



# New in town: unfair contract terms in B2B relations

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## Imagine...

Right after you invested in a new production line for your Antwerp factory, a major customer unexpectedly switches over to a different supplier. Fortunately, you manage to quickly find a new buyer. Of course, you have to offer very competitive prices, but in exchange this new buyer is willing to purchase large volumes over a period of three years. This ensures that your investment will not prove to be a loss-maker.

To your great surprise, six months later you receive a letter in which the new buyer terminates the contract with a notice period of 30 days. You immediately call him to point out that the agreement has a fixed three-year term, so it cannot simply be cancelled. The buyer suggests that you really need to talk to your lawyer right away, because apparently you are unaware of a new Belgian law ensuring that everyone always has the right to cancel an agreement with a "reasonable" notice period - even if it is a fixed-term contract. And, in the buyer's judgement, 30 days is precisely such a reasonable period.

Your surprise grows steadily greater. New law? Fixed-term contracts always cancellable? Indeed, it would seem to be high time to consult your lawyer.

## A brief clarification...

On March 21st, the Belgian legislature adopted a law that intervenes in B2B relationships via three measures.

First of all, the law introduces a prohibition on abusing economic dependency in B2B relationships. This change of law enters into effect on the first day of the thirteenth month after its publication in the Belgian Official Journal.

Secondly, the law expands the existing general prohibition on unfair market practices in a B2B context, with specific prohibitory provisions concerning misleading and aggressive practices. This change of law enters into effect on the first day of the fourth month after its publication in the Belgian Official Journal.

Thirdly, the law puts limits on so-called “unlawful clauses” in B2B relationships.

It is this last measure that is important for our producer.

As was already the case for B2C relationships, the law now also introduces for B2B relationships a **general principle** that clauses creating a manifest imbalance between professional contracting parties are unlawful and void. The unlawful clause can even result in the invalidity of the entire contract if it is so essential for the contract that the latter cannot continue to exist without the invalid clause.

The general principle is translated into a **black list and a grey list with specific unlawful clauses**. The black list contains clauses that are always unlawful; the grey list contains clauses that are presumed to be unlawful until proof of the contrary.

The grey list states, amongst other things, that **clauses that bind the parties without specification of a reasonable notice period** are unlawful in the absence of proof to the contrary. Moreover, the law makes no distinction between unlimited-term contracts, for which it already applies that they always have to be cancellable with a reasonable notice period, and limited-term contracts, for which until now it has generally applied that they are *not* cancellable, unless provided otherwise in the contract.

The preparatory Parliamentary documents make it clear that the thinking behind the law focused on circumstances where one is “**contractually bound for an abnormally long term without a reasonable notice period**” or even an “**excessively long period of being contractually bound**”. What an abnormally long or excessively long term is and how long a notice period, if at all necessary, must be, will have to be determined on a case-by-case basis. For example, one will have to consider the relationship between the parties, the nature of the goods or services and the sector involved, the commercial practices, as well as the overall context.

Contracting parties can **intentionally agree on an arrangement in the grey zone**, for example by not

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providing for any notice period in a fixed-term contract. However, they then run the risk that the other party will nevertheless invoke the unlawfulness of the arrangement if it wishes to get out from under the contract. That is the case for the buyer in our example. According to the letter of the law, the burden of proof for lawfulness in that event lies with the party who is pressing for compliance with the agreed fixed term, in our case the producer. The latter could argue that the very competitive prices for the buyer were predicated on the contract's fixed term, and that the 30-day notice period is an unreasonably short time for finding a new buyer to absorb the freed-up capacity.

The new legislation on unlawful clauses applies in every B2B business relationship, regardless of the size of the contracting parties or the sector. The legislation only applies to contracts that are concluded, modified or renewed after the amendment of the law enters into force, so current contracts remain unaffected. The law enters into force on the first day of the nineteenth month after its publication in the Belgian Official Journal.

### Concretely:

- Contracts that are concluded, modified or renewed after the first day of the nineteenth month after the publication in the Belgian Official Journal must be screened for unlawful clauses.
- Clauses on the black list must be avoided in any event; clauses on the grey list have to be evaluated on a case-by-case basis.
- If a clause is in the grey zone, it would be wise for the parties to clarify why, in their specific case, they believe that the entirety is *not* manifestly unbalanced. This is best done not only by means of standard (so-called "boilerplate") clauses, but on the basis of an analysis of the specific contract.

### Want to know more?

The law has not yet been published in the Belgian Official Journal. You can find the text as adopted by the Parliament here: <http://www.dekamer.be/FLWB/PDF/54/1451/54K1451008.pdf>

The prohibition on abusing economic dependency will be addressed in an upcoming In The Picture.