



IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1615/5/7/23

BETWEEN:

UP AND RUNNING (UK) LIMITED

Claimant

- v -

DECKERS UK LIMITED

Defendant

REASONED ORDER (EXPERT EVIDENCE)

UPON the Defendant's Application dated 28 February 2024 for permission to rely on expert evidence for the purpose of Trial 1

AND UPON the Claimant's response to the Defendant's Application dated 4 March 2024

AND UPON the correspondence from the Defendant dated 15 March 2024 and the Claimant dated 18 and 22 March 2024 setting out their views on what the relevant market should be and providing an indication of the parties' shares of the relevant market

IT IS ORDERED THAT:

1. The Defendant is granted permission to adduce expert evidence on the topics of market definition and market share, subject to the conditions listed in paragraph [14] below.
2. The Defendant is to file and serve its expert report by 4pm on 24 May 2024.

3. If, having seen the Defendant's expert report, the Claimant wishes to submit a report in response from an economic expert with expertise in market definition, then it shall have permission to do so, provided that it notifies the Tribunal and the Defendant of its intention to do so within 14 days after service of the Defendant's expert report.

REASONS:

4. The Defendant seeks permission to adduce expert evidence on the market definition which should apply to these proceedings and the shares of the relevant market or markets which the parties hold. The Claimant opposes that application. The background to the proceedings is summarised in my Ruling (Split Trial and Fast Track Procedure) at [2024] CAT 9.
5. The issue of market definition arises mainly if the Claimant is unsuccessful in its primary case that the Defendant has imposed a hardcore restriction on the Claimant. In such circumstances, the Defendant seeks to rely on the block exemption set out in Commission Regulation (EU) 330/2010 ("the Commission Regulation") and the Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 ("the Order"), which exempt vertical agreements falling within their terms from the Chapter I Competition Act 1998 prohibition.
6. Both the Commission Regulation and the Order permit selective distribution systems where the market share held by each of the supplier/buyer does not exceed 30% of the relevant market on which it sells/purchases the contract goods or services. It is clear (in relation to both the Commission Regulation and the Order) that the relevant market is that market on which the Defendant supplies the Claimant, which is a wholesale market.
7. The Defendant also relies on the Commission's *Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the TFEU* (2014/C 291/01) ("the De Minimis Notice"). Under the De Minimis Notice, vertical agreements entered into by non-competing undertakings whose individual market share on the relevant market does not exceed 15% are generally considered to fall outside the scope of Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU") by reason of a lack of an appreciable restriction of competition. The

De Minimis Notice makes clear that where undertakings are actual or potential competitors, or where it is difficult to classify the agreement as one between competitors or non-competitors, the applicable threshold is an aggregate market share held by the parties to the agreement of 10%.

8. In the case of the De Minimis Order, the relevant market includes any market affected by the agreement. In these proceedings, the Defendant competes with the Claimant in the retail market (for example, the Defendant sells directly to retail customers through its website and the Claimant sells to retail customers through its website and its physical outlets). It therefore seems at least possible that there may be some effect on the retail market.
9. The Claimant intends to contest the applicability generally of the Commission Regulation, the Order and the De Minimis Notice, and also intends to contest the application of the market share thresholds.
10. I directed the parties to provide details of their cases on market definition, and there was some degree of consensus, in that both Claimant and Defendant assert that the relevant market is for the product category of specialised running shoes. There is, however, disagreement about:
 - (a) Whether the relevant market is the wholesale market, the retail market or both.
 - (b) What products comprise the category of specialised running shoes, with some disagreement about which brands should be included in such a category.
 - (c) What the relevant market shares of the respective parties are in the relevant market(s).
11. The disagreement between the parties about the relevant market may reflect the difference of approach between the Commission Regulation and Order on the one hand, and the De Minimis Notice on the other. The former two instruments are focused on the market in which the vertical agreement operates, which here is the wholesale

market, while the latter requires consideration of any market affected by the agreement, so in these circumstances appears to contemplate a degree of focus on the retail market.

12. I am also mindful that these issues only arise in the event that the Claimant fails in its case that there is a hardcore restriction (it being accepted by the Defendant that none of the Commission Regulation, the Order or the De Minimis Notice apply if there is found to be a hardcore restriction). Nonetheless, the Defendant's case on selective distribution is in scope for the trial of this matter in July 2024 and is apparently contested by the Claimant.
13. In those circumstances, I give permission to the Defendant to adduce expert evidence on the topics of market definition and market share. It seems to me that there are some narrow issues of disagreement between the parties that can usefully be clarified by expert evidence from an economic expert with expertise in market definition. It is also likely to be useful for there to be an exercise in gathering relevant market share data for presentation to the Tribunal.
14. However, this permission is subject to the following conditions:
 - (a) The expert will of course be mindful of the importance the Tribunal attaches to the primary duty of the expert to assist the Tribunal and to provide unbiased opinion as an independent witness. That applies all the more so in circumstances where the Claimant is unrepresented and may not seek to submit expert evidence in response (see further below). In particular, the expert is not to act as an advocate for the Defendant or to stray into matters which are for the Tribunal, rather than being the proper subject of expert evidence.
 - (b) The scope of the permission to submit expert evidence is strictly limited to:
 - (i) identification of the relevant markets (likely to be the wholesale and retail markets) for specialised running shoes;
 - (ii) the products which are likely to comprise those markets; and

- (iii) the market shares of the parties on those markets. Any part of the expert report which seeks to go beyond those matters is liable to be struck out.
 - (c) There is no apparent need for there to be any assessment of the geographical market, as the Claimant has not pursued its claim under Article 101 TFEU and both the Claimant and the Defendant appear to operate on a UK wide basis.
- 15. The Defendant is to file and serve its expert report by 4pm on 24 May 2024, at the same time it serves its statements of witnesses of fact.
- 16. If, having seen the Defendant's expert report, the Claimant wishes to submit a report in response from an economic expert with expertise in market definition, then it shall have permission to do so, provided that it notifies the Tribunal and the Defendant of its intention to do so within 14 days after service of the Defendant's expert report. The Tribunal will set a timetable at that stage for the Claimant's expert response and any reply evidence from the Defendant's expert.

Ben Tidswell
Chair of the Competition Appeal Tribunal

Made: 2 April 2024
Drawn: 4 April 2024