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# VBB on Belgian Business Law

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“Van Bael & Bellis excels in M&A work, and often provides domestic Belgian law advice on cross-border transactions.”

IFLR1000, 2019

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## COMMERCIAL LAW

### **Publication of Book 3 of New Civil Code Modernising Property Law**

On 17 March 2020, the Belgian Official Journal (*Belgisch Staatsblad / Moniteur belge*) published a Law of 4 February 2020 inserting Book 3 entitled "Goods" in the new Civil Code (*Wet van 4 februari 2020 houdende boek 3 "Goederen" van het Burgerlijk Wetboek / Loi du 4 février 2020 portant le livre 3 "Les biens" du Code civil; the Book on Property Law*).

The Book on Property Law is divided in eight titles: (i) general provisions; (ii) classification of goods; (iii) right of ownership; (iv) co-ownership; (v) neighbourly relations; (vi) usufruct; (vii) long-lease rights (*erfpacht / emphytéose*); and (viii) construction right (*opstal / superficie*).

According to the legislative preparatory works, the reform aims to enhance transparency and legal security in the field of property law. It also intends to make property law more practical and in line with the current societal needs. Finally, the reform aims to increase flexibility in order to strike an adequate balance between contractual freedom and legal certainty.

The Book on Property Law brings together various existing provisions of the Civil Code, including provisions governing the right of ownership, co-ownership, real use rights (*zakelijke gebruiksrechten / droits réels d'usage*) and real securities (*zakelijke zekerheden / sûretés réelles*), as well as other specific laws dating back from 1824 which govern long-lease rights and construction rights.

Additionally, the Book on Property Law also creates a new set of rules in the Civil Code. The below non-exhaustive overview summarises the key novelties introduced by the Book on Property Law.

First, the general section of the Book on Property Law contains harmonised provisions that commonly apply to all real rights. It governs the creation, termination and transfer of real rights and thus enhances legal certainty.

Second, the maximum duration of usufruct for legal entities is extended from 30 years to 99 years. The Book on Property Law also specifies that usufruct ends when a legal entity is facing bankruptcy or voluntary, legal or judicial dissolution. By contrast, mergers, divisions or similar operations will not extinguish usufruct. In addition, the bare owner (*blote eigenaar / nu-proprétaire*) now enjoys a visiting right in order to ascertain that the usufruct holder maintains the property in good condition. The usufruct holder may also be held liable for part of the structural repair costs. This contribution will be proportionate to the value of the usufruct holder's right compared to that of the bare owner's right.

Third, the Book on Property Law extends the maximum duration of the construction right from 50 years to 99 years. Importantly, it creates perpetual volume ownership (*i.e.*, ownership of a specific volume of space above the ground). Previously, ownership of the land entailed ownership of the space located under and above. As a result, superposing volumes owned by different persons proved legally challenging and required the creation of a construction right or the waiving by the land owner of accession rights. In any event, construction rights and waiver of accession rights were limited in time to 50 years. Thus, the creation of volume ownership should prove helpful in the context of complex real estate projects and is expected to increase Belgium's attractiveness for real estate investors. Furthermore, the provisions on volume ownership will enable parties to escape the application of strict co-ownership rules.

Fourth, the minimum duration of the long-lease right is reduced from 27 years to 15 years, while its maximum duration remains 99 years. Moreover, the Book on Property Law amends the long-lease liability regime by making the leaseholder liable for all repairs, including structural ones. On the other hand, the Book on Property Law removes the obligation to pay an annual consideration to the long-lease owner. It also obliges the long-lease owner, at the end of the lease, to compensate the leaseholder for the works and plantations made in conformity with the right.

Fifth, the Book on Property Law is generally optional in nature. Accordingly, its provisions will apply, unless the parties agreed otherwise. Consequently, the provisions offer more flexibility to parties entering into new agreements. Nevertheless, some provisions are mandatory in nature and do not allow for any contractual derogation. For example, it will not be possible to deviate from the definitions of real rights and from other provisions that expressly indicate their compulsory nature (*e.g.*, the provisions on forced co-ownership).

The Book on Property Law will enter into force on 1 September 2021. However, and unless parties decide otherwise, the Book on Property Law applies neither to future effects of legal acts or facts which came into existence before its entry into force, nor to legal acts or facts which originate after its entry into force but relate to real rights that already existed before its entry into force.

## COMPETITION LAW

### **Belgian Competition Authority Adapts to Covid-19 Lockdown Measures**

On 19 March 2020, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*; the *BCA*) published a press release indicating that it had closed its offices until further notice due to the lockdown measures adopted by the Belgian federal government to fight the COVID-19 outbreak. Its staff work remotely and continue to handle cases.

The BCA fears that the lockdown measures may impact its ability to handle merger cases and therefore invites companies to delay the notification of any concentrations that are not urgent.

The press release of the BCA can be found [here](#).

### **Belgian Competition Authority Refuses to Grant Interim Measures against HP**

On 16 March 2020, the Competition College (*Mededingingscollege / Collège de la concurrence*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*; the *BCA*) rejected the request of DPI BVBA (*DPI*) request to impose interim measures on HP Belgium BV and HP Inc. (*HP*) on account of an alleged abuse of dominant position.

This case started on 7 February 2020 with a complaint filed by DPI alleging that HP had abused its dominant position. DPI is active in the large scale printing sector and had purchased an HP printer on 30 December 2011 for an amount of EUR 154,469. DPI used this printer on a daily basis and it constituted its main investment. On 25 November 2019, DPI was informed that HP would cease the production and supply of print heads and ink for this machine as from 26 March 2020. According to DPI, HP had abused its dominant position on the market by withdrawing these products from production on such short notice without offering an alternative solution.

The Competition College decided that there was not enough information available to identify the relevant product and geographic markets and demonstrate HP's dominant position. As a result, there were insufficient indications to conclude that there was an abuse of dominant position within the meaning of Article IV.2 of the Code of Economic Law and of Article 102 of the Treaty on the Functioning of the European Union. The BCA added that these provisions do not preclude a business from ceasing production of certain products or of products that are required for the use of other products, save in the case of essential facilities.

Finally, the BCA pointed out that, pursuant to international and European environmental rules, the commercialisation and use of the relevant ink would in any event become prohibited at the latest in December 2020.

### **Belgian Competition Authority Allows Interim Measures Suspending Network Sharing Agreement between Orange Belgium and Proximus To Expire**

On 16 March 2020, the Competition College (*Mededingingscollege / Collège de la concurrence*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*; the *BCA*) allowed the interim measures which it had imposed on telecommunications operators Orange Belgium and Proximus to expire without establishing alternative measures.

On 8 January 2020, the Competition College suspended the implementation of the mobile network sharing agreement that Orange Belgium and Proximus had signed on 22 November 2019. It did so at the request of competing operator Telenet (See, [this Newsletter, Volume 2020, No. 1, pp. 4-5](#)).

The suspension applied until 16 March 2020 and was designed to allow the Belgian Institute for Postal Services and Telecommunications (*Belgisch Instituut voor Postdiensten en Telecommunicatie / Institut belge des services postaux et des télécommunications*; the *BIPT*), to investigate whether the commitments offered by the parties to ensure compliance with the competition rules would be sufficiently reflected in binding agreements and to discuss with them any remaining concerns. The Competition College also ordered that, by 9 March 2020, Orange Belgium and Proximus should advise it and the Competition Prosecutor General of their discussions with the BIPT and of the BIPT's views.

The outcome of these discussions remains unknown, as does the final assessment of this matter carried out by the Competition College. As far as is known, it appears that the BCA merely allowed the interim measures ordered on 8 January 2020 to expire without adopting any formal decision determining whether such measures or alternative measures are still necessary.

In the absence of any express decision closing the interim measures procedure, it is unclear how this case can be made subject to judicial review. Separately, the complaint on the merits which Telenet filed against the same network sharing agreement is still pending.

### **Belgian Competition Authority Publishes Enforcement Priorities for 2020**

On 26 March 2020, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*; the *BCA*) published its enforcement priorities for 2020 (in [Dutch](#) and in [French](#)).

The document starts with the remark that, in 2019, national institutions such as the Central Economic Council (*Centrale Raad voor het Bedrijfsleven / Conseil Central de l'Economie*) as well as international organisations such as the OECD and the European Commission, have stressed the importance of competition for Belgian firms and consumers and the necessity of increasing the resources allocated to the BCA.

The rest of the document is very similar to the enforcement priorities published by the BCA in 2019. The list of priority sectors remains to a large extent the same: just like last year, it includes according to the ranking followed by the

BCA the telecommunications sector; the distribution sector and its relationships with suppliers; service providers; public procurement; the pharmaceutical sector; and logistics (See, [this Newsletter, Volume 2019, No. 3, p. 3](#)).

The only novelty for 2020 is the "digital economy", which now features in sixth position, just above logistics. The BCA explains that digital companies often benefit from significant economies of scale; from direct and indirect networks effects which strengthen any market power that they may have; and from the ability to improve services and algorithms through the use of sufficiently detailed personal data. The BCA affirms that, "like other authorities", it will be particularly attentive to possible abuses of a dominant position and to infringements of competition law facilitated by the use of algorithms or data.

## CORPORATE LAW

### ***Alternatives for General Shareholder Meetings and Board of Directors Meetings***

The current lockdown measures make it impossible for shareholders and directors to convene physically. Therefore, the Belgian Federal Government adopted on 9 April 2020 a Royal Decree allowing (i) all legal entities governed by the Belgian Companies and Associations' Code (companies and associations); (ii) all legal entities that acquired legal personality through a specific law; and (iii) contractual Institutions for Collective Investment to organise general shareholder meetings and board of directors' meetings in more flexible ways or to postpone such meetings (the *Royal Decree*).

The Royal Decree applies regardless of the rules contained in the articles of association of the entity at issue. It applies to meetings that should have been held or are to be held between 1 March 2020 and 3 May 2020 or in relation to which the convocation notice was issued or is to be issued during that period.

In addition, the deadlines for approving and filing the annual accounts were also extended.

A detailed overview of the flexible regime now available to organise general shareholder meetings and board of directors' meetings can be found in [our memorandum](#) of 10 April 2020.

## DATA PROTECTION

### **Data Protection Authorities Provide Guidance on Processing of Personal Data in Context of COVID-19 Outbreak**

The outbreak of the corona virus COVID-19 has caused various emergencies with novel challenges for many organisations collecting and processing personal data. Here are a few examples:

- Employers monitor employees working from home; they request employees and visitors to report risk factors such as travelling or exposure to people with flu-like symptoms; and they may have to report to other employees that an employee was infected with COVID-19.
- Physicians and pharmaceutical companies may wish to use personal data to investigate new treatments.
- Authorities try and enforce lockdown measures by video cameras and tracking phones.
- Health authorities need detailed test results and other health data to map virus spreads and develop detailed statistics.

European and Belgian data protection authorities offered guidance on the application of data protection rules to these novel challenges. “*Data protection rules (such as the GDPR) do not hinder measures taken in the fight against the coronavirus pandemic*”, writes the European Data Protection Board (EDPB).

While the urgency of the situation may justify measures that go further than would be normally allowed, the EDPB warns that these measures should be proportionate and limited to what is necessary: an “*emergency is a legal condition which may legitimise restrictions of freedoms provided these restrictions are proportionate and limited to the emergency period*”.

For its part, the Belgian data protection authority (*Gegevensbeschermingsautoriteit / autorité de protection des données*; the DPA) published a series of questions and

answers (Q&A) on COVID-19 and the processing of personal data in the workplace. The DPA is of the opinion that employers should only process health data if required by public authorities. In other cases, health data of employees should always be processed by the occupational physician.

For example, the DPA explains that measuring body temperature does not constitute a processing of personal data as long as it is not recorded. Nevertheless, the DPA reiterates that such measures should be implemented in accordance with applicable employment rules.

The full statement of the EDPB can be consulted [here](#).

The Q&A of the Belgian DPA is available in [Dutch](#) and in [French](#).

### **Belgian Data Protection Authority Publishes Direct Marketing Recommendation**

On 10 February 2020, the Belgian Data Protection Authority (DPA) published its first recommendation of 2020 on data processing activities for direct marketing purposes (the *Recommendation*).

Direct marketing was marked as a “priority sector” in the recently presented strategic plan of the DPA. In this context, the lengthy (79 pages!) Recommendation provides welcome clarifications for the challenging task of matching direct marketing with the protection of personal data. The recommendation discusses the roles of the various players in the direct marketing field, defines key concepts and provides an overview of how the data protection principles of Regulation 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (the *GDPR*) can be applied to direct marketing. The DPA illustrates its recommendations with practical examples and recent decisions by supervisory authorities in various EU Member States.

### *What is "Direct Marketing"?*

First, the DPA explains that direct marketing covers a wide range of activities affecting a very large group of data subjects. Actors in this area range from data brokers who rent out personal data to the advertiser that carries out specific targeting activities or the company that analyses certain results.

The DPA defines direct marketing as "*any communication, in any form, solicited or unsolicited, originating from an organisation or an individual and aimed at the promotion or sale of services, products (whether in return for payment or free of charge), as well as brands or ideas, addressed by an organisation or an individual acting in a commercial or non-commercial context, which is addressed directly to one or more natural persons in a private or professional context and which involves the processing of personal data*". This definition promotes a very broad concept of what constitutes direct marketing. The DPA explains that the concept also covers preparatory measures for compiling contact lists and automatic price adjustments based on users' profiles. Even messages that are not for profit can be regarded as direct marketing.

On the other hand, the GDPR will not apply if an advertisement does not use personal data. For instance, banners with advertisements that are the same for every visitor of a website will not fall under the GDPR.

### *Roles of Parties Involved with Direct Marketing*

In order to define the obligations of all parties involved, each party's role must be determined. The data controller, also if acting as joint controller, must provide transparent information on the processing to the data subjects. The DPA points out that when personal data are collected through social media, the terms of use of these social networks do not discharge the controller of informing the data subjects about its direct marketing activities.

The data controller often relies on processors that carry out activities on their behalf, for instance, when it engages a service provider to send marketing messages on behalf of the controller. In such a case, the controller is responsible for selecting a processor that can provide sufficient guarantees for the protection of personal data. In other words, the controller must carry out an assessment of the

candidates. The DPA indicates that adherence to a code of conduct may indicate an adequate guarantee for the protection of personal data. When the selection process is complete, the controller should enter into a written data processor agreement setting out the rights and obligations listed in Article 28 of the GDPR.

### *Defining Purpose and Processing Activities*

An assessment of data protection compliance requires a clear and detailed definition of the purposes of the direct marketing. The direct marketing purpose could be, for instance, to inform customers of new products/services, or the creation of personal customer profiles.

If the data controller intends to re-use personal data collected for direct marketing purposes, the controller must verify whether the intended use is compatible with the initial purpose for which the personal data were collected. The controller will also have to update the information given to the data subject to include the new purpose and processing activities.

The DPA underlines that the purpose of the processing is not the same as the processing activities. The processing activities are each of the operations involving personal data in order to achieve the purpose. For instance, processing activities may include using a customer's e-mail address to inform him/her of various campaigns or sending out a regular newsletter.

### *Profiling*

The GDPR imposes additional requirements for profiling operations that are particularly relevant in the context of direct marketing. Article 4.4 of the GDPR defines "profiling" as "*any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movement*".

The requirements for profiling depend on how the profiling is used. In particular, whether profiling is relied on to make decisions, and if so, whether the decision is made with or without human intervention. The Recommendation

explains that the use of profiling in automatic decisions without human intervention is only possible if the data subject has given his or her explicit consent.

#### *Identify Personal Data Needed for Purpose at Hand*

The DPA recommends that controllers should assess which personal data are needed for the direct marketing purposes. Anonymous data fall outside the GDPR, but the DPA points out that the threshold for anonymisation is high. Accordingly, even if a service provider asserts that data are anonymous, it is recommended to verify whether this is the case.

If personal data are necessary, the GDPR prescribes that only personal data necessary to achieve the processing purposes can be used. The DPA thus advises to assess regularly whether the data are still adequate, relevant and limited to what is necessary for the pursued processing purposes. Also, the DPA encourages frequently updating databases such as the "Do Not Call" lists using automated means.

#### *Lawfulness of Direct Marketing: Do We Need Consent?*

Processing of personal data will only be allowed if it is based on one of the legal bases provided for in the GDPR (Articles 6 and 9 of the GDPR). The Recommendation discusses the application of the GDPR but reminds organisations to verify the application of special laws that restrict the applicable legal basis. For instance, under the ePrivacy Directive (Directive 2002/58/EC), consent is always required before sending unsolicited electronic direct marketing messages by email, unless a business can rely on the "existing customer" exemption of Article 13.2 of the ePrivacy Directive.

The DPA advocates a very strict interpretation of the legal basis permitting the processing of personal data that is necessary for the performance of a contract (*i.e.*, Article 6.1(b) of the GDPR). Therefore, this legal basis is unlikely to permit the use of personal data for direct marketing purposes. As a result, organisations usually will rely on "legitimate interests" (*i.e.*, Article 6.1(f) of the GDPR) or consent (*i.e.*, Article 6.1(a) of the GDPR).

The Recommendation proposes a three-step test for determining whether the direct marketing purpose can be permitted on the basis of the organisation's "legitimate interest" under Article 6.1(f) of the GDPR. First, the organisation must clearly set out the legitimate interest pursued. Second, it should determine whether the processing activity is strictly necessary (and the DPA underlines that this criterion is very strict) and third, the legitimate interest must be balanced against the impact on the interests, fundamental rights and freedoms of the data subject.

If no other options are available, or if special laws require this, the controller must obtain consent from the data subject. The DPA explains that consent as a legal basis for direct marketing purposes must be (i) informed (*i.e.*, based on transparent information); (ii) freely given (*i.e.*, the data subject must have a real choice), (iii) specific (*i.e.*, precise) and (iv) unambiguous (*i.e.*, it must be clear and certain that the data subject agreed). The mere fact that a user did not opt out is not sufficient for claiming valid consent.

The DPA also reminds organisations to take account of the special rules that apply to the consent of minors. In Belgium, minors can give valid consent from the age of 13. Organisations may have to verify the age of data subjects as part of the consent procedure.

#### *Transparency and Objections*

Finally, direct marketing must be transparent, which means that data subjects must receive clear and meaningful information as required by Articles 12 to 14 of the GDPR. In this regard, the Recommendation states that the mere reference to a privacy policy in the small print at the bottom of a website does not meet the requirements of Article 12 of the GDPR.

Data subjects also have an unconditional right to object to the processing of personal data for direct marketing purposes. If a data subject objects to direct marketing, the DPA requires that the controller ceases all processing of data relating to the data subject for the purposes of direct marketing.

The DPA concludes the Recommendation with a reminder that "*acting in accordance with the GDPR is not only an obligation with regard to the personal data you process. It is just as much about ethical behaviour in the market, both towards those involved and partners*".

The DPA also recommends sector associations to draw up codes of conduct, as provided for in Article 41 of the GDPR. Such codes of conduct should ensure a harmonised sector-wide approach.

Direct marketing is a priority in the strategic plan of the DPA. Now that it has provided its guidance, it remains to be seen whether this will be followed by an increase in enforcement action. In any case: forewarned is forearmed. Organisations should make sure that they heed the DPA's advice in their current and future marketing projects.

The Recommendation is available in [Dutch](#) and [French](#).

### **Advocate General Opinion on Data Subjects' Consent for Telecommunications Services**

On 4 March 2020, Advocate General Szpunar delivered his opinion (the *Opinion*) in case C-61/19, *Orange România SA v Autoritatea Națională de Supraveghere a Prelucrării Datelor cu Caracter Personal (ANSPDCP)*. The Advocate General examined the requirements of consent under Directive 95/46 of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (*Directive 95/46*) and Regulation 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (the *GDPR*).

Orange Romania concluded (paper) contracts with individual customers for mobile telecommunications services. The contract required the customer to consent to the collection and storage of the copies of his or her identity documents and a copy of these documents was annexed to those contracts. Customers seeking to object had to write on the contract that they did not consent to the copying and storing of their identification document.

The ANSPDCP, the Romanian Data Protection Authority, considered that Orange Romania used identity papers without valid consent and imposed an administrative penalty. It also held that Orange Romania failed to show that customers made an informed choice.

The decision of the Romanian Data Protection Authority was appealed and the appellate court referred questions to the Court of Justice of the European Union (CJEU) to rule on the criteria for determining whether consent is specific, informed and free.

The Advocate General referred to the CJEU's judgment in *Planet49* (C-673/17) to explain that consent is "freely given" when the data subject enjoys a high degree of autonomy when choosing whether (or not) to give his or her consent. The Advocate General noted that the requirement of a freely given indication of consent implies a form of active behaviour on the part of the data subject. Consent in the form of ticking a preselected checkbox does not amount to the expression of active consent. According to the Advocate General, in such a situation, one does not know whether the pre-formulated text in question has been read, which makes it impossible to determine whether consent was freely given.

With respect to the requirement that consent must be "informed" and "specific", the Advocate General asserted that the data subject must be informed of all circumstances surrounding the data processing and its consequences. The data subject must know (i) which data will be processed; (ii) the duration of such processing; (iii) in what way the processing will take place; and (iv) for which specific purpose the processing occurs. The data subject must also be informed about (v) who will be processing the data; and (vi) whether the data are intended to be transferred to third parties. The Advocate General also observed that the data subject must be informed of the consequences of refusing consent, in particular with regard to the conclusion of the contract.

According to the Advocate General, it is for the controller to demonstrate that the data subject has consented to the processing of his or her personal data and that such consent meets the above requirements.

On this basis, the Advocate General reached the conclusion that the requirement to object in writing on the contract does not permit consent to be freely given. The Advocate General noted that a positive action of the customer is required for granting consent while Orange Romania had created the reverse situation in which positive action was needed in order to refuse consent. The Advocate General added that if un-ticking a pre-ticked checkbox on a website is considered too much of a burden, then a customer cannot reasonably be expected to refuse his or her consent in handwritten form.

The full text of the Advocate General's Opinion can be found [here](#).

## FINANCIAL LAW

### ***Financial Measures Mitigating Negative Impact of Covid-19 on Companies' Financial Position***

On 22 March 2020, the Belgian federal government announced that it had reached an agreement with the National Bank of Belgium and the financial sector on a set of financial measures aiming to mitigate the negative impact of Covid-19 on the financial position of companies.

The financial measures are twofold: companies that face financial difficulties as a result of the Covid-19 crisis may be eligible for (i) a six-month standstill under existing credit agreements; and (ii) bridge loans of up to twelve months.

#### *Six-month Standstill*

Non-financial companies, small and medium-sized enterprises (SMEs) and self-employed persons are eligible for a standstill on the repayment of principal amounts and interests under existing credit agreements up to 30 September 2020.

Only companies that can prove that they are in financial difficulties as a result of Covid-19 and that had no payment arrears on 1 February 2020 and no payment arrears of less than 30 days on 29 February 2020, are eligible for this standstill.

#### *Bridge Loans*

In addition, the federal government introduced a guarantee regime for bridge loans for viable non-financial companies, SMEs and self-employment persons up to a maximum of EUR 50 million per group. This guarantee regime applies to bridge loans granted by financial institutions between now and 30 September 2020 with a maximum term of twelve months. The maximum interest rate applicable to these new credit lines will be 1.25% (excluding the fee, which will be capped as well).

The federal government allocated a total budget of EUR 50 billion to guarantee the losses that financial institutions may incur on these new credit lines.

Any defaults on these bridge loans will be borne by financial institutions up to 3% and between 3% and 5% by financial institutions and the Belgian State, each for 50%. Any defaults on these loans exceeding 5% will be borne by the Belgian State for 80%.

For a more elaborate discussion of the main corporate and finance considerations in relation to Covid-19, please see our [news alert of 24 March 2020](#).

## INSOLVENCY

### ***Execution of Retention Right not Affected by Failure to File Claim with Bankruptcy Estate***

On 16 January 2020, the Supreme Court (*Hof van Cassatie / Cour de cassation*; the *Court*) confirmed a judgment of the Antwerp Court of Appeal of 14 February 2019 in relation to the execution of retention rights in the context of a bankruptcy. The Court of Appeal had ruled that a creditor may still execute its retention right even though it had failed to file its underlying claim with the bankruptcy estate.

In the case at hand, a creditor executed its retention right on goods of the debtor which the creditor held in its possession. Soon after the execution of the retention right, the debtor was declared bankrupt. The bankruptcy trustee and the creditor agreed on the sale of the goods concerned. They also agreed that part of the proceeds of this sale would be used to pay the uncontested amount of the creditor's claim, while the remainder would be deposited on a blocked account until the dispute regarding the contested part of the creditor's claim was resolved. The Court of First Instance held in favour of the creditor and confirmed that the creditor's claim was meritorious, and that the retention right had been executed lawfully.

The bankruptcy trustee, however, objected to the release of the blocked funds. He argued that the creditor should have filed its claim with the bankruptcy estate within a period of one year from the date of the bankruptcy judgment in accordance with Articles 61 and 72 of the previous Bankruptcy Act (now Articles XX.155 and XX.165 of the Code on Economic Law). The bankruptcy trustee argued that the failure to file its claim had caused the creditor to lose its entitlement to the proceeds arising from the execution of the retention right.

However, the Court of Appeal held that the execution of a retention right after the debtor was declared bankrupt, and its enforceability against the debtor and third parties, is not affected by the failure to file the underlying claim with the bankruptcy trustee. As noted, the Court sided with the Court of Appeal.

## LABOUR LAW

### **Covid-19: Overview of Employment and Social Security Measures Designed To Safeguard Employment**

#### *Background*

Pursuant to the Ministerial Decree of 23 March 2020 (*Ministerieel Besluit van 23 maart 2020 houdende dringende maatregelen om de verspreiding van het coronavirus COVID-19 te beperken / Arrêté ministériel du 23 mars 2020 portant des mesures d'urgence pour limiter la propagation du coronavirus COVID-19*; the **Ministerial Decree**), which abolished and replaced the previous Ministerial Decrees of 13 and 18 March 2020, all retail shops, restaurants and bars were required to close, with the exception of specific essential stores such as food markets and pharmacists.

Other companies can continue to operate, provided that they organise teleworking for any function for which this is possible.

For functions and positions for which teleworking is not possible, the employer should ensure compliance with the "social distancing" rule (*i.e.*, ensuring a minimum distance of 1.5 m between employees) in the exercise of work (and transport, if this is organised by the employer). The employer should also take other prevention measures that guarantee a safe working place (*e.g.* putting sanitising handgel and masks at the disposal of employees).

These provisions do not apply to employers who provide essential services. These are listed in the Ministerial Decree (*e.g.* employers belonging to the Joint Committee No. 227 competent for the audiovisual sector with a limitation to radio and television). However, also such employers should still organise teleworking to the extent possible or, alternatively, ensure that the "social distancing" rule is observed.

In order to safeguard employment as much as possible, the following employment-related measures were adopted.

#### *Measures Facilitating Reliance on Temporary Unemployment*

There are two specific regimes of temporary unemployment. One is linked with *force majeure*, while the other is based on economic reasons.

#### 1. Regime of Temporary Unemployment on account of Force Majeure (*overmacht / force majeure*)

The use of temporary unemployment on account of *force majeure* has recently been made much easier by the National Employment Office (*Rijksdienst voor Arbeidsvoorziening / Office National de l'Emploi; NEO*). For the period between 13 March 2020 and 19 April 2020 (with a possible extension until 30 June 2020, depending on the duration of the lockdown measures):

- Any employer who suffers from the consequences of Covid-19 can invoke temporary unemployment for *force majeure* (*e.g.* employers who are obliged to stop activities as a result of the lockdown measures adopted in the Ministerial Decree or employers who are faced with a decreased workload).
- This regime can be applied even if the company does not stop all its activities, which means that it is possible:
  - to rely on temporary unemployment due to *force majeure* for part of the employees while the rest of the workforce is still working (*e.g.* while 50% of the employees can continue to work through teleworking, temporary unemployment for *force majeure* can be adopted for other employees; and
  - to alternate working days and days of temporary unemployment due to *force majeure* provided that the second category applies for at least one full day.
- This regime requires submitting an electronic form (*ASR scenario 5 / DRS scénario 5*) in which the employer indicates the number of employees and days during which temporary unemployment due to *force majeure* has been applied. This electronic form should be completed as soon as possible and in any event on the last day of the ongoing month. All the other administrative formalities for the employer no longer apply.

Based on this regime the employees are entitled to unemployment allowances capped at 70% of their normal gross salary (which in turn is also capped at EUR 2,754.76 gross). This payment is subject to 26.75% withholding taxes. In addition, NEO pays the employees EUR 5.63 per day.

## 2. Regime of Temporary Unemployment for Economic Reasons

The regime of temporary unemployment for economic reasons for white-collar employees (also known as economic unemployment) is less flexible than the regime of temporary unemployment on account of *force majeure*. This is because employers are required to demonstrate a substantial decrease of at least 10% of their orders, production or profit in one of the four quarters preceding the first use of the economic unemployment compared to the same quarter of 2008 (considering the financial and economic crisis in 2008) or of one of the two calendar years preceding the application.

Employers failing to meet this burden of proof are entitled to rely on economic unemployment due to an unexpected substantial decrease of their orders, production or profit to the extent that they were recognised as firms in difficulties by the Minister for Employment (*Minister van Werk / Ministre de l'Emploi*). In addition, the employers should fall under the scope of a collective bargaining agreement (CBA) at industry or company level allowing the regime of economic unemployment or, failing this, adopt a specific company plan that should be approved by the competent authorities.

As several industries do not have a CBA at industry level, the national CBA No. 147 regarding temporary unemployment based on economic reasons for white-collar employees due to the coronavirus crisis was concluded on 18 March 2020 (*Collectieve arbeidsovereenkomst tot vaststelling van een regeling van volledige schorsing van de uitvoering van de arbeidsovereenkomst en/of een regeling van gedeeltelijke arbeid bij gebrek aan werk wegens economische oorzaken voor bedienden als gevolg van de coronaviruscrisis / Convention collective de travail établissant un régime de suspension totale de l'exécution du contrat de travail et/ou un régime de travail à temps réduit en cas de manque de travail résultant de causes économiques pour les employés en raison de la crise du coronavirus*; the CBA No. 147).

As a result, employers belonging to industries for which no industry CBA was concluded are no longer required to conclude a company CBA with the trade unions or submit a company plan to the competent authorities.

Pursuant to the CBA No. 147, employers can partially or totally suspend the employees' employment contracts and employees are entitled to unemployment allowances during such suspension days which employers are required to supplement with a payment of EUR 5 gross per day.

The CBA No. 147 applies until 30 June 2020 (with a possible extension that will be assessed at the beginning of May 2020).

Given the simplification of the regime of temporary unemployment on account of *force majeure*, it is recommended to apply this regime rather than the system of economic unemployment. The latter can, however, still offer benefits in specific cases and in particular during periods after the abolishment of the lockdown measures. The Minister for Employment indicated that the review of applications to be recognised as companies in difficulties would be suspended until the more flexible regime of unemployment due to *force majeure* will have lapsed (*i.e.*, until after the lockdown measures).

### *Measures Adopted to Facilitate Teleworking*

In view of the requirement to organise teleworking for any function for which this is possible resulting from the Ministerial Decree, the Preliminary Tax Ruling Service (*De Dienst Voorafgaande Beslissingen in Fiscale Zaken / Le Service des Décisions Anticipées en matière fiscales*) confirmed on 18 March 2020 that a lump sum net cost reimbursement of maximum EUR 126.94 per month can be granted to all employees working remotely. This indemnity will be considered as a reimbursement of employer's costs and will therefore not be subject to withholding taxes. From a social security perspective, however, no ruling can be obtained. The amount of EUR 126.94 per month is nevertheless in line with the maximum amount that was accepted by the social security authorities.

Employers who wish to grant this lump sum net cost reimbursement must introduce a specific request online with the tax authorities.

Additionally, employers should also take the necessary employment-related measures in relation to teleworking, including the adoption of a general policy or amended employment contracts with specific provisions regarding teleworking.

#### *Measures Adopted in Relation to Social Elections*

On 24 March 2020, the National Labour Council (*Nationale Arbeidsraad / Conseil National du Travail; NLC*) issued advice No. 2.160 to request the temporary suspension of the social elections procedure due to the Covid-19 crisis. The NLC thus confirmed the position which the social stakeholders had announced on 17 March 2020.

The NLC agreed that the procedure would continue until X+35 included ("X" being defined as the date when the actual date of the social elections is communicated to the employees) and would be suspended until further notice as from day X+ 36. In practical terms, this means that the procedure would be suspended between 18 and 30 March 2020, depending on the date of the actual elections that had originally been decided within a given firm (foreseen between 11 and 24 May 2020).

Firms for which no list of candidates (for any category of employees) had been submitted by day X+35 were allowed to stop the procedure permanently. The other had to suspend the procedure on X+36 and will have to resume it after the suspension period on the new day X+36 which still has to be defined. The NLC advised the federal government to schedule the new date for social elections between 16 and 29 November 2020.

During the suspension period in the run-up to the social elections, the current employee representative bodies will remain operational and employers should continue to inform them or consult with them when legally required, for example via video conference or by telephone.

#### *Social Security Measures*

All payments that were due to the National Employment Office (*Rijksdienst voor Arbeidsvoorziening / Office National de l'Emploi; NEO*) on 20 March 2020 can be postponed until 15 December 2020.

This postponement will be granted automatically to all firms that are compelled to close pursuant to the Ministerial Decree. Firms not forced to close for this reason but which stopped their operations for other reasons (for example because they cannot comply with the social distancing requirements) can request a similar postponement.

For the social security contributions due for the first and second quarter of 2020, all employers can request a payment plan which will allow the payment in monthly instalments over a maximum period of 24 months.

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