

CASE CARD | 4 October 2021

L'Oréal (31/80)

Selective distribution

1. CASE SUMMARY

A. Summary of facts

L'Oréal SA is a French company manufacturing and marketing perfumery, beauty and toilet products. L'Oréal NV, a subsidiary company owned 99% by L'Oréal SA, markets L'Oréal products in Belgium. De Nieuwe AMCK is a Belgian wholesaler of perfumery products.

The L'Oréal companies established in Belgium for Kérastase hair-care products a selective distribution network of which De Nieuwe AMCK is not a part.

On 22 February 1978, the European Commission ('Commission') addressed a letter to L'Oréal according to which it took the view that there was no need to intervene under Article 101(1) TFEU with regard to L'Oréal's distribution system. Reasons for the Commission to allow the matter to rest were (i) L'Oréal's small portion of the market for perfumery, beauty and toilet preparations in the various countries, and (ii) the large number of competing undertakings of similar size.

L'Oréal brought summary proceedings before the President of the Commercial Court of Antwerp (Belgium):

- L'Oreal sought a declaratory ruling confirming that the actions of De Nieuwe AMCK in offering for sale Kérastase products bearing an express statement that they may be sold only by Kérastase hairdressing consultants, and in obtaining stocks of those products by being party to a breach of contract, are contrary to fair trading practices. L'Oreal also sought an injunction forbidding De Nieuwe AMCK to offer for sale these products, or to obtain stocks thereof.
- De Nieuwe AMCK claimed that the selective distribution network set up by L'Oréal is illegal as contrary to the Community rules on competition.

By an order of 17 January 1980, the Commercial Court of Antwerp referred the case for a preliminary ruling by the European Court of Justice ('ECJ') on questions relating to the interpretation of Articles 101 and 102 TFEU.

B. Legal analysis

The ECJ reminds the parties that selective distribution systems can accord with Article 101(1) TFEU provided that it fulfils the following (*Metro*) criteria:

- resellers are chosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the reseller and the suitability of his trading premises;
- that such conditions are laid down uniformly for all potential resellers; and
- are not applied in a discriminatory fashion.

The ECJ further explains that in order to determine the exact nature of such qualitative criteria, it is necessary to consider whether:

- the characteristics of the product concerned necessitate a selective distribution system in order to preserve its quality and ensure its proper use;
- those objectives are not already satisfied by national rules governing admission to the resale trade or the conditions of sale of the product concerned; and
- the criteria laid down go not beyond what is necessary.

However, agreements containing quantitative conditions or conditions that go beyond a simple objective selection of a qualitative nature do not fall automatically within the scope of the prohibition of Article 101(1) TFEU. The ECJ specifies that such agreements must also be capable of affecting trade between Member States and of distorting competition (by its object or effect).

- In order to assess whether an agreement is capable of affecting trade between Member States it must be determined, on the basis of a set of objective factors, whether it is possible to foresee with a sufficient degree of probability that the agreement may have an influence, direct or indirect, actual or potential, on the trade between Member States. Particular attention must be paid to the impact of the contested agreement on opportunities for parallel imports.
- In order to assess whether an agreement is capable of distorting competition (by its object or effect), it is necessary to consider the competition within the actual context in which it would occur in the absence of the contested agreement. To that end, the ECJ deems it appropriate to take in account in particular the nature and the quantity of the products covered by the agreement, the position and the importance of the parties on the market for the products concerned, and the isolated nature of the contested agreement or, alternatively, its position in a series of agreements.

The remainder of the procedural matters have lost their relevance since the adoption of Regulation 1/2003.

2. QUOTES

"As the Court observed in its judgment of 25 October 1977 (Case 26/76, Metro v Commission [1977] ECR 1875), selective distribution systems constitute an aspect of competition which accords with Article [101(1) TFEU] provided that re-sellers are chosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the re-sellers and his staff and the suitability of his trading premises and that such conditions are laid down uniformly for all potential re-sellers and are not applied in a discriminatory fashion." (§15)

"In order to determine the exact nature of such 'qualitative' criteria for the selection of re-sellers, it is also necessary to consider whether the characteristics of the product in question necessitate a selective distribution system in order to preserve its quality and ensure its proper use, and whether those objectives are not already satisfied by national rules governing admission to the re-sale trade or the conditions of sale of the product in question. Finally, inquiry should be made as to whether the criteria laid down do not go beyond what is necessary. [...] the obligation to participate in the setting up of a distribution system, commitments relating to the achievement of turnovers and obligations relating to minimum supply and to stocks exceeded the requirements of a selective distribution system based on qualitative requirements." (§16)

"When admission to a selective distribution network is made subject to conditions which go beyond simple objective selection of a qualitative nature and, in particular, when it is based on quantitative criteria, the distribution system falls in principle within the prohibition in Article [101(1) TFEU], provided that, [...], the agreement fulfils certain conditions depending less on its legal nature than on its effects first on 'trade between Member States' and secondly on 'competition'." (§17)

"The agreements laying down a selective distribution system based on criteria for admission which go beyond a mere objective selection of a qualitative nature exhibit features making them incompatible with Article [101(1) TFEU] where such agreements, either individually or together with others, may, in the economic and legal context in which they occur and on the basis of a set of objective factors of law or of fact, affect trade between Member States and have either as their objective or effect the prevention, restriction or distortion of competition. It is for the Commission alone, subject to review by the Court, to grant an exemption in respect of such agreements under Article [101(3) TFEU]." (§1 of the operative part)

3. RELEVANT LEGISLATION

- Article 101 TFEU

4. RELEVANT LITERATURE

On purely qualitative selective distribution, see [F. WIJCKMANS and F. TUYTSCHAEVER, *Vertical Agreements in EU Competition Law*, Oxford University Press, 2018](#), §9.17 – 9.24.

5. PRACTICAL RELEVANCE

The principal significance of this case is that it confirms the *Metro* test on the basis of which selective distribution systems are characterized as purely qualitative and, on account of such qualification, escape the prohibition of Article 101 TFEU. The case repeats also the factors mentioned in *Metro* that render a selective system quantitative (as opposed to purely qualitative) and hence trigger the application of Article 101 TFEU.