Combating economic abuse in a franchise agreement (Belgian B2B law)

April 7, 2021

Business to business ("B2B") agreements are often characterized by an economic imbalance between the parties, particularly in the franchise sector where the franchisor is (seen to) impose contractual clauses that are contrary to normal market practices. The Belgian legislator recently adopted and implemented a law to address the abuse of economic dependence, unfair contractual terms and unfair practices in B2B relationships (the "B2B Law").

Moreover, the Belgian Competition Authority, in its enforcement priorities for 2021, listed economic dependency abuse as one of its four "strategic priorities". More than ever, caution is required when drafting B2B agreements.

This article is divided in two parts: (1) a brief overview of the B2B Law and its scope; and (2) the implications of the B2B law for franchise agreements, the particularities and best practices.

I. The B2B law

Scope and applicability. The B2B Law introduces, in Books IV and VI of the Belgian Code of Economic Law, three sets of rules addressing the economic imbalance between the parties:

1. a prohibition of unfair market practices, i.e. misleading and/or aggressive practices (entered into force on September 1, 2019);
2. a prohibition of abuse of economic dependence, where competition is likely to be affected on the Belgian market concerned or a substantial part thereof, e.g., the application of unequal conditions to equivalent services to economic partners (entered into force on June 1, 2020); and
3. a prohibition of unfair clauses, see infra (entered into force on December 1, 2020).

These rules are considered as mandatory law in Belgium. This means that the B2B Law applies to all agreements performed in Belgium, irrespective of the contracting parties' location or of any governing law clause in favor of the laws of another jurisdiction.

Unfair clauses. With regard to rules on unfair clauses, the B2B Law introduces (i) a general transparency principle; (ii) a prohibition of significant imbalance between the rights and obligations of the parties; (iii) a black list; and (iv) a grey list of unfair contractual clauses.

General transparency. The contracting parties must comply with the general transparency principle, which provides that all written contractual clauses must be drafted in a clear and comprehensible way. The transparency of a clause shall be taken into account when assessing its unfairness.

Significant imbalance. Each contractual clause, individually or taken together with other clauses, that creates a significant imbalance between the rights and obligations of the contracting parties, is considered abusive. The imbalance is assessed by taking into account the nature of the services or products that are the subject of the

agreement and by referring to all the circumstances surrounding the conclusion of the agreement, to its general scheme or to commercial practices.

Black list. The B2B Law establishes a “black list” of clauses which are considered per se as unfair and prohibited, without the need for any further evaluation, e.g. clauses conferring on a party the right to unilaterally interpret any clause of the agreement; or having the other party renounce all means of recourse in the event of a dispute.

Grey list. The B2B Law also introduces a “grey list” of clauses which are presumed to be unfair, unless proven otherwise. This presumption can be rebutted if, taking into account the circumstances and characteristics of the agreement, the clause does not create a significant imbalance between the rights and obligations of the parties, which could urge the parties to explicitly refer to the circumstances and characteristics in the agreement.

For instance, grey list clauses could be ones that give a party the unilateral right to modify, without valid/objective reason, the price, characteristics or terms of the agreement; ones placing the economic risk on one party without compensation, where that risk is normally borne by the other party; or ones limiting the means of evidence a party may rely upon.

Sanctions. Abusive and unfair clauses will be considered null and void. The agreement itself will remain binding upon the parties, provided it can continue to exist without the unfair clauses. In addition, interested parties may initiate cease-and-desist proceedings or bring actions for damages. Criminal sanctions can also be imposed, under specific conditions (e.g. one of the parties acting in bad faith).

II. Implications of the B2B law for franchise agreements

Definition of a franchise agreement

Franchise agreements involve the collaboration between two independent professionals, the franchisor and the franchisee, whereby the franchisor grants "to the franchisee, in return for remuneration, the right to exploit a brand for the production and/or marketing of products, services or technologies, while maintaining, through a network, uniformity in the methods of exploitation of this brand”.

The franchise relationship allows the franchisor to extend his network territorially, making use of the local expertise and the franchisee to benefit from the expertise and renown of a tested concept.

The particular relationship between the franchisor and the franchisee typically brings together what is considered a stronger and a weaker party. During the parliamentary debates for the adoption of the B2B Law, franchise agreements were a focal point of the discussions since franchise agreements are perceived to contain unbalanced terms and conditions, restricting the economic freedom of the franchisee.

Clauses at risk in a franchise agreement

Franchise agreements are often perceived as containing clauses that potentially create an imbalance between the rights and obligations of the contracting parties, which is the general criterion to assess the unfairness of a clause. Especially the following clauses in franchise agreements are targeted:

- Clauses authorizing the franchisor to unilaterally change the price, features or conditions of the franchise agreement at his sole discretion without providing objective justification;
- Clauses allowing the franchisor to set a maximum resale price or recommending to the franchisee the application of

predetermined resale prices;

- Clauses obliging the franchisee to purchase products from suppliers chosen by the franchisor or from wholesalers which have received prior approval from the franchisor; or
- Clauses imposing the franchisee to comply at all times with the franchise standards and manuals issued by the franchisor.

These clauses are commonly found in franchise agreements and will have to be assessed on a case-by-case basis in order to avoid the characterization as an unfair contractual clause rendering them null and void.

Best practices for drafting a franchise agreement

The unfairness of a clause must be assessed on a case-by-case basis and taking into account a number of factors, in particular:

Pre-contractual information. The franchisor is obliged to provide the franchisee with a pre-contractual information document at least one month before the conclusion of the franchise agreement (including the rights and obligations arising from the agreement, the history, status and prospects of the franchised market, etc.). The franchisee will thus be aware of all the legal and economic conditions of the franchised network before making an informed decision.

The purpose of this mandatory pre-contractual information document is precisely to re-establish a certain balance between the contracting parties. It is therefore recommended to list all the information and documents delivered prior to the conclusion of the agreement.

Circumstances surrounding the conclusion of the agreement. The context of the agreement's conclusion plays a role in the assessment of the will and motives of the parties. The parties should explicitly detail the circumstances preceding and surrounding the conclusion of the agreement, as well as their intention and will to co-operate. Such motives can be included for instance in a 'whereas' section of the agreement, in the body of the franchise agreement or even in a separate document/annex.

Usages of commercial formula chosen. It is well established that a franchisee's economic freedom may be somewhat restricted in return for the franchisor's long-term efforts to maintain a successful brand. Clauses to choose specific suppliers, clauses to ensure an equivalent level of quality to customers or clauses to comply with the franchised network could be considered as indispensable elements for the success of a franchised network and could be justified in order to maintain a uniform image.

Justification of certain clauses. Certain 'problematic' clauses will not be considered unfair provided that they can be justified for a "valid reason", e.g. clauses allowing unilateral changes of the price, features or conditions of the agreement. In the context of franchising, a "valid reason" might be the franchisor's mission to develop his network to meet the ever-changing expectations of his customers; the consumers' expectation of a homogeneous network; the favourable economic conditions negotiated in the specific interest of all the franchisees, etc.

Therefore, it is recommend to detail the specific reason for these clauses and to draft the clauses in a sufficiently transparent and precise manner in order to avoid the characterization as unfair clauses.

If you are wondering whether your franchise agreement is compliant with the B2B law or have any questions regarding the stringent pre-contractual information obligations, please do not hesitate to contact your Dentons Brussels team!

Your Key Contacts

Pieter-Jan Aerts
Counsel, Brussels
D +32 2 552 29 34
pieter-jan.aerts@dentons.com

Celine Van Lierde
Associate, Brussels
D +32 2 552 29 76
celine.vanlierde@dentons.com