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Competition law and exclusive distribution agreements: should the exclusive distributor be protected from active sales made in its territory by all the supplier's other buyers (the so-called 'parallel' imposition requirement)?

CJEU, Opinion of Advocate General Leila Medina, 9 January 9, 2025, Case C-581/23, Beevers Kaas BV v Albert Heijn België NV, Koninklijke Ahold Delhaize NV, Albert Heijn BV, Ahold België BV

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Where there is an exclusive distribution system, the supplier traditionally commits to selling its products to only one distributor for a given territory or territories. While it was accepted that the supplier could limit active sales to other exclusive territories (or customer groups), passive sales were not restricted (cf. Guidelines for former vertical block exemption regulation, VBER No. 330/2020, paras. 151 and 152). Under that system, block exemptions were granted provided that the market share of the supplier and the distributor remained below 30% and that their agreements did not contain any hardcore restrictions of competition. The granting of an exclusive distribution right could be combined with a non-compete obligation for a period of up to five years. This general structure was upheld by the new vertical exemption regulation No. 2022/720 but with some adjustments and extensions: recognition of shared exclusivity through the option of appointing up to 5 exclusive distributors for the same territory or the same customer base, extending the concept of active sales capable of being prohibited, the option of including a clause to pass on the prohibition to the distributor's direct customers.

The Court of Justice is currently reviewing a very interesting legal question on the scope of the protection to be granted to exclusive distributors to qualify for the exemption. In this context, the conclusions of Advocate General Laila Medina have just been published and argue in favor of protecting exclusive distributors against active sales in their territory by all other buyers of the supplier established in the EEA.

While the facts fall under the former regulation, the question also arises under the present one and merits careful consideration. We propose here to summarize the factual and procedural context before addressing the legal concerns.

In 1993, a supplier set up an exclusive distribution network for the marketing of its cheese in Belgium and Luxembourg. The exclusive distributor sued a buyer who was sourcing from the supplier and actively reselling in Belgium and Luxembourg, claiming violation of the exclusivity he enjoyed. In response, the buyer argued that the exclusive distribution agreement did not prohibit it from selling in Belgium, not least because the prohibition on passive sales is prohibited.

The Belgian court rejected the exclusive distributor's complaint, ruling that the agreement prohibited the sole supplier from selling to Belgian or Luxembourg distributors, but did not prohibit sales by other buyers in Belgium. The exclusive distributor then took the case to the Antwerp Court of Appeal. Having noted that neither Regulation No 330/2010 nor the 2010 Guidelines specify how the supplier must protect its exclusive distributors against active sales by its other buyers in the exclusive territory, or in particular how it should inform its other buyers of the ban on active sales, or how the latter should comply with this ban, the appeal court referred several questions to the Court of Justice for a preliminary ruling.

The implicit existence of a "parallel imposition requirement" in exclusive agreements

In considering the questions posed, a preliminary point arose: Does Regulation No 330/2010 impose, in addition to the supplier's commitment to supply only the buyer in question in the territory, an additional commitment by the supplier to protect its distributor against all active sales made in the exclusive territory by all its other distributors/buyers (a condition known as the "parallel imposition requirement")? The Advocate General answered in the affirmative.

The Advocate General first recalls that Article 4(b)(i) of Regulation No 330/2010 is intended to exempt restrictions on active sales into the exclusive territory of

a distributor/buyer where such restrictions are contained in a binding agreement between the supplier and its other buyers. Although this provision does not explicitly contain the condition of the supplier's "parallel imposition requirement" towards its exclusive distributor, this condition is linked to and inherent in the concept of "exclusive allocation" referred to in the text of the regulation and implicitly follows from it. It is also mentioned as such in point 51 of the 2010 Guidelines on Vertical Restraints.

Furthermore, the Advocate General went on to add that in order for the exclusivity to be meaningful, the enjoyment of the right granted to that buyer must be protected against any potential harm, and that, if a supplier decides to make use of the exception from hardcore restrictions, there is a corresponding obligation to ensure the effectiveness of this exclusive allocation of a territory, including by protecting that buyer against active sales in that territory by all the supplier's other buyers.

Meeting the parallel imposition requirement condition

For the condition of the parallel imposition requirement to be met, the Advocate General asserts that there must have been or there must be an agreement between the supplier and its buyers, it being specified that the mere finding that other buyers do not engage in active sales in the territory allocated exclusively to a specific buyer is not sufficient to establish the existence of an agreement. To ensure that the supplier meets the requirement in practice, she recommends including an explicit clause in the binding written contract.

In the absence of such a clause, the intention of the parties would have to be determined by assessing the contracts as a whole, based on corroborating facts and evidence. The intention of the supplier may be inferred from their explicit or implicit invitation to other buyers to refrain from carrying out active sales in an exclusive territory. The intention of the other buyers will be characterized by their acceptance of this restriction, by their written or behavioral acquiescence.

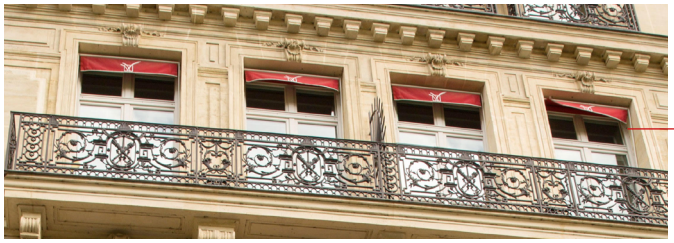
Point in time that acquiescence has to take place

In principle, prohibiting active sales is a hardcore restriction within the meaning of Regulation No 330/2010. Therefore, the exception to this principle provided by the regulation in the case of restrictions on active sales to exclusive territories must be assessed narrowly. It would be too lenient to acknowledge that the invitation and acceptance of the parallel imposition requirement could only be combined when the other buyers are preparing to engage in active sales in an exclusive territory. Thus, the Advocate General considers that, as long as the supplier has not obtained the acquiescence of the other buyers, the conditions for exemption are not met and if the supplier wishes to benefit from the exemption over a given period, it will have to prove that its other buyers have agreed to respect the exclusive territories before the conclusion of the exclusive contract and for the entire period.

It follows that Article 4(b)(i) of Regulation No 330/2010 must be interpreted as meaning that, "where a supplier has allocated a territory exclusively to a particular buyer, *it is not sufficient, for the purposes of applying that provision, for the supplier to be able to demonstrate that its other buyers acquiesce to the restriction of active sales in the exclusively allocated territory only if and when those buyers are about to engage in active sales in that territory". Instead, for the purposes of applying that provision, the supplier is required to demonstrate that the parallel imposition requirement is fulfilled in respect of all of its other buyers within the EEA during the entire period for which it claims the benefit of the block exemption provided for in Regulation No 330/2010.*

The exclusive network owners and their members will all have to pay close attention to the Court of Justice's response. The debate is not as clear-cut as the Advocate General's conclusions suggest. If the Court adopts those conclusions, it will be up to the network heads to ensure that they comply with the new conditions in order to be eligible for the block exemption.

Regulation No 2022/720 in any case seems to endorse the position of the Advocate General since the parallel imposition requirement is expressly included in the definition of exclusive distribution which was included for the first time in a vertical block exemption regulation (cf. Article 1(1) (h): "'exclusive distribution system' means a distribution system where the supplier allocates a territory or group of customers exclusively to itself or to a maximum of five buyers ***and*** *restricts all its other buyers from actively selling into the exclusive territory or to the exclusive customer group;").*



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