Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

14 June 2012*

((Competition — Article 101 TFEU — Motor vehicle sector — Regulation (EC) No 1400/2002 — Block exemption — Selective distribution system — Concept of 'specified criteria' concerning a quantitative selective distribution system — Refusal to grant authorisation as a distributor of new motor vehicles — Lack of precise, objective, proportionate and non-discriminatory quantitative selection criteria))

In Case C-158/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Cour de cassation (France), made by decision of 29 March 2011, received at the Court on 1 April 2011, in the proceedings

Auto 24 SARL

v

Jaguar Land Rover France SAS,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, U. Lõhmus, A. Rosas, A. Ó Caoimh (Rapporteur) and A. Arabadjiev, Judges,

Advocate General: J. Mazák,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 11 January 2012,

after considering the observations submitted on behalf of:

— Auto 24 SARL, by R. Bertin, avocat,

— Jaguar Land Rover France SAS, by J. Vogel and L. Boudailliez, avocats,

— the French Government, by G. de Bergues and J. Gstalter, acting as Agents,

— European Commission, by B. Mongin, A. Biolan and F. Ronkes Agerbeek, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: French.

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 1(1)(f) of Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector (OJ 2002 L 203, p. 30, 'the Regulation').

2 The reference has been made in proceedings between Auto 24 SARL ('Auto 24') and Jaguar Land Rover France SAS ('JLR') concerning the refusal of the latter to authorise Auto 24 as a distributor of new LAND ROVER motor vehicles.

Legal context

European Union Law

3 The Regulation, adopted on the basis of Article 1 of Council Regulation No 19/65/EEC of 2 March 1965 on application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices (OJ 1965, 36, p. 533), lays down an exemption from the prohibition provided for in Article 81(1) EC for certain categories of vertical agreements and concerted practices in the motor vehicle sector ('the exemption').

4 Recital 1 and recitals 4 to 8 in the preamble to the Regulation read as follows:

'(1) Experience acquired in the motor vehicle sector regarding the distribution of new motor vehicles … makes it possible to define categories of vertical agreements which can be regarded as normally satisfying the conditions laid down in Article 81(3).

...

(4) The benefit of the exemption should be limited to vertical agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 81(3).

(5) Vertical agreements falling within the categories defined in this Regulation can improve economic efficiency within a chain of production or distribution by facilitating better coordination between the participating undertakings. In particular, they can lead to a reduction in the transaction and distribution costs of the parties and to an optimisation of their sales and investment levels.

(6) The likelihood that such efficiency-enhancing effects will outweigh any anti-competitive effects due to restrictions contained in vertical agreements depends on the degree of market power held by the undertakings concerned and therefore on the extent to which those undertakings face competition from other suppliers of goods or services regarded by the buyer as interchangeable or substitutable …

(7) Thresholds based on market share should be fixed in order to reflect suppliers' market power. Furthermore, this sector-specific Regulation should contain stricter rules than those provided for by Regulation (EC) No 2790/1999, in particular for selective distribution. The thresholds below which it can be presumed that the advantages secured by vertical agreements outweigh their restrictive effects should vary with the characteristics of different types of vertical agreement. It can therefore be presumed that in general, vertical agreements have such advantages where the supplier concerned has a market share of up to 30% on the markets for the distribution of new motor vehicles or spare parts, or of up to 40% where quantitative selective distribution is used for the sale of new motor vehicles…

(8) Above those market share thresholds, there can be no presumption that vertical agreements falling within the scope of Article 81(1) will usually give rise to objective advantages of such a character and magnitude as to compensate for the disadvantages which they create for competition. However, such advantages can be anticipated in the case of qualitative selective distribution, irrespective of the supplier's market share.'

5 Pursuant to Article 1(1)(f) to (h) of the Regulation, for the purposes of applying the latter,

'(f) "selective distribution system" means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors or repairers selected on the basis of specified criteria and where these distributors or repairers undertake not to sell such goods or services to unauthorised distributors or independent repairers, without prejudice to the ability to sell spare parts to independent repairers or the obligation to provide independent operators with all technical information, diagnostic equipment, tools and training required for the repair and maintenance of motor vehicles or for the implementation of environmental protection measures;

(g) "quantitative selective distribution system" means a selective distribution system where the supplier uses criteria for the selection of distributors or repairers which directly limit their number;

(h) "qualitative selective distribution system" means a selective distribution system where the supplier uses criteria for the selection of distributors or repairers which are only qualitative in nature, are required by the nature of the contract goods or services, are laid down uniformly for all distributors or repairers applying to join the distribution system, are not applied in a discriminatory manner, and do not directly limit the number of distributors or repairers'.

6 Article 3(1) of the Regulation provides:

'Subject to paragraphs 2, 3, 4, 5, 6 and 7, the exemption shall apply on condition that the supplier's market share on the relevant market on which it sells the new motor vehicles, spare parts for motor vehicles or repair and maintenance services does not exceed 30%.

However, the market share threshold for the application of the exemption shall be 40% for agreements establishing quantitative selective distribution systems for the sale of new motor vehicles.

Those thresholds shall not apply to agreements establishing qualitative selective distribution systems.'

7 As regards the sale of new motor vehicles, Article 5(2)(b) of the Regulation states that the exemption does not apply to any direct or indirect obligation on any distributor of passenger cars or light commercial vehicles within a selective distribution system which limits its ability to establish additional sales or delivery outlets at other locations within the common market where selective distribution is applied.

8 In accordance with Article 6 of the Regulation, the benefit of the exemption may be withdrawn where it is found, in any particular case, that the vertical agreements in question have effects which are incompatible with the conditions laid down in Article 81(3) EC.

9 According to Article 12 of the Regulation, it entered into force on 1 October 2002, with the exception of Article 5(2)(b) which became applicable from 1 October 2005.

French law

10 Under Article 1382 of the Code Civil ('Civil Code'), 'any act of man which causes damage to another obliges the person whose fault has caused it to make good the damage'.

The dispute in the main proceedings and the question referred for a preliminary ruling

11 JLR imports new motor vehicles and LAND ROVER branded products into France.

12 Since 1994, Auto 24 has been the exclusive distributor of JLR in Périgueux (France). Its dealership agreement was terminated on 27 September 2002, with effect from 30 September 2004, in accordance with the two year notice period prescribed by the contractual provisions. On the date on which that termination became effective, it concluded an authorised repairer contract with JLR. However, its application to be an authorised distributor was not accepted by JLR.

13 By a judgment which became final on 28 October 2005, the Tribunal de Commerce (Commercial Court), Versailles, held that JLR's examination of that application was discriminatory and, accordingly, ordered JLR to pay EUR 100 000 to Auto 24 in damages for the loss of profit which the latter could have made if it had acquired the status of authorised distributor.

14 On 19 January 2006, JLR again refused Auto 24 the status of authorised distributor in Périgueux, on the ground that the '*numerus clausus*' drawn up by JLR did not provide for the appointment of a distributor of new vehicles in that town.

15 In October 2006, the company Pericaud Automobiles, JLR's authorised distributor, opened a secondary outlet in Trélissac (France), near Périgueux.

16 Against that background, Auto 24 brought proceedings against JLR before the Tribunal de Commerce, Bordeaux, seeking compensation for the loss caused by the refusal of the latter to appoint it as an authorised distributor for the Périgueux sector.

17 By judgment of 8 February 2008, the Tribunal de Commerce, Bordeaux, dismissed all of Auto 24's claims.

18 By judgment of 2 December 2009, the Cour d'Appel, Paris, upheld that judgment, noting, inter alia, that JLR had refused to appoint Auto 24 as an authorised distributor on the basis of a *numerus clausus* drawn up on 8 April 2005, which provided for 72 dealership agreements for 109 sites, set out in a table of contracts and sites in which Périgueux does not feature.

19 Auto 24 then lodged an appeal in cassation against that judgment before the Cour de cassation ('the referring court'). By its appeal, Auto 24 claims, inter alia, that the Cour d'Appel, Paris, had infringed Article 1(1)(g) of the Regulation and Article 1382 of the Code Civil by holding that no legislative provision or regulation, in national or Community law, requires the grantor to justify the reasons, economic or otherwise, behind the drawing up of a *numerus clausus* and by finding that JLR had drawn up a *numerus clausus* precluding the possibility of a location in Périgueux, without examining the objectivity of the selection criteria, their economic use, the improvement in customer services and the conditions of their implementation. According to Auto 24, in a quantitative selective distribution system, the supplier must use quantitative selection criteria that are specific, objective, proportionate to the aim pursued and implemented in a non-discriminatory manner when selecting its distributors.

20 In those circumstances, the Cour de cassation, having doubts as to the correct interpretation of the Regulation and, in particular, as to the requirements relating to selection criteria for quantitative selective distribution, decided to stay proceedings and to refer the following question to the Court:

'What is to be understood by the words "specified criteria" in Article 1(1)(f) of Regulation No 1400/2002 as regards quantitative selective distribution?'

The question referred for a preliminary ruling

21 By its question, the referring court asks, in essence, whether the term 'specified criteria' in Article 1(1)(f) of the Regulation must be interpreted as meaning that it requires, in order to benefit from the exemption, a quantitative selective distribution system, within the meaning of the Regulation, to be based on criteria which are objectively justified and applied in a uniform and non-differentiated manner in respect of all applicants for authorisation.

22 As a preliminary point, it is important to note that it follows from the Court's case-law (see, inter alia, Case 10/86, *VAG France* [1986] ECR 4071, paragraph 12; Case C-230/96 *Cabour* [1998] ECR I-2055, paragraphs 47, 48 and 51; and Case C-260/07 *Pedro IV Servicios* [2009] ECR I-2437, paragraph 68) that non-compliance with a condition necessary for the exemption cannot, in itself, give rise to damages pursuant to Article 101 TFEU or oblige a supplier to accept an applicant distributor into a distribution system.

23 In the present case, Auto 24 claims, in essence, that all quantitative criteria within the meaning of Article 1(1)(g) of the Regulation, namely, all criteria which, in order to select distributors or repairers, directly limit the number of those distributors or repairers, must satisfy objective economic justifications, of which the supplier must provide evidence, and must be applied in a uniform and non-discriminatory manner in all of the catchment areas and to all of the potential candidates for the distribution system.

24 In that respect, it can be seen from recital 1 and recitals 4 to 6 of the Regulation that the benefit of the exemption is limited to the vertical agreements that, having regard to the experience acquired in distribution in the automotive sector, are presumed to fulfil the conditions set out in Article 101(3) TFEU, as a result of the improvements in efficiency that they bring about.

25 As is apparent from recital 7 of the Regulation, thresholds below which it can be presumed that the advantages secured by vertical agreements outweigh their restrictive effects vary according to the characteristics of different types of vertical agreement.

26 According to recitals 7 and 8 of the Regulation, vertical agreements generally have such advantages where the supplier concerned has a share of up to 40% of the market on which it sells new motor vehicles where 'quantitative selective distribution' is used for the sale of new motor vehicles, while, in the case of 'qualitative selective distribution', such advantages may be expected whatever the market share of the supplier.

27 Accordingly, as provided in the second subparagraph of Article 3(1) of the Regulation, the market share threshold for the application of the exemption is 40% for agreements establishing quantitative selective distribution systems for the sale of such vehicles, whereas, in accordance with the third subparagraph of Article 3(1), the market share held by the supplier concerned is irrelevant for the application of the exemption to agreements establishing qualitative selective distribution systems.

28 It is in that context that the concepts 'selective distribution system', 'quantitative selective distribution system' and 'qualitative selective distribution system', defined in Article 1(1)(f), (g) and (h), respectively, of the Regulation, must be understood.

29 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.

30 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.

31 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, as the French government pointed out, of compromising business secrets, or even facilitating possible collusive behaviour.

32 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.

33 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'.

34 Thus, it follows from the actual terms of the definitions set out in Article 1(1)(f) and (g) of the Regulation that, where a distribution system for the sale of new motor vehicles prohibits resale to unauthorised distributors and is based on specified criteria which directly limit the number of distributors, such a system may be classified as a 'quantitative selective distribution system', within the meaning of the Regulation. The fact that, in practice, distribution systems for new motor vehicles often include both quantitative and qualitative criteria is irrelevant in this respect, as JLR and the European Commission acknowledged, in essence, during the hearing.

35 In those circumstances, as JLR, the French Government and the European Commission essentially argue, if, in the context of the Regulation, quantitative selection criteria had to be objective and non-discriminatory, that would result in a conflation of the conditions required by the Regulation for the application of the exemption to qualitative selective distribution systems and those required for the application of the exemption to quantitative selective distribution systems.

36 It is not however apparent from the scheme of the Regulation that the legislature wished to impose the same conditions of exemption for the two systems of selective distribution. On the contrary, given that, as can be seen from, inter alia, paragraphs 26 and 27 of the present judgment, the Regulation envisages distinct exemption conditions according to whether the selective distribution in question is classified as 'quantitative' or 'qualitative', the elements set out only in Article 1(h) of the Regulation cannot also be applied to Article(1)(g) of that regulation, without conflating those two types of selective distribution.

37 Furthermore, contrary to what Auto 24 suggests, the fact that, in accordance with Article 5(2) of the Regulation, a supplier cannot prevent the opening of a secondary place of business by one of it authorised distributors, is irrelevant in this respect.

38 In addition, the case-law relied on by Auto 24 deriving from the judgment in Case 26/76 *Metro SB-Großmärkte* v *Commission* [1977] ECR 1875 is irrelevant in the present case. On that point, it is enough to note that, in the context of the Regulation, as is apparent from paragraphs 32 to 34 of the present judgment, a 'quantitative selective distribution system' may be distinguished, by definition, from the qualitative selection of distributors referred to in paragraph 20 of the judgment in *Metro SB-Großmärkte* v *Commission*.

39 In view of all of the foregoing, the answer to the question submitted must be that the term 'specified criteria', referred to in Article 1(1)(f) of the Regulation, means, as regards a quantitative or qualitative 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 which are objectively justified and applied in a uniform and non-differentiated manner in respect of all candidates for the authorisation.

Costs

40 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

The term 'specified criteria', referred to in Article 1(1)(f) of Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, 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.

[Signatures]