B2B legislation in the spotlight: what about commercial and IP agreements?

In 2019, Belgium introduced additional legislation prohibiting the abuse of imbalanced bargaining positions in B2B relationships. The legislator considered that, similar to consumers, certain professionals also needed to be protected against a specific set of unfair market practices. The Law of 4 April 2019 aims at targeting, among other things, unfair contractual terms (Articles VI.91/2 et seq of the Code of Economic Law ("CEL")) and unfair (aggressive and/or misleading) market practices (Articles VI.103/1 et seq CEL). The provisions implementing the protection against unfair contractual terms are due to enter into force on 1 December 2020.

From a commercial and IP law perspective, a number of agreements are likely impacted, including (but not limited to) agency, concession, distribution, franchise or other commercial cooperation agreements, settlement agreements, general terms and conditions, supply agreements, IP assignment or license agreements and IP security agreements.

For a number of those agreements, the new provisions come on top of what was already mandatory law in Belgium. As a result, the practical impact on agency agreements may be rather limited, given that Title I of Book X of CEL already provides for a legislative framework that should be considered when assessing compliance in a B2B setting. For those provisions of the B2B protection regime which deal with termination issues, this also holds true for concession (or exclusive distribution) agreements, given Title III of Book X of CEL on unilateral termination of said type of agreements. More generally, Title II of Book X of CEL dealing with the pre-contractual information obligations for commercial cooperation agreements should also be considered (as illustrated further below).

In this newsletter, after a short recap of the key features of the B2B protection regime[1], we will focus on a few unfair clauses of particular relevance for commercial and IP agreements including:

- clauses including an irrebuttable presumption that one contracting party had knowledge of or adhered to a contractual provision, while it did or could not have had knowledge of such provisions prior to the conclusion of the agreement (Article VI.91/4, 4° CEL),
- clauses enabling one party to alter unilaterally, without a valid reason, the price,

[1] For further explanations about the B2B protection regime, please see our *B2B legislation in the spotlight* micro-site and our interactive guides "*The prohibition of unfair terms in B2B contracts: the door opened to legal uncertainty*" and "*The prohibition of unfair market practices – What to expect?*".

characteristics or other terms of the agreement (Article VI.91/5, 1° CEL), and

- clauses requiring one party to commit itself contractually without providing for a reasonable termination period (Article VI.91/5, 5° CEL).

The key elements of the B2B protection regime

The new B2B protection regime applies regardless of the size of the businesses involved (*i.e.*, either small to larger enterprises) and of the existence of any relationship of economic dependency between the parties to the agreement.

Almost every agreement[2] is susceptible to falling within the scope of the B2B protection regime, irrespective of its nature and its subject matter (*i.e.*, either addressing movable and/or immovable goods, services, rights and obligations) and regardless of whether certain clauses or agreements have actually been negotiated (*i.e.*, not only covering accession agreements).

In certain cases, a *lex specialis* may take precedence over the new regime of the CEL. For example, the parliamentary works refer, among other things, to the Law of 11 July 2013 amending the Civil Code as regards collateral securities on movable property, which also covers security on intellectual property rights.

The B2B protection regime revolves around four major pillars:

1. First, in accordance with Article VI.91/2 CEL, contractual terms must be drafted in plain and intelligible language. The so-called "transparency" requirement 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 both essential and non-essential contractual terms.
2. Second, Article VI.91/3 CEL prohibits the use of non-essential contractual terms (taken individually or read together with other terms or related agreements) that would create a significant imbalance between the rights and obligations of the parties. If a contractual term does not pass this significant imbalance (unfairness) test, it will be prohibited and of no effect from the start. That being said, the nullity sanction is partial by operation of law and implies that the agreement may remain binding, provided it can still exist without the cancelled contractual term. It should be noted, moreover, that any breach of the protection regime can also give rise to non-contractual liability and possibly even 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[3] that are regarded as unfair or abusive *per se* (see Article VI.91/4 CEL). Apart from the example already mentioned in the introduction, it covers contractual terms that (i) make an agreement binding on one contracting party while the performance of the obligations of the other party remains subject to a condition whose realisation depends on that party alone, (ii) allow a contractual party to unilaterally construe the terms of the agreement, and (iii) imply a waiver by one contracting party of any legal remedy in case of dispute.
    - The grey list targets eight contractual clauses[4], all deemed unfair but for which the proof of the contrary can be adduced (see Article VI.91/5 CEL). It covers, among other things, contractual terms that (i) allow for a unilateral alteration of the price,

2 Two exemptions have been included in the scope of the B2B protection regime: the first relates to financial services and the second refers to public procurement and agreements directly or indirectly deriving from the public procurement in question. For further explanations about these exemptions, please see our newsletter "*B2B legislation in the spotlight: the financial industry will not escape its reach*" and "*B2B legislation in the spotlight: the legal insecurity and its inordinate impact on the real estate market*".

3 Article VI.91/4 CEL.

4 Article VI.91/5 CEL.

characteristics and terms of the agreement, without valid reason; and (ii) require a contractual commitment without allowing for the possibility of terminating the agreement with a reasonable notice period.

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 agreement (characteristics such as quality and quantity of the goods/services) and/or the adequacy between price or remuneration for the goods or services provided. That being said, if the core terms do not meet the transparency requirement, they do fall within the remit of the B2B protection regime, including with respect to the significant imbalance (unfairness) test.

Selected review of commercial and IP agreement clauses that are likely impacted

Below are a number of examples of clauses, taken from a selection of commercial and IP agreements, that could possibly be considered unfair and may therefore be annulled pursuant to Article VI.91/6 CEL:

> A clause inserted in the general terms and conditions, stating that the mere use of the acquired product or service implies the automatic and unconditional consent with the general terms and conditions. Such clause will be regarded as always unfair and therefore blacklisted as per Article VI.91/4, 4° CEL. The counterparty should indeed always, prior to the conclusion of the agreement, be able to have access and agree to said general terms and conditions.

  Under the current Civil Code provisions, general terms and conditions are not opposable, to the extent the company or person against which they are to be enforced was not able to duly peruse and agree to them. Should general terms and conditions appear on an invoice, they will be presumed agreed in a B2B context in the absence of a timely challenge (see Article 8.11 § 4 of the new Civil Code (book on evidence), which entered into force on 1 November 2020).

> A clause in an IP license agreement, allowing the licensor full freedom (not) to maintain and/or to abandon or withdraw any of the licensed IP rights, without specifying that such decision would need to be benchmarked on the basis of reasonable business justifications or can only take place in the ordinary course of the licensor's business. We believe that such a clause may be considered unfair and therefore grey-listed as per Article VI.91/5, 1° CEL.

  Already under the current law, said clause would be questionable and possibly void pursuant to Article 1174 of the Civil Code, as it may be qualified as a purely discretionary condition (*"condition potestative"* / *"potestatieve voorwaarde"*) on the side of the licensor.

  Recommendation: Limit a non-maintenance clause to the situation where the licensor can prove that there are valid business reasons for not maintaining any specific licensed IP rights and, only to the extent this makes reasonable business sense, provide for a possibility of the licensee to acquire said IP rights.

> A franchise agreement often includes a clause whereby the franchisee commits to procure certain products from the franchisor or a third-party supplier and whereby the franchisee is to comply with guidelines or policies issued by the franchisor (which may deal with various aspects, *e.g.* use of trademarks of the franchisor, franchise manual, supplier policies, regular investments required by an investment plan, etc.). If the agreement also enables the franchisor (or third-party supplier, on behalf of the franchisor) to alter unilaterally without a valid reason the price (*e.g.*, sudden price increase), the characteristics or the

terms of the agreement (*e.g.*, material amendments to guidelines or policies incorporated into the agreement or sudden change of supplier), such clause may – absent valid justification – be deemed unfair and grey-listed as per Article VI.91/5, 1° CEL.

Recommendation: Include an illustrative list of reasons in the agreement based on objective criteria, which may trigger such unilateral alteration (*e.g.*, adaptation of the price to the changing economic conditions or increasing costs, amendments to guidelines or policies based on a change in the law, or ensuring that the concept of the franchise and relevant trademarks evolve with time). Such criteria may then be used to rebut the unfairness presumption and corroborate the parties' consent to a possible unilateral alteration in the future. In such a context, it will be relevant to be specific and to avoid overly generic provisions.

The application of the legal concept of a party decision (*"partijbeslissing"*) would not be considered grey-listed, as per Article VI.91/5, 1° CEL, as it merely enables a party to determine a price (which is not the same as altering a price unilaterally). This concept remains useful in case the price of the products or services is unknown at the date of the conclusion of the agreement and will be determined at a later stage by one party, albeit based on objective criteria agreed upon at the time the agreement was concluded.

> A contractual term may be deemed unfair if, individually or in combination with any other clauses, it creates a significant imbalance between the rights and obligations of the parties (Article VI.91/3 CEL). For this assessment, one would need to consider, on a case-by-case basis, any relevant circumstances surrounding the conclusion of the agreement, prevailing market practices and any other relevant factors.

Clauses requiring regular investments by the franchisee or a franchisee's regular contribution to the marketing budget of the franchisor could, *e.g.*, be scrutinised under this significant imbalance (unfairness) test.

Recommendations: An important point of attention will be whether the parties complied with the so-called "pre-contractual information obligations for commercial cooperation agreements", including the one-month standstill period set out in Title II of Book X of CEL[5]. This legislation allows the future franchisee to assess any respective unfair terms prior to the conclusion of a franchise agreement and to contemplate during the standstill period whether it agrees to the full package in light of all relevant background information.

The specific nature of a franchise agreement is also a crucial element to take into consideration. Quality assurance, reputation of the franchise concept and uniform customer experience are important factors for the success of a franchise and may ultimately benefit both parties (including the franchisee).

If it can be shown that the abovementioned clauses in a franchise agreement will effectively contribute to the success of a franchise cooperation, they should not be construed as creating a "significant imbalance" between the parties' rights and obligations.

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[5] Allowing the franchisee to examine the draft agreement's rights and obligations and the history, state and perspective of the market on which the relevant activities are performed.

The absence of a "reasonable termination period" in an agreement is grey-listed as per Article VI.91/5, 5° CEL.

This prohibition may impact commercial and IP agreements such as franchise, supply and IP license agreements.

The parliamentary works refer to this provision, saying that it addresses an "*abnormally long contractual commitment without reasonable termination period*". While an unreasonable termination period could therefore be either too short or too long, legal scholars seem to approach this prohibition as mainly targeting an unreasonably long termination period. It is so far unclear whether this would apply only to agreements for indefinite duration (note that already under the current civil law principles, each party is entitled to terminate an agreement for indefinite duration with a reasonable notice period, even if this is not explicitly foreseen) or also to agreements concluded for definite duration.

Most legal scholars argue that this provision should not apply to agreements for definite duration, as it may undermine legal certainty and impact the very essence of this type of agreement (*i.e.*, entering into an agreement for a fixed period of time). Others argue that this prohibition should only kick in if the agreement of definite duration provides for a notice period for termination (hence allowing for an assessment of it being too long or too short).

We are of the opinion that if parties knowingly and willingly conclude an agreement for a definite duration without a possibility of terminating for convenience, the explicit will of the parties should not be called into question and freedom of contract should prevail.

Recommendations: Awaiting the courts' or legislator's confirmation that the above prohibition should not apply to agreements for definite duration, it is well-advised to clarify any objective factors which may justify the absence of a "reasonable termination notice period" in any such type of agreement. The "general economy" of the agreement, the type of products or services, the trade practices, the parties' relationship and any other specific circumstances surrounding the conclusion of the agreement could be referred to and further explained in the agreement to rebut the unfairness presumption.

For instance, the supplier could grant a customer advantageous commercial conditions in return for it not being able to terminate a supply agreement of a definite duration for convenience. The business rationale could be that it may be difficult for the supplier to find an alternative client in a short timeframe and that it wants to keep its production output stable. We recommend specifying in the agreement that the client benefits from a significant discount on the price of the products in return for a fixed long-term procurement undertaking.

Closing remarks

The latest B2B protection regime needs to be on the radar of every business when drafting or reviewing any commercial and IP agreements.

It is more important than ever to carefully tailor the wording of these agreements to avoid including a black- or grey-listed clause or a contractual term that (taken individually or read together with other terms or related agreements) may create a significant imbalance.

When including a clause that may be at risk, we recommend adding clear, concrete and specific recitals, clauses and any other (written) evidence or indications, explaining, corroborating or substantiating – based on objective criteria – why such clause does not fall under the black or grey lists and does not run afoul of the significant imbalance (unfairness) test.

While a significant degree of uncertainty remains, customary provisions in a specific type of agreement (*e.g.*, in a franchise arrangement) may be backed up by the "general economy" or "specific nature" of the agreement and/or any other specific circumstances surrounding the conclusion of the agreement. For commercial cooperation agreements, compliance with Title II of Book X of CEL will further corroborate compliance with the B2B protection regime.

Without a doubt, the new B2B protection regime is likely to trigger additional discussions and may create legal uncertainty.

The broad call for a remediation law, both by legal scholars and the business world, has resulted in a recent bill aimed at inserting, in the upcoming Book V of the Civil Code concerning the law of obligations, a specific provision pursuant to which only unfair terms of accession agreements (*"contrats d'adhésion"* / *"toetredingscontracten"*) would potentially be nullified, resulting in a significant limitation of the soon-in-force B2B protection regime.

The legislative process and the precise timing regarding the adoption of the upcoming Book V are far from clear, however. In its current version, the bill still provides for an entry into force 18 months after publication in the Belgian Gazette, which implies that the B2B protection regime (including its flaws) will nevertheless have to be applied for a certain period of time.

Our IP/TMT team has longstanding expertise with the drafting and negotiation of any type of commercial and IP agreements and is happy to assist you with any queries that you may face in relation to the B2B protection regime.

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