

Abuse by non-dominant companies? Belgian rules prohibiting "abuses of economic dependence" now enforceable

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As of 1 June 2020, a new form of competition law infringement will be enforceable in Belgium* in addition to the prohibitions on anti-competitive agreements and abuses of a dominant position. The new Article IV.2/1 of the Belgian Competition Act (**CA**), applicable in the B2B context only, now prohibits companies from abusing a non-dominant position vis-à-vis companies that are "economically dependent" on them. While this kind of competition law infringement does not exist at EU level, similar provisions can be found in other EU member states and have been more regularly enforced in recent years (e.g., recently in France resulting in fines of over €1 billion).

This new provision will enable the Belgian Competition Authority (**BCA**) to significantly increase its antitrust scrutiny over companies active in Belgium. In addition, its entry into force in the midst of the COVID-19 pandemic means that the new rules will likely be put to the test quickly in respect of B2B disputes in the food or medical consumables distribution chain (e.g., in relation to suppliers who refuse to supply /impose onerous terms/prices for critical goods such as sanitizing gel or face masks).

With this move, Belgium puts itself front and center of the trend of increased antitrust scrutiny in Europe and around the world. According to the Belgian legislator, this new provision responds to a need to address the abuses of relative market power in B2B relationships, in particular vis-à-vis SMEs (the main type of company the legislator is aiming to protect).

Abuse of economic dependence – extending the scope of antitrust liability?

The new prohibition addresses abuses which take place between companies where one is economically dependent on the other (i.e., an almost "unavoidable" trading partner) but where neither contracting party is "dominant" within the meaning of Article IV.2 CA/102 of the Treaty on the Functioning of the European Union (**TFEU**).

How does the prohibition work? Three conditions must be satisfied:

- a) *One company must be in a position of "economic dependence";*
- b) *The other company must have "abused" this position of economic superiority vis-à-vis the first company; and*
- c) *The abuse must have the potential to "affect competition" on (a part of) the Belgian market.*

(a) What is a position of "economic dependence"?

According to the actual wording of Article IV.2/1 CA, "economic dependence" is defined as a *"subordinate position of a company in relation to one or more other companies, characterised by the absence of reasonably equivalent alternatives available within a reasonable period of time, on reasonable terms and at reasonable costs, allowing it or each of them to impose services or conditions that could not be obtained under normal market circumstances"*.

Essentially, this legal definition aims to catch business relationships between companies and their unavoidable trading partners (suppliers/customers). The new rules also set out that "economic dependence" relates to a situation where economically stronger parties to a business relationship can impose requirements or conditions that cannot be obtained under normal market conditions.

Finding a situation of "economic dependence" will be the most difficult to establish criterion under Article IV.2/1 CA and, as can be seen above, the definition of "economic dependence" is very open-ended. This will raise questions of interpretation which the BCA or the Belgian courts will need to answer. One of the first questions for the BCA (or Belgian courts) is whether only one or more "reasonably equivalent alternatives" should be available to a company arguing it is economically dependent on another company.

The Belgian legislator has given little guidance on the concept of "economic dependence". However, the parliamentary proceedings leading up to the introduction of the new prohibition suggest that a company may be considered economically dependent where a large share of its revenues is derived from another company or where a company is dependent on (unique) technology or know-how owned by another company. Other elements such as brand reputation, scarcity or perishability (and even customer loyalty) could be taken into account. For instance, companies that supply "must-have" products or brands will need to be careful in their dealings with their customers. Indeed, even a manufacturer with a limited market share may be an unavoidable trading partner to a retailer who may have come to depend on this manufacturer for a number of products (e.g., where the reputation of the manufacturer's brand is such that the loss of access may damage the retailer).

(b) Abuse

While this new prohibition is likely to tackle primarily vertical conduct (where companies are active at different levels of the supply chain), the concept of "abuse" contained in Article IV.2/1 CA is the same concept as contained in Article IV.2 CA and Article 102 TFEU. And just as it the case with the previously established prohibitions, Article IV.2/1 CA provides an illustrative (but non-exhaustive) list of practices that are traditionally considered to be an abuse – such as charging unfair prices, limiting production and discrimination that places certain companies at a competitive disadvantage. The link with the concept of "abuse" contained in Article IV.2 CA/Article 102 TFEU will allow Belgian enforcers to rely on existing case law in respect of the concept of "abuse".

However, unlike Article IV.2 CA/Article 102 TFEU, the new prohibition contains an explicit reference to abuses in the form of "refusal of sale, purchase or other transaction terms". This is very important because it gives clear insight into the practices the Belgian legislator is seeking to fend off. Refusal to supply cases where, for instance, a supplier of a most-have product refuses to supply an economically dependent customer, are likely to be the first cases brought under Article IV.2/1 CA.

(c) Affect competition

An abuse of "economic dependence" must have the potential to affect competition on the Belgian market or a substantial part thereof (which can be as limited as a region or even a single city). An actual *effect* is not required and the BCA will likely consider this condition to be easily met, as is the case in traditional abuse of dominance investigations under Article IV.2 CA/Article 102 TFEU.

What are the key takeaways for companies active in Belgium?

The new rules apply to everyone. While the parliamentary works refer to the food distribution chain and to internet platforms as prime examples of where situations of economic dependence may occur, the prohibition is not limited to specific industries or sectors. Indeed, it is easy to see how these new rules could for instance play a role in respect of relationships between producers of fast-moving consumer goods and distribution chains, but also in franchising relationships.

New opportunities for complainants/aggrieved parties. The broad language of Article IV.2/1 CA will raise many questions of interpretation. However, companies considering themselves economically dependent will now undoubtedly feel encouraged to use this new legal route to bring cases against unavoidable trading partners for behavior which, in the past, would not have led to antitrust scrutiny.

Time for ex ante compliance. Companies should now ensure that their trading/commercial terms and conditions applicable to activity in Belgium comply with Article IV.2 CA/Article 102 TFEU and, in turn, are set up in a way that does not disadvantage their trading partners unfairly.

The BCA will enforce ex officio. We expect that the first cases will be brought by companies directly through complaints. However, despite such parties' potential lack of resources, the BCA is reportedly willing and eager to use this new tool provided to it by the Belgian legislator (and will likely do so sooner rather than later given the current crisis situation).

COVID-19 will fuel cases in the short term. The current pandemic has lead companies to increasingly rely on income maximizing strategies, potentially to the detriment of their trading partners. It is in this context that we expect companies to take advantage of this new provision. There have already been alleged cases of companies charging excessive prices, discriminating between customers or making purchases of highly sought-after products/services conditional on the purchase of other goods/services. The new rules will allow the BCA to tackle these situations even where none of the companies involved are "dominant".

Significant financial consequences. The BCA will be able to impose administrative fines capped at 2% of a company's consolidated annual Belgian sales for an infringement of Article IV.2/1 CA (in addition to potential damages claims brought by parties harmed by this prohibited conduct). This is, however, lower than fines which can be imposed for the traditional competition law infringements, e.g., in case of abuses of dominance or the entering into of anti-competitive agreements (capped at 10% of annual worldwide sales).

** On 24 May 2019, the "Act of 4 April 2019 amending the Code of Economic Law with regard to abuses of economic dependence, abusive terms and unfair market practices between companies" was published in the Belgian Official Gazette. The Act is electronically available here in [French](#), and here in [Dutch](#).*

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