CLIENT ALERT

Contracts & E-Commerce

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IT Contracts and inflation: how about the validity of indexation clauses in Belgium?

Over the past years, inflation rates have steeply increased to reach a high in 2008. Indexation clauses in various IT contracts could therefore be triggered. However, are you sure that the indexation clause in your IT contract is valid? And if it is not, what are the risks and opportunities?

Introduction
According to the most recent statistics of the Belgian National Bank, the inflation in Belgium reached 3.2 % in November 2008, significantly above the inflation rate of the last years and of the average in the Euro zone. This high inflation rate could in the near future trigger the application of indexation clauses in a high number of IT contracts. However, indexation clauses are strictly regulated and not everyone is informed of the pitfalls. Therefore, either as a vendor or as a purchaser of goods or services, have a close look at your contracts.

Belgian law prohibits indexation clauses
The Belgian Economic Redress Act of 1976 provides for a very clear ban on indexation clauses. Article 57 para. 1 of the Act provides that "*any formula of indexation of industrial and/or commercial prices, of tariffs and of price fluctuation formulas in function of the consumer price index or in function of any other index is prohibited*".

It is very important to note that any clause that contains an indexation formula is automatically void. This constitutes a tremendous threat for vendors, and a tremendous opportunity for clients: the latter can, at any time, and even after having explicitly agreed to an indexation clause, challenge the validity thereof and refuse to accept any price increases.

Belgian law allows price increase clauses under very strict conditions
The Economic Redress Act leaves a (small) opening to adapt prices to the increasing cost of life. As a matter of fact, contracts can

contain price increase clauses "*to the extent the increase only applies to maximum 80% of the end price, and to the extent the increase refers to parameters that reflect real costs, and to the extent each such parameter only applies to a fraction of the price that is proportionate to the cost it represents*".

In other words, price increase clauses that reflect the increase in labor cost, energy, petrol or raw materials can, on a case by case basis, be deemed valid to the extent that these increases correspond to a "real and proportionate" increase in the production cost.

Again, any clauses that are not in conformity with these requirements are automatically and absolutely void and can be challenged by clients.

Conclusion
Clients have all interest in meticulously reviewing their IT contracts in order to verify whether these contain any indexation or price increase clause, and the case being to challenge the validity of any price increases.

Vendors on the other hand, need to carefully craft any price increase clauses so as to ensure that they are valid and enforceable. In addition, it is recommended to provide wording that, in the event of invalidity of the price increase clause, it shall be automatically replaced by a clause approaching the parties' economic intent to the largest extent legally possible.

References: Act of March 30, 1976 concerning economic redress measures

For more information, contact: Christoph De Preter or Thomas De Meese.

ECJ provides guidance on information obligations in the framework of E-commerce transactions

The ECJ has provided guidance on the information obligations that must be complied with by online vendors of goods and services. The judgment may have a significant impact on the way online vendors work. It may force them to ensure a telephone hotline or other telephone or facsimile availability. Online vendors may have an interest in verifying whether their competitors respect the ECJ's requirements.

Introduction
The ECJ recently had to take position in a preliminary reference ruling regarding a German litigation. In that litigation, the German automobile insurance company DIV, which offered its services exclusively on the internet, was sued by the German Federation of Consumers' Associations. As a matter of fact, DIV's web pages only mentioned its postal and electronic mail addresses but *not* its telephone number and this, according to the German Federation, constituted a violation of the E-Commerce Directive and of the German implementation legislation.

The ECJ decision
The ECJ needed to analyze Article 5.1 of the E-Commerce Directive, which provides that "*the service provider shall render easily, directly and permanently accessible to the recipients of the service and competent authorities, at least the following information: (a) the name of the service provider; (b) the geographic address at which the service provider is established; (c) the details of the*

service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner".

The question asked to the ECJ was in essence whether online vendors absolutely need to provide their customers with a telephone number or whether the requirement of Article 5(1)(c) of the E-Commerce Directive ("*provide details which allow to be rapidly contacted and to have direct and effective communication*") can also be met by other means.

According to the ECJ, it is in principle true that the requirement of Article 5.1(c) of the E-Commerce Directive can be met in various ways. Besides a telephone number, an electronic enquiry template may also be regarded as offering a direct and effective means of communication within the meaning of Article 5(1)(c) of the Directive. The ECJ held that a response time of between 30 to 60 minutes to enquiries asked via such template met the requirement of directness and effectiveness.

However, and very importantly, the ECJ held that "*in exceptional circumstances*" where a recipient of the service, after making contact by electronic means with the service provider, is, for various reasons, such as a journey, holiday or a business trip, deprived of access to the internet, communication by an enquiry template can no longer be regarded as effective within the meaning of Article 5(1)(c) of the Directive. In such cases, according to the ECJ, the online vendor must provide "*access to a non-electronic means of communication*" at the client's request, even if that client initially entered into contact with the online vendor via the internet.

Practical consequences of the ECJ decision
The ECJ decision perhaps reaches further than the ECJ itself realised.

The ECJ held that it is only in "*exceptional circumstances*" that non-electronic means of communication must be provided. But since such "*exceptional circumstances*" cannot never be excluded nor anticipated, such non-electronic means of communication must be readily available at all time.

In practice, the ECJ decision therefore seems to imply that online business having operations in the EU must make sure to have some kind of telephone or facsimile availability - *and* must make sure that responses are given "*rapidly, directly and effectively*", the ECJ apparently accepting a turnaround time of 30 to 60 minutes. This may cause difficulties to online vendors based, for instance, in the United States or Asia and not necessarily having staff available during European daytime.

Conclusion
Online vendors that have an entirely online operation may need to investigate whether they should implement some kind of telephone or facsimile hotline in order to comply with the requirement that they should allow to be contacted rapidly and communicated with in a direct and effective manner. Online vendors may also have an interest in verifying whether their competitors comply with this requirement.

References:

- E-Commerce Directive
- ECJ judgment C-298/07

For more information, contact: Christoph De Preter or Thomas De Meese.

Belgian court allows "powershopping" in summary proceedings

The online platform Ichoosr recently obtained intense press coverage after serving as an online platform for various public and private bodies and organizations, that jointly purchase petrol products in order to negotiate cheaper purchase prices ("powershopping"). An Antwerp Court has now decided in summary proceedings that, prima facie, Ichoosr does not violate the Belgian trade practices and competition legislation and can continue to offer its services pending proceedings on the merits.

Introduction
Ichoosr is an online platform that is active in Belgium since 2008. It acts as an online intermediary between suppliers and purchasers of goods or services. Ichoosr received significant media attention when it grouped purchasers of gazoil and organized auctions where gazoil suppliers could bid and where the lowest bid was accepted.

Ichoosr was summoned in summary proceedings before the Antwerp Court of Commerce by a consortium of gazoil suppliers.

The decision
Aside from a number of procedural issues, the Court briefly discussed the question whether Ichoosr's activities constituted a violation of Belgian unfair trade practices and competition law. Apparently, Ichoosr was accused of various infringements: Ichoosr would have violated the legal rules on distance selling and would have aided and abetted in committing sales at a loss, setting up horizontal pricing agreements and purchasing cartels.

The Court held that, at least *prima facie*, none of these infringements were established. Ichoosr can now freely continue to offer its services. At the date of the judgment, proceedings on the merits were not introduced yet.

References: President of the Antwerp Court of Commerce, C/08/184

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