

# Kluwer Competition Law Blog

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

Gavin Bushell (Baker McKenzie, Belgium) · Thursday, June 14th, 2012

In a judgment handed down today (C-158/11 Auto 24), the EU Court of Justice (“CJEU”) confirmed that suppliers operating selective distribution systems (“SDSs”) are under no obligation to publish the criteria used to appoint distributors, and that a car manufacturer using a SDS based on quantitative criteria is under no obligation to apply these criteria in a uniform manner, or to ensure that these criteria are objectively justified. Whilst the proceedings relate to a case brought in respect of the Motor Vehicle Block Exemption Regulation (MVBER), the CJEU’s judgment may have meaning for the assessment of other types of SDSs.

At a time when selective distribution is under attack from the lobbying activities of certain e-commerce platforms, this may be seen as a welcome judgment by suppliers that confirms the legitimacy of selective distribution systems, and confirms 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 admitting distributors is recorded in writing, and provided on request, to rebut claims of EU competition law violations from 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 (and the market shares of its distributors) is below 30%, a supplier may rely on the general Vertical Block Exemption Regulation (“VBER”) to appoint distributors based on so-called quantitative criteria (criteria which directly limit the number of distributors, e.g. only appointing a fixed number of distributors per EU territory). Under the MVBER, this threshold is raised to 40% where quantitative selective distribution is used for the sale of new cars.

Outside of the VBER/MVBER (as the case may be), the parties to an SDS must self-assess whether the criteria used to appoint distributors comply with Article 101 TFEU. At market shares above these thresholds, only selective distribution systems based on qualitative criteria are likely to be defensible: qualitative criteria (unlike quantitative criteria) do not directly limit the number of distributors which the supplier may appoint, and must be: (i) applied uniformly and in a non-discriminatory manner; and (ii) objectively necessary given the nature of the product or service involved.

The case before the CJEU

Auto 24 was Land Rover's authorised dealer from 1994 to 2002 at which point in time it became an authorised repairer but its application to be readmitted as an authorised dealer was rejected. The subsequent dispute was appealed to the Paris Cour de Cassation which rejected Auto 24's case on the grounds that Land Rover was entitled to refuse entry on the basis of a "numerus clausus" which it established in 2005 and which foresaw the admittance of 72 dealers covering 109 sites in France.

On appeal, Auto 24 argued that in a quantitative SDS, the supplier must satisfy objective economic justifications, of which the supplier must provide evidence, and the criteria must be applied in a uniform and non-discriminatory manner in all areas and to all participants. The Cour de Cassation referred to the CJEU the question of the extent to which the supplier is required to define entry criteria.

### Judgment

The CJEU's judgment is short (at nine pages) and the Court gives short shrift to the arguments raised by Auto 24. In any SDS, quantitative or qualitative, distributors must be admitted on the basis of specified criteria (paragraph 29), which the CJEU defines as "criteria whose precise content may be verified". This does not mean that a supplier is under an obligation to publish these criteria: as the CJEU points out, as this may jeopardise business secrets, and even risk facilitating possible collusive behaviour (paragraph 31). The CJEU does not deal with when these criteria must be disclosed (e.g. to a distributor applying to join the system). In practice, we continue to advise suppliers operating SDSs to record their criteria in writing, and to provide these on request.

The CJEU also confirmed that there is no obligation on a supplier using a quantitative SDS in accordance with the MVBER to adopt criteria that are objectively justified (i.e. by the product or service) or to apply these criteria in a uniform or non-discriminatory manner (paragraph 32). Such a requirement would conflate the requirements of quantitative SDS (covered by the block exemption) with those of a qualitative SDS (which applies outside of the MVBER) (paragraph 35 of the judgment). 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.

### Implications for SDSs in other industries

This 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 Commission's Guidelines on Vertical Restraints (the "Guidelines"). Therefore, there would appear to be good arguments that the judgment applies more broadly.

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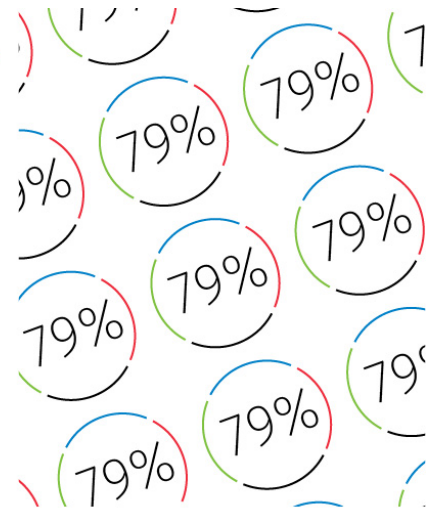
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