

In the *Beevers Kaas* judgment ([Case C-581/23](#)), the CJEU recently clarified the steps that suppliers operating exclusive distribution networks should take to fulfil the so-called “parallel imposition” requirement necessary to ensure compliance with EU competition law.

Absent such steps, a supplier may not be able to enforce active sales restrictions in territories, or to customer groups that have been exclusively allocated to another distributor and could face competition authority enforcement action in the EU/UK. In this insight, we explore the implications of the CJEU ruling for the EU and UK competition rules. For a wider discussion on Territorial Supply Constraints see our earlier article [In The Spotlight](#).

Key Takeaways

- Parallel imposition requirement – To fall within the vertical agreements block exemption safe harbour in the EU and UK, exclusive distribution networks must meet two cumulative conditions:
 - First, the supplier must reserve an exclusive territory and/or customer group to itself, or allocate it to one or more distributors
 - Second, the supplier must also ensure that all its other distributors are prohibited from engaging in active sales within that exclusive territory/customer group (parallel imposition requirement).
- Burden of proof – Absent an explicit clause in the supplier's distribution agreements with other distributors prohibiting active selling into the exclusive territory/customer group, to satisfy the parallel imposition requirement, the supplier must be able to demonstrate that:
 - It invited all other distributors not to actively sell into the exclusive territory/customer group (e.g. via contract clauses, correspondence and reference to such provision within the supplier's general terms and conditions etc.)
 - Those other distributors have in practice acquiesced (i.e. have explicitly or tacitly accepted such an invitation (e.g. via written agreement or consistent conduct supported by the supplier monitoring/enforcement)

The fact that the other distributors did not sell into the exclusive territory can be a relevant factor in demonstrating tacit acceptance of the active sales ban from the other distributors did not sell into the exclusive territory can be a relevant factor in demonstrating tacit acceptance of the active sales ban from the other distributors; however, it is insufficient proof of the existence of an enforceable agreement prohibiting active sales.

Therefore, suppliers should document invitations made to distributors to respect exclusivity and monitor compliance with active sales bans. Without such oversight, exclusive distribution agreements risk being unenforceable.

Further, where a supplier has not imposed (via explicit contractual restriction or via invitation combined with distributor acquiescence) such a parallel active sales restriction on all its other distributors, it is likely a hardcore vertical restriction for the supplier to seek to impose such a restriction on some only of its distributors, with respect to which competition authority enforcement action in the EU/UK cannot be excluded.

Background

Dutch cheese maker Cono Kaasmakers (Cono) is the producer and supplier of Beemster cheese. Cono entered into an exclusive distribution agreement in the territory of Belgium with wholesaler, Beevers Kaas.

Albert Heijn, the largest supermarket chain in The Netherlands, also purchased Beemster cheese from Cono for distribution to markets outside Belgium and Luxembourg. However, after several years, Albert Heijn also started selling Beemster cheese in Belgium, which was the exclusive territory allocated by Cono to Beevers Kaas.

The Belgium wholesaler therefore approached Cono and asked for confirmation that they enjoyed exclusive distribution rights, and that Albert Heijn should cease sales in Belgium. However, when Cono approached Albert Heijn, the latter refused to acknowledge the exclusive right of Beever Kaas to distribute Beemster cheese in Belgium and instead argued that they were not contractually prevented from actively selling there.

Legal Issue

The exclusive allocation of territories or group of customers between suppliers and distributors is generally unenforceable under Article 101 TFEU. However, the EU Vertical Agreements Block Exemption Regulation¹ exempts exclusive distribution agreements allocating a territory or group of customers between suppliers and distributors if each of their market shares are below 30%, and the exclusivity is limited to the prohibition of active sales (i.e. unsolicited passive sales are permitted) within the exclusive territory.

The key legal issue before the CJEU centred on the so-called “parallel imposition requirement”, according to which a supplier can protect the exclusive distributor from active selling in the exclusive territory allocated to that distributor by all the other buyers of that supplier.²

¹ Article 4(b)(i) of Commission Regulation No 330/2010 (VABER 2010) is now replaced by Article 4(b)(i) Commission Regulation 2022/720 (VABER 2022). Although based on the 2010 Vertical Agreements Block Exemption Regulation (VABER), the ruling remains equally relevant for the interpretation of the new 2022 VABER. In particular, the novelty under the 2022 VABER that a supplier can have up to five exclusive distributors in a given territory does not impact the need to evidence compliance with the parallel imposition requirement. Also, the same legal principles underpin the UK Vertical Agreements Block Exemption Order (VABEO), so the CJEU ruling, while not binding on the UK courts, can be expected to have high persuasive effect on how the UK courts interpret and apply the parallel imposition requirement for the purposes of UK VABEO.

² CJEU ruling, Paragraph 18.

In particular, the CJEU was asked to answer two questions:

- Where a supplier has allocated an exclusive territory to one of its buyers, is the mere finding that the other buyers of that supplier do not engage in active sales in that territory sufficient to establish the existence of an agreement between that supplier and those other buyers concerning the ban on active sales in that territory for the purpose of applying the exemption?
- Is the benefit of the exception granted for the period that it is shown that there is acquiescence by a supplier's buyers to the supplier's invitation not to make active sales in the exclusive territory allocated to another buyer?

CJEU Ruling

The CJEU answered the two questions as follows:

- "Where a supplier has allocated an exclusive territory to one of its buyers, the mere finding that the other buyers of that supplier do not engage in active sales in that territory is not sufficient to establish the existence of an agreement between that supplier and those other buyers concerning the ban on active sales in that territory."
- "The benefit of the exception is granted for the period for which it is shown that there is acquiescence by a supplier's buyers to the supplier's invitation not to make active sales in the exclusive territory allocated to another buyer."

The CJEU also clarified the type of evidence and other indicia that can be relied upon to prove the existence of an agreement. In this case, there was no explicit clause between Cono and Albert Heijn preventing active sales within the exclusive territory reserved to Beevers Kaas. Absent such an explicit contractual restriction, the CJEU considered that, to infer the existence of an agreement, there must be at least evidence or other indicia that:

- Firstly, Cono (as the supplier) had invited Albert Heijn (the other distributor), in any form whatsoever, not to engage in active sales within Beevers Kaas' exclusive territory³³ – such an invitation can take different forms, such as, for instance, a specific communication sent by the supplier to its buyers requiring them to respect an exclusive territory, or a clause or specific mention to that effect in the supplier's general terms and conditions.
- Secondly, Albert Heijn (as the other distributor) "expressly or tacitly acquiesced to a possible invitation" from Cono.⁴

The CJEU held that, absent "a specific communication addressed to those other buyers requiring them to respect that exclusive territory"⁵, "the mere finding that Cono allocated an exclusive territory to Beevers Kaas and that Cono's other buyers may have been aware of the existence of such a territory does not allow [...] the conclusion that Cono invited them not to engage in active sales in that territory".

Although the CJEU did concede that Albert Heijn's abstaining from active selling into the exclusive territory for several years would likely "constitute a relevant element to be taken into consideration to show the possible tacit acquiescence of Cono's other buyers to an invitation...not to engage in active sales on the exclusive territory";⁶ the CJEU concluded that this is not sufficient, on its own, to establish the existence of such acquiescence.

The CJEU noted that for such restraint to amount to tacit acquiescence, the supplier should have also taken certain steps "to implement that ban in practice, such as a system of monitoring and penalties".⁷

Finally, the CJEU's ruling means that enforceability of active sales bans in exclusive distribution networks can only be guaranteed for the period that the supplier can prove that all of its other distributors are restricted (either under explicit contractual restrictions or due to acquiescing in a stipulation from the supplier) from actively reselling into the exclusive territory/customer group. In practice, this means that suppliers, wishing to rely on the VABER exemption, should regularly review their distribution agreements and compliance with the parallel imposition requirement including by keeping an up-to-date record of exclusivity granted, notifications sent and responses received.

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³ [Paragraph 49].

⁴ [Paragraph 51].

⁵ [Paragraph 53].

⁶ [Paragraph 54].

⁷ [Paragraph 56].