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Banning Advocaten

CASE CARD | 26 August 2026

123inkt v HP (C/13/739577)

Selective distribution

1. CASE SUMMARY

A. Summary of facts

This case forms part of a broader dispute between 123inkt, an online retailer of printers and printer supplies, and HP, a manufacturer of printers and cartridges. The dispute arose against the background of intense competition between the parties in the aftermarket for HP compatible cartridges and several other legal proceedings between them.

The case concerns HP's selective distribution system, introduced throughout Europe in August 2020. Under that system, HP products could only be sourced and resold through authorised distributors complying with HP's selective distribution criteria. On 3 June 2022, HP alleged that 123inkt had breached those criteria. 123inkt responded that it was not an HP Authorised Partner and was therefore not bound by the system. HP, in turn, took the position that only authorised partners could sell HP products. 123inkt subsequently challenged the enforceability of HP's selective distribution regime before the Dutch courts. It argued that the system unlawfully restricted access to original HP products and was designed to limit competition from compatible cartridges.

123inkt claimed that HP's selective distribution system infringed Article 101 TFEU because it did not satisfy the *Metro* criteria and, in the alternative, that HP had abused a dominant position contrary to Article 102 TFEU. HP maintained that its selective distribution system was lawful, that it was compatible with EU competition law, and that it did not hold a dominant position.

B. Notes on case history

The judgment of 11 February 2026 follows an interim judgment of 18 December 2024, in which the Amsterdam Court of First Instance held that a selective distribution system that does not satisfy the *Metro* criteria is not necessarily unlawful. According to the Court, such a system may still qualify for exemption under Article 101(3) TFEU, either through the Vertical Block Exemption Regulation ('VBER') or following an individual assessment.

The interim judgment further held that HP's selective distribution system could not benefit from the VBER, but might nevertheless qualify for an individual exemption under Article 101(3) TFEU. As the parties had not sufficiently addressed whether the cumulative conditions of Article 101(3) TFEU were fulfilled, the Court invited further submissions on that issue before rendering a final judgment.

Finally, the Court concluded in its interim judgment that HP had not been shown to hold a dominant position within the meaning of Article 102 TFEU. Consequently, the operation of HP's selective distribution system could not constitute an abuse of dominance.

C. Legal analysis

The Amsterdam Court of First Instance confirmed that failure to satisfy the *Metro* criteria does not automatically result in an infringement of Article 101(1) TFEU. Non compliance with the *Metro* criteria merely means that the selective distribution system cannot benefit from the presumption that it falls outside the scope of Article 101(1) TFEU. A separate assessment remains necessary to determine whether the agreement restricts competition by object or by effect.

In reaching that conclusion, the Court relied on the analytical framework developed by the UK Competition Appeal Tribunal in *Up & Running v Deckers*. According to that framework, non compliance with the *Metro* criteria does not give rise to a presumption of a restriction by object. Instead, the agreement must be assessed in light of its wording, objectives and legal and economic context.

Applying that framework, the Court held that 123inkt had failed to demonstrate that HP's selective distribution system infringed Article 101(1) TFEU. The burden of proof rested on 123inkt, yet it failed to establish sufficient facts and circumstances showing that the nature of the system was detrimental to competition. The Court specifically noted that:

- the selective distribution system was, in principle, open to all traders;
- admission did not require any substantial prior assessment;
- the restrictive nature of the selection criteria was limited; and
- there were no indications of cumulative anticompetitive effects.

The Court further found that 123inkt had not substantiated any restriction by effect. In particular, it had not provided arguments concerning the actual or potential appreciable effects of the system on the relevant market, nor had it presented a counterfactual analysis of how the market would operate in the absence of the selective distribution system.

The Court therefore concluded that it had not been established that HP's selective distribution system infringed Article 101(1) TFEU, either by object or by effect. In light of that conclusion, the Court did not proceed with a separate assessment under Article 101(3) TFEU. The Court also confirmed its earlier finding that HP had not been shown to hold a dominant position for the purposes of Article 102 TFEU.

2. QUOTES

"As follows from the framework set out above [...], selective distribution systems, and therefore also HP's system, affect competition in principle. However, this does not mean, contrary to what 123inkt appears to assume, that a selective distribution system which does not meet the Metro criteria and therefore falls within the scope of Article 101(1) TFEU is prohibited.

Contrary to what 123inkt's use of the term 'distribution cartel' in relation to HP's selective distribution system might suggest, a selective distribution system is, in principle, a legitimate means of distributing products. It is, after all, generally recognised that selective distribution can offer certain advantages to manufacturers, distributors and consumers. A cartel agreement might arise where the introduction of the system constituted a disguised strategy to exclude competitors from the market, but 123inkt confirmed at the hearing that this is not the implication of its arguments regarding HP's selective distribution system.

It is therefore up to 123inkt to argue and substantiate that the selective distribution system constitutes an infringement of competition law." (free translation of §2.1 (citation of §5.23 of the interim judgment))

"In this regard, as considered in the interim judgment, it is for 123inkt to argue and substantiate that the selective distribution system constitutes an infringement of competition law. Whether an agreement – including a selective distribution system such as the one at issue here – by its very nature restricts competition must be assessed on the basis of the wording of the agreement, the legal and economic context, that is to say the nature of the goods and/or services concerned and the structure of the market in which the parties operate, and, where relevant, the objectives of the agreement. 123inkt made no such submission [...]." (free translation of §2.4)

"All of this means that 123inkt has failed to adduce sufficient facts and circumstances from which it might follow that the nature of HP's selective distribution system is harmful to competition. As considered in the interim judgment, there are also no indications that this is the case: (i) HP's selective distribution system is, in principle, open to all, and traders may join the system without any substantial prior assessment (para. 5.46), (ii) the restrictive nature of the selective distribution criteria is minimal (para. 5.47) and (iii) there do not appear to be any cumulative anti-competitive effects (para. 5.48)." (free translation of §2.7)

"Nor has 123inkt put forward any facts or circumstances from which it might follow that the selective distribution system has an anti-competitive effect [...]. 123inkt has not put forward any arguments regarding (i) the characterisation of actual or potential (appreciable) effects of the distribution system on the relevant geographic and product markets, and (ii) the counterfactual scenario of what that market would look like if the selective distribution system did not exist. Given the burden of assertion and the burden of proof resting on it with regard to the alleged infringement, it would have been incumbent upon it to do so." (free translation of §2.8)

3. RELEVANT LEGISLATION

- Article 101 TFEU
- Article 102 TFEU

4. PRACTICAL SIGNIFICANCE

This judgment clarifies the relationship between the *Metro* criteria and Article 101(1) TFEU. A selective distribution system that does not satisfy the *Metro* criteria does not automatically infringe Article 101(1) TFEU. Rather, such a finding merely removes the possibility of relying on the *Metro* doctrine to conclude that the agreement falls outside Article 101(1) TFEU. A claimant must still establish that the agreement restricts competition by object or by effect.

The judgment therefore confirms that non compliance with the *Metro* criteria does not create a presumption of illegality. Before concluding that a selective distribution system infringes Article 101(1) TFEU, it remains necessary to assess the nature of the restrictions, their objectives and their legal and economic context.

The judgment is particularly relevant for private enforcement actions involving selective distribution systems. It confirms that:

- failure to satisfy the *Metro* criteria does not in itself establish a restriction by object;
- the claimant bears the burden of proving either a restriction by object or a restriction by effect; and
- allegations of anticompetitive effects must be supported by evidence concerning actual or potential market effects and an appropriate counterfactual analysis.

More broadly, the case illustrates that a finding that a selective distribution system does not satisfy the *Metro* criteria is only the starting point of the Article 101 TFEU assessment and not its conclusion.