

Abuse without Dominance in Competition Law: Abuse of Economic Dependence and its Interface with Abuse of Dominance

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1 Introduction

Competition is closely linked to economic freedom: freedom of contract and freedom to participate in the market. From a legal perspective, economic freedom is expressed through contractual relationships that market participants conclude in their day to day dealings between businesses and consumers. From an economic perspective economic freedom is expressed through the objective of keeping the market open and competitive by preventing and sanctioning behaviors that restrict the very economic freedom of market participants. Competition law aims to protect economic freedom by prohibiting and sanctioning anticompetitive behaviors (cartels and abuse of dominance) and by monitoring, preventively, transactions (mergers) that could potentially affect the openness and competitiveness of the market.

The conceptual approach to protecting competition, using competition law as a legal instrument, informed by economic theory, relies on the economic weights (market power²) of the participants in a given market (the relevant market). Assessing whether competition is restricted in a given market requires, therefore, that a market participant enjoys a dominant position and effectively abuses it³. In abuse of dominance cases, although the anticompetitive behaviors are directed to competitors (exclusion) or consumers (exploitation), there is a fundamental requirement that competition in the

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² For a discussion of the concept of market power in comparison to market dominance, see, Josef Drexler 'The relationship between the legal exclusivity and economic market power: links and limits' in von Inge Govaere, Hanns Ullrich (eds.), *Intellectual Property, Market Power and the Public interest* (Brussels Peter Lang, 2008), pp... (distinguishing market dominance which trigger competition law enforcement whereas having a certain market power is necessary for an undertaking to participate and compete in the market economy).

³ This is the approach to the concept of abuse of dominance in the EU. Market dominance is defined in case law as "the power to behave to an appreciable extent independently of its competitors, customers, and ultimately of its consumers", C-27/76 *United Brands* [1978] ECR I- 00207. It has influenced the approach of many jurisdictions.

relevant market be affected. If the conduct does not affect at all the relevant market there is, in principle, no finding of abuse of dominance.

This approach ignores relative dominance and its effects in situations where a market participant enjoys a superior bargaining position towards its business partners and uses it to its advantage. Market participants do not have even economic powers. In some situations, however, although an undertaking does not enjoy a dominant position in a relevant market, it may have a stronger economic position vis-à-vis its trading partner. Uneven market powers appear, also, in situations where a weaker economic partner depends on a stronger partner in order to exercise its freedom of competing in the market. An abuse of such differentiated market power may affect the freedom of the weaker party to compete.

Whereas most of the jurisdictions do not get involved in business-to-business dealings if the relevant market is not affected, some jurisdictions have provisions dealing with abuse of economic dependence, also termed as abuse of superior bargaining position⁴. A situation of economic dependence may be different from a situation of abuse of superior bargaining position⁵. Some jurisdictions deal with such practices under ‘traditional’ abuse-of-dominance rules following a ‘pure’ competition law analysis, others rely on contract law or civil law⁶ in order to deal with abuses arising between parties which have asymmetric economic powers.

The concept of abuse of economic dependence is unknown to US and EU competition laws. However, some EU member states such as Italy, Germany and France have in their competition laws provisions dealing with uneven bargaining power⁷.

This paper investigates the interface between the concept of abuse of economic dependence and the concept of abuse of dominant position. Section 2 discusses the interface between economic dependence, freedom of contract and competition law. It highlights how freedom of contract may create economic dependency, affect the structure of the market and thereby have competition law implications. The paper will, in section 3, discuss the legal approach to the application of the concept of economic dependence. By legal approach I refer to the main criteria put forward by competition authorities in jurisdictions applying the concept of abuse of economic dependence and how different

⁴ For an overview on how jurisdictions deal with abuse of superior bargaining position in their competition law, see the survey done by the International Competition Network on the issue. See, ICN, ‘Report on Abuse of Superior Bargaining Position’(2008)available at:

<http://www.internationalcompetitionnetwork.org/uploads/library/doc386.pdf>

⁵ One may be in a situation of abuse of superior bargaining position without being in a situation of economic dependence. When a firm is in a situation of economic dependence it is more exposed to situation of abuse of superior bargaining position from the economically stronger firms. The concepts are used interchangeably but they do not necessarily reflect the same situation.

⁶ This is the case of the prohibition of abusive clauses aiming to protect the weaker party in contract law.

⁷ Having stricter provisions is in line with EU Law.

(or similar) the approach is to the finding of an abuse of dominant position. Section 4 of the paper deals with the concept of abuse of economic dependence from the perspective of the goals of competition law. What does the concept of economic dependence tell us about the goals of competition law? Does the concept of economic dependence stretch the goals of competition law by taking into account fairness and the protection of the weaker party against the stronger? Does abuse of dominance focus the goals of competition law on efficiency? This discussion on abuse of economic dependence and goals, from a practical perspective, is relevant when assessing the ‘appropriate’ level of enforcement of competition law. Applying abuse of economic dependence offers a different enforcement perspective in competition law. Section 5 of the paper deals with that issue. The international dimension which considers the issue especially from the perspective of developing jurisdictions with weak local businesses facing competition from international firms will be discussed in section 6. The question of whether, and how, applying the concept of abuse of economic dependence would help protect competition in their markets will be of relevance.

2 Economic dependence, freedom of contract and competition law

Uneven economic power in vertical relationships may affect competition in horizontal relations⁸, between competitors. From the perspective of the dominant firm it may reinforce its market power in the relevant market vis-à-vis its competitors. From the perspective of the weaker party, it may affect its ability to effectively compete on the downstream market. Competition law does not interfere with the freedom of market participants to enter into business dealings as long as the business transactions do not affect the relevant market. Some aspects of the consequences of uneven economic powers in business transactions are dealt with by a contract law or consumer law⁹. The rationale behind the reluctance of competition authorities to intervene in economic transactions based on uneven bargaining positions is the respect of the freedom of contract, in addition to the market regulatory goal of competition law¹⁰. Market participants are the best protectors of their own economic interests. They enter into business dealings only if they expect to profit from the transaction; if they are better off economically. Uneven

⁸ Laurence Boy, ‘Abuse of market power: controlling dominance or protecting competition?’ in Hanns Ullrich (ed.), *The Evolution of European Competition Law: whose Regulation, which Competition?* (Cheltenham and Northampton, MA, Edward Elgar, 2006), p. 216.

⁹ In EU, for instance, see DIRECTIVE 2011/83/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, L 304/64, 22-11-2011, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0064:0088:en:PDF>.

¹⁰ Competition law aims to protect the competitiveness of the market. Its objective is not to police contracts which do not affect competition in the market.

market power between market participants may even be considered a sign of effective competition. It is transitory and may shift depending on the realities of a given market.

Contract law does not, however, stand alone, independently, from the market. Contracts can shape the structure of the market. Contracts are legal instruments used to formalize business dealings. As such, they have a different function than competition law, which is a system of legal ordering of economic relationships¹¹. Contract law formalizes economic dealings between market participants whereas competition law regulates the general legal environment where transactions take place. Contract law is permissive and freedom-enhancing whereas competition law is, in a sense, restrictive and freedom-monitoring. Freedom of contract should therefore be exercised in respect of competition law rules. An anticompetitive agreement is an expression of the freedom of contract, but it violates the general principle of open and competitive markets. In principle, as long as freedom of contract does not affect free competition, competition law does not intervene. Hence, competition law is not concerned with ensuring formal economic equality between market participants¹². It is concerned with keeping the market open and competitive and protecting all market participants' opportunities to compete, regardless of their market power. Uneven economic powers leading to uneven bargaining positions are normal in a competitive environment.

The regulation of abuse of economic dependence, however, seems to be more concerned with protecting the weaker party in business dealings. It aims at correcting the effects of contractual inequalities in vertical relations. Its acceptance as an antitrust problem, therefore, raises questions. As we shall see, however, regulation of abuse of economic dependence may be in line with the general objective of protecting competition¹³.

This distinction between vertical relationship and horizontal relationships may turn out to be superficial in some situations. Hence freedom of contract may restrict not only the economic freedom of the weaker party, but competition in general. The issues raised by restrictive business practices such as abuse of economic dependence also concern

¹¹ Harry First and Spencer Weber Waller, 'Antitrust's Democracy Deficit'(201) *Vol. 81, Fordham Law Review*, , p. 3.

¹² This approach of competition law focus on efficiency as a goal of competition law is questioned by an emerging literature especially in the context of developing jurisdictions which have concentrated markets and where markets are not functioning due, inter alia, to concentration of economic power. See on the issue, Mor Bakhom, 'A dual language in modern competition law? Efficiency approach versus development approach and implications for developing countries' (2011), *World Competition*, p.495; Michal S. Gal, Eleanor Fox, 'Drafting competition law for developing jurisdictions: learning from experience' in Michal Gal, Mor Bakhom, Josef Drexl, Eleanor Fox, David Gerber (eds.), *Economic characteristics of developing jurisdictions: their implications for competition law*, (Cheltenham and Northampton, MA, Edward Elgar, June 2015, forthcoming).

¹³ See below .

competition law¹⁴. This is the case when a network of contracts is created by a relatively dominant firm with the sole objective to lock in smaller weaker business partners in a network and thereby limit their possibility to shift to another trading partner. This kind of network of contracts may limit not only the economic freedom of the weaker party (*vertical approach*), but may also strengthen the market power of the relatively dominant firm (*horizontal approach*).

In France, the Competition authority (*Autorité de la concurrence*) has dealt with a case that illustrates, in the distribution sector, how contractual freedom may be used in order to close competition horizontally, by enhancing a relative dominant position, and vertically, by limiting the freedom of weak competitors. In this case, *Carrefour*¹⁵, which is active in the food retail business, created a network of contractual relationships with its affiliated distributors which had the consequence of giving it an actual control of the network. *Carrefour* concluded a variety of contracts that are kinked to each other that allowed it to create dependency relationships with its affiliates and to control the network. With individual distributors, *Carrefour* agreed on a franchise contract of seven years automatically renewable for a further seven-year period. Parallel to that, another contract of seven years is signed which obliges the individual distributors to commercialize *Carrefour's* products. These contracts have one month difference in their signing date so that one contract is always into force. A notice of cancellation of one year is included and a high monetary fine is applicable in case of cancellation. With franchised companies, *Carrefour* systematically enters into the capital of the franchised distributor which allows it to veto important decisions such as the cession of the capital. *Carrefour*, also, has the right to authorize the acquisition of the franchise or to exercise its preemption right. In addition to those contracts which create direct and long-term business dealings between *Carrefour*, the franchised companies and individual distributors, additional provisions related to fidelity rebates and suggested retail prices are included. An arbitral provision¹⁶ states that the disputes are solved through arbitration¹⁷.

Analyzed individually, these contracts reflect the freedom of contract of *Carrefour* and its affiliates and may be beneficial to individual distributors and franchised businesses.

¹⁴ Laurence Boy, 'Abuse of market power: controlling dominance or protecting competition?' in Hanns Ullrich (ed.), *The Evolution of European Competition Law: whose Regulation, which Competition?* (Cheltenham and Northampton, MA, Edward Elgar, 2006), p. 220.

¹⁵ See, Autorité de la Concurrence, Décision n° 10-D-08 du 3 mars 2010 relative à des pratiques mises en oeuvre par Carrefour dans le secteur du commerce d'alimentation générale de proximité, available at : <http://www.autoritedelaconcurrence.fr/pdf/avis/10d08.pdf>. For a critical comment on the decision, see, Laurence Boy, 'Abus de dépendance économique: Reculer pour mieux sauter?' (2010) n° 23, *Revue Lamy Concurrence*, p. 93.

¹⁶ This provision prevents the contractant to take a potential case to the judge. Given the potential expenses for arbitration, it, in fact, discourages the contracting party to take this route.

¹⁷ Despite all those provisions, the competition authority rejected the existence of a dependency between *Carrefour* and its franchisees. The competition authority concluded that there is no characterization of a situation of economic dependence.

However, analyzed together, with regard to their actual effects on the market, those individual contracts allow *Carrefour* to create a network of distributors, economically dependent on it. It allows it to plan and coordinate its distribution¹⁸. The costs to leave the network or to shift to another supplier are high enough to deter individual distributors or franchised companies from leaving the network.

This contractual integration with the creation of a network showcases how the law, contract law in particular, can be used in order to restructure the market¹⁹ by stabilizing or enhancing the market share of an economically stronger party and by limiting the freedom to compete of the weaker party. Only a ‘substantial analysis’²⁰ which goes beyond the formal and individual relationships and takes into account the actual economic impact²¹ of the contracts allows to perceive how contract law can be used in order to impact the structure of the market. This has been termed as “*economic contracts*”²² which characterizes the network.

This case is not isolated. The strategy of locking affiliated and independent retailers is common in the distribution sector. A sector inquiry conducted by the French Competition Authority in the food retail sector confirms this strategy of creating dependency and lock mobility through economic contracts. As stated in the report, “*although independent in term of pricing and buying decisions, (...) affiliated stores are often captive from their retail group due to numerous clauses included in their agreements and status, which prevent them from moving to another retailing group*”²³.

Given the foreclosure effects of economic contracts in the distribution sector, the French legislator, following the recommendation of the Competition Authority, is considering broadening the legal basis of the intervention of the competition Authority in distribution networks. This is done by regulating contractual relationships in the distribution sector

¹⁸ Laurence Boy, ‘Abus de dépendance économique: Reculer pour mieux sauter?’ (2010) n° 23, *Revue Lamy Concurrence* p. 4. Criticizing the approach of the competition authority of analyzing the contracts individually and considering them as a whole.

¹⁹ Ibid.

²⁰ Gerard Farjat a pioneer of this approach which go beyond the formal aspects of economic phenomenon to consider their actual impact on the market. See, Gerard Farjat, ‘L’importance d’une analyse substantielle en droit économique’ (1986), *RIDE*.

²¹ Analysis closed to the more economic approach.

²² Laurence Boy, ‘Abus de dépendance économique: Reculer pour mieux sauter?’ (2010) n° 23, *Revue Lamy Concurrence*, op. cit. (note 15), p. 11.

²³ Autorité de la concurrence, press release 7 December 2010, Sector inquiry/retail in the food sector, available at: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=368&id_article=1512. The incriminated clauses that create dependency and restrict the freedom of competition of independent retailers are the same that those concluded in the Carrefour case. These provisions, according to the report, relate to: the duration of the agreements which are very long (up to 30 years); the store is bounded to its network head through several agreements (franchise agreements, cooperative group membership contract, supplying contracts, leasing contracts, partners agreements independent store status etc...) and whose terms are overlapping; the storekeeper has to pay “entry rights with delayed payments”; post-agreement non re-affiliation and non-competition clauses are often included in these agreements.

that might affect the freedom of the franchised or individual distributors to shift to another supplier. Some clauses in distribution agreements will be regulated, thereby monitoring the freedom of contract, in order to protect free competition. The proposed legislation, Loi Macron²⁴, which amends some provisions of the French Commerce Code, is currently discussed. It puts forward the following measures:

It is stated in the proposed changes that all contracts between suppliers and a distributor should have the same ending date²⁵. Also, the cancellation of one contract ends the network of all contracts²⁶. Those changes react to the strategy used in the distribution sector of concluding a network of contracts with different ending dates with the consequence of always having a contract into force.

The proposed reform also prohibits contractual provisions that restrict the freedom of a party to engage into a commercial activity at the end of the contract²⁷. Such provisions are considered void if included in a contract. Additional measures such as the duration of affiliation contracts, which should not exceed nine years²⁸, are also included. All those changes are of public order²⁹ nature which means parties may not derogate to them by contractual provisions. Those measures which limit freedom of contract have been strongly criticized as being too interventionist³⁰. However, they aim to limit the restrictive impact freedom of contracts may have on the freedom of competition of market participants in the distribution sector.

Freedom of contract is closely linked to freedom of competition, which is a fundamental pre-condition for a competitive market. Freedom of contract may affect economic freedom which, in turn, may affect the competition process. Vertical behavior may have horizontal effects. As pointed out:

²⁴ See, « TITRE IV, Des réseaux de distribution commerciale, available at : <http://www.assemblee-nationale.fr/14/ta/ta0473.asp>. For discussion of the proposed reforms, see, Nicolas Dissaux, 'Loi Macron et réseaux de distribution: d'une polémique à l'autre' (2015) n° 9, *Recueil Dalloz*, pp. 496-497.

²⁵ Art. L. 341-1. – « *L'ensemble des contrats conclus entre, d'une part, une personne physique ou une personne morale de droit privé regroupant des commerçants, autre que celles mentionnées aux chapitres V et VI du titre II du livre Ier du présent code, ou mettant à disposition les services mentionnés au premier alinéa de l'article L. 330-3 et, d'autre part, toute personne exploitant, pour son compte ou pour le compte d'un tiers, au moins un magasin de commerce de détail, ayant pour but commun l'exploitation d'un de ces magasins et comportant des clauses susceptibles de limiter la liberté d'exercice par cet exploitant de son activité commerciale prévoient une échéance commune* ». (to be translated).

²⁶ Art. L. 341-1. « *La résiliation d'un de ces contrats vaut résiliation de l'ensemble des contrats mentionnés au premier alinéa du présent article* ». (to be translated).

²⁷ Art. L. 341-2. – « *Toute clause ayant pour effet, après l'échéance ou la résiliation d'un des contrats mentionnés à l'article L. 341-1, de restreindre la liberté d'exercice de l'activité commerciale de l'exploitant qui a précédemment souscrit ce contrat est réputée non écrite* ». (to be translated).

²⁸ Art. L. 341-3. – « *Les contrats mentionnés à l'article L. 341-1 ne peuvent être conclus pour une durée supérieure à neuf ans. Ils ne peuvent être renouvelés par tacite reconduction* ». (to be translated).

²⁹ It means those rules are binding to contracting parties.

³⁰ Nicolas Dissaux, 'Loi Macron et réseaux de distribution: d'une polémique à l'autre' (2015) n° 9, *Recueil Dalloz*, op cit. (note 24), pp. 496-497. .

[I]f the intensity of competition should only be measured on a horizontal level between companies acting at the same level in the relevant market, it is often in vertical relations that competition is restricted. These vertical relations effectively determine the competition game which can exist on the horizontal level. (...) the logic of competition cannot be cut off from the requirements of contractual equality because the market is based on the legal instrument of the contract³¹.

3 The legal approach to abuse of economic dependence

The suitable legal instrument for regulating economic unbalances in contractual relationships raises theoretical and practical legal challenges. The theoretical questions relate to the objectives of competition law. Should competition law be concerned with economic unbalances in contractual relationships? Practical questions relate to the criteria for applying provisions dealing with abuse of economic dependence. Economic unbalances can be analyzed under the angle of contract law, consumer law, or competition law. Competition law, applied with efficiency and consumer welfare as main objectives, is not a popular tool to correct vertical economic unbalances. Competition law regulates economic transactions and types of behavior that affect a relevant part of the market. As long as the relevant market is not affected, competition law does not intervene. This mainstream approach questions the appropriateness of competition law's intervention in regulating contractual relationships. However, this strict approach to the scope of competition law intervention contradicts some attempts to correct the effects of economic unbalances in business dealings by the very instrument of competition law, by extending its scope of application. This is done by including in some jurisdictions' competition laws rules on abuse of economic dependence. Such approach is not, however, without its critics. Provisions in some legislations and enforcement approaches showcase the differences and difficulties in apprehending vertical contractual relationships between undertakings which are not competing in the same market; which do not hold a dominant position by using competition law.

3.1 Approaches to abuse of economic dependence

A report prepared for the International Competition Network's (ICN) annual conference in Tokyo in 2008 dealing with abuse of superior bargaining position³² provides valuable information on the law and case law of countries which have specific provisions regulating dealings between undertakings which do not enjoy even economic position. More importantly, the report also reveals that the majority of jurisdictions which have

³¹ Laurence Boy, 'Abuse of market power: controlling dominance or protecting competition?', op. cit. (note 14), page 220.

³² ICN, 'Report on Abuse of Superior Bargaining Position' (2008), op. cit. (note 4).

taken part to the survey do not have specific provisions regulating contractual relationships between parties that have uneven bargaining power. Whereas some jurisdictions deal with such practices under the traditional abuse of dominance rules following a pure competition law analysis, other relies on contract law or civil law to deal with abuses arising from dealings from parties which have asymmetric economic power. The concept of “abuse of economic dependence” is unknown to US and EU competition laws. Some EU member States³³, however, have such provisions in their competition laws. This is the case of Germany³⁴ and France³⁵ and Italy³⁶.

The rationale behind including such rules is to protect the weaker party’s freedom to compete from potential abuse resulting from the uneven market power of its stronger business partner. Uneven market powers may affect the economic freedom of the weaker party without necessarily affecting the market. When aggregated in a network of contracts³⁷, they may affect the structure of the market. Hence, relative market power may restrict market access for a weaker party and, thereby, hinder free competition. In France, for instance, the development in the 1970s of the retail sector which created uneven economic dependency situations between suppliers and distributors led to the inclusion of the incrimination of abuse of economic dependence in the 1986 competition law³⁸. This is especially the case in the distribution sector where strong buyers deal with weaker suppliers and are able to impose their purchasing conditions³⁹.

³³ Recital 8 of Regulation 1/2003 states: “(...) Member States should not under this Regulation be precluded from adopting and applying on their territory stricter national competition laws which prohibit or impose sanctions

on unilateral conduct engaged in by undertakings. These stricter national laws may include provisions which prohibit or impose sanctions on abusive behaviour toward economically dependent undertakings”. Article 3(2) confirms this possibility. See Council Regulation (EC) no 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 2003, OJ L 1/1.

³⁴ See § 20(2) of the *Gesetz gegen Wettbewerbsbeschränkungen* (GWB), available at <http://dejure.org/gesetze/GWB/20.html>

³⁵ See Article L 420-2 (2) of the French Commerce Code, available at:

<http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000005634379>.

³⁶ For discussion on the recent developments, see, Valeria Falce, Abuse of economic dependence and competition law remedies: a sound interpretation of the Italian regulation, *European Competition Law Review* (E.C.L.R.), 36, 2015, Issue 2 at page 71 & seq.

³⁷ Supra, the example of Carrefour

³⁸ See, Pablo Neruda, ‘Ordre concurrentiel et abus de dépendance économique’ in Hanns Ullrich, Michel Rainelli, Laurence Boy (eds.), *L'ordre concurrentiel: mélanges en l'honneur d'Antoine Pirovano*(Paris, Frison-Roche, 2003), pp. 619-620. The inclusion of such provisions appeared revolutionary to the first commentators given its *contractual* and *competition* dimensions and its dual aim to limit the economic power of both producers and/or distributors. See Laurence Boy, ‘Abus de dépendance économique, reculer pour mieux sauter’, op. cit. (note 14), p. 7. See also, Frédéric Marty and Patrice Reis, ‘Une approche critique du contrôle de l’exercice des pouvoirs privés économiques par l’abus de dépendance économique’(2013), *RIDE*, p. 581.

³⁹ Examples here: France, Germany, Switzerland.

3.1.1 Characterizing an economic dependency situation

Economic dependency may exist in various situations. It may relate to a product range or a strong brand, a long lasting economic dealing between two undertakings, the scarcity of a product, or the technicality of a given product⁴⁰. A common criteria competition authorities take into account when analyzing the existence of a situation of economic dependence is the *impossibility or the costs of a trading partner to shift to another trading partner*⁴¹. The French competition authority for instance put forward four criteria when assessing the existence of an economic dependence: the reputation of the supplier's brand, its market share, the importance of supplier's share in the retailer's turnover and the *possibility for the distributor to shift to another supplier on identical terms*⁴². The likelihood of shifting to another trading partner is key in finding a situation of economic dependence⁴³. This criteria has been restrictively interpreted in French case law⁴⁴. Relevant provision in German Act Against Restriction of Competition (*Gesetz gegen Wettbewerbsbeschränkungen, GWB*)⁴⁵ put also an emphasis on the impossibility of the trading partner in an economic dependency situation to shift to another supplier. Article 20 (2) GWB read:

“(2) Paragraph 1 shall also apply to undertakings and associations of undertakings insofar as small or medium-sized enterprises as suppliers or purchasers of certain kinds of goods or commercial services depend on them in such a way that sufficient and reasonable possibilities of resorting to other undertakings do not exist (emphasis added). A supplier of a certain kind of goods

⁴⁰ Market, in Ulrich Immega, Ernst-Joachim Mestmäcker (eds.), *GWB Kommentar zum Kartellgesetz* (München, Beck, 2014) § 20, 6 et seq.

⁴¹ This has resulted from Case law in France and in Germany dealing with abuse of economic dependence. For discussion, see, Pranvera Kellezi, ‘Abuse below the threshold of dominance? Market power, market dominance, and abuse of economic dependence’ in Mark-Oliver Mackenrodt, Beatriz Conde Gallego, Stefan Enchelmaier (eds.), *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?*, *MPI Studies on Intellectual Property, Competition and Tax Law* (Berlin and Heidelberg, Springer, 2008), pp. 69-71.

⁴² This requirement is reinstated in a recent decision by the competition authority. The competition authority stated in *Carrefour*, «*La modification de l'article L. 420-2 du Code de commerce introduite par la loi du 15 mai 2001, qui a éliminé la référence à la notion de « solution équivalente », n'exempte pas les parties d'en démontrer l'existence. En effet, le Conseil de la concurrence a eu l'occasion de rappeler, postérieurement à l'entrée en vigueur de la loi du 15 mai 2001, que l'état de dépendance économique implique « l'impossibilité dans laquelle se trouve une entreprise de disposer d'une solution techniquement et économiquement équivalente aux relations contractuelles qu'elle a nouées*», point 151 of the decision. For discussion, Laurence Boy, ‘Abuse of market power: controlling dominance or protecting competition?’, op. cit. (note 11), p. 217, also, Pranvera Kellezi, op. cit. (note 41), p. 64.

⁴³ This is the case in situation where a distributor is in economic dependence vis à vis a supplier or a supplier is in a situation of economic dependence vis-à-vis a distributor. See, Frédéric Marty and Patrice Reis, ‘Une approche critique du contrôle de l'exercice des pouvoirs privés économiques par l'abus de dépendance économique’ (2013), *RIDE*, op. cit. (note 38), p 584.

⁴⁴ Ibid.

⁴⁵ Op. cit.

or commercial services shall be presumed to depend on a purchaser within the meaning of sentence 1 if this purchaser regularly obtains from this supplier, in addition to discounts customary in the trade or other remuneration, special benefits which are not granted to similar purchasers”.

The existence of a reasonable possibility to switch to another supplier is the main criteria to find the existence of an abuse of economic dependence. Mere existence of competition between suppliers does not mean that reasonable possibility to switch exists. This is especially the case when the dependency is upon a branded product⁴⁶. When a reasonable alternative solution exists there is no finding of economic dependence. When a supplier or a distributor does not have reasonable alternative solutions to do business, its economic freedom is restricted. Its distributor or supplier becomes an obligated economic partner which may impose unfair contractual terms or lock it into a network of contracts⁴⁷.

The requirement that an alternative solution does not exist for the partner in economic dependency situation expresses the concern of the competition authorities to protect the freedom of competition of the weaker trading partner. The aim of the provision is less the protection, *per se*, of the weaker party. It is more concerned with protecting its economic freedom; its freedom to compete. It aims to ensure that the economically weaker party has alternative solutions, either as a supplier or a buyer. This objective, contrary to the general understanding of the provisions regulating abuses of economic dependence, is in line with the goal of keeping the market open and competitive. This underscores the argument put forward in abuse of economic dependence cases that the rules on economic dependence protect competitors.

3.1.2 Restriction of the scope: requirement that the relevant market be affected

Some legislations, such as the French commercial code, requires for a finding of an abuse of economic dependence that the market be affected. This requirement, which takes a market approach in a pure competition law analysis, has restricted the scope of application of the provision dealing with abuse of economic dependence. This requirement goes beyond the vertical relationships to consider the horizontal effect of a situation of economic dependence in a given market, from a horizontal and macro-economic perspective⁴⁸. This combination of contractual (analysis of the dependence

⁴⁶ Pranvera Kellezi, *op. cit.* (note 41), p. 62.

⁴⁷ This situation is illustrated in the sector inquiry report of the French competition authority in the food retail sector. Gerard Farjat, *op. cit.* (note 20).

⁴⁸ Laurence Boy, *Abus de dépendance économique, reculer pour mieux sauter*, *op. cit.* (14), p 10 : «*Alors que selon l'autorité l'état de dépendance économique s'apprécie in concreto dans la relation bilatérale ou*

from the bilateral point of view) and competition (taking the market as a benchmark for a finding of abuse) related requirements made difficult the enforcement of the provision in practice⁴⁹. Such requirement is not a must in some legislations⁵⁰ which do not require the market be affected for a finding of an abuse of economic dependence⁵¹. Such requirement expresses the difficulties in dealing with abuse of economic dependence with the traditional competition law approach which requires that the market be affected.

3.2 Interfaces between abuse of economic dependence and abuse of dominance

At first sight, the incriminations of abuse of economic dependence and abuse of dominance seem to be distinct. However, they have similarities with regard to their objectives and enforcement mechanisms.

One of the objectives of including provisions regulating abuses of economic dependence in some jurisdictions is to protect the weaker party in distribution agreements between producers and distributors. Similar practices, such as abuse of buyer power, can also be dealt with by using rules of abuse of dominant position. However, the legal and economic analysis may not be the same. For instance the finding of an abuse of dominant position requires that the undertaking be in a dominant position and that the incriminated practice affects the relevant market. Such requirements are not a must in abuse of economic dependence cases. A relative market power which is analyzed with regard to the business partner suffices to a finding of a dependency situation. With regard to a product range, a strong brand or in situations of shortage, a dependency relationship may exist⁵².

In abuse of dominance cases, the existence of a market power is analyzed vis-à-vis other competitors market shares in the relevant market. In economic dependency situations there is a pre-requirement of relative market power for the undertaking in relative dominant position vis-a-vis its trading partner. Market power exists vertically, in relation with the trading partner or partners towards which the undertaking can behave independently. The same idea of the power to behave independently towards its competitors, customers and consumers is present in the definition of market power by the

dans les relations dont les membres sont placés dans la même position économique et juridique, il faut démontrer que la pratique 'est susceptible d'affecter le fonctionnement ou la structure du marché' et donc envisager la situation du point de vue macro-économique ».

⁴⁹ Frédéric Marty and Patrice Reis, 'Une approche critique du contrôle de l'exercice des pouvoirs privés économiques par l'abus de dépendance économique' (2013) *RIDE*, op.cit. note (38), p. 584.

⁵⁰ German law on abuse of economic dependence for instance.

⁵¹ Parallel to the requirement that the market be affected, in French law there is an evolution. Since 2001 (French law on new regulations), abuse of economic dependence situations may be considered restrictive practices of competition which are sanctioned by general courts. For discussion, see, Laurence Boy, 'Abuse of market power: controlling dominance or protecting competition?', op.cit. (note 8), p. 218.

⁵² Pranvera Kellezi, op. cit. (note 41), p. 62.

ECJ⁵³. Economic dependency situations imply the existence of a certain level of market power which allows the relative dominant firm to behave independently from its trading partner without fear of losing market shares. However, the concept of market power is relative here. It does not extend to a dominant position or a monopoly. It is not analyzed taking into account the relevant market.

In economic dependency situations, firms behave independently towards their customers, as would be able to do an undertaking in a dominant position. Elements of abuse of economic dependence may lead to a finding of a dominant position. Economic dependency situation may, therefore, constitute an element of finding the existence of market power or a dominant position⁵⁴. As pointed out, “including ‘dependency’ in the definition of market power means looking at a dominant firm not only from the supply side but from the demand side as well. Hence the notion that dominance may also exist if a customer is dependent upon an individual supplier because there is no alternative source available for him”⁵⁵.

From an enforcement perspective, however, the requirements for finding and sanctioning an abuse of economic dependence are less strict than the requirements of an abuse of dominant position. Finding of an abuse of economic dependence is analyzed only vertically, relying only uneven bargaining powers between two undertakings which have the consequence of hindering the freedom to shift of one party; the economically weaker. Being dominant is not a requirement. It suffices that there is proof that dependency exists for the rules on economic dependence to be applicable.

With regard to effects, in abuse of dominant cases, there is a requirement that the relevant market be affected for the prohibition to be applicable. Competition in the relevant market need not be affected (although some legislations have such requirements) for a finding of an abuse of economic dependence. In principle the requirements for finding an abuse of dominant position are less restrictive. A dominant position in a market does not result necessarily in an economic dependence position of an undertaking. Economic dependence may exist without finding of a dominant position. Hence, sufficient competition may exist between suppliers despite the fact that there is a dependency situation of one undertaking. Existence of vivid competition does not mean, however, that the dependent undertaking has reasonable possibility to shift to a competitor. The

⁵³ C-27/76 *United Brands* [1978] ECR I- 00207, para. 65; C-85/76, *Hoffmann-La Roche/ Commission* [1979] ECR I-00461, para. 38. The ECJ defined market power as a power “to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers”.

⁵⁴ Pranvera Kellezi, op. cit. (note 44), at page. Cite cases where the authorities rely on dependency in finding the existence of a dominant position (see, *British Airways and Aeroport de Paris* cases).

⁵⁵ Peter Behrens, ‘Comment: Controlling dominance or protecting competition: from individual abuses to responsibility for competition’ in Hanns Ullrich (ed.), *The Evolution of European Competition Law: whose Regulation, which Competition?*, op. cit. (note 8), p. 227.

vertical uneven bargaining power of the undertakings and the existence of reasonable possibility to shift are more relevant in the analysis of abuse of dominance cases.

4 Economic dependence and the goals of competition law

The goals of competition law are closely linked to the issue of relative dominance and the problems of uneven economic power between market participants. The regulation of abuse of economic dependence raises the general issue of economic unbalances and competition law⁵⁶. The challenge when applying provisions dealing with economic unbalances is the required balancing between *safeguarding competition in the market, respecting freedom of contract and protecting the freedom of competition of weaker parties against powerful business partners*⁵⁷. At a more fundamental level, including provisions on abuse of economic dependence in competition laws raise the question of the orientation of the goals of competition law. Should goals be limited only to efficiency and consumer welfare, or should goals also care about protecting the economic freedom of business actors. The overarching and underlying debate relates to the issue of an economic oriented approach to competition law or a social⁵⁸ approach to competition law. Efficiency as an objective and protecting the economic freedom of weaker parties are not necessarily exclusive goals. Addressing abuses of economic dependence by safeguarding economic freedom is closely linked to protecting competition from a macro perspective. I argue that if we analyze the issue of abuse of economic dependence from the perspective of economic freedom and freedom to compete, it is possible to protect a weaker party by safeguarding the openness of the market in line with efficiency.

4.1 Economic dependence and efficiency: irreconcilable?

The prohibition of abuse of economic dependence raises a fundamental question: should competition law be concerned with economic unbalances between market participants? The trajectory of US, German and Japan competition laws showcase how competition law can be used in order to control concentration of economic power⁵⁹. New forms of

⁵⁶ For general discussion on the issue, see, Josef Drexl, 'Déséquilibres économiques et droit de la concurrence' in Laurence Boy (ed.) *Les déséquilibres économiques et le droit économique* (Brussels, Larcier, 2014), pp. 32-47.

⁵⁷ Laurence Boy, 'Abuse of market power: controlling dominance or protecting competition', op. cit. (note 8), p. 218.

⁵⁸ See Pablo Neruda, 'Ordre concurrentiel et abus de dépendance économique', op. cit. (note 38) pp. 621 et seq., on the discussion in France between a social approach to competition law and an economic approach to competition law with regard to the incrimination of abuse of economic dependence.

⁵⁹ See Josef Drexl for short discussion with relevant references, Josef Drexl, 'Consumer welfare and consumer harm: adjusting competition law and policies to the need of developing jurisdictions' in Michal Gal, Mor Bakhoun, Josef Drexl, Eleanor Fox, David Gerber (eds.), *Economic characteristics of developing jurisdictions: their implications for competition law* (Cheltenham and Northampton, MA, Edward Elgar,

concentration of economic power have now emerged, resulting from the very approach of open markets and freedom of contracts which give private economic groups⁶⁰ the leeway to concentrate economic power. This concentration of economic power through freedom of contract give stronger economic entities leveraging powers vis-a-vis weaker trading partners; be they suppliers or distributors. If it reaches a critical level, concentration of economic power may affect the structure of the market. Controlling concentration of economic power is not unknown to competition law, even in jurisdictions which advocate, in the name of efficiency, a non-interventionism stand toward uneven economic power. History teaches us that controlling economic power was behind the *Sherman Act*⁶¹. Germany ordo-liberalism after the war and Japan imposed antimonopoly law after the war was politically motivated by the need to control economic power⁶². With the shift, over time, to efficiency and consumer welfare as the sole goals of competition, informed by industrial economics, controlling dominance and concentration of economic power is no longer a competition law concern. To the contrary, dominance is praised as efficient and innovation enhancing. This justifies the reluctance in the US to intervene in markets by fear that vivid competition would be chilled⁶³. Europe on the other hand seems to be more concerned with concentration of economic power and its potential effects on competition. This justifies the special responsibility put on dominant firms not to foreclose competition⁶⁴.

In this context, concerns about economic unbalances between markets participants, should not be a concern of competition law. This would denature the purity of competition law which should only concern with efficiency. Risks associated with economic unbalance in contractual relationships are not a competition law problem. Policing contractual relationships are based on concerns of equity and fairness, not competition law, and therefore, should not be dealt with using competition law⁶⁵. Using competition law to deal with economic unbalance would lead to controlling dominance,

June 2015, forthcoming). (the author mentions that “In the United States, antitrust law was introduced as an instrument to fight concentration of economic power in the hands of a small number of firms. In post-war Germany and Japan, competition law was also accepted for highly political reasons with a view to breaking with the tradition of economic cartelization that had been the economic foundation of the previous totalitarian regimes”).

⁶⁰ Frédéric Marty and Patrice Reis, ‘Une approche critique du contrôle de l’exercice des pouvoirs privés économiques par l’abus de dépendance économique’ (2013), *RIDE*, op. cit. (note 38), p. 584.

⁶¹ Reference here

⁶² Reference here

⁶³ See, Eleanor Fox , ‘Comment: abuse of a dominant position: the Americanization of European competition law? The critical role of perspective’ in Hanns Ullrich (ed.), *The Evolution of European Competition Law: whose Regulation, which Competition?*, (Cheltenham and Northampton, MA, Edward Elgar, 2006) p. 235.

⁶⁴ *Ibid.*, pp.235-236. For discussion on the different approached between the US and the EU, see. Fox two papers discussing the different approaches (to be completed).

⁶⁵ Peter Behrens, ‘Comment: Controlling dominance or protecting competition: from individual abuses to responsibility for competition’, op. cit. (note note 55), p. 228.

not the competition process as such⁶⁶. As long as the competition process is not affected, competition law should not enter into play. Even some jurisdictions which have provisions dealing with uneven bargaining powers in contractual relationships experience difficulties in combining a competition law approach, which requires that the market be affected, and a pure contractual law approach which take into account the vertical relationships between two undertakings. This showcases the difficulties in reconciling contractual approach with competition law approach. This approach, however, ignores the very effects of freedom of contracts on the structure of the markets and the freedom of competition of markets participants in economically weaker positions.

4.2 Economic dependence, economic freedom and freedom to compete

The market economy rests upon the fundamental idea of freedom⁶⁷: economic freedom and free participation in the market. The idea of ‘free competition’ as an institution⁶⁸, and its regulation and protection by competition law, rest upon the prerequisite of the free participation of people and businesses to the economy by exercising their individual economic freedom⁶⁹. Protecting economic freedom is intrinsically related to the goal of “protecting free competition”⁷⁰. As a constitutionally protected fundamental right⁷¹, free competition should guarantee free individual participation in the economy. However, since markets forces and economic powers are uneven, put into practice, the economic freedom of one actor may undermine or restrain the economic freedom, and freedom to compete of another. This has been termed as the “freedom paradox”⁷². This particularly true for exclusionary abuse of dominance cases and, to a certain extent, abuse of economic dependency situations which put at risk the freedom to compete of the weaker party. Therefore, “competition law reacts to the problem of coordinating individual rights”⁷³. Given the potential conflicts amongst different individual economic freedoms,

⁶⁶ Peter Behrens, ‘Comment: Controlling dominance or protecting competition: from individual abuses to responsibility for competition’, op. cit. (note 55), p. 228.

⁶⁷ See Wolfgang Fikentscher, Philipp Hacker and Rupprecht Podszun, *Fair Economy: Crises. Culture, Competition and the Role of Law* (Heidelberg and Berlin Springer, 2013) p. 50 (on the importance of freedom in the market economic).

⁶⁸ On the protection of free competition as an institution, a fundamental constitutional right, see, Josef Drexl, ‘Competition law as part of the European constitution’ in Armine von Bogdandy and J Bast (eds.), (Oxford, Hart, 2009), p. 694.

⁶⁹ Wolfgang Fikentscher, Philipp Hacker and Rupprecht Podszun, op. cit. (note 67), p. 50 (distinguishing the two dimension of economic freedom. The ‘objective’ dimension which is a key “organizing principle for social interaction in economic affairs” which commands a general absence or limitation of government intervention. The second, individual dimension of economic freedom entails “the right of individual market participant to decide autonomously”).

⁷⁰ Bakhoun on Goals

⁷¹ See, Josef Drexl, ‘Competition law as part of the European constitution’, op. cit. (note 67).

⁷² Reference here.

⁷³ Josef Drexl, “Competition law as part of the European constitution”, op. cit. (note 67), p. 695.

safeguards are necessary in order to protect and coordinate individual freedoms which do not constitute absolute rights⁷⁴. Hence, “freedom needs regulation”⁷⁵. This is especially the case when freedom as an institution (*objective dimension*) is threatened by the exercise of individual freedoms (*subjective dimension*)⁷⁶. This happens when concentration of economic powers in the hand of private economic entities impact not only the structure of the market, but also the individual freedoms of market participants. Hence, there is a difference between ‘formal’ economic freedom and ‘substantial’ economic freedom as is the case in abuse of economic dependence situations. In a network of in distribution agreements that have the effect to lock in franchised firms, the freedom of competition of the weaker party to shift to another distributor is considerably restricted. Protecting economic freedom and freedom to compete may justify intervention in abuse of economic dependence cases in order to protect the market against “*structural restrictions*” and the “*individuals against coercion*”⁷⁷, two elements of economic freedom. As pointed out, with the examples of integrated economic contracts in distribution agreements⁷⁸ and vertical agreements in the agricultural sectors which, freedom of contract may affect the structure of the market.

As already discussed, relative dominance may affect individual freedoms, when, for instance, a supplier or a distributor depends exclusively on a distributor or a supplier does not have equivalent alternatives. In such cases, their individual freedoms are restricted. In some situations, access to a product from a dominant (or relatively) undertaking is a prerequisite for competition in a secondary market. This was the issue in *Aéroport de Paris*⁷⁹ case. In those situations, intervention is required in order to protect freedom, as an institution, and as an individual economic right.

It worth mentioning that protection of individual freedom does not mean a right of protection for inefficient firms or a right to profit. This kind of equity, non-economic objectives⁸⁰ would undermine efficiency. Protection should be warranted only to efficient, competitive firms which are able to compete effectively in the market and whose freedom are restricted by a relative dominant firm. This should be the case even if a firm is not dominant and the relevant market is not affected.

⁷⁴ Ibid, p. 695, “*Economic freedom in the market cannot be understood either as absolute freedom of the dominant undertaking from state intervention or as the protection of weaker and less efficient competitors from failing in the market*”.

⁷⁵ Wolfgang Fikentscher, Philipp Hacker and Rupprecht Podszun, op. cit. (note 67), p. 50.

⁷⁶ Ibid.

⁷⁷ Ibid, p. 51.

⁷⁸ French report, the sector inquiry report of the French competition authority in the food retail sector. Op. cit. (note 20). See also the *Carrefour* case, op. cit. (note 12).

⁷⁹ Reference here.

⁸⁰ See Michal S. Gal, Eleanor Fox, ‘Drafting competition law for developing jurisdictions: learning from experience’ in Michal Gal, Mor Bakhoun, Josef Drexler, Eleanor Fox, David Gerber (eds.), *Economic characteristics of developing jurisdictions: their implications for competition law*(Cheltenham and Northampton, MA, Edward Elgar, 2015, forthcoming). .

One could argue that such approach would, at the same time, limit the individual economic freedom of the economically more powerful trading partner. However, as individual freedom is not absolute, in situations where its exercise may restrict competition vertically (by limiting other's individual freedoms), or horizontally (by affecting the structure of the market) limited intervention may be warranted. Hence, protection of individual freedom and protection of freedom as an institution (free competition) go hand in hand. As pointed out:

“(…) competition not only means rivalry between suppliers but also freedom of choice on the part of the customers. When there is no room left for choice, competition is absent. It is this aspect of the European approach which has led Americans to blame Europeans for protecting competitors instead of competition. The response is easy: how can there be competition without competitors? It is precisely in the context of market dominance that the line between restraint of competition (in term of rivalry) and a restriction of competitor's freedom of action on the market becomes impossible to draw”⁸¹.

The freedom approach to market transactions, with its necessary regulation, is challenged by an effect based approach⁸² which makes it difficult to fit uneven bargaining powers issue in the tools box of competition authorities. Reliance on the protection of the competition process in the market provides a theoretical and practical approach to deal with abuse of dependency situations.

4.3 Economic dependence and safeguarding the competition process

The debate on the goals of competition law has been framed in an opposing approach between the advocate of “pure” competition law which should only be concerned with efficiency and consumer welfare⁸³ on the one hand, and the socially more sympathetic advocates of competition law which are also concerned with protecting the economically weaker parties⁸⁴ on the other hand. This debate is more prominent in unilateral conducts

⁸¹ Peter Behrens, ‘Comment: Controlling dominance or protecting competition: from individual abuses to responsibility for competition’, op. cit. (note 55), p. 228.

⁸² Wolfgang Fikentscher, Philipp Hacker and Rupprecht Podszun, op. cit. (note 67), p. 57.

⁸³ Cite here.

⁸⁴ This protection may take two forms: protecting their freedom to compete or protecting them as such from competition. This two aspects are distinguish by Gal and Fox under the heading of “equity economic goals” and “equity non economic” goals. Examples of equity economic goals: protecting small and middle-sized businesses from abuses; safeguarding economic opportunity for all. Equity non economic goals “include equity non-economic goals, such as protecting small players per se; protecting jobs; promoting the nation’s industries; promoting a greater spread of ownership to increase the stakes of historically disadvantaged groups of society”. See Michal S. Gal, Eleanor Fox, Drafting competition law for developing jurisdictions: learning from experience, op. cit. (note 81).

which the area where there is less convergence. It is relevant in a context of developing jurisdictions which have goals that deviate from a mainstream conception of competition that only focuses on efficiency⁸⁵. Are the two approaches exclusive? One has to distinguish between protecting weaker, inefficient businesses as such and protecting the freedom of competition of small and less powerful firms. Protecting the economic freedom of weaker parties is in line with protecting competition. There is a complementarity⁸⁶, from a conceptual and practical point of view, between the objective of protecting competition and the need to protect the economic freedom of market participants. It is, however, essential to distinguish situation where claims of abuse of economic dependence only aims at protecting the profits of a weaker party and situations where the protection of the very economic freedom of a weaker undertaking is at stake. This distinction commands competition law intervention when the freedom to compete is threatened due to uneven bargaining powers between undertakings. If, for instance, an undertaking downstream depends on the furniture of a product from a dominant firm upstream in order to compete effectively, without reasonable possibility to shift, abuses of this dependency from the dominant supplier may affect competition in the downstream market⁸⁷. In situations where the abuse of dependency aims to protect only the profits of the contracting party, competition authorities should refrain from intervening. Other instruments such as contract law, consumer law may enter into play⁸⁸. They are more suitable to protect fairness and to integrate equity considerations. Inclusiveness and the protection of the weaker, competitive undertaking, is in line with efficiency. Their opportunity to compete on the merits should be protected. As rightly pointed out, there is no competition without competitors⁸⁹.

If we consider that the protection of freedom of competition of weaker party is in line with efficiency, from a practical point of view, the question is what enforcement approach is more suitable. Two approaches, which reflect the enforcement pathways of two leading jurisdictions, the US and the EU, can be distinguished here. ‘Consumer harm’ as a criterion of competition law enforcement, reveals fundamental differences between the United States and the EU. Whereas in the US a showing of actual consumer harm

⁸⁵ Ibid. On the discussion, also see, Mor Bakhroum, ‘A Dual Language in Modern Competition Law? Efficiency Approach versus Development Approach and Implications for Developing Countries?’ (2011) 34, *World Competition* at page 495.

⁸⁶ Laurence Boy, ‘Abuse of market power: controlling dominance or protecting competition’, *op. cit.* (note 8), p. 219.

⁸⁷ Cite the French case with the Airports

⁸⁸ Peter Behrens, making the same argument. Peter Behrens, ‘Comment: Controlling dominance or protecting competition: from individual abuses to responsibility for competition’, *op. cit.* (note note 55), at page.

⁸⁹ Ibid., p. 228.

triggers competition law application⁹⁰, in the EU courts have rejected such a requirement. Showing consumer harms is not a prerequisite for finding restriction of competition⁹¹. In the EU, the goal of protecting the competition process as an institution guides the application of competition law⁹².

The objective of sanctioning abuses of economic dependency situations when the freedom to compete of the weaker party is threatened, even though the market is not affected, and the undertaking does not hold a dominant position, does not contradict the goal of protecting competition. It is in line with the objective of protecting the competition process which, as a result, guarantees the freedom to compete of dominant and non-dominant firms as well. This approach is in line with the EU competition law which put an emphasis on protecting the competitive structure of the market⁹³ contrary to US law which trusts the dominant firms in the name of efficiency⁹⁴. From those two premises, the approach of protecting the structure of the market is more in line with the objective of protecting economic freedom in abuse of dependence cases.

In agricultural markets for instance where small farmers are both purchasers and suppliers, protection of the competition process would allow them to avoid exploitative as well as exclusionary practices that originate from dominant or relatively dominant firms⁹⁵. This protection of markets participants is more important than their protection as end consumers⁹⁶. Protecting the competition process guarantees the protection of all actors, be they big or small. A “process oriented approach”⁹⁷ that considers economic freedom and freedom of competition as paradigms is more suitable to the issue of uneven bargaining power which is a competition law problem, which should be addressed using competition law. Competition law is also about inclusiveness, the protection of freedom to compete and goal to offer the weaker and the outsider the possibility to compete on the merits.

⁹⁰ For extensive discussion on the differences between the US and the EU approaches, see, Josef Drexl, ‘Consumer welfare and consumer harm: adjusting competition law and policies to the need of developing jurisdictions’ op.cit. (note 59).

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Eleanor Fox, ‘Comment: abuse of a dominant position: the Americanization of European competition law? The critical role of perspective’ in Hanns Ullrich (ed.), *The Evolution of European Competition Law: whose Regulation, which Competition?* op. cit. (note 63),p. 237.

⁹⁵ Josef Drexl, ‘Consumer welfare and consumer harm: adjusting competition law and policies to the need of developing jurisdictions’ op. cit. (note 59).

⁹⁶ Ibid

⁹⁷ Wolfgang Fikentscher, Philipp Hacker and Rupprecht Podszun, op. cit. (note 67),p. 54. (discussing how the effects based approach has replaced the process-oriented approach. This emphasis on efficiency and welfare standards underscore, they argue, discussions on normative values and individual rights).

5 Economic dependence and enforcement: a different enforcement perspective

Enforcement is not without political influence. Strong antitrust intervention or reluctance to intervene is a matter of public choice⁹⁸, and is informed by the objectives and characteristics of each jurisdiction. In dominance cases, two main perspectives may be identified. The US approach puts strong trust in the self-correcting mechanisms of the market. Dominance is not regarded with suspicions. Dominance is a sign of a healthy market and may have innovation incentives. Antitrust authorities are concerned with too much antitrust intervention⁹⁹. Too much intervention would lead to controlling dominance and protecting less efficient firms from competition¹⁰⁰. Europe has a different perspective. It is more concerned with keeping the market open and protecting the competition process; the structure of the market. This is reflected in the special responsibility of dominant firms not to foreclose competition or to use leverage to obtain advantages over rivals¹⁰¹.

Is there an alternative enforcement approach which is concerned with uneven bargaining position situations that threaten the freedom of competition of weaker parties? Would such approach fit the enforcement toolbox in abuse-of-dominant position cases? Relative dominance may affect freedom of competition. We have seen that in some situations freedom of contract may affect the structure of the market¹⁰². At the same time, the very freedom of competition of actual or potential market participants is affected. Cases of buyer power and purchaser power, especially in the agricultural sectors, showcase how relative dominance may affect economic freedom and freedom of competition, especially in integrated markets. An enforcement approach based on efficiency would not advocate intervention. As long as there is no dominant position and the relevant market is not affected, there is a belief that competition is not affected. However, in cases where the freedom of choice of market participants is restricted because of their dependence on an economically stronger partner, competition is also affected. In those cases, competition law should intervene to restore the economic freedom of economically weaker entities. By doing so, competition law protects the competition process. This can be achieved by considering all harms in the market¹⁰³, not just consumer harm¹⁰⁴. In the distribution

⁹⁸ Fox on the issue of choice.

⁹⁹ Michal S. Gal, Eleanor Fox, 'Drafting competition law for developing jurisdictions: learning from experience', op. cit. (note 80).

¹⁰⁰ Ibid.

¹⁰¹ Eleanor Fox, 'Comment: abuse of a dominant position: the Americanization of European competition law? The critical role of perspective' op. cit. (note 63), p. 237.

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¹⁰³ See Michal S. Gal, Eleanor Fox, 'Drafting competition law for developing jurisdictions: learning from experience', op. cit. (note 80). "Developed countries may adopt consumer welfare as their goal; but poor developing countries may prefer to take account of all market harms, not just consumer welfare harms". Also making the same argument: Eleanor Fox, *Imagine: Pro-poor(er) competition law*, OECD, 2013, at

sector, harm to the weaker party resulting from the behavior of the relatively dominant firm is very relevant. In the agricultural sector, it is more relevant to protect the freedom of competition of small farmers as business units than to protect them as end consumers¹⁰⁵. If, for instance, a showing of consumer harm, as is required in the US, is a requirement for competition enforcement, restraints of competition directed to small farmers as business units would not be dealt with by competition law. On the contrary, an ontological approach¹⁰⁶ to competition law rejects consumer welfare as the sole goal of competition law in favor of *protecting all market participants*, by protecting the competition process. Protecting the competition process requires also protecting the freedom of competition of all market participants, be they final consumers, intermediate consumers, producers or suppliers. Consumer welfare would be equally protected as producer welfare. Hence the need for competition law to intervene in abuse-of-economic dependence cases where producer welfare is affected. This approach requires having exceptions to the requirement of there being a dominant position in a given market and competition in the relevant market being affected for competition law to be applicable. As long as the freedom of competition of an efficient undertaking is affected, competition law should be applicable. *This is another enforcement perspective sympathetic to firms without power that are facing firms with power, but are efficient enough to stay on the market and compete on their merits.*

This approach might be suitable in poor developing countries markets where competition used to be restricted by dominant firms. Gal and Fox points out in this regard:

Whereas US law is especially concerned with false positives, with too much antitrust intervention lest inefficient firms will be protected from competition itself, developing countries may be more worried about false negatives, worried that dominant firms have for too long been protected from the forces of competition and that people/firms with no power have often been excluded from entering and competing on the merits¹⁰⁷.

page 10, available at: <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF%282013%294&docLanguage=En>.

¹⁰⁴ Protecting producer harm is even more relevant in some situations.

¹⁰⁵ Josef Drexler, 'Consumer welfare and consumer harm: adjusting competition law and policies to the need of developing jurisdictions' op. cit. (note 59). The author highlights in the context of developing countries the relevance to protect small farmers as market participants. "Protection of competition in markets in which small farmers are active both as direct purchasers and suppliers will matter even more for them than protection of competition in markets in which they act as classical end-consumers".

¹⁰⁶ Ibid. "The ontological concept avoids a dichotomy of protecting consumers, on the one hand, and protecting competitors from competition on the merits, on the other hand. All market participants, including consumers, suppliers and competitors, are to be equally protected through the guarantee of effective competition".

¹⁰⁷ See Michal S. Gal, Eleanor Fox, 'Drafting competition law for developing jurisdictions: learning from experience', op. cit. (note 80)

Context matters when crafting and applying competition law¹⁰⁸. This is especially true in developing jurisdictions where abuse of superior bargaining power is a big issue. Informed divergence¹⁰⁹ is important in unilateral-conducts rules.

6 Outlook: the international dimension

The issue of contractual law and competition has an international dimension with the entry of the retail industry into the markets of developing jurisdictions, which raises the issue of abuse of buyer power, supplier power and economic dependency situations. Hence, with the creation of international distribution networks, the progressive expansion of the retail industry and the creation of supply channels in the agricultural industry, there is a risk that abuses of economic dependence practices become common with multinationals facing local SMEs and/or small farmers. The tobacco cultivation in Malawi, the rice production in Nicaragua, the corn production in Mexico¹¹⁰ and the exploitation of cacao farmers by chocolate producers in Ivory Coast¹¹¹ are prime examples of this trend in agricultural markets¹¹². Hence, in agricultural markets, small farmer face a

¹⁰⁸ See Josef Drexl, 'Consumer welfare and consumer harm: adjusting competition law and policies to the need of developing jurisdictions' op. cit. (note 59): their implication for competition law ("contextualization builds on the insight that individual countries need more targeted competition policies in line with their social, economic, political and cultural situation and that this is particularly important for developing jurisdictions").

¹⁰⁹ Referring to the case of South Africa, Simon Roberts points out that: "Informed divergence is most important in the unilateral conduct area. There is a need to question applicability of the perspective taken from the international debate, which is based on the experience of developed economies. It may be hard for developed countries experts to conceive of an economy composed of firms with 80 to 95 % of a market, entrenched over decades; historically state-owned or supported; but this is the landscape of South Africa and many developing countries". See, Concurrence, n° 1, 2015, supplement, at page 10.

¹¹⁰ Ulla Schwager, 'Competition issues affecting the agricultural sector in selected developing countries: key findings

from selected UNCTAD market studies' in Michal Gal, Mor Bakhroum, Josef Drexl, Eleanor Fox, David Gerber (eds.), *Economic characteristics of developing jurisdictions: their implications for competition law*, (Cheltenham and Northampton, MA, Edward Elgar, June 2015, forthcoming). Based on three market studies conducted by the UNCTAD (tobacco cultivation in Malawi, rice production in Nicaragua and corn production in Mexico), which are characteristic of many other agricultural markets in developing economies, Ulla Schwager identifies three main characteristics that are relevant from a competition law perspective. First, the three markets are fragmented, with few large or medium-sized producers and a large number of smallholder growers. Second, there is a high level of concentration in the downstream markets, in contrast with the fragmented producers upstream. Third, there is also a high level of concentration in input upstream markets for agricultural production.

¹¹¹ B. Dorin. 'From Ivorian Cocoa Beans to French Dark Chocolate Tablet: Price Transmission, Value Sharing and North/South Competition Policy' in H. Qaqaya and J. Lipimile (eds.), *The Effect of Anti-Competitive Business Practices on Developing Countries and their Development Prospects* (Geneva, UNCTAD, 2008), p. 237.

¹¹² See OECD, 'Spotlight on Global Value Chains: Does it Mean Shutting out Small Producers?' in *Promoting Pro-Poor Growth: Agriculture* (Paris, OECD, 2006), p. 58. The study points out that "(...) concern is growing that markets are distorted by excessive corporate concentration in trading, processing, manufacturing and retailing. Trade liberalisation will not bring the expected benefits when agricultural

double bottleneck upstream and downstream, which implies that they are price takers and are subject, *inter alia*, to buyer or supplier power. They may face a dependency situation as purchasers of fertilizers and suppliers of crops vis-à-vis vertically integrated multinationals¹¹³. Walmart has entered the South African market not without raising heated controversies on the future of the competitiveness of the SMEs facing a strong buyer¹¹⁴. The first decision handed down by the Senegalese competition authority related to alleged abuse of economic dependence by the French airline Air France¹¹⁵.

In the tourism sector, Taimon Stewart has documented how, in the tourism sector, local small businesses face multinational hotels chains that threaten their freedom to compete¹¹⁶. The retail sector is entering the markets of developing jurisdictions, also raising the issue of the competitiveness of small businesses as suppliers of input and distributors of output. In this context, buyer power and supplier power and potential abuses of economic dependence towards local small businesses raise concerns. From the perspective of developing jurisdictions, lack of competitiveness of their markets and high levels of concentration of economic power in the hand of few private economic businesses raise the issue of not only dominance, but also of relative dominance¹¹⁷. Relative dominance may be a looming threat to the freedom to compete of small firms without power.

markets do not function competitively. And because corporate growth and consolidation is premised on expectations that larger buyers can extract more favourable terms from suppliers, there is a risk of declining shares of value for rural actors in the food chain – the workers in agriculture and processing and primary producers”.

¹¹³ Ulla Schwager, *op. cit.* (note 110).

¹¹⁴ *Walmart Stores Inc./Massmart Holdings Ltd*, 30 May 2011, 73/LM/Nov10. While a merger might be economically efficient and in conformity with competition law and policy, it always creates an accumulation of greater market power. This market power (not necessarily dominance) can become problematic in the long run, as it might create a disproportionate counterweight to SMEs in the same market. The Tribunal in South Africa, in order to avoid disadvantages for competitors now facing the bigger merged entity, *inter alia*, imposed the condition on Walmart/Massmart to establish a program aimed exclusively at the development of local South African suppliers, including SMEs.

¹¹⁵ The case resulted from a unilateral reduction by Air France of the commission it paid to travel agencies for each flight ticket sold. Air France was sued by the travel agencies based on the offense of abuse of economic dependence. See, Décision no. 02 D-0-2 of Commission Nationale de la Concurrence, 27 December 2002, relative à des pratiques mises en œuvre par la Compagnie Air France dans le secteur du transport aérien au Sénégal, available in Mor Bakhoun, ‘L’articulation du droit communautaire et des droits nationaux de la concurrence dans l’Union Economique et Monétaire Ouest Africaine’ (*UEMOA*) (Bern, Stämpfli, 2007), Annex 5, p. 394. French competition law has influenced most of the competition legislation in West Africa. They all include provisions dealing with abuse of economic dependence.

¹¹⁶ See Taimon Stewart, Regional integration in the Caribbean: the role of competition policy, in, Josef Drexler, Mor Bakhoun, Josef Drexler, Eleanor Fox, Michal Gal, David Gerber (eds.), *Competition policy and regional integration in developing countries*, Edward Elgar, 2012, at page 161 et seq.

¹¹⁷ Simon J. Evenett, ‘Competition law and the economic characteristics of developing countries’ in Michal Gal, Mor Bakhoun, Josef Drexler, Eleanor Fox, David Gerber (eds.), *Economic characteristics of developing jurisdictions: their implications for competition law* (Cheltenham and Northampton, MA, Edward Elgar, June 2015, forthcoming)

This issue parallels the development of competition laws and policies in developing jurisdictions which are in the process of creating competition law frameworks suitable to their context and needs. At the same time, the issue of unilateral context raises divergences of approach, even between the EU and the US. This raises the issue of how to approach dominance and, in general, how to deal with economic unbalances. In the process of creating competitive markets in developing jurisdictions, it is crucial to put an emphasis on giving small market participants equal opportunities to compete by protecting their economic freedom. This trend has been noticed in recently adopted competition laws which put an emphasis on giving local small businesses and SMEs an equal opportunity to compete. Of course, taking into account such concerns using competition law would undermine efficiency, some argue. It has likewise been argued also that developing jurisdictions could use rules on dominance as a weapon to fight concentration and tear down artificial barriers to entry and exploitative practices¹¹⁸. This could be done by having a stance swift enforcement toward abuse of dominance cases, but also to exclusionary-abuse-of-dependence cases.

¹¹⁸ See Michal S. Gal, Eleanor Fox, 'Drafting competition law for developing jurisdictions: learning from experience', *op. cit.* (note 80).