B2B legislation in the spotlight: the financial industry will not escape its reach

The Law of 4 April 2019[1] introduced various new provisions into the Belgian Code of Economic Law (the "CEL"), impacting relations between businesses (B2B). These provisions include the protection of businesses against unfair contractual terms. They enter into force on 1 December 2020.

At first glance, the impact on the financial industry may appear limited given a broad exemption in respect of financial services. However, a closer examination indicates that the financial industry does not entirely escape its reach.

After a short recap of the changes introduced by this new regime, we provide you with preliminary answers to questions you may have and which may need to be taken into account in your daily financial practice.

What are the key features of the protection regime against unfair contractual terms?

First, the new protection regime requires contractual terms to be drafted in plain and intelligible language. This rule, incorporated in Article VI.91/2 of the CEL, has been branded the "*transparency*" requirement.

Second, pursuant to Article VI.91/3 of the CEL, non-essential contractual terms are deemed unfair if they cause a significant imbalance between the rights and obligations of the parties under a contract, notwithstanding the other terms of the contract. Non-compliance with the transparency requirement (see above) is one of the elements which is considered in the assessment of the potential unfairness of a contractual term.

Third, the protection regime provides for a black list and a grey list of contractual terms, set out in Articles VI.91/4 and VI.91/5 of the CEL. These refer respectively to (i) contractual terms which are in any case considered unfair and therefore prohibited, and (ii) contractual terms which are presumed to be unfair and therefore prohibited, but where such presumption is rebuttable. The black list covers, among others, contractual terms which allow a contractual party to unilaterally interpret the terms of the contract as well as contractual terms dismissing any right for a contractual party to take legal action in the event of a dispute. The grey list targets, among others, contractual terms which entitle a party to unilaterally alter, without a valid

1 The Law of 4 April 2019 amending the Code of Economic Law regarding abuses of economic dependency, unfair terms and unfair commercial practices between enterprises, Belgian State Gazette 24 May 2019. The provisions were mainly incorporated in Articles IV.2/1, IV.41, IV.70 and IV.73 of the CEL (regarding the prohibition of abuse of economic dependency), Articles VI.91/1 to VI.91/10 of the CEL (regarding the prohibition of unfair contractual terms) and Articles VI.104/1 and following of the CEL (regarding the prohibition of unfair market practices). For a general description of the new protection regime, please see the section on 'unfair contract terms' in this B2B legislation in our spotlight guide.

reason, the price, the characteristics or the conditions of the contract.

The above rules are to be combined in a logical order: first, the contract needs to be checked against the provisions of the black list and the grey list; second, as the case may be, the significant imbalance test needs to be applied.[2]

According to Article VI.91/6 of the CEL, any unfair contractual term is prohibited and null. The contract as a whole will, however, remain binding on the parties if it can exist without the unfair contractual term. Where a specific matter is no longer addressed by the contract, suppletive law can be applied. The practical, and potentially unsatisfying, outcome thereof is that suppletive provisions could possibly govern the relationship which at the time of entering into the contract were not foreseen by the parties and are not necessarily aligned with their intention.

Finally, it should be noted that any breach of the protection regime can also give rise to non-contractual liability and criminal sanctions.[3]

As a financial institution, does the B2B regime apply to my business?

The protection regime relating to unfair contractual terms has a broad reach and in principle applies to all contracts between "*enterprises*" (i.e., any natural person or legal entity which pursues an economic objective in a durable manner).

As evidence of its broad reach, it is important to note that the protection regime does not distinguish between the size of the businesses involved, the type of contract at stake or the object of the contract.

The good news for the financial industry is that the CEL contains a general exemption in relation to "*financial services*" (Article VI.91/1, §1 of the CEL).

However, the exemption does not relate to "*financial institutions*" and their contractual relationships in general, which entails an important difference in practice.

The exempted financial services are broadly construed in the Parliamentary works. These regard, in particular, any service relating to banking activities, credit provision, insurance, individual pensions, investments and payments. The Parliamentary works specifically mention that the exemption applies to all MiFID-type financial instruments as set out in Article 2 of the Law of 2 August 2002.[4] These include, among others, securities, money market instruments, units of UCITS, options, futures, swaps and other derivatives.

The reasoning for this exemption stems from the fact that the legislator deemed that financial services are already subject to a vast array of "conduct of business" rules aimed at protecting users of financial services. Furthermore, the legislator considered the international character of financial services in the current globalised world, which could have been hampered should a national protection regime apply.

This exemption for financial services is, however, not carved in stone. Indeed, the protection regime against unfair contractual terms can be extended to certain financial services by way of a Royal Decree. We expect such a Royal Decree to be adopted sooner than later

As an additional way out, financial institutions may refer to specific extracts of the Parliamentary works stating that the 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 corresponding to *lex specialis* are specifically referred to, although it does not seem that this listing is meant to be exhaustive.[5] The practical

2 For further explanations about the functioning of these rules, please see the section on 'unfair contract terms' in this B2B legislation in the spotlight guide.

3 Subject to certain conditions (including bad faith), a criminal fine between EUR 26 and EUR 25,000 can be imposed (Articles XV.84 juncto XV.70, al 4 CEL).

4 The Law of 2 August 2002 on the supervision of financial markets and financial services, Belgian State Gazette 4 September 2002.

5 The Parliamentary works specifically refer to the Law of 25 April 2014 on the status and supervision of credit institutions and investment companies, the Law of 2 August 2002 on the supervision of financial markets and financial services, Book VII of the CEL, the Law of 3 August 2013 on various measures to facilitate the mobilisation of receivables in the financial sector, the Law of 15 December 2004 on financial collateral and containing various tax provisions on collateral arrangements and loans relating to financial instruments, the Law of 28 April 1999 transposing Directive 98/26/EC of 19 May 1998 on settlement finality

impact of this additional, but vague, qualification of the protection regime is being debated among legal scholars. Their positions so far vary from the precedence of the *lex specialis* over the protection regime in its entirety to the (sole) taking into consideration of the *lex specialis* to assess the existence of a significant imbalance and hence the unfair character of the clause (tackled by both sets of legislation). Some authors also consider that the protection regime and the *lex specialis* will have to be applied cumulatively and that only in a case of conflict will the protection regime have to give way to the (conflicting) *lex specialis* provisions.

Does my contract / transaction fall within the exemption relating to financial services?

As indicated above, the exemption for financial services is far-reaching but only relates to financial services and not to financial institutions generally.

This means that agreements entered into by non-financial institutions which concern financial services (such as intercompany loans or cash pooling agreements) will benefit from the exemption, whereas agreements entered into by financial institutions which are not linked to financial services will not.

Examples of contracts that will not benefit from the exemption include (outsourcing) contracts relating to IT services and providers, property leasing, safety and security contracts, contracts with consultants and agency agreements with self-employed bank agents.

For other types of services, the situation is less clear and the interpretation – strict or lenient – of the concept of "financial services" (services relating to banking activities, credit provision, insurance, individual pensions, investments and payments) will be crucial.

This is particularly the case for contracts relating to mixed services and ancillary services. Parliamentary works are silent and legal scholars are largely undecided.

Mixed contracts are contracts which cover both financial and non-financial services (for example general terms and conditions of a bank which govern banking services as well as wealth management advice). Some legal authors argue that the agreement is to be assessed clause by clause, potentially resulting in partial invalidity for those clauses linked to non-financial services. Another view is that one should look at the main service: if that is a financial service, the exemption should apply to the entire agreement.

Ancillary contracts are contracts which are accessory to a main contract. Taking the example of pledge agreements as an accessory to a loan, some legal authors expressed the view that these cannot benefit from the financial services exemption since they do not concern financial services. However, we tend to believe that these agreements, which have no purpose without the main agreement, should follow the legal regime applicable to the main agreement: to the extent that the main agreement relates to a financial service (for example a loan), the related security agreements should follow that qualification. Moreover, one could argue that security agreements entered into with banks are an integral part of the lending activities of a bank, which qualify as a banking service and hence a financial service.

Absent any guidance, in particular on mixed and ancillary contracts, it will be important to monitor market practice in the coming months. Given this uncertainty, mixed and ancillary contracts will require a prudent, case-by-case assessment.

When the financial services exemption does not apply, it is possible that certain provisions, although these can be deemed aligned with market practice, qualify as unfair terms in view of the new protection regime. This could then give rise to an unexpected risk of the nullity of certain market practice provisions.

One contractual provision pinpointed by legal authors[6] is the penalty provision which is customarily included in service level agreements, for example in relation to the guaranteed

in payment and securities settlement systems, and the Law of 11 July 2013 amending the Civil Code as regards collateral securities on movable property. Additionally, the Law of 13 December 2013 concerning various provisions on financing for small and medium-sized enterprises seems to fall within the remit of this rule.

6 T. Boedts and D. De Bruyne, "De impact van de B2B-Wet op financiële diensten en financiële instellingen", Bank- en financieel recht 2020/I, 50.

availability of service. Should the penalty provision result in a suspiciously high compensation, it leaves the door open for the aggrieved party to raise a significant imbalance of its rights and obligations and to seek the nullity of the provision, especially if the aggrieved party can evidence a strong bargaining position over its counterpart.

Taking into account the far-reaching and uncertain consequences which the new regime can have, the exemption for financial services is certainly welcome in a business-to-business (B2B) context.

As from when should I be prepared?

The sooner the better!

1 December 2020 should be marked in your calendar. As from that date, unless you can benefit from the financial services exemption, the regime will apply to new contracts as well as to existing contracts being renewed or amended as from that date. It will therefore be important to carefully consider any implications which the new protection regime may have on your contractual B2B relationships and negotiations in order to be prepared well in advance.

Is there a way to avoid the new regime from applying to my business?

The short answer is no, considering the nature of the protection regime from the legislator's point of view. Although there is a debate amongst legal scholars, the protection regime has been qualified in the Parliamentary works – rightfully or not – as a "*politiewet*" / "*loi de police*", i.e. overriding mandatory provisions (cf. Article 9 of the Rome I Regulation). As a consequence, a choice of foreign law could be defeated subject to sufficient connection with Belgium. In any case, this qualification opens a whole array of questions, for example in relation to the interpretation of Belgian law by foreign judges and the execution in Belgium of foreign judgments. It remains to be seen how a foreign judge would look at this in practice.

Where should I start?

Practically speaking, you should consider the following questions when assessing your contract:

1. Does the contract in question benefit from the financial services exemption?
2. If not, is there a *lex specialis* which would take precedence over the new regime of the CEL?
3. If not, the protection regime applies. In such case, you will need to run through the contractual provisions with a critical mindset in order to verify:
   a) whether any provisions can possibly fall within the scope of the black list or the grey list;
   b) if not, whether the contractual provisions pass the significant imbalance test between the rights and obligations of the contractual parties. At this stage, the general transparency requirement should also be verified.
4. Based on this assessment of the contractual provisions, you may need to remove or re-draft certain provisions, for example to rebut the presumption of unfairness of such provisions if they fall within the grey list. You can also consider adapting the preamble of the contract to insert indications evidencing the conscious striking of a balance between the rights and obligations of the parties.

After this exercise, your contract should be aligned with the new regime!

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