Distribution Law Center
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CASE CARD | 28 January 2022

Auto 24 (C-158/11)

Selective distribution

1. CASE SUMMARY

A. Summary of facts

For a considerable period of time Auto 24 was designated as an authorized distributor of Land Rover in France. The exclusive distributorship was terminated on 27 September 2002 with a notice period of twenty-four months and therefore ended on 30 September 2004. At that date an agreement became effective between the parties whereby Auto 24 was allowed to continue as an authorized repairer. Its right to distribute Land Rover cars was however not restored.

Auto 24 objected to this situation and started litigation. Its main argument was that Land Rover's selective system was invalid as it did not apply criteria that were specific, objective, proportionate to the aim pursued, and implemented in a non-discriminatory manner when selecting distributors.

The case ended up at the French Cour de Cassation which submitted a reference for a preliminary ruling to the European Court of Justice ('ECJ'). The central question in the matter was the correct interpretation of the words 'specified criteria' that appeared in the definition of selective distribution contained in Article 1(1)(f) of Regulation 1400/2002. This definition differs somewhat from Article 1(1)(e) of Regulation 330/2010. However, both definitions are identical when they refer to the need of the relevant criteria being 'specified'.

B. Legal analysis

The ECJ dismissed the arguments raised by Auto 24 and stated that the concept of 'specified criteria' means no more than that criteria are applied 'the precise content of which may be verified'. (§39) A useful addition is that the ECJ spelled out that there is no need for such criteria to be published. (§31) As long as it is possible to verify the criteria, they meet the standard of being 'specified'.

2. QUOTES

"*It follows from those provisions that, as regards both quantitative selective distribution systems and qualitative selective distribution systems, within the meaning of the Regulation, distributors must be selected on the basis of 'specified criteria', as provided for in Article 1(1)(f) of the Regulation.*" (§29)

"*In that context, the term 'specified criteria', within the meaning of that provision, must be interpreted as referring to criteria whose precise content may be verified.*" (§30)

"*On that point, it is worth noting that it is not necessary that, with a view to verification of their precise content, the selection criteria used for the purposes of a selective distribution system be published, at the risk [...] of compromising business secrets, or even facilitating possible collusive behaviour.*" (§31)

"*Furthermore, it does not follow from the definition of the concept of 'quantitative selective distribution system', in Article 1(1)(g) of the Regulation, that that concept must be interpreted as including a requirement that the criteria applied by the supplier in order to select the distributors must be not only 'specified', but also objectively justified and applied in a uniform and non-differentiated way with regard to all applicants for authorisation.*" (§32)

"*It is only in the context of qualitative selective distribution systems that the Regulation, by the definition set out in Article 1(1)(h), stipulates, inter alia, that the selection criteria used by the supplier should be 'required by the nature of the contract goods or services, ... laid down uniformly for all distributors or repairers applying to join the distribution system, [and] not applied in a discriminatory manner'.*" (§33)

"*The term 'specified criteria' [...] means, with respect to a quantitative selective distribution system within the meaning of that regulation, criteria the precise content of which may be verified. In order to benefit from the exemption provided for by that regulation, it is not necessary for such a system to be based on criteria that are objectively justified and applied in a uniform and non-differentiated manner in respect of all applicants for authorisation.*" (operative part)

3. RELEVANT LEGISLATION

- Regulation 1400/2002

4. RELEVANT LITERATURE

On the definition of selective distribution, see F. WIJCKMANS and F. TUYTSCHAEVER, *Vertical Agreements in EU Competition Law*, Oxford University Press, 2018, §9.14 – 9.26.

5. PRACTICAL SIGNIFICANCE

The practical significance of the case is that the ECJ confirmed, briefly and to the point, that qualitative and quantitative selective distribution must be distinguished from one another, and that the latter is block exempted as soon as the selective criteria can be verified. There is no need for the criteria to be required by the nature of the

contract products, neither for them to be uniform or to be applied in a non-discriminatory way to all candidate distributors. There is also no need for the criteria to be published.