New franchise law in Belgium – how should your template franchise agreement change?

DENTONS

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Belgium has recently implemented a new law which will have direct implications on B2B relationships, in order to address abuse of economic dependence, unfair contractual terms and unfair practices. The aim of the new legislation is to balance the position of the contracting parties, with direct application to franchise agreements. Specifically, the section on unfair contractual terms targets particular contractual provisions in order to protect the position of the franchisee, which is perceived as the economically weaker and dependent party in a franchise relationship. This alert is focused on the unfair contractual terms.

Business to business ("B2B") agreements, including franchise agreements, may be characterized by an economic imbalance between the parties, where the franchisor is (seen to) impose contractual clauses that would not have been accepted by a franchisee, were it not for the dominant position of the franchisor and their "take it or leave it" approach. 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, including franchise 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". This means that now, more than ever before, caution is required when drafting franchise agreements to ensure the franchisor's minimum exposure to challenges based on this new legislation.

This article is divided into two parts: (1) the implications of the new B2B law for franchise agreements, and (2) suggested best practices in franchising, given the new regulation.

I. The B2B Law in franchise scenario

The B2B Law is a mandatory law in Belgium. This means it applies to all franchise agreements where the territory of responsibility is located in Belgium, irrespective of the franchisor's or franchisee's location or of any foreign governing law clause of the franchise agreement. Amongst other things, it contains some crucial new rules generally prohibiting "unfair clauses", which can be categorised into the following groups:

- a general transparency principle;
- a prohibition of significant imbalance between the rights and obligations of the parties;
- a black list of contractual clauses; and
- a grey list of contractual clauses.

(i) General transparency – means 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. This means that a franchisor has to depart from its standard franchise agreement template if it has been drafted in a convoluted, complex manner using so-called “legalese” language that is not clearly understandable to a non-legal professional.

(ii) 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. On the face of it, a franchise agreement can contain a lot of potentially problematic clauses that favour the franchisor by granting them more rights than the franchisee (e.g. imbalanced termination provisions, audit rights, step-in rights) or impose more one-sided obligations on the franchisee (e.g. reporting, approved suppliers, training, non-competition, restrictions on transfers of ownership). Of course, in most cases these provisions stem from the true nature of the franchise relationship and are necessary for the effective functioning of the setup, which is designed to benefit both parties. However, to ensure that all potentially problematic clauses are truly the reflection of the commercial practice in the world of franchise, the standard franchise agreement should be critically reviewed on a case-by-case basis in order to avoid these clauses being rendered null and void in accordance with the provisions of the new B2B Law.

(iii) Black list – examples of clauses that are automatically considered unfair and, hence, are prohibited, without the need for any further evaluation, e.g. clauses granting 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. This may be relevant in relation to common clauses that refer to franchisor’s sole discretion as well as typical dispute resolution provisions in franchise agreements, where often only the franchisor is allowed to seek remedies in local courts (particularly, in the event of infringement of intellectual property rights and an immediate need for an injunction).

(iv) Grey list – i.e. clauses that are presumed to be unfair, unless proven otherwise. The grey list would include those clauses that give a party the unilateral right to modify, without valid/objective reason, the price, characteristics or terms of the agreement, such as a common franchisor’s right to unilaterally amend the charges for the mandatory services provided to the franchisee.

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. This necessities certain drafting mechanisms to ensure that the franchise agreement continues in an uninterrupted manner, even if some of its clauses are determined to be unfair. In addition, a franchisee would be in a position to initiate cease-and-desist proceedings or bring actions for damages if any of the clauses in their franchise agreement are determined to be contrary to the new B2B Law. Criminal sanctions can also be imposed, under specific conditions (e.g. one of the parties acting in bad faith).

II. Best practices in a franchise scenario

The unfairness of clauses in a franchise agreement must be assessed on a case-by-case basis and certain factors may work in a franchisor’s favour. Some examples of best practices would include:

(i) Pre-contractual information. The franchisor is obliged to provide the franchisee with a pre-contractual disclosure document at least one month before the conclusion of the franchise agreement. The franchisee is thus given ample opportunity to review the proposed offer, consult its professional advisers and reach informed conclusions based on full awareness of all the legal and economic terms that they would be bound by before making an informed decision to enter into the franchise relationship.

Generally, the purpose of any pre-contractual disclosure is precisely to establish a certain balance and transparency between the contracting parties. It ensures that the franchisee has access to all the relevant information about the franchise proposition, has an opportunity to assess the business model, make enquiries and potentially walk away at this preliminary stage if they consider the proposed obligations to be too onerous. It is, therefore, recommended to franchisors to retain a detailed record of all the information and documents shared with the proposed franchisee prior to their entry into the franchise agreement. This may serve as evidence of the franchisee making an informed decision and limits the potential for misrepresentation claims. The inability to prove that the pre-contractual disclosure document was validly served could result in the nullity of the entire agreement upon a franchisee’s application, which can be made up to two years after its conclusion.

(ii) Circumstances surrounding the conclusion of the franchise agreement. The context in which the franchise agreement is executed may be relevant in the assessment of the intention and motives of the parties to the contract. The parties should explicitly detail the circumstances preceding and surrounding the conclusion of the agreement, as well as their intention to create binding legal obligations and their will to co-operate. Such motives can be included for instance in the preamble to the franchise agreement, in the main body of the franchise agreement or even in a separate document/annex.

(iii) Usage of commercial formula chosen. It is well established that a franchisee’s economic freedom may be somewhat restricted, in return for access to the franchisor's professional support and training, trade secrets and the possibility to benefit from the goodwill established through the franchisor’s long-term efforts. 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.

(iv) Justification of certain clauses. Certain ‘problematic’ clauses may not be considered unfair provided that they can be justified with a "valid reason”. In the context of franchising, a "valid reason" might be the protection of the franchisor’s intellectual property and the goodwill associated with it, their continued intention to grow the network, the consumers’ expectation of a homogeneous network and consistent service delivery; the favourable economic conditions negotiated in the specific interest of all the franchisees, etc. We, therefore, recommend that when the agreement is drafted or redrafted, special attention is paid to ensure that such potentially problematic clauses are drafted in a transparent and precise manner and additional verbiage is added to explain the valid justification for their inclusion.

If you are wondering whether your franchise agreement is compliant with the new Belgian B2B Law or have any questions regarding the stringent pre-contractual disclosure obligations, please do not hesitate to contact our Dentons Franchise Team!

Your Key Contacts

Babette Märzheuser-Wood
Managing Director, Dentons Franchise Consulting, Düsseldorf
M +44 7780 990750
babette.mwood@dentons.com

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

Karolina Cotronei
Senior Associate, Warsaw
D +48 22 242 57 90
Karolina.Cotronei@dentons.com