



Deloitte Legal Newsflash

Commercial Law

Are your contracts compliant with the new B2B law?

The third set of rules in the “B2B law” of 4 April 2019 entered into force on 1 December 2020. This third set of rules (incorporated in art. VI.91/1-VI.91/10 Code of Economic Law) relates to “*unfair contract terms*” and imposes significant restrictions on freedom of contract in B2B relationships.

The law’s first set of rules, regarding unfair market practices, already entered into force on 1 September 2019. The second set, regarding abuse of economic dependence, entered into force on 22 August 2020.

Scope

Although the legislator’s main objective was to protect small and medium-sized enterprises against “strong” contract parties, the new rules on unfair contract terms apply to all agreements between enterprises (regardless of company size).

The new rules are applicable regardless of the agreement’s subject-matter (i.e. goods, services, sale, lease, commercial intermediaries, real estate, shareholder agreements, etc.). Only agreements regarding financial services and those relating or consequent to public contracts are excluded from the material scope.

The new rules on unfair contract terms only apply to agreements entered into, renewed or amended after 1 December 2020.

The rules aim to regulate the public economic order and are therefore considered overriding mandatory provisions ("*lois de police*"). Hence, agreements containing a choice of law favouring another jurisdiction's laws may remain subject to the rules on unfair contract terms if the contract is (partially) executed in Belgium.

Impact

The new rules on unfair contract terms provide for two general requirements:

- **Transparency:** written terms must be transparent and intelligible;
- **Balance:** terms that – either on their own or in combination with other clauses – generate a clear imbalance between the parties' rights and obligations are considered 'unfair'.

The law sums up several indicative elements that can be taken into consideration in determining the unfair nature of a clause, or in determining whether a clear imbalance exists (i.a. circumstances under which the contract was concluded, general economy of the contract, common commercial practices, etc.).

The 'balance test' does not apply to (i) terms defining the actual object of the agreement or (ii) the link or equivalence between the price to be paid and services or goods to be supplied.

In addition to the above indicative elements, the new rules provide for a "black list" of terms that are always deemed to be unfair and a "grey list" of terms that are presumed to be unfair (somewhat analogue to the rules on unfair contract terms in consumer protection law).

The **black list** prohibits clauses:

- that provide for an irrevocable obligation with respect to one party, while the execution of the other party's obligations is subject to a condition of which the fulfilment depends exclusively on that party's will;
- granting a party the unilateral right to interpret the (terms of the) agreement;
- resulting in a party *a priori* waiving any right to seek legal recourse against the other party in case of a dispute;
- stipulating that a party irrefutably acknowledges having read and accepted certain terms (e.g. general terms and conditions) even though it was impossible for said party to have knowledge of these terms.

The **grey list** of terms that are presumed to be unfair relates to clauses that:

- grant a party the right to unilaterally change the price, characteristics or terms of the agreement without justification or reasonable cause;
- provide for an automatic renewal or extension of a fixed term agreement without mentioning a reasonable notice term (that should be complied with to prevent renewal/extension);
- without compensation, place an economic risk with one party while that risk would normally be borne by the other / another party;
- inappropriately exclude or limit a party's right in case the other party fails to comply with its contractual obligations;
- bind parties without mentioning a reasonable notice period;
- exonerate a party for its (representatives') deliberate or gross errors in relation to non-compliance with its essential obligations that comprise the actual object of the agreement;
- limit the means of evidence that may be used by the other party in case of a dispute;
- provide for a fixed compensation in case of late or non-execution of a party's obligations, if said fixed compensation is not proportionate to the damage that could be incurred by the other party.

Sanctions

Unfair contract terms can be declared null and void by the courts. If the concerned stipulation relates to the agreement's essence/core, the entire agreement can be annulled.

Furthermore, any interested party and the Minister competent for Economy and Middle Class ("*ministers bevoegd voor economie en middenstand*" / "*ministères compétents pour l'économie et les classes moyennes*") can seek an injunction against the enterprise using unfair contract terms.

The use of unfair contract terms can even be criminally sanctioned, but only in cases of breach in bad faith.

It remains to be seen how the new rules on unfair contract terms will be applied by the courts, especially given the often vague and sometimes contradictory wording used by the legislator. The current legal doctrine is already extremely critical about the new rules on unfair contract terms (two of the main arguments being that the new rules are disproportionate for a B2B situation and that they create legal insecurity).

In any event, it is advisable to review new agreements (to be entered into and evaluate their conformity with the rules on unfair contract terms and to , keep these rules in mind when amending or renewing existing agreements. Furthermore, several mitigating actions can be taken. For example: a company's burden of proof to demonstrate that certain clauses (e.g. those on the grey list) do not create an imbalance can be facilitated by (i.a.) documenting the negotiations and concessions made during such negotiations, explaining the motives for including specific clauses (e.g. "grey list clauses"),

adding new standard clauses regarding the negotiations and the "raison d'être" of certain provisions, etc.

Contacts

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