

ECJ grapples with motor-vehicle distribution rules

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Author: Ana Rita Rego

IN BRIEF

The EU's Court of Justice today heard arguments on whether car manufacturers must disclose the criteria used to define how many dealers they will appoint to their distribution network. The case pits car-maker Jaguar Land Rover against a French dealer, but may have repercussions for other sectors where selective distribution systems are commonplace.

Luxembourg - The EU's Court of Justice today heard arguments on whether car manufacturers must disclose the criteria used to define how many dealers they will appoint to their distribution network.

Last year, France's Supreme Court asked for guidance on how far car manufacturers can limit the number of distributors accepted into their sales networks, specifically, whether they need to disclose the criteria used to reach such a decision (see [here](#)).

Jaguar Land Rover and dealer Auto 24 have been at odds for years over the manufacturer's decision to reduce the number of points of sale in France (read previous coverage [here](#)).

The European Commission and the French government also appeared in court, for the most part, supporting Jaguar's interpretation of EU rules covering distribution agreements.

Both companies agreed the case could have significant repercussions for industries where selective distribution is commonplace.

- Quantitative criteria: in need of specification? -

Renaud Bertin, counsel for Auto 24, argued that if manufacturers wished to limit the number of dealers, their decision had to be "objectively" justified and not lead to "discrimination" of one distributor over another. Arbitrary decisions, which result from non-transparent rules, should be avoided at all cost, he argued.

In the same way that manufacturers must convincingly explain why certain "qualitative criteria" used to pick dealers are fair, when limiting the number of retail outlets, the same standard should apply.

"The position in France, in particular of the Court of Cassation, is that quantitative criteria need to be objective, uniform and non-discriminatory [...] for a potential distributor to understand. This position [...] is sensible. It does strike a good balance."

For Bertin, giving a manufacturer free rein could be "dangerous" and lead to "flagrant discrimination", which in the end would result in consumer harm.

But counsel for Jaguar Land Rover disagreed, warning the court against handing distributors bargaining powers in such decisions. "The ability to operate a selective distribution system is at stake," Joseph Vogel noted.

For Vogel, the wording in the EU law text leaves little room for ambiguity. The regulation makes it clear that companies with less than a 40 percent share of the market can freely determine how many dealers they accept into their network. "Is Auto 24 entitled to force me to appoint an extra distributor?" he queried.

Pushing Auto 24's point further, Bertin illustrated his views with an example. If he were trying to avoid an appointed repairer in the area of Nancy, due to a previous poor experience, his option would be to turn to a repairer in Metz. However, the reduced number of distributors meant the repairer in Metz belonged to the same group. Effectively, he would have to take his car to Luxembourg to find a suitable alternative.

"My ability to shop around is limited. The exemption [to competition law] is only allowed if there is an economic rationale that benefits the consumer," he said.

To remedy, Jaguar should provide in advance a detailed list of criteria used to define why they would outsource their distribution to 109 as opposed to 110 dealers.

Later, Vogel argued his opponent was trying to add “new conditions” to the original text, and that such a reading of the law would lead to a never-ending need to justify business strategies.

“This is a very French idea. When you have criteria, you need to look at the criteria behind it. There is no end to it. This demand is unreasonable in a free market economy.”

Besides, the choice of appointing a given number of dealers is complex and involves analysing several factors, including population, age range, sex-breakdown or what competitors are doing in the area, Vogel explained.

“Why should the supplier decide? It’s the manufacturer that bears the risk. It’s him that loses out if it goes wrong.”

- Purpose of EU rules -

Commenting on the case, the commission insisted on the idea that the rules at issue were about “facilitating the application of competition rules covering distribution of vehicles.”

“It is not the purpose of the regulation to protect the weaker party in a commercial agreement,” Bernard Mongin said. That role is reserved for national law, the agent noted.

Siding with Jaguar, the commission argued “quantitative criteria must exist, which doesn’t mean it must be published.” For instance, the supplier does not have to discuss the merits of its decision.

As for France, its agent argued suppliers are free to set the criteria leading to such decisions, on the condition these are set prior to the appointment of dealers and are verifiable.

The bench later probed the litigants over the meaning of the arguments in practice. Reporting judge Aindrias O Caoimh, asked what leeway suppliers had to alter the number of appointed retailers, and the consequences of such amendments.

While Auto 24 highlighted that total freedom could lead to distributors being unfairly excluded - for instance, due to personal disputes - Jaguar argued all decisions were taken with an economic rationale in mind.

Judge Alan Rosas also asked how the criteria to set conditions before appointing a dealer would work in practice.

Jérôme Gstalter for France noted it would be possible to verify later if the “numerous clausus” had been established in advance. The commission responded criteria had to be “verifiable,” and in this case Jaguar had drawn up a list and circulated it, therefore abiding by the rules.

The court has not appointed an Advocate General to provide an opinion on the dispute.

The case bears the reference C-158/11.