

The New B2B-Act

In April 2019, the Belgian Parliament adopted a new law prohibiting (i) unfair market practices in B2B relationships, (ii) the abuse of economic dependence, and (iii) the use of unfair contract terms. This act of 4 April 2019 was published in the Belgian official Gazette will have important consequences on contracting and on business practices (“B2B-Act”). Businesses should consider adapting their (standard) contracts to limit the risk of sanctions and uncertainties. Further, smaller companies will find themselves in a stronger position.

1 WHAT DOES THE B2B-ACT INCLUDE?

The aim of the B2B-Act is threefold:

i. Prohibition of unfair B2B market practices:

Although an already existing rule generally prohibits unfair business practices, the B2B-Act provides for additional rules on business practices between companies to prevent misleading and aggressive actions. These rules are predominantly inspired by the existing principles of consumer law (“B2C”).

ii. Prohibition of abuse of economic dependence:

The B2B-Act prohibits the abuse a position of economic dependence affecting competition in the relevant Belgian market or in a substantial part of it.

The B2B-Act explicitly states that there may be an abuse in the event of:

1. a refusal of a sale, a purchase or other transaction conditions;
2. a direct or indirect imposition of unfair purchase or selling prices or other unfair contractual conditions;
3. a restriction of production, sales or technical development to the detriment of consumers;
4. applying different conditions to equivalent services with respect to economic partners, thereby placing them at a disadvantage in competition; or
5. making an agreement conditional upon the acceptance by the partner of additional services which, by their nature or according to commercial usage, have no connection with the subject matter of such agreement.

The Belgian legislator was inspired by Articles 101 and 102 of the EU Treaty prohibiting anti-competitive agreements and the abuse of a dominant position. Yet, the concept of abuse of economic dependence does not entirely correspond to the EU concept of abuse of a dominant position. While the former is based on an abuse of the economic dependence of one company toward another, alleged abuse of a dominant position will (in most cases) only be

investigated when a company has a market share of at least 40%. This threshold does not exist in the Belgian concept of economic dependence.

iii. Prohibition of unfair contract terms:

Similar restrictions on contract freedom to the ones already existing for B2C contracts will soon impose a general prohibition on clauses that, alone or together with other clauses, create a manifest imbalance between the rights and obligations of the parties.

This general prohibition is completed with a list of contract clauses that are always deemed unlawful and thus prohibited. The legislator has black listed the clauses that serve to:

1. create an irrevocable commitment by the other party while the performance of the obligations of the company is subject to a condition, the realization of which depends exclusively on the will of the company;
2. give the company the unilateral right to interpret any clause in the contract;
3. have the other party renounce all means of recourse against the company in the event of a dispute; or
4. irrefutably establish the knowledge or acceptance of clauses by the other party, while the latter was not actually able to become acquainted with said clauses prior to the formation of the contract.

The gray list also establishes a list of terms that are presumed to be unlawful:

1. grant a company the right to modify the price, characteristics or conditions of the contract unilaterally and without valid reason;
2. tacitly extend or renew a fixed-term contract, without providing a reasonable notice period;
3. impose the economic risk on a party, without any counter-performance, while that risk would normally be borne by the other company or by another party to the contract;

4. inappropriately exclude or limit the legal rights of one company in the event of total or joint non-performance or defective performance by the other company of any of its contractual obligations;
5. bind the parties without the right to terminate the contract by means of a reasonable notice period (without prejudice to the possibility of dissolving the agreement, see Art. 1884 of the Belgian civil Code);
6. exempt a company from its liability for its willful misconduct, gross negligence by itself or its employees or, except in cases of force majeure, for the non-performance of the essential obligations that are the object of the agreement;
7. limit the means of evidence that the other party can rely on; or
8. determine the compensation in the event of non-performance or delay in the performance of the other party's obligations, establishing an indemnity that is manifestly disproportionate to the prejudice that may be suffered by the company.

For for this gray list the undertaking can proof the lawful character of the clause, while such possibility does not exist for the clauses falling under the black list.

2 ENTRY INTO FORCE

- i. The rules on unfair B2B market practices have already entered into force on 1 September 2019.
- ii. The rules on abuse of economic dependence will enter into force on 1 June 2020.
- iii. The rules on unlawful B2B-clauses on 1 December 2020. The latter rules will only apply to agreements concluded, renewed or amended after said date and not to contracts that were already in force.

3 SCOPE

The B2B-Act applies to all undertakings (in the meaning of Article I.8. 39 CEL).

It applies to all sectors, with the exception of the provisions on unlawful B2B-clauses which shall not apply to financial services (in the meaning of Article I.8. 18° CEL, therefore also excluding insurance services) or public procurement. However, the B2B-Act ensures monitoring of the application of the new provisions and establishes the possibility to declare certain provisions applicable to the aforementioned services or sector or to supplement the black list or grey list, by Royal Decree.

4 WHAT ARE THE SANCTIONS?

- i. Unfair B2B-practices can lead to criminal sanctions or injunction actions upon initiative of the Belgian Minister of Economy or the aggrieved business.
- ii. In case of abuse of economic dependence, the aggrieved business can seek for damages and the Belgian Competition Authority may impose fines of up to 2% of the turnover of the company concerned if it concludes that the latter has abused the economic dependence of another company. Penalty payments may apply in case of non-compliance.
- iii. The aggrieved business may seek for annulment of unlawful contracts terms creating a manifest imbalance between the rights and obligations of the parties. Injunctions and class actions cannot be excluded. The use of unlawful contract terms can also lead to criminal sanctions or injunction proceedings conducted by the authorities or the aggrieved business.

WE REMAIN AT YOUR DISPOSAL FOR ANY QUESTIONS:



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