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Amsterdam District Court: HP's selective distribution does not meet the Metro criteria and is not block exempted

On 18 December 2024, the Amsterdam District Court delivered an important interlocutory judgment in the long-running legal battle between 123 inkt and HP. The latest dispute centered on the legality of HP's selective distribution system for printers and cartridges. The decision provides useful insights into the application of competition law to selective distribution systems.

Background of the Case

HP is a manufacturer or Original Equipment Manufacturer ('OEM') of printers and printing supplies, such as ink powder (toner) and ink cartridges (hereinafter: cartridges). HP sells its products worldwide, not only to traders (distributors), but also directly to consumers.

HP markets its cartridges under its own name (hereinafter: HP cartridges). In most HP printer models, only cartridges specifically intended for that model can be used. Such cartridges are not made by other OEMs. However, third parties can, in some printers by means of hacking, make cartridges that can be used on HP printers, so-called private label cartridges.

123 inkt is an online office supplies store that is active in several EU member states.123 inkt sells HP printers and the cartridges intended for them, not only from the HP brand but also cheaper private label alternatives. 123 inkt and HP have been engaged in a competitive battle in the HP printer cartridge market since 2013 in the context of which several legal proceedings have been conducted.

On 11 August 2020, HP introduced a selective distribution system for the distribution of its products and services, including printers and printing supplies such as cartridges. The distribution system applies to the area consisting of the European Economic Area ('EEA'), Switzerland and the United Kingdom ('the Area'). HP's selective distribution system means that HP products may in the Area only be purchased by authorized distributors and may only be resold to other authorized partners or consumers.

123 inkt argues that HP's selective distribution system is a new strategy by HP aimed at eliminating competition from private label cartridges. According to 123 inkt, HP's selective distribution system infringes the cartel prohibition and the prohibition of abuse of a dominant position.

The Court's Judgment

Metro criteria not fulfilled

Purely qualitative selective distribution that satisfy the three conditions laid down by the Court of Justice of the European Union in the Metro judgment are not considered to restrict competition. In order to rely on Metro, the organizer of a selective distribution system must demonstrate in particular that: (i) the nature of the products concerned makes selective distribution necessary in order to maintain their quality and ensure their proper use; (ii) the restrictions are established in a uniform manner for all resellers and are not applied in a discriminatory manner; and (iii) they are proportionate.

The court finds that HP's selective distribution system does not meet the first Metro criterion. The court agrees with 123 inkt that HP printers and cartridges are not high-quality or high-tech products or luxury products or products that otherwise require selective distribution. It is not the special quality or technology of HP printers and cartridges that requires a specific, corresponding, specialized method of selling. Nor is it the luxury nature of the products that requires a specific, corresponding, prestigious method of positioning these products in the market. Cartridges are containers of ink or ink powder that have been available on the market for decades without being selectively distributed. Full-fledged private label alternatives have been on the market for just as long. The court reasons that if there was apparently no need for selective distribution of these products for a long time before, while the products have not changed significantly since then, it is difficult to see why the properties of these products would suddenly make selective distribution necessary now.

Block exemption offers no relief

In assessing whether HP can benefit from the Vertical Block Exemption, the court assumes separate markets for printers and cartridges. Based on the information provided by the parties, the court finds that it cannot be established that HP's market share on the relevant market is less than 30%. The conclusion is therefore that HP cannot benefit from the Block Exemption.

Individual exemption (Article 101(3) TFEU)

The court then examines whether HP's selective distribution system can benefit from an (individual) exemption under Article 101(3) TFEU. To benefit from the legal exception regime under Article 101(3), a vertical agreement

must satisfy the following criteria:

- It must contribute to improving production or distribution or to promoting technical or economic progress.
- It must allow consumers a fair share of these benefits (this can often be assumed if there is sufficient residual competition on the market).
- It may not impose on the firms concerned vertical restraints which are not indispensable to the attainment of these benefits.
- It may not afford such firms the possibility of eliminating competition in respect of a substantial part of the products in question.

In its interlocutory judgment the court left the possibility of an individual exemption open. The parties are given the opportunity to further comment on this matter. Since HP is relying on the exemption, HP is given the first opportunity to explain (further) why its selective distribution system meets the requirements of Article 101(3) TFEU. In particular, HP will also have to address the question of the extent to which the system also meets the indispensability requirement (criterion iii). The parties may also address in their deed whether and why (as 123 inkt has argued) the invalidity of one criterion means that the entire selective distribution system is invalid or (as HP has argued) the invalidity of one criterion leaves the other parts of the system unaffected.

Abuse of Dominance

Finally, 123 inkt also accused HP of abusing its dominant market position. According to the court this allegation appears unfounded, because HP does not seem to hold a dominant position on the relevant market. A final decision on this issue has however not yet been made.

Commentary

This judgment highlights that after 40 years the Metro criteria are still alive and kicking. For standard products like printers and cartridges selective distribution systems are generally not justified unless the system can benefit from the Vertical Block Exemption or the strict conditions for an individual exemption are met. The case underscores the importance of robust legal justification for selective distribution systems.

We will closely monitor the further proceedings in this case. In particular, we look forward with great interest to the outcome of the debate on the individual exemption