Kluwer Competition Law Blog

New rules prohibiting the abuse of economic dependence entered into force in Belgium on 22 August 2020 – What does this mean for the digital sector?

Marc Wiggers (Loyens & Loeff, Netherlands) and Thomas Verstraeten, Robin Struijlaart (Loyens & Loeff) · Thursday, September 10th, 2020

Introduction

The recently introduced prohibition of abuse of economic dependence (Article IV.2/1 Belgian Code of Economic Law) is a novelty in Belgian law, which may become of significant importance for the digital sector. The legal concept of abuse of economic dependence is aimed to target a situation where a company abuses the relative economic dependence of another company (e.g. a specific supplier or customer) where one is an indispensable economic partner for the other. Similar rules already exist in e.g. France and Germany.

The new rules come in addition to the existing prohibition of the abuse of a dominant position (Article IV.2 Belgian Code of Economic Law).

The legislator has thereby introduced a new enforcement tool for the toolkit of the Belgian Competition Authority, allowing it to take action even in cases where the conditions of the abuse of a dominant position (Article IV.2 Belgian Code of Economic Law) are not fulfilled, in particular when a dominant position cannot be established.

It remains to be seen whether the Belgian competition authority will make extensive use of this new weapon in its arsenal. Nevertheless, the new rules could be an interesting instrument to target abusive practices in the digital economy in situations of dependency (for example in cases where a party needs to rely on a digital infrastructure from a third party for which it cannot find a suitable alternative).

Coinciding with the introduction of rules banning the abuse of economic dependence, the Belgian legislator introduced new rules regulating contractual terms in B2B relations in the Belgian Code of Economic Law. The rules prohibiting unfair contractual terms will come into force later this year, on 1 December 2020. It is important to note that these new rules on unfair contractual terms apply on all B2B contracts (with the exception of contracts for financial services and public procurement agreements) irrespective of any dominant position or position of economic dependence.

Parties in the digital sector will need to take the rules on unfair clauses into account when deciding

on whether to subject their B2B contracts to Belgian law.

Importance for the digital sector

The preparatory parliamentary works of the new law expressly refer to commercial relations in the food distribution sector as a field where the new rules could be applied, typically if small suppliers would be placed in a situation of economic dependency versus very large distribution groups. Another situation where the abuse of economic dependency may typically come into play are franchise relations between large franchisor groups with very strong brands and relatively smaller franchisees.

However, it is conceivable that the new instrument may also come to play a significant role in the digital sector. In this respect, it is important to observe that in the digital sector many undertakings are increasingly becoming dependent on a small number of crucial providers of platforms, services and/or infrastructures. The Belgian Minister of Economic Affairs, in commenting on the new law, also expressly mentioned e-commerce platforms as a sector where the new rules may serve to protect business users of such platforms from abusive behaviour. He explicitly referred to "*the manipulation of the ranking of products by online platforms, the prohibition of online sales imposed by a producer on its distributors, [and] the excessively short delivery times imposed on companies that distribute their products through online platforms*," (free translation from Dutch) as examples of conduct in an e-commerce context against which the new rules could be invoked.

Apart from online platforms as mentioned by the Belgian Minister, cases in which the allegedly injured party may attempt to invoke this new instrument may also relate to situations in which an undertaking is – or at least contends to be – dependent on a digital infrastructure held by another undertaking and is barred access from that infrastructure or is dissatisfied about the conditions on it which it is granted access. Under the traditional prohibition of abuse of a dominant position, such cases will normally require invoking the essential facilities doctrine, which is only rarely invoked successfully.

For example, one could think of the following situations:

- Providers of apps being refused access or being granted access only on excessive or discriminatory conditions by the operators of the app store for a particular mobile operating system;
- Developers of software being refused access to the source code of operating systems on which their software is intended to run;
- Search engines biasing rankings to prioritise their own services or to discriminate randomly between third party suppliers of goods and/or services;
- Restaurants being imposed excessive charges by meal delivery services;
- Hotel booking sites insisting that hotels agree with most favoured nation clauses, barring them from offering more favourable conditions through competing sites or their own sales channels;
- Service providers relying on patented technologies of manufactures of mobile devices (e.g. near-field communication technologies) being refused access or being granted access only on excessive or discriminatory conditions to that technology;
- Suppliers of operating systems prioritising their own applications and discouraging the use of rival products.

The above list could be stretched much further. Similar situations have in fact been addressed – and partially with success from the enforcer's perspective – in actual cases in various jurisdictions under the existing competition rules (cartel prohibition and/or prohibition on the abuse of a dominant position). Nevertheless, the removal of the need to demonstrate the existence of a dominant position for a competition authority or a complainant could in certain cases amount to a significant lowering of the burden of evidence. This could make article IV.2/1 the new legal instrument of choice in many of such situations, should they arise in Belgium. However, because of the definition of economic dependence as a position of subordination of an 'undertaking', article IV.2/1 can play no role in cases where the allegedly harmed party is a private individual. In similar cases, a private individual would have to invoke either consumer protection laws, or the Belgian Competition Authority could tackle the abusive conduct by relying on the regular prohibition of abuse of a dominant position.

The new rules in further detail

Economic dependence and anticompetitive effect on the Belgian market

Three cumulative conditions have to be fulfilled for an infringement of Article IV.2/1 to be established: (i) the existence of a relationship of economic dependence between two companies; (ii) an abuse; and (iii) an effect on competition on the Belgian market or a substantial part of it.Economic dependence is defined in article I.6, 12bis of the Belgian Code of Economic Law as *"a subordinate position of an undertaking in relation to one or more other undertakings, 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"*.

The concept of economic dependence differs from the classic concept of dominance. A situation of economic dependency relates to a relative subordinate position of an economic operator vis-à-vis a particular business partner who enjoys in that specific relation market power, whereas a dominant position relates to absolute or market wide market power allowing a dominant business to behave independently of its buyers, suppliers and competitors. The rules of abuse of economic dependence exclusively relate to businesses (typically referred to as 'undertakings' within a competition law context), the new rules do not aim to regulate a subordinate position of a consumer vis-à-vis a market player.

The preparatory parliamentary works explain that economic dependence is a factual situation that may arise from various factors such as (i) market power, (ii) the significant share of the undertaking in the turnover of the allegedly dependent undertaking, (iii) the technology or know-how of the undertaking, (iv) brand reputation, product scarcity, the perishable nature of the product or consumer loyalty, (v) access to essential resources or facilities, (vi) the fear of serious economic harm, retaliation or the termination of business relationships, (vii) unusual commercial conditions (not imposed or granted to similar undertakings) and (viii) whether or not the economic dependence stems from the deliberate choice of the dependent undertaking or rather from a constrained choice.

Abusive Conduct

Article IV.2/1 Belgian Code of Economic Law provides that an abuse of economic dependency

may consist of (i) refusal to deal (refusal to buy or supply) or refusal to agree on other contractual conditions, (ii) directly or indirectly imposing unfair contract prices or other trading conditions, (iii) limitation of production, distribution or technical development detrimental to the users, (iv) applying dissimilar conditions to equivalent transactions thereby causing competitive harm for the other contract party, or (v) tying or bundling of contractual conditions or contractual obligations which do not typically relate to the nature of the agreements. It should be noted that this is a non-exhaustive list of types of abuses, other practices may fall within the scope of the prohibition.

The third condition of the new provision requires a (potential) anticompetitive effect on the Belgian market or a substantial part of it. It is difficult to predict how this condition will be applied. It may reintroduce some elements of market wide analysis akin to the assessment of market power for abuse of dominance, or it could be effectively applied as a *de minimis* threshold, ensuring that only cases with a certain relevance for the whole Belgian market have to be dealt with by the competition authority.

Enforcement

The rules can be enforced by the Belgian Competition Authority or courts. In enforcing the new rules, the Belgian Competition Authority can conduct an investigation under the standard procedures, by means of requests for information or by conducting dawn raids. For abuses of economic dependency, the Belgian Competition Authority can impose fines (up to a maximum of 2% of the consolidated Belgian turnover of the infringing undertaking), periodic penalty payments (up to a maximum of 2% of daily Belgian turnover) or preliminary measures.

The new rules can also be enforced by commercial courts declaring contracts or clauses null and void or by granting compensation for damages suffered as a result of the abusive practices.

Regulation of unfair clauses in B2B relations

Under article VI.91/3 of the Belgian Code of Economic law a contract clause will be considered unfair and hence prohibited in B2B relations, if it creates a significant imbalance between the rights and obligations of the parties. The new rules will apply to contracts **concluded, renewed or modified after** the date of entry into force on 1 December 2020. The party suffering from the imbalance can go to court to have the unfair clauses or contractual conditions annulled. The rules are applicable to all sectors and business, regardless of size, with the exception of **financial services** or **public procurement contracts.**

Together with the general rule, two lists of types of contractual terms are introduced. Article VI.91/4 of the Belgian Code of Economic Law provides for a “black list” of clauses which are considered unfair and prohibited without requiring further assessment. Article VI.91/5 provides for a “grey list” of clauses which are presumed (legal presumption) to be unfair, unless the contrary is demonstrated. Certain “grey clauses”; such as unilateral modification of certain contractual terms, are not uncommon in the digital B2B context. Parties in the digital sector are well advised to take the rules on unfair clauses into account when deciding on whether to subject their B2B contracts to Belgian law.

Conclusion and outlook

With the introduction of rules on the abuse of economic dependency, Belgium is emulating Germany and France which already have similar rules in place. Together with the new rules on unfair contractual clauses in B2B relations, this new concept may become a legal weapon for businesses to act against unfair contractual or abusive practices.

Considering many situations where business have become, to a certain extent, dependent on e.g. digital platforms, the new rules may be particularly relevant for the digital sector. The new rules significantly reduce the burden of evidence for complainants as they do not require the demonstration of a dominant position vis-à-vis all market players, but merely the demonstration of a situation of economic dependence. In view of this reduction of the burden of evidence, we would expect that the new rules may lead to an increase in the number of complaints and court cases brought against players in the digital sector in Belgium with alleged market power.

On the other hand, the president of the Belgian Competition Authority commented that there was no necessity for competition authorities to have new tools (such as the prohibition of the abuse of economic dependence) because, in his view, the existing tools are sufficient to tackle e-commerce or big-data cases, provided the investigation of the facts is done in depth and revelatory of how such markets really work.

Time will tell what the impact of the new rules on the tech sector will turn out to be…

Kluwer Competition Law

This entry was posted on Thursday, September 10th, 2020 at 1:00 pm and is filed under Source: OECD“>Abuse of dominance, Belgium, Digital, Enforcement
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.