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CASE CARD | 4 October 2021

Metro v. Commission (26/76)

Selective distribution

1. CASE SUMMARY

A. Summary of facts

The judgment concerned undertakings Metro, a German self-service wholesaler, and SABA, a German manufacturer of electronic equipment such as radios, televisions and tape recorders. The activities of both SABA and Metro primarily focused on the Federal Republic of Germany, but SABA's distribution activities also spanned other Member States.

SABA employed a selective distribution system at the wholesale and retail level of trade. Accordingly, SABA only appointed wholesalers or retailers that fulfilled certain criteria, and appointed resellers were only allowed to (re)sell SABA products to other appointed resellers. For instance, wholesalers had to keep a specialized shop or department in electronic equipment and had to participate in the creation and consolidation of the SABA sales network and service system. In the same vein, retailers had to keep a specialized shop or department in electronic equipment, achieve an adequate turnover and corresponding stock, display SABA products in a respectable manner, and maintain suitable retail premises for the display and advertisement of SABA products.

SABA refused to appoint Metro as a wholesaler because it did not meet the relevant criteria, and accordingly excluded Metro from its distribution network. The Commission found that SABA's distribution system did not infringe Article 101 TFEU. Metro subsequently submitted an appeal against the Commission's decision with the European Court of Justice ('ECJ'). The ECJ dismissed Metro's appeal and confirmed the legality of SABA's distribution system.

B. Legal analysis

The ECJ first maintained that the appeal of Metro was admissible because it was directly and individually concerned by the Commission's decision, and confirmed that SABA did not hold a dominant position on the relevant market.

In relation to Article 101 TFEU, the ECJ held that several features of SABA's distribution system did not infringe the prohibition of Article 101(1) TFEU, whereas other features did infringe Article 101(1) TFEU but fulfilled the conditions for an individual exemption under Article 101(3) TFEU.

Importantly, in its assessment, the ECJ stipulated the criteria that a selective distribution system must meet in

order to qualify as 'purely qualitative' so that it falls outside the scope of Article 101(1) TFEU. These so-called '*Metro* criteria', which are still applied today, are the following:

- resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion;
- the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use; and
- the criteria laid down do not go beyond what is necessary.

The ECJ then assessed the features of SABA's selective distribution system which did not meet the above criteria, and accordingly infringed Article 101(1) TFEU. The ECJ's considerations primarily concerned the obligation for wholesalers to participate in the creation and consolidation of the SABA sales network, to achieve a turnover which SABA considered adequate, and to conclude supply contracts with SABA at least six months in advance taking into account the probable growth of the market. The ECJ found that these restrictions met the four (cumulative) criteria for exemption under Article 101(3) TFEU and consequently did not infringe Article 101 TFEU.

2. QUOTES

"*On this view the Commission was justified in recognizing that selective distribution systems constituted, together with others, an aspect of competition which accords with Article [101(1) TFEU], provided that resellers are chosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the reseller and his staff and the suitability of his trading premises and that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion*." (§20, subparagraph 4)

"*However, although price competition is so important that it can never be eliminated it does not constitute the only effective form of competition or that to which absolute priority must in all circumstances be accorded.*

[…]

For specialist wholesalers and retailers the desire to maintain a certain price level, which corresponds to the desire to preserve, in the interests of consumers, the possibility of the continued existence of this channel of distribution in conjunction with new methods of distribution based on a different type of competition policy, forms one of the objectives which may be pursued without necessarily falling under the prohibition contained in Article [101(1) TFEU], and, if it does fall thereunder, either wholly or in part, coming within the framework of Article [101(3) TFEU].

This argument is strengthened if, in addition, such conditions promote improved competition inasmuch as it relates to factors other than prices." (§21, subparagraphs 3, 5 and 6)

"*Whilst the Commission required SABA to refrain from imposing upon wholesalers the prohibition on supplies to trade consumers it permitted that undertaking to maintain the prohibition on supplies to private customers, including large-scale 'institutional' consumers such as schools, hospitals, military establishments, administrations and other customers of the same nature.*

The Commission considers that, apart from the fact that this limitation on the activity of wholesalers is in accordance with the requirements of German legislation, it does not constitute a restriction on competition within the meaning of Article [101(1) TFEU] because it corresponds to the separation of the functions of wholesaler and retailer and because if such a separation did not obtain the former would enjoy an unjustified competitive advantage over the latter which, since it would not correspond to benefits supplied, would not be protected under Article [101 TFEU].

[…]

The Commission did not infringe Article [101(1) TFEU] in considering that this separation of functions is in principle in accordance with the requirement that competition shall not be distorted." (§28-29, subparagraph 2)

3. RELEVANT LEGISLATION

- Article 101 TFEU
- Article 102 TFEU
- Vertical Guidelines, §175

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 *Metro* judgment is one of the ECJ's landmark judgments in relation to selective distribution. The judgment established the criteria that need to be met in order to qualify as a purely qualitative selective distribution system which falls outside the scope of Article 101(1) TFEU. These *Metro* criteria are still applied today, also by the Commission and the EU courts, and accordingly remain highly relevant and important.

The judgment is furthermore important in that it addresses (i) the role of price competition in selective systems

and (ii) the separation of functions between wholesalers and retailers. The first point (i) is relevant in the build-up of the resale price maintenance regime (see also Article 4(a) of Regulation 330/2010), and the second point (ii) is related to the permissible customer restrictions that may be imposed on wholesalers (see also Article 4(b)(ii) of Regulation 330/2010).