

CLIENT ALERT

Reform of Belgian Competition Law & New Rules in B2B Relationships

June 14, 2019

On May 24, 2019, two new acts bringing some major changes to Belgian competition law and the legal framework of B2B relationships were published in the Belgian Official Journal. Firstly, the Act of April 4, 2019, which introduces new rules for B2B relationships relating to unfair market practices, abuse of economic dependence and unlawful contractual terms. Secondly, the Act of May 2, 2019, which introduces a number of changes of the competition rules (i.e. book IV of the Code of Economic Law).

Act of April 4, 2019 introducing new rules for B2B relationships

Unfair Market Practices

Book VI of the Code of Economic Law already provided for general prohibitions of unfair market practices and misleading advertising. The Act of April 4, 2019 now introduces a more robust prohibition of “misleading” and “aggressive” practices in a B2B context. The definition of both terms is modelled on the existing prohibition of misleading and aggressive practices in B2C relationships. These new rules will enter into force on September 1, 2019.

Abuse of Economic Dependence

The Act of April 4, 2019 introduces an additional category of restrictive practices in Book IV of the Code of Economic Law. This new category relates to the abuse of economic dependence. A position of economic dependence is a position of an undertaking in its relation towards one or more other undertakings that is characterized by the absence of reasonable equivalent alternatives, available in a reasonable period of time, under reasonable conditions and costs, allowing this other or these other undertakings to impose performances or conditions that could not be obtained under normal market conditions.

The Act does not prohibit economic dependence itself, but only the abuse of such position by an undertaking if and to the extent that this affects competition on the affected Belgian markets or an essential part thereof. This requirement that competition on (a part of) a national market is affected distinguishes the Belgian rules from similar rules in other countries, such as France, that have no such territorial requirement.

The following practices may be considered as an abuse of economic dependence:

- Refusing a sale or purchase.
- Imposing unfair prices or other unfair trading conditions.
- Limiting production, markets or technical development to the detriment of users.
- Discrimination between trading parties.
- Abusive tying.

The Belgian competition authority is entrusted with the task of sanctioning abuses of a position of economic dependence. Companies that do not comply with these rules can incur fines of up to 2 percent of their annual Belgian turnover or periodic penalty payments that do not exceed 2 percent of the daily Belgian turnover.

Abuses of a position of economic dependence may also give rise to claims before national courts, e.g. a claim for an injunction or a claim for compensation.

The new rules relating to the abuse of economic dependence will be inserted in Book IV of the Code of Economic Law and will enter into force on June 1, 2020.

Unlawful contract terms

The Act also prohibits certain unlawful contract terms or abusive clauses in B2B contracts, without the need to show economic dependence. A contractual clause in a B2B contract will be unfair and consequently prohibited if it creates a “significant imbalance” between the rights and obligations of the parties.

In addition to this general prohibition, the new rules also introduce two lists of specific categories of clauses: a black list and a grey list of clauses. Blacklisted clauses are considered abusive and prohibited in all circumstances without the need for any further evaluation, and are for example:

- Potestative clauses (clauses that depend solely on the will of one party).
- Clauses giving a party the unilateral right to interpret a clause.
- Clauses requiring one party to waive any remedy against the other in the event of a dispute.
- Clauses which irrefutably establish the other party’s knowledge or acceptance of terms that it was not familiar with prior to the conclusion of the contract.

Greylisted clauses are presumed to be unfair unless proven otherwise, i.e. unless it is proven that such clauses do not create a significant imbalance. The grey list contains clauses that:

- Give one party the unilateral right to modify the terms of the contract (*e.g.* the price) without a valid reason.
- Permit the extension or renewal without a reasonable notice period.
- Shift the economic risks without a proper reason.
- Inappropriately limit or exclude the rights of a party in the event of contractual breach (a partial or total non-performance) by the other party.
- Exclude or limit liability in the event of fraud or gross negligence.
- Limit the means of evidence that a party may use.
- Provide for excessive damages in the event of non-performance or delay in the performance.

These rules will enter into force on December 1, 2020 and will only apply to contracts concluded, renewed or modified after that date. However, these rules do not concern financial services and public procurement contracts.

Act of May 2, 2019 replacing Book IV of the Code of Economic Law

The new rules of the Act of May 2, 2019 replacing Book IV (Protection of competition) of the Code of Economic Law entered into force on June 3, 2019.

The change that may have the most significant impact on companies concerns the increased cap on fines. The ceiling for fines is now determined as 10 percent of total worldwide turnover instead of 10 percent of the turnover on the Belgian market and export. This new ceiling only applies for infringements that have commenced after the entry into force of the Act. Consequently, the old ceiling will still apply for infringements that came to an end before June 3, 2019. Infringements that have commenced before the entry into force of the Act and have been continued after that date are subject of a special transitional arrangement: the old ceiling will apply to the infringement period before the entry into force and the new ceiling for the period after that date, without the total fine exceeding 10 percent of total worldwide turnover.

Other noteworthy changes relate to the existing prohibition for physical persons to infringe competition law.

In addition changes were made to procedural provisions relating to i.a. the investigation and decision periods.

Conclusion

In view of the adoption of these new rules governing B2B relationships, businesses may need to review existing agreements and practices to bring them in line with the new requirements.

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