INFORMATIVE NOTE

EU AND COMPETITION LAW

CJ PRELIMINARY ULING ON SELECTIVE DISTRIBUTION

On 14 June 2012, the EU Court of Justice (CJ) ruled that, in order to benefit from the exemption on vertical agreements, quantitative selective distribution systems do not have to be based on criteria that are objectively justified and applied in a uniform and non-differentiated manner in respect of all applicants, but onto criteria whose precise content may be verified.

As a general rule, all agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market are incompatible with the internal market and prohibited. However, when certain conditions are fulfilled, such prohibition may be declared inapplicable.

In this context, Commission Regulation (EC) No. 1400/2002 of 31 July 2002, meanwhile replaced by Commission Regulation (EC) No. 461/2010 of 27 May 2010, established an exemption for various agreements in the motor vehicle sector, provided that certain conditions, notably concerning market shares of the parties, are met. Those exempted agreements included quantitative selective distribution systems, which may be of two types: either «quantitative», when the supplier uses criteria which directly limit the number of distributors; and « qualitative», when the listed criteria are laid down uniformly, applied in a non-discriminatory manner and do not directly limit the number of distributors.

The present case concerns the quantitative selective distribution system established by Jaguar Land Rover France (JLR), which refused to appoint Auto 24 as an authorised distributor in Périgueux (France), on the grounds that the *numerus clausus* system as drawn up by JLR did not provide for the appointment of a distributor of new vehicles in that town. Consequently, Auto 24 brought proceedings against JLR, seeking compensation for the loss incurred with that refusal. According to Auto 24, in the context of a quantitative selective distribution system, when selecting its distributors, the supplier must use criteria that are specific, objective, proportionate to the aim pursued and implemented in a non-discriminatory manner. The *Cour de cassation*, having doubts as to the correct interpretation of the term «specified criteria», particularly as to the requirements relating to selection criteria for quantitative selective distribution, decided to stay proceedings and to make a reference for a preliminary ruling to the CJ on that matter.

As a preliminary point, the CJ points out that non-compliance with a condition necessary for the exemption cannot, in itself, give rise to damages or to oblige a supplier to accept an applicant distributor into a distribution system.

As regards the interpretation of the term «specified criteria» within the Regulation No. 1400/2002, the CJ explains that such expression refers to criteria whose precise content *may be*

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verified. It states that it is not necessary that the selection criteria used for those purposes be published, at the risk of compromising business secrets, or even facilitating possible concerted practices. Furthermore, the CJ states that 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.

On those grounds, the CJ rules that the term «specified criteria» shall be interpreted as a criteria whose precise content of which may be verified and, in order to benefit from the exemption, 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.

It should be noted that, as mentioned above, Regulation No. 1400/2002 has been replaced by Regulation No. 461/2010, which brought the rules applicable to the motor vehicle sector closer to the regime established for vertical agreements in general. However, the conclusions expressed in this preliminary ruling will certainly be applicable in the context of the new Regulation No. 461/2010, as well as to quantitative selective distribution systems implemented in other sectors.