CASE CARD | 13 December 2022

Koninklijke Auping v Beverslaap (12/01625)

Termination of a continuing performance agreement

1. CASE SUMMARY

A. Summary of facts

The case concerns the application of the legal standard to terminate a so-called 'continuing performance agreement' ("*duurovereenkomst*").

Auping is a manufacturer and supplier of beds, mattresses, and other related products with a strong brand reputation. It had an extensive network of dealers, consisting of single brand, multi-brand, and shop-in-shop dealers. The market share of Auping on the relevant market is around 20%.

Beverslaap was a multi-brand dealer of Auping since 2002.

In 2010, Auping introduced a selective distribution system, which led it to terminate almost half of its distribution agreements, including the agreement with Beverslaap. Beverslaap contested the termination as follows:

- The termination violates Article 6 of the Dutch Competition Act ('cartel prohibition'). Beverslaap claimed that Auping had terminated its agreement because other dealers had complained to Auping about the high discounts Beverslaap was offering online. According to Beverslaap, this resulted in a concerted practice between Auping and several dealers whereby Beverslaap was terminated due to its pricing policy.
- Beverslaap claimed that it met the qualitative and quantitative selection criteria to be admitted to the selective distribution system of Auping.
- A continuing performance agreement cannot be terminated without serious grounds. Beverslaap was dependent for around 50% of its turnover of Auping. The restructuring of the distribution network was not a sufficiently serious reason.

B. Legal analysis

At first instance and on appeal, the Dutch courts concluded as follows:

- There was no violation of Article 6 of the Dutch Competition Act. It was correct that some dealers had complained to Auping about the pricing policy of Beverslaap, but the facts did not substantiate that Auping had acted on these complaints. On the contrary, several statements confirmed that Auping had communicated to

dealers that it had no legal means to object to the online discounts of certain dealers. The mere fact that several dealers offering online discounts were terminated may be questionable, but it was not sufficient to prove a violation of the cartel prohibition.

- The restructuring of a distribution network can in principle be a sufficiently serious ground to terminate a continuing performance agreement. The Court of Appeal however concluded that Auping had not applied the quantitative criteria of its newly selective distribution network objectively and thus could not rely on this reason to terminate the agreement with Beverslaap (note: quantitative selective distribution does not need to be applied objectively for it be covered by the VBER assuming all other conditions are met).
- Based on the principles of reasonableness and fairness, Auping required a sufficiently serious ground to terminate the agreement with Beverslaap considering the dependence of Beverslaap on Auping (50% of its turnover). The introduction of a selective distribution system did not convince the Court of Appeal as sufficiently serious ground to terminate the relationship with Beverslaap in favour for a single brand dealer to be appointed in that area: no single brand dealer had been appointed since the beginning of the legal proceedings and another smaller multi-brand dealer had not been terminated for the same reason as Beverslaap in that area.

The Supreme Court upheld the decision regarding the first point (that there was no violation of the cartel prohibition), but annulled the decision of the Court of Appeal on the other two points. The second point was a procedural one: Beverslaap had argued that it met the selective distribution criteria only during the oral hearings in the appeal proceedings, which the Supreme Court ruled was too late in the proceedings.

The Supreme Court also disagreed with the Court of Appeal on the last point, ruling that the mere dependence of Beverslaap on Auping for 50% of its turnover, or a relationship of more than 8 years, did not invalidate the termination.

With this case, the Supreme Court confirmed that a continuing performance agreement can be terminated in principle. However, given the facts of the case, the principles of reasonableness and fairness may require sufficiently serious grounds for termination, or a reasonable notice period, and/or that compensation is offered.

2. QUOTES

"*In connection with the nature and content of the agreement and the circumstances of the case, the requirements of reasonableness and fairness may mean that termination is only possible if there is a sufficiently serious reason for the termination. The same requirements may, also in connection with the nature and content of the agreement and the circumstances of the case, result in the fact that a notice period must be observed or that the termination*

must be accompanied by an offer to pay compensation." (free translation of §3.6)

"*With the judgment in De Ronde Venen/Stedin, the Supreme Court seems to have shifted the emphasis from the terminability of continuing performance contracts to the conditions under which termination must be given.*" (free translation of §2.7 of the Opinion of the Advocate General)

"*The fact that the terminated party is largely dependent on the turnover in products that fall under the terminated agreement is not, in my opinion, sufficient, at least not simply, for the agreement to be non-terminable, other than on serious grounds. This is not changed by the circumstance that a business relationship has existed between the parties for 8.5 years.*" (free translation of §2.9 of the Opinion of the Advocate General)

3. RELEVANT LEGISLATION

- Dutch Competition Act (Article 6)
- Article 6:248, §1 of the Dutch Civil Code

4. PRACTICAL SIGNIFICANCE

Continuing performance contracts can be terminated in principle, even if they do not include arrangements on termination. Based on the circumstances of the case, the principles of reasonableness and fairness may require that there is a sufficiently serious ground for termination, that a certain notice period is observed, and/or that compensation is offered.