MEMORANDUM

B2B-ACT OF 4 APRIL 2020 - UNFAIR CONTRACT TERMS

ENTRY INTO FORCE

*On 24 May 2019, the act of 4 April 2019 amending the Belgian Code of Economic Law relating to (i) abuse of economic dependence, (ii) unfair contract terms and (iii) unfair market practices in B2B relations (the "**B2B-Act**") was publicized in the Belgian Official Gazette. Almost 19 months after said publication, we stand on the verge of the entry into force of the new rules regarding unfair contract terms in B2B relations. Notwithstanding the opposition it received in Belgian legal doctrine, the B2B-Act will enter into force as of 1 December 2020.*

This memorandum offers a general overview of the new rules regarding unfair contract terms in B2B relations introduced by the B2B-Act (hereafter "**New Rules**"). This memorandum is the first one in a series which will be dedicated to the new B2B-Act. The following weeks, we will explore certain special topics which are relevant for our firms' main practices (M&A, commercial contracts, real estate and dispute resolution).

1. SCOPE OF APPLICATION

The B2B-Act does not provide for elaborate rules regarding the scope of application, resulting in it being very general and broad. In general, every agreement between two enterprises shall be subject to these New Rules. Both the material and personal scope of the New Rules have few or no exceptions.

1.1. Material scope of application

The rules on unfair contract terms are applicable to every kind of agreement between enterprises irrespective of its object or nature. It should be noted that the application is not limited to the general terms and conditions, but also applies to the 'main agreement'. Therefore, the New Rules must be kept in mind in drafting all kinds of agreements between enterprises (such as, distribution agreements, license agreements, shareholders' agreements, option agreements, sale and purchase agreements, etc.)

The B2B-Act provides exceptions for agreements relating to financial services and public tenders which are excluded from the scope of application of the New Rules.

The definition of financial services (as applicable to the New Rules) is rather broad and could be subject to interpretation. According to the applicable definition, any service of a banking, credit, insurance, personal pension, investment or payment nature constitutes a financial service. As the terms used in this definition are not defined elsewhere, the reach of this exception is likely to be tested in disputes.

Finally, the B2B-Act provides for a possible (partial) extension of the scope of application to both exceptions. It is therefore not excluded that (one or both) exceptions will also become subject (in whole or in part) to the New Rules.

1.2. Personal scope of application

The New Rules are applicable to agreements between enterprises. An enterprise is defined as every natural person or legal entity which pursues an economic objective on a durable basis, as well as his/its associations. This definition is an open standard which requires an analysis based on the facts of every case. In general, a corporation shall always be considered as an enterprise under said definition. In contrast, the qualification of a natural person as an enterprise shall be less obvious and shall require a case-by-case approach.

Furthermore, it should be noted that the size of the enterprises involved is irrelevant for the applicability of the New Rules. Both multinationals as well as SME's benefit from the protection offered by the New Rules.

1.3. Temporal scope of application

The New Rules will enter into force as of 1 December 2020, without any retroactive effect. Only agreements concluded as of 1 December 2020 shall be subject to the New Rules. In general, agreements concluded prior to this date are not governed by the New Rules. However, note that existing agreements which are amended or renewed (or prolonged) after 1 December 2020 shall also become subject to the New Rules.

2. UNFAIR CONTRACT TERMS

The New Rules introduce three different sets of rules regarding unfair contract terms: (i) a general prohibition, (ii) a list of clauses which are considered unlawful under any circumstance ('black list') and (iii) a list of clauses which are deemed to create a manifest imbalance (and thus unlawful), unless proven otherwise ('grey list'). Clauses in breach of these rules are at risk of being declared null and void by a court.

2.1. General prohibition

As a general principle, clauses which create a manifest imbalance between the rights and obligations of the parties are prohibited. As this is an open standard, clauses will need to be assessed on a case-by-case approach. The B2B-Act provides certain elements that may be taken into account when making such an assessment:

- the circumstances surrounding the conclusion of the contract;
- the general economy of the contract;
- usages in the relevant sector;
- other clauses of the agreement (or other related agreements).

2.2. Black list

Four clauses are black listed and deemed unfair under any circumstance. It concerns clauses that aim to:

1° create an irrevocable obligation for the other party while the performance of the obligations of the enterprise is subject to a condition which depends solely on the will of the enterprise for its realisation;

2° give the enterprise the unilateral right to interpret any term in the contract;
3° in the event of a dispute, oblige the other party to waive any remedy against the enterprise;
4° irrefutably establish the other party's knowledge or acceptance of terms which that party had not been able to become acquainted with prior to the formation of the contract.

The prohibition of these clauses is closely in line with prevailing general law principles. Therefore, the black list is expected to have a limited impact on the existing freedom of contract.

2.3. Grey list

Clauses included on the grey list are presumed to be unfair, unless proven otherwise. The grey list includes clauses that aim to:

1° give the enterprise the right to unilaterally modify, without a valid reason, the price, characteristics or terms of the contract;
2° tacitly extend or renew a fixed-term contract, without providing a reasonable notice period;
3° place, without counter-performance, the economic risk on a party if that risk would normally be borne by the other enterprise or by another party to the contract;
4° inappropriately exclude or limit the legal rights of one party in the event of total or shared non-performance or defective performance by the other enterprise of any of its contractual obligations;
5° without prejudice to article 1184 of the Civil Code, bind the parties without providing a reasonable notice period;
6° discharge the enterprise from its liability for its willful misconduct, its gross negligence or that of its employees or, except in cases of force majeure, for the non-performance of essential obligations that are the subject matter of the contract;
7° limit the means of evidence that the other party may rely on;
8° in the event of non-performance or delay in the performance of the other party's obligations, fix damages amounts that are manifestly disproportionate to the harm that may be suffered by the enterprise.

The grey list has been met with great opposition in certain legal doctrine as it creates uncertainty and is often inconsistent with prevailing general law principles. The 3rd and 4th provision of the grey list are expected to create the most uncertainty for drafting contracts. Concerning the third clause, it is unclear (i) how to determine if and when an economic risk is shifted to another party, (ii) which risks are considered as ‘economic risks’ and (iii) what the counter-performance should consist of. Relating to the fourth clause, the question arises which limitation of legal rights will be considered inappropriate and what will be perceived as acceptable.

As the grey list introduces a presumption, the burden of proof shall be borne by the defending party (generally the beneficiary of a certain clause). According to the parliamentary preparatory works, the presumption may be rebutted if and to the extent it can be demonstrated that both parties truly wanted such arrangement. In anticipation thereof, it could be advisable to document questionable arrangements or expressly provide a clarification in the clause itself. In light of the objective of the B2B-Act it is

expected that general boiler plate clauses (stating that all clauses of an agreement correspond to the parties intentions) shall not suffice to rebut the presumption.

3. CORE CLAUSES

The fairness test of the New Rules does not apply to the subject matter of a contract, nor to the equivalence of, on the one hand, the price or remuneration and, on the other hand, the products to be supplied as consideration. This limitation should safeguard and guarantee the existing contractual freedom with regard to the "core clauses" of a contract. However, the B2B-Act does not provide a definition for the concept of core clauses, which leaves plenty of room for interpretation.

The exemption of core clauses only applies if and to the extent such core clauses are sufficiently clear and comprehensible.

4. SANCTIONS

Clauses which are considered as unfair (under the general prohibition, black list or grey list) are considered null and void. The nullity shall not affect the agreement itself, provided that it can continue to exist without the unfair clause(s).

Furthermore, interested parties may also initiate cease-and-desist proceedings or bring actions for damages. Finally, criminal sanctions may be imposed in case of bad faith.

5. EXCLUSION OF NEW RULES

As the New Rules entail some degree of uncertainty, parties could consider excluding the application of these New Rules to their contracts. As the B2B Act is mandatory law, it will govern the contract in case Belgian law applies to the parties' relationship. The choice for foreign law will not necessarily lead to the desired effect either, as legislature indicated that the New Rules should be considered as "special mandatory rules", resulting in the (possible) application to contracts with a choice of law clause in favor of the laws of another jurisdiction.

6. CONCLUSION

The New Rules have put the Belgian legal doctrine on notice, as it is expected to create uncertainty. A party to a contract might find legal arguments in the B2B-Act to challenge clauses in a contract which he (knowingly) accepted. The parliamentary works indicated that the contractual freedom remains the principle for contractual relations between enterprises, but the broad provisions of the New Rules have the potential to complicate this principle.

In the coming weeks, various updates will be posted on the website of Laurius to inform you of the impact of the New Rules of the B2B-Act, in particular concerning specific topics regarding our main practices (M&A, commercial contract, real estate and dispute resolution).

In the meantime, our lawyers remain readily available to assist and advise should you have any queries regarding the New Rules of the B2B-Act.

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