Neutral citation [2018] CAT 13

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1279/1/12/17

Victoria House
Bloomsbury Place
London WC1A 2EB

7 September 2018

Before:

ANDREW LENON Q.C.
(Chairman)
PROFESSOR JOHN BEATH O.B.E.
EAMONN DORAN

Sitting as a Tribunal in England and Wales

BETWEEN:

PING EUROPE LIMITED

Appellant

\- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

Heard at Victoria House on 10-11, 14-18, 23 and 25 May 2018

JUDGMENT (NON-CONFIDENTIAL VERSION)

APPEARANCES

Mr Robert O'Donoghue QC, Mr David Scannell and Mr Tim Johnston (instructed by K&L Gates LLP) appeared on behalf of the Appellant.

Ms Marie Demetriou QC and Mr Ben Lask (instructed by the CMA Legal) appeared on behalf of the Respondent.

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. On 24 August 2017, the Competition and Markets Authority (the "**CMA**") issued a decision entitled "*Online sales ban in the golf equipment sector*" addressed to Ping Europe Limited ("**Ping**") (the "**Decision**"). In the Decision the CMA found that Ping, a manufacturer of golf clubs, golf accessories and clothing, had infringed the prohibition in Chapter I of the Competition Act 1998 (the "**1998 Act**") and Article 101 of the Treaty on the Functioning of the European Union ("**TFEU**") by entering into agreements with two UK retailers containing clauses prohibiting those retailers from selling Ping golf clubs online. The Decision found that those agreements restricted competition by object and did not benefit from any exclusion or exemption. The Decision directed Ping to bring the alleged infringements to an end and imposed a fine of £1.45 million.

2. The Decision recognised that the genuine aim of Ping's internet policy (which the CMA refers to as the "Online Sales Ban") was to promote face-to-face custom fitting[1] of its clubs, which cannot take place online. The Decision found that the promotion of custom fitting constituted in principle a legitimate aim and that the internet policy was a suitable means to promote custom fitting but that the policy was not necessary to pursue the promotion of custom fitting, was disproportionate to the promotion of custom fitting and was not objectively justified.

3. On 24 October 2017 Ping appealed the Decision to the Tribunal pursuant to section 46 of the 1998 Act. Ping contended that its dynamic face-to-face custom fitting is the best way to optimise its products and enhance consumer choice and quality. The policy exists because a custom fitting cannot be carried out over the internet. According to Ping, this appeal therefore concerns the freedom of a company to pursue a business when the business involves the sale of a product whose properties are fundamentally inconsistent with internet selling.

[1] Custom fitting is described at paras 14 to 19 below.

4. By para 3(1) of Schedule 8 to the 1998 Act, the Tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal. Those grounds are, in summary, as follows.

(1) The Decision forces Ping to sell a product (non-custom fitted golf clubs) which it simply does not wish to sell. That is a breach of Ping's rights under the European Union Charter on Fundamental Rights (the "**EU Charter**") (Ground 1).

(2) The CMA's characterisation of Ping's internet policy as an agreement which has the 'object' of restricting competition is misconceived. The internet policy pursues a perfectly legitimate objective which benefits consumers (namely the promotion of custom fitting), is an integral part of Ping's products and has no material adverse effect on competition (Ground 2).

(3) The Decision is wrong to find that Ping's internet policy is disproportionate. In particular, the CMA's proposed 'alternative measures' - measures which the CMA contends could have been adopted by Ping in place of the internet policy - would be wholly impractical in the real world and would, in any event, be less effective than the internet policy at maximising custom fitting rates (Ground 3).

(4) In the alternative, given the genuine commercial aim pursued by Ping, the internet policy falls within the 'ancillary restraint' doctrine or is exempt under Article 101(3) TFEU/section 9, on the ground that it produces real benefits for consumers which could not be achieved in any other way (Grounds 4 and 5).

(5) The CMA was wrong to impose a fine on Ping, since the alleged infringement was not intentional or negligent. Alternatively, the proposed fine of £1.45 million is grossly excessive and should be reduced (Grounds 6 and 7).

5. This judgment refers to a number of legal authorities, which we list and define in the Annex to this judgment. We have taken full account of the parties' contentions. These we have summarised in the course of the judgment without attempting to address every point that was made.

B. FACTUAL BACKGROUND

6. The background facts are set out below.

(1) Ping

7. Ping is a UK based manufacturer and distributor of golf clubs, golf accessories and clothing. Ping has manufacturing, warehousing and distribution facilities in Gainsborough, Lincolnshire. Ping purchases and manufactures components and assembles them into golf clubs which it sells throughout the UK, Europe, the Middle East and South Africa. In addition to golf club assembly and distribution, Ping sells soft goods (e.g. golf bags, umbrellas, towels, gloves) and clothing. Ping is the sole licensee of the Ping brand in the UK, Europe and the other countries it supplies. Ping also owns and operates Gainsborough Golf Club. Ping had a turnover of £52.7 million in the financial year ended 31 December 2016. Ping has one subsidiary, Ping Scandinavia AB, established in Sweden.

8. Ping golf clubs are also manufactured and distributed by a number of other companies in different geographical territories including Ping Inc. based in the United States.

9. Ping is a private limited company ultimately owned by members of the Solheim family. The Ping brand was founded by Karsten Solheim in the United States in the nineteen fifties. He applied his engineering knowledge and experience as an aerospace engineer to the challenge of golf club design, in particular to putters. He also began developing the principle of custom fitting golf clubs to each individual golfer which included Ping's Colour Code Chart for personalised iron fitting. The Chart is a grid which plots height and wrist to floor

measurements, directing the fitter towards the correct lie angle (depicted by 10 different colour codes) and shaft length.

10. Ping operates a selective distribution network and supplies only authorised retailers, referred to by Ping as “account holders”, which meet certain qualifying criteria. In 2016 Ping clubs in the UK were sold through a network of 1,253 active account holders.

(2) Retailing of golf clubs

11. There are several manufacturers distributing golf clubs in the UK, including Callaway, Cobra, Mizuno, Ping, TaylorMade and Titleist. Most of the leading manufacturers supply all categories of club, with some specialising in the manufacture of one or two categories of clubs.

12. Competition in the golf club sector takes place at both the upstream level (rival manufacturers competing for sales to retailers and ultimately consumers) and downstream level (rival retailers competing for sales to consumers)

13. Ping provided evidence to the CMA, based on the Golf Datatech United Kingdom Retail Market Share Report 2015, which indicated that it had a total “brand” market share in the UK of between [[…][✂] *10-20-20-30%*] in the 10 years between 2006 and 2015, with a figure of approximately [[…][✂] *20-30%*] in 2015 YTD (December), making it the market leader by revenue in that year.

(3) Custom fitting

14. In the UK sales of golf clubs are made to consumers through three types of retailers: bricks and mortar stores (located on or close to golf courses or driving ranges or away from golf courses); bricks and mortar retailers also selling online and online only retailers.

15. Many bricks and mortar stores offer the consumer the choice of having a face-to-face custom fitting to assist in deciding which club best suits his or her individual requirements.

16. Custom fitting is described by Ping as consisting of the following inter-related steps:

(1) Initial interview - during which the PGA professional/trained fitter identifies the golfer's ball flight tendencies, current equipment specifications, likes and dislikes, as well as needs and preferences from new equipment.

(2) Static measurement - which focuses on taking and recording a golfer's basic measurements of height, wrist crease-to-floor, wrist crease-to-middle-finger and length of middle finger to the start of the palm.

(3) Dynamic swing test - during this part of the process, a golfer will hit balls from an impact board, with special tape on the sole of an iron. When the club hits the board, it leaves marks on the tape that help the fitter determine the correct lie of the club (i.e. the angle between the club sole and the shaft).

(4) Ball flight analysis - during this step, the consumer will hit a variety of clubs with slightly different specifications to isolate each fitting variable and determine the most appropriate model and fitting combination of colour code (iron only), club length, shaft type and flex, and grip type and size that gives the player the best opportunity to achieve his/her desired ball flight and ultimate shot result. This part of the fitting normally utilises a ball flight-tracking device which provides very accurate detailed information to assist in the fitting decision.

For convenience, in this judgment we refer to this dynamic face-to-face process simply as "custom fitting", or where clarity demands it, as "dynamic custom fitting".

17. Ping was a pioneer in developing and promoting custom fitting which John Clark, Ping's managing director, describes as "part of Ping's DNA". For example, Ping was the first golf club manufacturer to develop the Colour Code Chart for custom fitting, to produce a custom fitting manual and to invest in custom fitting technologies, such as nFlight. Most of the other club

manufacturers now also use fitting manuals or rely on their own systems comparable to Ping's Colour Code. The basic custom fit principles of the different brands are essentially the same. A consumer may try several brands of golf club simultaneously to ascertain which suits them best. American Golf has created its own custom fitting process, called the American Golf "Club Fitting Process", which is applicable to all brands, including Ping.

18. Custom fitting is increasingly popular. As Ping put it in its Amended Notice of Appeal "[t]*he direction of travel in the market is therefore clear…Custom Fitting is becoming the norm, and this has been driven by consumer demand*". The evidence of Terry Sims of Silvermere Golf & Leisure, one of Ping's witnesses, was as follows.

> "8. We have seen a significant increase in custom fitting rates over the past few years, including for Ping clubs. This year we have consistently carried out between 10% - 15% more custom fits every week than the previous year. To give an indication of the increase in our custom fitting rates, during the period between Boxing Day and New Year's Day 4 years ago, we carried out 3 custom fits. Last year, during the same period, we carried out 65 custom fits."

19. Retailers incur costs in providing custom fitting services. For example, they may invest in specialist equipment, they may set aside space for custom fitting which may otherwise be used for other purposes, they may incur costs training staff in the custom fitting process and they may also incur labour costs during each custom fitting session. Some retailers, including Silvermere, make a charge for custom fitting which may be deducted from a final purchase price and some, including American Golf, provide custom fitting for free, although the latter withholds the specifications if the consumer decides not to purchase a club.

(4) Benefits of custom fitting

20. A custom fit enables fine adjustments to be made to the geometry and flexibility of a golf club so as to optimise the player's performance.

21. Dr Paul Wood, the Vice President of Engineering at Ping Inc, referred the Tribunal to the results of a study carried out with a Ping retailer in the United States in which […][✂] golfers carried out a static measurement, taking their

height and wrist to floor measurements, followed by a staff member taking the same measurements and then using those results to begin a dynamic custom fitting. From this exercise it was found that only […][✂] of the […][✂] golfers' own measurements were close to the static measurements that were professionally recorded by the fitter and, following the dynamic element of the custom fitting of each golfer, only […][✂] of these […][✂] golfers ended up with club specifications matching the recommendations suggested by the golfers' self-fitted measurements.

22. Dr Wood also referred to an analysis of data from Ping's fitting software. This took […][✂] iron fittings and compared the static recommendation for colour code, shaft flex and shaft length with the results following the dynamic element of the custom fitting. For these […][✂] fittings, only […][✂]% of the golfers were dynamically fitted to the same colour code, shaft length and shaft flex as their static recommendation. There are other variables in the dynamic fitting such as grip size, shaft material, shaft model and set make-up, which when factored in would result in materially less than […][✂]% of golfers being dynamically fitted to the initial static recommendation.

23. In the course of a player's lifetime, changes to build, flexibility or strength may require a modified fitting specification and a new fit. On the professional golf tours, it is standard practice to have a professional club builder and club fitter for each of the major golf companies available at the event to make changes to the professional golfer's equipment - and thus optimise their performance - on a weekly basis.

(5) Purchasing practices

24. Consumers can choose whether to purchase a club, with or without a custom fitting, at a bricks and mortar store, by telephone or online. The consumer needs to provide a number of specifications prior to purchasing a club which can be sold off the shelf, if held in stock, or otherwise made to order.

25. For online purchases, consumers access a retailer's website, select a club and choose the relevant variables, which are typically listed in drop down boxes,

and then click on "Add to basket". Some online retailers (Online Golf and Golf Online) provide advice in real time through "live chat" technology or other methods. With the exception of Ping, all the other main brands allow their custom fit clubs to be sold online.

26. According to evidence submitted by Ping to the CMA in 2015 online retailers accounted for [[…][✂] *5-10 – 10-20%*] of sales of clubs depending on the club type.

27. For UK retailers operating both bricks and mortar stores and a transactional website, a significant proportion of their sales are made online. The evidence of Mr Lines was that the turnover in 2017 of Golfsupport, which has a website and bricks and mortar store, was £[…][✂] million (including VAT) of which approximately £[…][✂] million was from website sales. Mr Patani's evidence was that the turnover in 2017 of Golf Online was £[…][✂] million, […][✂]% of which originated from website sales. These sets of figures represent all sales, including soft goods.

28. The Tribunal was shown the websites of a number of golf retailers including the following:

(1) 2nd Swing, a US online retailer which offers standard fit clubs i.e. clubs which are in sizes suitable for most golfers, as well as clubs available in a large number of customisable options that can be selected by the customer. It also advertises face-to-face custom fittings.

(2) Golfsupport, which likewise offers standard fit clubs and customisable options online as well as a webpage explaining the benefits of in-store custom fitting.

(3) Foremost Golf, a retail group with links to websites of members, which offer a limited number of different standard fit clubs online but not customisable options, coupled with a notice advising the customer to make an appointment for a custom fit.

(4) American Golf, which offers standard fit clubs online but not customisable options and includes a webpage advising customers to take advantage of American Golf's custom fit facilities.

(5) Silvermere, which offers both standard fit clubs and customisable options online and advertises the availability of custom fitting.

29. The clubs assembled by Ping at its factory in Gainsborough include both the clubs which are built on a made-to-order basis and some clubs which are supplied to retailers in standard fits as initial season orders ("**ISOs**") and used to replenish depleted stock. Ping sells ISOs to almost all of its account holders with the purpose of ensuring that the brand achieves appropriate visibility in retailer stores.

30. The evidence of Mr Mahon of American Golf, which the Tribunal accepts, was to the effect that American Golf keeps a core stock of standard fit clubs from its suppliers, including Ping, as part of its ISOs which it replenishes in the course of the year as necessary.

(6) Ping's internet policy

31. Ping's emphasis on a face-to-face custom fitting process for its clubs is a long-standing policy which predates the advent of the internet and retail sales through e-commerce. When e-commerce arrived, Ping took the view that online selling was inconsistent with face-to-face custom fitting and therefore decided to prevent its account holders from selling online.

32. Ping first communicated its internet policy to its account holders by a letter dated 19 May 2000. It told retailers that online sales were "*inconsistent with our policy of individual custom-fitting*". The policy was re-communicated to account holders by a letter, dated 12 January 2005, informing them that Ping had carried out "*a review of internet selling and as a consequence in order to protect the brand and the consumer and to ensure that custom-fitting remains at the heart of the sale of Ping Golf Clubs we have decided to issue a new policy which will not allow account holders to execute sales transactions with*

consumers on the Internet." Ping further explained the rationale for the introduction of the internet policy in the following terms: "*We believe it is fundamental to the process of selling Ping Golf Clubs that the consumer is custom-fitted to ensure they receive clubs that are custom-built to their own specifications. We want to ensure that a personal conversation takes place between the account holder and the consumer so that the account holder can fully explain the benefits of Ping custom-fitting and make appropriate arrangements to arrange an appointment to fit the customer. This process cannot take place during an Internet transaction and it is for this reason we believe that Ping Golf Clubs should not be sold on the Internet.*"

33. Account holders operating transactional websites were given until 15 February 2005 to cease selling Ping products via these sites and were warned that, from that date, if they breached the internet policy by selling online (on their own website or on any third party internet sites) Ping would close their account.

34. On 26 June 2006, Mr Clark wrote to account holders to further clarify the internet policy: "*Following the closure of a number of accounts for breach of our Internet Policy I want to ensure that there is no doubt as to the meaning of our existing policy.* [...] *We are determined to keep custom-fitting a necessary and integral part of the Ping selling process and your support of this Internet Policy ensures this and is much appreciated.*" The letter enclosed a copy of the internet policy.

35. Ping launched new products in August/September 2006 and issued an updated version of its trade price list including terms and conditions effective from 1 September 2006. This version of Ping's terms and conditions incorporated the internet policy which stated as follows:

> "In order to protect the brand and the consumer and to ensure that custom fitting remains at the heart of the sale of PING golf clubs, the internet policy does not allow account holders to execute sales transactions of PING products with consumers on the Internet. Custom fitting is a very important part of the process of selling PING golf clubs in order to ensure that the consumers receive clubs that are custom-built to their own specifications. We want to promote the opportunity for a personal conversation to take place between the account holder and the consumer so that the account holder can explain the benefits of PING

custom fitting and strongly recommend that a custom fitting appointment be arranged." Internet transactions do not fulfil this philosophy. It is important for PING products to be sold in a manner consistent with the status of the PING brand and for this reason PING Europe has decided that PING products should not be sold on the Internet. For these reasons, any account holder who executes sales transactions of PING Products directly on the Internet will be in breach of our Internet Policy, risking closure of its account facility with the company. As well as account holders' own sites this requirement prevents sales of PING products using any third party Internet sites (including, but not limited to, Internet auction sites). This policy is necessary and in the best interest of PING, our account holders and not least the consumer. This policy is incorporated as a contractual term of our agreement with account holders."

36. Subject to minor amendments to the text, this is the same 'internet policy' clause which remains in Ping's terms and conditions to date, although re-numbered. On 17 January 2017 Mr Clark wrote to all account holders reminding them of Ping's terms and conditions and specifically highlighting the internet policy. The letter referred to the fact that Ping had reluctantly stopped doing business with a number of long-standing customers who had breached the internet policy and warned that any account holders who sold Ping products via internet auction sites would be in breach of the policy and put their account facility with Ping at risk.

37. Ping introduced its dynamic face-to-face custom fitting policy in May 2009. It said in a letter to its retailers that *"[w]e would like every Ping club to be sold through a face-to-face dynamic fitting interaction between you and the consumer. That is why we have invested heavily in customer fitting training and also why we have implemented our Internet Policy"*.

38. On 1 August 2011, Ping incorporated its dynamic face-to-face custom fitting Policy into its terms and conditions. The Policy stated that all new account holders from 2007 had been required to comply with the Policy. Ping informed its account holders that, from 1 August 2011, its terms and conditions would include a dynamic face-to-face custom fitting policy.

39. The dynamic face-to-face custom fitting policy stated as follows:

> "The Seller wants to ensure that each consumer is sold the right product, custom-fitted to their personal specifications, thereby enabling them to obtain the maximum benefit to their game from PING clubs. To achieve that outcome the Seller believes that sales of its clubs are best transacted through a face-to-face meeting between the consumer and the Buyer. This ensures that the consumer has the opportunity both to understand and go through PING'S custom-fitting process. To support this, the Seller has provided to date formal face-to-face custom-fitting training to over 2,500 of its Buyers throughout Europe. To reinforce this commitment to consumers, the Seller wants to ensure that its support is weighted towards those of its Buyers who invest considerable time and use their custom-fitting knowledge and fitting equipment to dynamically custom-fit the consumer face-to-face. Existing Buyers that rely on a significant proportion of their sales coming from non-face-to-face transactions will not receive the same level of support as those Buyers whose sales come primarily from the use of dynamic face-to-face custom fitting. Since 2007, the Seller has followed a policy whereby new account applications must immediately comply with the Seller's Dynamic Face-to-Face Custom-Fitting Policy otherwise the application will be refused."

40. During the course of 2011 and 2012 Ping reviewed the internet policy and considered various commercial options. Mr Clark wrote to account holders in August 2012 informing them that Ping had conducted a full review and decided to allow bags and accessories to be sold directly on the internet.

41. Ping's terms and conditions of sale, as well as Ping's 'New Account Application Form', impose an obligation on the account holders to:

    (1) accept and adhere to Ping's face-to-face dynamic custom fitting policy;

    (2) do everything reasonable to persuade the consumer of the benefits of having a dynamic fitting;

    (3) be proactive in promoting custom fitting and conduct a conversation with the consumer before executing a sales transaction or offering the facility to execute a sales transaction of Ping clubs.

42. Ping's terms and conditions of sale state in section 12 that *"any* [account holder] *who executes sales transactions of any* [Ping golf clubs] *or offers the facility to execute sales transactions of any* [Ping golf clubs], *prior to any conversation*

with the consumer, is in breach of [Ping's] *Internet Policy and risks closure of its account facility with* [Ping]*"*.

43. Section 14 of Ping's terms and conditions of sale incorporates the dynamic face-to-face custom fitting policy.

44. Ping's evidence was that its focus was not on short-term sales targets but on long-term quality, performance and customer satisfaction which it believes can only be achieved through custom fitting. On one occasion it had even destroyed US$1 million worth of driver heads which were excess to requirements and suitable only for very proficient golfers rather than flood the market with an ill-fitting product at a discounted price.

45. The evidence of Ping to the CMA in the investigation was that, whilst there had been some cases in the past of account holders not adhering to the internet policy, particularly when the policy was incorporated into Ping's terms and conditions in 2006/2007, generally account holders adhere to the policy. Since 2006 Ping has monitored its account holders for compliance with its internet policy, to ensure that account holders do not sell Ping golf clubs on their transactional websites. Ping employees (normally the area sales managers) contact account holders if they discover that an account holder has activated the 'Add to Basket' (or similar) button allowing consumers to purchase direct from websites. Where account holders breach the internet policy, particularly after having been warned, Ping may use the ultimate sanction of account closure.

46. Ping permits its account holders to sell golf clubs following a telephone call. For this reason, some account holders which list Ping golf clubs on their websites carry messages stating 'Call to Order' or similar. Ping's evidence, in terms of how this process works in practice, was that during a telephone call account holders are expected to try to persuade the customer to undergo a dynamic custom fit. Ping believes that the vast majority of its account holders are carrying out custom fitting but it does not monitor or report whether they are doing so.

47. Although Ping prohibits all of its UK account holders from selling any golf clubs online, Ping Inc does not operate an online sales ban in the US.

48. Ping makes substantial investments in custom fitting including the provision of fitting equipment and free training to account holders. Mr Clark's evidence was that in 2015 Ping's education programme for retailers represented an investment of approximately [[…][✂] *£0.05 – £0.1 million*], excluding Ping's staff time and costs, and that there was a similar cost in 2016. Ping also provides a demo fitting day service to account holders, to which prospective Ping customers are invited. In 2015 and 2016, Ping invested [[…][✂] *£0.2 – £0.3 million*] and [[…][✂] *£0.2 – £0.3 million*] in demo fitting days. Ping also operates an all-year-round fitting centre for consumers at a cost in 2015 and 2016 of [[…][✂] *£0.1 – £0.2 million*] and [[…][✂] *£0.1 – £0.2 million*] respectively.

C. THE WITNESSES

49. Ping provided evidence from the following witnesses of fact, all of whom were cross-examined, except for Dr Wood:

(1) Mr John Clark, Ping's Managing Director;

(2) Dr Paul Wood, Vice President of Engineering at Ping Inc;

(3) Mr Paul Hedges, CEO of Foremost Golf, a buying group representing over 1000 golf retaliers, golf retailer and Ping account holder;

(4) Mr Terry Sims, of the Silvermere Golf & Leisure brand, a golf retailer and Ping account holder;

(5) Mr Dave Clarke, of Clarke's Golf Centre, a golf retailer and Ping account holder; and

(6) Mr Robert Challis, manager and head PGA golf professional at the John Reay Golf Centre, a golf retailer and Ping account holder.

50. Ping also called the following expert witnesses:

(1) Mr Derek Holt, of Alix Partners, who addressed the effect of Ping's internet policy on inter-brand and intra-brand competition, and the consequences of allowing online sales on consumers and retailers; and

(2) Professor Chris Brady, of the Centre for Sports Business, Salford University, Manchester who addressed the impact that allowing online sales would have on Ping's brand image.

51. The CMA adduced evidence from the following witnesses of fact, all of whom were cross-examined:

(1) Ms Sue Aspinall, a Project Director within the CMA who worked on the Ping investigation;

(2) Mr Neil Mahon, of American Golf, a golf retailer and Ping account holder;

(3) Mr James Houghton, also of American Golf;

(4) Mr Nihar Patani, of Golf Online, a golf retailer but not a Ping account holder;

(5) Mr John Lines, of Golfsupport.co.uk, a golf retailer but not a Ping account holder; and

(6) The Complainant, a golf retailer and Ping account holder.

52. The Tribunal considers that all the witnesses were seeking to be helpful. Ping criticised the evidence of the Complainant on the basis that his evidence was motivated by the prospect of commercial gain if permitted to sell Ping clubs online in a largely unrestricted manner. It is clear that the Complainant was, in his own words, very keen to sell Ping clubs online - as were other witnesses called by the CMA - and that he would consider taking additional steps to promote custom fitting online beyond what he already does if required to do so by Ping. We consider that his evidence was nonetheless of assistance to the

Tribunal. It was, incidentally, not suggested by Ping, having had the opportunity to cross-examine the Complainant, that it had been hampered in dealing with the Complainant's evidence by the confidentiality arrangements that were put in place to protect the Complainant's identity.

D. LEGAL FRAMEWORK

53. In this section of the judgment, we set out the legal background to the appeal, the parties' contentions on the main legal issues, the relevant law and the Tribunal's approach to those issues.

(1) Article 101

54. Article 101 TFEU provides as follows:

> "1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those 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.
>
> 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
>
> 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
>
> - any agreement or category of agreements between undertakings,

- any decision or category of decisions by associations of undertakings,

- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

55. The Chapter I prohibition under the 1998 Act is materially the same as the prohibition under Article 101 TFEU and we therefore do not refer to it separately below unless the context requires.[2] As noted in *Balmoral v CMA* [2017] CAT 23 ("***Balmoral***"), section 60 of the 1998 Act requires the CMA and the Tribunal on this appeal to ensure so far as possible that questions arising under the Chapter I prohibition in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising under EU law, including consistency with the case law of the Court of Justice and General Court.

56. We note that, whilst both parties recognised that a 'by object' infringement might be capable in principle of receiving individual exemption under Article 101(3), neither party placed any real emphasis on this aspect of the appeal either in their written or oral submissions. Rather, it appeared that both parties considered that the case would stand or fall on the 'by object' / 'objective justification' limbs of the case. To the extent that individual exemption was addressed at all, both parties tended to do so by way of cross-referencing their earlier submissions on the Article 101(1) issues.

[2] The Chapter I prohibition requires an effect on trade within the UK, whereas Article 101 requires an effect on trade between EU member states. The conditions for individual exemption under section 9 of the 1998 Act mirror those in Article 101(3).

(2) Metro

57. Case 26/76 *Metro SB-Großmärkte v Commission* EU:C:1977:167 *("**Metro**")* concerned an annulment action brought before the Court of Justice of a European Commission ("**Commission**") decision approving (by a combination of negative clearance and time-limited exemption) a distribution system operated by SABA, a German manufacturer of electronic equipment. The Court of Justice recognised that, to be effective, a marketing system, such as a selective distribution system, would necessarily contain restrictions on participants' freedom of action. However, such restrictions were not to be regarded as restrictions of competition provided they did not go beyond what was necessary for the product in question.

58. The Court of Justice ruled at para 20 that, in relation to the production of high quality and technically advanced consumer durables:

> "selective distribution systems constituted… an aspect of competition which accords with [Article 101(1)], provided that resellers are chosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the reseller and his staff and the suitability of his trading premises and that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion."

The Court of Justice went on to state in para 21:

> "It is true that in [selective distribution systems] price competition is not generally emphasized either as an exclusive or indeed as a principal factor. This is particularly so when, as in the present case, access to the distribution network is subject to conditions exceeding the requirements of an appropriate distribution of the products. However, **although price competition is so important that it can never be eliminated it does not constitute the only effective form of competition or that to which absolute priority must in all circumstances be accorded.** The powers conferred upon the Commission under [Article 101(3)] show that the requirements for the maintenance of workable competition may be reconciled with the safeguarding of objectives of a different nature and that to this end certain restrictions on competition are permissible, provided that they are essential to the attainment of those objectives and that they do not result in the elimination of competition for a substantial part of the Common Market. **For specialist wholesalers and retailers the desire to maintain a certain price level, which corresponds to the desire to preserve, in the interests of consumers, the possibility of the continued existence of this channel of distribution in conjunction**

> **with new methods of distribution based on a different type of competition policy, forms one of the objectives which may be pursued without necessarily falling under the prohibition contained in [Article 101(1)], and, if it does fall thereunder, either wholly or in part, coming within the framework of [Article 101(3)]**. This argument is strengthened if, in addition, such conditions promote improved competition inasmuch as it relates to factors other than prices." (Our emphasis.)

59. In respect of one of the obligations on the distributors (the obligation to supply only appointed wholesalers or retailers) the judgment, at para 27, emphasises the mechanism by which the *Metro* criteria work, and also the consequences of not satisfying the criteria:

> "To be effective, any marketing system based on the selection of outlets necessarily entails the obligation upon wholesalers forming part of the network to supply only appointed resellers and, accordingly, the right of the relevant producer to check that that obligation is fulfilled. **Provided that the obligations undertaken in connexion with such safeguards do not exceed the objective in view they do not in themselves constitute a restriction on competition but are the corollary of the principal obligation and contribute to its fulfilment.** The Commission considered that the obligations imposed in this connexion under the agreement do not exceed what is necessary for an adequate control and constitute a normal duty for a wholesaler since, in the case of consumer durables, the identification of the retailers supplied and of the goods delivered constitutes a normal requirement in running a wholesale business. Accordingly, since such obligations concerning verification do not exceed what is necessary for the attainment of their objective and in so far as they are designed to ensure respect for the conditions of appointment regarding the criteria as to technical qualifications, they fall outside the scope of [Article 101(1)] **whereas, insofar as they guarantee the fulfilment of more stringent obligations, they will fall within the terms of the prohibition contained in [Article 101(1)], unless they together with the principal obligation to which they are related are exempted where appropriate pursuant to [Article 101(3)].**" (Our emphasis.)

60. It is clear from this passage that the Court of Justice envisages that a provision may either: (i) fall outside the scope of Article 101(1) entirely, because it is necessary to the "continued existence" of the selective distribution system; or, if it is not fundamental to the existence of the system, (ii) fall within the scope of Article 101(1) but nevertheless be redeemed under Article 101(3) because it can be "reconciled with the safeguarding of objectives of a different nature". In

other words, because the restriction on price competition promotes non-price competition.

61. The Court of Justice went on to find that certain of Metro's restrictions fell outside the ambit of Article 101(1) entirely (e.g. the obligation upon non-specialist wholesalers to open a special department for electronic equipment, see the discussion at paras 36-37) and that other restrictions, although caught by Article 101(1), were individually exemptible under Article 101(3), in particular because they provided a direct benefit to consumers in the form of ensuring regular supplies (e.g. certain turnover incentives discussed at paras 37-50).

(3) L'Oréal

62. The Court of Justice refined the *Metro* criteria in the subsequent case of *Case 31/80 NV L'Oréal and SA L'Oréal v PVBA "De Nieuwe AMCK"* EU:C:1980:289 ("***L'Oréal***"*)*, which was a preliminary reference case. In *L'Oréal,* the Court of Justice emphasised in para 16 that restrictions on the membership of the selective distribution system would only fall outside the scope of Article 101(1) entirely if "the criteria do not go beyond what is necessary". In other words, such criteria must be proportionate.

(4) AEG

63. In Case 107/82 *AEG v Commission* EU:C:1983:293 ("***AEG***"), AEG improperly refused to admit to its selective distribution system certain low price distributors who nevertheless satisfied the relevant criteria for admission. AEG also fixed the selling prices to be applied by its approved distributors. The Commission took an infringement decision under Article 101(1) and imposed a fine. AEG sought to annul this decision before the Court of Justice on the ground, amongst others, that Article 101(1) did not apply because the action by AEG to maintain minimum profit margins in the selective distribution system was lawful.

64. The Court of Justice restated the *Metro* criteria, as clarified by *L'Oréal* at paras 33-36 of its judgment, and noted at para 34 that:

> "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 [relation to factors other than price]. Otherwise they would have no justification inasmuch as their sole effect would be to reduce price competition."

65. AEG's argument, set out at para 71 of the judgment, was that its fixing of selling prices was necessary to improve non-price competition. AEG argued:

> "that maintenance of a high profit margin was **absolutely essential** for the **survival** of the specialist trade and that undertakings dispensing with a high profit margin must automatically be regarded as incapable of providing the very expensive services associated with the specialist trade." (Our emphasis.)

66. In other words, without the price fixing arrangements there would be no specialist trade and hence consumers would be deprived of the benefits flowing from that specialist trade.

67. After noting at para 72 that the maintenance of profit margins in the specialist trade could not be a legitimate aim as such, the Court of Justice accepted in para 73 that a restriction leading to a certain price level could *in principle* be compatible with Article 101(1) if it genuinely were necessary for the existence of the specialist trade in question:

> "The *Metro* judgment […] established in reality **a causal link** between **the maintenance of a certain price level** and **the possibility of the survival of the specialist trade** in conjunction with an improvement in competition and permits a restriction of price competition only to the extent to which such a restriction appears necessary to ensure competition at the level of the services provided by the specialist trade." (Our emphasis.)

68. However, immediately following this passage, the Court of Justice noted that if there were no causal link between the restriction and the existence of the specialist trade then such a restriction clearly would fall within the scope of Article 101(1):

> "However, if such services were provided also by the specialist departments of discount stores or other new forms of distribution which, thanks to their type of organization, would be in a position to provide them at a lesser price, the maintenance of a minimum profit margin would be deprived of any justification inasmuch as such a margin would

no longer serve to guarantee competition affecting factors other than price."

69. The Court of Justice went on, in paras 74-75, to note that AEG had not established that high profit margins were essential for the specialist trade to exist. On the contrary, the Court of Justice considered that discount stores were capable of organising themselves in a manner to satisfy the qualitative specialist trade conditions demanded by AEG and, indeed, AEG admitted that certain of them had satisfied its conditions. The restrictions therefore fell within the ambit of Article 101(1).

(5) Ancillary restraints

70. Before considering the more recent jurisprudence of the Court of Justice on internet selling, it is relevant to consider the Court of Justice's other case law on so-called "ancillary restraints". This line of cases has recently been considered by the Court of Justice in Case C-282/12 P *MasterCard Inc v Commission* EU:C:2014:2201 and by the Court of Appeal in *Sainsbury's Supermarkets Ltd and ors v MasterCard Incorporated and others* [2018] EWCA Civ 1536.

71. In outline, the requirements are as follows:

(1) There must be an operation or activity which has a neutral or positive effect on competition;

(2) The alleged restriction of competition must be objectively necessary to the implementation of that operation or activity; and

(3) The restriction must be proportionate to the objectives of that operation or activity.

72. Where the requirements are fulfilled, the restriction will fall outside the scope of Article 101(1) entirely.

73. The ancillary restraints doctrine bears a strong resemblance to the 'objective justification' case law elaborated in the *Metro* cases, in particular, given that a restraint must be linked to the "survival" of the relevant trade in question (cf para 73 of *AEG*). The Commission's Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C 101/97 (the "**Article 101(3) Guidelines**"), published before the *MasterCard* cases, also comment on the similarity of the 'objective justification' case law and that of the ancillary restraints doctrine. In the context of objective justification, at para 18(2) the Guidelines explain that:

> "certain restraints may in certain cases not be caught by [Article 101(1)] when the restraint is objectively necessary for the existence of an agreement of that type or that nature."

74. In the subsequent text on ancillary restraints, the Guidelines explain (at para 28) that where there is a main transaction which is not restrictive of competition (either because there is no restriction or because the restriction is objectively justified) it becomes necessary to examine whether individual restraints contained in the agreement are also compatible with Article 101(1) because they are ancillary to the main transaction. The Guidelines go on to explain (at para 29) that:

> "In Community competition law the concept of ancillary restraints covers any alleged restriction of competition which is directly related and necessary to the implementation of a main non-restrictive transaction and proportionate to it. […] A restriction is directly related to the main transaction if it is subordinate to the implementation of that transaction and is inseparably linked to it. The test of necessity implies that the restriction must be objectively necessary for the implementation of the main transaction and be proportionate to it. **It follows that the ancillary restraints test is similar to the test set out in paragraph 18(2) above.** However, the ancillary restraints test applies in all cases where the main transaction is not restrictive of competition. It is not limited to determining the impact of the agreement on intra-brand competition." (Our emphasis.)

75. The Guidelines emphasise that the 'objective justification' test is a strict and narrow test. The Guidelines also refer to the Court of First Instance's judgment in Case T-112/99 *Métropole télévision (M6) and others v Commission* EU:T:2001:215 *("**Métropole**")* concerning the ancillary restraints doctrine. There, at paras 72-78, the Court of First Instance rejected the contention that a 'rule of reason' exists under European law making it necessary for the court to

weigh the pro and anti-competitive effects of an agreement in order to determine whether it is caught by the prohibition laid down in Article 101(1). In particular, the Court of First Instance stated at para 74 that:

> "[Article 101] expressly provides, in its third paragraph, for the possibility of exempting agreements that restrict competition where they satisfy a number of conditions, in particular where they are indispensable to the attainment of certain objectives and do not afford undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. **It is only in the precise framework of that provision that the pro and anti-competitive aspects of a restriction may be weighed** […]. [Article 101(3)] would lose much of its effectiveness if such an examination had to be carried out already under [Article 101(1)]." (Our emphasis.)

76. The Court of First Instance went on to explain (at paras 75-77) that the fact that account of the economic context is taken within the assessment under Article 101(1) and that assessment is not wholly abstract in no way implies that it is necessary to weigh up the pro and anti-competitive effects of an agreement when applying that provision.

77. Although *Métropole* dealt specifically with the ancillary restraints doctrine, we consider that the conclusion it reached - that there is no place for a balancing exercise within Article 101(1) - is of general applicability and also applies in respect of an assessment as to whether an agreement is 'objectively justified'.

(6) Pierre Fabre

78. In Case C-439/09 *Pierre Fabre Dermo-Cosmétique* EU:C:2011:649 ("***Pierre Fabre***") a company, Pierre Fabre, established a selective distribution system for certain cosmetic and personal care products under specified brands. The distribution contracts for those products stipulated that sales must be made exclusively in a physical space, in which a qualified pharmacist must be present to give advice to the customer on the product best suited to specific health or care matters. It was accepted that 'de facto' the distribution contracts excluded sale of the products via the Internet.

79. The questions addressed to the Court of Justice on the reference from the Cour d'Appel de Paris were set out in para 33 as follows:

> "In those circumstances, the question referred for a preliminary ruling must be understood as seeking to ascertain, firstly, whether the contractual clause at issue in the main proceedings amounts to a restriction of competition 'by object' within the meaning of Article 101(1) TFEU, secondly, whether a selective distribution contract containing such a clause – where it falls within the scope of Article 101(1) TFEU – may benefit from the block exemption established by Regulation No 2790/1999 and, thirdly, whether, where the block exemption is inapplicable, the contract could nevertheless benefit from the exception provided for in Article 101(3) TFEU."

80. In paras 34-38 the Court of Justice set out the legal framework for establishing a breach of Article 101(1) 'by object', emphasising the seriousness of the restriction of competition inherent in the *de facto* internet sales ban. In paras 39-44 the Court of Justice reflected upon the *Metro* case law and the question whether the *de facto* internet sales ban in that case was objectively justified. In paras 45-46 the Court of Justice dismissed an argument that the internet sales ban was justified by the need to protect the prestigious image of the products in question. Finally, at para 47 the Court of Justice provided its answer on this aspect of the reference. This important text is as follows:

> "*The classification of the restriction in the contested contractual clause as a restriction of competition by object*
>
> 34. It must first of all be recalled that, to come within the prohibition laid down in Article 101(1) TFEU, an agreement must have 'as [its] object or effect the prevention, restriction or distortion of competition within the internal market'. […]
>
> 35. For the purposes of assessing whether the contractual clause at issue involves a restriction of competition 'by object', regard must be had to the content of the clause, the objectives it seeks to attain and the economic and legal context of which it forms a part […].
>
> 36. The selective distribution contracts at issue stipulate that sales of cosmetics and personal care products by the Avène, Klorane, Galénic and Ducray brands must be made in a physical space, the requirements for which are set out in detail, and that a qualified pharmacist must be present.
>
> 37. According to the referring court, the requirement that a qualified pharmacist must be present at a physical sales point *de facto* prohibits the authorised distributors from any form of internet selling.
>
> 38. As the Commission points out, by excluding *de facto* a method of marketing products that does not require the physical movement of the customer, the contractual clause considerably reduces the ability of an

authorised distributor to sell the contractual products to customers outside its contractual territory or area of activity. It is therefore liable to restrict competition in that sector.

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).

42. Although it is for the referring court to examine whether the contractual clause at issue prohibiting de facto all forms of internet selling can be justified by a legitimate aim, it is for the Court of Justice to provide it for this purpose with the points of interpretation of European Union law which enable it to reach a decision (see *L'Oréal*, paragraph 14).

43. It is undisputed that, under Pierre Fabre Dermo‑Cosmétique's selective distribution system, resellers are chosen on the basis of objective criteria of a qualitative nature, which are laid down uniformly for all potential resellers. However, it must still be determined whether the restrictions of competition pursue legitimate aims in a proportionate manner in accordance with the considerations set out at paragraph 41 of the present judgment.

44. In that regard, it should be noted that the Court, in the light of the freedoms of movement, has not accepted arguments relating to the need to provide individual advice to the customer and to ensure his protection

> against the incorrect use of products, in the context of non-prescription medicines and contact lenses, to justify a ban on internet sales (see, to that effect, *Deutscher Apothekerverband*, paragraphs 106, 107 and 112, and Case C‑108/09 *Ker‑Optika* [2010] ECR I-0000, paragraph 76).
>
> 45. Pierre Fabre Dermo-Cosmétique also refers to the need to maintain the prestigious image of the products at issue.
>
> 46. The aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU.
>
> 47. In the light of the foregoing considerations, the answer to the first part of the question referred for a preliminary ruling is that Article 101(1) TFEU must be interpreted as meaning that, in the context of a selective distribution system, a contractual clause requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be present, resulting in a ban on the use of the internet for those sales, amounts to a restriction by object within the meaning of that provision where, following an individual and specific examination of the content and objective of that contractual clause and the legal and economic context of which it forms a part, it is apparent that, having regard to the properties of the products at issue, that clause is not objectively justified."

81. We address the parties' submissions on the proper interpretation of *Pierre Fabre* in our analysis below.

(7) Cartes Bancaires

82. The parties agreed that the leading authority on the concept of infringement 'by object' is Case C-67/13 P *Groupment des Cartes Bancaires v Commission* EU:C:2014:2204 ("***Cartes Bancaires***" or "***CB***"). *Cartes Bancaires* post-dates *Pierre Fabre* and does not seek to distinguish or narrow the earlier judgment's application (in fact Advocate General Wahl refers with approval to *Pierre Fabre* in footnote 20 of his opinion). The background to *Cartes Bancaires*, and the law as set down in it, were recently summarised by the Tribunal in *GSK & ors v CMA (Paroxetine)* [2018] CAT 4. The Tribunal discussed *Cartes Bancaires* at para 165:

> "The law on restrictions by object was recently considered by the CJEU in Case C-67/13P *Groupement des Cartes Bancaires (CB) v Commission*: EU:C:2014:2204. That concerned certain membership fees payable under the rules of the grouping of French banks involved

in the issue of CB payment cards (used as debit cards and for cash withdrawal) in France. The Commission's finding that the imposition of those fees had the object of restricting competition, in particular from new members to the CB system, was upheld by the General Court. However, on further appeal the CJEU held that the General Court had erred in law regarding restriction by object. The CJEU explained, in essence, that:

(1) Certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition, such that there is no need to examine their effects, e.g. horizontal price-fixing cartels (paras 50-51)

(2) To determine whether an agreement reveals a sufficient degree of harm to competition to be considered a restriction 'by object' within Art. 101(1), regard must be had to the content of its provisions, its objectives and all relevant aspects of its economic and legal context. Further:

> "When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question." (para 53; see also para 78).

(3) The parties' subjective intention, although not a necessary factor to establish a restriction 'by object', can be taken into account (para 54).

(4) Where analysis on the basis above does not reveal a sufficient degree of harm to competition, there is not a restriction 'by object' and it is necessary to consider the effects of the coordination to determine whether there is an infringement of Art 101(1) (paras 52, 58)."

83. The Tribunal in *Paroxetine* also relied on the following passage from para 38 of Case C-32/11 *Allianz Hungária* EU:C:2013:160 ("***Allianz Hungária***"), a case cited with approval by the Court of Justice in *Cartes Bancaires*, where the Court of Justice stated at para 38 that:

> "[…] in order for the agreement to be regarded as having an anti-competitive object, it is sufficient that it has the potential to have a negative impact on competition, that is to say, that it be capable in an individual case of resulting in the prevention, restriction or distortion of competition within the internal market. Whether and to what extent, in fact, such an effect results can only be of relevance for determining the amount of any fine and assessing any claim for damages […]"

(8) Coty

84. Case C-230/16 *Coty Germany GmbH v Parfumerie Akzente GmbH* EU:C:2017:941 *("**Coty**")* post-dates both *Pierre Fabre* and *Cartes Bancaires*.

The case, a preliminary reference from the Oberlandesgericht Frankfurt am Main, concerned a manufacturer of luxury cosmetics which banned its distributors using third party online market places, such as Amazon. The restriction in *Coty* was less intense than the total sales ban in *Pierre Fabre* since the authorised distributors were permitted to sell online via their own websites. The reference questions are set out at para 20 of the Court of Justice's judgment:

> "(1) Do selective distribution systems that have as their aim the distribution of luxury goods and primarily serve to ensure a "luxury image" for the goods constitute an aspect of competition that is compatible with Article 101(1) TFEU?
>
> (2) Does it constitute an aspect of competition that is compatible with Article 101(1) TFEU if the members of a selective distribution system operating at the retail level of trade are prohibited generally from engaging third-party undertakings discernible to the public to handle internet sales, irrespective of whether the manufacturer's legitimate quality standards are contravened in the specific case? […]"

85. Pausing here, we note that these two reference questions concern whether Coty's selective distribution system and internet policy are 'compatible' with Article 101(1), as opposed to whether they are restrictive of competition 'by object'.

86. The Court of Justice addressed the first reference question at paras 21-36. In particular, it clarified that para 46 of *Pierre Fabre* is not to be read as a general rule that the aim of maintaining a prestigious image is not a legitimate aim. The Court of Justice explained that para 46 of *Pierre Fabre* must be *"read and interpreted in the light of the context of that judgment"* (para 31) and that para 46 related *"solely to the goods at issue in the case that gave rise to that judgment and to the contractual clause in that case"* (para 34). In particular, *Pierre Fabre* concerned whether the *de facto* internet sales ban was compliant with Article 101(1), as opposed to a selective distribution system as such (para 32). As such, (notwithstanding para 46 of *Pierre Fabre*) the maintenance of a prestigious image may justify the restriction of competition arising from the use of a selective distribution system, in particular in relation to luxury goods (para 35). The Court of Justice, therefore, answered the first question as follows:

> "36. […] Article 101(1) TFEU must be interpreted as meaning that a selective distribution system for luxury goods designed, primarily, to preserve the luxury image of those goods complies with that provision to the extent that resellers are chosen on the basis of objective criteria of a qualitative nature that are laid down uniformly for all potential resellers and applied in a non-discriminatory fashion and that the criteria laid down do not go beyond what is necessary."

87. The Court of Justice addressed the second reference question at paras 37-58. The second question concerned the lawfulness of the specific clause prohibiting the use of third party online market places. The Court of Justice stated that:

> "40. In the context of such a [selective distribution] 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."

Para 36 of *Coty* (quoted at para 86 above) requires that the clause must be objective, uniform, applied without discrimination to all authorised distributors, and that it "does not go beyond what is necessary" - i.e. that it is proportionate to the objective pursued.

88. The Court of Justice then went on to analyse whether the restriction on third party online market places was proportionate. It indicated that such restrictions were likely to be proportionate to the aim of preserving the luxury image of the products in question (paras 55-57).

89. The Court of Justice's judgment was in line with Advocate General Wahl's opinion (EU:C:2017:603). Advocate General Wahl also concluded (at para 106) that the prohibition on online market places was likely to be proportionate with the result that the prohibition:

> "may be excluded from the scope of Art. 101(1) TFEU in that it is likely to improve competition based on qualitative criteria. […] [T]hat prohibition is likely to improve the luxury image of the products concerned in various respects: not only does it ensure that those products are sold in an environment that meets the qualitative requirements imposed by the head of the distribution network, but it also makes it possible to guard against the phenomena of parasitism, by ensuring that the investments and efforts made by the supplier and by other authorised distributors to improve the quality and image of the products concerned do not benefit other undertakings."

90. Advocate General Wahl went on to consider what should happen if it were concluded that the prohibition were within the scope of Article 101(1):

> "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.
>
> 117. On the latter point, and unlike the contractual clause at issue in the case that gave rise to the judgment of 13 October 2011, *Pierre Fabre Dermo-Cosmétique* (C‑439/09, EU:C:2011:649), the prohibition at issue in the present case is in my view wholly incapable of being classified as a 'restriction by object' within the meaning of Article 101(1) TFEU, given that that concept must be interpreted restrictively. It is accepted that the concept of restriction of competition 'by object' can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition to render an examination of their effects unnecessary.[37]
>
> 118. In fact, unlike the absolute ban imposed on authorised distributors making use of the internet in order to distribute the contract products, a prohibition on the use of third-party platforms does not — at least at this stage of the development of e-commerce, which may undergo changes in the shorter or longer term — have such a degree of harm to competition.
>
> 119. In addition, and still in the event that it should be concluded that the clause at issue is indeed caught by Article 101 TFEU and that, moreover, it is restrictive of competition, it must be recalled that it is still necessary to examine whether it might benefit from an exemption under paragraph 3 of that article […]."

Footnote 37, at the end of para 117, refers to the Court of Justice's judgment in *Cartes Bancaires*.

91. From the above, it is apparent that where a provision fulfils the *Metro* criteria (i.e. where a prohibition is objectively justified) it will fall outside the scope of Article 101(1) entirely. Where the provision is not objectively justified, an assessment must be made as to whether it restricts competition by object or by effect. Where there is a restriction of competition, individual exemption must then be considered.

(9) The parties' contentions

92. Ping's case on the law with regard to infringement by object was, in summary, as follows.

(1) The essence of an infringement of competition by object is that it reveals in itself a sufficient degree of harm to competition. It is not sufficient to establish an infringement of competition by object to find merely that the activity or behaviour in question is activity or behaviour of a certain type or that it restricts commercial freedom of action. What is needed is an assessment of whether the rationale or purpose of the agreement is plausibly pro-competitive or not. The Court of Justice has required an effects analysis in cases where there was a plausibly pro-competitive rationale for a restriction (e.g. in Case C-234/89 *Delimitis* EU:C:1991:91 ("***Delimitis***") and Case C-345/14 SIA 'Maxima Latvija' EU:C:2015:784 ("***Maxima Latvija***")), whereas in cases where a pro-competitive rationale was absent - such as *Pierre Fabre*, where the justification for the restriction was a "sham" - it has found the clause to be a restriction of competition 'by object'. In the present case, the internet ban had a plausibly competitive objective.

(2) Proportionality is not relevant to the issue of whether an agreement is an object infringement. The conclusion of the Court of Justice at para 47 of *Pierre Fabre* that an internet sales ban was not "objectively justified" did not entail a test of proportionality. On a correct analysis, the Court of Justice was saying that an internet sales ban was an object infringement on the particular facts of that case because there was no legitimate or justified object for the clause.

(3) The CMA's concession that the aim of the internet policy was a legitimate aim precluded a finding of infringement by object. This was a pro-competitive rationale which compelled the CMA to pursue a case based on infringement by effect which it had not done. Article 101(3) considerations simply did not arise.

(4) If, contrary to the CMA's primary case, proportionality is relevant to the assessment of infringement by object, the CMA bears the burden of proving that the internet policy is disproportionate. The CMA has failed to establish an absence of proportionality.

93. The CMA's case was, in summary, as follows.

(1) Unless objectively justified, a ban on internet sales within a selective distribution system reveals in itself a sufficient degree of harm to competition to amount to a restriction 'by object'.

(2) A clause would be 'objectively justified' if it were proportionate to the objective it pursued. The Tribunal should apply the proportionality test established in Case C-331/88 *Fedesa* EU:C:1990:391. This entails a four-step analysis:

(i) The measure must pursue a legitimate objective;

(ii) The measure must be appropriate for achieving the objective pursued;

(iii) The measure must not go beyond what is necessary to achieve the objective pursued; and

(iv) The disadvantages caused by the measure must not be disproportionate to the aims pursued (so-called 'proportionality *stricto sensu*'). This requires the interests affected by the impugned measure to be weighed against the objectives pursued.

(3) An internet sales ban is, by its nature, a *prima facie* restraint of competition and only a truncated analysis is required. Further, the assessment of the content, objectives and context of the ban are all matters relevant to the question of whether the ban is objectively justified. The CMA relied in particular on paras 38 and 47 of *Pierre Fabre* to support this proposition.

(4) As the ban was not objectively justified, and since Ping's case under Article 101(3) relied on the same arguments and evidence as its case on objective justification, it would be incapable of being justified under Article 101(3).

(5) The burden is on Ping to adduce evidence establishing that the internet policy is objectively justified. This follows from the principle 'he who asserts must prove' and is, in any event, clear from the authorities including *Racecourse Association v OFT* [2005] CAT 29 in which the Tribunal held that, in relation to a 'necessity' argument under Article 101(1), the evidential burden of demonstrating that an apparent restriction on competition was justified fell upon the undertaking advancing that assertion. Ping bears the evidential burden of demonstrating that the ban is proportionate. This in turn requires it to demonstrate by evidence that any less restrictive alternative to the policy would unacceptably compromise its aims. If it fails to discharge that burden, it follows that the internet ban is not objectively justified and is an object restriction under Article 101(1).

(10) The Tribunal's approach

(a) Relevant questions

94. The case law referred to above establishes that the following questions must be addressed when considering the legality of Ping's internet ban.

(1) Does the ban satisfy the criteria in the *Metro* case, including the requirement of showing that it is necessary for non-price competition to exist? If it does so, the ban falls outside Article 101(1) and no question of an object restriction arises.

(2) If the ban does not satisfy those criteria, and so falls within the scope of Article 101(1), does the agreement reveal a sufficient degree of harm to competition to be considered a restriction 'by object' within Art. 101(1),

taking into account its provisions, its objectives and all relevant aspects of its economic and legal context?

(3) If the ban is restrictive of competition by object, can it nevertheless be redeemed under Article 101(3)? In particular, can it be *"reconciled with the safeguarding of objectives of a different nature"*? In other words, is the restriction on price competition counterbalanced by its promotion of non-price competition?

95. The assessment of whether the ban satisfies the criteria in the *Metro* case (i.e. the first question) is a binary assessment: either the restriction is necessary for non-price competition to exist or it is not. It is not a balancing exercise. The Tribunal is not weighing up the likely pro- and anti- competitive effects of the restriction. Where a restriction is not strictly 'necessary' for non-price competition to exist, but it does promote non-price competition, then it is clear that such a clause may benefit from an individual exemption under Article 101(3).

96. It follows that the assessment of whether a restriction satisfies the *Metro* criteria, is conceptually distinct from that of whether the restriction is capable of being redeemed under Article 101(3). The Court of First Instance in *Métropole*, in the context of assessing an ancillary restraint argument, noted that the "*examination of the objective necessity of a restriction in relation to the main operation cannot but be <u>relatively abstract</u>*" (para 109, our emphasis). We consider that this applies equally in the context of the application of the *Metro* criteria. Moreover, the proper place to <u>weigh up</u> the pros and cons of a measure is in the framework of Article 101(3).

97. Under the CMA's approach the question of objective justification was bound up with the question of whether the policy constituted a 'by object' restriction. This assessment entails a detailed enquiry into the proportionality and effectiveness of the policy. The CMA contended that Ping's internet ban was not objectively justified because it was not proportionate to the objective pursued and - on the facts of this case - such a finding meant that the policy would also be incapable of justification under Article 101(3). If correct, the CMA's approach to the law

might risk the assessment under Article 101(3) being emptied of any real substance.

98. We accept Ping's submission that objective justification and proportionality are not in themselves relevant to an assessment of whether an agreement is an infringement by object. The law on 'object' is set out authoritatively by the Court of Justice in *Cartes Bancaires* which makes no reference to proportionality. We should emphasise that we do not see any contradiction between *Pierre Fabre* and *Cartes Bancaires*. In particular, we do not consider that it was the intention of the Court of Justice in *Pierre Fabre* to devise a special form of 'by object' assessment which incorporates proportionality considerations specifically for internet sales bans. On the contrary, it can be seen that the Court of Justice conducted a standard (albeit brief) assessment of the nature of the restriction in its relevant context at paras 35-38 of the judgment. The Court of Justice then went on to consider the separate question of 'objective justification' in paras 39-44 and concluded that the internet sales ban was unlikely to be proportionate. The reference to "objective justification" at para 47 of the Pierre Fabre decision is, in our view, best understood as a reference back to the *Metro* criteria, compliance with which would take the internet sales ban outside the prohibition in Article 101(1).

99. We therefore consider that the CMA erred in law by conducting a full proportionality analysis as part of its assessment under Article 101(1) of whether Ping's internet policy was "objectively justified". An assessment of this type properly forms a part of the assessment under Article 101(3) and is necessary if - and only if - it has first been established that the impugned provision constitutes a restriction of competition 'by object' or 'by effect'.

100. Whilst the CMA has erred in law, this error would only be a material error requiring the Decision to be quashed if the Decision cannot stand in the light of that error and it cannot be supported on some other basis. In later parts of this judgment we conclude that the CMA´s error made no difference to the overall conclusions reached by the CMA and is not a ground for quashing the Decision.

(b) Concept of by object infringement

101. We do not accept Ping's submission that the presence or absence of a "plausibly pro-competitive rationale" is the key to identifying an infringement by object. This submission simply does not reflect the law as stated by the Court of Justice in *Cartes Bancaires*. Had the Court of Justice considered it appropriate for national courts to limit their consideration as to the plausibility of the rationale underlying the relevant restrictions, it would have said so explicitly. Further, this approach cannot be reconciled with the Court of Justice's judgment in Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd* EU:C:2008:643 ("***BIDS****")*. That case concerned a 'crisis cartel' where there was significant overcapacity in beef and veal processing services. Arrangements were put in place to encourage certain participants to exit the market to enable the remaining participants to approach, or even attain, their minimum efficient scale. It is obviously plausible that a scheme which aims at enabling market participants to increase their efficiency might be pro-competitive. However, the Court of Justice ruled that even if the impugned measure had a pro-competitive purpose, this was *"irrelevant"* to an assessment of whether it constituted an object restriction for the purposes of Article 101(1): *"an agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives"* (para 20). The Court of Justice went on to state that: "*It is only in connection with* [Article 101(3)] *that matters such as those relied upon by BIDS may, if appropriate, be taken into consideration for the purposes of obtaining an exemption from the prohibition laid down in* [Article 101(1)]."

102. In Case C-551/03 P *General Motors v Commission* EU:C:2005:639*,* cited in *BIDS*, Advocate General Tizzano explained at para 68 that "*it is the very fact that an agreement obviously has an anti-competitive purpose that renders irrelevant and uninfluential the fact that it also pursues other purposes*". The Court of Justice held at para 64 (EU:C:2006:639) as follows *"*[...] *it is sufficient to note, as the Advocate General states in point 67 of his Opinion, that, contrary to what General Motors argues, an agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives*." Similarly, in Joined Cases

T49/02 to T51/02 *Brasserie Nationale v Commission* EU:T:2005:298, the Court of First Instance held as follows: "*Once it has been established that the object of an agreement constitutes, by its very nature, a restriction of competition, such as a sharing of clientele, that agreement cannot, by applying a rule of reason, be exempted from the requirements of* [Article 101(1)] *by virtue of the fact that it also pursued other objectives,* […]."

103. Contrary to the above, Ping argued that the Court of Justice has ruled that restraints with a plausible pro-competitive justification should not be classed as restrictions by object. In support of this argument, Ping noted that in *Delimitis* the Court of Justice ruled that an exclusive dealing agreement will only be caught by Article 101(1) if it makes an appreciable contribution to market foreclosure. Similarly, in *Maxima Latvija* the Court of Justice accepted an argument that an agreement giving an anchor tenant of a shopping centre the right to veto the letting of other premises to third parties could potentially restrict competitors' freedom of action but ruled that this fact alone was insufficient to establish that the agreement was restrictive of competition 'by object'. The Court of Justice held that:

> "22. Even if the clause at issue in the main proceedings could potentially have the effect of restricting the access of Maxima Latvija's competitors to some shopping centres in which that company operates a large shop or hypermarket, such a fact, if established, does not imply clearly that the agreements containing that clause prevent, restrict or distort, by the very nature of the latter, competition on the relevant market, namely the local market for the retail food trade."

104. However, on a close reading of these cases, it is apparent that they do not support Ping's case on 'object'.

(1) The reference questions in *Delimitis* (set out at para 7 of that judgment) did not concern whether the agreements in question should be classified as 'object' or 'effect' restrictions, but rather how the referring court should conduct an effects analysis (in particular, whether and how it would be appropriate to consider cumulative effects of similar agreements of other breweries). In fact, the judgment expressly proceeded on the basis that the agreements in dispute did not have the

object of restricting competition (para 13). *Delimitis* therefore contains nothing useful on the distinction between object and effect.

(2) *Maxima Latvija*, a case which did relate to the boundaries of the object classification, is of relevance. However, Ping's reliance on para 22 (cited in the previous paragraph) is misplaced. It is clear from that passage that it is the <u>absence</u> of a sufficiently credible negative potential effect arising from the nature of the agreement (as opposed to the <u>presence</u> of a credible positive potential effect) which explains the Court of Justice's ruling that the veto right for the anchor tenant did not restrain competition by object. This is made clear in the Court of Justice's earlier statement (at para 17) that: "[w]*here* […] *an analysis of the content of the agreement does not reveal a sufficient degree of harm to competition, the effects of the agreement should then be considered* […]." This is also in line with the Court of Justice's earlier rulings in *Allianz Hungária* and *Cartes Bancaires*.

105. In the light of the authorities cited above, the Tribunal approaches the issue of object infringement on the basis that an agreement revealing a sufficient degree of harm to competition may be deemed to be a restriction of competition "by object" irrespective of the actual, subjective aims of the parties involved, even if those aims are legitimate.

106. A finding that the object of an agreement is to restrict competition removes the need to establish whether the agreement had, in fact, the effect of restricting competition. Such an agreement may, however, escape prohibition via the medium of Article 101(3) provided the conditions in that subsection are satisfied.

(c) Burden of proof – objective justification

107. Ping accepted that it bore the burden of proving that the ban was individually exempted under Article 101(3) but maintained that, consistently with what the Tribunal said in *Tesco v OFT* [2012] CAT 31, the burden was on the CMA to prove *"each of the analytical steps"* which are prerequisites to a finding that

there has been an infringement of competition law (para 88) and that this included proof that less intrusive measures could have been used instead of the ban without unacceptably compromising the objective. The CMA's position was that Ping had the burden of demonstrating that the ban was objectively justified, necessary to achieve a legitimate aim and not disproportionate by application of the maxim: 'he who asserts must prove'.

108. The Tribunal does not consider that anything turns on burden of proof in this case. Nevertheless, given that the matter has been raised, the Tribunal considers that the incidence of burden of proof is as follows.

(1) The CMA had the burden of proving an overall object infringement (as was common ground) and an evidential burden of proving that there were alternative measures available; Ping could not be expected to identify and debunk in advance all possible alternative measures for achieving its commercial objectives.

(2) Ping had the burden of proving that the ban is necessary and, as part of that exercise, of rebutting the CMA's case as to proposed alternatives.

The Tribunal also takes account of the presumption of innocence, enshrined in Article 6(2) of the European Convention on Human Rights and Fundamental Freedoms, in the context of infringements of the 1998 Act resulting in the imposition of financial penalties.

109. We now turn to Ping's grounds of appeal.

E. GROUND 1 – HUMAN RIGHTS

110. Article 16 of the EU Charter provides as follows:

> "The freedom to conduct a business in accordance with Community law and national laws and practices is recognised."

111. Article 17 of the EU Charter provides as follows:

> "Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as necessary for the general interest…"

112. Ping's case, in summary, was that the Decision contravenes its rights under Article 16 by requiring it to sell a product that it does not sell, and does not wish to sell, namely non-fitted clubs (i.e. clubs sold without the customer first having had a custom fit). Ping maintains that it has built its brand image as a manufacturer which sells only customised clubs and that the Decision would require Ping to give this unique position up, and thus damage a core element of its brand. It relies on the evidence of Professor Brady to the effect that Ping's product comprises goods, services and experiences, each being an inextricable component of a composite product which is unique. Ping's case under Article 17 is that business goodwill is a "possession" and that it enjoys goodwill as a result of its investment in custom fitting which would be seriously undermined if the internet policy were discontinued. Such an interference with Ping's goodwill cannot be justified as necessary and proportionate.

113. The CMA's response was first, that Articles 16 and 17 are qualified rights and that their exercise may be limited pursuant to Article 101 where such restrictions are proportionate to the general interest objectives pursued by that Article. Therefore, if Ping's internet ban is an object restriction under Article 101(1) and does not qualify for exemption under Article 101(3), any limitation on Ping's freedom to conduct business or the enjoyment of its property rights is necessarily lawful.

114. Second, with regard to Article 16, the CMA submitted that Ping's contention that the Decision *forces* it to sell non-custom fitted golf clubs is wrong on the facts. Ping account holders already do sell some Ping clubs off the shelf without a custom fitting. On Ping's own case, [[…][✂] *10-20 – 20-30%*] of its clubs are sold without a custom fitting. Moreover, Ping would be able to maintain its policy of promoting custom fitting with or without the ban.

115. Third, with regard to Article 17, the CMA submitted that Strasbourg jurisprudence draws a distinction between the present day value of future income, which is not treated by the European Court as part of goodwill, and the present day value of a business, which reflects its capacity to earn profits in the future, which may be part of goodwill and a possession. At its highest, Ping's case under Article 17 is that the Decision will adversely affect its future income stream.

116. In reply, Ping contended, in summary, as follows.

(1) Whilst accepting that its rights under Articles 16 and 17 are qualified rights, Ping contended that, in view of the CMA's acknowledgment that the internet ban is an appropriate means of achieving a legitimate objective, the CMA has an exceptionally heavy burden to establish its object case and must show that that aim could be achieved using a different method but at less cost to its rights.

(2) The CMA's case ignores the nature of Ping's business model which, whilst not completely foolproof, seeks to minimise the number of golfers who buy clubs without a custom fit. The Decision forces Ping to alter its business by abandoning its core philosophy that the number of consumers who do not benefit from a dynamic custom fitting should be minimised.

(3) The CMA's case on goodwill is inconsistent with the Decision which acknowledged that Ping possessed goodwill, but went on to find that Ping would not be deprived of that goodwill, citing the case of Ping Inc which does allow limited online purchases to be made and is still perceived to be the market leader in custom fitting in the US.

117. We accept the CMA's submission that Ground 1 adds nothing of substance to Grounds 2 to 5. If, as the Decision found, Ping's internet policy constitutes an object restriction under Article 101(1) and does not qualify for exemption under Article 101(3), any restriction on the exercise of its rights under Article 16 and Article 17 rights resulting from the Decision is *ex hypothesi* proportionate to the

legitimate aim of avoiding the distortion of competition within the EU and qualifies Ping's rights under those Articles.

118. We also accept CMA's submission, in relation to Article 16, that the Decision does not force Ping to sell a product (i.e. a non custom fit golf club) that it does not already sell. During his cross-examination it emerged that Professor Brady had been unaware that a significant minority ([[…][✂] *10-20 – 20-30%*]) of customers already buy Ping clubs without any custom fit. Moreover, the effect of the Decision is to prevent Ping from promoting custom fitting through an online sales ban, not to force it to sell non custom fit golf clubs. Ping could continue to promote dynamic custom fitting and refuse to supply retailers who failed to support dynamic custom fitting.

119. In relation to Article 17, we consider that Ping has failed to establish that the Decision would deprive its business of goodwill, i.e. value reflecting the capacity to earn profits in the future. We are not persuaded that the removal of the internet ban would lead to Ping losing its reputation as a market leader in custom fitting or to an erosion of Ping's capacity to earn profits in the future. We do not consider that Ping's reputation as a market leader in custom fitting is dependent on the internet ban. As set out at section G(6) below, the evidence, in particular the Supplementary Retailer Survey, indicates a difference of only [[…][✂] *5-15]* percentage points between Ping's custom fitting rates and the average custom fitting rates of all other brands, and this differential may be caused by factors other than the internet ban.

120. Nor do we consider that the evidence establishes that the ending of the internet ban will result in consumers making uninformed decisions about their custom fitting specifications, causing them to blame Ping and thereby damaging the brand (see sections G(8) and G(9) below).

121. For these reasons, we dismiss Ground 1 of Ping's appeal.

F. GROUND 2 – OBJECT

122. Ping contended that the CMA's characterisation of Ping's internet policy as an object restriction is misconceived since the internet policy pursues a perfectly legitimate objective - the promotion of custom fitting - which benefits consumers and is an integral part of Ping's products with no material adverse effect on competition (Ground 2).

123. Ping submitted that the CMA's approach to the question of object restriction is inconsistent with the principles set out in the *Cartes Bancaires* and *Pierre Fabre* cases and that the legal and economic factors cited by the CMA do not support an object classification.

124. Ping identified what it contended were four specific errors in the CMA's approach to the issue of infringement by object, each of which is considered, in turn, below.

(1) The online sales ban has a legitimate objective with positive or neutral effects on competition.

(2) The online sales ban has no negative effects on competition.

(3) *Pierre Fabre* does not classify all internet sales bans as object restrictions; it requires a fact-sensitive analysis.

(4) The CMA's "legal and economic factors" do not support an object classification.

(1) Legitimate objective

125. In approaching the question of whether an agreement containing the internet ban constituted an object infringement, the Decision took as its starting point (at para 4.31) the need to have regard to the content of its provisions, its objectives and the economic and legal context of which it forms part, i.e. the test established by Court of Justice case-law and restated in *Cartes Bancaires*.

126. In relation to objectives, the CMA found (at para 4.47) that the immediate objective of the policy was to prohibit any sales on the internet of Ping golf clubs by UK Account holders and that a prohibition on online sales is, by its very nature, liable to restrict competition between account holders through an important sales channel namely online, both within the UK and across the EU more generally.

127. The CMA supported this finding with references to the following materials.

(1) The Opinion of Advocate General Mazak in *Pierre Fabre* (EU:C:2011:113) which described the way that an online sales ban restricts or distorts competition as follows:

> "56. […] a general and absolute ban on internet sales eliminates a modern means of distribution which would allow customers to shop for those products outside the normal catchment area of those outlets thereby potentially further enhancing intra-mark competition."

(2) The Court of Justice's holding at para 38 of the judgment in *Pierre Fabre* that, by excluding one method of distance selling, the internet ban was liable to restrict competition and could not qualify for a block exemption.

(3) The Opinion of Advocate General Wahl in *Coty* contrasting the contractual clause at issue in that case with the "*particularly serious restrictions, such as the outright ban on internet sales that resulted from the clause at issue in the judgment in* [*Pierre Fabre*]" (para 84).

(4) The Commission's Guidelines on Vertical Restraints [2010] OJ C 130/1, which set out a number of ways in which restrictions of internet sales may restrict competition, para 52 of which states as follows:

> "The internet is a powerful tool to reach a greater number and variety of customers than by more traditional sales methods, which explains why certain restrictions on the use of the internet are dealt with as (re)sales restrictions. In principle, every distributor must be allowed to use the internet to sell products. [...] The Commission thus regards

> the following as examples of hardcore restrictions of passive selling[3] given the capability of these restrictions to limit the distributor's access to a greater number and variety of customers: […] (c) an agreement that the distributor shall limit its proportion of overall sales made over the internet."

(5) Ping's acknowledgement in the course of the investigation that online ban may well entail a restriction on passive selling.

(6) The fact that consumers cannot click-to-basket and complete a transaction online which reduces the ability and incentives of retailers to attract and win consumers' business using the internet and restricts consumers from accessing a greater number of Ping golf club retailers. In particular, retailers cannot attract consumers located outside their catchment areas to buy Ping golf clubs online by offering better prices or a quality online service, which was the basis on which the Court of Justice rejected the possibility of a block exemption in *Pierre Fabre*.

(7) The fact that the inability to complete a sales transaction online also limits a consumer's ability to make use of comparison tools in order to find the best available Ping deals.

128. In its Defence, the CMA also referred (at para 85.3) to a number of decisions of the Commission and national competition authorities which have classified contractual restrictions on internet sales as object restrictions for the purposes of Article 101. The CMA neatly summarised its theory of harm in the following passage in its skeleton argument (para 16):

> "The rationale for [the approach in *Pierre Fabre*] is easily discernible. The internet is a powerful tool for reaching a greater number and variety of customers than more traditional sales methods. By excluding the use of the internet, such bans reduce the ability of retailers to sell to consumers located outside their geographic areas (including consumers located in other EU Member States), and prevent them from selling outside of normal trading

[3] "Passive" sales are defined in para 51 as "responding to unsolicited requests from individual customers including delivery of goods or services to such customers. General advertising or promotion that reaches customers in other distributors' (exclusive) territories or customer groups but which is a reasonable way to reach customers outside those territories or customer groups, for instance to reach customers in one's own territory, are passive sales. General advertising or promotion is considered a reasonable way to reach such customers if it would be attractive for the buyer to undertake these investments also if they would not reach customers in other distributors' (exclusive) territories or customer groups."

> hours. In so doing they reduce both the ability and incentive for retailers to compete for business using the internet, thereby seriously restricting intra-brand competition."

129. Ping's principal challenge to the CMA's characterisation of the online sales ban as an object infringement was put on the basis that the ban had a legitimate objective of maximising custom fitting. The concept of object infringement is to be interpreted narrowly and agreements where the requisite sufficient degree of harm is not clear by its very nature are not to be treated as object infringements.

130. As noted at para 101 above, however, the case law of the Court of Justice establishes that an agreement may be regarded as having an anti-competitive object even if it does not have a restriction of competition as its sole aim but also pursues other legitimate objectives. The existence of a pro-competitive objective does not *per se* preclude a finding of infringement by object. It follows that, regardless of Ping's subjective aim in introducing the internet ban as a means of promoting or maximising custom fit rates, the ban may be characterised as an object infringement if it reveals a sufficient degree of harm to competition. We also reject Ping's argument that the objective pursued in *Pierre Fabre* was a "sham". The Court of Justice made no such finding, rather it found that the need to provide individual advice to the customer to ensure protection against the incorrect use of the product did not justify an internet ban (see para 44).

131. In the light of this case law, we consider that the CMA's finding that the objective of the internet ban was to prohibit internet sales of Ping golf clubs was justified and supports its conclusion that the ban was an object infringement.

(2) Absence of negative effects

132. Ping contended that the internet ban had a positive or neutral effect on inter-brand and intra-brand competition which the CMA had failed to take into account in finding that the internet sales ban was an object infringement.

133. Ping's case as to the effects of the ban was supported by the economic report of Mr Holt. Mr Holt's evidence was that, whilst the internet sales ban (like any vertical restraint) does impose some restrictions on intra-brand competition, this is only likely to be problematic if inter-brand competition is limited, which is not the case in the golf club market. His conclusions included the following.

(1) There is strong inter-brand competition in the golf club market. There are three rivals with market shares of around 20-30%, as well as other suppliers with significant market shares; no supplier is dominant; and market shares fluctuate over time as firms launch and market new products. By increasing the opportunity for customers to be custom fit (a dynamic custom fitting can only occur face-to-face in-store and not online), Ping's internet policy leads to improved value for customers and increases the competitive pressure on rivals to improve.

(2) The CMA overstated the effects of the internet ban. The internet is not an important sales channel for custom fitted golf clubs. The vast majority of respondents to Ping's Supplementary Retailer Survey do not make any sales of golf clubs online.

(3) Consumers are also markedly indifferent about purchasing golf clubs online. Even on the CMA's figures, only around 10% of golfers have reported ever purchasing clubs over the internet. The consumers that would potentially benefit from purchasing Ping's clubs online without a custom fitting represents less than [[…][✂] *0-5%*] of the entire market. The impact of the internet policy on retailers, in terms of their overall sales volumes, is therefore limited.

(4) [[…][✂] *90-100%*] of all UK consumers already have a choice of three existing Ping retailers within a fifteen- mile radius of their home, whilst [[…][✂] *90-100%*] have a choice between at least two retailers. The benefits of making Ping clubs available online so that consumers are able to purchase from a wider geographical range of retailers are therefore minimal.

(5) A relatively small number of customers may gain some potential convenience benefit if they are able to purchase Ping golf clubs online outside of normal shop opening hours. However, against this, one must weigh the potential costs associated with removing the internet policy, including the fact that more consumers will purchase the wrong golf clubs for them because, without a custom fitting, consumers will not know which golf club variant is the 'right' option to select in the first place.

(6) Retailers will have fewer incentives to put effort into custom fitting as their incentives to promote custom fitting will reduce as the internet is a lower cost form of making sales. Charging up-front fees to cover the costs of fitting is likely to reduce further custom fitting rates.

(7) In the longer term, Ping's own incentives to differentiate itself by its focus on custom fitting may be jeopardised, reducing inter-brand competition. Any gains to consumers from removing Ping's internet policy are speculative and likely to be very limited, while the welfare costs to consumers are certain and significant.

(8) Even with the internet ban in place, retailers are able to advertise Ping golf clubs online and to advertise their prices online. Contrary to the CMA's assertions in the Decision, consumers are able to compare the prices charged by different retailers on price comparison websites.

134. In response, the CMA contended, in summary, as follows.

(1) Internet sales bans are to be regarded, by their very nature, as so likely to have negative effects on competition that an analysis of their actual effects is unnecessary. The CMA was not required to perform any effects-based analysis, save insofar as required by Article 101(3). As the Court held in Joined Cases 56 and 58/64 *Consten and Grundig* EU:C:1966:41 at page 342 "[…] *for the purposes of applying Article* [101(1)] *there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention,*

restriction or distortion of competition." The Court also established (also at page 342) that the fact that an agreement, which has the object of restricting intra-brand competition, may result in an increase in inter-brand competition does not prevent it being a restriction of competition by object:

> "The principle of freedom of competition concerns the various stages and manifestations of competition. Although competition between producers [i.e. inter-brand competition] is generally more noticeable than that between distributors of products of the same make [i.e. intra-brand competition], it does not thereby follow that an agreement tending to restrict the latter kind of competition should escape the prohibition of [Article 101(1)] merely because it might increase the former."

(2) In any event the Decision identified how the online sales ban is liable to restrict competition materially, namely by preventing consumers from completing click-to basket, which reduces, by its very nature, the ability and incentives of retailers to attract and win consumers' business using the internet. In particular, retailers cannot attract consumers located outside their catchment areas to buy Ping golf clubs online by offering better prices or a quality service online. The ban restricts consumers from accessing a greater number of Ping golf club retailers.

(3) The CMA's case as to the restrictive nature of the online sales ban was supported by the evidence of retailers. Mr Patani's evidence was that selling custom fit clubs online provides Golf Online with a way of reaching new customers in different parts of the UK and EU and doing so outside of business hours. He referred to the online ban introduced by Acushnet in September 2011 which had led to an 85% reduction in Golf Online's sales of Acushnet products. Golf Online was prompted to become a party to the Acushnet litigation because of a concern that if the policy were left to stand other manufacturers would implement similar policies. After Acushnet dropped the ban, Golf Online's sales recovered.

(4) The evidence of Mr Lines and the Complainant was that the ability to purchase custom fit golf clubs online is important because it gives

customers who already know their requirements a convenient way to shop.

(5) The fact that retailers are able to advertise Ping's golf clubs online does not detract from the key fact that retailers are unable to sell clubs online since, by its very nature, this reduces both the ability and the incentive for retailers to compete for business and reach new customers using the internet (for example, by offering better online prices, a quality online service, greater convenience or a wider range of products) including to customers located in other EU member states. In 2017, the Complainant's online sales of custom fit clubs amounted to £[…][✂], approximately half of which £[…][✂] was to customers in other EU Member States.

(6) Furthermore, contrary to Ping's case, the ability to compare Ping's prices using online price comparison tools is significantly more limited than it is for other brands. Thus, even if some comparison can be made online, the ban deprives consumers of the real advantages of online retail, increases search costs (by making it harder for consumers to compare retailers' prices and services for Ping clubs), and reduces retailers' incentives to compete online.

(7) The evidence as to the proportion of UK consumers who have a bricks and mortar store in their vicinity failed to address the fact that, by restricting retailers from competing via the internet, the ban makes it harder for consumers to access the services and prices (and range of products) offered by retailers in a different geographic area.

(8) Mr Holt accepted that the ban has the potential to restrict intra-brand competition between retailers of Ping golf clubs. He also accepted that lifting the ban would benefit those customers who did not want to be custom fitted and those who are deterred from buying Ping clubs because of the ban.

135. The Tribunal accepts the CMA's contention that, if the internet sales ban is so inherently damaging to competition as to amount to an object infringement, it is not necessary to conduct an assessment of the actual effects on competition in the context of Article 101(1) and that a vertical agreement that restricts intra-brand competition by object does not cease to be an infringement by object because it can bring about improvements in inter-brand competition. The inherently damaging nature of a restriction cannot just be assumed, however. It is necessary to consider its potential effects in its relevant economic and legal context, taking into consideration the nature of the goods as well as the real conditions and function and structure of the market.

136. The Tribunal is satisfied that the internet ban is capable of restricting intra-brand competition. The Tribunal makes the following findings in this regard.

137. The internet is an increasingly important sales channel for sales of golf clubs. The evidence from the CMA's online retailers was that sales from internet platforms have grown rapidly over recent years. Retailers are investing substantial sums in websites. The evidence from Ping cited in the Decision (para 3.21) indicates that in 2015 online retailers accounted for [[…][✂] *5-10 – 10-20%*] of sales of golf clubs, depending on club type. Evidence from a number of retailers showed that between 2013 and 2015, online sales made up between 12% and 51.5% of total golf clubs sales.

138. The evidence from the CMA's witnesses and the evidence cited in the Decision establishes that there is significant and growing demand from customers for online sales of custom fit golf clubs. This demand comes from customers who have already had a custom fitting, from experienced professionals who are able to identify their custom fitting or from customers who are not interested in having a custom fit because they have tested out a club and want the same specifications. The evidence of Mr Patani, for example, was that Golf Online's sales of custom fit clubs online had more than quadrupled from £[…][✂] in 2013 to £[…][✂] in 2017. To facilitate online sales of custom fit clubs, retailers including a number of Ping account holders such as Silvermere, offer customised options (for non-Ping clubs) on their websites.

139. The internet ban has the potential significantly to restrict intra-brand competition. As the CMA found, it restricts the ability of account holders to compete with each other for sales out of their local catchment areas or to make passive sales via the internet. It removes the advantages of online sales (in particular, access from any location 24 hours a day) to the detriment of consumers.

140. There is only limited price comparison information available online in relation to Ping clubs. The Decision stated that consumers could not compare prices of Ping golf clubs at all because Ping's account holders are not listed on comparison shopping websites. In fact, as explained by Ms Aspinall, there is some price information for Ping clubs on Google Shopping and pricerunner.co.uk but the information is more limited than for other manufacturers. For example, there was no price comparison available for Ping irons on Google Shopping. The explanation for this appears to be that Google requires retailers wishing to advertise on Google Shopping to comply with certain guidelines, including a requirement that products advertised on Google Shopping are available for direct purchase on the retailer's website.

141. Ping's internet policy is to be distinguished from the clause at issue in *Coty*. The prohibition on the use of third party platforms in *Coty* did not place any significant limitation on retailers' ability to sell to consumers over the internet, since those retailers were permitted to sell via their own websites. The nature of that clause therefore did not reveal a sufficient degree of harm to competition (see the Opinion of Advocate General Wahl at paras 116-118).

142. In our judgment, Ping's reliance in the context of Article 101(1) on arguments that the removal of the internet ban would be damaging to consumers because of the risk that they would end up with wrongly fitted golf clubs or that it would damage Ping's brand or give rise to a significant free-riding problem is misplaced. Arguments to the effect that the negative impact of the internet policy is limited and outweighed by countervailing benefits are appropriately considered in the context of Article 101(3). In line with *Allianz Hungária* (cited at para 83), we consider that the internet policy has a real (non-fanciful) *potential or capacity* to restrict competition. This supports a conclusion that the

very nature of the agreement is to restrict competition. We need not make any findings as to the *actual* effect of the internet policy at this stage.

(3) Fact-sensitive analysis

143. In the Tribunal's view, contrary to Ping's case, the CMA did not proceed in the Decision on the basis that all internet sales bans must be automatically treated as object restrictions. It carried out a detailed assessment of the content, objectives, and legal and economic context of the online sales ban and concluded that the ban revealed a sufficient degree of harm to competition such that it was to be classified as an object infringement. It went on to consider whether the ban pursued a legitimate aim in a proportionate manner (i.e. whether it complied with the *Metro* criteria). In our view, that approach was in accordance with *Pierre Fabre*.

(4) Legal and economic context

144. At paras 4.57 to 4.75 of the Decision, the CMA examined various aspects of the legal and economic context of the ban. Ping does not dispute the CMA's analysis of the nature of Ping's distribution arrangements, the position of the ban in Ping's standard terms and conditions or the prevalence of custom fitting across the industry. It takes issue with the following assertions (in addition to the assertions addressed at paras 125 to 143 above).

(1) The CMA's assertion that the ability to sell Ping golf clubs online is important for a large number of retailers is disputed on the basis that there is a wide variety of brands which highlights the fact that the internet ban has no effect whatsoever on inter-brand competition.

(2) The CMA's assertion that the custom fitting of Ping's clubs does not provide greater benefits than custom fitting provided for clubs of other manufacturers is disputed on the basis that Ping's custom fitting is superior to other manufacturers' in that its custom fitting offers a greater number of adjustments and that it invests more resources in the process than other manufacturers.

(3) The CMA's assertion that a consumer may fall within the top of the 'bell curve' of the most popular variables of Ping's clubs, and therefore may not need to undergo a custom fitting, is disputed on the basis that a consumer cannot know whether he or she falls within the top of the bell curve until he or she undergoes a custom fitting process which cannot be done over the internet.

(4) The CMA's assertion that there is *"nothing about* [the] *intrinsic properties"* of Ping clubs that mean they can only be sold immediately following a custom fitting is disputed on the basis that custom fitting is an integral part of Ping's products, and Ping only wishes to sell custom fit clubs.

145. The Tribunal finds that these challenges to the CMA's findings are not made out, for the following reasons.

(1) The CMA was entitled to find that the ability to sell Ping clubs online is important for retailers, given that Ping has a significant market share in relation to each category of golf club and the fact that the internet is an important sales channel. In its Defence the CMA noted that when weighted by revenue, Ping's own survey results indicate that those account holders that sell clubs online account for 38% of Ping golf club sales and, for those that do, online sales represent, on average, around 29% of their total sales.

(2) The evidence did not show that Ping's custom fitting process was materially different or superior to that of other manufacturers. Mr Clark, Ping's managing director, accepted that the custom fitting processes between the brands are "very similar".

> "Q: […] So is it something about the custom fitting process that makes your clubs better?
> A: Well, I think the processes between the brands are very similar […]
> Q: [In your witness statement] you talk about the process for custom fitting, but I think you've explained to me now that in terms of the process that's used, manufacturers all use pretty much the same processes to custom fit.

A. There are differences, but in a general sense the processes are similar, yes.
Q. Some retailers use their own process, don't they, to custom fit for all clubs? American Golf is an example of a retailer that does that.
A. Yes, but if you look at their process, it is extremely similar. There may be subtle differences, but they would only be subtle.
Q. Sure, but they use the same process for all manufacturers?
A. They do -- they say they do, yes."

(3) The relevant finding in the Decision was that Ping's custom fitting process was not of benefit to those customers who did not need a custom fitting (immediately prior to purchase or at all) and that in practice some customers did purchase stock off the shelf. The fact that customers bought off the shelf was supported by evidence at the hearing. Mr Mahon's evidence was that *"American Golf purchases Ping clubs which we sell to customers from stock on display in our Retail Stores, without any individual customisation just as we do for other brands of custom fit clubs."* Mr Clark's evidence was as follows.

"Q. Or you may have a customer who has been custom fit already and they have broken a club or lost a club or lost their set and so, even though they believe in custom fitting, they don't think they need a custom fitting on that occasion?
A. (Nods)
Q. Now, Ping doesn't ban retailers from selling Ping clubs to customers like that without a custom fitting, does it?
A. Say that again. Sorry.
Q. So Ping doesn't ban retailers from selling its clubs to customers who don't want a custom fitting for whatever reason?
A. From a shop interaction, you mean?
Q. Yes.
A. No, we don't. We ban them online, but we don't obviously -- we don't ban them –
Q. In-store?
A. Yes:
Q. So a customer may come into a store and, for example, purchase some clubs held by the retailer as part of their stock inventory without having custom fitting at all; that's possible?
A. Some consumers do that.
Q. And the retailer is permitted by Ping to make that sale?
A. We would expect the retailer to do everything they can possibly do to persuade the consumer that they should be custom fitted before they buy.
Q. But if that doesn't work, then the retailer is allowed to go ahead and make the sale?

A. Yes."

(4) Ping allows its clubs to be sold following a telephone conversation and not necessarily following a custom fit. As already noted, on Ping's own case, 10-20% of its clubs are sold without a custom fitting.

146. We consider that the CMA's analysis of the legal and factual context of the internet policy supports a finding that the *very nature* of the internet policy is to restrict competition.

(5) Conclusion on Ground 2

147. The issue of whether the internet ban is an object infringement is not, in the Tribunal's view, entirely straightforward. It is *prima facie* counterintuitive that the internet ban, adopted by Ping with the intention of ensuring that customers purchase correctly fitted clubs, thereby enhancing their enjoyment of the game, should be found to have had as its object the prevention, restriction or distortion of competition resulting in the imposition of a quasi-criminal fine. The legal criterion to be applied in making such a finding ("*revealing in itself a sufficient degree of harm to competition*") begs questions as to what constitutes sufficient harm and how that harm is to be assessed. This is particularly the case in circumstances such as these where internet selling, whilst material, is far from being the primary sales channel for the product in question (see para 137 above) and where the harm to consumers primarily takes the form of increased inconvenience and the softening (but not elimination) of intra-brand competition.

148. Notwithstanding these considerations, the Tribunal is of the clear view that, consistently with the case-law referred to above and taking account of the matters referred to at paragraphs 122 to 146 above, the CMA was correct to find that the ban reveals in itself a sufficient degree of harm to competition to constitute an object restriction, notwithstanding Ping's legitimate aim. The potential impact of the ban on consumers and retailers is real and material. It significantly restricts consumers from accessing Ping golf club retailers outside

their local area and from comparing prices and it significantly reduces the ability of, and incentives for, retailers to compete for business using the internet.

149. It follows that the Tribunal upholds the CMA's finding that the ban constitutes an object restriction and dismisses Ground 2 of Ping's appeal.

G. PROPORTIONALITY OF THE INTERNET POLICY

(1) Introduction

150. Ground 3 of Ping's appeal is that the Decision is wrong to find that Ping's internet policy is disproportionate. In particular, Ping contended that the CMA's proposed 'alternative measures' would be wholly impractical in the real world and would, in any event, be less effective than the ban in maximising custom fitting rates.

151. As set out at paras 94ff above, the Tribunal considers that the matters which the parties addressed under the heading "proportionality" are relevant to two legal issues which arise on this appeal. First, whether the internet ban satisfies the criteria in the *Metro* case, in particular the requirement that the restriction does not go beyond what is essential to the existence of the distribution network. Second, whether Ping is entitled to an individual exemption under Article 101(3), which forms Ground 5 of Ping's appeal.

152. The CMA, in line with its reading of *Pierre Fabre*, carried out a detailed analysis of proportionality in addressing the issue of objective justification in the context of Article 101(1) rather than in the context of Article 101(3). We consider that this approach was incorrect, but since the CMA's decision and Ping's appeal were framed in this way it is convenient for us to make our factual findings regarding the 'proportionality' of the internet policy before addressing the questions we identified at para 94 above, namely whether the policy fell outside the purview of Article 101(1) entirely and whether it might benefit from an individual exemption under Article 101(3).

(2) The parties' contentions regarding the proportionality of the policy

153. In approaching the proportionality of the internet policy, the CMA addressed the following four questions (Decision, para 4.96):

(1) Does the internet ban have a legitimate aim?

(2) Is the ban suitable or appropriate to pursue any such legitimate aim?

(3) Is the ban necessary to pursue that aim and in particular,

(i) are there realistic alternatives and, if so, are they suitable or appropriate to meet the legitimate aim in question?

(ii) are those alternatives less restrictive than the ban?

(4) Is the ban proportionate *stricto sensu* by which is meant whether the burden imposed by the ban is disproportionate to the benefits secured?

154. The CMA's conclusion on the first question was that promoting a custom fitting service in the distribution of a high-quality or high-technology product, such as a custom fit golf club, in principle constituted a legitimate aim. Its conclusion on the second question was that, whilst it accepted that the internet policy was a suitable means to promote custom fitting, it is likely to have only a limited effect in increasing the rate of custom fitting by Ping's account holders. However, the internet policy may also lead to an increase in consumers visiting a bricks and mortar shop when they do not wish or need to do so.

155. In relation to the third issue, the CMA found that there were available to Ping suitable and appropriate alternative measures to meet the legitimate aim of promoting custom fitting which were less restrictive than the internet ban and would allow account holders to sell golf clubs online. In relation to the fourth question, the CMA found that the restrictive nature of the ban was disproportionate to the promotion of custom fitting. The CMA also found that

the ban was not objectively justified to address a free riding problem. In the light of these findings, the CMA concluded that the ban was not objectively justified.

156. On the appeal, Ping challenged the CMA's findings on the third and fourth questions. Its case was that the internet ban was necessary in pursuit of a legitimate aim, that there were no realistic alternatives to the internet ban and that the internet ban was proportionate.

(3) Meaning of 'necessity'

157. With regard to the legal test, the CMA's case was that the notion of necessity requires an assessment of whether a less intrusive measure could have been used without unacceptably compromising the objective.

158. The Supreme Court addressed this point in a unanimous judgment in *R (Lumsdon) v Legal Services Board* [2015] UKSC 41, [2016] AC 697, a case concerning whether a quality assurance scheme for advocates was proportionate under EU law. Concluding that it was, the Court stated at para 105:

> "Addressing the argument that it had not been shown that there was no less intrusive means of achieving the aims pursued by the scheme, the Court of Appeal correctly observed that it was not the law that, unless the least intrusive measure was selected, the decision was necessarily disproportionate. **Rather, the question was whether a less intrusive measure could have been used without unacceptably compromising the objective of improving the standards of advocacy in criminal courts**." (Our emphasis.)

159. Ping suggested in its Reply that this test was not applicable to competition law cases and that, if it did apply, Ping, as an unrivalled expert in custom fitting, was entitled to a margin of discretion when deciding which commercial policies are best suited to achieving its legitimate and long-held goal of maximising custom fitting. Ping did not, however put forward any alternative legal case and the Tribunal considers that the test is applicable here. As noted by the CMA, Roth J applied essentially the same test in *Streetmap v Google* [2016] EWHC 253 (Ch) when considering the question of objective justification in the context of Article 102 TFEU (see paras 148ff). There is no justification for Ping having a margin of discretion. Provided the Tribunal is satisfied that a proposed

alternative is realistic and attainable, the question whether Ping's objectives would be unacceptably compromised, if the alternative were to be adopted, is an objective matter for the Tribunal.

(4) Key issues in dispute

160. The main issues between the parties arising from the application of the test in the present case were as to:

(1) whether Ping's legitimate aim should be characterised as "promoting" or "maximising" custom fitting;

(2) whether the internet ban was effective; and

(3) whether the alternative measures proposed by the CMA would unacceptably compromise Ping's legitimate aim.

(5) Ping's aim

161. In the Decision (para 4.99), the CMA found that Ping's aim was that of promoting custom fitting. By the time of the hearing, Ping characterised its aim as being that of "maximising" custom fitting rather than of "promoting". According to the CMA, this change was forensically designed to support an argument that a less restrictive alternative measure, resulting in even a miniscule reduction in Ping's custom fitting rates, would fail to achieve its legitimate aim.

162. The characterisation of Ping's aim is an objective matter for the Tribunal rather than a matter for determination by Ping. We consider that Ping's aim is correctly characterised as that of promoting custom fitting, rather than maximising in an absolute sense, for the following reasons.

(1) Ping does not contractually require its account holders to custom fit its golf clubs. Ping maintained that there is such a requirement but section 12 of its terms and conditions only prohibits an account holder from executing a sale that is not preceded by a conversation with the

consumer. It does not prohibit any sale that is not preceded by a custom fit.

(2) Ping permits telephone sales of golf clubs. Although Ping contended that such sales were *de minimis*¸ the evidence of Mr Mahon of American Golf suggests that telephone sales take place on a not infrequent basis.

> "When customers call, they usually want to know why they have to do it that way and the customer service team explain Ping's policy to them. If the customer wants to purchase the standard fit club without coming to a store, our customer services colleague will manually load the basket and send an email link to the basket for the customer to view, and to use to complete the purchase via our website. This method of sales is obstructive to customers, which is reflected in the fact that these telephone sales of Ping clubs are lower than online sales of clubs manufactured by other members of the Big Six."

(3) Ping does not monitor the rates of custom fitting of its account holders, as Mr Clark accepted:

> "Q. And Ping doesn't carry out spot checks to find out custom fitting rates for its account-holders?
>
> A. We don't carry out spot checks to specifically get custom fitting rates. What our sales reps do on a continual basis is build up a relationship with the customer so they're aware of how they are conducting their business. So we would have a good sense of their level of -- their general support for custom fitting, but it wouldn't be a numerical number. We wouldn't come up with a numerical number." (T3 pages 35 – 36)

(4) As noted in the Decision, Ping recognises that a significant proportion of its customers, estimated at 10-20%, does not have a custom fitting and is prepared to tolerate this.

(6) Effectiveness of the internet policy

163. The Decision found that, whilst the internet policy was a suitable means of promoting custom fitting, it was likely to have only a limited effect in increasing the rate of custom fittings carried out by Ping's account holders (paras 4.102 - 4.113). The magnitude of any difference between the custom fit rates achieved in relation to Ping clubs and the rates achieved in relation to non-Ping clubs could not be

quantified with any accuracy on the basis of the evidence provided. Furthermore, even if Ping could establish that its own custom fitting rates were higher than those of other brands, it had failed to demonstrate that this difference, or any of it, was attributable to the internet policy.

164. The finding as to limited effectiveness is relevant to the question of the necessity of the ban, in particular as a reference point for assessing whether alternative measures would unacceptably compromise Ping's objective and, also, as to whether any inconvenience to consumers resulting from the ban is proportionate to any increase in custom fitting rates resulting from the policy.

165. The evidence as to the effectiveness of the policy adduced by Ping included a comparison between, on the one hand, an estimated percentage ([[…][✂] *80-90%*] of customers who had had a face-to-face custom fitting before purchasing a Ping club, and, on the other hand, an estimated percentage ([[…][✂] *70-80%*] of purchasers of other brands who had had a custom fitting before purchase. The first percentage was derived from a retailer survey carried out in 2016 of Ping's active UK retailer accounts ("**the Retailer Survey**"). The second percentage was derived from a consumer survey conducted by Sports Marketing Surveys ("**SMS**") which asked respondents how important they considered custom fitting to be.

166. In support of its appeal, Ping relied on a further retailer survey conducted in October 2017 **("the Supplementary Survey")** which suggests that the respective rates for custom fitting of Ping and non-Ping clubs were [[…][✂] *80-90%*] and [[…][✂] *70-80%*] respectively. The Supplementary Survey employed the same methodology as the Retailer Survey, save that, whilst the Retailer Survey only sought views as to Ping's custom fitting rates, the Supplementary Survey asked account holders to estimate both the proportion of consumers who were custom fitted for a Ping club and the proportion who were custom fitted for non-Ping clubs.

167. Ping submitted as follows in relation to the effectiveness of the ban.

(1) It is clear from the evidence that Ping's custom fitting rates are very high. The overwhelming weight of the evidence establishes that Ping's custom fitting rates substantially exceed those of all of its competitors.

(2) The Retailer Survey and Supplementary Survey were consistent with a 2015 Golf Datatech UK survey in showing that Ping custom fitting rates were substantially higher than the custom fitting rates for non-Ping clubs. According to the Golf Datatech survey, [[…][✂] *60-70%*] of respondents across all brands had had a custom fit; one of Ping's main competitors, Titleist, has custom fitting rate of only [[…][✂] *50-60%*] for irons and [[…][✂] *30-40%*] for other clubs.

(3) The CMA purported to doubt the precision of the [[…][✂] *80-90%*] and [[…][✂] *70-80%*] figures, while never going so far as to deny the underlying fact that Ping's custom fitting rates are plainly higher than those of any other brand. That is an argument that would be credible if the CMA had used its extensive statutory powers to conduct its own retailer surveys. But it had not done so and not explained why not.

(4) The only evidence put forward by the CMA against Ping's estimate of its own fitting rates are the records kept by two retailers, […][✂] and […][✂], which appear to show fitting rates for Ping clubs of 43% and 33%, respectively, at the time they responded. However, the CMA accepts that, since these figures derive from only two retailers, they "*may not be fully representative of the whole market*". […][✂]'s evidence was that it had materially increased its focus on, and investment in, custom fitting and currently carries out custom fittings for approximately 85% of Ping's irons, whereas the corresponding rate for non-Ping irons is 20% lower. […][✂].

(5) The fact that Ping Inc, Ping's US parent company, allows internet sales sheds no useful light on the issue of the effectiveness of the ban on custom fitting. Ping Inc is a separate legal entity operating in a different market and in a different competition law context. In any event, Ping Inc only has […][✂] authorised internet retailers, with only […][✂]

selling golf clubs, out of a pool of approximately […][✂] accounts. The proportion of retailers permitted to sell clubs online is therefore miniscule ([…][✂]%).

(6) With regard to causation, the Decision concedes that there is a direct causal relationship between the ban and the benefits associated with custom fitting (at para 4.209). It is too late to rewrite that finding. The ban is the factor most likely to account for the difference in custom fitting rates. The CMA expects the impossible of Ping in that the only logical way of proving that the ban causes higher custom rates is to consider a counterfactual where there is no internet policy. The best that can be done is to compare evidence of rates without the policy with Ping's rates and, then, to infer a conclusion based on plausibility.

168. The CMA contended as follows.

(1) The estimates of custom fitting rates relied on by Ping were unreliable. The estimate of Ping custom fitting rates in the Retailer Survey was based on account holders' estimates. The concordance between these and the actual figures remain unverified as Ping account holders did not all maintain detailed records as to the proportion of their customers that had had a custom fit. Of Ping's four largest account holders, the two which had kept contemporaneous records and provided data to the CMA were […][✂] and […][✂]. According to […][✂]'s records only 43% of Ping clubs were sold after a custom fitting and according to […][✂]'s records only 33%. These figures cast doubt on the Ping estimate of an [[…][✂] *80-90%*] custom fit rate.

(2) The estimate of non-Ping custom fit rates was based on the number of respondents to the SMS Survey who answered a questionnaire saying that they considered custom fitting of any brand of club to be "important" or "very important". This percentage might not be a good proxy for the proportion of customers who had a custom fitting before purchasing, as the respondents in question may not have been through a custom fitting process for each purchase of golf clubs they made.

Furthermore, the SMS Survey did not distinguish between brands or whether customisable options are offered in relation to some or all of their golf clubs and was, therefore, likely to include some golf clubs which could not be customised. The Golf Datatech data suffered from the same problems as the SMS survey. Nor could any weight be given to the Titleist rates. As Mr Holt acknowledged, there was no indication as to how the rates had been estimated or defined and they related to global sales (rather than UK sales).

(3) As the Supplementary Survey uses the same methodology as the Retailer Survey it was subject to the same objections. The Supplementary Survey forms the centrepiece of Ping's case on necessity. It is therefore striking that, of the […][✂] account holders who responded to the Survey, [[…][✂] *60-70%*] indicated that their custom fitting rates for other brands were in fact the same as for Ping, whilst a number of them indicated that their non-Ping rates were in fact higher. The Supplementary Survey suggests only a modest differential between Ping's custom fitting rates and the aggregated rate for its competitors. Thus, even taken at face value and even leaving aside the critical question of causation, the Supplementary Survey does not begin to suggest that Ping's rates "*substantially exceed those of all of its competitors*" or that the policy is "*highly effective*" at maximising custom fitting rates.

(4) Moreover, there were grounds for inferring that the [[…][✂] *5-15%*] differential overstates the difference in custom fitting rates between Ping and non-Ping clubs. The use of an aggregated figure for non-Ping rates overstates the differential between Ping's custom fitting rates and those of its next closest competitor. Ping cannot establish that its rates are higher than all its competitors by reference to evidence that fails to distinguish between those competitors, and in particular between those that value and promote custom fitting and those that do not. Any aggregate rate for Ping's competitors conceals the fact that some brands may indeed achieve higher rates than Ping. This is not just a theoretical possibility. Mr Mahon of American Golf - by far Ping's largest retailer

- gave evidence that Ping "*is one of our highest in-store custom fitted brands, but not the highest*".

(5) The Supplementary Survey was based on mere estimates provided to Ping by its account holders, who have an obvious incentive to present a rosy picture to Ping of Ping's custom fitting rates given the contractual requirements imposed on them by Ping to promote custom fitting. They were given no advance notice of the Survey but were simply telephoned 'out of the blue' and asked to estimate the proportion of Ping sales and all other sales, that were preceded by a dynamic custom fitting. The inaccuracy of the estimates provided is evidenced by the fact that, in a number of cases, Ping's witnesses gave estimates in their witness statements for their businesses that differed from the estimates that were given for those businesses in the Supplementary Survey. Ping did not produce any actual sales data from any of its retailers.

(6) Ping had failed to establish that any differential in custom fitting rates between Ping and its competitors is attributable to the internet ban. The differential may be attributable to other factors. These included its contractual requirement on account holders to promote custom fitting, its penetration down the retail chain to on-course retailers who are well-placed to promote custom fitting to golf club members, its quick, 48 hour, delivery time and its decision not to require its account holders to buy a minimum quantity of standard specification clubs. Other manufacturers do require their account holders to purchase significant levels of standard fit stock. This can weaken the incentive of account holders to custom fit those other brands as account holders need to sell that standard specification stock. Mr Hedges, who gave evidence on behalf of Foremost Golf which has over 1,000 smaller golf retailers in its membership, said that this was the "*biggest*" factor in causing other brands to have lower custom fitting rates than Ping. Mr Dave Clarke also accepted that his was an important factor. Another factor was the higher level of provision of fitting equipment, compared with other manufacturers, as attested to by Mr Clark.

(7) Ping Inc. allowed its clubs to be sold online in the US and was nevertheless considered to be the market leader in custom fitting there.

169. The Tribunal considers that the evidence as to rates of custom of fitting adduced by Ping was unreliable for the reasons put forward by the CMA but that, viewed in the round, that evidence, in particular the Supplementary Survey and the Silvermere data, establishes that the rate of Ping clubs sold following a custom fit is somewhat higher than the aggregated rates for other brands of clubs. The differential is, however, a modest one. Even on the basis of the Supplementary Survey relied on by Ping, the differential is no higher than approximately [[…][✂] *5-15%*] and, given the differences in custom fit rates between brands, it may be the case that one or more of Ping's competitors in fact achieve higher rates than Ping. Even assuming that Ping has the highest rate, the differential between Ping and its next highest competitor is likely to be significantly less than [[…][✂] *5-15%*].

170. The evidence does not establish the extent to which the difference between Ping's rates of custom fitting and those of its competitors is attributable to the ban or to other causes. The Tribunal notes the unanimous evidence of Ping's witnesses that allowing online sales would reduce custom fitting rates compared to the *status quo* and concludes that the ban makes some contribution to the higher than average rate of custom fitting for Ping clubs, although it does not account for the full differential. There are a number of contributing factors which probably account for a portion of the differential. The Tribunal accepts the evidence of the retailers called by Ping suggesting that the difference between Ping and non-Ping custom fitting rates was not solely attributable to the ban but was partly attributable to other factors. For example, Mr Clarke's evidence was that the high rate of Ping custom fitting was primarily due to "*the wealth of models and variables that Ping offers to the consumer*"; Mr Sims' evidence was that "*Ping also offers fast, industry-leading delivery of between 2 – 3 days that facilitates ordering custom fitted clubs. This is important to us as generally all the Ping clubs we sell are made to order. Ping like some of our other key suppliers also offers the opportunity to undertake excellent custom-fitting training to our PGA professionals*."

(7) Parties' contentions regarding the alternative measures

171. In the Decision (paras 4.114 – 4.149), the CMA found that the ban is not necessary to achieve Ping's aims, as Ping has realistic alternatives which are suitable and appropriate to achieve its aim of promoting custom fitting and less restrictive than the internet ban, because they would allow customers to purchase custom fit clubs online.[4]

172. The Decision proposed as alternatives to the ban:

(1) By way of amendment to Ping's current selective distribution criteria, a requirement that an account holder should be able to demonstrate an ability to promote custom fitting online. In addition the Decision proposed the following four additional conditions which it suggested Ping could include in those criteria to authorise its account holders to sell online.

(2) A contractual requirement that account holders must promote custom fitting services online, by displaying a prominent and clear advisory notice strongly recommending that consumers take advantage of a custom fitting service, to achieve the potential benefits of Ping custom fit clubs before each purchase.

(3) A contractual requirement that approved internet retailers' websites provide customers with all available custom fit options. Ping could determine that only account holders with an appropriate website with drop-down boxes providing a certain range of relevant Ping custom fit options would meet its quality standards. It would then be for account holders to assess whether this was an investment that they wished to make in order to be able to sell Ping custom fit clubs online.

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[4] Ping became disengaged during the investigation and did not submit evidence on the CMA's proposed alternative measures during the investigation. Ping did, however, submit evidence relating to the alternative measures in the appeal. The CMA sought an order seeking to exclude that evidence from the appeal. On 26 March 2018 the Tribunal ruled that the evidence should not be excluded. The full background of this dispute is set out in the Tribunal's ruling: [2018] CAT 8.

(4) A contractual requirement that approved internet retailers' websites must have online interactive features which provide an opportunity for personal advice, such as the provision of 'live-chat' technology to promote custom fitting and affording consumers an opportunity for a personal conversation to take place online before completing an online transaction.

(5) A contractual requirement that approved internet retailers' websites must have a mandatory tick-box for consumers to confirm that they understand the importance of custom fitting and the 'risks' of purchasing without having a custom fitting before being able to purchase Ping golf clubs.

173. On the appeal Ping contended as follows.

(1) The CMA's proposals would open the door to consumers making an uninformed decision to purchase non-fitted clubs rather than undertaking a proper face-to-face custom fitting. This would be likely to harm their own interests since they would be stuck with an expensive set of clubs which were not optimised to their game. In turn, the consumer would be likely to hold Ping responsible for this, which would cause serious damage to the Ping brand and potentially dismantle Ping's status as the long-standing and current market leader for custom fitting.

(2) The alternative measures have built into them the likelihood that, over time, Ping's existing retailers will increasingly become used by customers for custom fitting and nothing else. It would not be commercially sustainable for account holders to make investments in equipment and facilities if a potential customer could obtain a custom fitting in a bricks and mortar store and then order the same clubs online. The level of investment by retailers into the promotion of custom fitting will inevitably be reduced if online sales of golf clubs, which are not dynamically custom fitted, were allowed. This is referred to as "free-riding".

(3) The CMA's first proposed measure (general obligation to promote custom fitting online) is already a term of Ping's distribution criteria for in−store and telephone orders. The CMA's proposal is therefore simply to extend this to online sales but it would not be effective. In a brick and mortar store or on the telephone the consumer at least has to listen to the custom fitting recommendation before declining; in an online context, it can always be ignored immediately. The displays on the American Golf and Silvermere websites do not effectively promote custom fitting and would therefore not be effective at maximising fitting rates.

(4) The CMA's second alternative measure (drop down boxes) is wholly impractical. As Mr Clark explained, in 2015 Ping offered more than 3 billion possible combinations of irons and 5 billion possible combinations for woods in its portfolio. In order to comply with the CMA's proposed requirement, retailers would be required to display all the variables that are required to create a valid, finished Ping club combination, including a drop down box of all the options for the consumer to choose from and, for each option, a price accumulating with other drop down box selections to calculate the final price for the combination selected. Each time Ping launches a new club or updates its price list, these pages, variables, options and prices would need to be edited. Furthermore, retailers would need to establish a variable structure and/or algorithms to prevent the consumer from ordering combinations that do not work together. That is simply not viable, especially for small players in the market. The screenshots of webpages on Silvermere's and Dick's Sporting Goods' websites, with a limited range of options, and the evidence of Ping's witnesses, show how impractical it would be for retailers to make an entire range of custom fitting variables available online.

(5) The third alternative (interactive features) is unworkable and prohibitively expensive. The evidence of Ping's retailers is that it would not be viable or economical for a significant proportion of them to offer a 'live chat' feature 24 hours a day, 7 days a week or for most retailers

to do so either after their usual opening hours or during all of their opening hours. Ping's retailers are also clear that interactive features, such as 'live chat', are not a proper substitute for a face-to-face conversation about custom fitting. Further, interactive features such as 'live chat' fail to meet Ping's existing requirement that the retailer should be "proactive" in taking all reasonable measures to ensure that the consumer obtains a custom fitting. 'Live chat' features are entirely passive, because they depend on the consumer choosing to make use of the facility (as well as the facility being available at the time he or she wishes to make a purchase). The maximum a 'live chat' could hope to achieve is to encourage a consumer to undergo a dynamic face-to-face custom fitting in-store. By contrast, the ban on online sales is designed to maximise custom fitting rates, and sends a much stronger and more effective message in this regard for both the retailer and consumer.

(6) The CMA's fourth proposed alternative (mandatory tick boxes) is a hypothetical measure that has never been tested in the real-world. Professor Brady referred to the European Commission's 2016 'Study on consumers' attitudes towards Terms and Conditions', according to which very few people actually click to access terms and conditions. He also referred to a speech given by the CMA's own (former) Chairman citing research showing that only one or two people out of a thousand bother to read things like terms and conditions. The CMA has offered no evidence or research on the effectiveness of such measures. The alternative ignores the obvious risk that consumers will instead simply attempt to 'guess' their custom fit measurements rather than obtain an in-store fitting. The evidence of Ping's retailers was that a 'tick-box' requirement would not be as effective as the internet policy at maximising custom fitting rates.

174. In response, the CMA contended as follows.

(1) The risk of customers guessing their custom fit measurements, thereby harming the interests of consumers and ultimately the Ping brand, is unrealistic and overstated.

(2) The evidence demonstrates that the free-riding problem is implausible, in particular given the increasing demand for and investment in custom fitting, the fact that the vast majority of custom fittings carried out by retailers result in a sale and the limited financial impact of the ban on account holders.

(3) The first alternative measure (promotion of custom fitting online), is realistic and precedented. The Decision cited the […][✂] and […][✂] websites as examples of how some of Ping's account holders already promote custom fitting online but did not suggest that Ping would be limited to the requirements already reflected in the illustrative screenshots.

(4) The second alternative measure (drop down boxes) would accord both with the approach taken in the US, where Ping Inc. authorises online sales only by retailers who satisfy strict criteria on quality, training and service, and with the approach taken by Ping in relation to the online sale of soft goods. The evidence cited in the Decision, including Silvermere's and Golf Warehouse's websites, indicates that it is both technically achievable and commercially viable for retailers to provide a vast range of customisation options online, including through the use of drop-down boxes. Examples from other industries such as spectacle retailing, where websites offer a large number of different options, reinforce this point.

(5) Ping implicitly accepts that at least some of its account holders would be willing and able to make the necessary investment in online features (the third alternative measure), as some already do. Live chat is not the only kind of feature by which custom fitting could be promoted. For example, retailers could adopt a requirement to have a 'contact us' service, e.g. by email or Skype, available to customers. No evidence has been provided as to the actual costs involved. Ping's evidence provides no basis for the proposition that a 'live-chat' feature or some other interactive feature would not be viable for a significant proportion of Ping's retailers. As to whether an online interactive feature would be

a "*proper substitute for a face-to-face conversation about Custom Fitting*", Ping is content for its account holders to promote custom fitting by telephone. If a telephone conversation is adequate for this purpose, then there is no reason why an online interactive feature would not be. Causing a box to appear on-screen offering the consumer a personal conversation about the benefits of custom fitting is no less proactive than approaching a consumer in-store to offer him such a conversation.

(6) As to the fourth alternative measure (mandatory tick boxes) Ping does not deny that it would be technically achievable and commercially viable for an online retailer to incorporate a tick-box feature requiring the consumer to confirm that he understands the benefits of custom fitting and the 'risks' of purchasing without one. Instead, Ping argues that this would fail to mitigate the *"obvious risk"* that consumers would simply 'guess' their custom fit measurements. Features such as mandatory tick-boxes are, however, frequently used in other online contexts and are considered by the Court of Justice to be adequate for protecting against risks as serious as the risk of consumers purchasing incorrect contact lenses or non-prescription medicines. Nor is Professor Brady's evidence on click-through rates for online terms and conditions of any assistance. The mechanism proposed in the Decision need not involve the consumer being invited to click-through to a separate page or box containing detailed advice.

(8) Guessing

175. Ping's fundamental objection to the alternative measures proposed by the CMA was that they are likely to lead to customers making an uninformed decision to guess their custom fit measurements rather than undertaking a proper face-to-face fitting, thereby harming their game and ultimately damaging Ping's brand. The Tribunal does not regard this objection as compelling, for the following reasons.

176. First, given the considerable expense involved in purchasing golf clubs, and the vast number of customisable options to select from, and the expectation that a golf club will last for several years, it is inherently unlikely that customers would run the risk of guessing the specification they needed by buying custom fit golf clubs online without having had a custom fitting. Mr Clark's evidence was as follows.

> "Q. […] So I think your point is that if you're not a professional golfer or somebody that is very, very used to having lots of custom fittings, you simply wouldn't know which of these was appropriate for you.
>
> A. I think if you're any golfer who hasn't been custom fit, apart from understanding right and left hand, I think you would have extreme difficulty choosing any of those options without some -- you would have extreme difficulty just choosing any of those options […] without a dynamic face-to-face custom fit. […]
>
> Q. It's also the case, isn't it, that these clubs can cost hundreds of pounds? So -- what's the price there? A set of irons, is it?
>
> A. That's for eight clubs.
>
> Q. That's for eight clubs in the set of irons. That's, you know, nearly coming on for £2,000. They're generally expected to last a number of years, aren't they, because –
>
> A. Yeah, I mean, typically irons would last -- I mean, it varies on the consumer, but a typical life of a set of irons will be four or five years, sometimes six." (T3, pages 134-5)

177. Second, it is significant that the Court of Justice has endorsed the use of online interactive features as providing adequate protection against the serious risk of consumers purchasing incorrect contact lenses or non-prescription medicines. If such a feature is adequate for protecting against risks of that nature, this would suggest that it is adequate for protecting against the purchase of an imperfectly-fitted golf club. Thus, in C-322/01 *Deutscher Apothekerverband eV* EU:C:2003:664, the Court of Justice identified online interactive features as a suitable means of protecting against the risk that medicines would be incorrectly used:

> "114. As to the argument that virtual pharmacists are less able to react than pharmacists in dispensaries, the disadvantages which have been mentioned in this regard concern, first, the fact that the medicine concerned may be incorrectly used and, secondly, the possibility that it

> may be abused. As regards incorrect use of the medicine, the risk thereof can be reduced through an increase in the number of online interactive features, which the customer must use before being able to proceed to a purchase. As regards possible abuse, it is not apparent that for persons who wish to acquire non-prescription medicines unlawfully, purchase in a traditional pharmacy is more difficult than an internet purchase."

178. Similarly, in C-108/09 *Ker-Optika BT* EU:C:2010:725, the Court of Justice rejected the argument that the need for a precautionary eye examination or medical advice could justify a ban on the online sale of contact lenses:

> "68. Accordingly, undergoing such examinations and obtaining such advice must be held to be optional, and consequently it is primarily the responsibility of each contact lens user to make use of them, while the task of the optician in that regard is to give advice to the users.
>
> 69. However, customers can be advised, in the same way, before the supply of contact lenses, as part of the process of selling the lenses via the internet, by means of the interactive features on the internet site concerned, the use of which by the customer must be mandatory before he can proceed to purchase the lenses (see, to that effect, as regards the selling of medicinal products via the internet, *Deutscher Apothekerverband* [2005] 1 C.M.L.R. 46 at [114])."

179. The Court of Justice in *Pierre Fabre* identified at para 44 that in previous judgments it had not "*accepted arguments relating to the need to provide individual advice to the customer and to ensure his protection against the incorrect use of products, in the context of non-prescription medicines and contact lenses, to justify a ban on Internet sales the issues which arose in choosing the correct medicine or the risks in having the wrong contact lens.*"

180. Third, the fact that other brands' custom fit clubs are available online would suggest that guessing amongst customers of those brands is not a significant problem. The evidence of the CMA's witnesses was that customer dissatisfaction with custom fit clubs sold online is not in practice a serious issue. Mr Patani's evidence was as follows:

> "26. My experience is that online sales of custom fit clubs are able to meet the expectations of consumers. As mentioned, I am responsible for customer service and complaints for all aspects of the business. In addition to the continued growth of online sales, we receive many positive reviews in relation to our sales, including online sales — we

have a five star rating on Trust Pilot and 98% of reviewers (9,812 in total) rate us as excellent (90%) or great (8%).

27. I would estimate that only a very small number of customers would complain or try to return custom fit clubs as being unsuitable, from both in-store and online sales."

181. Similarly the evidence of Mr Lines:

"27. In my view, the ability to purchase custom fit golf clubs online is important because it gives customers who already know their requirements a convenient way to shop. The high proportion of clubs we sell online indicates that consumers value the ability to buy custom fit clubs online.

28. In my experience, our customers are happy with the custom fit golf clubs that they purchase on our website. We have a five star rating on Trust Pilot where 95% of 5,837 reviewers rated us excellent (85%) or great (10%). We also offer a returns policy for all our custom fit clubs, whether bought in-store or online. Even though we don't have a legal obligation to accept returns of custom fit clubs we offer an 80% refund (less shipping). However, we rarely receive requests for refunds of custom fit clubs, and I can't recall my customer services representatives recently dealing with any relevant complaints about custom fit clubs sold in-store or online. The few complaints we do receive about custom fit clubs usually relate to an error in assembly by the manufacturer which we missed in our quality control process, or where there has been an inadvertent mistake by the customer."

182. For these reasons, the Tribunal finds that the alternative measures proposed by the CMA would not lead to customers guessing their specifications and buying the wrong clubs.

(9) Brand damage

183. Ping's case as to brand damage was linked to its case as to the risk of consumers wrongly guessing their specifications. Mr Clark's evidence was as follows:

"105. [Allowing internet sales] will also adversely, and likely irreversibly, affect the PING brand because Ping Europe will no longer be able to effectively promote purchases of PING golf clubs only following a face-to-face fitting session. If more golfers start purchasing clubs that are not optimal, they are likely to blame the PING brand and lose interest in any future purchases of PING golf clubs. Online consumers of PING golf clubs are also more likely to select incorrect fitting options and blame Ping Europe for purchasing clubs which do not improve their game."

184. If, as the Tribunal finds, allowing online sales would not lead to consumers purchasing the wrong clubs and blaming Ping, this would indicate that the Ping brand would not be damaged by online sales. As noted above (para 109), Professor Brady expressed the view that the Decision would cause serious damage to Ping's brand by divorcing the physical product (the golf club) from the custom fitting process. However, when it was put to him that Ping already allowed its clubs to be sold without a custom fitting (something he was not aware of when he drafted his report), he rightly conceded that custom fitting could not be characterised as an *"inseparable"* element of Ping's product.

(10) Free-riding

185. A free-rider problem can arise when one retailer is able to take advantage of another retailer's investments and, as a result, the latter's incentives to invest are diminished. Ping's case was that this would be the effect of the alternative measures. It contended that the free-riding problem was particularly acute in the context of this case because of the investment needed to be made by retailers in expensive equipment, conducting face-to-face investments and taking careful measurements, only for the consumer to leave because he never intended to make a purchase in the first place, causing account holders to stop custom fitting or to go out of business. Mr Clark's evidence was as follows:

> "50. If there is a greater risk of a retailer, who invests in fitting equipment and gives their time free of charge, eventually losing the sale to an online retailer (who free rides on that investment), the retailer is less likely to commit to fitting and will be more likely to charge the consumer a higher fee for the time spent. Free riding will lead to less consumer choice through a reduction in the number of retailers offering custom fitting. By concluding in para. 4.235 of the Decision that "*free riding by online retailers on Ping Account Holders' pre-sale retail services would not directly impact on Ping's own sales volumes or wholesale revenues, which would still be earned on the related online sales*", the CMA completely disregards this long term effect of allowing online sales of Ping golf clubs."

186. In the Tribunal's view, the evidence does not establish that the alternative measures would give rise to a free-rider problem and a consequential diminution in rates of custom fitting of Ping's clubs, for the following reasons.

187. First, it was common ground between the parties that custom fitting rates have been rising across all brands and retailers and the other manufacturers have increased their investments in custom fitting. Mr Clarke's evidence was as follows:

> "Q. Now, in the years since 1976 that you have been in the business, you have generally seen custom fitting become much more popular with customers, haven't you?
>
> A. Yes.
>
> Q. So there is generally more awareness of it and a greater proportion of customers ask for it?
>
> A. Yes, I would say probably "Yes"." (T4 page 88)

188. Mr Sims' evidence was as follows:

> "Q. You say that Silvermere's custom fitting rates -- so the proportion of sales which are custom fit sales -- have been increasing over the past few years across all brands.
>
> A. Yes, we invested a significant amount of money in 2014, £2.5 million in a new driving range, £150,000 in four custom fit suites and a lot of extra staff and we have been pursuing a custom process from there, so yes.
>
> Q. Are you continuing to invest?
>
> A. Yes.
>
> Q. That is because you recognise that there is demand for it and it is the way to grow your business?
>
> A. If you want to sell hardware properly, custom fitting is the proper and the best way to (a) service the customer and (b) for longevity, to bring the customer back to buy other products off us and more golf clubs and then tell their friends and tell their friends and tell their friends.
>
> So, you know, guys play golf in four-balls, so if one guy has a great custom fit, he will play in a four-ball and he will go and explain to his three guys that he has been to Silvermere and he's had a great fit. "Blimey, what you have got?"; "I have got this and I saw Jamie". All my guys -- we have ten or 11 fitters and all our guys are encouraged to give their own personal card as well. So, actually, they get a lot of inquiries direct into their own phones -- never mind my site -- to actually go, "Oh, Jim had a fit with you and he said you did a really good job", so we have by accident a kind of personal process going as well." (T4 pages 113 – 114)

189. Second, the evidence established that the vast majority of custom fittings result in a sale. The evidence of Mr Sims, Mr Challis, Mr Clarke and the Complainant was that a custom fitting resulted in a sale in between 80% and 90% of cases. This is not surprising given that the smaller retailers, in particular retailers based on golf course, are in a position to develop ongoing relationships with customers and offer a range of services.

190. In this context the interview given by Mr Hedges to Golf Business News in October 2014, about how the internet has influenced the way Foremost Golf members operate, was telling:

> "About ten years ago some of us saw the internet as a massive threat. We thought that online retailers might seriously damage the on course business, but it hasn't happened that way. Indeed, it is the High Street retailer whose business was based on price and choice that has struggled [...] instead of steering clear of the internet we have embraced it and learned how we can utilise the digital world to our best advantage [...] I would argue that with the right focus today's PGA professionals have an advantage over the High Street and online retailers. Our unique business model with three different sources of income – from retailing, teaching and club services, combined with our low overheads allow us to deliver fantastic value to golfers and clubs – whereas the High Street and online retailers are totally dependent on retail sites at a time when the market is sluggish and margins are under threat... [that] is not a very comfortable position [for such retailers] to be in."

191. An interview given by Andy Martin, a fellow board member of Foremost Golf, was to similar effect.

192. The high custom fitting to conversion rate is also explained in part by the fact that, although some retailers provide their customers with their custom fit specifications after a custom fitting, many do not do so. Mr Mahon's evidence was that American Golf has a policy of not providing customers with their specifications, unless they place an order on the same day. Mr Clark confirmed that Ping's retailers are not obliged to provide their customers with their custom fit specifications. To the extent that custom fit specifications are withheld, no problem of free riding can arise.

193. The evidence fell far short of showing that the financial impact of the alternative measures was such that Ping retailers would stop custom fitting or be put out of

business. For the majority of Ping's retailers, sales of golf clubs were small. Annex 1 to the CMA's skeleton argument showed that, in 2016, [[…][✂] *90-100%*] of Ping's account holders each purchased less than [[…][✂] *£30,000-£40,000*] of Ping clubs, the mean figure being [[…][✂] *£10,000-£20,000*] equating to roughly [[…][✂] *50-60*] Ping clubs per year. The average profit margin per club is around £[…][✂] meaning that the majority of Ping's retailers make a margin of only £[…][✂] from the sale of Ping clubs per year excluding the retailer's costs. In this context, it is implausible that, in the absence of the internet policy, Ping retailers would go out of business or that their incentives to invest in custom fitting would be materially reduced.

194. Ping contended, with the support of Mr Holt's evidence, that, in order to meet the free-riding problem, retailers would have to charge for their services or to charge more, and that as a result more consumers will opt not to have a custom fit. There was, however, no evidence that current charges have had such an effect. Customers value custom fitting and custom fitting rates have increased notwithstanding the incidence of charging.

195. Ping's free-riding case presupposed that, absent the ban, Ping would allow any high volume retailer to sell its clubs without constraint. The Tribunal considers, however, that more realistically, Ping would be likely to require its account holders to promote custom fitting by measures such as the alternative measures, as Ping Inc does in the US in relation to online sales.

196. In summary there is, in our view, no sound basis for Ping's contention that the alternative measures would give rise to a free-rider problem.

(11) Viability of the alternative measures

197. Ping did not respond specifically to what is described in the Decision as the "*main alternative*" to the ban, namely a requirement that account holders should demonstrate an ability to promote custom fitting online. It contended that the drop down boxes and interactive features would be unworkable. The Tribunal disagrees. In our view, it would be viable for at least some of Ping's account holders to operate websites on which all of Ping's custom fit variables, or such

range as Ping considered it appropriate to require, were available by drop down boxes as shown on Silvermere's and Golf Warehouse's websites. Similarly, the Tribunal considers that the interactive features would be viable, for the reasons advanced by the CMA.

198. In short, for the reasons set out above, we conclude that the alternative measures would not unacceptably compromise Ping's objective of promoting custom fitting.

H. GROUND 3 – OBJECTIVE JUSTIFICATION

199. Ground 3 of Ping's appeal is that the Decision was wrong to find that Ping's internet policy is disproportionate and hence not objectively justified.

200. As noted at para 94(1) above, to be objectively justified such that the internet policy falls entirely outside the scope of Article 101(1), we must ask ourselves whether the internet policy satisfies the *Metro* criteria, and in particular whether the ban is <u>necessary</u> for non-price competition <u>to exist</u>.

201. In our view, the internet policy clearly is not objectively justified in the above sense. Whilst Ping obviously competes on non-price parameters (e.g. quality and innovation) against other manufacturers, it could still do so without the ban. This is clear from the fact that other golf club manufacturers do not prohibit online sales yet nevertheless compete vigorously on non-price parameters against Ping. The ban may assist Ping to compete more vigorously on non-price parameters than it could otherwise do absent the ban, but this is a balancing exercise which falls to be considered under Article 101(3).

202. Although, as noted above at para 97-100 above, the CMA carried out a more detailed proportionality analysis than was required in order to determine whether the internet policy satisfies the *Metro* criteria, its findings of fact were correct and the conclusion which it reached, namely that the internet ban was not objectively justified, was also correct. It follows that the approach adopted by the CMA in addressing objective justification in more detail than was

required, which the Tribunal considers was erroneous, is not a basis for quashing the Decision.

203. We therefore dismiss Ground 3 of Ping's appeal.

I. GROUND 4 – ANCILLARY RESTRAINTS

204. Ping contended, by way of alternative to its primary case that the internet policy falls within the 'ancillary restraints' doctrine, with the consequence that it falls outside the purview of Article 101 (Ground 4).

205. In order for a restriction to fall outside Article 101(1) as an ancillary restraint, it must *inter alia* be objectively necessary to the implementation of a main operation which has a neutral or positive effect on competition. The requirement of objective necessity means that the main operation would be impossible to carry out in the absence of the restriction in question i.e. the ancillary restriction must be essential to the survival of the type of main operation (see section D(5) above).

206. If, as the Tribunal has found, the ban is not necessary for the promotion of custom fitting (for the purposes of objective justification), it must follow that it would not be impossible to carry out the promotion of custom fitting without it (for the purposes of the ancillary restraint doctrine).

207. Ground 4 therefore fails.

J. GROUND 5 – INDIVIDUAL EXEMPTION

208. Ping contended that the internet ban should be exempted under Article 101(3) TFEU on the ground that it produces real benefits for consumers which could not be achieved in any other way (Ground 5).

209. A restriction will benefit from exemption under Article 101(3) if four cumulative conditions are met. These conditions are conveniently summarised at para 39 of the Commission's Article 101(3) Guidelines as follows:

(1) The agreement must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress;

(2) Consumers must receive a fair share of the resulting benefits;

(3) The restrictions must be indispensable to the attainment of these objectives; and

(4) The agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

210. Para 39 of the Guidelines explain that it is most convenient to consider condition 3 ("indispensability") before condition 2 ("fair share").

211. Our assessment is as follows:

(1) **Conditions 1 and 3**: Our starting point is that consumers benefit from custom fitting because they receive a better quality product. This constitutes an "efficiency" in the sense of the first condition of Article 101(3). Further, we find that the internet ban marginally increases custom fitting rates of Ping's clubs. The scale of the benefit attributable to the ban is, however, limited because the ban is not a particularly effective means of increasing custom fitting rates (see our discussion of the "effectiveness" of the ban at section G(6) above). Further, the CMA's less restrictive, alternative measures present viable alternatives in the sense that they are comparably effective at achieving the benefits of the ban (see the discussion at section G(11) above). The Tribunal rejects Ping's contention that the Decision would generate a free-riding problem (see section G(10) above). The consequence is that, as the CMA found in the Decision (para 4.230), the policy cannot be considered "indispensable" to the attainment of the efficiency.

(2) **Condition 2**: The Article 101(3) Guidelines explain at para 43 that consumers receive a 'fair share' if the efficiencies generated by the

restriction outweigh the anticompetitive effects of the agreement. This is a 'balancing exercise' and we must consider the benefits of the restriction (in terms of the marginal increase in custom fitting rates and associated efficiency gain) against the disbenefits to consumers in terms of increased inconvenience and reduced choice of retailer (and the reduction in competition this generates). The benefits of the policy are, in our view, very limited: it motivates relatively few consumers (who would not otherwise have had a custom fitting) to get a custom fitting and does little to counteract free-riding. The disbenefits are, in our view, also relatively constrained in view of the fact that relatively few consumers purchase custom fit clubs online. However, we consider that the policy does not on balance generate benefits outweighing its disbenefits. We therefore conclude that this condition is also not fulfilled.

(3) **Condition 4**: It is clear that the policy does not risk the elimination of competition: inter-brand and intra-brand competition would continue to exist despite the policy.

212. In view of our findings above, we consider that the policy does not benefit from an individual exemption under Article 101(3). We therefore dismiss Ground 5.

K. CONCLUSIONS ON LIABILITY

213. For the reasons set out above, we dismiss Ping's grounds of appeal on liability.

L. PENALTY

(1) Introduction

214. Further to its finding that Ping had infringed Article 101 and the Chapter I prohibition, the CMA imposed a penalty on Ping of £1.45 million. Ping challenged this penalty. Ping argued that the CMA had no power to impose a penalty because the infringement had not been committed intentionally or negligently (Ground 6). In the alternative, Ping argued that if the CMA had the

power to impose a penalty then the amount of the penalty should be substantially reduced (Ground 7).

215. Section 36 of the 1998 Act, as amended, provides (so far as relevant) as follows:

> "(1) On making a decision that an agreement has infringed the Chapter I prohibition or that it has infringed the prohibition in Article 101(1), the CMA may require an undertaking which is a party to the agreement to pay the CMA a penalty in respect of the infringement.
>
> […]
>
> (3) The CMA may impose a penalty on an undertaking under subsection (1) […] only if the CMA is satisfied that the infringement has been committed intentionally or negligently by the undertaking.
>
> […]
>
> (7A) in fixing a penalty under this section the CMA must have regard to –
>
> (a) the seriousness of the infringement concerned, and
>
> (b) the desirability of deterring both the undertaking on whom the penalty is imposed and others from-
>
> (i) entering into agreements which infringe the Chapter I prohibition or the prohibition in Article 101(1) or
>
> […]
>
> (8) No penalty fixed by the CMA under this section may exceed 10% of the turnover of the undertaking […]."

216. Section 38 of the 1998 Act requires the CMA to prepare and publish guidance as to the appropriate amount of any penalty in respect of an infringement of the Chapter I prohibition or the prohibition in Article 101(1). That guidance must be approved by the Secretary of State and according to section 38(8) when setting the amount of a penalty, the CMA and the Tribunal must have regard to the guidance for the time being in force under this section. The Guidance in force at the time of the Decision was: *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board. Shortly before the hearing in this appeal, the CMA replaced the 2012 Guidance by adopting a revised document: *Guidance as to the appropriate amount of a penalty* (CMA 73, April 2018). There are no relevant material differences

between the two sets of guidance and so for convenience we refer in this judgment simply to the CMA's "Penalty Guidance".

217. Paragraph 3(2) of Schedule 8 to the 1998 Act, as amended, provides that on an appeal against penalty the Tribunal may confirm or set aside the decision which is the subject of the appeal and may impose or revoke, or vary the amount of, a penalty.

(2) Ground 6 – no penalty should be imposed.

218. Ping argued that the CMA had erred in finding that it had committed the infringement intentionally or negligently. On this basis Ping argued that the CMA lacked the power to impose a penalty because the threshold in section 36(3) had not been passed.

219. The test under section 36(3) was discussed by the Tribunal in *Argos and Littlewoods v OFT* [2013] CAT 13:

> "221. […] an infringement is committed intentionally for the purpose of section 36(3) of the Act if the undertaking must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition. An infringement is committed negligently for the purposes of section 36(3) if the undertaking ought to have known that its conduct would result in a restriction or distortion of competition."

220. In discussing the concept of 'intentional infringement' by a dominant undertaking, the Tribunal in *Napp v DGFT* [2002] CAT 1 ("***Napp***") stated that:

> "456. […] While in some cases the undertaking's intention will be confirmed by internal documents, in our judgment, and in the absence of any evidence to the contrary, the fact that certain consequences are plainly foreseeable is an element from which the requisite intention may be inferred. If, therefore, a dominant undertaking pursues a certain policy which in fact has, or would foreseeably have, an anti-competitive effect, it may be legitimate to infer that it is acting "intentionally" for the purposes of section 36(3)."

We consider that this statement applies by analogy to the case of a distribution policy adopted by a manufacturer vis-à-vis its distributors which is found to restrict competition.

221. The CMA is not obliged to specify whether an infringement is committed intentionally or merely negligently in order to impose a fine and it chose not to do so in this case (see *Napp* paras 453 to 457).

222. The CMA found that the infringement had started on 30 July 2012 (at the latest) when Ping had entered into the agreement with a certain account holder. The CMA's reasons for finding that Ping had intentionally or negligently infringed the law are set out at length at paras 5.20 to 5.39 of the Decision. In summary, the CMA relied upon:

(1) The fact that Ping was aware that its distributors could not compete in an unrestricted manner online; and

(2) The fact that Ping undertook a review of its internet policy during 2011 and 2012 after the Court of Justice handed down its judgment in *Pierre Fabre* on 13 October 2011. According to the CMA, *Pierre Fabre* made it clear that online sales bans would constitute 'by object' infringements unless objectively justified.

223. The CMA's fall-back position was that Ping must have become aware that its internet policy restricted competition on 17 November 2015 when it learned of the CMA's investigation or, alternatively, on 9 June 2016 when it received the CMA's Statement of Objections.

224. Ping argued that its conduct was neither intentional nor negligent. Ping relied upon five separate arguments to substantiate its argument. These are set out at para 282 of its skeleton argument:

> "(1) the Internet Policy is unconnected with any intent to restrict competition. To the contrary, it came into existence as a corollary to the long-standing Custom Fitting Policy, as a genuine attempt to preserve a system which is accepted to be beneficial to consumers;
>
> (2) the Internet Policy itself pursues a genuine and perfectly legitimate objective and is accepted by the CMA to be a suitable means to achieve that objective;
>
> (3) the Internet Policy has no negative effect on inter-brand competition and no meaningful […] negative effect on intra-brand competition;

> (4) the policy applies only in so far as is necessary to preserve the Custom Fitting Policy. Accordingly, all Ping merchandise not requiring a custom fitting in accordance with the Custom Fitting Policy (i.e. 'soft goods', such as golf bags, balls and clothing) is available for sale online. Prices of Ping golf clubs are also readily available online so that consumers can shop around for the cheapest option (albeit not online); and
>
> (5) the Decision involves a novel extension of the law which could not have been anticipated by Ping. *Pierre Fabre* was not a case involving a legitimate objective. Nor was it a case involving a bespoke product. Both are absolutely sound bases on which any legal advisor would have advised the company that the facts of the case were distinguishable from those in *Pierre Fabre*. *Coty* did not concern an online sales ban at all, and held that selective distribution systems restricting Internet sales were not prohibited."

225. We consider that, properly understood, arguments 1-4 relate to the question of whether Ping "intentionally" infringed competition law as opposed to whether its conduct was "negligent". Specifically:

(1) Arguments 1, 2 and 4 relate to the absence of any specific subjective intention (or design) on the part of Ping <u>knowingly</u> to infringe competition law: the internet policy was designed specifically to promote custom fitting of golf clubs as opposed to promote any nefarious purpose. However, Ping cannot have been unaware that the policy would affect online competition - indeed, it <u>intended</u> the policy to do just that. The key questions so far as negligence is concerned is whether it should have appreciated that this impact on online competition would likely be considered a 'by object' restriction of competition in the light of the law at the time and whether it would or would not likely receive an individual exemption. These arguments do not assist with these issues.

(2) Argument 3 is similarly only relevant to the question of intention. If the CMA had run an effects case, and proven such effects, it might have been said that those effects were so obvious that Ping could not have denied that an impact on competition was foreseeable and therefore could not have denied that its conduct was intentional (as per *Napp* cited at para 220 above). However, the CMA does not rely on the effects to

show that Ping intended to restrict competition. The CMA did not need to prove any effects in order to establish an infringement. It is therefore irrelevant that effects have not been proven in this case.

226. Whether or not the CMA has the *vires* to impose a fine depends upon Ping's fifth argument, namely that the relevant law was unclear at the time the infringement began: 20 July 2012.

227. We do not accept Ping's argument that the Decision represents an extension of the law that could not have been anticipated. Whilst *Pierre Fabre* was not a case involving a legitimate objective, Ping ought to have realised that the pursuit of a legitimate objective would not be a material point of distinction from the *Pierre Fabre* case, given the well-established principle that the pursuit of a legitimate objective would not prevent a restriction of competition from being characterised as an object infringement. The correctness of the *Pierre Fabre* decision in concluding that the internet ban was an object infringement was not called into question in *Coty.* We also reject Ping's argument that the fact that the product in *Pierre Fabre* was not bespoke means that that case did not provide clear guidance for Ping. Ping could not have failed to appreciate that a significant proportion of customers purchase clubs without having had a custom fit before a purchase so this does not form an appropriate basis for distinguishing *Pierre Fabre*.

228. Given the above, we consider that Ping ought to have been aware that there was a very substantial risk that its internet policy would be found to infringe competition law 'by object'. Ping could only reasonably believe that the policy would not restrict competition if it had taken reasonable steps to satisfy itself that it could establish that the policy was objectively justified or would be suitably crafted to benefit from an individual exemption under Article 101(3). However, the evidence before us is that Ping took no steps to assess whether other, less restrictive, alternative means might be effective in achieving its aim of promoting custom fitting. Nor did Ping review the effectiveness of the policy after it had been implemented. Accordingly, we find that Ping's conduct was "negligent" because: (i) it should have realised that there was an obvious, significant risk that the internet policy would be considered to infringe

competition law 'by object'; and (ii) it nevertheless failed to take reasonable steps to satisfy itself that its policy could be objectively justified or individually exempted. We therefore dismiss Ground 6.

229. We do, however, accept that Ping did not "intentionally" restrict competition since: (i) Ping believed its policy pursued a legitimate aim and was suitable for achieving that aim (albeit it negligently failed to appreciate that it should have considered less restrictive alternatives); (ii) it has not been shown that negative effects of the infringement were foreseeable, such that an intention to restrict competition can be imputed to Ping; and (iii) there are no other reasons to impute an intention to restrict competition to Ping. This finding may be relevant to Ground 7 of Ping's appeal, which we consider next.

(3) Ground 7 – the penalty should be reduced.

230. Ping argued that a fine of £1.45 million is out of proportion to its culpability and profitability. Ping's primary case is that the fine should be reduced to a nominal level on account of the novelty of the infringement, alternatively, that it should be reduced substantially to reflect the quality of the alleged infringement and Ping's financial status.

(a) Discretion to impose a nominal penalty

231. The CMA's Penalty Guidance contains no provision for the imposition of a nominal fine. However, the CMA accepted that it was open to it to depart from its Guidance, or to exercise its discretion not to impose a penalty, in an appropriate case. The CMA argued that it had considered whether to do so and had correctly concluded that there was no justification for imposing a nominal fine in this case.

232. Ping challenged the CMA's conclusion on the basis that the Decision raises novel issues in a controversial and uncertain area of the law. We dismiss this argument. We have found that Ping ought to have known that its conduct would seriously risk restricting competition by object and that it should have assessed whether other, less restrictive, alternatives were available to it (see the previous

section). For this reason, we consider that the CMA cannot be faulted for deciding not to impose a nominal fine.

233. Ping also referred us to a number of previous penalty decisions of the Commission, however we did not find these to be of assistance. As the Tribunal noted in *Kier Group Plc v OFT* [2011] CAT 3 ("***Kier***") previous penalty decisions have limited precedent value, other than in matters of legal principle, because each case is very dependent on its facts (see para 116).

(b) Calculation of the amount of the penalty

234. In accordance with the Penalty Guidance the CMA adopted a six-step approach to the calculation of Ping's penalty. The six steps are as follows:

(1) Calculation of the starting point having regard to the seriousness of the infringement and the relevant turnover of the undertaking.

(2) Adjustment for duration.

(3) Adjustment for aggravating or mitigating circumstances.

(4) Adjustment for specific deterrence and proportionality.

(5) Adjustment if the maximum penalty of 10% of worldwide turnover of the undertaking is exceeded and to avoid double jeopardy.

(6) Adjustment for leniency and/or settlement discounts.

235. In summary, the CMA applied the steps as follows:

(1) As a starting point for the penalty, the CMA applied a rate of 12% of Ping's turnover.

(2) The CMA assessed the duration of the infringement as five years.

(3) The CMA applied a 10% uplift for "director involvement", noting that the managing director of Ping (Mr Clark) had played a major role in creating, implementing and enforcing the internet policy.

(4) Under step 4 the CMA considered specific deterrence and proportionality of the fine. Taking this into account, the CMA decided to decrease the fine by 90%.

(5) No adjustments were made under steps 5 or 6.

(6) The resulting fine came to the amount of £1.45 million. This equates to £290,000 in each year of the infringement.

236. Ping took no issue with the CMA's application of steps 2, 5 or 6 but challenged steps 1, 3 and 4.

237. As noted at para 217 above, the Tribunal is empowered to impose, revoke or vary the amount of a penalty. The Tribunal's task in this matter was recently considered at paras 133-136 of *Balmoral*. The Tribunal in *Balmoral* cited with approval the *dicta* in *Kier* at para 75: "*the Tribunal's role is not to minutely analyse each step of the Guidance but rather to consider the matter in the round, and on that basis, assess whether the final penalty is appropriate.*"

<u>Step 1 – starting point</u>

238. In accordance with its Penalty Guidance, the CMA adopts a starting point for an undertaking's penalty of between 0 and 30% of the undertaking's turnover. The CMA explained its general approach to penalty setting at paras 5.55 to 5.56 of the Decision:

> "5.55. The starting point […] depends in particular upon the nature of the infringement: the more serious and widespread the infringement, the higher the starting point is likely to be.
>
> 5.56. The CMA will apply a rate of up to 30% to an undertaking's relevant turnover in order to reflect adequately the seriousness of the particular infringement and, in so doing, to deter the infringing undertaking and other undertakings generally from engaging in that

> particular practice or type of practice in the future. A starting point towards the upper end of the range will be used for the most serious infringements of competition law, including hardcore cartel activity and the most serious abuses of a dominant position."

239. The CMA went on to consider what starting point to apply in this specific case at paras 5.58 to 5.65 of the Decision. Ultimately, the CMA adopted a starting point of 12%. In adopting this starting point the CMA specifically took account of the fact that Ping intended that its internet policy would promote custom fitting (para 5.61(b)). The CMA also took into account its finding that the internet policy amounted to an object infringement (para 5.60(a)), albeit it acknowledged that it was not the most serious form of object infringement in a vertical agreement and one which was not secret in nature (para 5.61(a)). The CMA also considered that the internet policy had a clear impact on retailers and consumers (paras 5.60(b) and (c)). Finally, the CMA considered the need to deter Ping and other undertakings from engaging in similar infringements (para 5.63).

240. Ping argued that the 12% starting point adopted by the CMA "*overstates the gravity of the case*". In particular, Ping argued that the CMA was wrong to rely on its finding that the infringement was 'by object' in order to select a high starting point. Further, Ping argued that the gravity of the infringement in this case was lower than that in *Pierre Fabre*, and that this should also be recognised in the starting point. Ping also denied that the internet policy had any impact on inter-brand competition and argued that the impact on intra-brand competition had been extremely limited. Finally, Ping argued that the CMA's concern to deter other manufacturers from implementing similar internet policies was misplaced: other manufacturers' business models were different and embraced internet sales.

241. We reject Ping's submissions on the starting point for the penalty calculation. We note that the starting point adopted by the CMA was well below the 'mid-way' point available to it. This decision was, in our view, well within the margin of appreciation afforded to the CMA. It is also clearly appropriate for the CMA to take into account the "nature" of an infringement, and one aspect of its nature will be whether it is a restriction by 'object' or 'effect'. Whether or not the

infringement was less serious than that in *Pierre Fabre* is beside the point, the CMA did not – and did not need to – draw any comparison with *Pierre Fabre*. More pertinently, the CMA did correctly take into account Ping's legitimate aim when setting the starting point. We also see no error in the CMA's assessment of the impact of the internet policy on consumers and retailers. The CMA was also correct to consider deterrence on Ping, other golf club manufacturers and other manufacturers and wholesalers in retail sectors more generally. Whilst objective justification and individual exemption are fact-specific exercises, the fine should deter other manufacturers from engaging in similar conduct likely to be considered to restrict competition by object without having first satisfied themselves that they are able to justify their internet policies.

<u>Step 3 – adjustment for aggravating and mitigating factors</u>

Director-involvement

242. The CMA imposed a 10% uplift on the fine because Ping's managing director (Mr Clark) had been involved in the creation and enforcement of the internet policy. Its reasoning for treating director involvement as an aggravating factor in this case was set out at para 5.75 of the Decision:

> "company directors have an additional responsibility, beyond that of other employees, not to infringe the law. The CMA considers that this applies equally, regardless of the size of the company and the '*hands on*' role of senior management."

243. Ping accepted that Mr Clark had been involved in the creation and enforcement of the internet policy, but argued that the CMA was wrong to treat director involvement as an aggravating factor in this case. Ping argued that it was unreal to suggest that a company of its size could take action such as setting the internet policy without director involvement. Ping argued that such an uplift would only be appropriate if senior personnel from a separate parent company were involved, which was not the case here.

244. We reject Ping's submission that the size of Ping's organisation alone means that it would be wrong in principle for the CMA to exercise its discretion to treat director involvement as an aggravating factor. In our view, this aspect of the

CMA's reasoning is sound, essentially for the reason given in para 5.75 of the Decision.

245. Nevertheless, we do consider that the CMA has erred in treating director involvement as an aggravating factor on the specific facts of this case. Before considering those facts, it is useful to take a step back to consider why it might sometimes be appropriate to treat director-level involvement as an aggravating factor meriting an increased fine.

246. An example where director-level involvement is likely to be treated as an aggravating factor is the case of a secret cartel. Cartel behaviour is a serious infringement because it can restrict competition very significantly. Further, a cartel merits particularly stern punishment since the cartelists <u>intend</u> to restrict competition. Cartelists know their conduct has adverse effects, which is why they keep the existence of the cartel secret from their customers, who would much prefer a competitive market. However, a cartel organised by an undertaking's junior staff (without director-level knowledge) is clearly not to be treated as sternly as an infringement where director-level staff permit or coordinate the wrongdoing. This is because, as the CMA correctly notes, society has a greater expectation that senior management will lead by example and abide by the law. It is the fact that the <u>intention</u> to restrict competition extends to the highest echelons of the undertaking which aggravates the offence. This holds true even if the undertaking is relatively small.

247. The case before us is very different to the "secret cartel" example considered in the previous paragraph. In this case, the infringement was <u>public</u> and related to a central element of the Ping's way of doing business. Unlike the cartel example, Ping considered that its policy was legitimate and ultimately benefitted consumers. Ping restricted competition law through its negligence rather than with intention (see paras 228 to 229 above). Moreover, because of its public nature the infringement could not have occurred without director-level knowledge: junior staff could not have implemented the internet policy alone. If the fact of director-level knowledge alone were treated as an aggravating factor then this infringement could never have been considered as anything other than aggravated. However, applying an uplift would then become

meaningless: an uplift should be reserved for more reprehensible behaviour. Such an approach would also be out of kilter with the CMA's earlier (correct) assessment under step 1 that the fact that the infringement was "*not secret in nature*" weighed as a factor indicating that the infringement should be regarded as "*less serious*" (see para 5.61(a) of the Decision). It makes little sense to treat a "*less serious*" offence as always aggravated.

248. In this case the director-level staff were negligent. Whilst we would not rule out the possibility that in some factual situations director-level negligence should be treated as an aggravating factor, we are of the view that it should not be treated in this case as an aggravating factor. This is in view of the fact that Ping's directors sought to pursue a legitimate aim with the internet policy. Accordingly, the CMA erred in this step of its assessment. For the avoidance of doubt, we would have treated as an aggravating factor Mr Clark's involvement in setting the internet policy (despite Ping's size) if the restriction of competition had been committed intentionally.

Other mitigating factors – uncertainty in the law / cooperation

249. Ping contended that the fine should be reduced to reflect what it described as "genuine uncertainty in the law". We reject this submission for the reasons in section L(2) above. Ping also contended that it should receive a reduction of its fine to reflect its cooperation during the CMA's investigation. We reject this submission. During the investigation Ping refused to respond to the CMA's Alternatives Paper. At an interim hearing the Tribunal found that Ping's conduct was "*rash and misguided*".[5] We also consider that this refusal undoubtedly disrupted the CMA's investigation and so a reduction for cooperation is clearly unmerited.

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[5] *Ping v CMA (Application to exclude evidence)* [2018] CAT 8, at para 45.

Step 4 – adjustment for specific deterrence and proportionality

250. Step 4 of the penalty setting process is explained at paras 5.87 to 5.88 of the Decision:

> "5.87. The CMA may adjust any penalty at step 4 for specific deterrence (that is, to ensure that the penalty imposed on the infringing undertaking will deter it from engaging in anti-competitive practices in the future) or proportionality, having regard to appropriate indicators of the size and financial position of the relevant undertaking, as well as any other relevant circumstances of the case. At step 4, the CMA will assess whether, in its view, the overall penalty is appropriate in the round. Adjustments at step 4 may result in either an increase or a decrease to the penalty.
>
> 5.88. Where necessary, the CMA may decrease the penalty at step 4 to ensure that the level of penalty is not disproportionate or excessive. In carrying out this assessment of whether a penalty is proportionate, the CMA will have regard to the undertaking's size and financial position, the nature of the infringement, the role of the undertaking in the infringement and the impact of the undertaking's infringing activity on competition."

251. The CMA went on to consider specific deterrence and proportionality at paras 5.89 to 5.97 of the Decision. The CMA ultimately decided to reduce the fine by 90%. The CMA explained that this reduction was appropriate to ensure the penalty was not disproportionate or excessive taking into account: (i) Ping's size and financial position; (ii) the fact that a relatively small percentage of golf clubs are sold online; and (iii) the fact that the aim of Ping's internet policy was to promote custom fitting (Decision, para 5.89).

252. Ping argued that the scale of the reduction under step 4 showed that "*there was something seriously awry with the CMA's overall approach to gravity and duration.*" The CMA's answer to this allegation was at para 5.92 of the Decision:

> "[…] the proportionality adjustment envisaged in Step 4 recognises that the mechanistic nature of steps 1 to 3 for setting a penalty, may in some circumstances produce results that are not proportionate. That, however, does not indicate that the CMA is wrong to follow the approach set out in the Penalty Guidance in relation to those first three steps."

253. We reject Ping's submission that the fact that a large reduction was applied at stage 4 indicates that the CMA erred in its assessment of the infringement in the earlier stages of the penalty setting process. In our view, the factors identified at para 251 above did merit a large fine reduction. Had those factors not been present the much larger fine resulting from steps 1 to 3 may not have been disproportionate. Accordingly, we do not consider that the CMA erred in this step of fixing the penalty.

Overall assessment

254. Taking a step back from the detailed arguments on the step-by-step calculation of the fine, we now consider the overall fairness and proportionality of the fine imposed on Ping for this infringement. The Decision imposed on Ping a fine of £1.45 million. This equates to a fine of £290,000 per year of the infringement. In our view, this is within the correct ballpark figure for an infringement of this nature, taking into account the specific circumstances of the infringement including Ping's financial position and its genuinely held intention to promote custom fitting. We note our finding that the CMA erred in treating Ping's managing director's involvement as an 'aggravating factor' justifying an uplift in the penalty at step 3 of its penalty calculation. We have also considered whether the CMA effectively 'remedied' this error in step 4 of its calculation by substantially reducing the fine amount produced by the first three steps of the calculation. In our view, however, the fine imposed is slightly too high and a further small reduction is therefore appropriate. Rather than mechanistically applying a 10% reduction to the fine we will take a view in the round. On consideration, we consider that a fair and proportionate fine, taking into account that it was not an 'aggravated' infringement, should be £1.25 million. This equates to a fine of £250,000 in each year of the infringement.

(4) Conclusion

255. The Tribunal shall reduce the fine imposed on Ping by £200,000. The resulting penalty is therefore £1.25 million.

M. OVERALL CONCLUSION

256. We dismiss Ping's appeal on liability and we reduce the penalty imposed on Ping by £200,000 to £1.25 million. This judgment is unanimous.

Andrew Lenon QC Chairman	Professor John Beath	Eamonn Doran

Charles Dhanowa O.B.E., Q.C. (*Hon*) Registrar	Date: 7 September 2018

ANNEX

Authorities: case law of the European Courts

Case	***Abbreviation***	***Para***
Case 26/76 *Metro SB-Großmärkte v Commission* EU:C:1977:167	*Metro*	57
Case 31/80 *NV L'Oréal and SA L'Oréal v PVBA "De Nieuwe AMCK"* EU:C:1980:289	*L'Oréal*	62
Case 107/82 *AEG v Commission* EU:C:1983:293	*AEG*	63
Case C-282/12 P *MasterCard Inc v Commission* EU:C:2014:2201	-	70
Case T-112/99 *Métropole télévision (M6) and others v Commission* EU:T:2001:215	*Métropole*	75
Case C-439/09 *Pierre Fabre Dermo-Cosmétique* EU:C:2011:649 (and Opinion EU:C:2011:113)	*Pierre Fabre*	78
Case C-67/13 P *Groupment des Cartes Bancaires v Commission* EU:C:2014:2204	*Cartes Bancaires* or *CB*	82
Case C-32/11 *Allianz Hungária* EU:C:2013:160	*Allianz Hungária*	83
Case C-230/16 *Coty Germany GmbH v Parfumerie Akzente GmbH* EU:C:2017:941	*Coty*	84
Case C-234/89 *Delimitis* EU:C:1991:91	*Delimitis*	92(1)
Case C-345/14 *SIA 'Maxima Latvija'* EU:C:2015:784	*Maxima Latvija*	92(1)
Case C-331/88 *Fedesa* EU:C:1990:391	-	93(2)
Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd* EU:C:2008:643	*BIDS*	101

Case C-551/03 P *General Motors v Commission* EU:C:2006:229	-	102
Joined Cases 56 and 58/64 *Consten and Grundig* EU:C:1966:41	-	134(1)
C-322/01 *Deutscher Apothekerverband eV* EU:C:2003:664	-	177
C-108/09 *Ker-Optika BT* EU:C:2010:725	-	178

Authorities: Opinions of the Advocates General of the European Court

Case	***Abbreviation***	***Para***
Opinion of Advocate General Mazak in Case C-439/09 *Pierre Fabre Dermo-Cosmétique* EU:C:2011:113	-	127(1)
Opinion of Advocate General Wahl in Case C-230/16 *Coty Germany GmbH v Parfumerie Akzente GmbH* EU:C:2017:603	-	89
Opinion of Advocate General Tizzano in Case C-551/03 P *General Motors v Commission* EU:C:2005:639	-	102

Authorities: Judgments of the UK Courts

Case	***Abbreviation***	***Para***
Balmoral v CMA [2017] CAT 23	*Balmoral*	55
Sainsbury's Supermarkets Ltd and ors v MasterCard Incorporated and others [2018] EWCA Civ 1536	-	70
GSK & ors v CMA (Paroxetine) [2018] CAT 4	-	82
Racecourse Association v OFT [2005] CAT 29	-	93(5)
Tesco v OFT [2012] CAT 31	-	107

R (Lumsdon) v Legal Services Board [2015] UKSC 41, [2016] AC 697	-	158
Streetmap v Google [2016] EWHC 253 (Ch)	-	159
Argos and Littlewoods v OFT [2013] CAT 13	-	219
Napp v DGFT [2002] CAT 1	*Napp*	220
Kier Group Plc v OFT [2011] CAT 3	*Kier*	233

Authorities: Guidance Papers

Papers	***Abbreviation***	***Para***
Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C 101/97	Article 101(3) Guidelines	73
Guidelines on Vertical Restraints [2010] OJ C 130/1	-	127(4)
Guidance as to the appropriate amount of a penalty (OFT423, September 2012)	-	216
Guidance as to the appropriate amount of a penalty (CMA 73, April 2018)	-	216