Provisional text

JUDGMENT OF THE COURT (Second Chamber)

8 May 2025 (*)

(Reference for a preliminary ruling – Competition – Agreements, decisions and concerted practices – Prohibition – Vertical agreements – Article 101(3) TFEU – Regulation (EU) No 330/2010 – Block exemption – Article 4(b)(i) – Hardcore restriction that removes the benefit of that exemption – Exception – Exclusive distribution agreements – Restriction of active sales in an exclusive territory – Concept of 'agreement' – Concurrence of wills between the supplier and its buyers – Proof – Exclusive territory allocated to a buyer – Absence of active sales by other buyers in that territory)

In Case C-581/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hof van beroep te Antwerpen (Court of Appeal, Antwerp, Belgium), made by decision of 13 September 2023, received at the Court on 21 September 2023, in the proceedings

Beevers Kaas BV

v

Albert Heijn België NV,

Koninklijke Ahold Delhaize NV,

Albert Heijn BV,

Ahold België BV,

intervening party:

B. A. Coöperatieve Zuivelonderneming Cono,

THE COURT (Second Chamber),

composed of K. Jürimäe (Rapporteur), President of the Chamber, K. Lenaerts, President of the Court, acting as Judge of the Second Chamber, M. Gavalec, Z. Csehi and F. Schalin, Judges,

Advocate General: L. Medina,

Registrar: A. Lamote, Administrator,

having regard to the written procedure and further to the hearing on 16 October 2024,

after considering the observations submitted on behalf of:

– Beevers Kaas BV, by J. Janssen and F. Petillion, advocaten,

– Albert Heijn België NV, Koninklijke Ahold Delhaize NV, Albert Heijn BV and Ahold België BV, by H. Burez and M. Varga, advocaten,

– B. A. Coöperatieve Zuivelonderneming Cono, by L. Bersou, J.-P. Fierens and P. Goffinet, avocats, and L. Goddeau, advocaat,

– the Belgian Government, by A. De Brouwer, C. Jacob, C. Pochet and M. Van Regemorter, acting as Agents,

– the European Commission, by P. Berghe, N. Cambien and D. Viros, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 January 2025,

gives the following

Judgment

1 This request for a preliminary ruling concerns 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) [TFEU] to categories of vertical agreements and concerted practices (OJ 2010 L 102, p. 1).

2 The request has been made in proceedings between Beevers Kaas BV, on the one hand, and Albert Heijn België NV, Koninklijke Ahold Delhaize NV, Albert Heijn BV and Ahold België BV (together 'the Albert Heijn companies'), on the other, concerning the latter's breach of the exclusive distribution agreement between Beevers Kaas and B.A. Coöperatieve Zuivelonderneming Cono ('Cono') for the distribution of Beemster cheese in Belgium and Luxembourg ('the exclusive distribution agreement at issue in the main proceedings').

Legal context

European Union law

3 Regulation No 330/2010, which the referring court considers to be applicable to the dispute in the main proceedings, succeeded, with effect as from 1 June 2010, Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) [EC] to categories of vertical agreements and concerted practices (OJ 1999 L 336, p. 21). Under the second paragraph of Article 10 thereof, Regulation No 330/2010 expired on 31 May 2022.

4 Under Article 11 of Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) [TFEU] to categories of vertical agreements and concerted practices (OJ 2022 L 134, p. 4), that regulation entered into force on 1 June 2022 and is to expire on 31 May 2034.

Regulation No 330/2010

5 Article 2 of Regulation No 330/2010, entitled 'Exemption', provided in paragraph 1 thereof:

'Pursuant to Article 101(3) [TFEU] and subject to the provisions of this Regulation, it is hereby declared that Article 101(1) [TFEU] shall not apply to vertical agreements.

This exemption shall apply to the extent that such agreements contain vertical restraints.'

6 Article 4 of that regulation, entitled 'Restrictions that remove the benefit of the block exemption – hardcore restrictions', provided:

'The exemption provided for in Article 2 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

…

(b) the restriction of the territory into which, or of the customers to whom, a buyer party to the agreement, without prejudice to a restriction on its place of establishment, may sell the contract goods or services, except:

(i) the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer,

…’

Guidelines on Vertical Restraints

7 The Guidelines on vertical restraints (OJ 2010 C 130, p. 1; ‘the 2010 Guidelines’) were published by the European Commission at the same time as the adoption of Regulation No 330/2010.

8 Under paragraph (25) of the 2010 Guidelines:

‘The definition of “vertical agreement” referred to in paragraph (24) has four main elements:

(a) The Block Exemption Regulation applies to agreements and concerted practices. The Block Exemption Regulation does not apply to unilateral conduct of the undertakings concerned. Such unilateral conduct can fall within the scope of Article 102 [TFEU] which prohibits abuses of a dominant position. For there to be an agreement within the meaning of Article 101 [TFEU] it is sufficient that the parties have expressed their joint intention to conduct themselves on the market in a specific way. The form in which that intention is expressed is irrelevant as long as it constitutes a faithful expression of the parties’ intention. In case there is no explicit agreement expressing the concurrence of wills, the Commission will have to prove that the unilateral policy of one party receives the acquiescence of the other party. For vertical agreements, there are two ways in which acquiescence with a particular unilateral policy can be established. First, the acquiescence can be deduced from the powers conferred upon the parties in a general agreement drawn up in advance. If the clauses of the agreement drawn up in advance provide for or authorise a party to adopt subsequently a specific unilateral policy which will be binding on the other party, the acquiescence of that policy by the other party can be established on the basis thereof … Secondly, in the absence of such an explicit acquiescence, the Commission can show the existence of tacit acquiescence. For that, it is necessary to show first that one party requires explicitly or implicitly the cooperation of the other party for the implementation of its unilateral policy and second that the other party complied with that requirement by implementing that unilateral policy in practice … For instance, if after a supplier’s announcement of a unilateral reduction of supplies in order to prevent parallel trade, distributors reduce immediately their orders and stop engaging in parallel trade, then those distributors tacitly acquiesce to the supplier’s unilateral policy. This can however not be concluded if the distributors continue to engage in parallel trade or try to find new ways to engage in parallel trade. Similarly, for vertical agreements, tacit acquiescence may be deduced from the level of coercion exerted by a party to impose its unilateral policy on the other party or parties to the agreement in combination with the number of distributors that are actually implementing in practice the unilateral policy of the supplier. For instance, a system of monitoring and penalties, set up by a supplier to penalise those distributors that do not comply with its unilateral policy, points to tacit acquiescence with the supplier’s unilateral policy if this system allows the supplier to implement in practice its policy. The two ways of establishing acquiescence described in this paragraph can be used jointly;

…’

9 Paragraph (51) of the 2010 Guidelines states:

‘There are four exceptions to the hardcore restriction in Article 4(b) of [Regulation No 330/2010]. The first exception in Article 4(b)(i) allows a supplier to restrict active sales by a buyer party to the agreement to a territory or a customer group which has been allocated exclusively to another buyer or which the supplier has reserved to itself. A territory or customer group is exclusively allocated when the supplier agrees to sell its product only to one distributor for distribution in a particular territory or to a particular customer group and the exclusive distributor is protected against active selling into its territory or to its customer group by all the other buyers of the supplier within the [European] Union, irrespective of sales by the supplier. The supplier is allowed to combine the allocation of an exclusive territory and an exclusive customer group by for instance appointing an exclusive distributor for a

particular customer group in a certain territory. Such protection of exclusively allocated territories or customer groups must, however, permit passive sales to such territories or customer groups. For the application of Article 4(b) of [Regulation No 330/2010], the Commission interprets “active” and “passive” sales as follows:

– “Active” sales mean actively approaching individual customers by for instance direct mail, including the sending of unsolicited e-mails, or visits; or actively approaching a specific customer group or customers in a specific territory through advertisement in media, on the internet or other promotions specifically targeted at that customer group or targeted at customers in that territory. Advertisement or promotion that is only attractive for the buyer if it (also) reaches a specific group of customers or customers in a specific territory, is considered active selling to that customer group or customers in that territory.

…’

Belgian law

10 Article VI.104 of the Wetboek van economisch recht (Code of Economic Law) provides:

‘Any act contrary to honest market practice by which an undertaking adversely affects or may adversely affect the professional interests of one or more undertakings shall be prohibited.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 Beevers Kaas is the exclusive distributor in Belgium of Beemster cheese, which that company purchases from the producer Cono, which is itself established in the Netherlands.

12 On 1 January 1993, Cono and Beevers Kaas entered into the exclusive distribution agreement at issue in the main proceedings.

13 The Albert Heijn companies are active in the supermarket sector in Belgium and the Netherlands. They buy Beemster cheese produced by Cono for markets outside Belgium and Luxembourg.

14 Beevers Kaas alleges that the Albert Heijn companies have breached together, as third parties, the exclusive distribution agreement at issue in the main proceedings, which, in its view, infringes Article VI.104 of the Code of Economic Law. That infringement allegedly resulted from the resale activities that those companies engaged into in Belgium, despite knowing that Cono and Beevers Kaas were bound by an exclusive distribution agreement.

15 According to the Albert Heijn companies, Beevers Kaas and Cono seek to impose on them a ban on resale, which is prohibited. The Albert Heijn companies therefore argue that the exclusive distribution agreement at issue in the main proceedings, inasmuch as it does not impose an obligation upon Cono to protect Beevers Kaas from active sales by other distributors, does not fulfil the strict conditions of competition law to justify a resale ban.

16 By judgment of 9 July 2021, the President of the Ondernemingsrechtbank Antwerpen (Business Court, Antwerp, Belgium) dismissed Beevers Kaas’s action as unfounded on the ground that ‘it does not follow from any contractual or legislative provision that undertakings are prohibited from obtaining supplies directly, in the Netherlands, from Cono and from distributing [them] in Belgium’. In particular, it was found in that judgment that the exclusive distribution agreement at issue in the main proceedings only provided that Cono could not itself sell to Belgian distributors. Beevers Kaas’s interpretation would thus mean that all undertakings, wherever they may be established, have to comply with that agreement and refrain from selling Beemster cheese produced by Cono in Belgium. Likewise, Beevers Kaas does not enjoy any contractual protection in its exclusive distribution territory in Belgium against active sales by other buyers which obtain their supplies from Cono.

17 Beevers Kaas brought an appeal against that judgment before the Hof van beroep te Antwerpen (Court of Appeal, Antwerp, Belgium), which is the referring court.

18 Before that court, the parties disagree on whether the exclusive distribution agreement at issue in the main proceedings complies with competition law and, more specifically, with the conditions laid down in Article 4(b)(i) of Regulation No 330/2010. The debate concerns the so-called parallel imposition requirement, according to which the supplier is to protect the exclusive distributor from active selling in the exclusive territory allocated to that distributor by all the other buyers of that supplier.

19 In that court's view, it is for Beevers Kaas to show that the alleged protection offered to it by Cono from active sales falls within the exception provided for in Article 4(b)(i).

20 By interim judgment of 27 April 2022, the referring court found that Beevers Kaas had shown that the Albert Heijn companies had, at least tacitly, acquiesced to an active sales ban. However, in that court's view, Beevers Kaas must also show that all the other resellers supplied by Cono have accepted that ban.

21 The referring court agrees with the observation of the Belgian competition authority, with which that court has, by that interim judgment, opened an amicus curiae procedure, and which submits that the parallel imposition requirement must be interpreted in the light of the concept of 'agreement' within the meaning of Article 101 TFEU.

22 In that regard, that court notes that Regulation No 330/2010 and the 2010 Guidelines do not specify how the supplier must protect its exclusive distributors from active sales, in the exclusive territory allocated to those distributors, by the other buyers of that supplier. In particular, that regulation and those guidelines do not indicate how that supplier must communicate such ban on active sales to those other buyers or how the latter are to acquiesce to that ban.

23 In the present case, there is no evidence of the express acceptance of an active sales ban by all the other resellers of Cono. The Belgian competition authority argues that the referring court could infer tacit acquiescence to that ban by those resellers from the mere fact that, at present, none of them sold products purchased from Cono in Belgium. Beevers Kaas concurs with that view and therefore submits that it has sufficiently shown that those resellers have accepted that ban.

24 By contrast, the Albert Heijn companies contend that such an interpretation disregards the burden of proof incumbent upon Beevers Kaas. They argue that, for there to be tacit acquiescence, Beevers Kaas must show that Cono's strategy that no Beemster cheese purchased in the Netherlands may be sold actively in Belgium, was, on the date on which exclusivity was granted, communicated to all resellers which were authorised on that date and then to each newly designated reseller, and that each of them was required to comply with it.

25 In those circumstances, the Hof van beroep te Antwerpen (Court of Appeal, Antwerp) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Can the parallel imposition requirement laid down in Article 4(b)(i) of [Regulation No 330/2010] be regarded as met, and can a supplier who satisfies the other conditions laid down in [that regulation] 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 [Regulation No 330/2010] be regarded as met, and can a supplier who satisfies the other conditions laid down in [that regulation] 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?'

Application for the oral part of the procedure to be reopened

26 By documents lodged at the Registry of the Court of Justice on 11 and 28 February 2025, respectively, Beevers Kaas and Cono requested the Court to order the oral part of the procedure to be reopened, pursuant to Article 83 of the Rules of Procedure of the Court.

27 In support of their applications, they claim that, in her Opinion, the Advocate General, in the first place, answered a question different from that raised by the referring court in the context of the second question referred and, in the second place, relied on incorrect factual and legal elements in order to answer that second question, as rephrased. In those circumstances, it is necessary for the parties to the main proceedings or the other interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union to be able to give their point of view on those elements in order to preserve their procedural rights and to avoid the Court answering a question which is not necessary for the resolution of the dispute in the main proceedings.

28 Pursuant to Article 83 of its Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.

29 In that regard, it should be noted, however, that the content of the Advocate General's Opinion cannot constitute in itself a new fact, otherwise it would be possible for the parties, by invoking such a fact, to respond to that Opinion. The Advocate General's Opinion cannot be debated by the parties. The Court has thus had the opportunity of underlining that, in accordance with Article 252 TFEU, the role of the Advocate General is to make, in open court, acting with complete impartiality and independence, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require the Advocate General's involvement in order to assist the Court in the performance of the task assigned to it, which is to ensure that, in the interpretation and application of the Treaties, the law is observed. Pursuant to the fourth paragraph of Article 20 of that statute and Article 82(3) of the Rules of Procedure, the Opinion of the Advocate General brings the oral part of the procedure to an end. The Opinion does not form part of the proceedings between the parties, but rather opens the stage of deliberation by the Court. It is not therefore an opinion addressed to the judges or to the parties which stems from an authority outside the Court, but rather, it is the individual reasoned opinion, expressed in open court, of a Member of the Court of Justice itself (see, to that effect, judgment of 6 October 2021, *Sumal*, C-882/19, EU:C:2021:800, paragraph 21 and the case-law cited).

30 It follows, in particular, that the fact that the Advocate General has examined a question referred for a preliminary ruling on the basis of a rephrased question is not, in itself, a reason justifying the reopening of the oral part of the procedure (see, to that effect, judgment of 23 January 2003, *Makedoniko Metro and Michaniki*, C-57/01, EU:C:2003:47, paragraphs 33 to 36).

31 In the present case, the Court finds, having heard the Advocate General, that the elements put forward by Beevers Kaas do not disclose any new fact capable of having a decisive influence on the decision that it is called upon to deliver in the present case and that it is not necessary to make that decision on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union. Furthermore, the Court has at its disposal, at the close of the written and oral parts of the procedure, all the elements necessary and is therefore sufficiently informed to make a ruling.

32 Consequently, the Court considers that it is not necessary to order that the oral part of the procedure be reopened.

Consideration of the questions referred

The first question

33 By its first question, the referring court asks, in essence, whether Article 4(b)(i) of Regulation No 330/2010 must be interpreted as meaning that, 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 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 that provision.

34 It should be borne in mind that Article 2(1) of Regulation No 330/2010 provides for a block exemption from the prohibition of agreements falling within Article 101(1) TFEU in respect of vertical agreements. That provision states that, under Article 101(3) TFEU, it is declared that Article 101(1) TFEU is not to apply to vertical agreements which meet the conditions laid down by that regulation.

35 That exemption is, however, not to apply to vertical agreements which contain the hardcore restrictions listed in Article 4 of that regulation.

36 Thus, under Article 4(b) of Regulation No 330/2010, that exemption is not to 'apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object … the restriction of the territory into which, or of the customers to whom, a buyer party to the agreement, without prejudice to a restriction on its place of establishment, may sell the contract goods or services'.

37 Under Article 4(b)(i) of that regulation, a vertical agreement whose object is to restrict the territory or customer base of a buyer may nevertheless benefit from the block exemption provided for in Article 2(1) of that regulation where what is involved is the restriction of active sales of that buyer into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer and where such a restriction does not limit sales by the customers of the first buyer.

38 Active sales restrictions in the exclusive territory that a supplier has allocated to one of its buyers may therefore benefit from that exemption, provided that the conditions laid down in Regulation No 330/2010 are met.

39 As the Advocate General pointed out, in essence, in points 39 to 43 of her Opinion, and as is apparent, in particular, from paragraph (51) of the 2010 Guidelines, the allocation by a supplier of territorial exclusivity to one of its buyers is necessarily accompanied by a parallel imposition on that supplier to protect that buyer from active selling by other buyers of that supplier. It follows that Article 4(b)(i) of Regulation No 330/2010 is intended to cover the restrictions on active sales which a supplier must, in this respect, impose on its buyers in order to ensure the effectiveness of such exclusivity in the territory which it has allocated to one of its buyers.

40 In order to assess whether a distribution agreement concluded between a supplier and a buyer can be classified as a vertical agreement capable of falling within Article 4(b)(i) of that regulation, it is necessary to consider the concept of 'agreement' within the meaning of Article 101 TFEU.

41 According to the settled case-law of the Court, in order for there to be an 'agreement' within the meaning of Article 101(1) TFEU, it suffices for the undertakings at issue to have expressed their joint intention to conduct themselves on the market in a specific way. An agreement cannot therefore be based on a statement of a purely unilateral policy of one party to a contract for distribution (judgment of 29 June 2023, *Super Bock Bebidas*, C-211/22, EU:C:2023:529, paragraphs 47 and 48 and the case-law cited).

42 However, an act or conduct which is apparently unilateral will constitute an 'agreement' within the meaning of Article 101(1) TFEU, where it is the expression of the concurrence of wills of at least two parties, the form in which that concurrence is expressed not being by itself decisive (see, to that effect, judgment of 29 June 2023, *Super Bock Bebidas*, C-211/22, EU:C:2023:529, paragraph 49).

43 Thus, with regard to a restriction of active sales in the exclusive territory allocated to a buyer, that concurrence of the parties' wills may be shown both from the terms of the distribution contracts which bind the supplier to buyers who do not benefit from territorial exclusivity, where those contracts

contain an express prohibition not to make such sales, and from the explicit or tacit conduct of the parties allowing the conclusion to be drawn that the latter buyers acquiesced to an invitation from that supplier not to make those sales (see, by analogy, judgment of 29 June 2023, *Super Bock Bebidas*, C-211/22, EU:C:2023:529, paragraph 50 and the case-law cited).

44 As regards proof of the existence of an ‘agreement’ within the meaning of Article 101(1) TFEU, it is apparent from the Court’s case-law that, in the absence of EU rules on the principles governing the assessment of evidence and the requisite standard of proof in national proceedings for the application of Article 101 TFEU, it is for the national legal order of each Member State to establish those rules, in accordance with the principle of procedural autonomy, provided, however, that those rules are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness) (judgment of 29 June 2023, *Super Bock Bebidas*, C-211/22, EU:C:2023:529, paragraph 55 and the case-law cited).

45 The principle of effectiveness requires that an infringement of EU competition law may be proven not only by direct evidence, but also through indicia, provided that they are objective and consistent. In most cases, the existence of an agreement must be inferred from a number of coincidences and other factual elements which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (see, to that effect, judgment of 29 June 2023, *Super Bock Bebidas*, C-211/22, EU:C:2023:529, paragraph 56 and the case-law cited).

46 It follows that the existence of an ‘agreement’, within the meaning of Article 101(1) TFEU, whose object is to restrict active sales in an exclusive territory, may be established not only by means of direct evidence but also on the basis of objective and consistent indicia, where it may be inferred with sufficient certainty that a supplier invited its buyers not to make such sales in that territory and that the latter, in practice, acquiesced to that invitation (see, by analogy, judgment of 29 June 2023, *Super Bock Bebidas*, C-211/22, EU:C:2023:529, paragraph 57 and the case-law cited).

47 In the present case, it is apparent from the information provided by the referring court, first, that the distribution agreements concluded between Cono and its buyers do not contain any clause seeking to impose on those buyers a ban on active sales in the exclusive territory allocated to Beevers Kaas and, secondly, that, except for the Albert Heijn companies, no buyer of Cono has engaged in such sales in that territory.

48 It is for the referring court to assess the facts of the dispute in the main proceedings in the light of the case-law recalled in paragraphs 42 to 46 of this judgment.

49 Thus, in the first place, it will be for that court to ascertain, in the light of all the elements at its disposal, whether it can be established, in the present case, that Cono invited, in any form whatsoever, its buyers not to engage in active sales in the exclusive territory allocated to Beevers Kaas.

50 As the Advocate General pointed out in point 78 of her Opinion, 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.

51 In the second place, it will also be necessary to ascertain whether Cono’s buyers expressly or tacitly acquiesced to a possible invitation from that supplier.

52 In view of the two requirements which were recalled in paragraphs 49 and 51 of this judgment, it should be noted that the circumstance that, except for the Albert Heijn companies, none of Cono’s other buyers engaged in active sales in the exclusive territory of Beevers Kaas is not sufficient in itself to establish the existence of an ‘agreement’ within the meaning of Article 101 TFEU.

53 First, such a circumstance does not allow the inference that Cono invited its buyers not to engage in active sales in the exclusive territory allocated to Beevers Kaas. In that regard, it should be noted that 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, in the absence, in

particular, of a specific communication addressed to those other buyers requiring them to respect that exclusive territory, the conclusion that Cono invited them not to engage in active sales in that territory.

54 Secondly, that circumstance is, admittedly, likely to constitute a relevant element to be taken into consideration to show the possible tacit acquiescence of Cono's other buyers to an invitation from the latter not to engage in active sales on the exclusive territory of Beevers Kaas. However, it is not sufficient, on its own, to establish the existence of such acquiescence.

55 Taken in isolation, that circumstance does not allow it to be shown with sufficient certainty that the absence of active sales in the exclusive territory of Beevers Kaas results from the will of those other buyers to comply with a possible invitation from Cono not to engage in such sales or from an autonomous commercial decision of those other buyers not to sell in that territory.

56 That circumstance could, however, constitute proof of tacit acquiescence by the buyers concerned, where, as is apparent from paragraph (25) of the 2010 Guidelines, there is, in parallel, in particular, an explicit invitation from the supplier to comply with the ban on active sales in the exclusive territory and means enabling that supplier to implement that ban in practice, such as a system of monitoring and penalties, set up by that supplier to penalise buyers who do not comply with that ban.

57 In the light of all of the foregoing considerations, the answer to the first question is that Article 4(b)(i) of Regulation No 330/2010 must be interpreted as meaning that, 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, for the purpose of applying that provision.

The second question

58 By its second question, the referring court asks, in essence, whether Article 4(b)(i) of Regulation No 330/2010 must be interpreted as meaning that the benefit of the exception provided for in that provision 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.

59 It follows from the answer to the first question that a ban on active sales falls within the scope of Article 4(b)(i) where, first, the supplier has invited its buyers not to engage in such sales in the exclusive territory allocated to another buyer and, secondly, the buyers concerned have acquiesced to that invitation.

60 Thus, the party relying on the exception provided for in Article 4(b)(i) must provide, where appropriate on the basis of objective and consistent indicia, proof of the combination of the two elements referred to in the previous paragraph. The benefit of that exception is then granted for the period for which that proof could be provided.

61 In the light of the foregoing, the answer to the second question is that Article 4(b)(i) of Regulation No 330/2010 must be interpreted as meaning that the benefit of the exception provided for in that provision 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.

Costs

62 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **Article 4(b)(i) of Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) [TFEU] to categories of vertical agreements and concerted practices**

must be interpreted as meaning that, 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, for the purpose of applying that provision.

2. **Article 4(b)(i) of Regulation No 330/2010**

must be interpreted as meaning that the benefit of the exception provided for in that provision 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.

[Signatures]

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* Language of the case: Dutch.