

New rules for B2B contracts

1. Unfair, misleading or aggressive market practices

The law prohibits unfair, misleading or aggressive market practices in B2B relationships, as is already the case in B2C relationships.

The concepts used and the prohibitions are extremely similar to what already exists in B2C. Companies should therefore have no difficulty in adapting.

This prohibition is into force since September 1st, 2019.

2. Unfair terms in B2B relations

Which contracts are concerned?

All contracts between undertakings¹, except financial services contracts and public procurement.

What is being implemented?

A system similar to what already existed for B2C contracts: for B2B contracts too, unfair terms are now prohibited and must be considered invalid.

Which terms of a contract are concerned?

Any term that creates, alone or in combination with other terms, a "manifest imbalance" between the rights and obligations of the parties, is abusive.

The description of the product or service to be delivered, as well as the adequacy between the price to be paid and the product or service to

¹ The notion of undertaking is very broad and is not limited to companies: a non-profit organization, a tradesman or a physical person exercising an economic activity is an undertaking.

be provided in return, can however never be considered abusive on the basis of this law².

To check if there is a “manifest imbalance”, one should consider, among other things:

- the nature of the products covered by the contract,
- all the circumstances surrounding the conclusion of the contract,
- the general scheme of the contract,
- the commercial practices that apply,
- all other terms of the contract,
- the clarity and comprehensibility of the terms.³

Black List

The law contains a list of terms that are considered to be always unfair and are therefore always prohibited. So for the terms aiming at:

- providing for an irrevocable commitment by one party, while the performance of the other party's services is subject to a condition whose fulfilment depends solely on the will of that other party;
- giving a party the right to interpret any clause of the contract itself;
- in the event of a conflict, having the other party waive any means of appeal;
- irrefutably establishing the other party's knowledge of or adherence to clauses of which it has not actually had the opportunity to become aware before the conclusion of the contract⁴.

Grey list

The law also contains a list of terms that are presumed unfair and prohibited, unless proven otherwise. These are the terms that are intended to:

- authorize a party to unilaterally change the price, characteristics or conditions of the contract without valid reason;
- place, without counterpart, the economic risk on one party when it is normally borne by the other undertaking or another party to the contract;

² If the clauses concerning them are clear.

³ Article VI.91/3 CRC.

⁴ Article VI.91/4 CRC.



- release a party from liability for willful misconduct, gross negligence or that of its employees or, except in cases of force majeure, for failure to fulfil the essential commitments covered by the contract;
- set amounts of damages claimed in the event of non-performance or delay, which clearly exceed the extent of the damage likely to be suffered.
- tacitly extend or renew a fixed-term contract without specifying a reasonable period of notice;
- bind the parties without specifying a reasonable notice of termination;
- exclude or inappropriately limit the legal rights of a party in the event of total or partial non-performance or defective performance by the other party of one of its contractual obligations;
- limit the means of evidence that the other party may use⁵;

Sanctions

Unfair terms must be declared null and void. This nullity could lead to the nullity of the contract if it cannot survive without the term declared void⁶.

When will it apply?

The provisions regarding unfair terms in B2B will apply as of the 1st of December 2020, and only for new contracts and contracts that are renewed or amended after that date.

What to do about it?

Check your contracts to see if certain clauses are not contrary to the new provisions.

3. The prohibition of "abuse of economic dependence"

⁵ Article VI.91/5 CRC.

⁶ Article VI.91/6 CRC.

The new provisions establish the principle of prohibiting the abuse of a position of economic dependence⁷.

Economic dependence?

An undertaking is in a "position of economic dependence" when:

- (i) it must contract with another undertaking and there is no reasonably equivalent alternative available, within a time limit, on reasonable terms and at reasonable cost and,
- (ii) its co-contractor may therefore impose services or conditions which could not be obtained under normal market circumstances⁸.

In order to assess whether there is economic dependence, one will take into account, among other things:

- The market power of the undertaking;
- The more or less significant share of the undertaking in the turnover of the other;
- The technology or know-how held by the undertaking;
- The strong reputation of a brand, the rarity of a product, the perishable nature of a product or the loyalty of consumers for a product;
- Access to essential resources or infrastructure by the undertaking;
- Fear of serious economic disadvantages, retaliation or termination of the contractual relationship;
- The regular granting to an undertaking of special conditions which are not granted to other undertakings in similar cases;
- The deliberate choice or, on the contrary, the forced choice to place oneself in a position of economic dependence.

All sectors of the economy are concerned, as well as all types of contracts: as for example the entire distribution sector in which some players hold a strong position, the retail sector with franchise or concession contracts, the e-commerce sector and sales or reservation platforms, as well as all sectors in which exclusive rights (trademark rights, copyright, patents) or particular know-how make it difficult to circumvent certain players.

⁷ Article IV.2/1 of the Code of Economic Law.

⁸ Article I.6, 4° of the Code of Economic Law

When is there a (prohibited) abuse ?

The law does not provide a clear answer to this question: it will be up to undertakings in a position of dependence that want to have a clause in their contract annulled to convince the judge that there is indeed an "abuse"⁹.

As an indication, however, the legislator has included in the law a series of clauses that are likely to constitute an abuse, when there is economic dependence:

- refusal to sell, purchase or other terms of transaction;
- the direct or indirect imposition of purchase or sale prices or other unfair trading conditions;
- the limitation of production, markets or technical development to the detriment of consumers;
- applying unequal conditions to equivalent services to economic partners, thereby placing them at a competitive disadvantage;
- making the conclusion of contracts subject to the acceptance by the economic partners of additional services which, by their nature or according to commercial usage, are not related to the subject matter of those contracts.

Sanctions

The defaulting undertaking is exposed to actions under private law: damages, termination, cancellation of all or part of a contract.

But the law also provides for fines and periodic penalty payments:

- A fine of up to 2% of the company's turnover;
- A penalty payment of up to 2% of average daily turnover per day of delay¹⁰.

When will it apply?

The provisions on abuse of economic dependence will enter into force on¹ June 2020.

⁹ It seems to be a deliberate choice of the legislator to let the courts gradually determine what can and cannot be done. This obviously leaves companies very poor... It will also be necessary to demonstrate that competition may be affected on the Belgian market or a substantial part of it.

¹⁰ Articles IV.70, §2 and IV. 73, §2 of the CDE.



What to do about it?

If you are in a position of dependence, or if your clients are, review your contracts and check whether certain clauses are not contrary to the new law.

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