



Who sold my cheese?

Reflections on territorial exclusivity clauses following the CJEU ruling in Case C-581/23 (Beevers Kaas)

Background

Vertical agreements are those concluded between two or more companies operating at different levels of the production or distribution chain. They define the conditions under which the parties may purchase, sell or resell certain products or services. Such agreements are common in the pharmaceutical sector - supply, distribution or co-marketing agreements are good examples.

The judgment at hand addresses key questions about territorial exclusivity and provides useful guidance on such clauses.

In this case, Cono, a Dutch cheese manufacturer, entered into a distribution agreement granting exclusive rights to the Belgian company Beevers Kaas for the marketing of its Beemster cheese in Belgium.

In an agreement like this, it is crucial to clearly define the scope of the exclusivity rights. Under EU competition law, a manufacturer may prohibit an exclusive distributor from actively selling products in territories reserved for the manufacturer or for other distributors. For example, Beevers Kaas could be restricted from seeking purchase orders from customers outside its assigned territory (Belgium) and such a restriction would generally be permissible under competition law.

However, what happens if a customer of Cono in the Netherlands purchases batches of Beemster cheese in the Netherlands and markets them

in Belgium, engaging in active sales in Belgium? Does this mean that Cono is infringing the exclusive rights granted to Beevers Kaas? Can Beevers Kaas prevent Cono's customer who has purchased these batches of Beemster cheese in the Netherlands from placing them on the market in Belgium? And if so, is Beevers Kaas acting in contravention of competition rules?

Key takeaways from the judgment

At first instance in Belgium, the court held that Beevers Kaas could not stop Cono's Dutch customer from selling the Beemster cheese in Belgium.

However, the CJEU clarified that territorial exclusivity can be enforced if there is an agreement - express or tacit - between the manufacturer and its other customers restricting active sales into the exclusive territory. Such an agreement may be acceptable under competition law if its purpose is to protect the legitimate rights of the exclusive distributor. Accordingly, Cono may require its non-exclusive customers to refrain from actively selling in Belgium, the territory reserved for Beevers Kaas.

A tacit agreement exists, according to the Court, only where there are unequivocal actions showing that the customer accepted the restriction on carrying out active sales in territories reserved for the manufacturer's exclusive distributors. Furthermore, the CJEU makes it clear that the burden of proof lies with the party seeking to enforce exclusivity.



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Conclusion

The ruling underscores the importance of clear contractual terms and solid documentation, especially in sectors where exclusive distribution plays a strategic role.

For distributors: it is important to ensure that the manufacturer granting exclusivity imposes on its other customers, through contracts or terms of sale, a ban on active sales into the territory granted to the distributor.

For manufacturers: Providing this type of assurance can help negotiate other key terms, such as minimum purchase commitments or marketing investments that the distributor must carry out in the assigned territory.

Finally, it is relevant to remember that competition law imposes many other requirements on distribution agreements, particularly where companies hold significant market power. Each case, therefore, requires an individual legal assessment.
