

HAS THE PROHIBITION ON ABUSE OF ECONOMIC DEPENDENCE LIVED UP TO EXPECTATIONS?

The prohibition on abuse of economic dependence entered into force on 22 August of last year. The anticipated impact on practice was widely discussed. This article summarises the developments so far.

GREAT EXPECTATIONS

On 22 August 2020, the Belgian legislation prohibiting the abuse of economic dependence entered into force (Article IV.2/1 CEL). The purpose of the new law was to fill a gap in the Belgian and European rules on abuse of dominance, which do not protect against abusive practices by an undertaking that does not enjoy a 'dominant position' on the market, even when its trading partners are economically dependent on it.

The prohibition is intended to provide undertakings with **a new tool** to take action against abusive practices by suppliers or customers that constitute indispensable trading partners and to strengthen the negotiating position of so-called weaker undertakings. Faced with the possibility of legal actions as well as investigations by the Belgian competition authority ("BCA"), undertakings were strongly advised to revise their contractual practices and parties injured by potentially abusive practices were urged to come forward.

However, even strong promotional campaigns such as that sponsored by the Belgian Ministry for Economic Affairs, stating that 'might is right is a thing of the past', have been dwarfed by **criticism** of the new legislation. This criticism focuses in particular on (i) the difficulty of relying on the prohibition in practice and (ii) the lack of available guidance, which will inevitably result in uncertainty in the context of B2B contracts.

Criteria for Application of the Prohibition on Abuse of Economic Dependence		
Criterion	Starting point for the analysis	Criticism and expected application
Position of economic dependence	<p>Economic dependence is defined as a position of submission by an undertaking in relation to another undertaking, characterised by:</p> <ul style="list-style-type: none"> - the absence of reasonably equivalent alternatives - available within a reasonable period of time and at reasonable conditions and costs. <p>The legislative history mentions a number of relevant factors, such as the share the stronger undertaking represents of the weaker undertaking's turnover, the technology or knowhow of the stronger undertaking, the reputation of the brand, as well as the weaker party's choice to occupy such a position.</p>	<p>A high degree of uncertainty was expected since the existence of economic dependence (and determination of the position of the stronger undertaking compared to the weaker one) requires a separate assessment for each individual supplier and customer. Moreover, the potentially relevant factors may be interpreted and weighed differently, thereby adding to the uncertainty.</p> <p>Furthermore, when looking at decisional and judicial practice in France – where a similar provision has been in place for some time, which in fact served as inspiration for the Belgian provision – it is clear that a position of economic dependence is not easy to prove.</p>
Abuse	<p>The legislation merely provides examples of abuse. The legislative history adds that abuse may entail any form of conduct that an undertaking could not impose in the absence of the weaker economic position of the other undertaking.</p>	<p>The available guidance on abusive behaviour suggests that behaviour that would be considered abusive if committed by a dominant undertaking may also constitute an abuse of economic dependence. However, one example mentioned in the law – a refusal to sell or purchase – is not widely accepted as abusive under competition law rules. The actual application therefore remains uncertain.</p>
Impact on competition	<p>Abuse is only prohibited if it affects competition on the Belgian market or an</p>	<p>This criterion appears to require that the abuse be not merely disadvantageous for the</p>

	essential part thereof.	economically dependent undertaking but for (competition on) the market in general. The French provision contains a similar condition. Based on application of the French provision in practice, it appears that this condition makes it more difficult to rely on the provision.
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BUT FEW RESULTS SO FAR

The business world and legal practitioners looked to the BCA and the courts to clarify the scope of the prohibition through concrete examples. At first, the **BCA** expressed concern that, in the absence of additional funding, it would not be able to investigate potential violations of the new provision. According to statements made by the authority, it appears that in the meantime the BCA has received various complaints, of which two are currently being formally investigated.

On 28 October, the **first judicial decision** on the prohibition was rendered. The case concerned a request for an injunction brought before the president of the Ghent Commercial Court against a Belgian designer and producer of (children's) clothing. The claimant was a small retailer, which primarily sold children's clothing supplied by the defendant. The retailer claimed that the defendant had abruptly decided to cease supplying it, which constituted an alleged refusal to supply in violation of the prohibition on abuse of economic dependence. The president of the Court sided with the claimant and concluded that there had been an abuse of economic dependence or at least careless conduct violating fair market practices (Article VI.104 CEL). Unfortunately, the judgment may lack precedential value and did not provide the hoped-for clarification.

<i>First Ruling on the Prohibition on Abuse of Economic Dependence</i>		
<i>Criterion</i>	<i>Facts</i>	<i>Analysis</i>
Position of economic dependence	The retailer was an individual shop that relied exclusively on the supplier's products. The refusal to supply would lead to its business becoming practically unsustainable. The fact that it is generally known that a collection for the following season should be ordered well in advance and that the retailer would not be able to find an alternative supplier for the winter season in late September were relevant.	There was no discussion on what could be considered a 'reasonable alternative' and reasonable expense and/or conditions. Furthermore, the abovementioned factors were not discussed (or weighed) in the assessment of economic dependence.
Abuse	When assessing the existence of abuse, the president considered that the supplier: <ul style="list-style-type: none"> - had unilaterally and abruptly refused to supply the winter collection, even though it knew the retailer was dependent on it in order to remain commercially viable; - had acted in bad faith as it apparently gave the impression it would continue to supply by sending promotional materials at the end of July and waited until a few days before delivery to end the relationship; and - by citing the retailer's questionable solvency as a reason for the refusal, even though it had been aware of this situation for some time, hid the real reason for termination of the relationship. According to the president, the supplier's decision formed part of a broader strategy to push the retailer out of the market, thereby enabling the supplier to directly approach the 	It appears that, for the president, it was sufficient that the refusal to supply was in reality part of a new distribution policy and therefore arbitrary. The president considered a marginal review sufficient to conclude that strategic policy was the real reason behind the refusal to supply. However, the judgment does not clarify how the retailer demonstrated that this was in fact the real reason and what this 'marginal review' entailed. Even if a change in strategic policy was the underlying reason, it should not necessarily have resulted in finding an arbitrary refusal to supply. Moreover, the judgment does not provide further guidance on the conditions to establish abuse of economic dependence in the case of a refusal to supply or on the extent to which the conditions applicable to a refusal to supply by a dominant undertaking can be carried over to the assessment of abuse of economic dependence.

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	retailer's customers either physically or online.	
Impact on competition	The president did not discuss the (potential) impact on the Belgian market or part thereof.	An impact on competition is a prerequisite for establishing abuse of economic dependence. If a retailer will disappear from the market, this could impact competition but may not be sufficient. As the retailer in this case was rather small, it is questionable whether the refusal to supply would in fact impact the market, meaning the outcome of the case would have been the same.

KEEP CALM AND CARRY ON?

Despite a slow start, and the perceived difficulty to rely on the new prohibition, it is reasonable to expect that case law by the BCA and civil courts may emerge soon and (hopefully) provide further guidance for undertakings and legal practitioners. The prohibition on abuse of economic dependence should therefore not yet be disregarded as a tool for negotiations and an additional ground to take legal action against certain contractual practices.