THE ENFORCEMENT OF ABUSE OF ECONOMIC DEPENDENCE IN THE EU

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INTRODUCTION

Behaviors such as excessive pricing and refusal to supply are often well understood to create potential issues if the company is dominant. However, under the national laws of some EU member states, such conduct can be problematic without the company being dominant on the market, but rather when another party is in a position of economic dependence to the market participant in relation to its dealings with that party. This could include a customer, a supplier, a distributor or a franchisee and could be considered to introduce an additional, arguably relatively onerous, obligation on companies to treat counterparties fairly in these geographies.

This article explores key recent developments concerning the economic dependency laws, including new rules in Germany and Belgium, and increased enforcement efforts in France and Italy. These developments reflect a growing trend in Europe in favor of adopting new legislation and enforcing existing laws to more aggressively police economic dependency claims. They therefore add a new dimension governing business relations which all companies should pay attention to when dealing with their business partners, even if they would not be regarded as having market power.

GERMANY

The German provision sanctioning an abusive exploitation of relative market power towards economically dependent undertakings is § 20(1) and (2) of the Act against Restraints of Competition (ARC).

The legal situation in Germany has just changed significantly: Until mid-January 2021, undertakings with relative market power were only sanctioned under § 20(1) ARC if they directly or indirectly impeded a dependent small or medium-sized enterprise (SME) in an unfair manner or treated it differently from other enterprises without objective justification.

The 10th amendment to the ARC - ARC-Digitisation Act – which has just passed the Federal legislative bodies and entered into force on 19 January 2020, has significantly broadened the scope of review with regard to an abuse of relative market power and economic dependence:

(i) The causal link between (relative) market power and abusive conduct has been loosened and strict causality is no longer required. Rather, it will be sufficient that market power is reflected in the anticompetitive outcome of the

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abusive conduct (so-called causality of outcome, this was already introduced by the Federal Court of Justice's Facebook-decision of 23 June 2020, KVR 69/19, see our previous alert).

(ii) In addition, § 20(1) ARC is no longer limited to SMEs. Instead, dependence is qualified by a clear economic disequilibrium, which leads to even bigger companies` countervailing market power not being able to counterweigh the market power of the undertaking they are dependent on. For example, under the new rule claims for data access even by larger companies should be easier to enforce against so-called “Gatekeepers” (i.e. companies that can influence the activities of undertakings in markets in which they themselves are not active through network effects, data access, resources, and strategic positioning).

(iii) A new form of economic dependency is introduced: In two-sided markets, an undertaking providing essential intermediary services is also subject to the prohibition of abusive impediment and discrimination if there are no sufficient and reasonable possibilities to substitute the intermediary service.

(iv) Finally, access to competition-relevant data is included as a criterion for relative market power in a new §20(1a) ARC (data access claim). If access to such data is denied, a resulting dependency on data can lead to undue impediment even if commercial utilization of this data has not yet started.

These rules – while new in legislation – actually previously have been used and been of particular significance in the German Federal Cartel Office's (FCO) abuse investigations. In the last two years alone, important decisions have been based on the abuse of economic dependency in the automotive sector, on e-commerce and online marketplaces, on selective distribution systems and even for sports associations. Of particular interest was the decision of the FCO that a narrow most-favored nation clause used by Booking.com, in the particular case of a two-sided network platform, violates competition rules and constitutes an unfair impediment to dependent SMEs. In a court case, this decision was initially overturned by the Regional Higher Court of Düsseldorf (see our pervious Alert). The final outcome remains unclear currently, though, as the Federal Court of Justice (the highest German antitrust court) has upheld a complaint of non-admission by the FCO and paved the way for final judicial review of the case.

At the same time the FCO substantially broadened its powers to review abusive behavior, the new law has significantly reduced the probability of a merger control filing in Germany by raising the turnover thresholds to EUR 50 and 17.5 million (from previously EUR 25 and 5 million) – thereby re-allocating resources at the FCO and reducing the regulatory burden on SMEs.

BELGIUM

Belgium recently adopted legal provisions prohibiting the abuse of economic dependence. In particular, a law of 4 April 2019, entered into force on 22 August 2020, introduced Article IV.2/1 in the Belgian Code of Economic Law (CEL).

Article IV.2/1 CEL sets up a threefold cumulative test similar to the one of Art. L 420-2 FCC: (i) a situation of economic dependence; (ii) an abuse of that situation; and (iii) an actual or potential impact on competition in the Belgian market. The new rules can be enforced by both the Belgian Competition Authority (BCA) and the civil courts. In that regard, the BCA can impose fines up to a maximum of two percent of the consolidated Belgian turnover of the infringing company.

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On 28 October 2020, the President of the Ghent Commercial Court applied the provision for the first time in a judgment regarding a cease-and-desist order against a supplier of children's clothing. The court's president found that the supplier's refusal to supply its winter clothing collection to a retailer constituted an abuse of economic dependence. It is worth noting that the new legal provisions list “the refusal of a sale, a purchase, or other transaction terms” as an example of abuse. While the court's president ignored the third condition of the legal test, it found that the retailer was in a position of economic dependence (the retailer's supplies depended completely on the supplier) and that the supplier abused such a position.

FRANCE

An abuse of economic dependence is an anticompetitive practice prohibited under French law (Art. L 420-2 of the French Commercial Code (FCC)). The German legal basis served as a template for Art. L 420-2, so that the legal situation in Germany and France is very similar. The prohibition aims to allow companies to be sanctioned, even when they do not hold a dominant position (relative market power), if they use the dependence in which their customers or suppliers are placed to enforce anticompetitive behavior.

An abuse of economic dependence is established where three cumulative criteria are met:

(i) The existence of a situation of economic dependence;

(ii) An abusive exploitation of this situation; and

(iii) An injury, actual or potential, on the functioning or structure of competition in the market.

The types of conduct caught are generally in line with those flagged as an abuse of a dominant position, e.g., refusal to supply, tying and bundling, or discrimination.
In practice, the three cumulative criteria are rarely met, often because the state of dependence or the damage to the market could not be established. Indeed, it is rare that companies carry out most of their activity with one specific partner and that they are deprived of any alternative when the relationship with this partner breaks down.

Having said that, the French Competition Authority (FCA) has already used Art. L 420-2 FCC, notably very recently against Apple Inc. (Apple).

In March 2020, the FCA fined Apple €1.1 billion for an abuse of the economic dependence of its premium resellers (among other things). The premium resellers were economically dependent on Apple, as they were contractually required to sell almost exclusively Apple products and their customers were particularly loyal to Apple. This meant that it would not have been viable for the premium resellers to stop selling Apple products. Apple abused this economic dependence by discriminating against premium resellers in terms of supply in comparison to Apple-owned stores and bigger retailers (e.g., supermarkets). In addition, there was uncertainty with respect to the volume of supplies and the terms of the rebates granted by Apple. The profitability of the premium resellers' business depended on those rebates and the ability of the premium resellers to satisfy the orders/demands of their customers.

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ITALY

Article 9 of the Italian Law n.192 of 18 June 1998 (so-called Law on Subcontracting in Production Activities), prohibits the abuse by one or more companies of the economic dependence in which a customer or supplier company may be found. The criteria for determining economic dependence are the following:

(i) The possibility for the company to impose an “excessive imbalance of rights and obligations in the companies' commercial relationships”; and

(ii) The “effective possibility” for the alleged abused company in “finding satisfactory alternatives on the market.”

The Italian law remedies provided in the context of such an abuse are the nullity of the agreement concerned, injunctions, and compensation for damages.

If the Italian Competition Authority (AGCM) deems an abuse of economic dependence relevant for the protection of competition in a relevant market, it can proceed with warnings and sanctions against the company or companies committing the alleged abuse, after having enforced its investigative powers. As with traditional abuses of dominance, fines can be up to 10 percent of the turnover of the company concerned as well as penalty payments in the case of non-compliance with the AGCM's decision.

The AGCM recently opened an investigation against Benetton Group S.r.l. (Benetton) for an alleged abuse of economic dependence in the clothing market. In particular, the AGCM focused its attention on two franchise agreements entered into with an independent retailer of Benetton branded products. The AGCM conducted unannounced dawn raids at Benetton's premises, in collaboration with the Italian Tax Police.

According to the AGCM, the alleged conduct relates to the discretionary use by Benetton of some contractual clauses that allow Benetton to influence the retailer's strategic choices, such as defining sales proposals and purchase orders, not just in terms of timing, but also of quantities. Benetton may have significantly affected the economic activity of the franchisee concerned, by preventing the latter from independently managing its own commercial activity, thus creating an excessive imbalance of rights between the companies.

CONCLUSION

Accordingly, dealings with counterparties must be considered not only from the perspective of EU and UK competition laws on anti-competitive agreements and abuse of dominance but also from the perspective of any relevant national laws on economic dependence.

K&L Gates' Brand Equity team includes experts across French, German, Italian, Belgian, and UK laws and is therefore able to provide a one-stop shop for all competition issues arising from companies' conduct.

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