Clear roads ahead? Judgment on selective distribution systems from the European Court of Justice

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In a judgment handed down today (C-158/11 Auto 24), the EU Court of Justice ("CJEU") confirmed that suppliers operating selective distribution systems ("SDS") may appoint distributors based on so-called "quantitative" criteria (i.e. criteria that directly limit the number of distributors, e.g. appointing a fixed number of distributors per EU territory). Under the MVBER, such thresholds are set at 15% whereas quantitative selective distribution systems are used for the sale of new cars.

Outside of the VBER/MVBER, the CJEU explained that it was not apparent from the scheme of the MVBER that the European Parliament and the European Commission wished to impose the same conditions on the two different types of SDS. Therefore, the CJEU's judgment may provide helpful clarification for SDSs in other industries. Whilst the general VBER itself does not make the explicit distinction between quantitative or qualitative, this is dealt with in the judgment. The CJEU explained that criterion on which criteria are objectively justified ("VBER") to appoint distributors based on so-called "quantitative" criteria (i.e. criteria which directly limit the number of distributors, e.g. appointing a fixed number of distributors per EU territory). Under the MVBER, the thresholds is set at 15% whereas quantitative selective distribution systems are used for the sale of new cars.

Outside of the VBER/MVBER, the CJEU confirmed that suppliers without market power have a high degree of flexibility in determining who they appoint to supply their products in the EU. Nevertheless, suppliers operating SDSs should continue to ensure that the criteria for selecting distributors is recorded in writing, and provided on request, to reduce claims of competition law relations than those distributors which are refused admission to the system.

Background

Under a selective distribution system ("SDS") a supplier may appoint a network of distributors to sell its products, and restrict sales outside of this network. Where a supplier's market share is above 15%, a supplier may rely on the general non-discriminatory Exemption Regulation ("VBER") to appoint distributors based on so-called "quantitative" criteria which directly limit the number of distributors, e.g. appointing a fixed number of distributors per EU territory. Under the MVBER, the threshold is set at 15% whereas quantitative selective distribution systems are used for the sale of new cars.

Outside of the VBER/MVBER, the CJEU explained that it was not apparent from the scheme of the MVBER that the European Parliament and the European Commission wished to impose the same conditions on the two different types of SDS. The CJEU also confirmed that there is no obligation on a supplier using a quantitative SDS in accordance with the VBER to publish these criteria in writing. The CJEU explained that suppliers using a quantitative SDS in accordance with the VBER are under no obligation to publish the criteria used to appoint distributors. In Auto 24, the CJEU confirmed that suppliers operating SDSs have the flexibility to decide who they appoint as distributors and how they appoint them. However, suppliers operating SDSs should continue to ensure that the criteria used to select distributors is recorded in writing, and provided on request, to reduce claims of competition law relations than those distributors which are refused admission to the system.

The case before the CJEU

Auto 24 was Land Rover's authorised dealer from 1994 to 2002 at which point it became an authorised dealer based on so-called "qualitative" criteria. Auto 24 continued to supply authorised Land Rover products, although it was not an authorised dealer. The dispute was appealed to the Cour de Cassation which reversed Auto 24's case on the grounds that Land Rover had refused to appoint Auto 24 at the request of a distributor who had been in the network.

The CJEU's judgment

The CJEU's judgment is short (at nine pages) and the Court gives short shrift to the arguments raised by Auto 24. The CJEU confirmed that the supplier must satisfy objective economic justifications, of which the supplier must provide evidence. The CJEU accepted that the supplier is entitled to refuse appointment to a distributor on the basis of a "numerus clausus" which it established in 2005 and which forms the basis of the judgment. The CJEU did not rule on whether the CJEU's judgment may have meaning for the assessment of other types of SDS.

The CJEU confirmed that suppliers operating SDSs must define entry criteria which the supplier may apply to the system. In any SDS, quantitative or qualitative, distributors must be admitted on the basis of specified criteria. The CJEU confirmed that suppliers operating SDSs may not adopt criteria that are objectively justified ("VBER") to appoint distributors based on so-called "quantitative" criteria (i.e. criteria which directly limit the number of distributors, e.g. appointing a fixed number of distributors per EU territory). Under the MVBER, the thresholds is set at 15% whereas quantitative selective distribution systems are used for the sale of new cars.

Outside of the VBER/MVBER, the CJEU confirmed that suppliers without market power have a high degree of flexibility in determining who they appoint to supply their products in the EU. Nevertheless, suppliers operating SDSs should continue to ensure that the criteria for selecting distributors is recorded in writing, and provided on request, to reduce claims of competition law relations than those distributors which are refused admission to the system.

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