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Advocate General's Opinion in Case C-581/23 | Beevers Kaas

Competition law and distribution deals: The exclusive distributor must be protected against active sales in its territory by all the supplier's other buyers

The mere finding that other buyers do not engage in active sales in the territory given exclusively to a particular buyer is not sufficient in this context. Instead, it is necessary (i) for the supplier to have invited the other buyers to behave in a certain manner and (ii) for the buyers to have, at least tacitly, expressed their will to acquiesce to the active sales ban, which may be inferred from indirect evidence ('consistent coincidences or indicia')

Beevers Kaas is the exclusive distributor in Belgium of the well-known Beemster cheese, which it purchases from the Dutch producer Cono. Since 1993, there has been an exclusive distribution agreement between Cono and Beevers Kaas for the distribution of Beemster cheese in Belgium and Luxembourg.

The Albert Heijn companies (in particular, the Albert Heijn and Delhaize supermarket chains) are active *inter alia* in Belgium and the Netherlands. They are buyers of Beemster cheese produced by Cono for markets outside Belgium and Luxembourg.

However, Beevers Kaas accuses the Albert Heijn companies of infringing honest market practices by engaging in activities which have the direct or indirect effect of infringing Beevers Kaas' exclusive rights in Belgium. The Albert Heijn companies deny this allegation and argue that Beevers Kaas and Cono are attempting to impose on them an active sales ban, which is prohibited ('active sales' mean actively approaching individual customers through advertisements, direct mail, visits, etc.).

Before the Belgian courts, the parties disagree as to whether the exclusive distribution agreement complies with the conditions laid down in European Commission Regulation No 330/2010, ¹ in particular the condition known as the "parallel imposition requirement". This condition requires the supplier to protect its exclusive distributor against active selling into the exclusive territory by all its other distributors/buyers.

The Court of Appeal of Antwerp (Belgium) referred questions on this point to the Court of Justice of the European Union.

In her Opinion, Advocate General Medina analyses how EU competition law applies to exclusive distribution deals.

In response to the **first question** referred, she proposes to the Court to recognise – for the first time in its case-law – that Article 4(b)(i) of Regulation No 330/2010 contains a 'parallel imposition requirement', despite the fact that that article does not explicitly refer to such a requirement.

The Advocate General explains however that that provision is applicable only to exclusive distribution agreements which genuinely encourage the exclusive distributor to invest in its sales activities in the exclusive territory. In order

to guarantee that stimulant, **the exclusive distributor must be protected against active sales in its territory by all the supplier's other buyers**. She suggests that this condition is fulfilled only to the extent that **the other buyers expressly or tacitly accept the prohibition of active sales in the exclusive territory**.

The fact that none of the supplier's other buyers engaged in active sales is not sufficient. In order to establish that there was an agreement within the meaning of Article 101(1) TFEU, it is not sufficient to ascertain inactivity on the part of the other buyers. Rather, their will to acquiesce must be shown ('acquiescence' means acceptance through action or inaction).

By its **second question**, the referring court raises the issue of **the relevant point in time that acquiescence by the other buyers has to take place**. In particular, it wishes to know whether it is enough for the supplier to show that its other buyers accepted the active sales ban only if and when those buyers show an intention actively to sell into the exclusive territory.

The Advocate General explains that for so long as the supplier has not obtained acquiescence from the other buyers, the conditions laid down by Article 4(b)(i) of Regulation No 330/2010 for the agreement to fall within the block exemption are not met. Accordingly, that is the case **only if and from the moment that the other buyers have acquiesced to the prohibition of active sales, but not before that point in time**. In other words, the supplier must be able to show that that condition is satisfied in respect of all its other buyers **during the whole period for which it is claiming the benefit of the block exemption**.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of EU law or the validity of an EU act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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¹ Commission [Regulation \(EU\) No 330/2010](#) of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.