Two new acts bringing changes to Belgian competition rules and B2B relationships have been published in the Belgian Official Journal (Moniteur Belge/Belgisch Staatsblad) on 24 May 2019.

The first act will entirely replace Book IV of the Code of Economic Law (“CEL”), containing the substantive and procedural rules of Belgian competition law. The new Book IV CEL mainly aims to correct inconsistencies and does not involve major substantive or procedural changes, save for the change of the 10% cap on competition fines which will now apply on the worldwide turnover.

The second act introduces a prohibition on the “abuse of a position of economic dependence” in the CEL, essentially extending the competition rules on abuse of a dominant position to situations of a relative dominant position (i.e. dominance in a one-to-one context) rather than an absolute dominant position. The experience of similar provisions in neighbouring countries shows that contractual practices have been challenged mainly in the agro-food sector and more through private court actions than enforcement by public authorities.

The second act also extends protections traditionally benefitting consumers, namely the prohibition of unfair contractual terms and of unfair market practices, to relationships between enterprises. The overall aim of these changes is to offer undertakings additional (and more effective) tools to ensure a fair balance in business dealings. This part of the act can be expected to have a substantial impact on contracts between enterprises. Businesses are therefore encouraged to review their usual practices and clauses in general terms and conditions and in their most important contracts in order to manage the additional risk of legal challenges.

1 New Book IV CEL on competition rules

The new Book IV CEL does not involve major substantive or procedural changes to the Belgian competition rules. It rather concerns streamlining and rectification of some procedural points, including on interim measures, commitments, confidentiality and languages. The most important substantive change relates to the maximum fine that the Belgian Competition Authority (“BCA”) can impose for the infringement of the competition rules. In line with the ECN+ Directive (EU) 2019/1, the cap will increase to 10% of the worldwide turnover of the undertaking involved. This will likely increase fines (and thus deterrence) significantly in Belgium, given that, to date, fines were capped at 10% of Belgian turnover (including exports), which was favouring international players over Belgian entities. The worldwide cap will not apply retroactively and will only cover the duration of the infringement after entry into force of the new Book IV CEL.

These provisions will enter into force on Monday 3 June 2019.
Prohibition of the abuse of a position of economic dependence

The new provisions on economic dependence aim to protect undertakings which are economically dependent on their suppliers or buyers and aim to cover cases where general competition rules do not offer relief. The preparatory works expressly refer to commercial relations in the food distribution sector and internet platforms, as examples where such situation of economic dependence may occur.

Three conditions must be fulfilled for a party to succeed in bringing a claim: (1) proof of a position of economic dependence, (2) which has been abused, and (3) as a result, competition on the Belgian market, or a substantial part thereof, may be affected.

A finding of economic dependence will essentially be centred on two criteria: 1) the absence of reasonably equivalent alternatives available within a reasonable timeframe, at reasonable conditions and costs; (2) which allows this undertaking to impose acts or conditions that deviate from standard market conditions. It will remain to be seen how the BCA and Belgian courts will interpret these provisions. In particular, will the prevalence of one alternative supplier imply there are reasonable equivalent alternatives or should there be multiple alternative providers? Will the BCA and Belgian courts develop certain presumptions of economic dependence lowering the evidentiary hurdle for companies wanting to bring a claim (e.g. in cases of assortment-related dependency)?

Abuses that will be in scope include, in line with articles 102 TFEU and IV.2 CEL, refusal to deal, imposing unfair prices, unfair contract terms or discriminating conditions, tying and bundling, and limiting the output or production. Only abuses of an economic dependency that have a broader impact on the market will be captured; it remains to be seen how this will be interpreted and applied in practice. In particular, it can be assumed that the BCA will be particularly interested in cases that have broader general implications, e.g. due to a high number of similar cases/complaints or the particularly strong impact on the sourcing practices in a specific industry.

The BCA can use its existing tools under the competition rules to investigate and prosecute abuses of economic dependence, with the power to fine undertakings up to 2% of their Belgian turnover (by exception to the general rules on competition fines). In addition, private parties can also bring their own cases, separately or in parallel to the BCA, for example through cease and desist procedures.

To allow the BCA to prepare for the enforcement of this new competence, the prohibition on the abuse of economic dependency will only enter in force in one year, on 1 June 2020.

B2B unfair contractual terms

The Belgian legislator was concerned that, in contracts between enterprises, the “strong” party was increasingly able to impose on the other party contractual terms affecting the legal balance between the parties’ respective rights and obligations, without any true possibility for the affected party to negotiate.

The Belgian legislator has thus decided to extend the prohibition of unfair contractual terms benefiting consumers (articles VI.82 et seq.) to undertakings. These provisions will apply to contracts concluded by all undertakings, and not only by SMEs. These provisions are, however, not initially meant to apply to financial services (Article I.9, 18° CEL) or to public procurement and to contracts deriving therefrom. The King is competent to extend the prohibition of B2B unfair contractual terms to the same.
As the rules at stake are meant to regulate the economic order, they are considered overriding mandatory provisions pursuant to Article 9 of the Rome I Regulation ("lois de police") and they will therefore apply to contracts subject to foreign law if they are performed in Belgium.

**Unfair terms in B2B contracts will be deemed to be null.** To determine whether contractual terms are unfair, the act introduces a general legal test, supplemented with a "black list" and a "grey list" of prohibited contractual terms.

Under the **general test**, a B2B contractual term will be deemed unfair when, either on its own or in combination with other clauses, it creates an obvious (legal) imbalance between the rights and obligations of the parties. The general legal test does not extend to essential terms, e.g. clauses defining the object of the contract or the price/compensation to be paid.

Four B2B contractual terms will always be deemed unfair, without the ability to rebut their unfairness. This "black list" prohibits:

- a clause providing that a party is irrevocably bound, while the performance of the obligations of the other party is subject to the fulfilment of a condition that is at this party's entire discretion;
- a clause granting a party the unilateral right to interpret any clause of the contract;
- a clause which, in case of a dispute, leads the other party to waive any legal recourse against the enterprise. Quite surprisingly, the preparatory works mention as an example for such a clause the clause imposing arbitration on the other party;
- a clause which provides, in an irrebuttable fashion, that the other party has had knowledge or adhered to provisions which it did not actually have knowledge of before entering into the contract.

Another eight B2B contractual terms will be presumed to be unfair ("grey list"), unless it is proven that the clause at stake does not create an obvious imbalance between the rights and obligations of the parties, or that such clause was truly desired and knowingly adopted by the parties.

For example, a clause allowing the enterprise to unilaterally modify, without a valid reason, the price, characteristics or terms of the contract, is included on the "grey list", as well as a clause binding the parties without providing for a reasonable termination notice. Regarding the latter clause, the preparatory works state that, even in case of a contract of definite duration, a reasonable termination notice should also be offered in principle.

The black list and the grey list may both be extended by the King.

The provisions on B2B unfair contractual terms will enter into force on 1 December 2020, for contracts concluded, renewed or modified after such date.

### 4 B2B unfair market practices

The new provisions on B2B unfair market practices aim at prohibiting conducts which would unduly affect an enterprise’s decision, whether in the precontractual, contractual or post-contractual phase.

Inspired by the provisions prohibiting unfair market practices towards consumers, the act prohibits (1) **misleading market practices** between undertakings, and (2) **aggressive market practices** between undertakings.
The provisions on misleading market practices prohibit the provision of erroneous or misleading information, or the omission of substantial information, in relation to one of the elements identified by the act, when this leads or is likely to lead the other undertaking to adopt a decision which it would have not otherwise adopted.

The provisions on aggressive market practices prohibit restricting the freedom of choice or conduct of an enterprise by means of harassment, duress (including physical force) or unjustified influence, in a way that significantly limits the other undertaking’s ability to make an informed decision regarding the contract.

The provisions on B2B unfair market practices will enter into force on 1 September 2019.

5 Comments

The new Book IV CEL was long awaited by the legal community and will contribute to streamline procedures before the BCA. The new Book IV CEL does not significantly alter substantive rules on competition and the changes will thus not significantly impact undertakings.

The new definition of the position of economic dependence is, however, relatively broad. The newly adopted prohibition on an abuse of such position could therefore potentially apply to a wide range of industries characterised by strong buyer/supplier power.

With provisions on the abuse of economic dependence, Belgium follows the example of several EU Member States which have introduced such provisions, often to address practices in the agro-food sector. The enforcement practice in those countries has, however, been uneven, and often driven by actions in court rather than enforcement by public authorities.

The implementation of B2B unfair contractual terms can be expected to have a substantial impact on contracts between enterprises and on the (relative) freedom which enterprises enjoyed in negotiating their contracts, in particular considering the interpretation given by the preparatory works to certain provisions.

Another striking feature of the new B2B provisions is that the enforcement of B2B unfair contractual terms and B2B unfair market practices will no longer be left to the affected undertaking only:

- An injunction procedure against B2B unfair contractual terms or B2B unfair market practices could now also be filed by the Ministers competent for the Economy and for Middle Classes, and even potentially by consumer associations such as Test-Achat/Test-Aankoop;
- Being integrated into Book VI CEL, a breach to the new B2B provisions could also constitute the basis of a class action pursuant to Book XVII CEL (albeit currently only to the benefit of consumers and SMEs);
- The prohibition of B2B unfair market practices is criminally sanctioned. The prohibition of unfair contractual terms is also criminally sanctioned, but only in the case of breach in bad faith, as per the general provision of article XV.84 CEL.

Given their general applicability and potential far-reaching consequences, the two newly published acts should be carefully reviewed and considered by undertakings in their B2B dealings.
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