KROMANN REUMERT

EU-konkurrenceretten: Væsentlige nedslagspunkter fra 2025

Peter Barslev, Director

Kromann Reumert

C-581/23 – *Beevers Kaas*

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.

BEEVERS KAAS

Albert Heijn

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.

BEEVERS
KAAS

Article 1.3 of the Exclusive Distribution Agreement expressly states: '1. Exclusivity rights and territory

y...j

1.3 Beevers' exclusive rights extend to all sales of (Beemster cheeses) to and for the benefit of customers established in Belgium and Luxembourg'.

Article 4.1 of the Exclusive Distribution Agreement further clarifies that Cono itself may not supply Beemster cheese to third parties in Belgium or Luxembourg:

'4.1 Cono undertakes to Beevers that, during the term of the agreement, it will not supply cheese under the brands 'Het Beemsterwapen' and 'Beemsterkaas' to third parties in Belgium and Luxembourg other than through Beevers (...)'.

In turn, Beevers Kaas itself was not allowed to actively sell outside Belux (Article 3.2).

BEEVERS
KAAS

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.

Albert Heijn

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.

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.

Forhandler i Danmark

2. **EXCLUSIVE DISTRIBUTION**

2.1 The Manufacturer hereby appoints the Distributor as its exclusive distributor of the products listed in clause 4 (the "Products") in the area specified in clause 3 (the "Territory") on the terms and conditions set out in this Agreement.

3. **TERRITORY**

3.1 The Territory shall be: Denmark.

3.2 Only the Manufacturer or any distributor(s) appointed by him may actively distribute the Products outside the Territory.

Forhandler i Sverige

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AT.40795 – *Food delivery service*

(4) The Parties own and manage an app and a website through which customers may order food, grocery and other retail products and ensure the delivery of such products to customers.

(17) On 17 July 2018, Delivery Hero invested approx. EUR 51 million in Glovo, acquiring a 15% minority non-controlling stake (on a fully diluted basis) in the company. This initial investment was followed by additional rounds of non-controlling minority investments between 2018 and 2021, during which Delivery Hero increased its shareholding in Glovo to 37.4% (on a fully diluted basis) as of 31 December 2021. Finally, on 4 July 2022, Delivery Hero announced the acquisition of sole control over Glovo, becoming the majority shareholder with approximately 94% of the shares on a non-diluted basis and 80.9% of the share capital of Glovo on a fully diluted basis.

(20) First, the minority shareholding entailed formal agreements that were used to coordinate the business conduct of the Parties. As part of the Shareholders' Agreements ("SHAs") that they concluded in the context of Delivery Hero's minority non-controlling investments into Glovo, Delivery Hero and Glovo agreed, starting in July 2018, on reciprocal no-hire clauses for certain categories of employees.

(27) This no-hire clause imposed a one-way obligation on Glovo (the target of the investment) in favour of Delivery Hero (the investor). It had no specified duration, its territorial scope was not limited to a specific country and/or region within the EEA and therefore had an EEA-wide scope, and its personal scope did not apply to all employees but was limited to "*anybody having a management grade or senior capacity in DH* [Delivery Hero] *in the previous 12 months*".

(32) On 30 October 2018, following attempts from Glovo to poach from Delivery Hero[28], a top manager of Delivery Hero sent an email to a top manager of Glovo to suggest that they should *"find some kind of non-solicitation agreement"*[29]. Glovo immediately replied and confirmed that they accepted to be bound by an agreement not to actively approach each other's employees[30] (the "General No-Poach"). Glovo asked its staff to be particularly careful not to breach that commitment (*"From now on let's be very careful with this ok?"*), because any such breach would jeopardize the overall relationship between the Parties (*"let's not kill the relationship with poaching"*)[31]. The evidence clearly shows the Parties had the objective to restrict or distort competition for talent[32].

(33) This happened in a legal and economic context in which Delivery Hero and Glovo competed to attract talent which Glovo saw as scarce and in high demand[33]. Glovo routinely used active solicitation and saw it as a decisive source of talent[34].

5.2.2.2.1. No-Poach

(71) The General No-Poach and the no-poach clauses included in the SHAs are restrictions of competition by object. They are a form of sharing of the sources of supply within the meaning of Articles 101(1)(c) of the Treaty and Article 53(1)(c) akin to a buyer cartel.

(72) As paragraphs (25)-(32) and (34)-(36) above show, the content and the objective of the General No-Poach and the SHA no-poach clauses show that they had as their object the restriction or distortion of competition for talent between the Parties. As paragraph (33) above shows, the analysis of the legal and economic context confirms this conclusion. No-poach agreements typically cause economic harm. In particular, they can have negative effects on wages because the parties can no longer proactively offer higher wages to induce employees to switch, and/or provide counteroffers to induce their own employees to stay. By doing so, no-poach agreements are capable of preventing the efficient allocation of productive employees to productive firms. Declining job reallocation rates have been linked to declining productivity and hence slower GDP growth.

(74) Given the non-controlling nature of the investments (see paragraphs (25)-(30) above), the SHAs no-hire clauses are not subject to the rules on ancillary restraints applicable to concentrations[110]. Moreover, as one can deduct from paragraphs (27) and (30) above, the no-hire obligations were not objectively necessary for, or proportionate to, the relevant investment agreements, and therefore do not qualify as ancillary restraints[111] because (i) they were unlimited in terms of duration and territory, (ii) they were de facto reciprocal, so they went beyond what was objectively necessary and proportionate to protect the value of the investors' interests in Glovo, and (iii) they did not equally apply to all investors, thereby again excluding that they were objectively necessary or proportionate to protect the value of the investors' interests in Glovo[112].

RWE AG / E.ON SE

C-464/23 P, (C-464/23 P, C-465/23 P, C-467/23 P, C-468/23 P & C-470/23 P) – *EVH v Commission*
C-466/23 P – *Stadtwerke Hameln Weserbergland*
C-469/23 P – *Eins energie in Sachsen*
C-484/23 P – *Mainova*
C-485/23 P – *enercity v Commission*

RWE and E.ON are both energy companies based in Germany and are active across the whole electricity supply chain, from generation and wholesale to distribution and retail of electricity. The two companies are engaged in a complex asset swap. Following this asset swap, RWE will be primarily active in upstream electricity generation and wholesale markets, whereas E.ON will focus on the distribution and retail of electricity and gas.

European Commission - Press release

Mergers: Commission approves RWE's acquisition of E.ON electricity generation assets

Brussels, 26 February 2019

RWE and E.ON are both energy companies based in Germany and are active across the whole electricity supply chain, from generation and wholesale to distribution and retail of electricity. The two companies are engaged in a complex asset swap.

Mergers: Commission clears E.ON's acquisition of Innogy, subject to conditions

Brussels, 17 September 2019

The European Commission has approved, under the EU Merger Regulation, the acquisition by E.ON of Innogy's distribution and consumer solutions business as well as certain of its electricity generation assets. The approval is conditional on full compliance with a commitments package offered by E.ON.

115 It follows from the foregoing considerations that the General Court was right to conclude, in paragraph 86 of the judgments in Cases T-312/20, T-313/20, T-315/20 and T-319/20 and in paragraph 85 of the judgment in Case T-317/20, that the concept of a 'single concentration' cannot apply where independent undertakings gain control of different targets, as is the case, like here, in an asset swap.

(4) *The sharing of the electricity markets decided upon by RWE and E.ON*

392 The applicant submits in essence that, by means of the overall transaction, RWE and E.ON shared the value-added stages in the German electricity market, which constitutes a restriction of competition in breach of Article 101 TFEU.

Arguments of the parties

The appellants state that the General Court, on account of its position in relation to Article 101 TFEU, did not verify whether the evidence which they submitted characterised a restriction of competition prohibited by that Article 101. However, it is apparent from the file that RWE and E.ON agreed to share the electricity market. The General Court could have, and ought to have, classified that market sharing as prohibited under Article 101(1) TFEU. Furthermore, it is not disputed that the Commission did not carry out any review of concentration M.8871 in the light of Article 101 TFEU and that the parties to that concentration also failed to provide the slightest evidence that that concentration would produce favourable effects under Article 101(3) TFEU.

T-441/21, T-449/21, T-453/21, T-455/21, T-456/21 & T-462/21 – *UBS Group & UBS v Commission*

UniCredit UBS BANK OF AMERICA NOMURA Royal Bank of Scotland

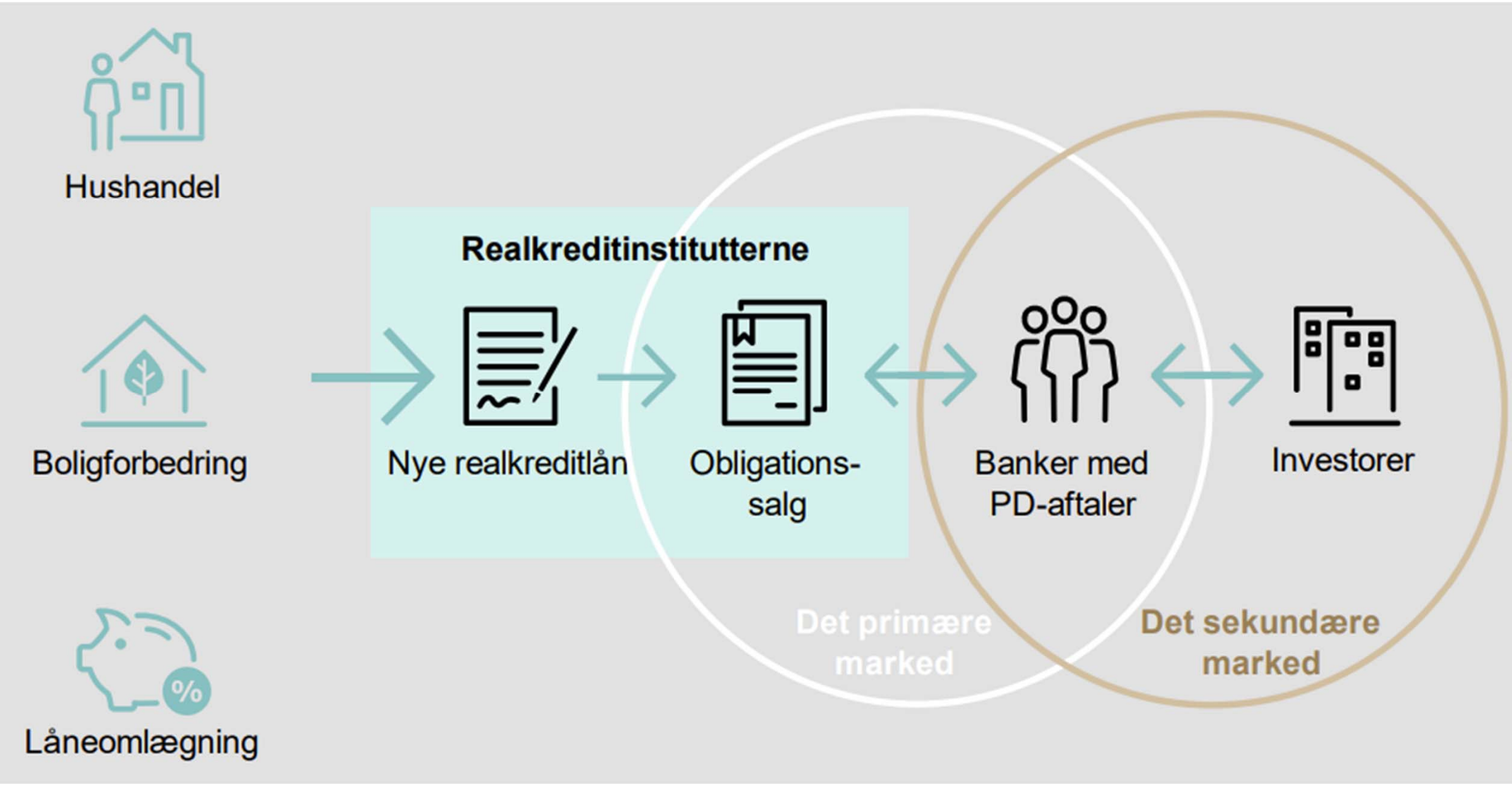
AT.40324 - European Government Bonds

The EU Commission found that **the seven banks** participated in a cartel **through a group of traders** working on their EGB desks and operating in a **closed circle of trust**.

T-441/21, T-449/21, T-453/21, T-455/21, T-456/21 & T-462/21 – *UBS Group & UBS v Commission*

11 EGBs are issued by central governments on the primary market. That issue is often delegated to a debt management office, which defines the procedure for issuing those bonds. The latter procedure generally takes the form either of an auction, which is a tendering process, or of a syndication, which is a private placement process involving a more limited group of operators.

12 The bonds may be obtained, in either of the aforementioned forms, only by financial institutions with the status of primary dealers. Those dealers compete on the primary market to acquire EGBs. After acquiring the EGBs, the dealers may keep them or resell them on the secondary market to other financial institutions or investors.


Hushandel
Boligforbedring
Låneomlægning
Realkreditinstitutterne
Nye realkreditlån
Obligations-
salg
Banker med
PD-aftaler
Investorer
Det primære
marked
Det sekundære
marked

27 As is apparent from recitals 11 and 40 of the contested decision and footnote 10 thereto, primary dealers are generally expected to take on the role of market maker on the secondary market, quoting two-way prices for bonds as described in paragraph 14 above.

28 When banks act on the secondary market, they seek to generate revenue by capturing the difference between the bid price and the ask price. The difference between those two prices is known as the 'spread' and constitutes the bank's revenue on a combined buy and sell transaction.


Ask Price
$101.00
The price at which you can buy an asset from the market maker
Bid-Ask Spread
Bid Price
$100.00
The price at which you can sell an asset to the market maker

AT.40324 - European Government Bonds

In the chatrooms, the relevant traders exchanged commercially sensitive information:

- They informed and updated each other **on their prices and volumes offered in the run up to the auctions** and **the prices shown to their customers or to the market in general**.
- In addition, they discussed and provided each other with **recurring updates on their bidding strategy in the run up to the auctions** of the Eurozone Member States when issuing Euro denominated bonds on the primary market, **and on trading parameters on the secondary market**.
- The conduct partially took place during the financial crisis (more specifically, between 2007 and 2011).

(102) On **5 January 2007**, the CODS & CHIPS chatroom is created between traders of ABN-AMRO ([…]), RBS ([…]) and UBS ([…]).[115] All three participants communicate the whole working day. Once all three participants enter the chatroom at 07:06 the RBS trader asks: '*WAT THE FUK IS THIS*' and the UBS trader replies: '*this is nice*'. The ABN-AMRO trader greets the others with: '*morning!*' '*chat room*' '*but persistent*' '*BBG [Bloomberg] technology*'. During the chat, the participants discuss spreads and mid-prices for various bonds. For example, at 08:46 the RBS trader enquires: '*wat spread 37/37 italy?*' and the UBS trader promptly replies: '*37/5*' '*?*'. A few seconds later the ABN-AMRO trader further complements: '*we got 37.75.*' The RBS trader quotes: '*ok cheers just gonna make it.*' At 13:36, the ABN-AMRO trader asks the mid-price for a (probably Italian) bond maturing in 2037: '*mid 37s?*' to which both the traders of UBS: '*47 49*', and RBS: '*47*', immediately respond. The ABN-AMRO trader expresses his gratitude to the other two participants for providing him with the relevant information and adds: '*just checking our pricer.*' Earlier that day, at 08:11, the RBS trader asked for the price of a French EGB maturing in 2029. The ABN-AMRO trader promptly replies and discloses his bid and offer price: '*95 bid vs 72 offer*'. Later that day, at 13:36, he also shares his mid-price for a bond maturing in 2037: '*47*' '*49*'. At 14:32, UBS discloses the price a specific customer has paid: '*oil bougth btp 29s*' '*15*'.[116]

41 In that context, the Commission considered that the overall aim of the collaboration between the traders was to help each other in their operation on the market, by reducing uncertainties regarding the issuing and/or trading of EGBs, with the general purpose of increasing the revenues earned on both the primary and secondary markets and resulting from the participation of the banks concerned in EGB issues and subsequent trading thereof. In doing so, those banks knowingly substituted practical cooperation between them for the risks of the market, to the detriment of other market participants, their customers or debt management offices.

(559) A first set of a banks' claims invoke their function as market makers.[1045] They claim that this function requires them to engage in contacts with each other when trading EGB. More specifically, UBS argues that, in this context, the service being delivered by its EGB dealers is financial intermediation; a EGB dealer is ready to buy and sell, supporting liquidity in a particular instrument, the value of which is vastly larger than that of the intermediation itself.[1046]

(565) A second set of claims concern Bank of America, Nomura and Portigon, who assert that the facts described in the Decision are not capable of justifying the finding of a restriction of competition by object.[1053] They claim that a proper analysis of the economic and legal context of these contacts would confirm that the information exchanged had insignificant strategic value and was not capable of removing uncertainty between the parties as regards the timing, extent and details of modifications to be adopted by them. First, the context - they claim - is characterised by the complexity, diversity and volatility of an EGB market that is highly competitive and fragmented and in which traders occupy asymmetric positions for many different EGB.

Third, some parties add that in such context the exchanges of information were necessary for the market to function properly and were even pro-competitive, and in any event did not harm the traders' customers. In their view, the information exchanged consisted of mere 'market colour' observations based on personal assessments of publicly available information.[1055]

Spørgsmål?

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