



## B2B legislation in the spotlight: the legal insecurity and its inordinate impact on the real estate market

In a Law of 4 April 2019, the Belgian legislator recognised the existence of imbalanced bargaining positions, likely to lead to unfair practices in B2B commercial relations and the need to prohibit them or to frame their consequences.

The Law of 4 April 2019 introduced various new provisions in the Belgian Code of Economic Law (the “CEL”)<sup>1</sup> **protecting the businesses against the inclusion of unfair contractual terms**, which rules are enforceable as from 1 December 2020.

It must be noted that the B2B protection regime applies regardless of the size of the businesses involved (small to larger enterprises) and of the existence of a relation of economic dependency between them.

Every contract is susceptible to falling under the scope of the B2B protection regime irrespective of its nature and its subject matter (movable and immovable goods, services, rights and obligations) and regardless of whether certain clauses or contracts have been negotiated.

After a short overview of the main principles of the B2B protection regime, we will focus on **issues of particular relevance for the real estate sector** including:

- > the scope of the second exemption of the B2B legislation (i.e. public procurement),

- > are public bodies – apart from in a public procurement context - subject to the B2B legislation,
- > the interweaving of mandatory law such as commercial lease law and the B2B legislation, and
- > the potential impact of specific black and grey list clauses in a real estate context.

### The B2B protection regime in a nutshell

**The B2B protection regime is based on four major axes .**

1. First, in accordance with Article VI.91/2 CEL, contractual terms must be drafted in plain and intelligible language. This is the so-called **“transparency” requirement**. This entails that a clause must be drafted in such a way as to allow the parties to understand its scope and economic consequences. The transparency requirement applies to core and non-essential contractual terms.
2. Second, Article VI.91/3 CEL prohibits non-essential contractual terms (taken individually or read together with other terms or related contracts) from creating a **significant imbalance between the rights and**

<sup>1</sup> Article VI.91/2 and ff. CEL.



**obligations of the parties.** This is the so-called unfairness test. As a consequence, an unfair contractual term is prohibited and is of no effect from the beginning. The nullity sanction is by effect of law partial and implies that the contract may remain binding if it can exist without the avoided contractual term. Moreover, it should be noted that any breach of the protection regime can also give rise to non-contractual liability and criminal sanctions.

3. Third, the B2B protection regime provides for a **black list and a grey list of contractual terms.**

**The black list includes four contractual clauses<sup>2</sup>** which are in any case **regarded as unfair or abusive.** It 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 eight clauses<sup>3</sup> deemed unfair** but for which the proof of the contrary can be adduced.

It covers, among others, contractual terms which involve (i) a unilateral alteration of the price, characteristics and terms of the contract without a valid reason, (ii) a tacit prolongation or renewal of the contract with a definite duration without a reasonable termination notice, (iii) the placing of the economic risk without compensation on the other business, (iv) the inappropriate exclusion or limitation of legal rights in case of non-performance or inadequate performance.

4. Fourth, the **B2B protection regime does not apply to the core or essential contractual terms.** These clauses relate to the subject-matter of the contract (characteristics such as quality and quantity of the good/service) and the adequacy between the price or remuneration for the good or service provided. However, if the core terms do not meet the

transparency requirement, then they fall into the remit of the B2B protection regime, including the unfairness test.

### As a real estate market player, what should I know about the scope of the B2B protection regime and the exemption relating to public procurement and related agreements?

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

Furthermore, the B2B protection regime applies to all contracts entered into between “enterprises” and does not distinguish between the type of contract at stake or the object of the contract or the fact that the contract is or not negotiated.

As a consequence, long-term leases, right to build agreement, commercial leases, office leases, share purchase agreements in relation to an SPV owning an asset, construction, turn-key or architect agreements are all likely to fall into its scope of application.

We have below a closer look to a few specific issues in relation with the scope of the B2B protection regime.

#### What about an association of co-owners?

In the light of the functional definition of business adopted by the legislator, the question arises of whether an association of co-owners is to be considered as a “business” falling within the remit of the B2B legislation.

We believe that the answer is negative in the light of the speciality requirement attached to the corporate purpose of such association laid down in Article 577 § 3 of the Civil code (Article 3.86 §3 of the future Book 3), pursuant to which it may exclusively carry out acts of conservation or administration of the co-ownership immovable

<sup>2</sup> Article VI.91/4 CEL.

<sup>3</sup> Article VI.91/5 CEL.



good(s). A confirmation of our position is found in a recent bill<sup>4</sup> aiming at granting the consumer status to certain associations of co-owners and which states that the action of such association of co-owners has no commercial, professional or artisanal purpose.

### What about public bodies?

The European legislation and the ECJU have conferred a broad meaning on the terms “trader” or “enterprise”, encompassing any natural or legal person carrying out a gainful activity. More specifically, they do not exclude from these notions either bodies pursuing a task of public interest or those governed by public law or bodies conducting tasks on a (mainly) not-for-profit basis. In other words, the private or public status of the entity engaged in an economic (gainful) activity has no bearing on the question of whether or not that entity is an “enterprise”. It is furthermore apparent from the ECJU’s case law that any activity consisting of offering goods or services against (even not direct) consideration is an economic (gainful) activity.

Transposed into the Belgian B2B context, it means that a public legal person will be considered as an enterprise affected by the B2B protection regime not only when it offers goods or services against a consideration but also when it buys goods or services against a consideration outside the framework of the public procurement exemption discussed below.

### What about the specific exemption?

Next to the exemption relating to financial services<sup>5</sup> Article VI.91 §2 CEL provides for a second exemption, relating to public procurement and agreements [directly or indirectly] deriving from the public procurement in question.

The exact scope of this exception is rather vague and is not further explained in the Parliamentary works. The legislator’s intent seems to cover subcontracts entered into by the tenderer with

subcontractors. Although no specific indication is given as to the contracts concluded in turn by the subcontractors of the tenderer, it seems logical to consider that they fall within the scope of the exemption as they are related to the public procurement in question.

However, as is the case for the exemption relating to financial services, the legislator has left the door open. Indeed, Article VI.91 §2 CEL provides that specific provisions (yet to be determined) of the protection regime against unfair contractual terms can be extended to certain instances of public procurement and the related agreements by Royal Decree.

### Which terms of an agreement are essential and which are not?

#### *The somewhat blurry distinction between core and non-core terms*

As stated above, the B2B protection regime **only targets the non-essential terms of an agreement**. As such, as long as they meet the transparency requirement, the Belgian B2B protection regime excludes its application to the core or essential contractual terms. However, it is not always clear-cut which clauses are “essential” or “core” and could therefore escape the B2B-protection regime.

According to the Parliamentary works, the B2B protection regime **should only test the fairness of the legal imbalance** between the rights and obligations of the parties. This follows the reasoning that the *economic* balance (i.e. what parties agree and against which price) “*should remain in principle the business of the free market*”. The distinction between the legal and economic balance of an agreement is difficult, especially because they overlap and, in essence, together aim to find an overall balance of the agreement.

<sup>4</sup> Bill n°1372/001 of 23 June 2020. Having clearly put forward the speciality requirement and the absence of trade purpose, the bill however, and in a somewhat contradictory manner, defines without any explanation a “threshold” triggering the status of consumer for the association of co-owners, i.e. where half of the value of the shares is held by members (co-owners) entitled to claim the status of consumers.

<sup>5</sup> For further explanations about this exemption, please see our newsletter “*B2B legislation in the spotlight : the financial industry will not escape its reach*”.



Essential clauses are described as clauses relating to the subject matter of the agreement or the adequacy between, on the one hand, the price or remuneration and, on the other hand, the goods or services to be delivered in return. They determine the **essential obligations** following from the agreement and as such “*characterise the agreement*”.

Straightforward examples of essential terms are those terms relating to the **price, or the nature, size, quantity and quality of the goods or services** to be provided (such as the weight and quality of the goods).

Non-essential or ancillary terms are those which further regulate the modalities of the goods or services, such as terms concerning delivery periods, price increases, price adjustments or damages, and terms which regulate the liability of the parties.

It is argued that even if some of these ancillary clauses actually impact the price which eventually has to be paid, they do not shape the adequacy between price and goods or services, as such, and are therefore non-essential. However, other authors argue that, if an ancillary term strongly influences a core term, an unfairness test of an ancillary obligation could actually result in an indirect test of the essential obligation it is impacting. Consider, for example, an exoneration clause determining the contractual liability of the parties and thereby influencing the price negotiated. Testing the fairness of such an exoneration clause could therefore indirectly test the price, which is an essential term of the agreement.

Moreover, it is also debated whether the exclusion of core terms should be interpreted restrictively or, on the contrary, more broadly.

**To sum up, depending on the type of agreement, the distinction between essential and non-essential terms will be more or less easily determined and/or up for discussion.**

Indeed, when comparing a relatively simple purchase of goods (for example, construction materials) to a more complex and layered services agreement, such as a delegated development agreement, terms considered to be essential may widely differ.

Finally, adding some stylistic sentence according to which a certain clause is “*essential, without which the parties would not have entered into the agreement*”, does not suffice to escape the unfairness test of the B2B protection regime.

#### *A few examples in the real estate practice*

- > Consider a (commercial) lease agreement: the obligation to pay rent and the object of the lease including its destination will fairly easily be qualified as essential terms falling outside the scope of the B2B protection regime.

The payment terms and the inventory of fixtures clause would, in our opinion, be considered non-essential. The repair and maintenance clause is typically less prone for a clear-cut qualification and could be considered as a core term if it forms an essential part of the economic balance. A similar observation applies to indexation clauses. It can indeed be argued that indexation is part of the pricing and that leases would not be traded for the same price if the rent was not indexed.

- > Consider a delegated development agreement in which the economic balance will be formed around the services to be rendered and the price to be paid. One could argue that the risk allocation between the delegated developer and the general contractor forms a key element of the economic balance and should therefore be considered essential.





## What is the sanction for unfair 'non-essential' terms? What about severability clauses?

According to the B2B protection regime, every unfair (non-essential) term is forbidden and null.<sup>6</sup>

The reduction of the unfair term to its licit part is debated. As such, not explicitly provided for in the B2B protection regime but there are arguments in the doctrine for this approach.

### *Is it still useful to insert severability clauses?*

Severability clauses confirm what is now anchored in Article VI.91/6 CEL, namely that the contract remains binding for the parties in case it can continue to remain in force without the unfair term.

It is, however, still possible for a judge to nullify the full agreement in case it is decided that the agreement cannot continue to exist without the abusive term. The judge shall take the intentions of the parties into account and a severability clause can form an element of proof as to the parties' intentions.

Interestingly, clauses regulating the consequences of the nullification of a specific clause will, as a consequence, gain importance. Since reduction is not provided by the B2B protection regime, it could be useful to determine contractually that reduction corresponds to the parties' intentions. For example, parties could state that, when a certain clause is nullified, the judge should adopt a substitute clause which should be as close as possible to the result aimed for by the nullified clause.

Non-severability clauses, on the other hand, are no longer enforceable given Article VI.91/6 CEL and the fact that the B2B protection regime is mandatory law.

## Which of the clauses in my lease, construction agreement might qualify as "black" or "grey" under the B2B protection regime?

In a real estate context, we do not immediately see a term that would be considered an issue under the black list.

A term in a commercial lease agreement, for example, declaring "*the perfect knowledge of the condition of the leased premises by the tenant*" concerns the burden of proof rather than the limitation of proof or the possibility of taking legal action.<sup>7</sup> Moreover, this example relates to factual knowledge and not legal knowledge. Therefore, it would not fall under the black list clause targeting terms "*irrefutably presuming the acknowledgment or acceptance of terms of which the counterparty did not have actual knowledge before entering into the agreement*".

The grey list of the B2B protection regime, on the other hand, is likely to find its application in all sectors, including the real estate sector. We have selected examples to demonstrate the broad applicability of this grey list.

**Example 1:** *In a long-term lease agreement, the payment of the consideration is irrevocable, unconditional and abstract, and is in no case linked to the enjoyment of the goods, nor with the condition or value thereof, and shall not be affected by any event of any kind, including force majeure, loss of permits or licences, total or partial destruction or expropriation of the goods or the entry into force of new legal or regulatory provisions or other rules or standards, even for a period exceeding three (3) years during which the goods are not operational for any reason whatsoever.*

Depending on the context and the rest of the agreement, this example could be in breach of several of the grey list clauses. **This example could be considered to fall under Article VI.91/5, 3° CEL** as it might impose the economic

<sup>6</sup> Article VI.91/6 CEL.

<sup>7</sup> Article VI.91/4, 1° CEL.



risk that normally rests with one party to the other party without any compensation.

We would like to highlight how closely this grey list clause is at the heart of contracting: sharing economic risks between contracting parties. Therefore, if parties wish to deviate from the 'normal distribution of risk' with regard to a certain economic risk, they must in principle provide a *quid pro quo* by, for example, including it in the agreed price.

Article VI.91/5, 4° CEL targets terms imposing an inappropriate exclusion or limitation of legal rights in case of non-performance or inadequate performance of the counterparty.

**If, in the case of our example, the definition of force majeure is drafted rather broadly, one could argue that this term unduly restricts the legal rights of the contracting party and falls under Article VI.91/5, 4° CEL.** In light of the current covid-19 crisis and various lockdown scenarios being included in force majeure definitions, this grey list clause could be triggered in even more agreements. Interestingly, this grey list clause has been qualified in the Parliamentary works as a “catch-all” provision.

*Example 2: In a building maintenance agreement of definite duration, it is provided that the operator, for its part, may not terminate the agreement without the express prior written consent of the owner who, in the event of its consent, will define the conditions of termination. There is no other term in relation to the termination of the agreement.*

Depending on the context and the rest of the agreement, **this example could also be in breach of Article VI.91/5, 4° CEL** as it targets terms imposing an inappropriate exclusion or limitation of legal rights in case of non-performance or inadequate performance of the counterparty. We note that there is a broad margin of appreciation by the judge as to what would be deemed “inappropriate”.

Pursuant to Article VI.91/5, 5° CEL, terms are unfair when they bind parties without providing for

a reasonable notice period (without prejudice to Article 1184 of the Civil Code). As such, the example above, could be considered unfair as there is no possibility for the operator to terminate the agreement early. The doctrine argues that this grey list clause should not be applicable to agreements of limited duration.

*Example 3: What about a “sole remedy” clause according to which a purchaser can only request indemnification subject to the limitations provided for in the contract rather than requesting the annulment of the contract?*

This type of clause implying a waiver of other rights available to a party (under general Belgian law) could fall under the scope of Article VI.91/5, 4° CEL that presumes unfair a clause excluding or limiting *inappropriately* the legal rights of a business in the event of partial or total non-performance, or inadequate performance by the other business 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.

What would be an inappropriate exclusion or limitation? The legislator fails to define what inappropriate means. Scholars' opinions vary from 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.

Finally, should the “sole remedy” clause be annulled, then the purchaser is entitled to invoke all other available legal rights, including the termination of the contract on the basis of a serious breach of the seller. A purchaser might be tempted to pursue this road whenever one of the contractual limitations (floor, basket and cap or limitation in time) would prevent him from recovering fully the damage.



## (How) can I escape the B2B-regime in this context?

It is not easy to escape the B2B protection regime. Not only are the provisions of this regime mandatory, the regime itself is even given the qualification of a special mandatory law as the “police law” (“*politiewetten*”/“*lois de police*”). According to the Parliamentary works, the B2B protection regime aims to regulate public economic order, explaining this qualification.

Nonetheless, in a case **where a *lex specialis* is applicable, it could in principle prevail over the mandatory B2B protection regime**, which is qualified as *lex generalis*. It is debatable as to which extent this hierarchy applies since certain authors argue for a cumulative application wherever possible.

In a real estate context, the commercial lease Law of 1951 is a well-known example of *lex specialis*. This law consists of both mandatory and non-mandatory (“*suppletief*”/“*supplétif*”) provisions. The cumulative application of the B2B protection regime and the commercial lease Law means that the contractual terms in compliance with the mandatory provisions of the commercial lease Law cannot be subjected to the unfairness test of the B2B protection regime while those in relation to the non-mandatory provisions can be.

When subjecting terms diverging from non-mandatory provisions to the unfairness test, one should note that the mere divergence of non-mandatory provisions in itself could form one indication among others that the term is in fact unfair. However, this divergence does not suffice in itself as that would in fact upgrade the non-mandatory provisions of the commercial lease Law into mandatory law via a broadened application of the B2B protection regime.

## Closing remarks

The B2B protection regime is **full of potential issues and creates significant legal uncertainty**. Some of the difficulties stemming from the application of this regime arise from the somewhat blurred difference between essential and non-essential terms, or between the terms in an agreement relating to its economic or legal balance. In real estate contracts, typically, this last balance is inherently complicated. The B2B protection regime as now devised is revealed to be a real burden on the drafting process of real estate agreements.

The B2B protection regime also shifts the burden of the fairness or appropriateness of the clauses examined onto the shoulders of judges when they potentially have little or no knowledge or evidence to fully grasp the underlying economics.

Legal scholars and authors have heavily criticised the B2B protection regime and the lack of precision and depth with which it is drafted. Many authors have voiced the need for a remediation law – or even an abrogation law – to be adopted as soon as possible.

This concern has been relayed by the business world and has resulted in a recent bill aimed at inserting, in the upcoming Book V concerning the law of obligations, a specific provision pursuant to which only unfair terms of accession contracts (*‘contrats d’adhésion’* / *‘toetredingscontracten’*) would be nullified, and at the uplifting of the soon in-force B2B protection regime.

The legislative process and the precise timing regarding the adoption of the upcoming Book V are – to say the least – far from clear. However, in its current version, the bill still provides for an entry into force 18 months after its publication in the Belgian Gazette, which implies that the B2B protection regime with all its flaws will be applied for a while.



*Authors: Bénédicte Deboeck, Emma De Koster, Yves Moreau and Pieter Puelinckx.*

This publication is intended merely to highlight issues and not to be comprehensive, nor to provide legal advice. Should you have any questions on issues reported here or on other areas of law, please contact one of your regular contacts, or contact the editors.

© Linklaters LLP. All Rights reserved 2020

Linklaters LLP is a limited liability partnership registered in England and Wales with registered number OC326345. It is a law firm authorised and regulated by the Solicitors Regulation Authority. The term partner in relation to Linklaters LLP is used to refer to a member of the Linklaters LLP or an independent consultant or, outside of Belgium, an employee of Linklaters LLP or any of its affiliated firms or entities with equivalent standing and qualifications. A list of the names of the members of Linklaters LLP and of the non-members who are designated as partners and their professional qualifications is open to inspection at its registered office, One Silk Street, London EC2Y 8HQ, England, or on [www.linklaters.com](http://www.linklaters.com). This document contains confidential and proprietary information. It is provided on condition that its contents are kept confidential and are not disclosed to any third party without the prior written consent of Linklaters. Please refer to [www.linklaters.com/regulation](http://www.linklaters.com/regulation) for important information on our regulatory position.

We process your data in line with our Global Privacy Notice. You can view this at [www.linklaters.com/en/legal-notices/privacy-notice](http://www.linklaters.com/en/legal-notices/privacy-notice).

To opt-out of receiving any marketing emails from us, or to manage your email preferences and the personal details we hold for you, please contact: [marketing.database@linklaters.com](mailto:marketing.database@linklaters.com)

**linklaters.com**

**Linklaters LLP**

Rue Brederode 13  
B - 1000 Brussels

Tel: +32 2 501 94 11  
Fax: +32 2 501 94 94