

CLIENT ALERT

Belgian Rules Against Abuse of Economic Dependence Enter into Force

August 14, 2020

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Article IV.2/1 introduced last year in the Belgian Code of Economic Law¹ (“CEL”), which prohibits the abuse of economic dependence, will enter into force on 22 August 2020. This new provision aims to cover cases where general competition rules on abuse of dominant position (article 102 of the Treaty of the Functioning of the European Union (“TFEU”) and its national equivalent, article IV.2 CEL), do not offer adequate protections to economic actors in a position of weakness in relation to another. The prohibition of abuse of economic dependence has been introduced further to a comparative law study based on France, Germany and other European Union Member States².

Conditions of the abuse of economic dependence

Three conditions must be fulfilled for a company or the Belgian Competition Authority (“BCA”) to establish an abuse of economic dependence: (i) proof of a position of economic dependence, (ii) proof of an abuse of this position, and (iii) as a result of this abuse, proof that competition on the Belgian market, or a substantial part thereof, is likely to be affected.

¹ Belgian Parliament, Law No. C-2019/11404 modifying the Code of Economic Law with regards to the abuses of economic dependence, abusive clauses and unfair conducts between undertakings, 4 April 2019.

² Belgian Parliament, Law Proposal modifying the Code of economic law, Document 1451/003, 12 February 2019, p. 4. Also based on Austria, Portugal, Cyprus, Spain, Romania, Hungary, Portugal and Italy.

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(i) The economic dependence

The new abuse prohibition does not require the establishment of an absolute dominant position on the market but, rather, a situation of economic dependence.

Unlike other jurisdictions, the Belgian legislator decided to introduce a legal definition of economic dependence. An economic dependence is defined as “a subordinate position of an undertaking in relation to one or more other undertakings, characterized 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”.

What is “reasonable” will likely be discussed at length in upcoming cases. This criteria will perhaps give some flexibility to characterize a situation of economic dependence compared to other jurisdictions, notably France, where the French Competition Authority has acknowledged that, in practice, conditions are strict and abuse of economic dependence cases rarely lead to infringement decisions.

According to the preparatory work of the law³, several factors may be considered in establishing an economic dependency, notably market power, the significant proportion of the other undertaking in the turnover, the technology and know-how held by the other undertaking, brand awareness, product rarity or consumer loyalty, access to essential resources or infrastructures owned by the other undertaking, the fear of significant economic disadvantages or retaliation, or the termination of business relationships.

(ii) The abusive exploitation of economic dependence

The mere position of economic dependence is not sufficient to be caught by the new provision, only the abusive exploitation of economic dependence may constitute an infringement. Article IV.2/I CEL provides a non-exhaustive list of potential abuses which closely mirrors the list provided by article 102 of the TFEU and Article IV.2 CEL, namely (a) refusal to deal, (b) the direct or indirect imposition of unreasonable purchase or resale prices or of other unreasonable trading conditions, (c) the limitation of production, opportunities or technical development, (d) applying dissimilar conditions to equivalent transactions and (e) tying or bundling.

³ Belgian Parliament, Law Proposal modifying the Code of economic law, Document 1451/003, 12 February 2019, p. 4.

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(iii) The effect on competition in the Belgian market or in a substantial part of it

The abuse of economic dependence will only be prohibited if the conduct has an actual or potential anticompetitive effect in the Belgian market or in a substantial part of it. As in case of abuse of dominance, it is expected that this requirement will be easily met.

Enforcement of the new provision

The BCA will enforce the provision on the abuse of economic dependence. The BCA can launch an investigation on its own initiative or following a complaint. In cases of infringement, the BCA can impose a fine on the undertaking(s) liable for an abuse of economic dependence of up to 2% of its or their annual turnover(s). If the company does not comply with the decision, the BCA may impose a penalty of up to 2% of the average daily turnover for each day of delay.

The Belgian courts will also play a role in the enforcement. In particular, companies can seek injunctive relief by lodging a complaint to the president of the relevant commercial tribunal which can prohibit the abusive conduct with a threat of a periodic penalty.

Since it is a relatively new addition to the Belgian competition law arsenal, it remains to be seen how the three conditions will be implemented in practice. However, the BCA and the Belgian courts may rely on French Competition Authority case law which has been implementing a similar prohibition for many years. The new prohibition will certainly spark new cases but the question remains whether the BCA will have sufficient resources to properly enforce it.

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