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# Goodwin Antitrust Short

## When Can a Supplier Lawfully Restrict Active Sales in an Exclusive Distribution Agreement?

In its recent judgment in *Beevers Kaas* (Case C-581/23),<sup>1</sup> the European Court of Justice (ECJ) clarified how suppliers may validly restrict active sales in exclusive distribution arrangements under Article 4(b)(i) of the Vertical Block Exemption Regulation (VBER).<sup>2</sup> The ECJ confirmed that such restrictions must be grounded in an express or tacit agreement between the supplier and *all* affected distributors.<sup>3</sup>

### Case Background

The case arose from a dispute between Beevers Kaas, the exclusive distributor of Beemster cheese in Belgium and Luxembourg, and Dutch retailer Albert Heijn, which sourced the cheese from producer Cono and sold it in its Belgian supermarkets. While Beevers Kaas held exclusive distribution rights, Cono's agreements with its other distributors, including Albert Heijn, did not include any restriction on making targeted sales into Beevers Kaas' exclusive territory. The Antwerp Court of Appeal referred questions to the ECJ regarding the conditions under which VBER protection applies in such a scenario.

Although the Court's reasoning was based on VBER 330/2010 (the version of the VBER in force at the time of the facts), the principles articulated in the judgment apply equally under the current VBER (Regulation 2022/720),<sup>4</sup> which maintains the structure and requirements of Article 4(b)(i) but expands the notion of exclusivity to include up to five other exclusive distributors.

### Parallel Imposition: Core Principle of Exclusive Distribution Under the VBER

Under the VBER, suppliers may appoint exclusive distributors and restrict active sales (targeted efforts such as direct marketing or customer solicitation) into territories or customer groups allocated exclusively to other distributors.

However, this restriction is only permitted when the supplier imposes equivalent restrictions on all affected distributors. This is known as the principle of parallel imposition: the restriction must not apply solely to the exclusive distributor but must be mirrored across the supplier's entire distribution network. The rationale is to prevent indirect undermining of exclusivity by allowing non-exempt third parties to engage in the restricted conduct.

To benefit from the VBER safe harbour, this parallel imposition must meet the definition of an "agreement" under Article 101(1) of the Treaty on the Functioning of the European Union. The ECJ reiterated that this requires a "concurrence of wills." In other words, an alignment of intent between the supplier and each distributor to restrict active sales is necessary.

<sup>1</sup> Judgment of 8 May 2025 in Case C-581/23, EU:C:2025:323 (*Beevers Kaas*).

<sup>2</sup> Commission Regulation 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, Official Journal L 102, 23.4.2010, p. 1–7.

<sup>3</sup> For clarity, we use the term "distributor" in this alert to refer broadly to all intermediary buyers, including traditional distributors, wholesalers, and hybrid retailers that sell both to businesses and directly to consumers.

<sup>4</sup> 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, Official Journal L 134, 11.5.2022, p. 4–13.

## Key Legal Findings

### 1. Parallel Imposition Requires Agreement

The ECJ confirmed that a parallel imposition agreement can be

- express, in which a contractual clause explicitly prohibits active sales into an exclusive territory; or
- tacit, based on conduct through which the supplier communicates its expectation or policy and the distributor knowingly complies. Relevant indicators include internal communications, terms and conditions, monitoring mechanisms, and consistent distributor behaviour.

### 2. The Absence of Sales Is Insufficient

The ECJ emphasised that the mere absence of active sales by other distributors does not, on its own, establish an agreement. Without evidence of supplier conduct or distributor acquiescence, no parallel imposition exists for purposes of the VBER.

### 3. Time-Limited Protection

The VBER safe harbour applies only during periods when there is credible evidence, either direct or circumstantial, of both the supplier's intention and the distributor's acceptance. Absence such evidence, the exemption no longer applies.

## Practical Implications

The *Beevers Kaas* judgment has important implications for suppliers operating exclusive distribution systems:

- **Ensure contractual clarity.** Suppliers should ensure that active sales restrictions are clearly articulated in all relevant contracts across their distribution network.
- **Retain evidence of tacit agreements.** When express terms are absent, suppliers should retain records of communications, policy documents, and distributor conduct supporting a mutual understanding not to sell into the exclusive territory.
- **Avoid assumptions based on market outcomes.** The lack of cross-border or targeted sales does not, by itself, evidence compliance with the VBER requirements.
- **Maintain ongoing compliance.** Monitoring, documentation, and training are critical to substantiate the existence of parallel obligations and safeguard the VBER exemption.

## Conclusion

The ECJ's ruling in *Beevers Kaas* provides welcome clarity on the interpretation of parallel imposition under the VBER. Although decided under the prior VBER, the Court's reasoning applies to the current VBER framework. Businesses relying on exclusive distribution arrangements must take proactive steps to ensure that active sales restrictions are consistently applied and demonstrably accepted by all relevant distributors. In a post-*Beevers Kaas* landscape, reliance on informal arrangements or passive market conditions is no longer sufficient: clear, documentable alignment is essential.

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