



International Distribution Institute

# **THE ABUSE OF ECONOMIC DEPENDENCE IN FRANCHISE AGREEMENTS: a comparative overview in different jurisdictions**

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## SOURCE OF LAW

**Italy:** Article 9 of Law n. 192 of 18/6/1998

**Spain:** Article 16.2 and 3 of Spanish Unfair Competition Law no. 3/1991

**Uruguay:** Section 6 of Act 18.159 of 30/07/2007

**Belgium:** Article IV.2/1 of the Belgian Code of Economic Law (BCEL)

## NOTION OF ECONOMIC DEPENDENCE AND ABUSE

### ITALY:

«(..) A situation in which an undertaking is able to cause, in its commercial relations with another undertaking, an excessive imbalance of rights and obligations.

Economic dependence shall also be assessed taking into account the real possibility for the party subject to abuse, to find satisfactory alternatives on the market.»

«**Abuse** may [also] consist in a refusal to sell or a refusal to buy, the imposition of unjustifiably onerous or discriminatory contractual conditions, or the arbitrary interruption of existing commercial relations.»

Article 9, Law 192/1998

Interpretation by case-law v. Italian Antitrust Authority

# NOTION OF ECONOMIC DEPENDENCE and ABUSE

## SPAIN

«It is considered unfair for a company to exploit the situation of economic dependence in which its customers or suppliers may find themselves if they do not have an equivalent alternative for the exercise of their activity. This situation shall be presumed when a supplier, in addition to the usual discounts or conditions, must grant its customer on a regular basis other additional advantages that are not granted to similar buyers»

Article 16.2 of the Spanish Unfair Competition Law

## THE ABUSE

### SPAIN

«The following shall also be considered unfair:

(a) The termination, even partially, of an established commercial relationship without at least six months' prior written and precise notice, unless it is due to serious breaches of the agreed conditions or in case of force majeure.

b) Obtaining, under threat of termination of commercial relations, prices, payment conditions, sales modalities, payment of additional charges and other conditions of commercial cooperation not included in the agreed supply contract»

Article 16.3 of the Spanish Unfair Competition Law

# NOTION OF ECONOMIC DEPENDENCE

## URUGUAY

- Economic Dependence is not illegal itself; however an abuse would be considered against Uruguayan Antitrust Rules
- According to Uruguayan Act economic dependence exists when an undertaking acts in an illegal way by targeting advantages or causing damages to another undertaking which would not be possible without economic dependence.
- Courts have directly applied general principles of contract law to unbalanced contractual relations between parties.

## THE ABUSE

### URUGUAY

- Abuse can consist in changing certain conditions of the contract, asking for investments without complying with the good faith principle, unequal treatment of franchisees that are part of a franchising network, among others.
- Contracts of collaboration between independent parties and, in principle, it is considered that parties freely sign a Franchise Agreement.
- However, there have been situations in which local Courts have gone deeply inside the contract by applying general principles and doctrines of contractual law in order to identify abuses in the exercise of rights.
- Taking advantage of a situation of “superiority”

# NOTION OF ECONOMIC DEPENDENCE

## BELGIUM

«The position of subordination of an undertaking in relation to one or more undertakings, characterised by the absence of reasonably equivalent alternatives available within a reasonable period of time, on reasonable terms and at reasonable costs, allowing it or each of them to impose services or conditions that could not be obtained under normal market circumstances » (Article I.6, 17 of BCEL)



## **THE ABUSE**

### **BELGIUM**

The following may be considered abusive practices :

- refusing a sale, a purchase or other transaction terms;
- directly or indirectly imposing unfair purchase or sales prices or other unfair contract terms;
- limiting production, markets or technical development to the detriment of users;
- applying dissimilar conditions to equivalent obligations towards economic partners, thereby putting them at a disadvantage in competition;
- making the conclusion of contracts dependent on the acceptance by the economic partners of additional obligations that, by their nature or according to commercial usage, have no connection with the subject matter of such contracts.

## CONSEQUENCES

### ITALY:

- «The pact through which the abuse of economic dependence is carried out shall be null and void»
- Possible damages granted by ordinary courts
- The antitrust authority can impose sanctions up to 10% of the turnover of the companies involved, based on their last financial statements

Article 9, Law 192/1998

The position of the Italian Antitrust Authority

## CONSEQUENCES

### SPAIN

- Declaration that the conduct constitutes an unfair competition act.
- Cessation/prohibition of the conduct.
- Removal of the effects produced by the disloyal conduct.
- Compensation of damages (if willful misconduct or negligence).
- Unfair enrichment (when the unfair conduct harms a legal position protected by a right of exclusivity or another with a similar economic content).
- No consequences at competition law level.

## CONSEQUENCES

### URUGUAY

- Clauses that allow the abuse of economic dependence can be considered overridden by general principles in contradiction with them. Consequently, Courts would apply them directly .
- Termination of contracts since franchisor may terminate the contract due to franchisee is not amenable to accept these new conditions. Courts can grant damages to franchisee.

## **CONSEQUENCES**

### **BELGIUM**

The rules may be enforced by the commercial courts and by the Belgian Competition Authority.

Commercial courts may declare contracts or clauses null and void or grant compensation for damages suffered as a result of the abusive practices.

The Belgian Competition Authority may also impose fines up to 2 % of the consolidated annual turnover of the company.

## RELEVANT CASE-LAW

### ITALY

Important decision of the Supreme Court (not on franchising):

Cass. 21/01/2020, No. 1184

Recent decisions on franchise agreements which did not find abuse of economic dependence:

Trib. Milano, 12/07/2021, n. 6058

App. Roma, 14/09/2020, No. 4226

App. Milano 10/03/2020, no. 749

Trib. Milano, 10/3/2020 no. 2080

Trib. Treviso, 14/08/2019

Trib. Roma, 09/08/2019, No. 16265

Trib. Milano, 03/07/2019

Trib. Vicenza, 20/05/2019

Trib. Catania, 30/04/2019

Trib. Bolzano 11/04/2019, No. 370

Trib. Milano, 10/10/2018 No. 10116

App. Roma, 01/03/2018, No. 133

Trib. Reggio Emilia, 17/01/2018, No. 39

Trib. Genova 05/01/2018, No. 20

## RELEVANT CASE-LAW

### SPAIN

Important decision of the Supreme Court: (not on franchising):

Decision No. 75/2012 [ECLI: ECLI:ES:TS:2012:1580]

Decision on franchise agreements declaring abuse of economic dependence:

Decision No. 112/2005 issued by the Court of Appeal of Málaga [ECLI:ES:APML:2005:392]

Decisions on franchise agreements not declaring abuse of economic dependence:

Decision No. 365/2005 of the Court of Appeal of Madrid [ECLI: ECLI:ES:APM:2005:16498]

Decision No. 111/2006 of the Court of Appeal of Barcelona [ECLI: ES:APB:2006:5675]

Decision No. 216/2015 of the Court of Appeal of Castellón, [ECLI: ES:APCS:2015:705]

Decision No. 750/2020, of the Court of Appeal of Valladolid [ECLI:ES:APVA:2020:1536]

## RELEVANT CASE-LAW

### URUGUAY

Civil Appeal Court, No 2, 54/2009, Ruling of 30 Jul. 2009

Civil Appeal Court, No 1, Ruling 123/2009

Civil Appeal Court, No 5, Ruling 104/2009

Uruguayan Antitrust Agency- Resolution 32/2012 of 2 May 2012

Uruguayan Antitrust Agency- Resolution No. 67/013 of 21 May 2013

Uruguayan Supreme Court, Ruling of 30 June 2015

Uruguayan Antitrust Agency-Resolution N° 22/016



## RELEVANT CASE-LAW

### BELGIUM

- Commercial Court Brussels, 15 October 2020, *Competitio* 2021/1, p.58
- Commercial Court Brussels, 11 February 2021, *Competitio* 2021/2, p.166
- Commercial Court Ghent, 28 October 2020, *Competitio* 2020/4, p.369
- (App.) Antwerp, 20 October 2021, *Competitio* 2021/3, p.285
- Commercial Court Brussels, *Competitio* 2021/2, p.187
- Commercial Court Tongeren, 16 April 2021, *Competitio* 2021/2, p.159
- Commercial Court Leuven, 27 April 2021, *Competitio* 2021/3, p.275
- Commercial Court Antwerp, 20 April 2022, AR A/21/355 (not published yet)



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**Thanks for your kind attention!**

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