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ECJ confirms and clarifies requirement of parallel imposition of active sales restriction under VBER in Case C-581/23

Current regime

The Vertical Block Exemption Regulation block-exempts active sales restrictions imposed by a supplier on its buyers towards territories allocated on an exclusive basis to another buyer. The Vertical Guidelines clarify that this assumes that the supplier imposes such a restriction on each and every of its buyers. This is referred to as the parallel imposition requirement.

Confirmation

In a case opposing the exclusive Belgian importer of Beemster cheese to a retailer selling Beemster cheese purchased in the Netherlands in its Belgian stores, the ECJ confirmed that the parallel imposition requirement is embedded in the definition of exclusive distribution.

Clarification

The ECJ furthermore clarified with whom, how and when such an active sales restriction needs to be agreed to comply with the parallel imposition requirement and hence remain covered by the VBER:

- It needs to be agreed with all direct buyers of the supplier in the EER (even if they do not seem to intend to start selling actively into the exclusively allocation territory).
- An agreement does not necessarily require a written and signed contract. Instead, the consent of the buyers can be implicit. But the ECJ emphasizes that the resellers' absence of active sales in the exclusive territory can only be interpreted as an implicit consent with an active sales restriction, if the supplier has proven that he first explicitly and specifically invited the resellers not to actively sell into the exclusive territory. Otherwise, the absence of active sales can be the result of the resellers' own independent business decision, rather than their consent to an active sales restriction.
- It is only as of when, and as long as, the supplier can demonstrate that such consent from all resellers in the

EEA is in place, that it can protect its exclusive distributor against active sales from either reseller.

Commentary

The judgement of the ECJ in Case C-581/23 provides undertakings in the EEA with certainty and clarity: active sales restrictions to protect exclusive distributors are block exempted only if they are agreed with all the supplier's resellers, which requires at least an explicit invitation from the supplier and the explicit or implied consent of each reseller. For as long as this condition is not fulfilled, the active sales restriction imposed on a single or a few – but not all – resellers is a hardcore restriction.