

2 December 2011

## **NEW EU DECISION ON THE LIMITATION OF DISTRIBUTORS' POSSIBILITIES FOR INTERNET SALES**

### **Introduction**

Recently, the EU Court of Justice ("the Court") has made a decision in which it was pointed out which factors are legitimate and, especially, which factors are illegitimate when manufacturers limit distributors' possibilities for internet sales in a selective distribution system.

The Court found that a limitation of the possibilities for internet sales, in principle, was an agreement with an anti-competitive purpose and that, in the case in question, no circumstances warranting such an anti-competitive purpose had been demonstrated.

### **The Facts of the Case**

A French cosmetics producer had sold certain of its cosmetic products and body care products through a selective distribution system. The distribution agreements prescribed that the distributors were only allowed to sell the producer's products at a physical locality in the presence of a qualified pharmacist.

On its own initiative, the French competition authority started an investigation into whether the practice of the French cosmetics producer was anti-competitive.

Amaliegade 3-5  
DK-1256 København K

Tel: +45 7070 1505  
Fax: +45 7070 1506  
Mail: [info@mwblaw.dk](mailto:info@mwblaw.dk)  
Web: [www.mwblaw.dk](http://www.mwblaw.dk)

CVR: 3162 7885

According to the French competition authority, the distribution agreements were anti-competitive in such a way that they could not be exempted under the group exemption scheme for vertical agreements<sup>1</sup> (the "Regulation") in force at the time.

Therefore, the cosmetics producer was fined, and it subsequently brought the case before a French court which asked the Court to answer the relevant questions regarding EU law.

### **The relevant Competition Law Rules**

The decision has been made based on the then current group exemption scheme for vertical agreements. It is our assessment that the Court would not have reached a different result had the current group exemption schemes for vertical agreements been used<sup>1</sup>.

As a result of the general exemption clause in article 2(1) of the Regulation, the prohibition of anti-competitive agreements, article 101(1) of the EU treaty, is inapplicable on vertical agreements under certain circumstances.

In order to be covered by the exemption schemes of the Regulation, the means, which are normally anti-competitive, must be *necessary* for the handling of a legitimate issue. These legitimate issues may be to maintain the right quality or to protect consumers and ensure that the products are used in a correct manner. However, the handling of the legitimate issues may not overstep what is necessary.

Under certain circumstances, it is permitted to have a selective distribution system. A selective distribution system is defined in Article 1, subsection d, of the Regulation as a sales system in which the supplier undertakes to only sell products to distributors who have been chosen based on certain objective criteria, and where these distributors commit themselves to not sell such products or services to distributors who have not been approved.

Furthermore, it is a requirement for exemption under the Regulation that the supplier's market share does not exceed 30% of the relevant market, cf. article 3(1) of the Regulation.

The last relevant requirement for this case is the requirement mentioned in Article 4, subsection c, from which it appears that these vertical schemes, in order to be covered by the Regulation, may not directly or indirectly limit the members of a selective distri-

---

<sup>1</sup> Regulation no. 2790/1999 on the use of article 81(3) of the EC treaty on categories of vertical agreements and concerted practice.

bution system's active or passive sale to the end users, without prejudice to the possibility of banning a member of the system from conducting business from an unauthorised place of establishment.

### **The Decision**

Initially, the Court investigated whether the agreement had an anti-competitive purpose.

In order to fall within the normal EU competition law rule, an agreement must be aimed at or result in a prevention, limitation or distortion of competition within the inner market.

In the case, it was undisputed that the distributors of the selective distribution system were chosen based on objective quality criteria identical for all potential redistributors and that the market share of the French cosmetics producer was less than 30% of the relevant market.

Furthermore, it was undisputed that the terms of the selective distribution system de facto prevented the members' sale over the internet. Therefore, the terms which the French cosmetics company imposed on the members of the system operating in the retail section limited the members' active, and especially passive, sale to end users.

The Court rejected that the prevention of sales over the internet was comparable to a ban on "conducting business from an unauthorised place of establishment", cf. Article 4, subsection c, last sentence. Therefore, the question was only if there were legitimate issues which could justify the de facto ban on internet sales.

The French cosmetics company argued that out of consideration for the users of the products in question it was necessary to have a qualified pharmacist present at the sale. Only in this way was it possible to ensure that the users received personal, professional guidance based on a direct examination of the user's skin, hair or scalp. Furthermore, the company argued that the terms were necessary in order to protect the products' prestigious image.

Initially, the Court noted that it had not previously accepted the necessity for users to receive personal guidance for protection against incorrect use of products in connection with the sale of over-the-counter medicinal products and contact lenses as a justification for a ban on internet sales.

Subsequently, the Court found that the wish to maintain the prestigious image did not justify a ban on internet sales, but that the prestigious image could be maintained pro-

portionally through the objective quality criteria which the French cosmetics producer would be able to lay down for the selective distribution system.

### **Assessment**

The decision illustrates that there are limits as to how much the maintenance of a prestigious image can justify as a legitimate anti-competitive issue.

The selective (and therefore, limiting) distribution system is, in itself, based on the idea of competition on other parameters than price, such as for example product quality and service level.

Provided that the selection of distributors has taken place based on objective quality criteria and there, additionally, is an image to protect, further image-maintaining requirements may be made on the selected distributors.

In most cases, an actual ban on internet sales is too excessive, unless more important arguments can be put forward, for example to avoid injuries or impairment of the users' health.

The Court did not decide on this matter, but it must be assumed that demands may be made on distributors' internet sales – without it being a case of an actual ban. For example, this may be:

- i) requirements as to the layout in order for the website and the products to appear prestigious,
- ii) a requirement that a guide on the use of the products, possibly divided into hair and skin types, is put on the website and must be read through (normal "scroll and accept") before a purchase may be made,
- iii) a requirement that it be stated on the website that the manufacturer *recommends* that the users receive individual guidance on the use of the product from a qualified pharmacist at a physical locality.

In any case, however, this will require that the requirements are specifically necessary for the maintenance of the prestigious image.

If you have any questions or require additional information on the decision or the competition law rules, please contact Attorney Dan Moalem ([dmo@mwblaw.dk](mailto:dmo@mwblaw.dk)), or Attorney Christian R.J. Nielsen ([crn@mwblaw.dk](mailto:crn@mwblaw.dk)).

*The above does not constitute legal counselling and Moalem Weitemeyer Bendtsen does not warrant the accuracy of the information. With the above text, Moalem Weitemeyer Bendtsen has not assumed responsibility of any kind as a consequence of a reader's use of the above as a basis of decisions or considerations.*