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CASE CARD | 4 October 2021

AEG v. Commission (107/82)

Selective distribution

1. CASE SUMMARY

A. Summary of facts

AEG was engaged in the development, manufacture and marketing of consumer electronic products. It operated a (purely qualitative) selective distribution system through several subsidiaries. After receiving several complaints on the implementation of the distribution system, the Commission started an investigation.

In its decision of 6 January 1982, the Commission concluded that AEG had intended to apply the selective distribution system in such a way as to pursue aims incompatible with competition law rules. The practices to which the Commission objected concerned the exclusion in principle of certain resellers, as well as vertical price fixing (resale price maintenance). The Commission imposed a fine of 1 million ECU.

AEG appealed the Commission's decision. The European Court of Justice ('ECJ') however dismissed the appeal and confirmed the Commission's decision.

B. Legal analysis

B.1 - Article 101(1) TFEU

AEG disputed the applicability of Article 101(1) TFEU on the basis of the following arguments:

Agreements and concerted practices

AEG claimed that the relevant practices were unilateral acts falling outside the scope of Article 101(1) TFEU. The ECJ rejected this view: the policy of refusing certain types of resellers to enter the qualitative selective distribution network (even when they meet the objective criteria) is not a unilateral act, but forms part of the contractual relationship between AEG and its resellers. Approval of the admission of a reseller is indeed based on the acceptance (tacit or express) by the contracting parties of the policy pursued by AEG which requires *inter alia* the exclusion from the network of all resellers who are qualified for admission but are not prepared to adhere to that policy.

Admission criteria for qualitative selective distribution networks

AEG claimed that the conduct to which objection is made (the readiness to charge certain prices) was designed to maintain a level of prices indispensable for the survival of the specialist trade and that, if selective distribution

systems are justified by the need to guarantee the existence of that trade (whose costs are much higher than those of the non-specialist trade), such systems cannot be considered contrary to competition law in so far as they are structured or applied in such a way as to guarantee to approved dealers the enjoyment of a minimum margin. The ECJ rejected this view, stating that, while it is true that selective distribution systems generally require a higher profit margin in order to assure the quality of the additional services the resellers must supply to consumers, the manufacturer can ensure the quality of these services by the fact that it is authorized to reject traders who are not in a position to provide these services. The object of a selective distribution system is solely the improvement of competition in so far as it relates to factors other than prices and not the guarantee of a high profit margin for approved re-sellers. A commitment to uphold a certain price level cannot legally be part of the conditions to become an authorized distributor in a selective distribution network.

Non-systematic nature of the infringements

AEG claimed that the alleged infringements were non-systematic and that – given the size of the distribution network – it was inevitable that certain infringements might occur, but that this could not lead to the finding that the system as a whole was applied incorrectly. The ECJ rejected this view, stating that the mere fact that there are only a relatively restricted number of infringements does not prove that the infringements were non-systematic, nor that there was no general policy on the part of AEG or its subsidiaries designed to exclude resellers who were too aggressive or to influence prices.

Absence of obstacles to intra-Community trade

AEG argued that Article 101 TFEU was not applicable because the traders concerned did not carry out trade between Member States or were not in a position to do so. The ECJ observed that the mere fact that at a certain time traders applying for admission or who have already been admitted are not engaged in intra-Community is not sufficient to conclude that there is no or insufficient effect on trade between Member States. The ECJ adds that the situation may change from one year to another in terms of alterations in the conditions or composition of the market both in the common market as a whole and in the individual markets.

2. QUOTES

"*AEG was therefore not justified in taking the view that the acceptance of an undertaking to charge prices making possible a sufficiently high profit margin constituted a lawful condition for admission to a selective distribution system. By the very fact that it was authorized not to admit to and not to keep in its distribution network traders who were not, or were no longer, in a position to provide services typical of the specialist trade, it had at its disposal all the means necessary to enable it to ensure the effective application of the system. In such circumstances the existence of a price undertaking constitutes a condition which is manifestly foreign to the*

requirements of a selective distribution system and thus also affects freedom of competition." (§43)

"*It follows that the non-systematic nature of the infringements is not necessarily proved by their relatively restricted number and the possibility that there has been a systematic use of the conditions for admission in a manner incompatible with Community law can be ruled out only after it has been established that there was no general policy on the part of AEG or its subsidiaries designed to exclude re-sellers who were too aggressive or to influence prices.*" (§46)

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 SIGNIFICANCE

This case shows that a selective distribution system that may appear valid in theory, can still lead to an infringement of Article 101(1) TFEU when it is applied incorrectly. Such incorrect application can be derived from a limited number of individual cases, when these cases demonstrate an overall policy that is contrary to competition law.

This case confirms first of all the *Metro* criteria that must be complied with in order to keep a qualitative selective distribution system out of Article 101(1) TFEU.

The case underscores furthermore that vertical price fixing is incompatible with Article 101 TFEU and undermines the validity of an otherwise valid qualitative selective system.

The case is particularly interesting as regards the ability to challenge individual refusals of admission to the network on the basis of Article 101 TFEU. First, the judgment observes that the number of refusals must be sufficient to preclude the possibility that they are isolated cases not forming part of systematic conduct. Second, the judgment considers that the limited number of cases with which AEG was charged does not by itself prove the non-systematic nature of the infringements. Hence, the judgment seems to indicate that a limited number of refusals of which it cannot be established that they reflect systematic conduct on the part of the supplier do not necessarily trigger the prohibition of Article 101 TFEU.

The case illustrates furthermore that it will be difficult to challenge the application of Article 101 TFEU to selective systems applied in different Member States on account of the absence or insufficiency of an effect on trade between Member States.