

The prohibition of unfair trading practices between undertakings

What to expect?



Introduction

Following European trends, the Belgian legislator has in 2019 recognised the existence of significant imbalances in bargaining powers, likely to lead to unfair trading practices between undertakings and the need to prohibit them or to frame their consequences.

With the aim of providing businesses **with more effective tools to combat unfair trading practices**, the Law of 4 April 2019 revised the few existing provisions and significantly **extended their scope** (Articles VI.103/1 and ff. CEL¹).

In this guide, we summarise the key elements of the B2B protection regime fighting unfair trading practices.

¹ CEL stands for Code of Economic Law. Undertakings, businesses and enterprises are synonyms.

A general prohibition combined with specific prohibited trading practices

Next to the pre-existing and general provision prohibiting any act contrary to honest trading practices (Article VI.104 CEL²), the new provisions target specific unfair practices, namely:

- > **misleading trading practices** (Article VI.104/1, 1° and Articles VI.105 – VI.105/1 CEL);
- > **aggressive trading practices** (Article VI.104/1, 2° and Articles VI.109/1 - VI.109/2 CEL);

that cause or are likely to cause the other business to take a transactional decision that it would not have taken otherwise (Article VI.103/1); and

- > **trading practices supporting an act considered as a breach of Book VI** of the CEL or as an offence under specific provisions of the CEL³ (Article VI.104/1, 3° CEL).

The provisions, in operation since 1 September 2019, apply to:

- > **all commercial transactions**, whatever their stage, object or nature;
- > all “enterprises”, ie, **any natural or legal person which pursues an economic objective in a durable manner**, including its associations (Article I.8, 39° CEL). This encompasses businesses irrespective of whether privately or publicly owned, and regardless of their size, turnover, bargaining positions or sectors.



Articles VI.104 prohibits **any act contrary to honest trading practices**, causing harm or likely to cause harm to professional interests of other businesses.

Articles VI.104/1, 1° and Articles VI.105-105/1 prohibit **misleading trading practices** causing or likely to cause the other party to take a transactional decision that it would not have taken otherwise.

Articles VI.104/1, 2° and Articles VI.109-109/2 prohibit **aggressive trading practices** causing or likely to cause the other party to take a transactional decision that it would not have taken otherwise.

Articles VI.104/1, 3° prohibits the **trading practice that promotes an act** that is to be **regarded as a breach** of Book VI of the CEL **or as an offence** as enshrined in specific provision of the CEL.



² The other pre-existing provisions prohibiting among other things misleading advertisement and the creation, promotion or operation of a pyramid promotional scheme have been renumbered (Articles VI.106, VI.107 and VI.109).

³ Under Articles XV.83 to XV.86 and Article XV.126 CEL.

A trading practice?

The **notion of trading practice** is **not legally defined** but is attributed a **broad meaning**.

It includes **any act, omission, course of conduct or representation, commercial communication** (including advertising and marketing) from a business linked **to a commercial transaction** (eg, promotion, sale or purchase, order or supply) **with another business** and **involving a product**.

The **concept of product** relates to any goods or services, including immovable property, rights and obligations.

The trading practice takes place **before, during and/or after** the commercial transaction.

Finally, the trading practice may be carried out by any of the contracting parties, regardless of their capacity (seller or purchaser).

A transactional decision impacted by the unfair trading practice?

The **transactional decision** taken by a business that would have been different in the absence of the unfair trading practice **is legally defined** by Article VI.103 CEL.

It encapsulates any decision taken by a business, whether to:

- > conclude a contract and as the case maybe under what terms; or
- > maintain or waive a contract; or
- > make a payment in whole or in part; or
- > exercise a contractual right in relation to a product.

Causing the business either to act or to refrain from acting.

In other words, given the broad meaning attributed to the transactional decision, it is not required that the business (the victim of the unfair trading practice) had concluded a contract or had made the envisaged purchase.

What are the sanctions?

Misleading and aggressive trading practices are sanctioned through:

- > **injunction proceedings** (cease-and-desist action), initiated by the injured business(es) or filed by the competent ministers if it concerns a misleading or an aggressive practice;
- > **criminal sanctions**, ie, fines of €26 to €100,000; and
- > **a claim for damages**.

What in practice?

The prohibitions on unfair trading practices have been aligned with those already granted in the B2C context, thereby giving effective and far-reaching tools to businesses to combat unfair trading practices.

By way of examples:

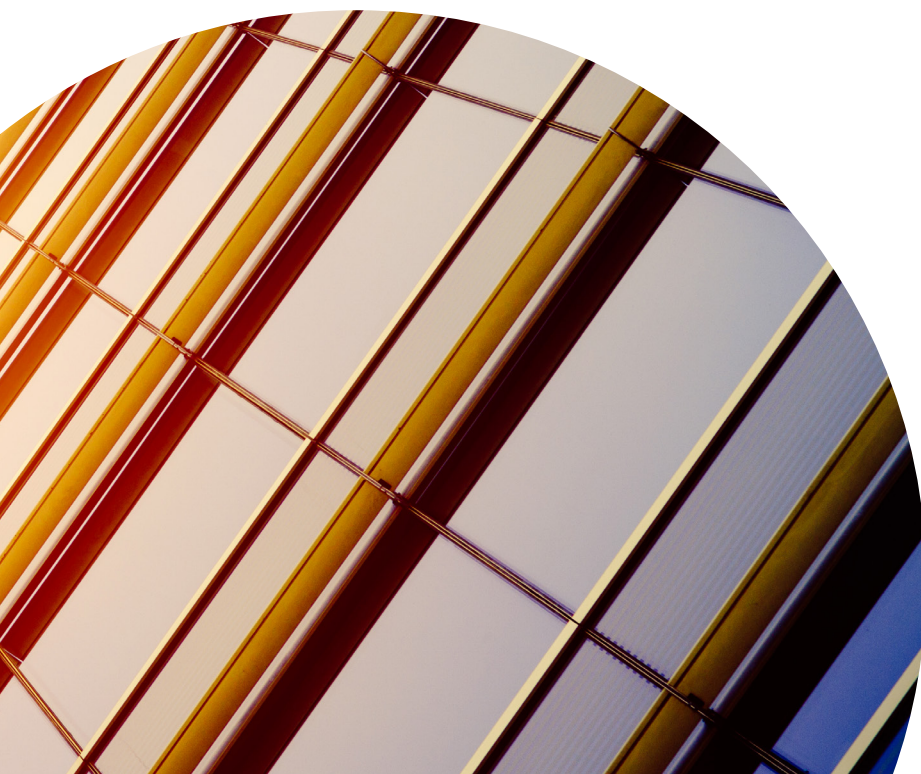
- > The Law of 4 April 2019 qualifies as a misleading trading practice, **the non-compliance by a business with firm and verifiable commitments contained in sectorial codes of conduct** by which the business has undertaken to be bound.

It implies that **self-regulated industries are no more immune to challenges** by competitors or authorities if they have not fulfilled commitments and/or targets settled within the framework of sectorial codes of conduct.

- > The Law of 4 April 2019 qualifies as an aggressive trading practice, **the exercise of undue influence that significantly impairs or is likely to impair the business' freedom of choice or conduct** with regard to a product.

Given the broad meaning of undue influence, an imbalance in the respective (bargaining) position linked to the exercise of a pressure, in a way which significantly limits the business' ability to make an informed decision, might suffice to develop strategic litigation defences for a party dissatisfied with a settlement agreement or credit restructuring negotiations.

Consider franchise agreements and the frequent observation regarding the operation of a scheme of economic dependence. Whilst they will not necessarily meet the strict requirements of an abuse of economic dependence, this situation could be challenged by claiming the existence of an aggressive trading practice, based on an undue influence (as exemplified by the contractual position of the respective parties).



Focus on the newly prohibited misleading trading practices (Articles VI.104/1,1° and VI.105-105/1 CEL)

A misleading trading practice can consist of either **active deception or misleading omission** in relation to information that allows a business to take an informed transactional decision.

Active deception: false or potentially deceiving information (Article VI.105 CEL)

The misleading practice contains false information and is therefore untruthful or, in any way, including overall presentation, deceives or is likely to deceive a business, even if the information is factually correct, in relation to one or more of the ten following elements:

1° and 2°

The **existence or the nature of the product**, the **main characteristics of the product**, such as its availability, benefits, risks, execution, composition, accessories, after-sale assistance and complaint handling, method and date of manufacture or performance, its delivery, fitness for purpose, usage, quantity, specification geographical or commercial origin or the results to be expected from its use or the results and material features of tests and checks carried out on the product.

3°

The extent of the **other contracting party's commitments**, the motives for the trading practice and the nature of the sales process, any statement or symbol in relation to direct and indirect sponsorship or approval of the business or the product.

4°

The **price** or the manner in which the price is calculated, or the existence of a specific price advantage.

5°

The **need for a service**, part, replacement or repair.

6°

The **nature, attributes and rights of the other contracting party** or its agent, such as its identity and assets, its qualifications, status, approval, affiliation or connection and ownership of industrial, commercial or intellectual property rights or its awards and distinctions.

7°

The **business' rights or the risks it may face**.

8°

Any marketing of a product, including any comparative advertisement which creates confusion with any products, trade-marks, trade names or other distinguishing marks of a competitor.

10°

Passing on disparaging elements with respect to a business, its assets, services or activity.

9°

Non-compliance by the other contracting party with commitments contained in sectorial codes of conduct by which the business has undertaken to be bound **where the commitments are not aspirational but are firm and capable of being verified**.

Misleading omission: where the information provided is not enough (Article VI.105/1 CEL)

A trading practice is misleading if, in its factual context, taking into account of all its features and circumstances and the limitations of the communication medium, it **omits material information** that the other business needs to take an informed transactional decision and thereby causes or is likely to cause the other business to take a transactional decision that it would not have taken otherwise.

A business hiding or providing in an unclear, unintelligible, ambiguous or untimely manner such material information or failing to identify its commercial intent, if not already apparent from the context, thereby causing or being likely to cause the other business to take a transactional decision that it would not have taken otherwise, also commits a misleading trading practice.



Focus on the newly prohibited aggressive trading practices (Articles VI.104/1, 2° and VI.109/1-2 CEL)

A trading practice shall be regarded as **aggressive** if, in its factual context, taking account of all its features and circumstances, **by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the business' freedom of choice or conduct with regard to the product** and thereby causes it or is likely to cause it to take a transactional decision that it would not have taken otherwise.

The **concept of undue influence** is legally defined as **exploiting a position of power** in relation to another business so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the business' ability to make an informed decision.

The **recourse to harassment, coercion and undue influence is further illustrated** under Article VI.109/2 **by taking into account six elements:**

1°

The **timing, location, nature** or persistence of the trading practice.

2°

The **use of threatening language or behaviour.**

3°

The **exploitation** by the business - of which it is aware - **of any specific misfortune or circumstance** of such gravity **as to impair the other business' judgement** to influence its decision with regard to the product.

4°

Any **onerous or disproportionate non-contractual barriers imposed by the business** where the other business wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another business.

5°

Any **threat to take any action that cannot legally be taken.**

6°

The **contractual position of one business** towards the other business.





Conclusion: a wise undertaking is worth two...

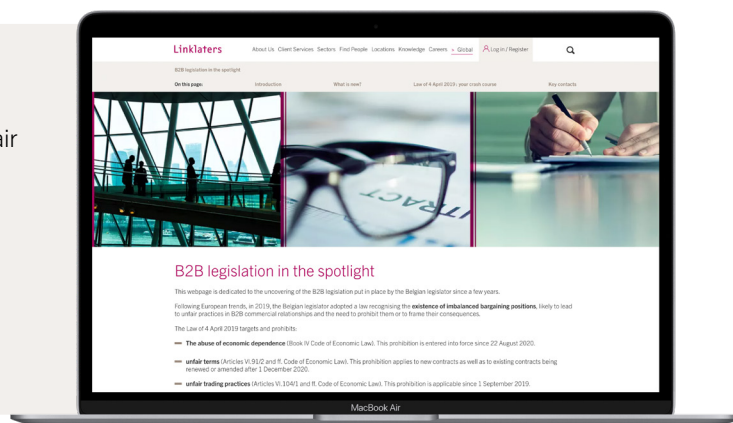
The B2B protection regime against unfair trading practices equips undertakings with efficient and powerful tools to combat unfair trading practices but is also an open door to strategic judicial tactics in the hands of fierce competitors.

It compels any business to revisit carefully the way they approach their business counterparts on a daily basis and to review the information they pass on with a view to making or executing a commercial transaction.

B2B legislation in the spotlight webpage

Our 'B2B legislation in the spotlight' webpage is dedicated to the uncovering of the B2B protection regime fighting unfair contractual terms and unfair trading practices in Belgium.

For more information, please contact your usual Linklaters contact.



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