UNLAWFUL TERMS IN A B2B CONTRACT

Consumers have since long been protected from the "power" of companies. For example, there are various types of terms which are invalid in B2C contracts. The legislator found that the power in a B2B contract is by no means always equal. In some cases this relationship is even similar to that in a B2C contract. That is why the legislator decided to extend the protection to companies when concluding an agreement with other companies.

By means of the Act of 4 April 2019 amending the Economic Law Code ("*Wetboek Economisch Recht")* with regard to abuses of economic dependency, unlawful terms and unfair commercial practices between companies, the legislator also wants to give companies a form of protection when the power dynamic between companies is unequal.

These rules apply to all contracts between companies in the meaning of article I.8, 39° of the Economic Law Code. This definition deviates from the "new" concept of "enterprise" that is normally used. As a result, "any natural or legal person who pursues an economic objective in a sustainable manner (as well as his associations)" is considered to be an enterprise in the context of the unlawful terms in a B2B contract.

The consequence of this definition is that for example a non-profit organisation not pursuing an economic or professional activity cannot benefit from this protection. However, a non-profit organisation cannot benefit from (similar) consumer protection either. This leads to the perverse effect that such non-profit organisations are in a less protected position than, for example, corporations.

General prohibition

First of all, there is a generally formulated ban. A contractual term in a B2B contract can be unlawful and prohibited if, possibly in conjunction with other terms, it creates an obvious imbalance between the rights and obligations of the parties. In order to assess this imbalance, the circumstances surrounding the conclusion of the contract, the general commercial practices, etc. should be taken into consideration.

The imbalance does not automatically exist when a large enterprise concludes a contract with a small enterprise. A small enterprise, due to the lack of competition in the surrounding area, may impose unbalanced conditions on a large enterprise. These conditions could be declared invalid.

Black and grey list

In addition to the general prohibition, a black and a grey list of unlawful terms were also included. The terms on the black list are always unlawful. These are terms with the following aims:

- to provide for an irrevocable obligation on the other party while the performance of the company's services is subject to a condition of which the fulfilment depends solely on its' will;

- to give the company the unilateral right to interpret any term of the contract;
- in the event of a dispute, to dissuade the other party from any means of redress against the company;
- unequivocally determine the other party's knowledge or acceptance of terms which it has not actually been able to ascertain prior to the conclusion of the contract.

The grey list contains terms presumed to be unlawful. This is a rebuttable presumption. The grey list contains following terms:

- to give the undertaking the right to unilaterally alter the price, characteristics or terms of the contract without valid reason;
- to tacitly extend or renew a fixed-term contract without giving reasonable notice;
- impose the economic risk on one party, without any quid pro quo, if it is normally borne by the other undertaking or another party to the contract;
- improperly exclude or limit a party's legal rights in the event of full or shared breach or defective performance by the other company of one of its contractual obligations;
- without prejudice to article 1184 of the Civil Code, to bind the parties without giving a reasonable period of notice;
- release the company from its liability for its wilful misconduct, its gross negligence or that of its appointees or, except in cases of force majeure, for the non-execution of the essential obligations that are the subject of the agreement;
- to limit the means of proof on which the other party may rely;
- in the event of non-performance or delay in performance of the other Party's obligations, to fix damages clearly out of proportion to the prejudice which may be suffered by the undertaking.

In case of terms stipulated in the grey list, it is always possible for the enterprise concerned to prove that the term is lawful. This can be done, for example, by demonstrating the proportionality of the overall contract. Where a grey list term appears in a contract, this may be the result of negotiations between the parties, which have led to concessions in other terms.

Entry into force

The provisions regarding the unlawful B2B clauses will enter into force on December 1st 2020. This will only apply to agreements concluded, extended or amended after this date. Contracts already concluded before December 1st 2020 cannot be subject to these legal provisions.

In any case, these rules will not apply to financial services and public procurement contracts and the agreements resulting therefrom, unless certain provisions are declared applicable by a royal decree.

When drawing up B2B contracts, you will, as always, have to pay proper attention to the content of your agreement. If you would like help with this, you can always contact us via info@studio-legale.be or +323 216 70 70.