

New B2B law: the courts define what can be done or not done in relationships between undertakings.

It cannot be done to stop deliveries as a pressure in legal proceedings!



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1. Introduction

A new recent decision illustrates the application of the so-called "B2B" law, i.e the law of 4 April 2019, which came into force, for the part on the prohibition of the abuse of economic dependence, on 22 August 2020.

On 16 April 2021, the President of the Enterprise Court of Antwerp, Tongeren division, ordered the cessation of the refusal by an undertaking to supply another one, based on the provisions of the "B2B" law prohibiting the abuse of economic dependence between undertakings (Article IV.2/1 of the Code of economic law (« CEL »)).

A judgment had already been rendered in another case on 28 October 2020 by the President of the Enterprise Court of Ghent, also in the context of a cease and desist order and also concerning a refusal of delivery.

2. The facts giving rise to the decision

In the course of 2020, a German manufacturer of hunting rifles decided to terminate its distribution contract with its dealer for the Benelux. Legal proceedings followed, in which the dealer claimed severance payments from the German manufacturer. The dealer has a Belgian sister company, which operates a retail store specialized in hunting accessories in Hasselt. Following the termination of the distribution contract, this company decided to buy directly from the German manufacturer to ensure the continuity of its operations, which the latter seemed to accept at first, confirming orders (to be delivered a few months later) and furthermore transmitting the price lists that would apply in the future. However, just as deliveries were to take place, the German manufacturer informed the Belgian retailer that deliveries would be suspended for the duration of the procedure initiated by the Belgian distributor. It did that in terms which left no doubt as to the link with the pending dispute: *"I am sure we will work together in a very good way once the lawyers came to a conclusion. Therefore I must inform you that we have to wait with accepting the order until the case with [the Belgian Distributor] is closed"*. The Belgian retailer was left without the ordered goods, with a stock of unsaleable spare parts and had to refer the customers to other stores.

In his judgment, since the refusal to supply was not contested by the manufacturer, the President reasoned in two steps: (i) is there, in this case, *economic dependence* within the meaning of the law and (ii) if so, can an abuse of this economic dependence be identified?

3. The economic dependence

The position of economic dependence is defined by article 1.6.12bis CEL as: *"a position of subjection of a business towards one or more other businesses characterized by the absence of a reasonable equivalent alternative, available within a reasonable period of time, and under reasonable conditions and costs, allowing this or each of these businesses to impose obligations or conditions that cannot be obtained under normal market circumstances"*.

The President of the Court, taking into account the concrete circumstances of the case, decided that the Belgian retailer was in a state of economic dependence on the manufacturer, taking into account, in particular, the following circumstances:

- (a) **The relative market power.** The retailer can only purchase the products and parts from the manufacturer. Especially for the accessories and spare parts, which are essential for the retailer'

business, no alternatives exist. Moreover, the retailer still has an important stock of spare parts, which cannot be sold anymore if there is no continuity in the supply.

- (b) **The share of sales.** The products bearing the trademark of the manufacturer, which the retailer has sold for more than 35 years, account for more than 90% of its sales.
- (c) **The technology or the know-how which the other undertaking possesses.** Both parties were not denying that the products bearing the trademark of the manufacturer were of very high quality and that the retailer has acquired specific expertise since 1985.
- (d) **The fame of a brand, scarcity of the product, loyal buying behavior of the consumers.** The retailer has built up a very loyal clientele, who come back very regularly after buying a gun to buy new parts and modify the gun.
- (e) **The undertaking's access to resources or essential infrastructure.** The products bearing the trademark of the manufacturer are essential for the retailer. It was only when the distributor asserted its rights in a procedure that the deliveries stopped.
- (f) **The fear of serious economic disadvantage, of reprisals or of the termination of a contractual relationship.** By suddenly stopping every delivery until the settlement of the dispute with the distributor, the retailer will not only suffer a serious loss of turnover, but also could see its entire business becoming worthless. The economic disadvantage is manifest.

The circumstances (a) and (b) are deemed to be the most important by the President of the Court.

4. The abuse of economic dependence

Article IV.2/1 CEL provides:

"It is prohibited for one or more undertakings, to abuse of a position of economic dependence in which one or more undertakings find themselves, as a result of which competition may be affected on the Belgian market concerned or on a substantial part of it. Abuse may occur in the event of: 1° refusing a sale, a purchase or other transaction terms (...)"

The law specifically targets refusal to sell as an example of abuse of economic dependence (Article IV.2/1, 1° CEL).

In the judgement under review, the President refers to the judgement of 28 October 2020 of the President of the Enterprise Court of Ghent, noting that in that case the supplier had given the impression that it was willing to deliver, but that suddenly and without prior warning ("*plots en onverwacht*") the deliveries had ceased at a time that was particularly detrimental to the contracting party.

In the present case, the sole purpose of stopping deliveries was to provide leverage, i.e., a purpose to harm, which makes the abuse, according to the judge, flagrant ("*overduidelijk*").

The situation in this case is indeed very clear. However, one can assume that the existence of abuse in other cases could be the subject of more extensive debate.

Without confining itself to the sole definition of Article IV.2/1 CEL, which seemed to be sufficient, the judgment examines the conditions of the abuse of rights theory. The demonstration of the existence of an abuse of rights in fact makes it possible to dispense with establishing the (potential) effect on competition, the third condition required by the law.

5. The potential effect on competition

While the law imposes as a condition for the abuse of economic dependence that competition is likely to be affected on the Belgian market concerned or a substantial part of it, the President decides that a potential distortion of competition does not have to be demonstrated. The first decision did not address this issue either.

The doctrine accepts that, since the abuse of economic dependence can in all cases also be sanctioned by Article IV.104 CEL, which prohibits any act contrary to honest market practices by which an undertaking harms or may harm the professional interests of one or more other undertakings (the so-called "*catch all provision*"), the potential effect on competition on the Belgian market concerned or a substantial part of it does not have to be demonstrated when this provision is also invoked as the basis for the claim.

6. What practical lessons can be learned?

- How to assess the existence of economic dependence on a co-contractor

In order to verify the existence of economic dependence, case law essentially uses the following two criteria, which are considered to be the most important and encompass the other criteria:

- (i) the relative market power of the concerned undertaking: does it have other alternatives? If so, under what conditions and within what timeframe?
- (ii) the importance of the share of the concerned company's turnover, bearing in mind that the more important this share is, the greater is the risk of economic dependence.

The judgment specifies that an *in concreto* assessment of the existence of a position of economic dependence must be made.

- As for the existence of an “abuse”

- The « *abused* » perspective

The abuse of economic dependence depends also on the situation in which the undertaking in a position of economic dependence (the “*abused*”) finds itself.

- Abuse of right theory

The reference to the abuse of rights theory (and not simply to abuse of economic dependence) may prove useful, since an act may be deemed to be in conformity with competition law (a refusal to sell, for example), but recognized as constituting unfair competition when it is analyzed as an abuse of rights. This is the case in particular if the refusal to sell is motivated by an aim to harm. The same is true for an abuse of economic dependence, even if the condition of affecting competition is not met. This last condition does not have to be demonstrated, since Article VI.104 CEL explicitly requires only that the professional interests of one or more other undertaking(s) be affected.

- Sudden changes in business relationships

In both decisions, the judges condemned decisions taken “suddenly and unexpectedly” to stop supplying. The risk of abuse of economic dependence could perhaps have been mitigated by giving the other company a sufficient notice before implementing a decision such as to stop selling (in compliance with the contractual stipulations, of course).

- Arbitrary behavior

The judgment, referring to the prior decision of 28 October 2020, also condemns the arbitrary behavior of the supplier: its decision to stop delivering is based solely on its own interest, without any valid reason.

- The third legal condition: for the record?

Given its obvious advantages regarding the proof of the third legal condition of Article IV.2/1 CEL (the potential effect on competition), it seems likely that this provision will be used in cease-and-desist procedures more often as an illustration of unfair market practices in the meaning of Article VI.104 CEL than as a legal basis in itself.