

**Case C-581/23****Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

21 September 2023

**Referring court:**

Hof van beroep te Antwerpen (Belgium)

**Date of the decision to refer:**

13 September 2023

**Appellant:**

Beevers Kaas BV

**Respondents:**

Albert Heijn België NV

Koninklijke Ahold Delhaize NV

Albert Heijn BV

Ahold België BV

**Intervener:**

B.A. Coöperatieve Zuivelonderneming Cono

**Subject matter of the main proceedings**

The dispute in the main proceedings concerns the appeal brought against the judgment of 9 July 2021 of the President of the ondernemingsrechtbank Antwerpen, afdeling Antwerpen (Companies Court, Antwerp, Antwerp Division) in proceedings for interim measures, dismissing as unfounded the action for an injunction brought by Beevers Kaas BV under Article VI. 104 of the Wetboek van economisch recht (Code of Economic Law) of 28 February 2013 for alleged third-party liability of the respondents for breach of contract.

## **Subject matter and legal basis of the request**

Request for a preliminary ruling under Article 267 TFEU on the interpretation of Article 4(b)(i) of 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, which contains the parallel imposition requirement. By its questions, the referring court seeks to ascertain whether the exclusive distribution agreement at issue in the main proceedings, which is a typical example of a vertical agreement within the meaning of Regulation (EU) No 330/2010, meets the parallel imposition requirement, under which the supplier is required to protect its exclusive distributor from active selling into the exclusively allocated territory by all its buyers within the European Economic Area.

## **Questions referred for a preliminary ruling**

(1) Can the parallel imposition requirement laid down in Article 4(b)(i) of 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 be regarded as met, and can a supplier who satisfies the other conditions laid down in Regulation (EU) No 330/2010 therefore legitimately prohibit active sales by one of its buyers into a territory for which one other buyer has been exclusively assigned, solely on the basis of the finding that the other buyers do not actively sell into the territory? In other words: is the existence of an agreement prohibiting active sales between those other buyers and the supplier adequately proved merely on the basis of the finding that those other buyers do not actively sell into the exclusively allocated territory?

(2) Can the parallel imposition requirement laid down in Article 4(b)(i) of 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 be regarded as met, and can a supplier who satisfies the other conditions laid down in Regulation (EU) No 330/2010 therefore legitimately prohibit active sales by one of its buyers into a territory for which one buyer has been exclusively assigned, where the supplier receives the acceptance of its other buyers only if and in so far as they show signs of actively selling into the territory thus exclusively allocated? Or, on the contrary, must such acceptance have been received from each of the supplier's buyers, irrespective of whether those buyers show signs of actively selling into the exclusively allocated territory?

## **Provisions of European Union law relied on**

Article 101(1) and (3) TFEU

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, Article 4(b)(i)

Commission Regulation (EU) 2022/720 of 10 May 2022 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, Article 1(1)(h)

European Commission Guidelines on Vertical Restraints (OJ 2010 L 130, p. 1) ('the 2010 Guidelines'), points 25(a) and 51

European Commission Guidelines on Vertical Restraints (OJ 2022 C 248/1, p. 1) ('the 2022 Guidelines'), point 122

### **Provisions of national law relied on**

Code of Economic Law of 28 February 2013 ('the WER'), Article VI. 1 and Article VI. 104

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 The appellant, Beever's Kaas BV, is the exclusive distributor in Belgium of Beemster cheese, which it buys from the producer B.A. Coöperatieve Zuivelonderneming Cono ('Cono'). Since 1 January 1993, there has been an exclusive distribution agreement between the appellant and Cono, Article 1.3 of which provides that the appellant's exclusivity rights extend to all sales of Beemster cheeses to buyers established in Belgium and Luxembourg ('the exclusive distribution agreement').
- 2 The respondents are active in the supermarket sector in Belgium and the Netherlands. They are buyers of Beemster cheeses produced by Cono for markets outside Belgium and Luxembourg.
- 3 According to the appellant, Cono's undertaking, set out in Article 4.1 of the exclusive distribution agreement, not to supply cheese under the trade mark 'Beemsterkaas' to third parties in Belgium or Luxembourg during the term of the agreement constitutes a prohibition on active sales, which the respondents dispute.
- 4 Since the appellant takes the view that the respondents are infringing honest market practice by carrying out activities in Belgium that have the direct or indirect effect of infringing the appellant's exclusivity rights under the exclusive distribution agreement, even though the respondents know that Cono is bound by that agreement, the appellant sought an injunction before the court at first instance under Article VI. 104 of the WER for third-party liability for breach of contract, which was dismissed by judgment of 9 July 2021.

- 5 On 30 August 2021, the appellant brought an appeal against that judgment before the referring court.
- 6 Cono intervened voluntarily in those proceedings on 17 December 2021.

### **The essential arguments of the parties in the main proceedings**

- 7 First of all, the respondents dispute the content and scope of the exclusive distribution agreement, arguing that the exclusive distribution agreement does not require Cono to protect the appellant from active sales by other distributors, meaning that there could be no breach of contract for which they might be liable as third parties.
- 8 The appellant submits that it is clear from Articles 1.3 and 4.1 of the exclusive distribution agreement that Cono and the appellant intended to protect the appellant, as the exclusive distributor in Belgium and Luxembourg, from active sales by Cono or other distributors. In addition, the appellant, having become aware of the respondents' plans to operate supermarkets in Belgium, drew Cono's attention, by letter of 20 January 2011, to Cono's obligation to impose on its other customers, including the respondents, a prohibition on actively selling the products covered by the exclusive distribution agreement in Belgium or Luxembourg. By letter of 14 February 2011, Cono drew the respondents' attention to the existence of the prohibition on active sales and to its obligation to impose it on its other buyers. Lastly, it is apparent from the respondents' emails to Cono that they acknowledged the prohibition on resale.
- 9 The respondents consider that the exclusive distribution agreement does not satisfy the conditions of competition law that would justify a prohibition on resale. In this respect, they refer to Article 101(1) and (3) TFEU (according to which, respectively, agreements restricting competition are prohibited and this prohibition may be declared inapplicable in the case of agreements between undertakings which contribute to improving the production or distribution of goods) and to Regulation (EU) No 330/2010 (the Vertical Block Exemption Regulation), according to which certain hardcore restrictions in a vertical agreement cannot benefit from an exemption. For instance, there is no exemption for vertical agreements, referred to in Article 4(b) of that regulation, which, directly or indirectly, have as their object the restriction of the territory into which, or of the customers to whom, a buyer party to the agreement may sell the contract goods or services, unless such a restriction does not limit sales by the customers of the buyer (Article 4(b)(i)). The respondents infer from this that a restriction on active sales must satisfy three cumulative conditions: first, that the supplier has designated an exclusive distributor for a specific territory (or for a specific customer group), second, that sales by customers of the distributor subject to the active sales restriction are not limited and, third, that the exclusive distributor is protected by the supplier from active sales in its territory (or to its customer group) by all the supplier's other buyers in the European Economic Area, a

condition known as the parallel imposition requirement. The respondents argue that the exclusive distribution agreement does not satisfy the latter condition.

- 10 According to the appellant, Article 4(b)(i) of Regulation (EU) No 330/2010 does not mention the parallel imposition requirement. It disputes that the exception relating to the hardcore restriction applies only if those three conditions are satisfied. The protection by Cono from active sales in the appellant's exclusively allocated territory, as provided for in the exclusive distribution agreement, is therefore covered by the exception provided for in Article 4(b)(i) of Regulation (EU) No 330/2010 and constitutes an authorised restriction of competition.

### **Succinct presentation of the reasoning in the request for a preliminary ruling**

- 11 By interim judgment of 27 April 2022, the referring court resolved the dispute concerning the content and scope of the exclusive distribution contract in favour of the appellant. In addition, it stayed the proceedings and requested the Belgische Mededingingsautoriteit (Belgian Competition Authority; 'the BMA') to submit its written observations on the compatibility of the exclusive distribution agreement with competition law.
- 12 According to the BMA, the parallel imposition requirement must be met in order for a restriction of active sales to be legitimate. That condition must be interpreted in particular in the light of the concept of 'agreement' within the meaning of the competition rules, in particular Article 101 TFEU and Article IV. 1 of the WER, which implies that the concurrence of wills and the existence of explicit or tacit acquiescence to the supplier's instructions by the distributors may be inferred from the conduct of the parties (actual compliance).
- 13 The referring court finds that the appellant has shown that the respondents accepted, at least tacitly, the prohibition on active sales, but that there is no evidence that all the other resellers explicitly accepted that prohibition. It points out in that regard that neither Regulation (EU) No 330/2010 nor the 2010 Guidelines indicate how the supplier is to communicate the prohibition on active sales to its other buyers, or how those buyers are to acquiesce to that prohibition.
- 14 According to the BMA, the referring court could infer tacit acceptance of the prohibition on active sales by the other resellers from the mere fact that none of those resellers sells Beemster products purchased from Cono in Belgium. The respondents dispute that view, arguing that tacit acceptance exists only if it is shown that, at the time the exclusivity was granted to the appellant, Cono's policy that no Beemster products purchased in the Netherlands should be actively sold in Belgium was communicated to all the other resellers authorised at that time and that each of them was required to comply with it.