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The prohibition of unfair terms in B2B contracts

The door opened to legal uncertainty

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.

The Law of 4 April 2019 targets and prohibits among others unfair clauses (Articles VI.91/2 and ff. CEL[1]) and unfair (aggressive and misleading) trading practices (Articles VI.104/1 and ff. CEL).

In this guide, we summarise the key elements of the B2B protection regime fighting unfair clauses. We also outline key action points.

1 CEL stands for Code of Economic Law. Clauses and contractual terms are synonyms as well as undertakings, enterprises and businesses.

The far-reaching scope of the B2B protection regime: to which undertakings and to what types of contracts does it apply?

Take-away

The B2B protection regime applies regardless of the size of the undertakings involved (small to larger) and regardless of the nature and the object of the commercial relations at stake (with a few exceptions).

Two exemptions have been included in the scope (Article VI.91/1, §§ 1-2 CEL): the first relates to financial services[2] and the second refers to public procurement and contracts directly or indirectly deriving from the public procurement in question.

In-depth

- The B2B protection regime **applies to any natural or legal person, irrespective of whether privately or publicly owned, and regardless of its size or turnover**, which pursues an economic objective in a durable manner, including its associations (cf. notion of "*enterprise*", Article I.8, 39° CEL).

  A public legal person will be considered as an enterprise affected by the B2B protection regime when it buys goods or services against a price outside the framework of a public procurement or outside the exercise of a regulatory mission.
- **Every contract is susceptible to falling under the scope of the B2B protection regime** irrespective of the nature and the subject matter of the contract (movable and immovable goods, services and rights and obligations) and regardless of the existence of negotiations.
- **Examples of possibly impacted contracts** or **particular clauses** in contracts are a franchise agreement, a service level agreement between an insurance company and a cloud services provider, an office lease agreement or a long-term lease agreement, a settlement agreement, a distribution agreement, an earn-out clause in an SPA, a non-compete clause in a JV agreement, an arbitration clause in a claims assignment agreement, a reciprocal put and call options clause in a sale agreement, a penalty clause in a service level agreement between a bank and a services provider.

2 See our newsletter addressing the impact of the B2B protection regime on the banking and insurance sectors.

The nature of the B2B protection regime: is there any escape from it?

Take-away

The short answer is no, considering the legal nature of the B2B protection regime as "*politiewet*"/"*loi de police*".

However, according to the legislator's point of view, the B2B protection regime operates as a general regime (lex generalis), giving way to a certain extent if a *lex specialis* exists.

In-depth

- In the parliamentary works, the B2B protection regime has been described as "*politiewet*"/"*loi de police*" i.e. **overriding mandatory provisions** that are considered crucial to safeguarding the public interests of a country (cf. Article 9 of the Rome I Regulation). As a consequence, any choice of foreign law should give way to the B2B protection regime subject to the facts that one of the undertakings involved is located in Belgium and that a Belgian judge is handling the dispute. If a foreign judge is handling the matter, the application of the B2B protection regime is optional and subject to the fact that the obligations arising from the contract have to be performed or have been performed in Belgium and their performance is unlawful in the light of the B2B protection regime.

  The qualification put forward in the parliamentary works is very much debated in the legal literature published. Indeed, it cannot be easily reconciled with some characteristics of the B2B protection regime such as the inclusion of a grey list of clauses for which the unfairness qualification can be rebutted and the fact that according to the parliamentary works, the *lex specialis* should take precedence over the B2B protection regime.

  For the time being, in anticipation of any decisive case law and/or a remedial legislation, **the B2B protection regime should be considered as mandatory** ("*dwingend*" / "*impératif*").

- **The legislator adds some confusion** to the legal qualification of the B2B protection regime by referring in the parliamentary works to the precedence granted to regimes set out in specific legislations.

  A few extracts of the parliamentary works allude to the fact that the B2B protection regime operates as a general regime (*lex generalis*), as opposed to any regimes set out in specific legislation (*lex specialis*). A number of financial legislations, specific provisions regarding the duration of a contract and its termination in the energy sector and the Law of 2 August 2002 combating late payment in commercial transactions are quoted as *lex specialis*. However, this enumeration does not seem to be exhaustive.

  The **practical impact of this further (but somewhat vague) qualification** is that **if a *lex specialis* exists, it may take precedence over the B2B protection regime in its entirety or partially** (if its scope is limited to some contracts and provides for specific sanctions) **or at least it may impact the unfairness test with regard to one specific clause** (which would be tackled by both sets of legislation).

“Unfair clause / unfair contractual terms”: what does it mean? What is the sanction?

Take-away

Four provisions shape the concept of unfair clauses.

First, Article VI.91/2 CEL enshrines a general transparency requirement applicable to all contractual terms (be it essential or not). Contractual terms need to be drafted in plain and intelligible language.

Secondly, according to Article VI.91/3 CEL, a clause is unfair or abusive if it creates a ***significant imbalance between the rights and obligations*** of the parties. It must be noted that Article VI.91/3 CEL only **targets clauses / contractual terms** that are **not essential**, i.e. not relating to the definition of the main subject matter of the contract nor to the adequacy of the price or remuneration against the services or goods supplied in exchange.

Thirdly, Article VI.91/4 CEL contains a **black list** of clauses / contractual terms regarded as **always unfair**.

Fourthly, Article VI.91/5 CEL contains **a grey list** of clauses / contractual terms **presumed to be unfair**.

The above rules are to be combined in **a certain logical order**: first, check the black and the grey lists provisions, and secondly – as the case may be – apply the unfairness test which can in turn be triggered by a non-compliance with the transparency requirement.

Black list?	>	Grey list?	>	Unfairness test of non-essential terms	>	Transparency requirement
Article VI.91/4		Article VI.91/5		Article VI.91/3		Article VI.91/2

According to article VI.91/6 CEL, the unfair clause / contractual term is **prohibited and void**. The avoided clause / contractual term is **retrospectively invalid as from the beginning**. The contract may remain binding for the parties if it can exist without the avoided unfair / contractual term.

In-depth

Article VI.91/2 CEL: the transparency requirement (and its flaws)

The **transparency requirement** implies that the clauses / contractual terms need to be **drafted in plain intelligible language**.

In a B2C context, the similar transparency requirement is interpreted as meaning that the relevant clauses / terms should not only be formally and grammatically intelligible but should allow the consumer to evaluate, on the basis of precise and intelligible criteria, the economic consequences which derive from these clauses / contractual terms.

However, the explicit rejection by the legislator of an application by analogy with the B2C case law and the fact that businesses are not easily equated with consumers, who are unfamiliar with the business world and often not assisted by legal in-house or external advisers, lead to the conclusion that this specific interpretation should not prevail in a B2B context.

How should the transparency requirement be understood in a B2B context?

The guidance given by the legislator is scarce and highlights the fact that the clauses / contractual terms should **be drafted clearly enough** to allow the other party to give informed consent.

How do you assess the informed consent of a business party expected to run its business, with some technical and commercial knowledge?

There is not a ready-made answer to this question.

Practical tips: build up evidence on the informed consent on the basis of the information received or asked, the checks done (or that could have been done) by the other party (possibly through its legal team), and the existence of trade usages directly related to the contract in question.

What is the sanction in case of a breach of the transparency requirement?

It is two-fold:

- a breach of the transparency requirement by a non-essential clause / contractual term will be taken into consideration when assessing its unfairness. In other words, the breach is an additional factor pointing to a possible unfair clause / contractual term
- a breach of the transparency requirement by an essential clause / contractual term will open the possibility of checking its unfairness, thereby subjecting it to Article VI.91/3

Article VI.91/3 CEL: the unfairness test applied to non-essential clauses / contractual terms

A clause / contractual term is deemed **unfair or abusive** if it creates a **significant imbalance between the rights and obligations** of the parties, whether or not taking into account other clauses / terms of the same contract or of other contract(s) related to them.

A significant imbalance between the rights and obligations of the parties **does not equate to a quantitative economic evaluation**. Indeed, the definition of the main subject matter of the contract (characteristics such as quality and quantity of the good/service) and the adequacy between the price or remuneration paid for the goods or services provided fall outside the scope of the unfairness test.

The **significant imbalance prohibited is a legal imbalance** and covers situations reflecting a **serious impairment of the legal situation in which a party to a contract is placed**, be it by a constraint on the exercise of its rights or by the imposition of additional obligations not envisaged in the legal rules that would apply in the absence of the contract.

When should the unfairness test be assessed? It must be assessed by reference to the **time of conclusion of the contract** at issue.

What are the **additional factors looked at in the unfairness test**? The **nature of the products** (being broadly construed as movable and immovable goods, services, rights and obligations), for which the contract was concluded, the **circumstances attending the conclusion of the contract** (such as a stronger bargaining position or the absence of reciprocity of a contractual term), **the general economic scheme of the contract, the commercial practices of the economic sector** in question, the other clauses / contractual terms of the contract or of another contract on which it is dependent, the fact that the clause / contractual term is not drafted in plain intelligible language and the **existence of a non-mandatory legal or regulatory framework**.

Article VI.91/6 CEL: the sanction(s)

According to Article VI.91/6 CEL, the unfair clause / contractual term is **prohibited and null and void**.

The avoided contractual term is automatically **of no effect from the beginning**. Although debated among the scholars, the nullity is relative as it can only be invoked by the aggrieved party.

The **nullity is also – by effect of the law – partial**. Indeed, Article VI.91/6 CEL provides that the contract may remain binding for the parties if it can exist without the avoided contractual term.

Following the avoidance of the clause / contractual term, the judge seized will assess the legal position of the parties **by replacing** the avoided clause / term by mandatory or supplementary legal provisions that would have applied in its absence. This possibility has been set aside in a B2C context to ensure the dissuasive effect of the unfair clause / contractual term prohibition.

Some scholars consider that as it is the case under the *droit commun/gemeen recht*, the unfair clause / contractual term could be **reduced to its licit part** if the parties had in mind to consider the clause / contractual term as severable from the outset. **The reduction of the clause / contractual term may imply to re-write part of it**. Consider a broad exoneration clause in the event of non-performance by the party benefiting from the exoneration. This clause, targeted under the grey list (Article VI.91/5,6° CEL), could be reduced to its licit part.

Finally, unfair clause / contractual terms can lead to **other sanctions**, amongst which **damages on the basis of the pre-contractual liability, the initiation of a cease and desist (injunction) procedure or criminal sanctions** subject to some conditions (including a bad faith breach).

The black list and its restrictive interpretation

Take-away

The black list includes **four contractual clauses** which are in any case regarded as unfair or abusive:

- 1° the clauses making **an agreement binding on one contract party while the performance of the obligations of the other party is subject to** a condition whose realisation depends on **its own will alone**
- 2° the clauses enabling one contract party to **unilaterally interpret any clause** of the contract
- 3° the clauses **dismissing any legal remedy for one contract party** in case of a dispute; and
- 4° the clauses laying down **the irrebuttable presumption that one contract party had knowledge of or adhered to the contractual provisions**, when it did not actually have knowledge of such provisions before entering into the contract[3]

"Escape from my obligations as I please" clause	> "Right to unilateral interpretation" clause	> "Waiver of any legal remedy in case of dispute" clause	> "Presumed knowledge of or adherence to contractual terms" clause
Article VI.91/4, 1°	Article VI.91/4, 2°	Article VI.91/4, 3°	Article VI.91/4, 4°

In-depth

1° *"Escape from my obligations as I please"* clause

Examples of such prohibited clauses are (i) a clause where the commitment of one party is subject to board of directors' approval whereas the other party has already taken a firm commitment, and (ii) a clause where the seller's acceptance of an order only entails its commitment to make some efforts to deliver the goods ordered at its own discretion. The alternative mechanism of consecutive reciprocal put and call options clauses in real estate (sale) transactions is also picked up in the legal literature as potentially impacted by the prohibition under Article VI.91/4.

2° *"Right to unilateral interpretation"* clause

The parliamentary works highlight the **discretionary power that such a clause can grant to one party**. They also link its prohibition to the fact that such clause will operate when the clauses/ contractual terms are not clear, thereby breaching the transparency requirement.

Do not fall under this category, the *partijbeslissing* clause enabling one party to let determine *via partijbeslissing* the object of the contract or the clause imposing in case of doubt, an interpretation in favour of one party because the judge will eventually decides about the interpretation.

3 See our newsletters for illustrations of contractual situation where these prohibited clauses appear.

3° "Waiver by one business of any legal remedy in case of dispute" clause

According to the parliamentary works, this prohibition must be **strictly construed** and only targets the **clauses that exclude the access to a judge**.

Not falling under this category are the clause that arranges for a unilateral right to terminate a contract or to suspend its performance subject to a posteriori judicial control, the clause that provides for a binding decision from a third-party, the clause that abbreviates the limitation period as long as it does not equate to no effective legal remedy available.

The parliamentary works incorrectly state that an arbitration clause would fall into this category, thereby confusing access to a private jurisdiction (i.e. an arbitrator) with no access to justice. This confusion has been unanimously denounced by the legal literature.

4° "Non-rebuttable presumption of knowledge of or adherence to clauses / contractual terms" clause

Thoughts are given in the legal literature as to whether there is any point in having such a prohibition in the light of the requirements already imposed under the *droit commun/gemeen recht* (see Article 5.23 of the Civil Code).

Should this type of clause be included in general terms, then the requirements for the opposability of the general terms imply a reasonable opportunity to take cognizance of them and to accept them.

The usefulness of the prohibited clause inserted in general terms is therefore highly questionable.

Furthermore, should the general terms appear on an invoice, then Article 8.11 § 4 of the Civil Code will imply that in the absence of its timely challenge, the invoice including the general terms is presumed to be accepted.

Finally, **a clause that provides for a rebuttal presumption** that one party had knowledge or adhered to the contractual provisions, **is valid**.

The grey list – "Comply or explain and convince"

Take-away

The grey list targets **eight clauses** deemed unfair, but for which the proof of the contrary can be adduced.

Article VI.91/5, 1° Unilateral alteration without a valid reason	Article V1.91/5, 2° Tacit prolongation or renewal without reasonable termination notice	Article V1.91/5, 3° Placing the economic risk without compensation on the other business	Article V1.91/5, 4° Inappropriate exclusion or limitation of legal rights in case of non-performance or inadequate performance
Article V1.91/5, 5° Binding parties without providing for a reasonable termination notice	Article V1.91/5, 6° Exoneration of liability for fraud or gross misconduct, including that of its agents or for non-performance of essential obligations	Article V1.91/5, 7° Limiting the means of proof available to the other business	Article V1.91/5, 8° Excessive penalty clause

In-depth

1° A clause **enabling one party to alter unilaterally without a valid reason** the price, the characteristics or the terms of a contract.

Examples of a valid reason are an adaptation to the changing economic conditions or a change in the law. They will be accepted to the extent that the derived alteration is not purely discretionary and is based on objective criteria.

Practical tip: consider inserting in the clause an illustrative list of valid reasons triggering unilateral alteration to evidence the parties' consent to a possible and future unilateral alteration.

2° A clause **enabling a tacit prolongation or renewal of a contract of definite duration without reasonable termination notice.**

The wording of this grey clause is **particularly confusing** as the legislator seems to ignore the main effect of the prolongation or renewal of a contract of definite duration, which is to transform it into a contract of indefinite duration that can be terminated at any time with a reasonable termination notice.

In an attempt to give some sense to this clause, scholars support the view that the intent of the legislator was to provide in a contract of definite duration a mechanism that enables the other party to oppose in a reasonable time before its end the tacit renewal or prolongation of the contract.

Practical tip: screen your definite duration contracts and adapt accordingly.

3° A clause **placing, without compensation, economic risk on a party, when such risk would normally fall on the other party or on any other party** to the contract.

According to scholars, this clause raises **dauting challenges of legal understanding** such as the notion of economic risk (as opposed to legal risk, as opposed to situations without uncertainty?), the determination of the *"normal allocation of the risk"*, the definition of a compensation (whether monetary or non-pecuniary?, whether substantial or derisory?), and the transfer of the risk (including the issue of the aggravation or moderation of the risk but without transfer of it).

Consider an earn-out clause: where does the economic risk of a bad performance of the target company (post-closing) normally lie? What if the seller stays in the management of the target company, thereby in a position to influence the future performance of the target company?

Practical tip: consider the insertion of indications of compensation (e.g. its impact on the price or the gaining of any other advantage) to justify an "abnormal" allocation of economic risk or consider the insertion of a comment according to which these specific clauses are the result of intertwined and reciprocal concessions.

4° A clause **excluding or limiting inappropriately the legal rights of a party in the event of partial or total non-performance, or inadequate performance** by the other party of its contractual obligations.

According to the parliamentary works, this prohibited clause is a catch-all clause in the assessment of which the judge enjoys great discretion.

Legal rights of a party? Scholars construe this **term broadly** as covering the right to enforce performance, the right to damages, the right to reduce the price, the right to termination and consecutive restitutions, the right to withhold performance and the right to be held harmless.

What would be an **inappropriate exclusion or limitation**? The legislator fails to define what inappropriate means. Scholars' opinions vary from a restrictive interpretation of the inappropriateness, reducing it to a default category by contrast with what is permissible under the *droit commun/gemeen recht* to a *sui generis* / autonomous notion yet to be developed where a proportionality test between the extent of the limitation imposed on the legal rights on the one hand and the gravity of the breach and the importance of the disregarded contractual obligation on the other hand would take place.

For example, a clause excluding the right to withhold performance would not be inappropriate in a construction contract where timely performance is of the essence. On the contrary, a broad meaning of force majeure (e.g. de facto exonerating one contract party) could lead to the prohibition of the clause in some circumstances.

According to the parliamentary works, a clause excluding the indemnification of *"indirect/consequential loss which was not foreseeable"* is not an inappropriate limitation of the right to indemnification/ damages.

To what extent an exoneration clause capping the liability of a business to a fixed amount is valid, will be a matter of proportionality.

5° A clause **binding parties without providing for a reasonable termination notice without prejudice to Article 1184 of the old Civil Code** (now Articles 5.90 and ff of the Civil Code).

This **prohibition is puzzling** in many ways.

Indeed, in contracts of indefinite duration, it is well established that the parties have the right to terminate them at any time subject to reasonable notice.

What is the added value of the prohibition, then? Is it to impose the insertion of a specific provision according to which the contract can be terminated subject to reasonable termination notice as it is the case in a B2C context?

Secondly, the sanction of nullity rather than the one derived from the *droit commun / gemeen recht* (right to unilateral termination subject to reasonable notice) could lead to legal uncertainty for many long-term contracts, threatened by retroactive nullity, where the only contractual breach would have been the lack of specification of a reasonable termination notice.

Notwithstanding the fact that the prohibition could also encompass contracts of definite duration, the majority of the scholars reject this possibility. Indeed, if the prohibition were to apply, it would simply negate one of the main objectives of contracts of definite duration, i.e. to give the parties the benefit of a certain stability regarding their relationships as it cannot be ended unilaterally by anticipation.

6° A clause **exonerating one party of its liability for fraud** (*"dol / opzet"*), **gross misconduct** (*"faute lourde / zware fout"*) **or that of its agents** (*"préposés / aangestelden"*) or, except in the event of force majeure, for non-performance of essential obligations.

First, it must be noted that **the prohibition goes beyond the rules under the** *droit commun/gemeen recht* (see Article 5.89 §1, al. 2 of the Civil Code).Indeed, Article 5.89 considers valid an exemption for gross misconduct subject to the fact that the parties' will regarding this exemption is certain.

Secondly, the prohibition reiterates the existing legal rule that a clause affecting one essential obligation of a contract would deprive the latter of its whole substance and will be annulled (Article 5.89 §1, last sentence).

Thirdly, a remarkable textual omission, in comparison with the similar B2C prohibition, is the fact that only **agents of a business** fall under the prohibition **and not its representatives**. It also differs from the broader wording used in Article 5.89 which refers to *"personne dont il répond / persoon voor wie hij moet instaan"*.

Finally, **partial exemption or exoneration clauses are valid** under the B2B protection regime, subject to Articles VI.91/5, 4° and VI.91/3.

7° A clause **limiting the means of proof available** to the other party.

This prohibition has **an unexpected, far-reaching consequence**.

Indeed, under the *droit commun/gemeen recht*, parties may use any means of proof (*"freedom of proof system"*) but may also select specific means of proof (for example, documentary evidence) or exclude some (for example, no witness).

The practical impact of the prohibition is to render null and void any selection or exclusion of means of proof between businesses, which goes even beyond what is imposed in a B2C context (where only the *undue* restriction of means of proof is prohibited).

However, clauses that allocate a different probative value to some means of proof compared with other ones are valid (for example, documentary evidence will have more probative value than a testimony).

8° A clause **fixing the amount of damages in the event of non-performance or late performance, which manifestly exceed the extent of the damage likely to be suffered**.

This prohibition is not easily reconcilable with Article 1231 of the old Civil Code (now Article 5.88 of the Civil Code) sanctioning excessive penalty clauses by reducing the amount of damages awarded or the general liability regime.

Indeed, a business could rebut the unfairness presumption regarding a penalty clause but without real benefit as the penalty clause could still be reduced on the basis of the Civil Code (which paragraph 7 prohibits any derogation to it).

On the other hand, the parliamentary works indicate that should the penalty clause be annulled, then the general liability regime operates again which could lead subject to the fulfilment of its requirements to the granting of damages.

In other words, the risk of inserting excessive penalty clauses has been broadened in that the sanction is not limited to a reduction of the damages as is the case under the *droit commun / gemeen recht* (by virtue of Article 1231 of the old Civil Code and Article 5.88 of the Civil Code) but could be the annulment of the clause in its entirety.

Conclusion

The B2B protection regime applies to contracts concluded after 1 December 2020 as well as to previously concluded contracts being renewed or amended after 1 December 2020.

When assessing your contract, run through this **check-list:**

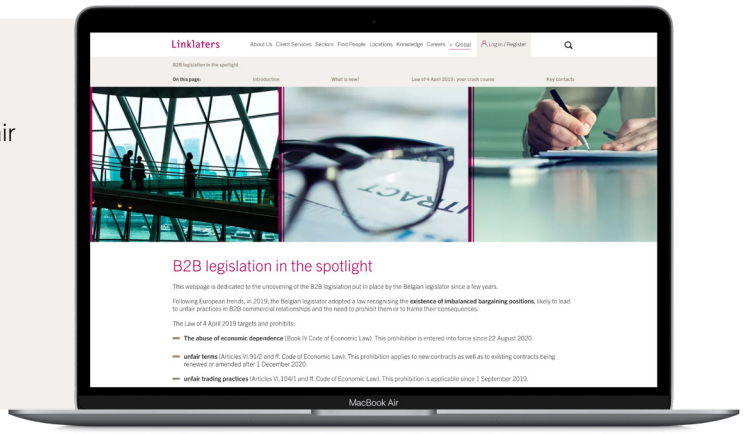
1. Does the contract in question benefit from one of the specific exemptions?
2. If not, is the clause / contractual term in question an essential clause / contractual term?
3. If not, is there a *lex specialis* which would impact the application of the B2B protection regime?
4. If not, the B2B protection regime applies. It is time to run through the clauses / contractual terms with a critical mindset in order to check:
   a. whether any clause / contractual term could possibly fall in the scope of the black list or the grey list
   b. if not, whether the clause / contractual terms in question pass the unfairness test between the rights and obligations of the undertakings (for non-essential clauses / contractual terms and in the event an essential clauses / contractual term does not fulfil the transparency requirement)

   At this stage, the general transparency requirement and its possible breach are to be verified.
5. Based on the above assessment, certain actions will have to be considered, including removing or re-drafting specific clauses / contractual terms or adapting the preamble in the contract to insert indications evidencing the conscious striking of a balance between the rights and obligations of the parties.

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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