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**Questionnaire for question A**

**Is the concept of the abuse of relative market power beyond market dominance necessary to ensure a functioning competition and what criteria should be used to assess it?**

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# Background and context

The term ‘relative market power’, also known in other jurisdictions as ‘economic dependence’, superior or unbalanced bargaining power’ or ‘significant imbalance in commercial relations’, is used to describe circumstances in which a company exploits its superior bargaining position vis-à-vis business partners. These rules exist all over the world, from Europe to South Korea or Brazil. In contrast to the traditional concept of dominance, the concept of relative market power is concerned with the analysis of asymmetric dependencies or bargaining positions in business- to-business (B2B) relationships, irrespective of a dominant market position or monopoly power in the traditional sense. This is relevant to business-to-business relationships, including distribution, franchising, subcontracting, supply chains and others, in both traditional and digital markets.

This additional tool for regulating unilateral conduct has recently received renewed attention, reflecting a broader trend in the regulation of business-to-business (B2B) relationships. In recent years, several jurisdictions in Europe, including France, Belgium, Switzerland and Austria, have introduced or updated legislation targeting the abuse of economic dependence or relative market power. The proliferation of these legislative measures highlights the need for transparent, predictable and enforceable criteria for assessing relative market power, situations of dependence and imbalances in bargaining power in the B2B context. It also raises the question of the extent to which such provisions serve to maintain effective competition and thus form part of competition, anti-monopoly or antitrust law as it is commonly understood. This study aims to examine how these criteria are applied in practice, the challenges of enforcement and the wider implications of this regulatory trend for competition policy and the economy.

The following list of questions should be understood as a reminder of issues that may rise in the relevant jurisdiction. National rapporteurs are free to structure the report as they wish, covering only issues relevant to their jurisdiction or discussing other issues arising in their jurisdiction that are not mentioned in this questionnaire.

# Introduction: Origin and Development of the Rules in your Jurisdiction

Does your jurisdiction have rules or case-law dealing in one way or another with relative market power or economic dependence?

What is the nature of the rules: are they part of competition law or other specific laws or general contract law? Where is there discussion or debate about how best to deal with such concerns?

When were rules on relative market power or abuse of economic dependence introduced in your jurisdiction? Discuss how the rules and their implementation have evolved over the years.

Which companies or economic sectors lobbied for the introduction of the rules?

Are these rules sector-specific ones or, on the contrary, general ones ? In the latter case, are they applied to specific sectors or industries?

Has your jurisdiction enacted, or proposed the introduction of, *ex ante* regulation that deals with relative market power or economic dependence?

Who is responsible for enforcing the rules? Are there many applications of these rules?

In the Italian legal system, abuse of economic dependence is regulated by Article 9 of Law No. 192 of 1998. The law was introduced in 1998, but recently, in 2022, it was amended to include provisions on digital platforms.

Paragraph 1 of the law prohibits abuse by one or more companies of the state of economic dependence in which a client or supplier company finds itself with respect to them. Moreover, the law provides a definition of economic dependence as a situation in which one company can impose, in its commercial relations with another company, an excessive imbalance of rights and obligations.

An important element, according to paragraph 1, in assessing whether economic dependence exists, is the evaluation of the actual possibility for the party that suffered the abuse to find satisfactory alternatives on the market.

Paragraph 2 of the law further adds that abusive conduct may also consist in a refusal to sell or to buy, in the imposition of unjustifiably burdensome or discriminatory contractual conditions, or in the arbitrary interruption of ongoing commercial relations.

In 2022, the law was amended through the introduction of provisions relating to digital platforms. Under paragraph 1 of the law, it is now presumed, unless proven otherwise, that economic dependence exists when a company uses intermediation services provided by a digital platform that plays a crucial role in reaching end users or suppliers, including in terms of network effects or data availability.

Paragraph 2 adds a list of certain practices by digital platforms (as referred to in paragraph 1) that are considered abusive: providing insufficient information or data regarding the scope or quality of the service provided; requiring undue unilateral performances not justified by the nature or content of the activity performed; or adopting practices that inhibit or hinder the use of other providers for the same service, such as applying unilateral conditions or additional costs not provided for in the contractual agreements or existing licenses.

The law in question refers to subcontracting contracts, but according to case law, this prohibition also extends to other long-term contracts. Various consolidated rulings (including Milan Court, 06/12/2017; Trieste Court, 20/09/2006; Turin Court, 11/03/2010) have established that, although the prohibition is set out within a specific sectoral regulation, it applies to any commercial relationship that results in so-called supply chain integration, and not only to subcontracting agreements.

In the Italian legal system, there are no *ex ante* regulatory provisions in this area, nor have any been proposed.

Both the specialized section of the Court (or arbitration panels, if the contract includes an arbitration clause) and the Italian Competition Authority (AGCM) are responsible for enforcement. Article 3-bis of the aforementioned law provides that the Italian Competition Authority, if it finds that an abuse of economic dependence is relevant to the protection of competition and the market, even following reports from third parties and based on its own investigative powers, may proceed with warnings and sanctions as set out in Article 15 of Law No. 287 of October 10, 1990, against the company or companies that have committed such abuse.

In cases of widespread and repeated violations of the provisions of Legislative Decree No. 231 of October 9, 2002, to the detriment of businesses, particularly small and medium-sized enterprises, the abuse is established regardless of whether economic dependence has been formally verified.

Therefore, the Italian Competition Authority will have the authority to act in cases of abuse of economic dependence when it finds that the issue is relevant from the perspective of public interest and anti-competitive behavior (*e.g*., when a company frequently imposes unfair contractual conditions on many counterparties in a repetitive and indiscriminate manner).

There are no sector-specific regulations, but the provision applies to all types of markets and operators. Only in the agri-food sector is there a similar regulation: Legislative Decree No. 198 of November 8, 2021, which deals with unfair trading practices in business relationships within the agricultural and food supply chain.

In terms of case law, Italian courts have issued several rulings over the years concerning the abuse of economic dependence. However, enforcement by the Italian Competition Authority in this area is relatively new. It wasn’t until 2018 that the Authority began to actively investigate and rule on cases involving abuse of economic dependence. Since then, it has taken action in some notable and widely discussed cases, such as the META/SIAE dispute (A559 – META/SIAE Decision n. 31537) and the case involving Poste Italiane (A539 – Poste Italiane Decision 28192), among others.

# Criteria for the Definition of Relative Market Power or of Similar Concepts

* 1. **Definition of Relative Market Power or of Similar Concepts**

Does the legislative text contain a definition and/or criteria of relative market power or similar concepts?

Do the criteria defined in the legislative texts differentiate according to the nature of the parties (customer or supplier) or the nature of the relationship?

To what extent is the concept of ‘intermediation power’ accounted for?

What elements of the criteria are defined in the legislation and what criteria have been developed through decision-making practice and case law?

Are there any legal or factual presumptions?

The law provides little definitions, besides the ones mentioned above. The concept of market is mentioned only when referring to the ability of the party that allegedly suffered the abuse of having access to alternatives on the market. However, no mention is made to the market power of the abusing company or to similar concepts. Moreover, the law does not distinguish between abuse of customers or suppliers.

No mention is made to criteria of the company that enacts the abuse other than the ability of the latter to impose, in its commercial relations with another company, an excessive imbalance of rights and obligations.

Other criteria or requirements to meet the definition are established by case law or practice.

No legal or factual presumptions are established, other than the ones introduced for digital platforms. In the latter case, as mentioned above, unless proven otherwise, economic dependence exists when an intermediation service provided by a digital platform represents a crucial gateway for end users or suppliers.

Finally, “intermediation power” is only mentioned with reference to digital platforms which play a crucial role in intermediating between companies and end users or suppliers.

# Criteria Related to the Market

Are there criteria related to the market, the market structure or the market shares of the companies in the market?

Is there a market definition? Is the definition of the relevant market a prerequisite?

If one of the criteria is alternatives for the undertaking that is dependent on another undertaking with relative market power, how are these alternatives assessed? Are the alternatives discussed in relation to the relevant market and the substitutability criteria, or can alternatives be found outside the relevant market (e.g. in other goods or services)?

What is the relationship between relative market power and the classic institution of dominance? Is economic dependence or relative market power a criterion for dominance?

Has there been a finding of relative market power in parallel with a finding of dominance? Conversely, has relative market power been denied in the presence of dominance?

How does the analysis change in the presence of two-sided, or multi-sided, markets?

In Italian law, the concept of economic dependence under Article 9 of Law No. 192/1998 does not require the presence of market dominance or a specific market share threshold, distinguishing it from an antitrust assessment. Instead, the focus is on the asymmetry of power within a particular commercial relationship, where one of the undertakings finds itself in a position of subordination due to the absence of reasonable alternatives for continuing its business activities. While a formal definition of the relevant market is not a prerequisite, elements such as market structure, entry barriers, and the availability of other trading partners might still be relevant, as they help assess whether the weaker party is effectively locked into a dependent relationship.

For determining an abuse of economic dependence, the law refers to two fundamental requirements:

a) An excessive imbalance of rights and obligations within the contractual relationship;

b) The impossibility of finding satisfactory alternatives on the market.

Thus, the provision does not make any explicit reference to the concept of “market”. Nevertheless, in case law, to assess requirement (b), namely, the impossibility of finding satisfactory alternatives, the relevant market of both the allegedly abusive undertaking and the dependent undertaking is taken into consideration, to verify whether satisfactory alternatives do, in fact, exist.

Through relevant case law the “alternatives” are assessed through a two-step analysis, which considers both objective and subjective elements. In terms of objective assessment, the first step is to verify whether objective alternatives exist on the market, regardless of the individual situation of the allegedly dependent company. This includes looking at the relevant market, which is defined using antitrust criteria such as substitutability and market structure. However, courts have clarified that alternatives do not need to be confined strictly within the same product or service market. For example, the Forlì Court(27/10/2010) ruled that there was no economic dependence where the allegedly dependent company had satisfactory alternatives even outside the specific market segment in which the dominant company operated.

In terms of subjective assessment, the second step involves determining whether the available alternatives are real and satisfactory from the perspective of the dependent undertaking. This means evaluating if the alternative options allow the firm to pursue its business goals in a similarly effective way. Courts emphasize that the alternative must be a concrete and reasonable opportunity, not just a theoretical possibility (Novara Court, 7.6.2018). This subjective analysis considers factors such as the size of the dependent firm, its organizational structure, investments tailored to the commercial relationship, and its ability to shift or diversify activities.

In conclusion, alternatives can indeed be found outside the strictly defined relevant market, provided they are functionally equivalent and realistically usable by the dependent firm.

As for the relationship between relative market power and dominance, a company can cause economic dependence under article 9 of said Law without being dominant in the antitrust sense. Likewise, having a strong position in a particular business relationship (relative market power) does not automatically mean that a company holds a dominant position in the overall market. However, it is useful to point out that there may be overlap: a dominant company could also cause economic dependence, which means the two legal tools (abuse of dominance and abuse of economic dependence) can sometimes apply to the same conduct.

As a consequence of the abovementioned, the decision as to which of the two legal frameworks should be applied in order to ensure more effective protection of the weaker contracting parties, of the market itself, and ultimately of consumer interests, who may suffer the negative effects of such abusive conduct, even indirectly (e.g., through higher costs passed on to the final purchaser of the good or service) represents an assessment marked by a high degree of discretion, which likely falls outside the scope of judicial review in these terms.

In terms of situations of relative market power where a finding of dominance is also present, in 2021 there has been a case examined by the AGCM where abuse of economic dependence was found in a situation where an abuse of dominant position could be found as well, notably the *Poste Italiane case*.

In that proceeding, the Italian Competition Authority found that Poste Italiane had abused a position of economic dependence by imposing unjustifiably burdensome contractual conditions on its local partner Soluzioni S.r.l., including exclusivity clauses, unilateral termination rights, and restrictions that effectively prevented Soluzioni from serving competitors or entering the market independently. The situation of economic dependence was confirmed by several indicators: Soluzioni generated 90–95% of its turnover from Poste, was heavily integrated operationally with Poste (e.g., through branding and logistics), and was left without alternatives after the termination of the relationship, eventually leading to its liquidation.

At the same time, the Italian Competition Authority acknowledged that Poste Italiane could be recognized as holding a dominant position in at least some of the postal services markets in which it operated, particularly due to its status as the universal postal service provider until at least 2026, and its overall position as the primary operator in the sector. The Authority noted that Poste’s conduct could alternatively be classified as an exclusionary abuse of dominance under Article 102 TFEU, because it effectively prevented Soluzioni from remaining in or re-entering the market, either directly or as a subcontractor for a competitor.

Therefore, while the Italian Competition Authority formally proceeded under Article 9 of Law 192/1998 (abuse of economic dependence), it acknowledged the “dual relevance” of the facts: the same conduct could potentially also be framed as a classic abuse of dominance. This reflects a broader principle in Italian competition law: while economic dependence and dominance are conceptually distinct, the same factual scenario may trigger both sets of rules, and the Authority may discretionarily choose which legal framework to apply, often based on evidentiary considerations or procedural efficiency.

On the other hand, there are no reported cases in which relative market power has been denied in the situation of a presence of dominance.

With the reform introduced by Law No. 118/2022, Article 9 has been significantly updated, especially to reflect the realities of the digital economy and platform-based markets (multi-sided markets). The reform introduced a rebuttable presumption of economic dependence in relations involving digital platforms. Specifically, the amended Article 9(3-bis) states that: *“In contracts involving the use of digital platforms that play a decisive role in reaching end users or suppliers, economic dependence may be presumed...”* This may be especially relevant in multisided markets, where business users depend on platforms to access customers. In this context, platforms may set unilateral conditions, including pricing, data access, and ranking, which the weaker party has no real ability to negotiate or reject. In multi-sided markets, a platform connects two or more interdependent groups of users and the more users on one side, the more attractive it becomes to the other side. This structure creates platform power that may not necessarily amount to dominance under competition law but can nonetheless produce situations of strong economic dependence on the business user side. The platform often becomes the primary, or only, channel through which a business can reach customers. Due to network effects and lack of viable alternatives, the possibility of switching to another provider is often illusory.

Italy’s 2022 amendment to Article 9 explicitly acknowledges the peculiarities of multi-sided markets, and it introduces a presumption of economic dependence when: *"The supplier uses a digital platform that plays a decisive role in reaching end users or suppliers."* (Art. 9(3-bis)). This provision significantly lowers the burden of proof for the dependent party and aligns with the real-world structure of digital ecosystems. The presumption shifts the analytical focus from proving dependency (often a complex and expensive task for SMEs) to examining whether the platform’s conduct is abusive, such as: (i) Unjustified contract termination; (ii) Refusals to share essential customer data; (iii) Excessive commission changes.

# Criteria Related to the Company having a Relative Market Power

Are there criteria that related to the size, turnover, products, brands or other elements of the company under investigation of relative market power?

How are these assessed?

No, Article 9 of Law No. 192/1998 does not require any specific criteria related to the size, turnover, products, or brands of the company allegedly committing the abuse to establish a situation of economic dependence.

The law does not impose any qualitative or quantitative thresholds for the stronger party, nor does it require that the company be large, dominant, or particularly well-known. These factors may be relevant in practice, but they are not legal conditions for the application of the rule.

Article 9 focuses exclusively on two key elements:

1. The existence of a situation of economic dependence, assessed based on the inability of the dependent party to find a reasonable alternative in the market;
2. The presence of an abuse, meaning an unjustified exploitation of that situation through conduct that creates an excessive imbalance in the rights and obligations of the parties.

Therefore, what matters is the actual commercial relationship between the parties and the degree of dependence not the size, revenue, or market status of the allegedly stronger party.

# Criteria related to the Company in a Dependency Situation

Are there criteria that relate to the size, activity, turnover, economic situation, behaviour, specific investments or other elements related to the company under investigation of relative market power?

If one of the criteria is alternatives for the undertaking that is dependent on another undertaking with relative market power, how are these alternatives assessed in relation to the dependent undertaking?

Is the cessation or abandonment of the activity considered as a valid alternative and, if so, under what conditions? To what extent are the economic consequences for the undertaking dependent on another undertaking with relative market power taken into account?

To what extent is a commitment to diversify activities or to work with different counterparties a criterion? To what extent is the behaviour and willingness of the dependent party to reduce the risk of dependency over time a criterion?

To what extent is the fault of the company in a dependency situation a criterion? How are these assessed?

The cessation or abandonment of the activity by the adoption of the remedy of nullity of the entire contract (as provided for by the law, Article 9 para. 3 Law 192/1998) has often proved inadequate to properly protect the party suffering the abuse. Indeed, in long-term relationships, the interest of the weaker contracting party is precisely to continue the contractual relationship. Hence the efforts of case law to identify a solution more consistent with the objectives of the legislation in question. In particular, in an attempt to resolve the issue, the possibility has been recognized of eliminating only those individual contractual clauses attributable to the abuse.

The economic consequences for the dependent undertaking are a central criterion: judges examine whether the economic consequences arising from the termination of the relationship or from the refusal of the imposed conditions are disproportionate and such as to significantly impair the business continuity or profitability of the undertaking. This assessment is intertwined with the verification of the absence of market alternatives, also taking into account the specific investments already made.

Art. 9 Law 192/1998 does not take into consideration the “fault” of the company in a weaker position as a formal element of the offence, the focus in on the conduct of the dominant undertaking and the objective conditions of dependence. As discussed above, authorities and courts in Italy often take into account a variety of factual circumstances on a case-by-case basis when determining whether an abuse of economic dependence has occurred. However, to date, there appear to be no reported cases in which Italian courts have held or emphasized the fault of the weaker undertaking as a decisive criterion in abuse of economic dependence claims. Judicial analysis has consistently focused instead on whether the dominant party exploited the situation abusively and whether the weaker party genuinely lacked acceptable market alternatives, without attributing blame to the latter.

# Criteria related to the Imbalance of the Party’s Position

Are there criteria to capture the relative position of one of the parties in relationship to the other, or that capture a possible imbalance in the bilateral relationship between the parties?

How are they assessed?

There are no fixed criteria to determine which party is the weaker one; it is essential to refer to the contractual relationship and the rights and obligations that it imposes on the parties. The only elements mentioned by the law for determining an abuse of economic dependence are the imbalance between rights and obligations, also taking into account the actual ability to find satisfactory alternatives on the market. In practice, the authority or the judge will consider different elements depending on the case to establish the situation of economic dependence.

Taking a concrete example (the McDonald’s Italian Competition Authority case, A546 – Franchising McDonald’s Decision n. 30059), the Authority identifies the situation of economic dependence by evaluating the combined effect of various factors, including the duration of the conduct, the obligation of the franchisees to bear significant specific investments, and the differing market positions of the parties involved (on one side, McDonald’s, a leader in the relevant market with a position very close to absolute dominance; and on the other, prospective franchisees, usually lacking even the slightest bargaining power).

The difficulty of finding economically satisfactory alternatives on the market, together with the need not to lose the costs incurred for preliminary training, would also induce the franchisees to accept the terms of the franchise contract unilaterally prepared by the franchisor, even without fully understanding its content. In this case, a double “lock-in” effect (i.e., being “trapped in the contract”) would occur, generated both by the substantial costs required to enter the franchise network and by the unrecoverable losses associated with a potential exit from it.

According to case law, the company in the “weaker” position is in a “situation in which one undertaking (meaning, the abusive one) is able to determine, in its commercial relations with another undertaking (meaning, the weaker undertaking), an excessive imbalance of rights and obligations. Economic dependence is assessed also taking into account the actual possibility for the party suffering abuse to find satisfactory alternatives on the market.” These are indeterminate concepts, the meaning of which must be filled in by the interpreter, in line with the rationale of the legislation and the principles of the legal system.

Furthermore, case law considers the situation of economic dependence as a potential exposure of one party to the harassment or oppression of the other, when, based on the commercial relations between them, one undertaking has for a long time adapted its activity to that of another undertaking and, in particular, has made investments—in machinery and/or know-how—that, being intended for the production or distribution process specific and exclusive to another undertaking, would be difficult to reallocate in dealings with a different undertaking. As a result, the former tends to accept disadvantageous contractual conditions so as not to lose the economic value of the acquired know-how and the investments made for the benefit of the latter.

Fundamental for case law, in order to establish the existence of a situation of “economic dependence,” is to examine whether the imbalance of the parties’ rights and obligations is “excessive”, with the contracting party suffering it lacking real economic alternatives on the market (for example, being unable to easily diversify its business activity or having tailored its organization and investments in view of that relationship).

Moreover, case law underlines the need to investigate whether the other contracting party was genuinely devoid of economic alternatives on the market (considering, for example, the size of the dependent company, which may not easily allow diversification of its business, or the fact of having adapted its organization and investments in view of that relationship).

# Other Criteria and Considerations

Are there specific criteria depending on the industry or business model under investigation?

Are these criteria applied to current business relationships or also future or potential business relationships?

What kind of economic assessments, studies or industry expert opinions are used to refine the criteria?

What discretion does the enforcers have?

Under Legislative Decree No. 198 of 8 November 2021, which transposes Directive (EU) 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, a new legal framework has been established to prevent and sanction abuses in commercial dealings between suppliers and buyers. The decree introduced a set of mandatory rules that apply to the sale of agricultural and food products, regardless of the size or turnover of the parties involved, and is aimed at protecting the weaker contractual party, typically the supplier, from practices imposed unilaterally by the buyer and contrary to good faith and fair dealing.

These criteria apply to both current and future contractual relationships, including those already in force at the time the decree entered into effect. Article 14 required all existing contracts to be amended and brought into compliance with the new rules within six months of the decree’s entry into force, thereby ensuring uniform application across the supply chain.

To refine and support these criteria, the decree relies on economic assessments, particularly those developed by ISMEA (Istituto di Servizi per il Mercato Agricolo Alimentare), which is tasked with calculating average and sectoral production costs. These cost benchmarks are essential to assess whether a purchase price is below production cost—one of the key indicators of unfair trading practices under the decree (Article 5, letter b).

The enforcement of the decree is now entrusted to the ICQRF (Central Inspectorate for the Protection of Quality and the Prevention of Fraud of Agri-food Products), which replaces the AGCM (Italian Competition Authority) as the competent authority for these matters. The ICQRF has broad discretionary powers, including the ability to initiate investigations ex officio or based on complaints, conduct unannounced inspections, require the production of contractual and accounting documents, and issue administrative sanctions. Importantly, the ICQRF can evaluate conduct not only in isolation but also considering the overall context of the commercial relationship, including repetitive or systemic behaviors that result in imbalance.

This new legislative framework expressly repealed the former Article 62 of Decree-Law No. 1/2012, which had previously governed commercial relationships in the agri-food sector. That provision had been enforced by the Italian Competition Authority, competent in the past, which had opened various investigative proceedings for abuse of economic dependence, including a notable investigation concerning the sale of bread by large-scale retail chains, that the Council of State later overturned all related sanctioning decisions, raising concerns about the legal basis and enforcement mechanisms of the previous regime.

Legislative Decree No. 198/2021 now centralized enforcement within the Ministry of Agriculture through the ICQRF, thereby resolving institutional conflicts and aligning the Italian framework with the EU Directive. The current system provides a more specialized and sector-focused approach, rooted in data-driven economic analysis, and equipped with an authority specifically dedicated to agri-food market practices.

# Abuse of Relative Market Power

Is there a requirement of abusive behaviour (or a similar concept), or is the imbalance of power and dependency sufficient for legal regulatory ?

If there is a requirement of abusive conduct, is it the same as or different from abuse of a dominant position?

Is a restriction of competition necessary for an abuse to be found and, if so, how is it assessed?

Does the definition of abusive behaviour focus on exploitative or exclusionary behaviour, or both?

What kind of abusive conduct is most often the focus of ntervention? Are there more findings of exploitative or exclusionary abuse?

Are there more price or non-price infringements?

Is such conduct found in existing business relationships or also in future, potential ones (e.g. refusal to deal)?

What role does voluntary negotiation between the parties play in this context? What remedies are available?

What discretion do enforcers and judges have to reshape the commercial relationship between the parties (e.g. to modify the terms of the contract in favour of one of the parties, to add contractual provisions to the contract)?

Are there instances where mandatory contract law provisions have been introduced under

*ex ante* regulation to deal with relative market power and economic dependence? Are abuses of relative market power punishable by fines?

Are there differences between remedies ordered by courts and other administrative bodies (eg competition authorities)?

The mere existence of a situation of economic dependence and an imbalance of rights and obligations is not, in itself, sufficient to constitute an abuse of economic dependence. According to case law, Article 9 of Law No. 192/1998 clearly distinguishes between economic dependence, which is a factual condition frequently found in commercial relationships (e.g., franchising, vertical distribution, aftermarkets) and is not unlawful *per se*, and the abuse of such dependence, which is instead prohibited and subject to sanction.

In other words, even a significant contractual imbalance does not automatically amount to abuse. What matters is the conduct of the stronger party, which must actually result in the imposition of excessively unbalanced contractual conditions or in other abusive behaviors (such as unjustified refusal to contract or arbitrary termination of the commercial relationship).

Abuse arises only when the dominant enterprise uses its power to unilaterally impose unjustifiably burdensome or discriminatory conditions, thereby exceeding the limits of free negotiation and unreasonably distorting the equilibrium of the contractual relationship.

As for the specific types of conduct that may constitute an abuse of economic dependence, the law provides typical examples, even though the wording is broad and open to interpretation. In particular, Article 9 lists: (i) Refusal to sell or purchase; (ii) Imposition of unjustifiably burdensome or discriminatory contractual terms, and (iii) Arbitrary interruption of ongoing commercial relationships.

These are indeterminate legal notions, and it is up to the interpreter to give them concrete meaning in line with the purpose of the law and general principles of the legal system.

Examples of conduct that could be considered abusive include: (i) Unjustified refusal to supply essential products or services, on which the other party heavily relies to operate; (ii) Unilateral modifications to pricing or contractual terms, without fair negotiation or justification; (iii) Excessively punitive contract clauses, such as disproportionate penalties or exclusive dealing obligations that prevent the weaker party from working with other partners; (iv) Abrupt termination of a long-standing commercial relationship without adequate notice or legitimate cause, especially where the dependent party has made specific investments based on that relationship; (v) Discriminatory treatment compared to similar partners, without objective reasons.

Moreover, the Italian Supreme Court (judgement of November 25, 2011, no. 24906), clarified the relationship between economic dependence and contractual relations. It stated that abuse of economic dependence arises from an excessive imbalance of rights and obligations within the framework of “commercial relationships” and therefore requires the existence of a contractual agreement. This interpretation would exclude pre-contractual or post-contractual situations from the scope of the abuse.

However, the Italian Competition Authority has adopted a broader view. In McDonald’s case mentioned, it considered conduct occurring both before the contract (such as serious informational asymmetries) and after the contract (such as preventing the recovery of specific investments made in reliance on the contractual relationship) as relevant for assessing abuse.

In summary, while the law requires the presence of a contractual relationship for abuse to be recognized (according to the courts), there is growing interpretative openness, especially from the AGCM, to also evaluate pre- and post-contractual behaviors where they significantly harm the weaker party in a commercial context of dependence.

A restriction of competition may not be necessary if the case is under the scrutiny of the Tribunal, as, in that case, the parties involved are private parties, seeking private remedies. However, for the Italian Competition Authority to intervene in cases of abuse of economic dependence, it is necessary that the conduct in question has relevance from a competition law perspective, meaning it must go beyond the individual contractual relationship between the parties and affect the structure or functioning of the relevant market. According to Article 9, paragraph 3-bis of Law No. 192/1998, the Authority’s public intervention is not based solely on harm to the weaker party, which remains within the jurisdiction of the civil courts, but instead requires a “*quid pluris*”: namely, that the abuse generates negative systemic effects, distorting the competitive dynamics of the market in which the companies operate. This may occur, for instance, when: (i) the dominant firm uses its position to prevent or hinder the entry of new competitors; (ii) it creates artificial barriers to competition; (iii) it significantly influences the behavior of other market participants, reducing the variety or quality of the offerings available to consumers.

In such cases, the AGCM’s objective is not to compensate the injured party, but rather to halt conduct that harms market efficiency, by issuing an injunction and imposing an administrative fine. This approach is fully aligned with the logic of antitrust public enforcement, which aims to protect the general interest in maintaining effective market competition.

It is also particularly significant to highlight how certain conducts may, in abstract terms, constitute either an abuse of economic dependence or an abuse of dominant position, depending on the context and the market effects produced, since the frameworks refer to similar conducts.

In the Poste Italiane case mentioned the Italian Competition Authority found that Poste Italiane, while formally acting as a contracting party in a bilateral relationship, had in fact engaged in conduct that resulted in the exclusion of a potential competitor, Soluzioni S.r.l., from the market. More specifically, Poste: (i) prevented Soluzioni from working with other postal operators; (ii) barred Soluzioni from directly competing on the local market; (iv) deliberately chose not to internalize certain service lots (previously outsourced to Soluzioni) before the 2012 public tender, in order to avoid the risk that Soluzioni, once the contractual relationship ended, might enter the market as an autonomous competitor or as a subcontractor to other rival firms.

While the Authority formally pursued the case under the lens of abuse of economic dependence with competitive relevance, the same set of facts could have also been framed as an exclusionary abuse of dominance under Article 102 TFEU.

This case illustrates how certain conducts could be relevant from both an abuse of economic dependence and an abuse of dominant position perspective.

It is possible to take action, pursuant to the third paragraph of Article 9, either to obtain compensation for damages or to request an injunction against the abusive conduct and thus seek the restoration of the conditions that existed prior to the abuse.

In cases of contractual abuse, namely, the imposition of excessively burdensome clauses, it is possible to obtain the nullity of the agreement in addition to the injunction and compensation for damages.

Regardless of the wording of the law (which provides for the nullity of the abusive agreement), legal scholarship has excluded that the provision establishes the nullity of the entire contract and supports the partial nullity of the contract or the nullity of the individual abusive clauses.

In the context of the prohibition of abuse of economic dependence, there is a widespread reluctance to acknowledge that the civil judge can “rewrite” or modify the content of a contract declared abusive. The law provides that, when abuse is found, the abusive contractual clause is declared null and void, but does not authorize the judge to replace that clause with a new, balanced one by rewriting the contract itself. This means that after the declaration of nullity, the abusive clause loses its effect, but the contract remains incomplete and may become ineffective or no longer applicable (in fact, under Art. 1419 of the Italian Civil Code, if the clauses were essential to the contract’s framework, the latter may be voided altogether).

The Italian Competition Authority often acts through a more “regulatory” approach. In the event of a violation, the Authority may impose fines of up to 10% of the total turnover. However, in practice, the Authority has preferred to close cases of abuse of economic dependence through commitments (e.g. Mcdonald’s case mentioned; Original Marines case, A550 – Franchising Original Marines, Decision n. 29930; Wind Tre case A547 – Wind Tre case, Decision n. 30276).

In this instance, it is common that the party under investigation proposes a new contractual framework to replace the one deemed abusive often aligning with suggestions made by the Authority (similarly to commitments in antitrust proceedings). This allows the contract to remain in force but be adjusted to meet standards of fairness and proportionality, overcoming the issues of abusiveness. Although civil judges are not formally bound by these positions, which are not normative rules, it is likely that they will influence judicial assessments in disputes involving those standardized contract models.

# General Assessment and Conclusion

You are invited to draw conclusions on the main findings in your jurisdiction and to recommend improvements to the competition rules in your jurisdiction.

Should market criteria (eg market shares) be taken into account in the application of provisions on relative market power?

Are relative market power provisions necessary for competition to function? Are they generally justified as part of the competition rules?

Are they justified in certain sectors?

Are the current rules predictable for companies?

As a general indication, we can say that regulatory provisions on relative market power are necessary for the functioning of competition insofar as they can regulate cases of abusive conduct that can be traced back to the abuse of a dominant position.

However, there is a certain degree of uncertainty for businesses given that the rule is very general and therefore the principles can be derived, as is the case with antitrust legislation in general, from the practice of the Authority and the case law of the courts.

Once the Authority has established a stable approach, it might be useful to introduce soft law in the form of a communication/recommendation consolidating the basic principles for identifying economic dependence and abuse.

It is still too early to say, given that the Italian Competition Authority has not yet taken many measures in this area.

In conclusion and looking ahead, we can certainly point out that there is currently a trend towards increasing attention by the Italian Competition Authority to cases of abuse of economic dependence.

The Authority has always had the power to intervene to protect the market since the enactment of the law, but only recently has it decided to include enforcement in the area of abuse of economic dependence among its priorities.

This has led to a growing interest among companies that believe they have suffered damage as a result of abusive conduct to turn to the Authority rather than the ordinary courts. This is mainly due to the burden of proving economic dependence and abuse: while before ordinary courts the burden of proof is in charge of the plaintiff, the Authority, when faced with a well-founded report, has extensive investigative powers in terms of requests for information, inspection powers, etc.

It is therefore likely that a new frontier of follow-on actions for damages may arise following decisions by the Authority condemning conduct of abuse of economic dependence.