger about some of the reasons he gave for refusing permission for the Running Shoes website, and the relationship between those and the Deckers selective distribution system:[23]

> **MR TIDSWELL:** Mr Hagger, we are going to change subject. I have a few more. Sorry. We are going to keep you a bit longer. Actually that's quite a useful way just to make that connection, because I wanted to ask you about the reasons in 86 and particularly about logistics and credit. I just wanted to clarify, firstly, the point about logistics in relation to – I am now talking about in relation to Up and Running.
>
> **A.** Yes.
>
> **MR TIDSWELL:** And the decision that was made. I think you were saying yesterday this was a commercial reason when Mr Macfarlane asked you about it?
>
> **A.** Yes.
>
> **MR TIDSWELL:** I don't think you were suggesting it is part of an analysis that comes from the selective distribution account classification?
>
> **A.** No.
>
> **MR TIDSWELL:** Thank you. Similarly about credit. Again I think you were saying it was a commercial reason?
>
> **A.** Yes.
>
> **MR TIDSWELL:** And not one that falls into account classification and selective distribution?
>
> **A.** These were completely reflective thoughts when we first had that meeting with Jonathan, yes. My mind went immediately to these areas and I didn't feel that what they were proposing was at all possible."

(8) It was also apparent that this approach, with the absence of proper recording of the terms of the system and the lack of proper criteria, left Deckers with considerable discretion about how it would make any particular decision. This is well illustrated by the approach to Clause 15 itself. Mr Hagger was asked about this:[24]

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[23] Day 3, page 24, line 12 to page 25, line 5.
[24] Day 3, page 77, line 22 to page 79, line 3.

"**PROFESSOR IBÁÑEZ COLOMO:** Thank you, Mr Henderson. The first point is in Bundle A, page 27. Just to introduce the topic, it is all about the multiple websites issue. I understood that the starting point would be to allow only one website per retailer but there is the potential to allow multiple websites?

A. In theory correct, yes.

PROFESSOR IBÁÑEZ COLOMO: I was just wondering what criteria was followed to decide whether or not more than one website was allowed or whether this was something that was decided on a discretionary basis depending on the case.

A. So generally speaking I would say that would be a hypothetical but fortunately we have the real world example of what happened with Up & Running, so I can speculate a bit or I can (inaudible) what we did with Up & Running. As Carl and Steve did, Carl sent the email in 2019 which says (inaudible) "that has the same name as bricks and mortar if you want to sell from another website, please let us know".

So our intention was essentially exactly what happened, that Up & Running or any other retailer would come to us with a proposal for the second website. We would look to evaluate the reason for it, how it would impact our brand, and whether we felt that there were legitimate commercial reasons, not so much we understand, and Mr Macfarlane makes a good point. It is up to him and his colleagues to run the Up and Running business. That is not our concern or business. What is our concern is how they run their business as it impacts on the HOKA brand.

So if a proposal was made that we were satisfied met all of our brand criteria, then we may well have said "Okay. We will give you permission for a second website".

In terms of why we were keen to limit as a starting point to just one website, as I said earlier, we want to have a good idea of where our products are being sold. If we start giving permission to one retailer "Yes, you can sell on another website" then other retailers will be made aware of that and soon we might have loads of retailers. We are keen to know where our products are being sold, whether it is bricks and mortar or a website and that is why also we also feel that this is consistent with what happens in practice, as in as far as I am aware all of our customers do just sell HOKA from a single website, but if somebody had a good reason to propose a second one, as in the case with Up & Running and Running Shoes, we're happy to consider it.

(9) That extent of discretion inevitably gave rise to inconsistent treatment of retailers. For example, we were told about several situations where the application of Clause 15 had given rise to inconsistencies:

(i) A retailer called ShoeFit had been given permission to operate a separate website under a different name, "Precious Soles", without signposting back to the bricks and mortar operation

under the Shoefit brand. We were told there had been a misunderstanding in the account opening process, with Deckers believing that both bricks and mortar and online stores would be operating under the "Precious Soles" name. Mr Hagger told us that, when it was discovered that this was incorrect, there was an "administrative" action to open a new account for ShoeFit.[25]

(ii) A retailer called George Donald appeared to operate an online operation selling HOKA product under the name "Excell Sports" and bricks and mortar stores selling HOKA product under the brand names of "Justrite" and Intersport". Deckers sought (impermissibly) to add evidential material in closing argument which suggested that the name "Excell Sports" also appeared on the Justrite/Intersport store facias, but it is nonetheless clear that the main branding on the bricks and mortar stores is different from the online operation for the same retailer. Mr Hagger acknowledged that: "It looks like our criteria hasn't been correctly applied in this case...".[26]

(iii) A retailer called Outdoor & Cycle Concepts operates a website selling HOKA product under the name "Snow & Rock" and a bricks and mortar operation selling HOKA product under the name "Runners Need". Deckers argued that there was a clear connection on the Snow & Rock website to the Runners Need name, but it is again apparent that the approach taken to this retailer is, to say the least, more flexible than that taken in relation to Up & Running and the Running Shoes website (where there was a reference in the website terms and conditions to Up & Running). Mr Hagger told us: "That isn't how that should work".[27]

[25] Day 2, page 97, lines 3 to 10.
[26] Day 2, page 92, line 8.
[27] Day 2, page 119, line 26.

(10) The Deckers selective distribution system lacked transparency, given that it was not properly recorded, the criteria were not clearly set out (even for those applying it) and there was no publication of the terms of the system or its criteria, beyond the very basic provisions in the Terms and Conditions. Retailers were not told what they needed to achieve in order to succeed in joining the system and retailers who failed in their applications were not told why. Mr Hagger was asked about this and told us:[28]

> **PROFESSOR IBÁÑEZ COLOMO:** Thank you. I have a few questions that relate to your witness statement… There is some reference to certain criteria that refer to internally. The question I have is just to confirm that some of the criteria to decide whether or not someone becomes a member of the distribution system.
>
> **A.** Yes.
>
> **PROFESSOR IBÁÑEZ COLOMO:** Are not communicated to the retailer, some of the things are kept internally or assessed internally?
>
> **A.** That's correct, yes.
>
> **PROFESSOR IBÁÑEZ COLOMO:** Thank you. Another question I have. Next page, paragraph 36. In a sense this was the flip side of what we were discussing before. When a retailer is not approved.
>
> **A.** Yes.
>
> **PROFESSOR IBÁÑEZ COLOMO:** I would have two questions on that front. Are there any mechanisms for the retailer that has not been approved to challenge or to appeal to HOKA internally or question the decision that has been made?
>
> **A.** Yes, that can happen. Like I have said on here, we try and give more of a general response because there's improvements that can be made. That doesn't mean a no now is a no forever.
>
> **PROFESSOR IBÁÑEZ COLOMO:** Okay. That's the other question I had in relation to this paragraph. When it is no now, maybe some time in the future?
>
> **A.** Yes.
>
> **PROFESSOR IBÁÑEZ COLOMO:** Do they have sufficient elements or personalised elements about what they need to improve, or is the same feedback sent to everybody in the same way?

[28] Day 3, page 19, line 19 to page 20, line 25.

A. No, we don't generally give them specific feedback where they need to improve.

MR TIDSWELL: Can I check in relation to the question prior to that? I think the answer is there is no appeal mechanism. Is that right?

A. No formal appeal mechanism, no.

(11) There was therefore inevitable uncertainty for retailers about the "rules" of the system, including (but not limited to) the basis on which retailers might be admitted or refused entry to the system.

(12) As far as the Clearance Channel was concerned, there was no transparency about that from the perspective of the retailers in the Main Retail Channel. That lack of transparency and knowledge of conditions to enter the Clearance Channel allowed Deckers to discriminate against retailers in the Main Retail Channel, in that Deckers could avail itself of a clearance approach to residual stock, while retailers in the Main Retail Channel were constrained in that activity to their existing retail channels and their single, similarly named, website (in which, as we have found, there was an understandable reluctance to discount heavily). It should be noted in this context that Deckers competed directly with the retailers in the Main Channel through their direct to consumer online channel.

125. In addition, we have identified that Deckers employed at least some quantitative criteria in the selection of retailers for the Main Retail Channel - see the discussion at [120(7)] above.

126. Part of Deckers's distribution strategy also involves the Clearance Channel, which allowed for the disposal of residual stock held by Deckers itself on a clearance basis through specialist clearance websites operated by retailers outside the selective distribution system for the Main Retail Channel. One of these retailers was an entity called Sport Pursuit. Mr Yates explained the position to us as follows:[29]

"**MR TIDSWELL:** Your last point about clearance being solved through existing partners, I just jotted this down and I haven't got a transcript, so

[29] Day 3, page 98, line 2 to page 100, line 17.

I don't want to mischaracterise anything you have said, but I think you said that the idea would be you would sell -- so when we are talking about clearance, we are talking about older stock.

A. Yes.

MR TIDSWELL: The idea was you wanted to see them go through the existing partners but you also had a direct consumer channel yourself?

A. Yes.

MR TIDSWELL: Is that along -- how does -- does that mean that you -- does that have any relevance to the question of how the existing partners sold it? I think you were listening to the dialogue we had with Mr Henderson about this idea that you want to have the premium product sitting there at the best price it can be sold and then the less premium product sold at a particular time. Do you agree with that? Is that your understanding?

A. Residual stock, which is kind of what we refer to it internally, is driven by timing. So it is when product becomes -- effectively falls out of season. So on 1st January 2025, when we launch our spring/summer, literally on the 1st January autumn/winter '24 becomes residual stock. So there is then a requirement to look at how we execute selling that stock.

MR TIDSWELL: Are you talking about the stock that you still have in your warehouse?

A. Yes.

MR TIDSWELL: Not the stock that's gone to retailers?

A. It is stock that we have in our warehouse.

MR TIDSWELL: There is or has been a mechanism to do that through -- we have heard talk of an entity called SportPursuit.

A. We have several accounts which I am responsible for that we recognise as our partners for disposing of residual stock.

MR TIDSWELL: I see. So when you talked about the existing partners, is that who you mean?

A. Yes.

MR TIDSWELL: You are not talking about the retailers you are selling to?

A. No, they are retailers that I sell to.

MR TIDSWELL: Sorry. That's a very poorly worded question. I was not sure whether your observations about clearance were clearance of surplus -- of residual stock that you had or clearance of residual stock that your retailers might have.

A. Only stock that we have.

MR TIDSWELL: That's what you are talking about, the price strategy.

A. We are not concerned about the stock that retailers would have. That's entirely their business. We also have residual stock in our warehouse. We would then open a dialogue with our existing partners that specialise in that area about closing deals to move that stock.

MR TIDSWELL: Yes. Just before I move on, I just want to check to see whether -- do you have questions on that subject?

PROFESSOR IBÁÑEZ COLOMO: There is one point I want to understand along these lines. Would it be fair to say there is a dual distribution strategy effectively? There is some retailers that sell the full stock, in particular the in season stock, and then there is another range of retailers that are specialised in --

A. There are some retailers that specialise just in residual stock, plus there are several retailers that will take a mix across the course of a season or a full financial year."

127. As far as the Clearance Channel was concerned, there were apparently no recorded criteria on which a retailer might be admitted to that channel. Mr Yates explained the position:[30]

"**PROFESSOR IBÁÑEZ COLOMO:** And the criteria for the selection in one category and the other differs? There is the one range of --

A. They would be classified as different types of businesses if there is a specialist in residual stock. I am not sure what -- could you re-ask me that question?

PROFESSOR IBÁÑEZ COLOMO: No, no. Absolutely. I just wanted to understand. There is effectively two categories of retailers from what I understand. Is that correct?

A. In that sense I would agree with that.

PROFESSOR IBÁÑEZ COLOMO: And then when it comes to selecting them as part of the HOKA team, so to speak, are they subject to the same criteria for selection?

A. Well, I would guess that a retailer that specialised in buying and selling residual stock wouldn't be measured against the same criteria, because it is not about offer and presentation, because they are dealing with a completely different type of inventory, stock that's old effectively."

128. Mr Hagger described the clearance channel as follows:[31]

"As a specialist clearance retailer the way they work is they will buy excess stock when we have it and we will do flash sales with them for a period.

[30] Day 3, page 100, line 18 to page 101, line 4

[31] Day 3, page 7, lines 17 to 21.

They reserve bulk product. They sell it on their site. We then ship it to them and they ship directly to consumers. So we do short bursts with them. So when there's clearance product to sell with them, we sell it. If there isn't, then we don't."

129. We had evidence before us, in the form of a confidential summary of sales by Deckers to retailers, of the volume of sales made by Deckers to one of the Clearance Channel resellers, Sport Pursuit. It is not necessary to record these in detail: we note that they show considerable volatility year on year but averaged around […][✂]% of Deckers's total retail sales from FY17 to FY21, after which they seem to have ceased altogether.

130. There was also at this time a significant increase in the direct to customer online sales activity of Deckers both in absolute terms and as a proportion of all sales (wholesale + D2C). This grew from […][✂]% of combined sales in FY19[32] to […][✂]% in FY20 and […][✂]% in FY21. The channel for specialist clearance and the rapid growth of the direct-to-customer channel give Deckers significant flexibility and market intelligence to channel production through different outlets with different mark-ups.

(2) The reason why permission was refused

131. We now turn to the central factual question of why Deckers refused to give permission for Up & Running to sell HOKA shoes on the Running Shoes website.

132. By way of recap, Mr Hagger, in his witness statement, said that that the primary reasons for the refusal of permission were:

(1) Concern about the credit position of Up & Running.

(2) Concern about the ability of Up & Running to manage the level of stock which the Running Shoes website proposal implied.

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[32] That is, the year from 1 April 2018 to 31 March 2019.

(3) Concern about the lack of "signposting" on the Running Shoes website, so that consumers buying on the site would not easily realise that they were buying from an entity which was related to Up & Running.

133. In summary, we do not regard Mr Hagger's evidence on this point as being reliable or credible. Instead, 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. The concerns about "signposting", credit and logistics were reasons largely constructed after the event to justify the approach Deckers was taking.

134. The basis on which we make this finding of fact is as follows:

(1) There is a conflict between the evidence of Mr Hagger, who advances the reasons described above, and the evidence of Mr Yates, who told us that the reasons for refusal were to do with inconsistency with brand strategy. Mr Yates described the brand strategy (which had not previously been articulated by Deckers in these proceedings and in respect of which relevant documents had not been disclosed) as follows:[33]

> "**MS BERRIDGE:** If we go down towards the bottom of the page, there is an e-mail there from you on Friday, 14th August 2020 to Jonathan Midwood of Up and Running. Do you remember that e-mail?
>
> **A.** Yes.
>
> **MS BERRIDGE:** Thank you. If I can take you to the third paragraph where you say:
>
> "The proposition of runningshoes.co.uk goes against the fundamental principles of our brand strategy."?
>
> **A.** Yes.

[33] Day 3, page 94, line 9 to page 95 line 14.

MS BERRIDGE: So could you just expand and elaborate a little bit what you meant when you wrote that?

A. Sure, yes. Hopefully this is helpful. So I am employed as a salesman for HOKA and joined the business in 2019 and assumed the role of -- a new role of strategic account manager and as part of that inherited seven of our biggest accounts in the UK, obviously of which Up & Running was one of those. So principally concerned with selling shoes into our strategic accounts. Part of the brand strategy that was cascaded down from our global team -- HOKA is a global brand and predominantly driven by what happens in the US. We distil that down into a strategy for Europe and then ultimately for the UK and that's principally my area of concern.

So there are really four parts to that strategy that I applied in my thinking to dealing with strategic accounts and that was in an overall sense we were driving sales through strategic accounts as the appetite for the brand was extremely hot at that time and has continued to be so.

Secondly was a desire to improve the presentation of the brand across strategic accounts where that was possible.

Thirdly was also that we would be selling more product in at least as many accounts as we had or if not fewer globally. This was something that we were finding that the US team were driving, that they were selling more product in fewer accounts on occasions.

Lastly, where we had close-out or clearance product, that that would be sold through our existing partners for close-out and clearance and also migrating across to D to C, our direct to consumer channel, which was starting to emerge at that time.

So they were the four parts of the brand strategy that I was principally concerned with."

(2) In particular, Mr Yates referred to the desire to drive HOKA product through Up & Running's bricks and mortar stores and the existing website, upandrunning.co.uk, and the inconsistency of allowing Up & Running to run a clearance site alongside that. In questioning by the Tribunal, Mr Yates told us:[34]

"**MR TIDSWELL:** Thank you. That's helpful. If we could just change subject -- that has been very helpful. Can we just come back to the e-mail that started this dialogue? It is page 98. Your observation at the bottom when you talk about:

"... the fundamental principles of our brand strategy."

I think when you were asked about that, you gave the answer that directed us down that set of principles. Can you just identify for us more precisely what you meant by "brand strategy"? What was it about the brand strategy

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[34] Day 3 page 101, line 5 to page 102, line 8.

that was -- that the Running Shoes proposition was contrary to? Can you be more precise about the things we have just talked about? Which of those things was the thing that you didn't like?

A. It is not that I didn't like them personally. It was the fact that some of them I think ran slightly contrary to the strategy as it was presented to us and that was concentrating on or focusing on driving business through our existing strategic accounts. So that would be number one. So at the top level I was principally concerned with my business with Up & Running.

MR TIDSWELL: I see. So in your mind, if I get this right -- see if you agree with this -- in your mind you have a strategic account with Up and Running, which is an important account obviously, and there is now going to be another account which is going to be created which is not going to fall within the same category of being strategic. Is that right?

A. Where are think that fell over was as part of those other parts of the strategy, which was we had, for example -- because the conversation -- the proposal about Running Shoes was very clear to me as it was presented by Jonathan Midwood and in the document, and that was that it would be a website for disposing of residual stock principally.

MR TIDSWELL: Yes.

A. And, as I mentioned, in that strategy we already had existing partners for that particular job that we were doing.

MR TIDSWELL: Yes.

A. And there was, therefore -- that's kind of where it didn't really get over the first line, and I think probably why it didn't with some of the other brands as well, if I am being perfectly honest.

MR TIDSWELL: Yes, I see. So you are back actually to that fourth item?

A. Yes.

MR TIDSWELL: But just so I am clear about that, we have talked about that really being the disposal of your stock?

A. Yes.

MR TIDSWELL: Obviously Mr Macfarlane was trying to dispose of his stock?

A. He was, yes.

MR TIDSWELL: I think this is all about COVID now, isn't it, because he has a large amount of stock which is suddenly out of date that he needs to get rid of?

A. Yes.

MR TIDSWELL: But did you view it in a way through the same prism that it was not in line with the brand strategy to deal with it that way?

> **A.** You know, I batted very hard for Up and Running in terms of trying to help wherever I could drive that business. I wanted to see them -- as we have said, their online business was by comparison to some of our other partners very small, 3 to 5%. I saw a huge opportunity to drive that business through their own website for all the obvious reasons. They were a well-known business. Customers couldn't go to the stores, but they could go online. That makes sense.
>
> **MR TIDSWELL:** I see. That is very helpful indeed. So again, just to make sure I have got this right, in terms of the brand strategy you would prefer to see, firstly, product driven through the Up and Running business and therefore through its website, expanding its reach. That's one element of it. Then on the other side you didn't particularly think it was consistent with the strategy to have what was effectively a clearance outlet sitting alongside that?
>
> **A.** Correct."

(3) Mr Yates's evidence was consistent with the email he sent on 14 August 2020, in which he said "The proposition of Runningshoes.co.uk goes against the fundamental principles of our brand strategy". This is more consistent with a desire to protect the selective distribution model than any concern about "signposting".

(4) There was also a conflict of evidence about when Mr Henderson got involved with the issue, and therefore at what stage legal advice was injected into Deckers's consideration of the matter. Mr Hagger's evidence was that Mr Henderson got involved <u>before</u> Mr Yates sent the 14 August 2020 email. He said that he, Mr Henderson, Mr Yates and a senior Deckers executive, Mr Black, had a call before the 14 August email was sent and agreed the wording of the email. Paragraph [87] and the first part of [88] of Mr Hagger's first statement reads as follows:

> "87. For the reasons above, we were immediately against HOKA being sold on the Running Shoes Website. After the meeting, Mr Yates and I subsequently discussed the proposal with Alex Henderson in his role as a legal advisor and Cameron Black (who was, at the time, Incumbent Sales Director EMEA) and, for the reasons explained above, decided that we did not want to be a part of the venture. There was categorically no discussion about the fact that the proposed website offered products at a discount, and this was never a factor in the Running Shoes Website being rejected from the HOKA ecosystem.
>
> 88. We therefore confirmed to U&R that we did not approve sales of HOKA via this website, in-line with the initial view we had given at the meeting. The initial response to Mr Midwood came from Mr Yates [STBS0111] on 14 August 2020 but we had all agreed on the wording...."

(5) Mr Henderson was adamant that he was not involved until mid-September:[35]

> "**MR TIDSWELL:** I may have the chronology wrong, in which case I am sure I will be corrected, but I think it is paragraph 87 of Mr Hagger's statement, and certainly the impression I took from -- well, the sequence that's described by Mr Hagger -- I will wait until you have it. The sequence described by Mr Hagger in 86, if you just go back a page, he talks about the concerns that Mr Yates and he had here.
>
> **A.** So --
>
> **MR TIDSWELL:** Then you see in 87 his record that there was a meeting subsequently which involved you and Mr Black and then he talks about 88, where we see them then talking about the e-mails. I think the sequence -- Mr Hagger suggests the sequence does involve as I described to you?
>
> **A.** So to the best of my recollection in part having looked at this is I believe the sequence of events was website proposed -- request to have a meeting about the website proposal. Meeting takes place. At the end of the meeting Mr Midwood sends the written proposal. I think we -- despite the apparent discrepancies in date -- think that meeting probably happened on 23rd July. On I think it was 7th August actually that Mr Midwood followed up saying "Just to follow up on our meeting, here is the business plan". A week went by and on 14th August Mr Yates wrote back and said "It doesn't meet with our brand strategy". At that point I knew nothing about any of this. I was only made aware of this issue on 15th September when Carl sent me the e-mail basically saying -- at that point the decision had already been made that we were not going to supply and had been communicated.
>
> So I think that the meeting that Mr Hagger is referring to here must have taken place some time after 15th September.
>
> **MR TIDSWELL:** I don't think that's how Mr Hagger recollects it. It may be nothing turns on it particularly, but my understanding of Mr Hagger's evidence is that he has the meeting -- I don't think he refers to the written proposal being received. Then he says there's the meeting which involves you and then he says subsequently Mr Yates sent the 14th August e-mail. That would position the meeting involving you between 7th and 14th August. Now maybe you can't remember any of that.
>
> **A.** I don't remember specifically. I am confident the first time I was made aware of the issue was 15th September, when Mr Hagger sent me the e-mail. So it may have been that initially Steve and Carl felt confident that (a) we didn't want to supply or approve the second website and we were within our rights to do so, and it was only -- which Mr Midwood for what it is worth seemed to accept, and it was only when subsequently Mr Macfarlane challenged that decision, which I can understand why he did, only at that point did they come to me and say "Hey, we have made this decision. Does it stack up legally?"

[35] Day 3, page 84, line 21 to page 86, line 5.

(6) Mr Henderson's account is more consistent with the documents. The email of 15 September 2020, to which Mr Henderson referred in his evidence above, does on its face suggest that Mr Henderson had not previously been involved in a discussion about the matter before that date. It said, in the second paragraph:

> "We told them that what they have presented goes against our brand strategy, and as per our T&C's we wouldn't open a store fascia with an existing customer that does not clearly state to the consumer who they are buying from."

(7) This is in fact the earliest document in which we have seen the "signposting" issue raised. The email suggests that Mr Hagger may have raised the "signposting" issue with Mr Macfarlane during the call that day (it was not a reason given previously to Up & Running in the 14 August email). In that case, it seems that Mr Hagger had at that stage, either alone or possibly after speaking with Mr Henderson, alighted on the terms of Clause 15 and the 2019 email and identified "signposting" as a legally sufficient basis on which to refuse permission for the new website.

(8) It also seems likely that the email sent by Mr Yates on 14 August had not in fact been agreed by Mr Hagger at least, quite aside from Mr Henderson or Mr Black. That is because Mr Hagger told us that the last paragraph in the email, which concerned the possibility of Deckers increasing forward orders of stock for Up & Running, had not been agreed by him and that (contrary to his evidence at [88] of his first witness statement that "we had all agreed on the wording") he had not seen a draft of the email before it went:[36]

> **"MR MACFARLANE:** Do you recall -- if I can take you to Steve Yates's e-mail. I think it is C1, 102. Is that right? C1, 102, when Steve Yates sent the e-mail declining the proposal. It is page 102. It says in that e-mail that he wants to be clear that none of the stock is going -- Mr Yates was offering to increase the stock. "We are going to turn Running Shoes down but we want to sell you more stock"?
>
> **A.** Can I read it?

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[36] Day 2, page 112, line 1 to page 113, line 1.

MR MACFARLANE: Yes, sure.

A. "Should you wish to discuss further the prospect of increasing forward orders for Up and Running and associated support, we can provide for this."

So what he's saying is that if it's for Up & Running, then that's potentially something that we would look at, but Steve wouldn't have the authority to increase the credit limit. So he is just trying to find some common ground I think.

MR MACFARLANE: But he says you can provide for it. If we want to increase our orders, "We can provide for it"?

A. Steve could not do that.

MR MACFARLANE: I know he said it but that is what he offered.

A. That he is what it says in the e-mail.

MR MACFARLANE: Yes.

A. But that's not within his authority to do.

MR TIDSWELL: Can I just understand what you are saying here? Are you saying that he is making an unauthorised offer of granting more stock; in other words, are you saying that that's not something that actually Deckers would have been prepared to do?

A. I don't think that's something Deckers would have been prepared to do, no.

MR TIDSWELL: So why has he done that then? Did you see the draft of this before it went?

A. I didn't see a draft before it went, no.

(9) Mr Hagger's uncertainty about the reasons why "signposting" matters to the brand or to customers also suggests it was not the primary commercial concern which he and Mr Yates had after the meeting. When questioned by the Tribunal about why "signposting" mattered, Mr Hagger was unable to give any sensible explanation:[37]

"**MR TIDSWELL:** Why would it make any difference to a customer to know there is a connection between Running Shoes and Up & Running? If I go on to a website of Up & Running and I buy shoes at a price that I am happy with and the returns and the service and everything about it are satisfactory, why do I care who owns it?

[37] Day 2, page 108, line 6 to page 109, line 16.

A. We were concerned that there were nefarious reasons to have a website that is not connected with your own name. So perhaps it is the concerns for the brand as opposed to the consumer. I completely understand your point.

MR TIDSWELL: Just stick with the consumer for the moment and then we will come back to the brand. Just as far as the consumer is concerned, tell me if I am wrong, but I am not hearing from you anything that says the consumer really should care that much?

A. As long as they are serviced correctly I guess they don't care.

MR TIDSWELL: So let's turn to the brand.

A. Yes.

MR TIDSWELL: Can you explain what you mean by "nefarious". I don't understand what you mean by that. Can you give an example what concerns you might have?

A. Counterfeiting or any -- I don't understand a legitimate reason for them not to disclose who they are doing business with.

MR TIDSWELL: Well, I think Mr Macfarlane has just asked you that question and I think you just said you did understand that.

A. I understand for them. I understand for Up and Running, because they are trying to maintain prices in their Up and Running business. I don't see that as a benefit to the consumer or to HOKA.

MR TIDSWELL: I think we are approaching this as a consideration of the discussion with Up & Running rather than a general point. So can we proceed on that basis? We are just talking about the discussion you are having. There may be more general points. I understand that you may have a policy to deal with more general points, but there was not really a suggestion that Up & Running was going to put counterfeit material on their site, was there?

A. No.

MR TIDSWELL: You have dealt with them for a long time and that would be a very odd thing to do, wouldn't it?

A. Yes.

MR TIDSWELL: If you are thinking about the brand what would the concern be in relation to Up & Running from Deckers' point of view? How might it impact the brand to have a separate website?

A. I am not sure how I can answer that question."

(10) It was only some time after the 14 August email, when the executives at Deckers were required to articulate to Up & Running their precise reasons for refusing permission, and when legal advice was taken from

Mr Henderson, that the issue of signposting emerged. Mr Yates acknowledged this in his evidence:[38]

> "**MR TIDSWELL:** I see. That is very helpful indeed. So again, just to make sure I have got this right, in terms of the brand strategy you would prefer to see, firstly, product driven through the Up & Running business and therefore through its website, expanding its reach. That's one element of it. Then on the other side you didn't particularly think it was consistent with the strategy to have what was effectively a clearance outlet sitting alongside that?
>
> **A.** Correct.
>
> **MR TIDSWELL:** Yes. That's really helpful. Thank you. I think I need to put to you there is this -- obviously there is this question of what has been called the signposting point --
>
> **A.** Yes.
>
> **MR TIDSWELL:** -- which is a slightly different point I think. It is a point about whether consumers know or don't know who the owner of the website is. It sounds to me as if that's not actually what you meant when you sent your 14th August e-mail from what you have just told us.
>
> **A.** No, I was not necessarily directly referring to that. I mean, that was very clear in the proposal and the conversation that Carl, myself and Jonathan Midwood had. I mean, here was the thing. The genius of the idea of Running Shoes was that it was completely separate from Up & Running. That was made very, very clear.
>
> **MR TIDSWELL:** For the reasons that --
>
> **A.** For the reasons that Mr Macfarlane pointed out, the issue that he had with franchises, etc, etc. So that was very clear. There was clearly no signposting at that point, and again that is why the proposal really fell over at that stage was because the brand strategy -- the points around brand strategy, which really were, you know, predominantly in my mind from my own view but also the fact that it became -- you know, it was very obvious that -- in that sense it was assessed as a completely new entrant into the market for us, a completely new entrant.
>
> **MR TIDSWELL:** Yes. I think I am getting the sense that there was a -- so your initial reaction was more based around, if one can put it this way, the brand strategy and the way it appeared, and, of course, in that the separation of the websites plays quite a significant role.
>
> **A.** Yes.
>
> **MR TIDSWELL:** But then actually what seems to have happened is when people thought about it further, and particularly when you get to the meeting at which the decision is made to refuse it, there is some more focus on the signposting point.

[38] Day 3, page 103 line 2, to page 104, line 14.

A. That is correct.

MR TIDSWELL: Would that be fair?

A. That's a correct assessment."

(11) That accords with the evidence of Mr Henderson, which was that Mr Hagger and Mr Yates only approached him on 15 September to ask whether the decision not to approve the Running Shoes website "stacked up legally".[39]

(12) Mr Henderson gave a witness statement dated 30 June 2023 in the County Court debt proceedings against Up & Running, in which he set out the reasons for refusing permission to sell HOKA products on the Running Shoes website (emphasis added):[40]

> "I asked Mr. Hagger why Deckers did not wish to allow U&R to sell on the www.runningshoes.co.uk website and he said it was in large part due to the website's URL which bore no relation to the Up & Running name, nor was there any information on the website linking www.runningshoes.co.uk to Up & Running. Deckers had taken the decision to supply Hoka to U&R in large part due to U&R's reputation as a leading bricks and mortar running shoe supplier which was well-known and respected within the UK running market, which extended to the www.upandrunning.co.uk website, none of which was true for www.runningshoes.co.uk. <u>To the best of our knowledge, www.runningshoes.co.uk only offers for sale goods from previous selling seasons, whereas www.upandrunning.co.uk sells primarily shoes from the current selling season.</u> www.upandrunning.co.uk lists all of the Up & Running bricks and mortar stores and their addresses, while www.runningshoes.co.uk does not. These and other differences between the two websites were the primary reasons why Deckers determined it was not willing to authorise sales of Hoka on www.runningshoes.co.uk.

(13) The underlined passages seem clearly to state that the clearance nature of the Running Shoes website was a reason for refusing permission. Mr Henderson did not accept the premise put to him by the Tribunal that this reason was essentially about the difference in price between the two websites. We are sceptical about his responses, but in any event Mr Henderson accepted that he was making an observation about "the desirability of outlet type websites which sell only outlet stock".[41]

[39] Day 3, page 85, line 25 to page 86, line 6.
[40] See [4], line 13 to end of the paragraph.
[41] Day 3, page 64, lines 21 to 24.

(14) The other reasons given by Mr Hagger do not provide a plausible explanation of the reasons for permission being refused:

(i) In respect of the "commercial reasons" (logistics and credit), Mr Hagger told us:[42] "These were completely reflective thoughts when we first had that meeting with Jonathan, yes. My mind went immediately to these areas and I didn't feel that what they were proposing was at all possible."

(ii) In FY20, Up & Running was Deckers's third largest customer for HOKA products in the UK ([…][✂]% of all retail sales). It was a strategic account which had grown by an average 70% p.a. in the two years prior to COVID-19. It seems likely that if there were concerns about commercial matters such as credit and logistics, those would have been raised and discussed with an important customer in the normal run of business. Instead, there was no discussion or negotiation about these matters between Deckers and Up & Running.

(iii) The concern about logistics was mentioned in Mr Hagger's note of the July 2020 meeting, but Mr Hagger took no steps to investigate the seriousness of the point, which one would expect him to do if it was a genuine and material concern. Mr Hagger had never visited the Up & Running warehouse.[43] If he had made further inquiries of Up & Running, he would have been told that plans were being developed to manage the issue, as was apparent from a business planning document that Up & Running had prepared, dated 17 August 2020.

(iv) There is no reference in Mr Hagger's note of the July meeting to credit being a concern. Mr Hagger acknowledged in evidence that Deckers was effectively extending to Up & Running the

[42] Day 3, page 24, lines 20 to 22.
[43] Day 2, page 103 lines 20 to 10.

credit limit which represented the latter's outstanding exposure from time to time, despite a considerably lower recommended limit from Deckers's' third party credit analyst. The fact that Deckers increased supply of HOKA product to Up & Running in FY22 by £[…][✂] (30%) suggest that neither credit nor logistics were genuine concerns. Mr Hagger acknowledged that he had not looked at the Up & Running accounts at Companies House and had not asked for bank references.[44]

(v) Mr Yates offered to increase forward orders in his 14 August 2020 email. Although Mr Hagger said Mr Yates had no authority to make this offer, it seems unlikely that Mr Yates, who had been the account manager since April 2019, would have made it if there was any real concern about the ability of Up & Running to manage increased stock. Indeed, the addition by Mr Yates of the caveat that increased forward orders "could have no connection to Runningshoes.co.uk and any excess inventory arising from this would need to be managed through existing U&R channels" suggests that this was a genuine commercial proposition and that the channel through which it sold was the real issue.

(vi) In any event, Deckers continued to supply Up & Running with fresh stock orders as the new season arrived in October 2020, despite any concerns about credit or stock management.

(15) In conclusion on this point, we find that:

(i) Mr Yates fairly and accurately described to us the real reason for refusal of permission, which was that the proposed new website, and particularly the plan to dispose of stock on a clearance basis, was inconsistent with the selective distribution system in operation as part of the brand strategy, including the way in

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[44] Day 2, page 97, lines 13 to 24.

which Deckers itself was disposing of its excess stock through its online sales and through specialist clearance retailers.

(ii) We prefer the evidence of Mr Henderson as to the sequence of events in August/September 2020, which seems more consistent with the documents than the sequence set out by Mr Hagger.

(iii) Mr Hagger's evidence is unreliable, in that it misdescribes the sequence of events, in particular asserting that there was a meeting between senior executives to agree the wording of the 14 August 2020 email when it is plain that Mr Henderson did not attend any such meeting prior to the email being sent. Mr Hagger now concedes that he did not see a draft of the email.

(iv) Mr Hagger's evidence lacks credibility, as it is clear that the "signposting" issue was not the reason behind the refusal of permission communicated in the 14 August email and the "signposting", credit and logistics concerns lack any real substance on proper analysis. Contrary to what one might expect, there was no discussion or negotiation about the commercial issues, in our view because they were immaterial to the decision. We find that they are all reasons which were constructed after the communication of the refusal of permission, to give greater legal security to Deckers's position.

(3) The purpose of Clause 15 of the Terms and Conditions

135. As noted above, clause 15 of the Terms and Conditions was part of the selective distribution system. It sought to control the extent to which a retailer in the selective distribution system could make online sales by effectively giving Deckers a veto over any such initiative. That was not done by any express reference to the controls imposed on bricks and mortar operations (under clauses 5 and 6 of the Terms and Conditions). Clause 15 contained no criteria or explanation of the nature or operation of the control.

136. Clause 15 was supplemented by the 2019 email, which indicated that retailers were free to sell online provided the website had an identical or similar name to that under which the retailer carried out its bricks and mortar operations. If a retailer wished to operate a website with a different name, there was a requirement to consult. We read this as Deckers imposing a requirement for a retailer to obtain permission to operate such a website, and that is how it was operated in practice. The 2019 email gave no indication of the basis on which such permission would or would not be given.

137. There was therefore the same lack of clarity and transparency about this contractual provision as there was for the selective distribution system generally.

138. Deckers argues that the purpose of clause 15 and the 2019 email were to ensure that HOKA is only associated with businesses which are trustworthy and transparent, in the context of a selective distribution agreement which satisfies the *Metro* requirements. In other words, the purpose of the contractual provisions was to ensure "signposting". This position fails to reflect the content and actual operation of Clause 15, as supplemented by the 2019 email. In particular, we have already rejected the case advanced by Deckers that "signposting" was the reason for refusing permission for the new website in August 2020 and have found that this was in fact a reason constructed after permission was refused, in order to justify that decision. Clause 15 in the Terms and Conditions and sending the 2019 email were designed to give Deckers virtually unfettered discretion to decide which websites to allow and which to prohibit. 'Signposting' merely provided Deckers with a means to justify, after the event, the exercise of this discretion.

139. In our judgment, it is plain that the control imposed by clause 15 and the 2019 email was designed for a broader purpose, so as to allow Deckers to restrict, on a case-by-case basis, the use by retailers of alternative sales channels which were not consistent with the selective distribution system for the Main Retail Channel that it was seeking to operate (and conversely, to allow proposals that were consistent with it, even when they were blatantly in breach of the 'signposting' requirement). This is for the following reasons:

(1) It appears much more likely to us (and more consistent with the type of selective distribution system being operated by Deckers) that 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. Mr Macfarlane explained to us that to do so would cause likely customer discontent and, in his case, franchisee discontent as well. He was criticised by Ms Berridge for providing no evidence to support this assertion, but in our judgment it was a logical and sensible point and we think likely to hold true for retailers generally.

(2) In other words, 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.

(3) That, in itself, seems perfectly consistent with the theory behind standard selective distribution arrangements, which is to concentrate intra-brand competition among a select few, all operating on essentially the same basis. Mr Yates confirmed to us that Deckers was seeking to concentrate its business towards a smaller number of accounts.[45]

(4) It is also consistent with the wording of Clause 15 (which is expressed broadly in terms which we would expect to see in a selective distribution model) and the wording of the 2019 email:

(i) The requirement for names to be identical or similar to bricks and mortar operations can be explained by the likelihood that retailers would not operate different (and inconsistent) business models under the same names.

[45] Day 3, page 98, lines 1 to 5.

(ii) The last sentence of the first paragraph ("It is essential that we have a complete list of all authorised websites selling HOKA") indicates that Deckers's primary motivation was to know (and perhaps control) where HOKA was being sold online.

(iii) The second paragraph of the email contains a prohibition on distribution through internet mall/marketplaces (as prohibited by clause 14 of the Terms and Conditions) and is another example of controlling distribution channels which are inconsistent with a selective distribution model.

(5) When asked by the Tribunal, Mr Hagger was unable to explain why it was important that customers understood who the ultimate owner of a website was. He acknowledged that there was no obvious benefit to consumers or to the HOKA brand, provided the new website was operated in a way that met Deckers's selective distribution requirements generally (such as the level of service):[46]

> **MR TIDSWELL:** Why would it make any difference to a customer to know there is a connection between Running Shoes and Up and Running? If I go on to a website of Up & Running and I buy shoes at a price that I am happy with and the returns and the service and everything about it are satisfactory, why do I care who owns it?
>
> **A.** We were concerned that there were nefarious reasons to have a website that is not connected with your own name. So perhaps it is the concerns for the brand as opposed to the consumer. I completely understand your point.
>
> **MR TIDSWELL:** Just stick with the consumer for the moment and then we will come back to the brand. Just as far as the consumer is concerned, tell me if I am wrong, but I am not hearing from you anything that says the consumer really should care that much?
>
> **A.** As long as they are serviced correctly I guess they don't care.
>
> ….
>
> **MR TIDSWELL:** If you are thinking about the brand what would the concern be in relation to Up & Running from Deckers' point of view? How might it impact the brand to have a separate website?

[46] We have already quoted this passage, but believe it bears repeating: Day 3 page 110, lines 5 to 16 and page 111, lines 12 to 15.

A. I am not sure how I can answer that question."

(6) We would also have expected to see a clearer explanation of the basis on which websites with different names would be permitted, with criteria on what amounted to sufficient "signposting".

(7) We also heard evidence about other retailers where the approach to any requirement of "signposting" appeared, at best, to be vague and, at worst, non-existent. See the discussion relating to Shoefit, George Donald and Outdoor Cycle Concepts at [124(9)] above.

(8) All of this suggests that "signposting" was not in fact a serious concern for Deckers. The way in which Deckers responded when Up & Running did seek permission to sell HOKA products on the Running Shoes website is, in our view, considerably more consistent with our interpretation of Clause 15 and the 2019 email, at least until legal advice was sought and the "signposting" argument was retrospectively applied as the reason for refusal.

(4) The relationship between the enforcement of the contractual provision and the ability of Up & Running to set prices

140. Subsequently, Up & Running decided to challenge the decision and eventually contravened the agreement by selling HOKA product on the Running Shoes website. Deckers then sought to discipline Up & Running, by providing notice to terminate in the hope that Up & Running would revert to compliance with the agreement.

141. Compliance with the agreement meant selling HOKA product only through the Up & Running branded channels (the bricks and mortar stores and the upandrunning.co.uk website). Deckers must be taken to have known that this would reduce the extent to which Up & Running was able to discount HOKA product:

(1) It was clear from the July 2020 meeting that the Running Shoes website would operate as a clearance website, necessarily implying greater discounts.

(2) Deckers knew that Up & Running was not comfortable discounting significantly on the upandrunning.co.uk website – that was the whole point of the new website.

(3) It was plain from the screenshots taken by Mr Hagger in November 2020 that last season's HOKA product was being discounted at 30% on the Running Shoes website.

142. We find therefore that 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).

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.

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).

145. It is an entirely different question as to whether Deckers could use the selective distribution framework to achieve the same objective indirectly, by relying on a reason for termination apparently unconnected with price. That might be difficult to challenge where the reason relied on was a legitimate one, but in this case we have found that the reason given was not in fact the real reason for the termination.

146. In the absence of any alternative plausible explanation, we infer that 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.

(2) The Deckers witnesses all agreed that they hoped that the act of terminating the contract would cause Up & Running to remove HOKA product from the Running Shoes website, where it was being heavily discounted.

(3) Deckers's witnesses (in particular Mr Hagger) were candid about the fact that they preferred HOKA products to be sold at the recommended full price,[47] and about the fact that they kept tight control over supplies to minimise the scope for discounting by retailers.[48]

(4) Deckers has constructed a basis for termination which we have found not to be credible and, during closing submissions, resisted our attempts to engage (even on a hypothetical basis) on the legal consequences of what appear to be the real reasons for refusal and then termination.[49] In

[47] See for example Mr Hagger's evidence at Day 3, page 6, lines 16 to 18 and Mr Henderson's evidence at Day 3, page 90, lines 10 to 14.
[48] See for example the discussion with Mr Hagger at Day 3, page 7, lines 18 to 22 and Day 3, page 8, line 14 to page 9, line 4.
[49] Day 4, page 50, line 2 to page 60, line 7.

those circumstances, we are entitled to infer that the objective aim was illegitimate and therefore required concealment.

(5) Further, the evidence from the Deckers witnesses that there was no discussion between them of the pricing implications of the clearance website, including its impact on the attitudes and behaviours of other retailers in the Main Retail Channel, is simply not credible.[50] It would surely have been raised, even if only to be put to one side as an illegitimate consideration. That was however not the evidence before us.

(6) The lack of documentation (as a result of the document destruction policy and Mr Henderson's tardy instruction to preserve documents), the unreliability of Mr Hagger's evidence about crucial meetings and the remarkable lack of recollection of all the Deckers witnesses about discussions at those meetings are all matters which we are entitled to take into account in reaching the inference that Deckers was acting to prevent discounting by Up & Running.

(7) We attach little significance to the evidence from the Deckers executives that they would not interfere when a retailer priced below recommended retail price. That may be the case for direct intervention (which is understandable, as the legal implications of resale price maintenance are well understood in the sector) but is not necessarily the case for indirect intervention and in this case seems to be exactly what Deckers was seeking to achieve, under the pretence of a legitimate reason for termination.

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.

[50] In fact, another retailer did complain, as described by Mr Hagger to Mr Henderson in an email dated 1 December 2020.

G. KEY FINDINGS FROM THE EXPERT EVIDENCE

(a) Identification of relevant markets and the products which comprise those markets (expert issues (1) and (2))

148. Dr Majumdar identified the following markets as potentially relevant to these proceedings:

   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.

   c) The retail supply of specialised running shoes in the UK (potentially split by sales in-store and sales online).

149. Market (a) is the market in which Deckers operates when selling HOKA products to retailers; and market (b) is where Up & Running purchases specialist running shoes from wholesalers. These are the markets that Dr Majumdar considers would be relevant to application of the VBE. Market (c) is identified as a further market on which both Up & Running and Deckers sell specialised running shoes to consumers. Although it does not bear upon the application of the VBE, it is potentially part of the economic and legal context of the case. Mr Makin does not make any assessment of market definition.

150. We accept that the markets identified by Dr Majumdar are correct. We do not rule out the possibility that the relevant product markets may be wider than specialised running shoes and may extend to "fashion" and other more general training shoes, which may be viewed as substitutable by consumers. We do not consider that it is necessary to resolve the precise product dimension of the market, as the experts have provided a range of market share estimates that cater for broad and narrow markets as set out below.

151. We accept that Deckers supplies HOKA running shoes on the wholesale market to retailers including Up & Running. We also accept that the market on which

Up & Running purchases specialised running shoes, including HOKA running shoes, is the wholesale market.

152. Finally, market (c) is the retail market for specialist running shoes and it is clear that both Deckers and Up & Running supply running shoes on the retail market to end consumers. Both businesses operate bricks and mortar and online stores for this purpose. Dr Majumdar, citing the CMA in its Final Report on the acquisition by JDSports of Footasylum,[51] considers a single retail market (encompassing sales in-store and online) as the most appropriate and we agree with this opinion. We find that Deckers and Up & Running are competitors in the retail supply of running shoes.

(b) Market shares (expert issue (3))

153. First, we note that there has been significant interrogation of the veracity of the underlying turnover figures provided by Deckers in this matter. Considerable confusion has arisen from apparent contradictions between figures provided by Mr Henderson in a witness statement in the County Court proceedings and the figures provided by Deckers in these proceedings. Those apparent contradictions were not explained by Mr Henderson in his witness statement and resulted in a process of further interrogation by the experts, which included meetings with Deckers staff and the production of further explanations by Deckers. That was unfortunate, as the inconsistency caused considerable distraction and expense before it was satisfactorily explained.

154. The experts now agree that the turnover figures provided by Deckers are reliable measures of Deckers's HOKA product sales (including HOKA footwear and other HOKA products) across relevant distribution channels. The experts also agree that they can sufficiently rely on the wholesale purchasing and retail sales turnover provided by Up & Running.

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[51] See "Completed merger on the acquisition by JD Sports Fashion plc of Footasylum plc", CMA Final Report (6 May 2020), notably paragraphs 7.42 to 7.70.

155. We consider that the turnover figures employed by the experts are imperfect. There are for example, differences in the periods measured, with Deckers's turnover provided on a financial year basis and Up & Running's figures provided by calendar year. However, we agree with the experts' assessment that the figures are sufficiently robust to calculate market shares for our present purposes and we are assisted by the experts' agreement on this point.

156. The experts were also working from limited data concerning the size of the relevant markets. They agreed to rely on a slide from a report produced by American market research company NPD, which addresses the "Adult Running Footwear Market" in Great Britain in 2019. They applied assumptions on the level of retail mark-up to convert this to a wholesale market.

157. Although the experts agreed on the source of market data to be used and the assumptions to be applied, they disagreed on the product dimension of the market. Dr Majumdar prefers a larger market that includes shoes made for running that are used not only for running but also for lifestyle or a mix of activities (Scenario 2 in Figure 1). Mr Makin prefers a narrower market which includes only shoes that are made for running that are only used for running (Scenario 1 in Figure 1). Market shares based on both product dimensions are set out below, as extracted from the joint expert statement:

Figure 1 - Market Share estimates for 2020/21 and 2021/22 under Scenarios 1 & 2

	Financial Year	**2020/21**		**2021/22**	
Row[1]	**Scenario**[2]	**1**	**2**	**1**[3]	**2**
9	Estimated retail market size for "specialist running shoes"	£220m	£410m	£220m	£410m
10	Estimated wholesale market size[4] for specialist running shoes	£110m	£205m	£110m	£205m
11[5]	Deckers wholesale Share	[…][✂]%	[…][✂]%	[…][✂]%	[…][✂]%

12	U&R purchase share of wholesale market	[...][✂]%	[...][✂]%	[...][✂]%	[...][✂]%
13	Deckers retail share	[...][✂]%	[...][✂]%	[...][✂]%	[...][✂]%
14	U&R retail share	[...][✂]%	[...][✂]%	[...][✂]%	[...][✂]%
15[6]	Parties combined retail share	[...][✂]%	[...][✂]%	[...][✂]%	[...][✂]%

Notes (1) These are the row numbers from the Table at Annex 3 of the joint expert statement. (2) The different scenario estimates of total retail market of £220 and £410 million are explained in paragraph 158. (3) They are not uprated for inflation or volume growth from 2019. (4) The mark-up from wholesale to retail is assumed to be 100%. (5) Rows 11 to 14 show market share of Deckers/Up & Running at wholesale and retail level. (6) Row 15 is the parties' combined share of the retail market.

158. While we consider that the evidence for the estimates that we have for market shares in relation to specialist running shoes is limited, we are satisfied that the shares of the parties in any relevant market are unlikely to be significant. We are prepared to accept that the relevant market shares sit somewhere between the values set out under scenarios 1 and 2, which are likely to provide upper and lower bounds. Accordingly, we find that in FY 2021:

(1) Deckers's share of the wholesale supply of specialised running shoes in the UK was between […][✂]% and […][✂]% [less than 15%].

(2) Up & Running's share of wholesale purchasing of running shoes in the UK was […][✂]%less than 5%.

(3) It is not necessary to make any finding of fact in relation to retail supply of specialised running shoes in the UK, but we rely on the figures set out in Figure 1 above as part of the legal and economic context in which the parties operate.

H. ANALYSIS

(1) Agreement

159. Up & Running agreed to Clause 15 through acceptance of the Terms & Conditions. The manner in which that clause was applied was also tacitly accepted by Up & Running, both generally, in the context of the selective distribution system operated by Deckers, and specifically when Deckers used the clause to refuse permission for HOKA product to be sold on the Running Shoes website. We do not consider it to be seriously arguable on the facts before us that Deckers applied Clause 15 as a unilateral act. It is in our judgment clear that there has been an agreement (or at least a combination of an agreement and a concerted practice) which is capable of engaging Section 2.

(2) The application of the *Metro* Requirements

160. The selective distribution system operated by Deckers does not meet the requirements set out in *Metro* and therefore fails the *Metro* test:

(1) **Are resellers chosen on the basis of objective criteria of a qualitative nature?** No. The criteria for the Main Retail Channel are not properly recorded and so are unclear. They include quantitative considerations in relation to geographical location and retailer numbers. To the extent that criteria are ascertainable, they are not objective, but instead are broad requirements that allow for (and have in practice given rise to) the exercise of individual judgments by account managers and their line managers. There appear to be no criteria for choosing retailers who are admitted to the Clearance Channel and Deckers seems to have decided that it does not wish to admit further retailers into that channel.

(2) **Are the criteria laid down uniformly for all potential resellers and not applied in a discriminatory fashion?** No. The criteria for the Main Retail Channel are not properly recorded internally, let alone set out uniformly. They are not at all transparent or visible to existing or potential retailers. The criteria apply differently based on whether there

is already a retailer in the location where the potential new member plans to operate. The examples of Shoefit, George Donald and Outdoor Cycle Concepts illustrate the lack of uniformity in the application of the criteria. There is, moreover, evidence of discriminatory treatment in allowing some retailers to operate additional websites and not others. In the Clearance Channel, there are no criteria and decisions of a discriminatory nature have been made (most notably in relation to the Running Shoes website).

(3) **Do characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use?** It is not clear that this is the case. It was not argued in any detail before us and it is not yet established by the case law what type of product, beyond those with particular technical requirements (for example, *AEG-Telefunken*) and luxury goods (for example, *Coty*) might be entitled to the safe harbour. As we have indicated above in section C3, there are differing interpretations of this issue at a national level. Our tentative view is that it is possible that a specialised running shoe would justify the protection afforded by *Metro*, on the basis of the technical aspects of the shoe and differing consumer needs. However, it is not necessary to decide this point, given the other conclusions we have reached, and we therefore reach no concluded view on it.

(4) **The criteria laid down do not go beyond what is necessary**: Given the vagueness of the criteria associated with Clause 15, we cannot conclude that they go no further than is necessary. Given the existence of a significant discretion vested in Deckers in relation to the exercise of the clause, and the way in which it has been inconsistently applied, we conclude that this aspect of the test is also not met. This is particularly the case given the linkage between Clause 15 and the limitation of the number of retailers in the Clearance Channel.

(3) Infringement

161. The agreement/concerted practice, in the form of Clause 15 and the 2019 email, will amount to an infringement of the Chapter I Prohibition if it can be shown to have the object or effect of preventing, restricting or distorting competition within the UK.

162. It is therefore necessary to decide whether the contractual provision in question reveals a sufficient degree of harm to competition so as to be considered a "by object" restriction. The central question, in this regard, is whether, in the relevant economic and legal context, Clause 15, as agreed and applied, pursues a legitimate aim within the meaning of *Pierre Fabre* at [39] to [41] (as confirmed and fleshed out in *Generics*).

163. Up & Running alleges that Clause 15, as agreed and applied, amounts to an infringement in two ways:

    (1) It is designed to restrict Up & Running's ability to market and sell HOKA products online and otherwise to make effective use of the internet as a sales channel for the HOKA products it purchases from Deckers (the Online Sales Restriction).

    (2) It has been applied, by way of termination of contract and the cessation of supply, in order to prevent Up & Running from operating the new online sales channel with the objective of preventing discounting and therefore maintaining higher prices (the RPM Restriction).

164. We start our consideration of those allegations by inquiring into the content of Clause 15, the objective aim of Clause 15 (including taking account of the way it has been applied by Deckers in this case) and the legal and economic context in which the contractual provision sits.

(a) Content of the contractual provision

165. Clause 15 restricts a retailer within Deckers's selective distribution system from selling Deckers's products online, unless three conditions are complied with:

(1) The retailer has been granted permission to make online sales.

(2) The website complies with requirements communicated by Deckers. These were limited to those communicated in the 2019 email, which provided:

(i) Permission to sell on websites which had an identical or similar name to that under which bricks and mortar stores were operated.

(ii) A notification requirement if the retailer wished to sell HOKA products from a website with a different name.

(3) Deckers have approved the contents of the website in writing.

166. There was no further guidance given and no criteria formulated, let alone published, to indicate the basis on which Deckers would give approval for any website with a different name from any bricks and mortar operation. These provisions were therefore in the nature of conferring a very wide discretion upon Deckers to make decisions permitting or not permitting such an activity, without any accountability for the reasons for those decisions.

(b) The objective aim of the contractual provision

167. As can be seen in our findings of fact, the general purpose of the contractual provision is to promote the selective distribution model envisaged by Deckers by preventing the emergence of competing business models or channels for distribution. The discretion and vague wording enabled Deckers to pursue two discernible sub-purposes, which emerge from its brand strategy and from the evidence about the way in which Clause 15 has been applied:

(1) To restrict entry into the Clearance Channel, being the additional channel for the online clearance of residual stock, so that Deckers is largely able to determine when and what volumes are sold through this channel.

(2) To prevent retailers in Deckers's selective distribution system who sell HOKA product in the Main Retail Channel from accessing the Clearance Channel, so that discounting of residual stock is inhibited by only taking place within, and subject to the commercial and practical constraints of, the Main Retail Channel.

168. To some extent, these are two sides of the same coin. Restricting entry into the Clearance Channel stops retailers switching to that channel from the Main Retail Channel in order to pursue more aggressive discounting strategies and delivers the corresponding outcome that discounting only takes place in the Main Retail Channel, which disincentivises aggressive discounting by design. We are satisfied that they can both fairly be said to be the objective aims of Clause 15 as applied in practice.

169. The Deckers position has been that the purpose of Clause 15 is to ensure the adequate "signposting" of a website back to the main operation of its owner. We have discounted that as a plausible reason. We reach this conclusion in light of the very wording of Clause 15, which does not require "signposting", and Deckers's reaction to the lack of "signposting" by other resellers. The disparity of the reactions (negotiation and forbearance when entry into the Clearance Channel was not a concern; refusal of authorisation and closing of the account when it was) suggests that Clause 15, as applied in practice, pursued other aims.

170. We were also unable to discern, in the case advanced by Deckers at trial, any other plausible justification relating to the protection of the brand, based for example on the importance of the positioning of new season product as a high-quality, high-performance product. We invited Ms Berridge to consider the

position on a hypothesis that this was the objective of Clause 15, but she resisted that, on the basis that the evidence did not support the hypothesis.[52]

171. In any event, the way in which Deckers designed and operates the Clearance Channel would undermine any suggestion that the objective of the contractual provision is brand protection. As a result of the choices made by Deckers, it is not in a position to argue that preventing further entry into the Clearance Channel pursues this legitimate aim. We were not presented with any evidence that would indicate that Up & Running's access to this channel through the Running Shoes website would undermine HOKA's brand image any more, or any less, than existing clearance sites (including Deckers's own).

172. The above conclusion should not be interpreted as meaning that having a channel specialised in the sale of heavily discounted and/or out-of-stock products is necessarily inconsistent with the protection of a supplier's brand image. It does not mean, either, that suppliers cannot impose limitations concerning entry into a specialised channel in the name of brand protection. In fact, it is conceivable that a supplier that is genuinely concerned about the brand image of its products can carefully design its distribution system to ensure that clearance sales do not undermine its overall strategy.

173. Rather than a general statement about the legality of complex, multi-channel, distribution arrangements, our more limited finding in this judgment is that, in this particular case, no coherent explanation was ever put to us as to how the Clearance Channel had been conceived and managed to protect HOKA's brand image, or what specific measures had been taken to ensure that the Clearance Channel would not jeopardise the brand strategy that Deckers sought to promote via the Main Retail Channel. An objective evaluation of the operation of the agreement in its economic and legal context leads to the same conclusion: it is not plausible that the opaque and discretionary restriction of entry into the Clearance Channel was driven by a concern with the protection of HOKA's brand image.

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[52] See the extensive discussion at day 4, page 50, line 2 to page 60, line 7.

174. Turning particularly to the second sub objective relating to price, we bear in mind the observations in *AEG-Telefunken* at [42] and *Pierre Fabre* at [39] to the effect that a selective distribution system, even when legitimately established and operated, necessarily has an impact on intra-brand competition, and particularly price. It must be assumed that Deckers (in implementing such a system) would appreciate that consequence.

175. Were Deckers to have been operating a well-constructed selective distribution system, without the defects identified in [124] above, we may have been open to argument that the obvious, inherent impact on price was not the primary objective and that there were other legitimate aims arising from the selective distribution system which would rebut any categorisation of the contractual provision as a "by object" restriction.

176. However, this is not such a case. Despite our invitation to address this question in closing arguments, Ms Berridge did not seek to persuade us that this was the position. Instead, this is a case where, in the absence of any meaningful criteria, Deckers has a discretion which is exercised without any objectivity or transparency and is largely unaccountable, thereby leading to inconsistent and discriminatory outcomes. That discretion has been employed, first in the refusal of permission on 14 August 2020, and then in December 2020, as a basis to terminate the contractual arrangements with Up & Running.

177. We therefore conclude, from consideration of the contractual provision itself, that the objective aim of Clause 15 was at least in part to allow Deckers to prevent retailers from discounting on a clearance basis, and therefore to prevent them from setting retail prices as they wished.

178. When considering the objective of a contractual provision in this context, it is permissible to look at the way in which it has been operated subsequently by the parties. That is because the apparent intent of the parties can reinforce a

conclusion about the objective ascertained from a consideration of the provision itself.[53]

179. We have already found that, in the absence of any alternative plausible explanation, we are able to infer that the prospect of heavy discounting of HOKA product on the Running Shoes website was a matter of real concern to Deckers and was a material motivation in threatening to terminate and then terminating the contractual relationship with Up & Running.

180. That is consistent with the behaviour of the parties in and following August 2020, when Deckers refused permission for HOKA products to be sold on the Running Shoes website:

(1) Up & Running initially accepted the refusal of permission communicated on 14 August 2020.

(2) Once Deckers became aware of the sale of HOKA product on the Running Shoes website, it threatened to terminate and then served notice to terminate the contractual arrangements between Deckers and Up & Running. This was in order to persuade Up & Running to comply with Deckers's refusal to permit the sale of HOKA products on the website.

(3) This was not simply a unilateral act by Deckers. Deckers utilised the existing contractual framework surrounding the selective distribution system, which included a provision (Clause 15 as supplemented by the 2019 email) which gave Deckers the discretion to refuse permission to websites by which retailers could operate new online distribution channels, including clearance type channels. There was at least tacit acceptance by Up & Running that Deckers was contractually entitled to terminate for breach. Up & Running's reaction was not that Deckers lacked contractual entitlement to refuse permission or to terminate. Instead, it alleged (correctly in our view) that the discretion which the

[53] See, for example, *Super Bock* at [57], citing *Eturas* at [36] and [37]; the CMA's guidance of 12 July 2022 in relation to the Vertical Agreements Block Exemption Order (UK) at [8.12].

contractual arrangements vested in Deckers was being used in an anti-competitive way.

(4) Put another way, preventing access to the Clearance Channel served (for the most part) the interests of the retailers engaged in the Main Retail Channel, as they shared the aim of Deckers generally to promote and sell new season stock at full prices in priority to the disposal of older season stock. Clause 15 was therefore the expression of an agreement and/or concerted practice to this effect. See *AEG-Telefunken* at [39] and *Bayer* at [102].

181. In summary, on the question of objective, we therefore conclude that the objective aims of Clause 15, together with the 2019 email and taking into account the way that clause has been applied by Deckers in this case, are:

(1) To restrict entry into the Clearance Channel, being the additional channel for the online clearance of residual stock, so that only Deckers is able to determine what stock is sold and when it is sold through this channel.

(2) To prevent retailers in Deckers's selective distribution system who sell HOKA product in the Main Retail Channel from accessing the Clearance Channel, in which residual stock is sold, so that discounting of residual stock is inhibited, only taking place within, and subject to the commercial and practical constraints of, the Main Retail Channel.

(c) Legal and economic context

182. As to the legal and economic context, we will consider each of the objectives we have identified separately and will then assess the position in the round.

<u>The restriction of entry into the Clearance Channel</u>

183. Deckers has selected and contracted with online clearance websites to create the Clearance Channel for the disposal of the residual stock which Deckers has

accumulated through manufacturing stock and which it has been unable to sell to retailers through the Main Retail Channel. That Clearance Channel has been used to sell material volumes of residual stock at clearance prices, with those volumes increasing significantly during the first COVID-19 lockdown.

184. However, Up & Running has been denied the opportunity to access the Clearance Channel for clearance purposes, despite having similar economic drivers after the first lockdown.

185. There is complete opacity about the criteria and process by which other firms have accessed the Clearance Channel.

186. The opacity of the system enables Deckers to engage in self-preferencing, by which it has discriminated against retailers within its selective distribution system, with whom it competes with direct retail sales, so as to control online sales of residual stock for its own benefit. In doing so, Deckers has sought to limit the number of specialist retailers active in the Clearance Channel, thereby applying quantitative criteria to the selection process.

187. Mr Macfarlane submitted that this is analogous to the restrictions that the Commission identified in *Guess*. He relied on this decision as an example of restrictions on online selling and pointed in particular to the sections at [127] to [131] of the *Guess* Decision dealing with the restrictions that Guess imposed on retailers in relation to allowing any online sales.

188. We agree with Mr Macfarlane that *Guess* offers a useful analogy. However, we consider the section of the Decision between [114] and [126] to be of greater interest than those to which he pointed us. In that earlier section, the Commission considered the restrictions which Guess imposed on retailers in relation to using the Guess name when conducting online advertising. This gave Guess a considerable competitive advantage over the retailers it competed with online and restricted intra-brand competition.

189. The position here is indeed analogous, although in our judgment of a more serious nature. Deckers has limited the ability of Up & Running (and, by

inference, other similar retailers with which Deckers competes online, through its own retail offering and effectively through disposing of residual stock on the clearance websites) to compete in the Clearance Channel at all. Deckers has retained to itself, in the form of Clause 15, the ability to veto any such attempt.

190. It cannot be said that this pursues a "legitimate aim"[54] or that there is a "plausible explanation"[55] for it other than the restriction of intra-brand competition.

191. Deckers argued before us that the present situation was different from any previous authority, because the present circumstances did not involve an absolute ban on internet sales, but rather a situation in which such sales were permitted, but subject to qualitative criteria for the websites concerned. It was, Deckers said, akin to a limitation on dual price strategies imposed on retailers in relation to physical and online sales strategies.

192. According to Deckers, the absence of any previous court or regulatory decisions means that it is difficult to see any conceivable basis for concluding that the restriction amounts to an infringement by object.

193. This argument, in our judgment, misses the point. 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.

194. Further, the qualitative criteria put forward by Deckers is, we have found, constructed after the event to give legitimacy to Deckers's actions. We have discounted "signposting" as a reason which on its face discloses any plausible pro-competitive or other legitimate justification for the provision. No other

[54] See *Pierre Fabre* at [40].
[55] See *Generics* at [89] and [111].

explanation for the clause was put forward, despite our encouragement of Deckers to do so. Deckers's inconsistent and discriminatory approach to the application of Clause 15 confirms our conclusions.

195. It is equally incorrect to suggest that there are no previous court or regulatory decisions addressing this matter or that experience does not support a finding of a "by object" infringement in this scenario. The very issues on which our conclusions are substantiated were identified by the CJEU over 40 years ago as justifying a finding of a 'by object' infringement (see for example *Metro* and *AEG-Telefunken*). It was already clear at that time that clauses in a selective distribution system could be deemed restrictive of competition by their very nature in circumstances analogous to the ones examined here. The selective distribution system in issue in *AEG-Telefunken* was found to restrict competition precisely because of the arbitrary application of the admission criteria and because it was found to be aimed at maintaining a minimum profit margin for specialist retailers.

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.

The restriction on discounting on a clearance basis

198. Through Clause 15, Deckers was in a position to control the Clearance Channel for sales of residual stock and it was able to restrict access to that channel to a select group of clearance websites. Deckers was able to decide when to make stock available to the Clearance Channel and, subject to market conditions,

could determine the prices at which it would sell the stock to the clearance websites.[56] This means that it could control the timing and volume of sales, and indirectly the prices, to ensure sales of residual stock did not unduly influence sales of new season product.

199. The sale by retailers participating in Deckers's distribution system of discounted products on clearance sites was likely to be uncontrolled by Deckers. It therefore represented a considerable threat to the distribution arrangements it had in place, which relied on aligned incentives to discourage heavy discounting of old stock, in order to protect the premium positioning of new season stock.

200. The control which Clause 15 and the 2019 email allowed Deckers was very significant. There were no criteria, Deckers had in effect unconstrained discretion and there was no transparency about the process.

201. That threat became a reality when Deckers discovered that the Running Shoes website was selling HOKA products at a heavy discount.

202. Up & Running's COVID-19 stockpile created an incentive to depart from the tacitly agreed approach by which it (and other retailers) had historically priced residual stock in a way that did not undermine the positioning of new seasons stock as a premium product (at a premium price).

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 upandrunning.co.uk website. That must have been obvious to Deckers.

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.[57] That is because the existence of the discretion undermines the argument about pro-

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[56] Mr Hagger confirmed that Deckers would control the timing of sales to the clearance retailers, for the purposes of "flash sales" – day 3, page 7, lines 18 to 22.
[57] See, for example, *Superleague* at [171] to [179].

competitive purpose which meaningfully constrained (or non-existent) discretion might support.

205. We are also entitled to take into account the way in which the agreement has been operated. That is because such an analysis is permitted, on a consistent and objective basis, in order to identify the coincidences and indicia which may constitute evidence of an infringement, in the absence of another plausible explanation.[58] That includes evidence of a distributor complying in practice with the pricing indications of a supplier.[59]

206. It is also because a degree of inquiry into the subjective intention of a party to an agreement may be used as additional evidence to shed light on the underlying aims of the provisions.[60]

207. It is also well established that indirect means can be employed to ensure the observance of minimum prices such as threats, intimidations, warnings, penalties, delay or suspension of deliveries or contract terminations connected to the observance of a given price level. See for example the Commission's Guidelines at [47] and [48] and the CMA's guidance of 12 July 2022 in relation to the VBEO at [8.12].

208. As we have found in our section on key factual findings, Deckers sought to discipline Up & Running by serving a termination notice in the hope that Up & Running would remove the HOKA stock from the Running Shoes website, being its clearance site. That was an attempt to use the contractual provisions to force Up & Running to cease selling HOKA product on a discounted basis through the Clearance Channel.

209. It is therefore apparent, from the indicia of behaviour by Up & Running and Deckers after permission was refused, that there was an agreement which in effect prevented Up & Running from discounting as it wished, which Deckers sought to enforce by the termination threats and actions. These demonstrate that,

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[58] *Super Bock* and *Eturas*, ibid n52.
[59] *Super Bock* at [57].
[60] See *General Motors BV v Commission* EU:C 2006:229 at [78].

objectively and consistently, Clause 15 was a restriction on pricing. We have also found in our Key Factual Findings that Deckers intended to prevent Up & Running selling HOKA products at the significant discounts that the Running Shoes website implied.

210. As noted in [189] to [197] above, there is also no alternative "plausible explanation" or "legitimate aim" for the clause and its application, given we have rejected the justification put forward by Deckers.

211. As defined in Article 4(a) of the VBE, a restriction on a buyer's ability to set prices is considered to be a hardcore restriction.

212. This also confirms that it is not in any sense a "novel" finding to determine there has been a "by object" infringement in these circumstances.

(d) Conclusions on "by object" infringement

<u>The restriction of entry into the Clearance Channel</u>

213. We conclude from our review of the content, objective aim and the legal and economic context[61] that the restriction on entry into the Clearance Channel contained in Clause 15 and the 2019 email sought to prevent retailers in Deckers's selective distribution system, such as Up & Running, from making passive sales to consumers by way of a specialised channel of clearance retailers which Deckers controlled. That amounted as a matter of law to a restriction on internet sales under the Chapter I Prohibition.

214. We also conclude that this contractual restriction is to be categorised as a "by object" restriction. This conclusion is consistent with legal precedent: we are not confronted with a new or unprecedented practice. We have found that the contractual provision pursues no plausible material objective other than the restriction of intra-brand competition (that is, Up & Running's freedom to make

[61] It could be considered that there is a particular hierarchy of the steps in the accepted linear process of considering content, objective aims and legal and economic context. We have not approached the exercise in that way, but have instead applied the linear process and then considered our conclusions in the round with the benefit of our assessment at each stage.

passive sales on the internet). The relevant case law, from *Metro* and *AEG-Telefunken* to *Pierre Fabre* and *Ping*, shows that the sort of conduct examined here is restrictive of competition by its very nature in the absence of a legitimate aim.

<u>The restriction on discounting on a clearance basis</u>

215. We conclude from our review of the content, objective aim and the legal and economic context that the restriction in Clause 15 was an attempt to prevent retailers in the Main Retail Channel in Deckers's selective distribution system, such as Up & Running, from selling HOKA product at a material discount through the Clearance Channel on clearance websites. This was not just a side effect of a legitimate selective distribution system, but instead an attempt to control the ability of Up & Running to sell on clearance sites like the Running Shoes website, where a greater degree of discounting would inevitably take place than would be the case for stock sold on upandrunning.co.uk. That amounted as a matter of law to a restriction of price competition between retailers and an attempt to indirectly fix selling prices under Chapter I Prohibition.

216. We conclude that this contractual restriction is also to be categorised as a "by object" restriction, since it does not pursue any plausible "legitimate aim" within the meaning of *Pierre Fabre*. In reaching this conclusion, it has not been necessary to identify any new category of "by object" restriction, as we have identified a material objective of the contractual provision to be to restrict the freedom of Up & Running to set prices as it wished, and in particular to set discounted prices. That is RPM, an established category of "by object" infringement.

(e) Effect on Trade

217. In relation to Section 2(1)(a) of the Act, and bearing in mind our conclusion that Clause 15 is a provision that has as its object the prevention, distortion or restriction of competition, we find that the agreement/concerted practice may affect trade within the UK, given that the agreement/concerted practice applies

across the whole of Deckers's selective distribution arrangements with all UK wide retailers in the Main Retail Channel, and that Deckers's share of the wholesale market is not immaterial. This was not seriously contested by Deckers at trial.

(4) VBE

218. We can deal with this subject relatively shortly. It is clear that, if the VBE applies, then the relevant market shares of the parties are comfortably below 30%, in which case Deckers would be entitled to take advantage of the protection offered by the VBE.

219. However, we have found that Deckers has committed two separate infringements of the Chapter I Prohibition, both of which are clearly hardcore restrictions in terms of the VBE, and which therefore disapply the VBE altogether. In particular:

    (1) Under Article 4(c) of the VBE the restriction of active or passive sales to end users is considered to be a hardcore restriction.

    (2) Under Article 4(a) of the VBE, a restriction on a buyer's ability to set prices is considered to be a hardcore restriction.

220. Accordingly, the VBE does not apply to relieve Deckers of liability for those infringements.

I. CAUSATION

221. It is well established that infringement of the Chapter I Prohibition is enforceable in private actions as a breach of statutory duty, which is a tort.[62] It is also well established that, in order to make good a claim in tort, the claimant is required to show that the defendant's action has caused loss. In other words, establishing the causation of loss is an essential ingredient of a tort claim.[63]

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[62] *Crehan v Inntrepreneur Pub Company* [2004] EWCA Civ 637 at [156].
[63] Barnett v Chelsea and Kensington Hospital Management Committee [1969] 1 QB 428 ("*Barnett*").

222. In closing submissions, Ms Lawrence, appearing with Ms Berridge for Deckers, seemed to suggest to us that Up & Running was required to identify and prove loss for each head of damage claimed in order to meet this requirement.[64] No authority was cited for us for this proposition, which is presumably because it is not an accurate statement of the law. When challenged, Ms Lawrence appeared to accept that.

223. It is clear to us that Up & Running has established, on the balance of probabilities, that it has suffered loss as a result of the Chapter I Prohibition infringements that we have found. Mr Macfarlane has set out in his witness statement[65] in these proceedings his assessment of the impact on Up & Running of not being able to sell HOKA product. While it remains a completely open question as to the extent of loss suffered, we accept Mr Macfarlane's evidence to the extent that <u>some</u> loss has been suffered. The required element of causation has therefore been made out.

224. As noted earlier in this judgment, the question of damages is to be determined in a separate trial, so we say nothing further about that at this stage.

J. INJUNCTION

225. Up & Running seeks a final injunction requiring Deckers to resume and continue supply of HOKA product to Up & Running. The Tribunal has the power to make such an order pursuant to Rule 67(2), where it considers that it appears "just and convenient" to do so.

226. Deckers resists that, on the basis that:

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[64] Deckers pleaded as a causation issue that, if the T&Cs infringed the Chapter I Prohibition by reason of being a hardcore restriction, the agreement between the parties was void. This was the particular causation point which the Tribunal identified for determination in Trial 1 – see the Ruling at [2024] CAT 9. This argument was not pursued by Deckers during Trial 1. Instead, Deckers's opening submissions argued that Up & Running "must establish causation of at least some loss at the present trial", which is consistent with the requirement in *Barnett*. However, Deckers's closing submissions asserted that causation must be established for <u>each specific head of loss</u>, which is clearly a matter for Trial 2. This may have resulted from a misunderstanding about the scope of the causation issues which were to be dealt with in Trial 1.

[65] See for example Macfarlane 1 at [149] and [155]

(1) The order sought amounts to an order for specific performance (see for example *Sky Petroleum v VIP Petroleum* [1974] I WLR 576 ("*Sky Petroleum*")).

(2) Specific performance will not be ordered if damages are an adequate remedy, which would be the case here, given particularly that the goods in question (HOKA running shoes) are not specific or ascertained (*Sky Petroleum* at 578).

(3) The relationship between Deckers and Up & Running has broken down to a sufficient extent that it is unrealistic and impractical to think that a general obligation to resupply will work without constant supervision and intervention by the Tribunal.

(4) In any event, orders for supply by an unwilling seller to a willing buyer should be approached with considerable caution (see *Norbain SD Ltd v Dedicated Micros Ltd* [1998] ECC 379).

227. Up & Running submits in response that it is perfectly possible that the relationship with Deckers will return to a workable commercial relationship once the current issues are resolved. Mr Macfarlane gave evidence about similar disputes he has had with other distributors leading to more amicable relationships once the legal dispute was resolved.

228. We agree with Deckers that damages are an adequate remedy. We are also sceptical about Mr Macfarlane's confidence in the normalisation of relationships after this litigation is resolved. Without getting into the detail, which is unnecessary for these purposes, it is clear that there has been a significant personal falling out between Mr Macfarlane and the account executives (particularly Mr Hagger) at Deckers with whom Up & Running would need to deal in the future. We also think it quite likely that Deckers will look for any opportunity to cease supply on a legitimate basis, which is likely to promote further disputes and involve the parties in further litigation.

229. We therefore decline to exercise the discretion vested in us under Rule 67(2) to order an injunction for the supply of HOKA products by Deckers to Up & Running.

K. CONCLUSION AND DISPOSITION

230. We have found that Deckers has infringed the Chapter I Prohibition by reason of the Online Sales Restriction and the RPM Restriction, as analysed above. It has therefore committed the tort of breach of statutory duty and it is liable to Up & Running for such damages as Up & Running may be able to establish. There will be a separate trial to determine the quantum of those damages. The Tribunal will convene a case management conference in the immediate future to make provision for that second trial.

231. We decline to make an order by way of final injunction requiring Deckers to supply HOKA product to Up & Running.

232. We do wish to make some further observations, which we signalled in the introduction to this judgment. No doubt this judgment will be read by distributors in vertical supply arrangements and their advisers, in order to assess the risks those firms face in relation to their selective distribution arrangements. We anticipate that the analysis of the operation of the *Metro* requirement, the limits of that doctrine and the approach to analysis of arrangements falling outside of *Metro* will provide some guidance about these issues.

233. We are aware that it is unusual that a provision in a vertical agreement is found to restrict competition by object.

234. It should however be recognised that there are some very specific factual circumstances which apply in this case and which have led to the conclusions we have reached. The selective distribution system implemented by Deckers was incomplete and flawed in its design and operation. The criteria for admission into the system were not properly recorded or kept in writing. Those criteria were, moreover, applied inconsistently on a piecemeal basis at best and in a discretionary, if not arbitrary, manner at worst. It is also striking to see the

virtual absence of anything resembling a framework for treatment of separate channels (The Main Retail Channel and the Clearance Channel).

235. Against this background, Deckers found itself unable to present any credible link between the relevant clauses limiting access to retail channels and interfering with retailer pricing, on the one hand; and any legitimate aims that would explain why that limitation and interference was not problematic, on the other. In a similar vein, Deckers presented its arguments to justify the arrangements to us on a basis that was unsupported by the evidence.

236. These unusual features mean that the outcome of the case is by no means a signal that selective distribution arrangements that fall outside the *Metro* requirements are destined to be held to be "by object" infringements or to fall outside the VBE or VBEO. We also recognise, as the CJEU did in *Metro*, that the limitation of price competition that is inherent in selective distribution systems is not necessarily restrictive of competition and that these systems can genuinely promote competition in other ways. In this sense, we have recognised that there are legitimate aims, such as a response to free-riding and the protection of the brand image of a product, that may, in a particular economic and legal context, justify some vertical restraints.

237. Instead, we consider that the wider point to emerge from this case should be that assuming that a distribution agreement falls within the safe harbour of a block exemption does not absolve suppliers from the need to pay attention to the way they design and operate their distribution systems. There are principles in the case law that should not be ignored merely because the market shares remain below the relevant thresholds, or because the agreement apparently avoids some of the most blatant hardcore restrictions (such as overt resale price maintenance or an outright ban on online sales).

238. Similarly, we do not consider that the outcome of this case means that compliance with competition law need be complex or resource-intensive. Compliance is rather a matter of ensuring that there is discernible business strategy pursuing a legitimate aim, on the one hand, and that there is a clear,

identifiable link between this strategy and a set of well-designed vertical restraints imposed on resellers, on the other.

239. The decisions in this judgment are the unanimous decisions of all of us.

Ben Tidswell Chair	Keith Derbyshire	Professor Pablo Ibáñez Colomo

Charles Dhanowa O.B.E., K.C. (*Hon*)
Registrar

Date: 31 October 2024