**Abuse of Economic Dependence under Belgian law: Origins, Application and Critical Reflections**

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# Introduction

The emergence of the prohibition on abuse of economic dependence under Belgian law represents a significant evolution in the field of competition and business-to-business (B2B) relations. Historically, the focus in both Belgian and European competition law was placed squarely on abusive conduct by undertakings holding a dominant position within a relevant market. However, the novel Belgian approach, drawing on developments in France, Germany and other legal orders, responds to perceived gaps in the law: instances where a business is unable to act independently due to the relative bargaining position of a trading partner, even in the absence of classical market dominance.

This chapter offers an in-depth exploration of the prohibition as codified in Article IV.2/1 of the Belgian Code of Economic Law (BCEL), tracking its legislative origins, analytic framework, enforcement mechanisms, and practical application in Belgian courts. Special attention is given to issues of legal certainty and overlap with other legal provisions. The analysis draws extensively on academic and practical commentary, as well as the latest case law.

# Legislative Framework and Background

For decades, Belgian law addressed abusive conduct by dominant undertakings primarily through the prohibition of abuse of dominance – in line with Article 102 Treaty on the Functioning of the European Union (TFEU), and translated domestically in Article IV.2 BCEL. However, this framework left certain B2B practices largely unaddressed, in particular situations where one party could exert disproportionate influence over another despite not holding a classical market-dominant position.[[2]](#footnote-2) These concerns were especially acute in distribution, franchising, and asymmetric supply chain relationships.[[3]](#footnote-3)

Inspired by similar debates in neighbouring countries France and Germany, but also in Cyprus, Greece, Hungary, Italy, Austria, Portugal, Romania, Slovakia and Spain, Belgium enacted the B2B Law of 4 April 2019,[[4]](#footnote-4) introducing the concept of “economic dependence” into Belgian competition law. The relevant provision, which entered into force on 22 August 2020, is enshrined in Article IV.2/1 BCEL. The legislator’s stated goal was to rebalance commercial relationships where one party is, in practical terms, “locked in”, lacking sufficient viable alternatives and thus susceptible to unjustified or exploitative conduct by a counterparty.

The introduction of the prohibition on abuse of economic dependence was a long-term project. The first legislative initiative seeking to introduce such prohibition dates from January 2015.[[5]](#footnote-5) It concerned a legislative proposal to amend the Belgian Code of Economic Law “with regard to the abuse of a significant position of power”. According to the drafters of the bill a “significant position of power” existed if there was a relationship of economic dependency between buyer and seller. This proposal mainly targeted long-term vertical relationships – i.e., relationships between market players at different levels in the chain and not so much relationships between competitors – and cited the relationship between farmers and supermarket chains as an example. The primary objective was to preserve free competition, serving the broader economic interest. As a logical outcome, it was proposed to incorporate an open standard within the competition law section of the Belgian Code of Economic Law. This proposal, strongly inspired by the German example, attracted notable support.

In January 2018, a parallel legislative proposal was submitted “to amend the Belgian Code of Economic Law to better protect SMEs and small producers in commercial relationships, as well as to more vigorously combat certain unfair practices and abuses of economic dependence”.[[6]](#footnote-6) Unlike in the 2015 proposal, the choice was not made for an open standard, but rather for a series of concrete prohibitions. In addition, the proposers argued for embedding the prohibition in market practices law, more specifically as an amendment to the existing Article VI.104 BCEL – i.e., the general prohibition on unfair market practices –, instead of in competition law. This was due in part to the shifting focus from safeguarding free competition to protecting individual undertakings. The petitioners were mainly following the example of the French legislator.

In 2018, it was finally decided to further amend the bill from January 2015.[[7]](#footnote-7) In no time, the amended bill was unanimously approved in the Belgian Chamber of Representatives. Some authors are of the opinion that the law was hastily established, resulting in a great deal of ambiguity and uncertainty.[[8]](#footnote-8)

# Criteria for the Definition of Abuse of Economic Dependence

# Legal Definition

Article IV.2/1 BCEL defines abuse of economic dependence as follows:

“*It is prohibited for any undertaking to abuse the position of economic dependence on which one or more other undertakings depend, in a manner that may affect competition in the Belgian market or in a substantial part thereof.*

*Abuse may be involved in:*

*1° the refusal of a sale, purchase or other transaction conditions;*

*2° the direct or indirect imposition of unfair purchase or selling prices or other unfair contractual conditions;*

*3° the limiting of production, sales or technical development to the detriment of consumers;*

*4° applying dissimilar conditions to economic partners for equivalent transactions, thereby placing them at a competitive disadvantage;*

*5° the fact that the conclusion of agreements is made dependent on the acceptance by the economic partners of additional services, which, according to their nature or according to commercial practice, are not related to the subject of these agreements*.”

For the application of the prohibition in Article IV.2/1 BCEL, three constitutive conditions must be met cumulatively: (i) there must be a position of economic dependence of an undertaking, (ii) the dominating undertaking must abuse this position and (iii) this abuse must potentially affect competition in the Belgian market concerned or a substantial part thereof.[[9]](#footnote-9) Some of these elements are defined in the law, others are clarified in the preparatory works and other criteria have been further elaborated in case law. These elements will be discussed in what follows.

# Position of Economic Dependency

The first condition of Article IV.2/1 BCEL is that the undertaking at stake must find itself in a position of economic dependence. Article I.6, 12°bis BCEL defines a position of economic dependence as: “A position of subordination of an undertaking[[10]](#footnote-10) with respect to one or more other undertakings characterised by the absence of a reasonably equivalent alternative, available within a reasonable period of time, and under reasonable conditions and costs, which allow this or each of these undertakings to impose performances or conditions that cannot be obtained under normal market conditions”.

The definition of a position of economic dependence thus requires that two criteria be met: (i) the lack of a reasonably equivalent alternative, taking into account the term, conditions and costs, and (ii) the possibility for the dominating undertaking to impose performances or conditions that cannot be obtained under normal market conditions.[[11]](#footnote-11) These two requirements are intrinsically connected, as the absence of reasonable alternatives should enable the dominating undertaking to exert such influence.[[12]](#footnote-12)

# Absence of a Reasonable Equivalent Alternative

The absence of a reasonable equivalent alternative does not require that the dependent undertaking has no alternative whatsoever. The absence of a reasonably equivalent alternative is sufficient. Whether or not this condition is met will depend largely on the substitutability of the alternative, which in turn depends on the specific circumstances of the case. Notably, the alternative does not necessarily have to be within the market in question. Case law and legal doctrine clarify that the existence of an alternative abroad,[[13]](#footnote-13) or in another market than the relevant market[[14]](#footnote-14) does not exclude the possibility that a position of economic dependence exists.

Furthermore, the time required to find an alternative, the conditions attached to this alternative, and the costs involved must be considered. Consequently, even if a reasonably equivalent alternative is available, there may still be economic dependence if the alternative is not available within a reasonable period of time and/or if the conditions and costs associated with the alternative are unreasonable.[[15]](#footnote-15) If a reasonably equivalent alternative is available within a reasonable period of time and at reasonable costs and conditions, there is no economic dependence.[[16]](#footnote-16) The determination requires a concrete analysis of the relevant market in which the undertakings operate, the time required to switch to an alternative commercial relationship, and the costs involved.[[17]](#footnote-17)

# … Enabling the Dominating Undertaking to Impose Certain Performances or Conditions

Due to the lack of a reasonably equivalent alternative within a reasonable time frame and at reasonable terms and costs for the dependent undertaking, the dominating undertaking must be able to impose performances or conditions that cannot be obtained under normal market conditions. A comparison must therefore be drawn with what is known as the “zero scenario”.[[18]](#footnote-18)

This requirement is closely related to the abuse requirement, as further elaborated below (Section 3.3.1). Given that the causal link between the position of dependency and the behaviour of the dominant undertaking is also interwoven in the abuse requirement, the question arises whether it was necessary to include this second condition in the definition of the dependency requirement.

# Non-Limitative List of Indicative Factors

The preparatory works for the prohibition also list a number of factors on the basis of which the existence of a position of economic dependence can be concluded. These factors include: “The relative market power of the other undertaking; a significant share of the other undertaking in its turnover; the technology or know-how possessed by the other undertaking; the high profile of a brand, scarcity of the product, the perishable nature of the product or even loyal purchasing behaviour of consumers; the undertaking’s access to resources or essential infrastructure; the fear of serious economic harm, of reprisals or of termination of the contractual relationship; the regular granting to an undertaking of special conditions, such as discounts, that are not granted to other undertakings in comparable cases; the undertaking’s deliberate choice or its obligatory choice to put itself in a position of economic dependence”.[[19]](#footnote-19) The legislator did not include these factors in the law itself in order to safeguard the open standard nature of Article IV.2/1 BCEL.

These factors are purely illustrative.[[20]](#footnote-20) While they may help to determine whether an undertaking is in a position of economic dependence,[[21]](#footnote-21) as shown below (Section 3.2.4), courts retain considerable discretionary power to also take other factors into account.

# Putting into Practice

The presence or absence of a reasonably equivalent alternative often proves to be a decisive factor in case law when deciding whether or not a position of economic dependence exists.[[22]](#footnote-22) To determine to which extent a reasonable alternative is available and to which extent the undertaking finds itself in a dependency position courts tend to take into account a wide ray of elements:

* In the retail clothing sector, the collection for a particular season must be ordered well in advance. As such, a retailer of children’s clothing of a certain brand confronted with a refusal of delivery by its sole supplier of clothing of that brand only a few weeks before the start of the season, is not in a position to find a reasonable alternative, within a reasonable period of time and at reasonable costs and conditions. This retailer therefore finds itself in a position of economic dependence.[[23]](#footnote-23)
* A retailer of bathroom supplies is considered not to find itself in a position of economic dependence if its supplier of a certain brand of bathroom supplies refuses to continue to deliver, given the fact that the retailer also managed to purchase bathroom supplies of the same brand from other suppliers in the past and given the fact that also bathroom supplies from other brands – although less popular – were readily available.[[24]](#footnote-24)
* A retailer of weapons is considered to find itself in a position of economic dependency vis-à-vis its sole suppliers of two specific brands of weapons, given the fact that 90% of its revenues depends on the sale of the weapons of those two specific brands. The court ruled that discontinuation of supply would result in a serious loss of turnover but also threatens to render the entire business worthless.[[25]](#footnote-25)
* A distributor of automatic defibrillators is not considered to be in a position of economic dependence when the manufacturer of these products imposes price increases, given that these price increases were objectively justified and would not restrict competition, and there were seven other manufacturers of these defibrillators on the market from whom the distributor could purchase the defibrillators (and therefore has a reasonably equivalent alternative).[[26]](#footnote-26)
* A building materials trader is not in a position of economic dependence when its supplier of floor elements refuses to continue the supply, given that the building materials trader has been sourcing its floor elements from other suppliers for some time and therefore has a reasonably equivalent alternative at its disposal.[[27]](#footnote-27)
* A Belgian telehealth provider is not in a position of economic dependence vis-à-vis its supplier of telehealth technology and patented communication platforms used for the Belgian telehealth provider’s services, given that there is an existing alternative on the French market and several alternatives on the Belgian market, with at least one being a licensee of the aforementioned patent.[[28]](#footnote-28)
* A seller of shoes and accessories from a wide range of brands (including Dr. Martens) is not in a position of economic dependence when the supplier of Dr. Martens announces that it is terminating the commercial relationship and cancels outstanding orders, given that there are other, diverse brands on the market that offer lace-up boots/shoes and the seller therefore has available alternatives.[[29]](#footnote-29)

Some important questions with regards to the position of economic dependency remain unanswered in the current jurisprudence. As a result, undertakings may encounter uncertainty around the practical application of the test, and future rulings will likely clarify these outstanding issues as new disputes arise. For example:

* It is unclear whether cessation or abandonment of the activity should be considered a valid alternative. However, particularly in the context of a refusal to supply or contract, Belgian courts generally hold that if such a refusal would necessarily lead to the discontinuation of the dependent undertaking’s business – because no alternative is available – a position of economic dependence will generally be found.[[30]](#footnote-30)
* The legal test under Article IV.2/1 BCEL remains whether an undertaking can impose unfair conditions due to the economic dependence of its counterparty, irrespective of whether the market is single- or multi-sided. So far, there is no case law suggesting a different approach for two-sided or multi-sided markets. However, future decisions of the Belgian Competition Authority and courts are likely to reflect the reality that such markets involve interconnected user groups and network effects. In these settings, even modest market shares may be sufficient to establish economic dependence, particularly given the pivotal function platforms and intermediaries serve in connecting distinct sets of users and facilitating transactions between them.

# Abuse of the Position of Economic Dependence

# Absence of a Legal Definition

The second condition of Article IV.2/1 BCEL is that there must be an abuse by the dominating undertaking of the position of economic dependency of its counterpart. The legislation itself does not provide a definition of the abuse requirement.

An indication of what can be understood by abuse is however given in the preparatory works: “any behaviour that an undertaking can adopt thanks to the circumstance that it keeps its counterpart in a position of economic dependence”.[[31]](#footnote-31) In order to understand this description, it is necessary to clarify exactly what is meant by “... keeping its counterpart in a position of economic dependence”. To do this, one must refer back to the requirement of a position of economic dependency: a position of economic dependency exists if an undertaking that has no reasonable alternatives can be forced to provide services or accept conditions that cannot be obtained under normal market conditions. Abuse therefore only occurs when the dominating undertaking effectively imposes on the dependent undertaking performances or conditions that it would not be able to obtain under normal market conditions, and moreover only insofar as the third condition (potential harm to competition in the Belgian market or a part thereof) is also fulfilled.[[32]](#footnote-32)

As mentioned above (Sections 3.2.2 and 3.3.1), the causality between the lack of alternatives and the behaviour of the dominant undertaking is both intertwined with the dependency requirement and is implicit in the abuse requirement. Perhaps it would have been more straightforward if the legislator had simply defined “economic dependence” as “the position of subordination of an undertaking in relation to one or more other undertakings, characterised by the absence of a reasonably equivalent alternative available within a reasonable time and under reasonable conditions and costs” and “abuse” as “any conduct that an undertaking may engage due to the fact that its partner does not have a reasonable equivalent alternative and which it would not have been able to engage in under normal market conditions”.

# Non-Exhaustive List of Situations

Article IV.2/1 BCEL itself provides a non-exhaustive list of situations in which there may be abuse of the position of economic dependence:

“1° the refusal of a sale, purchase or other transaction conditions;

2° the direct or indirect imposition of purchase or selling prices or other unfair contractual conditions;

3° the limiting of production, sales or technical development to the detriment of consumers;

4° applying dissimilar conditions to economic partners for equivalent transactions, thereby placing them at a competitive disadvantage;

5° the fact that the conclusion of agreements is made dependent on the acceptance by the economic partners of additional services, which, according to their nature or according to commercial practice, are not related to the subject of these agreements.”

These situations may constitute abuse. However, this is not inevitably so, for example where there is an objective justification for the behaviour (Section 3.3.3).[[33]](#footnote-33)

It is important to note that these situations stem from the abuse framework established under Article IV.2 BCEL, which governs absolute dominance violations. Article IV.2/1 introduces an innovation by explicitly including refusal to contract as a recognised form of abuse. Whilst case law had already demonstrated that refusal to contract could constitute abuse of dominance,[[34]](#footnote-34) this express codification clarifies its application specifically in the economic dependence context, thereby providing greater legal certainty for conduct that may be scrutinised under Belgian competition law.

# Particularity of Refusal to Contract

While companies generally enjoy freedom of contract – including the right to choose their trading partners or refuse to enter into contracts – this freedom is not absolute.[[35]](#footnote-35) Refusals to contract, typically manifesting as a refusal to sell or supply, are not inherently unlawful, but can become problematic if exercised abusively.[[36]](#footnote-36) Traditionally, challenges to such refusals were brought under the prohibitions on abuse of dominance or abuse of rights, but these avenues have not always provided effective remedies.[[37]](#footnote-37) The introduction of Article IV.2/1 BCEL establishes, for the first time, an explicit legal basis on which refusal to enter into a contract can be sanctioned. This offers companies an additional argument for challenging a refusal to enter into a contract.

Recent case law under Article IV.2/1 BCEL tends to focus on whether refusals to contract amount to abuse, with courts generally examining the motivations and circumstances behind the refusal. Objective justifications and legitimate motives frequently preclude a finding of abuse, while sudden or arbitrary refusals without valid cause are more likely to be sanctioned.[[38]](#footnote-38)

# A Relative Position of Dominance Suffices

For the purpose of Article IV.2/1 BCEL, the undertaking committing the abuse does not need to occupy an absolute or objectively dominant position on the market.[[39]](#footnote-39) What matters is relative market power – where one undertaking’s specific relationship gives it leverage over its economic partner, rendering the latter vulnerable. The focus is on dominance within the relationship, not dominance across the market as a whole. This relative standard lowers the burden of proof.

There is, however, a significant drawback to this approach. For undertakings, it is often challenging to determine in advance whether they possess relative dominance in relation to a particular counterparty. This uncertainty is less pronounced under the prohibition of abuse of absolute dominance,[[40]](#footnote-40) where market power can generally be assessed more objectively. In that context, it is usually sufficient to analyse the company’s own standing within the market. In contrast, under Article IV.2/1 BCEL, the assessment hinges on the dynamics of each specific business-to-business relationship, rather than purely on the undertaking’s overall position in the market.

Case law shows that to determine the relative market power of the dominating undertaking several factor are taken into account, amongst others the share of the dominating undertaking in the turnover of the dependent undertaking, the technology or know-how possessed by the dominating undertaking, or products and brands at stake. As an example, the sole supplier of children’s clothing of a certain brand, refusing delivery of seasonal clothing to a retailer only a few weeks before the start of the season is considered to abuse its relative market power, given the fact that the retailer’s turnover derives exclusively from the sale of this particular brand children’s clothing and given the fact that it is unfeasible in the fashion sector to find an alternative for seasonal clothing only a few weeks before the start of that season.[[41]](#footnote-41)

# Potential Effect on Competition on the Belgian Market

Lastly, Article IV.2/1 BCEL requires that abuse has a potential effect on competition within the Belgian market, but does not define what constitutes such an effect. The preparatory works clarify that it is sufficient if the abuse can “based on legal and factual elements and with a sufficient degree of probability, directly or indirectly, actually or potentially, affect competition”.  In practice, this means that an actual impairment does not need to be proven, but a realistic risk of impairment must be established.[[42]](#footnote-42) A purely hypothetical possibility of a restriction of competition is insufficient. Importantly, the provision sets a low threshold, as even the slightest potential distortion of competition suffices, unlike the stricter requirement of a significant distortion under classical abuse of dominance.[[43]](#footnote-43)

Determining whether there is a potential impairment of Belgian competition requires identifying the relevant market. The Belgian legislator has intended the interpretation of this notion to align closely with the European competition law approach. Case law of the European Court of Justice and the European Commission’s notices[[44]](#footnote-44) are therefore a prominent source of inspiration for determining the relevant market. According to European competition law, the relevant market is “the set of substitutable products available in a given geographical area with sufficiently homogeneous conditions of competition to allow for an assessment of the economic situation of the undertakings concerned”.[[45]](#footnote-45) It is generally accepted that the relevant market in which the infringement took place consists of two dimensions: on the one hand, the relevant product market (goods or services) and, on the other hand, the relevant geographic market. The relevant geographic market can be defined as “the area in Belgium where the undertakings concerned are involved in the supply of and demand for relevant products or services, where the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring geographic areas because, in particular, the conditions of competition are appreciably different there”.[[46]](#footnote-46) The relevant product market can be defined as “the market comprising all products and/or services which, by virtue of their characteristics, their prices, and their intended use, are regarded by consumers as interchangeable or substitutable”.[[47]](#footnote-47)

The requirement of Article IV.2/1 BCEL of a potential restriction of competition already includes a geographical criterion: the potential restrictions must occur on the Belgian market concerned. Case law indicates that the assessment should primarily consider the market on which the position of economic dependence exists.[[48]](#footnote-48) Some commentators argue that only the market directly concerned – excluding derivative or related markets – should be taken into account when assessing the competitive impact, a view that appears to be gaining traction in legal doctrine.[[49]](#footnote-49) However, case law on this point remains limited and does not yet clearly resolve the question. If this restrictive approach becomes established, the practical reach of Article IV.2/1 BCEL could be significantly limited, narrowing its scope and impact in regulating abusive practices.

# General, Sector-wide, Competition Law Concept

Article IV.2/1 BCEL is a general, non-sector-specific provision. As outlined above (Section 3.3.4), the existence of a relative dominant position is determined on the basis of the relationship between the dominating undertaking and the dependent undertaking. It does not depend solely on the dominating undertaking’s market position, its size – as smaller niche players may also abuse their (relative) dominant position[[50]](#footnote-50) –, the sector it operates in – although financial institutions are excluded from the scope of application[[51]](#footnote-51) –, or the type of products involved. Nevertheless, these factors may be considered by courts as part of their overall assessment (Section 3.3.4).

The prohibition of abuse of economic dependence was ultimately incorporated into Book IV, “Protection of Competition”, of the Belgian Code of Economic Law, placing it alongside the prohibitions on anti-competitive agreements and abuse of dominance.[[52]](#footnote-52) Case law shows that undertakings do rely on the prohibition but mostly seems to target vertical business relationships and the protection of individual small businesses, rather than the protection of market forces. The actual value for competition law can thus be questioned.

Embedding this prohibition within competition law has indeed generated some debate, as some argue the prohibition better suited into market practices law, which focuses on ensuring fair commercial relations between individual economic actors rather than on market structure as a whole. Proponents of the market practices law approach argue that embedding the prohibition there would have made it easier for economically dependent undertakings to seek protection, as demonstrating a potential anti-competitive effect would not be required.[[53]](#footnote-53) This would have addressed the concerns – already raised in French and German case law and doctrine relating to the local provisions on abuse of economic dependency – about the often significant burden of proof under competition law, where complainants must typically show effects on market competition in addition to their own harm.

Ultimately, the main issue is not the choice of legal framework itself, but how the prohibition’s scope and requirements – particularly regarding proof of potential anti-competitive effects – are interpreted and applied in practice. This ongoing discussion continues to shape how abuse of economic dependence is regulated in Belgium.

# Enforcement

The prohibition on the abuse of economic dependence is subject to both public and private enforcement. The initiation of one procedure does not exclude the possibility of bringing the other.

# Public Enforcement by the Belgian Competition Authority

The Belgian Competition Authority (BCA) is responsible for monitoring and enforcing the prohibition of abuse of economic dependence under Article IV.2/1 BCEL.

The BCA may impose fines of up to 2% of the turnover of the dominating undertaking involved and penalty payments of up to 2% of the average daily turnover of the dominating undertaking per day of delay.[[54]](#footnote-54) This deviates from the regular sanctioning regime for restrictive competition practices, where the maximum fine is higher.[[55]](#footnote-55)

The Auditor-General of the BCA may also invite the dominating undertaking concerned to enter into settlement discussions.[[56]](#footnote-56) If this leads to a settlement, the undertaking must admit liability and accept the proposed fine.[[57]](#footnote-57) A reduction of 10% may be granted by the hearing officer.[[58]](#footnote-58)

The BCA procedure offers certain advantages over court proceedings. Notably, it strives to maintain the anonymity of parties, particularly benefitting complainants concerned about retaliation.[[59]](#footnote-59) The BCA can issue provisional measures swiftly, generally within two months, and its proceedings are free of charge.[[60]](#footnote-60)

Since this prohibition came into force, the BCA has not adopted any decisions. In 2023, it initiated a single investigation that did not result in further action, and to date, it has issued just one amicus curiae opinion[[61]](#footnote-61). Despite listing abuse of economic dependence as a priority area for three years, the BCA’s administrative activity has been limited. This likely reflects the BCA’s practice of intervening only in matters with a demonstrable impact, whereas Article IV.2/1 BCEL may apply in cases involving minor potential distortions of competition. Nevertheless, it is reported that the BCA has drawn on complaints received to develop practical insights and an evolving analytical framework.[[62]](#footnote-62)

# Private Enforcement by Belgian Courts

The dependent undertaking may bring actions before the enterprise court for a variety of remedies. Contrary to public law enforcement, the anonymity of the dependent undertaking is not guaranteed in the context of private enforcement. Practice however shows that undertakings turn more often towards civil courts for any case of abuse of economic dependency.

Sanctions available to civil courts differ from those of the BCA and include the following:

* Courts can put a stop to the abuse by ordering injunctions, with potential publication of the judgment and accompanying penalty payments to ensure compliance.[[63]](#footnote-63) The publication of the judgment and the threat of penalty payments serve not only to deter further violations, but also to inform the market and other stakeholders of the unlawful conduct. This immediate judicial intervention is often preferred because it can rapidly halt ongoing harm and prevent its escalation, providing timely protection to the affected business. Indeed, case law demonstrates that injunctions are frequently among the first remedies sought by companies that find themselves victims of abuse of economic dependence.[[64]](#footnote-64)
* Courts may annul (entirely or partly) contracts concluded as a result of abuse of economic dependence, with restitution of performances already rendered, if the abuse influenced the agreement’s conclusion or validity.[[65]](#footnote-65)
* Injured parties may claim full compensation for damage suffered, either individually or as part of collective redress, provided fault, damage, and causation are established.[[66]](#footnote-66) If the BCA has first established an infringement of Article IV.2/1 BCEL, this creates a presumption for civil proceedings. Nevertheless, fault will still need to be demonstrated, which generally requires showing that the infringement of Article IV.2/1 BCEL was committed knowingly and intentionally.
* Since 2018, it has been possible for SMEs to participate in collective actions in Belgium. SMEs cannot themselves initiate a collective redress procedure; this must be done through a group representative, as set out in Book XVII BCEL.[[67]](#footnote-67) The collective redress procedure appears particularly useful where individual damages are relatively minor compared to the costs associated with separate legal actions by each injured party.[[68]](#footnote-68) The introduction of these new rules for collective actions in competition law aims to promote private enforcement of competition law and improve access to justice.[[69]](#footnote-69) However, to date, no collective action has been initiated by SMEs for breaches of Article IV.2/1 BCEL, so it is too early to assess the effectiveness of this mechanism.
* Courts can also modify unfair commercial relationships. For example, where unfair contractual terms are imposed, courts may declare them void or revise them, ensuring the contract remains otherwise valid.[[70]](#footnote-70)

Although there is somewhat more activity in private enforcement than public, it remains limited. Since the prohibition’s adoption, courts have issued only handful of judgements: one by the Supreme Court clarifying that abuse of economic dependence does not require the existence of a contractual relationship[[71]](#footnote-71), one by the court of appeal in Brussels[[72]](#footnote-72), one by the court of Appeal in Antwerp[[73]](#footnote-73), one by the court of appeal in Ghent[[74]](#footnote-74) and six from enterprise courts[[75]](#footnote-75) all rejecting abuse, and four from enterprise courts finding abuse established[[76]](#footnote-76).

# Critical Assessment

The implementation of the prohibition on abuse of economic dependence in Belgian law has highlighted a number of significant challenges and unresolved questions regarding its practical operation. Despite the legislator’s intention to address gaps left by traditional competition rules, judicial decisions reveal persistent legal uncertainty and divergent approaches (Section 6.1). The overlap between the abuse of economic dependence and other legal concepts further complicates the framework and occasionally leads to inconsistent outcomes (Section 6.2). These issues underscore the need for further clarification, both in legal doctrine and in the jurisprudence, to ensure the intended protection of economically dependent undertakings and to enhance legal certainty within commercial practice.

# Divergencies in Case Law due to Legal Uncertainty

# Limitations and Uncertainties in Defining Economic Dependence and Establishing the Causal Link with Abusive Conduct

As discussed (Sections 3.2.2 and 3.3.1), a status of economic dependency necessitates the absence of reasonable alternatives, as well as a clear causal link between this absence and the potential for the dominating undertaking to impose unfair conditions.

In practice, courts frequently evaluate whether reasonable alternatives exist without sufficiently scrutinising whether such alternatives are truly accessible – that is, whether they are available at acceptable costs, on reasonable terms, and within a viable timeframe. Crucially, courts sometimes presume the absence of reasonable alternatives without adequately investigating the origins of the dependence, particularly in situations where the undertaking’s own decisions have resulted in comprehensive reliance on a supplier. This raises the issue of whether the dominating undertaking should be deemed liable in such circumstances.

Furthermore, judicial analysis rarely extends to examining whether the lack of alternatives specifically empowers the dominating undertaking to pursue abusive conduct. As indicated in Section 3.3.1, a better definition of the concepts “economic dependence” and “abuse” could have mitigated these problems.

Additionally, in the majority of cases, courts seldom refer to the list of indicative factors articulated in the preparatory works. When these factors are considered, they are often misinterpreted or treated as substitutes for the formal legal criteria, rather than as aspects to be evaluated in conjunction with them. As a result, there is considerable legal uncertainty: judicial reasoning regarding the establishment of economic dependence frequently lacks transparency and clarity.

Case law has also grappled with whether a contractual relationship between undertakings is necessary to establish a position of economic dependence. In its judgement of 20 October 2021, the Court of Appeal of Antwerp held that a position of economic dependence cannot arise where there is no long-term contractual relationship, reasoning that the absence of such a relationship indicates the availability of alternatives and, therefore, no dependence.[[77]](#footnote-77) This approach, however, was clarified by the Belgian Supreme Court in its decision of 20 February 2025, which confirmed that a position of economic dependence under Article IV.2/1 BCEL does not require the existence of a contractual relationship, settling an area of initial uncertainty.[[78]](#footnote-78)

# Different Interpretations of the Notion “Abuse”

Belgian case law demonstrates a diverse and evolving approach to the interpretation of “abuse” under Article IV.2/1 BCEL. While the examples of abusive conduct set out in Article IV.2/1 BCEL are derived from those in Article IV.2 BCEL on abuse of dominance, this parallel does not mean that the legal notion of abuse must be understood identically in both contexts. The jurisprudence reflects considerable divergence regarding the precise contours of the abuse requirement. At times, courts and legal scholars have drawn direct analogies between the two provisions, suggesting a legislative intent to create convergent interpretations.[[79]](#footnote-79) However, this view is not broadly endorsed: a number of legal scholars have emphasised important distinctions, arguing for a more nuanced application in cases of economic dependence.[[80]](#footnote-80) In other decisions and legal doctrine, the notion of abuse is aligned more closely with the doctrine of abuse of rights, further highlighting the lack of consensus.[[81]](#footnote-81)

Assessments of abuse in practice are shaped by an examination of both motives and objective justifications. Courts may take into account whether an undertaking acted with illegitimate intent, and generally exclude abuse where the conduct is supported by objective grounds.[[82]](#footnote-82) Additionally, also voluntary and extensive negotiations between the parties can weigh against a finding of abuse. In a judgement of the Enterprise Court of Leuven of 27 April 2021, the President took into account the many years of negotiations between the parties before ultimately ruling that the dominating undertaking had not abused the other party’s position of dependence. However, the President also took other factors into consideration when assessing the alleged abuse (e.g., whether the price increases at stake were objectively justified).[[83]](#footnote-83)

# Ignoring the Potential Impairment of Belgian Competition

The requirement of a potential distortion of competition is the main obstacle to the application of Article IV.2/1 BCEL. Indeed, Belgian courts rarely assess whether abuse of economic dependence could potentially affect competition, despite frequently making findings of abuse. Where it is taken into consideration, an analysis of this criterion usually leads to the conclusion that there is no potential distortion of Belgian competition.

All published judgments concerning abuse of economic dependence have exclusively concerned refusals to contract.[[84]](#footnote-84) In these cases, courts frequently hold that such conduct constitutes at minimum an unfair market practice, sanctioned by Article VI.104 BCEL.[[85]](#footnote-85) Notably, establishing a violation of Article VI.104 BCEL does not require complex market analysis nor proof of actual or potential harm to competition. On this basis, courts often find an infringement of Article IV.2/1 BCEL without assessing whether there is a potential restriction of competition, relying solely on the finding that the behaviour constitutes at least an unfair market practice. As such, Article VI.104 BCEL is used to address abuses of economic dependence more broadly. This development, which was anticipated and has been met with concern by commentators,[[86]](#footnote-86) means that Article IV.2/1 BCEL increasingly serves as an illustration of an unfair market practice within the meaning of Article VI.104 BCEL, rather than as an autonomous ground for infringement of competition law.

An important consideration in this context is the “negative spillover effect” of competition law. Some authors argue that when conduct is permitted under specific competition law provisions (such as Article IV.2/1 BCEL), it cannot subsequently be prohibited under the broader unfair market practices rules. In other words, if there is no infringement of competition law, there should be no finding of unfair market practices either.[[87]](#footnote-87) The Belgian Supreme Court endorsed this view in its Equiform judgment.[[88]](#footnote-88) In concrete terms, this means that where there is a characterised form of economic dependence but no distortion of competition, and as such the behaviour is allowed under competition law, a court may not apply the general standard of Article VI.104 BCEL. This approach has only been adopted once in Belgian case law on abuse of economic dependence.[[89]](#footnote-89)

Given these issues, a clearer delineation between Article IV.2/1 BCEL and Article VI.104 BCEL would help ensure that courts apply both provisions correctly and consistently, and would also promote greater legal certainty for undertakings.

That both courts and undertakings often bypass the requirement of a potential impairment on Belgian competition and try to find other ways to punish any abuse, is unsurprising. Demonstrating such impairment places a considerable burden of proof on claimants, as it requires extensive resources and knowledge to carry out these economic complex analyses. Also courts are usually not equipped to conduct such market studies if parties do not provide them with the relevant data. This challenge was highlighted in the explanatory memorandum to the 2015 bill and was also a main concern in other jurisdictions with a similar provision on abuse of economic dependence.[[90]](#footnote-90)

# Parallels with Other Legal Concepts

The prohibition of abuse of economic dependence has parallels with many other concepts in Belgian competition law, market practices law and contract law, such as the prohibition of cartels, the prohibition of abuse of dominance, the prohibition of unfair terms, the prohibition of unfair, misleading and aggressive market practices, the concept of abuse of rights, and defects of consent such as error, fraud, and abuse of circumstances. The legislator however failed to clarify the link between the prohibition of abuse of economic dependence and these other legal concepts.

Most of these legal concepts are not sufficient to cover *every* situation of abuse of economic dependence. The main reason for this is that often not all the conditions for the application of these other legal grounds are met. For example, the prohibition of cartels[[91]](#footnote-91) requires collaboration between undertakings and is therefore not suitable where dependence results from unilateral behaviour. The prohibition on abuse of dominance[[92]](#footnote-92) only applies when an undertaking holds absolute market power, which is not always present in dependency scenarios. The prohibitions on unfair terms[[93]](#footnote-93) are mainly confined to contractual relationships, limiting their suitability for addressing abuse of economic dependence. Remedies based on defects of will – such as error or fraud[[94]](#footnote-94) – also primarily address issues within formal agreements and do not capture the diverse and often subtle forms of economic dependence. Further, prohibitions on misleading market practices[[95]](#footnote-95) are only relevant in rare cases where the abuse takes the form of deceptive information. The prohibition on abuse of circumstances[[96]](#footnote-96) could provide an effective solution for contractual cases, but does not extend to non-contractual settings.

Nonetheless, certain broader legislative tools remain relevant. Prohibitions such as those against unfair or aggressive market practices[[97]](#footnote-97) and the principle against abuse of rights[[98]](#footnote-98) appear to form a solid basis for addressing abusive conduct in the context of economic dependency relationships. There is some debate as to whether these existing legal concepts are generally adequate to address situations of economic dependence, and whether the explicit prohibition in Article IV.2/1 BCEL brings significant additional value. It could be argued that, since these frameworks often reach similar outcomes and may be more straightforward to invoke, the dedicated provision may be redundant. Still, the inclusion of an explicit prohibition on abuse of economic dependence provides a clearer and more targeted legal tool, promising more effective protection in cases where other provisions may fall short. The extent to which this regime will differ in practice from established legal concept – and how the courts will further delineate its boundaries – remains to be seen.

# Conclusion: Necessity of a Prohibition on Abuse of Economic Dependence?

Article IV.2/1 BCEL was introduced to address a gap in Belgian competition law by targeting abuses arising from economic dependence – situations where one business has substantial influence over another without holding a dominant position in the traditional, market-wide sense. In practice, however, the usefulness of this provision appears rather limited.

Due to its challenging evidentiary standards, inconsistent application, and broad overlap with more robust and established legal provisions, Article IV.2/1 BCEL has, to date, proven of limited practical utility. Unless courts adopt a more consistent and thorough approach – or legislators clarify the provision’s purpose and parameters – it appears likely that Belgian courts and undertakings will continue to address abuse of economic dependence through other, better-established legal avenues. As a result, Article IV.2/1 BCEL would remain underutilised and, for now, largely redundant within the Belgian legal landscape.

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