"Van Bael & Bellis' Belgian competition law practice [...]. is a well-established force in high-stakes, reputationally-sensitive antitrust investigations"

Legal 500 2019

February 2021

VBB on Belgian Business Law

Highlights

COMMERCIAL LAW
Bills Introducing Two Further Books of New Civil Code Submitted to Chamber of Representatives
Page 3

COMPETITION LAW
Draft Bill to Exclude Clinical Networking between Hospitals from Application of Merger Control
Page 7

CORPORATE LAW
Court of Justice of European Union Confirms Joint Liability of Financial Investors for Competition Law Infringements of Indirect Subsidiaries by Virtue of Decisive Influence through Control of 100% of Voting Rights
Page 8

DATA PROTECTION
'Pink Boxes' for Future Parents Give Rise to Fine by Belgian Data Protection Authority
Page 10

ENERGY
Constitutional Court Dismisses Request to Suspend Validation Decree Temporarily Safeguarding Flemish Sectoral Environmental Conditions Governing Wind Turbines
Page 17

LABOUR LAW
Belgian National Labour Council Adopts Collective Labour Agreement No. 149 to Regulate Mandatory Telework to Cope with Covid-19
Page 19

LITIGATION
European Commission Launches Public Consultation on Modernising Cross-border Judicial Cooperation
Page 20

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

IFLR1000, 2019

Topics covered in this issue

COMMERCIAL LAW 3
COMPETITION LAW 7
CORPORATE LAW 8
DATA PROTECTION 10
ENERGY 17
INTELLECTUAL PROPERTY 18
LABOUR LAW 19
LITIGATION 20

vbb@vbb.com
www.vbb.com

Table of contents

COMMERCIAL LAW 3

Statutory Interest Rate and Default Commercial Internet Rate Remain Unchanged 3

Bills Introducing Two Further Books of New Civil Code Submitted to Chamber of Representatives 3

Minister for Economy Announces Plan for Circular Economy 5

COMPETITION LAW 7

Draft Bill to Exclude Clinical Networking between Hospitals from Application of Merger Control 7

CORPORATE LAW 8

Court of Justice of European Union Confirms Joint Liability of Financial Investors for Competition Law Infringements of Indirect Subsidiaries by Virtue of Decisive Influence through Control of 100% of Voting Rights 8

DATA PROTECTION 10

Pink Boxes' for Future Parents Give Rise to Fine by Belgian Data Protection Authority 10

European Commission Assessment of Member State Rules on Health Data in Light of GDPR 10

European Data Protection Supervisor Comments on Digital Services and Digital Markets Acts 12

European Commission Publishes Draft UK Adequacy Decision 14

Belgian Data Protection Authority Adopts Recommendations on Data Cleansing and Data Support Destruction Techniques 14

Constitutional Court Validates Digital Fingerprints on Identity Cards 15

ENERGY 17

Constitutional Court Dismisses Request to Suspend Validation Decree Temporarily Safeguarding Flemish Sectoral Environmental Conditions Governing Wind Turbines 17

INTELLECTUAL PROPERTY 18

AG Szpunar Offers View on Possible Limitations Put by Database Rights on Activities of Search Engines 18

LABOUR LAW 19

Belgian National Labour Council Adopts Collective Labour Agreement No. 149 to Regulate Mandatory Telework to Cope with Covid-19 19

LITIGATION 20

European Commission Launches Public Consultation on Modernising Cross-border Judicial Cooperation 20

Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels – Belgium

Phone: +32 (0)2 647 73 50 vbb@vbb.com
Fax: +32 (0)2 640 64 99 www.vbb.com

COMMERCIAL LAW

Statutory Interest Rate and Default Commercial Internet Rate Remain Unchanged

On 12 February 2021 and 24 February 2021 respectively, the statutory interest rate applicable to civil matters and commercial relations with private individuals/natural persons and the default interest rate for commercial transactions were published in the Belgian Official Journal (*Belgisch Staatsblad / Moniteur belge*).

The statutory interest rate remains unchanged from that applied in 2020 at 1.75% (*See*, this Newsletter, Volume 2020, No. 1, p. 3).

The default interest rate for commercial transactions which will apply during the first semester of 2021 amounts to 8% and also remains unchanged from that applied in 2020 (*See*, this Newsletter, Volume 2020, No. 1, p. 3). Pursuant to the Law of 2 August 2002 on combating late payment in commercial transactions (*Wet van 2 augustus 2002 betreffende de bestrijding van de betalingsachterstand bij handelstransacties / Loi du 2 août 2002 concernant la lutte contre le retard de paiement dans les transactions commerciales*), the default commercial interest rate applies to compensatory payments in commercial transactions (*handelstransacties / transactions commerciales*), *i.e.*, transactions between companies or between companies and public authorities.

Both the statutory interest rate and the default interest rate for commercial transactions may be deviated from by contract.

Bills Introducing Two Further Books of New Civil Code Submitted to Chamber of Representatives

On 24 February 2021, two Private Members' Bills were submitted to the federal Chamber of Representatives to insert two additional books into the New Civil Code:

- a Private Members' Bill inserting Book 1 "General provisions" of the Civil Code (*Wetsvoorstel houdende Boek 1 "Algemene bepalingen" van het Burgerlijk Wetboek / Proposition de loi portant le Livre 1er "Dispositions générales" du Code civil* – the ***Book on General Provisions***); and
- a Private Members' Bill inserting Book 5 "Obligations" of the Civil Code (*Wetsvoorstel houndende Boek 5 "Verbintenissen" van het Burgerlijk Wetboek / Proposition de loi portant le Livre 5 "Les obligations" du Code civil* – the ***Book on Obligations***).

Book on General Provisions

The Book on General Provisions contains cross-sectional rules which are not specifically associated with one of the other Books of the New Civil Code. For example, it governs the applicability of law in time and the calculation of time periods (*berekening van termijnen / calcul des délais*) triggered by legal acts, such as contracts or notice letters. If a contract provides that a product is to be delivered within three days, this time period will not be calculated in the same way as if the contract stipulated that the product must be delivered within 72 hours. It is specified that these rules on the calculation of time periods apply only if the law or the legal act in question does not provide otherwise. The Book on General Provisions also contains generally applicable principles of civil law such as the presumption of good faith (*subjectieve goede trouw / bonne foi subjective*), the prohibition of abuse of rights (*rechtsmisbruik / abus de droit*) and the inability of an intentional fault (*opzettelijke fout / faute intentionelle*) to procure an advantage for its author.

The Book on General Provisions will enter into force on the first day of the sixth month following its publication in the Belgian Official Journal (*Belgisch Staatsblad / Moniteur belge*).

Book on Obligations

The Book on Obligations brings together and re-organises existing provisions of the Napoleonian Civil Code. In doing so, it operates a clear distinction between the sources of obligations (*i.e.*, legal acts, tort, and quasi-contracts). Furthermore, it describes the general legal regime governing obligations, regardless of their source. The Book on Obligations is thus divided in three main sections: (i) introductory provisions; (ii) sources of obligations; and (iii) general regime of obligations.

Over the years, the courts have modernised the law of obligations as provided for by the Napoleonic Civil Code. Their contribution to the law of obligations has been such that their influence can be likened to the role of the courts at common law. The resulting complexity significantly decreased the readability of the provisions of the current Civil Code on obligations. As a result, there was a pressing need to codify the case law that modernised the law of obligations.

However, the Book on Obligations goes beyond codifying existing provisions and jurisprudential developments. It introduces several innovations which generally aim to strike a balance between the contractual freedom of the parties and the role of courts as guardians of both the weaker party's interests and of the general interest. The below non-exhaustive overview summarises the key novelties which the Book on Obligations brought about.

Pre-contractual Negotiations

First, the Book on Obligations attempts to clarify the legal regime applicable to pre-contractual negotiations. It confirms that tort liability applies to pre-contractual negotiations, but also creates sanctions for the interruption of negotiations due to the fault of a party, or if legitimate expectations were created. If pre-contractual negotiations are interrupted due to the fault of a party, the victim of the fault must be placed in the situation in which it would have found itself had negotiations not taken place. In practice, this means that the party at fault must reimburse any costs or fees incurred due to the negotiations and the loss of a chance to conclude a contract with a third party (*negatief contractbelang / intérêt contractuel négatif*). In contrast, costs which would have been incurred regardless of the negotiations do not have to be reimbursed. Exceptionally, if a party created legitimate expectations that a contract would undoubtedly be concluded, it may have to indemnify the victim for the net advantages expected from the contract (*positief contractbelang / intérêt contractuel positif*). Finally, legislative preparatory works indicate that the parties have no generally applicable duty of transparency (*informatieplichten / devoirs d'information*), except if required by law or good faith. In this respect, the Book on Obligations provides that the violation of a party's duty of transparency in pre-contractual negotiations may constitute a defect of consent (*wilsgebrek / vice de consentement*) which can lead to the invalidation of the resulting contract.

Abuse of Circumstances

Second, the Book on Obligations codifies the notion of "abuse of circumstances" (*misbruik van omstandigheden / abus de circonstances*), which was developed by the case law and is also known as "qualified injury" (*gekwalificeerde benadeling / lésion qualifiée*). This concept refers to a situation in which a contract creates a manifest lack of balance between the obligations of the parties because of the abuse by one party of its own position of strength or of the other party's position of weakness. In this respect, the legislative preparatory works offer the, somewhat extreme, example of a mother escaping a house on fire, and therefore in a deep state of shock, being induced to sign a contract by the expert mandated by her insurance company. The sanction of abuse of circumstances depends on whether the abuse was decisive for the conclusion of the contract. If the abuse of circumstances was decisive, a judge may invalidate the contract. By contrast, if the abuse of circumstances was not decisive, the powers of the judge will be limited to adapting the obligation which the protected party promised to perform.

Change in Circumstances

Third, the Book on Obligations codifies the notion of "change in circumstances" (*verandering van omstandigheden / changement de circonstances*), which was also developed by the case law under the theory of unpredictability (*imprevisieleer / théorie de l'imprévision*).

Change in circumstances should be distinguished from abuse of circumstances, in that it refers to a situation in which a lack of balance between the obligations of the parties did not exist when the contract was concluded but arose later due to circumstances outside of the parties' control. In principle, each party must perform its obligations, even if such performance has become more onerous, either because the cost of performing the obligation increased or because the value of the consideration decreased. Nonetheless, the debtor may request the re-negotiation of the contract with a view to adapting or terminating it if the following cumulative conditions are satisfied: (i) a change in circumstances makes the performance of an obligation excessively burdensome, so that it cannot reasonably be demanded; (ii) this change could not be predicted when the contract was concluded; (iii) the change cannot be ascribed to the debtor; (iv) the debtor did not assume this risk; and (v) neither the law, nor the

contract excludes this possibility. It is specified that the parties must continue to perform their obligations for the duration of the re-negotiations. If the parties fail to re-negotiate the terms and conditions of their contract within a reasonable time, either party can initiate injunctive relief proceedings (*kort geding / référé*) and request a court to adapt the contract to what the parties could reasonably have agreed to, had they taken account of the change in circumstances. Alternatively, either party can claim termination of the contract, either in whole or in part, at the earliest when the change in circumstances occurred and under conditions to be determined by the courts.

Termination for Breach of Contract

Fourth, the Book on Obligations attempts to clarify the legal regime which applies to termination for breaches of contract. In doing so, it codifies existing means for a creditor (*schuldeiser / créancier*) to terminate a contract, i.e., judicial termination (*gerechtelijke ontbinding / résolution judiciaire*) and termination clauses (*ontbindende bedingen / clauses résolutoires*) which allow a creditor to terminate the contract by way of a simple notification to the debtor. However, it also codifies a new means for a creditor to terminate a contract out of court and in the absence or inapplicability of a termination clause. This means of termination, known as termination by declaration (*ontbinding door verklaring / résolution par déclaration*), has only been explicitly validated by the Supreme Court (*Hof van Cassatie / Cour de cassation*) in 2019. After having taken the necessary measures to establish the debtor's breaches, including by way of a notice letter, a creditor may at its own peril unilaterally terminate a contract by simple notification to the debtor listing all such breaches. A contract may only be terminated by declaration if the debtor committed sufficiently serious breaches that justify termination. The debtor may challenge the termination by declaration in court, which may review the regularity and legitimacy of the termination based on the list of breaches, and as a result either confirm the creditor's decision or reject it and sanction the creditor.

Price Reduction

Fifth, the Book on Obligations introduces the reduction of the price as a sanction for a breach of contract which is not sufficiently serious to justify termination. While this possibility is already offered by the Vienna Convention on the International Sale of Goods, the Napoleonic Civil Code does not contain any generally applicable provision allowing a creditor to claim or apply a reduction of the price when the debtor only performed part of its obligation. A creditor may claim reduction of the price in court or apply it by way of a written notification to the debtor which indicates the cause of reduction. Reduction of the price is not aimed at indemnifying harm. Rather, it is meant to re-instate a balance between the obligations of the parties by reducing the price in proportion with the difference between the obligation as foreseen by the contract and the actual performance of the obligation. As a result, the creditor who obtains a reduction of the price may not claim damages for any harm caused by the debtor's partial performance. However, the creditor may still claim damages for other causes of harm.

The Book on Obligations will enter into force on the first day of the eighteenth month following its publication in the Belgian Official Journal and will apply to legal acts and facts that occur after its entry into force.

Book 8 of the New Civil Code on Evidence (*Bewijs / La preuve*) was adopted on 4 April 2019 and entered into force on 1 November 2020 (*See*, this Newsletter, Volume 2018, No. 11, p. 19 and this Newsletter, Volume 2019, No. 4, p. 15). Book 3 of the New Civil Code on Property Law (*Goederen / Les biens*) was adopted on 4 February 2020 and will enter into force on 1 September 2021 (*See*, this Newsletter, Volume 2020, No. 3, p. 3).

Minister for Economy Announces Plan for Circular Economy

At a meeting of 3 February 2021, the federal Chamber of Representatives' Committee for the Economy, Consumer Protection, and the Digital Agenda (*Commissie voor Economie, Consumentenbescherming en Digitale Agenda / Commission de l'Économie, de la Protection des consommateurs et de l'Agenda numérique*) addressed the issue of built-in obsolescence. "Built-in obsolescence" refers to a series of techniques that allow a manufacturer to reduce the lifetime of a product deliberately to accelerate its replacement.

In response to questions raised by two members of parliament of Socialist and Green parties, Minister for the Economy and Labour Pierre-Yves Dermagne (the ***Minister***)

announced that he would present an action plan for the circular economy (the ***Action Plan***) in the coming weeks. He would do so in cooperation with the Minister for the Climate, the Environment, Sustainable Development and the Green Deal, the Central Council for the Economy (*Centrale Raad voor het Bedrijfsleven / Conseil central de l'économie*) and the Federal Council for Sustainable Development (*Federale Raad voor Duurzame Ontwikkeling / Conseil fédéral pour le développement durable*).

The Minister noted that the Action Plan may draw inspiration from France, which recently established a so-called "repair score" for products, which indicates the extent to which a product may be repaired. If such a tool proves efficient, it may be combined with increased transparency obligations with respect to the lifetime of a product and the availability of spare parts. These different points of information on a product could be gathered in a so-called "product passport" to help consumers have their products repaired.

The idea of a product passport already forms part of a Private Member's Bill to combat built-in obsolescence and to support the repair economy (see also, here) (*Wetsvoorstel 55K0193 om geprogrammeerde veroudering tegen te gaan en de repaireconomie te steunen / Proposition de loi 55K0193 visant à lutter contre l'obsolescence programmée et à soutenir l'économie de la réparation* – the ***Bill***) which was submitted to the federal Chamber of Representatives in 2019. According to the Bill, the product passport would provide information regarding the possibilities of repair and the availability of spare parts, and would be made available via an online database or be displayed on the product packaging. Additionally, the Bill modifies Article 1649quater of the Civil Code to extend the duration of the statutory warranty from two to five years. It also empowers the federal government to oblige manufacturers and importers to provide the spare parts required for the repair of their products upon the request of professional sellers and repairers – whether authorised or not – within a certain delivery time and at a reasonable price. Finally, it introduces built-in obsolescence as a misleading commercial practice subject to sanctions.

The Bill is still pending.

COMPETITION LAW

Draft Bill to Exclude Clinical Networking between Hospitals from Application of Merger Control

On 25 February 2021, the federal government submitted to the federal Chamber of Representatives a draft bill modifying the consolidated Law of 10 July 2008 regarding hospitals and other institutions of care (the ***Law***), as regards the application of the merger control rules to clinical networking between hospitals (*Wetsontwerp tot wijziging van de gecoördineerde wet van 10 juli 2008 op de ziekenhuizen en andere verzorgingsinrichtingen, wat de toepassing van de voorafgaande controle op concentraties van de klinische networking tussen ziekenhuizen betreft / Projet de loi modifiant la loi coordonnée du 10 juillet 2008 sur les hôpitaux et autres établissements de soins, en ce qui concerne l'application du contrôle préalable des concentrations pour le réseautage clinique entre hôpitaux*; the ***Draft Bill***).

The Draft Bill seeks to exclude the constitution of local hospital networks (*locoregionaal ziekenhuisnetwerk / réseau hospitalier locorégional*) and any subsequent change in their composition from the application of the Belgian merger control rules by the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* - the ***BCA***).

The Law was amended on 28 February 2019 to require that each Belgian hospital should form part of a local hospital network as from 1 January 2020. Following this amendment, the BCA published a note on 22 July 2020 explaining that the creation of such networks may give rise to concentrations that must be notified to the BCA under the Belgian merger control rules, depending on whether there is a change of control on a lasting basis over at least some of the hospitals involved in the transactions and whether the Belgian notification thresholds are reached (*See*, this Newsletter, Volume 2020, No. 7, p. 4).

In response to this note, the Draft Bill seeks to exclude the creation of local hospital networks from the application of the Belgian merger control rules. The explanatory statement (*memorie van toelichting / exposé des motifs*) of the Draft Bill stresses the importance of hospital networks in the provision of quality, efficient, accessible, and affordable care. The government also considers that such hospital networks have a limited impact on competition, due to the heavy regulatory framework applicable to the hospital sector, the service that hospitals provide to the community using mostly public funds, the not-for-profit nature of most hospitals, and the mission of general interest entrusted to hospitals by the Law. According to the government, the application of merger control rules would "significantly delay the implementation of this reform and freeze its rapid implementation, considering the obligation contained in Article IV.10, § 4, of the Code of Economic Law" to wait for the BCA's approval before implementing a notifiable transaction.

The exclusion of Belgian hospital networks from the scope of the Belgian merger control rules does not prevent the possible application of the European merger control rules, should the EU notification thresholds be exceeded.

If adopted, the Draft Bill will enter into force with retroactive effect on 28 February 2019, i.e., the date of the amendment to the Law. The government thus wants to ensure that hospital local networks are excluded from the scope of Belgian merger control rules before the obligation on hospitals to join a local hospital network started applying on 1 January 2020.

The Draft Bill can be consulted on the website of the federal Chamber of Representatives (in Dutch and in French).

CORPORATE LAW

Court of Justice of European Union Confirms Joint Liability of Financial Investors for Competition Law Infringements of Indirect Subsidiaries by Virtue of Decisive Influence through Control of 100% of Voting Rights

On 27 January 2021, the Court of Justice of the European Union (the ***CJEU***) dismissed in its entirety an appeal by the Goldman Sachs Group (***Goldman Sachs***) against a General Court judgment upholding a European Commission decision finding Goldman Sachs jointly and severally liable for the conduct of its subsidiary, Prysmian SpA (***Prysmian***), in the 2014 *Power Cables* cartel case.

Background

Between 29 July 2005 and 28 January 2009, Goldman Sachs was the indirect parent company of Prysmian, through its subsidiary GS Capital Partners V Funds (***GSCPVF***) and various other intermediate companies. Although GSCPVF's shareholding in Prysmian was initially 100%, this decreased following two divestments made in September 2005 and July 2006, initially to 91.1% and then to 84.4%. As of the end of 2007, GSCPVF's shareholding further decreased to 31.69%.

On 2 April 2014, the Commission found that – during the period from 29 July 2005 to 28 January 2009 – Prysmian and several other undertakings participated in a single and continuous infringement of Article 101 TFEU. The Commission imposed a fine of EUR 104.6 million on Prysmian. Goldman Sachs was also fined EUR 37.3 million after it was held jointly and severally liable for the conduct of its subsidiary by virtue of its decisive influence over Prysmian, in particular because of (i) the level of its shareholding; and (ii) various factors demonstrating economic, organisational, and legal links between the two companies.

Action before General Court

In its action before the General Court, Goldman Sachs contended that the Commission had (i) improperly applied the presumption of actual exercise of decisive influence; and (ii) incorrectly considered that it had, in fact, exercised decisive influence over Prysmian by failing to consider Goldman Sachs exempt from parental liability as a "*pure financial investor*" (i.e., an investor which holds shares in a company in order to make a profit, while refraining from any involvement in the target company's management and control).

The General Court disagreed, affirming (i) the Commission's application of the presumption of the actual exercise of decisive influence to Goldman Sachs' ownership of all voting rights in Prysmian; and (ii) the Commission's finding that Goldman Sachs exercised decisive influence over Prysmian for the entire period during which it owned shares in the company. Goldman Sachs subsequently appealed to the CJEU.

Appeal to CJEU

In its judgment of 27 January 2021, the CJEU held that there is a rebuttable presumption that a parent company holding all of the voting rights associated with a subsidiary's shares is able to exercise decisive influence over the conduct of that subsidiary, irrespective of whether the parent owns all of the share capital.

In addition, the CJEU endorsed the factors considered by the General Court in finding that GSCPVF held decisive influence over Prysmian. Among the relevant elements in respect of the entire infringement period, the General Court examined GSCPVF's powers (i) to appoint members of the various boards of directors of Prysmian; (ii) to call shareholders' meetings; and (iii) to propose the removal of directors or the entire board of directors.

Further, the CJEU found that the General Court had sufficiently identified the existence and relevance of links between GSCPVF and the members of Prysmian's board of directors (and could therefore regard such links to be one of the elements on which the Commission could rely to demonstrate GSCPVF's decisive influence over Prysmian's market conduct). In this regard, the CJEU confirmed that the existence of an economic entity formed by the parent

and its subsidiary can be demonstrated not only by a formal relationship, but also by informal relationships (such as personal links between the legal entities comprising the relevant economic unit).

Comment

The CJEU's judgment both underlines and supports the particularly expansive approach that the Commission can sometimes adopt in respect of financial investors' parental liability for the conduct of their portfolio companies. Nonetheless, it remains to be seen whether this will prompt the Commission to include more financial investors within the scope of its future fining decisions relating to conduct committed by portfolio companies.

For any financial investor holding all of the voting rights associated with a portfolio company's shares, as a result of this judgment, it will now be very difficult to successfully rebut the presumption of decisive influence and escape parental liability for anticompetitive conduct perpetrated by such a portfolio company.

In this context, the CJEU's judgment is a timely reminder that all financial investors – including in particular private equity companies with wide-ranging portfolios – should take careful steps to mitigate the antitrust risk of their investments (including, for example, by conducting rigorous due diligence processes to detect potential competition law infringements, and by ensuring that transaction agreements contain robust indemnity language in this regard).

DATA PROTECTION

'Pink Boxes' for Future Parents Give Rise to Fine by Belgian Data Protection Authority

On 27 January 2021, the Litigation Chamber (*Geschillenkamer/Chambre Contentieuse* – the ***Litigation Chamber***) of the Belgian Data Protection Authority (*Gegevensbeschermingsautoriteit/Autorité de protection des données* – the ***DPA***) imposed a fine of EUR 50,000 on the marketing company Family Service, which distributes "pink boxes" – well known by soon-to-be mothers and fathers in Belgium – on account of various breaches of the General Data Protection Regulation (***GDPR***).

Family Service's "pink boxes" contain sponsored gifts such as samples, special offers and information leaflets and are distributed to new mothers and fathers. The boxes are distributed via gynaecologists and hospitals.

In its decision, the Litigation Chamber found that Family Service had rented out and/or sold the personal data of more than one million customers, including the data of children, for commercial purposes without informing its customers in a clear and comprehensible manner, as required by the GDPR. In particular, since the boxes were distributed through healthcare practitioners, Family Service should have informed its customers about this practice to avoid recipients being led to believe that the initiative came from the government. Moreover, customer data was not only passed on to providers of services related to young children, but also to other types of business partners such as data brokers. This lack of information resulted in a concrete risk for the customers, who lost control over their data and were confronted with an unanticipated processing of their personal data by third parties for purposes that had not been defined.

Furthermore, the Litigation Chamber also noted that Family Service transferred the personal data to its business partners without obtaining valid consent from the data subjects, let alone "informed" consent. The Litigation Chamber considered that, in any event, consent could not be free because customers who did not give consent would necessarily lose the benefits associated with receiving the pink box (such as, for example, the information leaflets which it contained). Instead, the customer's consent to receive the benefits of the pink box automatically resulted in their consenting to at least a form of data sharing for the purposes of direct marketing, while consent should be specific, *i.e.,* a customer must have the option of giving (or withholding) its consent for each data processing purpose separately.

A fine of EUR 50,000 is relatively high given the size of the company. However, in calculating the fine, the Litigation Chamber considered: (i) the high number of data subjects involved (21.10 % of the Belgian population); (ii) the severity of the violation; and (iii) the nature of the data processed, which includes children's data. The Litigation Chamber also ordered Family Service to bring its activities in line with the decision.

According to the DPA, the fine serves as a warning to data brokers that have activities like Family Service, with business models that might be inherently non-compliant with the GDPR. An incomplete and misleading presentation of how data will be used is in breach of Belgian and European data protection rules. The DPA added that the company in question was aware of the rules concerning direct marketing, or should have been aware of them, given that the DPA published an extensive recommendation on direct marketing last year. (Our note on the DPA's direct marketing recommendations can be found here).

The DPA's decision is currently only available in Dutch here.

European Commission Assessment of Member State Rules on Health Data in Light of GDPR

On 12 February 2021, the European Commission's Directorate-General for Health and Food Safety (the ***Commission***) published an assessment of the EU Member State rules governing health data in the light of the General Data Protection Regulation (EU) 2016/679 (***GDPR***). The study's objective was to examine possible differences between Member States and identify elements that might affect the cross-border exchange of health data in the EU for the purposes of healthcare, research, innovation, and policy-making. The European Commission concluded that the

existing fragmented approach of national rules governing health data between Member States hampers cross-border co-operation in the provision of healthcare, the administration of healthcare systems and research carried out to further public health objectives.

Variations in National Law Linked to Implementation in Health Area

The study discussed the use of health data for primary purposes (patient care) and for secondary use in public health and for scientific or historical purposes. For each of these uses, the study analyses the legal bases for processing the data under the GDPR and inquires whether local legislation provides for alternatives to the use of consent as a legal basis.

The Commission thus found that various legal bases are available under national law to provide patient care. By contrast, newer forms of patient care, such as those involving apps and specific devices, usually rely on the patient's consent.

The Commission observed differences in the implementation of the GDPR in the health area. The resulting fragmented approach can have a negative impact on cross-border co-operation for the provision of care, healthcare system administration, public health, and research. The study showed that the implementation of the law is complex for researchers at national level, while patients do not always find it easy to exercise the rights granted to them by the GDPR. In this regard, the evidence gathered through the study demonstrated strong interest in the prospect of a European Health Data Space that would allow access to health data under a sound level of legal and operational governance and would support the free movement of digital health services. The study highlighted the need for operational governance and widespread implementation of technical standards to ensure data interoperability and build trust in data governance amongst EU citizens.

With its study, the European Commission also included an overview of "Country Fiches", discussing, for each Member State, the relevant legal framework for the subjects discussed in the study as well as the practical regulation of health records and technical standards.

Potential Actions at EU Level

In response to the challenges identified, the study suggested actions at EU level to support the European Health Data Space and ensure the best possible use of health data. These include:

- Stakeholder-driven Codes of Conduct;
- New sector-specific EU level legislation;
- Non-legislative measures, including guidance and policy actions; and
- Practical Measures to support a European Health Data Space.

As a strong tool to support the use and re-use of trusted health data, the Commission advocated establishing a Code of Conduct governing the use of health-related data at EU level. However, this could involve quite a lengthy path from initial idea to final adoption through an EU level implementing act.

The study also favoured an additional international assessment of the EU Member State rules on health data in the light of the GDPR to seek legal interoperability across countries and regions, both within and outside the EU. According to the Commission, the GDPR, rather than other weaker data protection laws, should be the basis for this exercise.

The Code of Conduct could be given legal status through a legally binding act that enables the Commission to set conditions that ensure the uniform application of EU rules. Other legal instruments could harmonise health data processing, address data governance principles, and promote the responsible use of health data and health data accessibility.

As regards non-legislative measures, the study highlighted the need for harmonised digital skills and capacity-building for primary and secondary use of health data. Patients should act as active agents in both their health and their care and have the maximum ability to exercise their health data related rights. These factors could be regarded as pillars of trust necessary to enhance the development of a European Health Data Space. In this regard, the study

addressed the legal framework for patient care, data subjects' rights, and data governance strategies, including the promotion of "data altruism". This phrase involves making data available without reward for purely non-commercial usage that benefits communities or society, such as the use of mobility data to improve local transport.

Furthermore, the study showed that co-operation between the EU Member States is crucial. Such cooperation should draw on the work of national data protection authorities that come together as the European Data Protection Board, as well as on the numerous national and EU level bodies that represent patients, patients of specific disease groups, healthcare professionals, researchers, and industry. The COVID-19 pandemic has fostered the willingness for such co-operation and provides many new models for rapid, responsive, and impactful action.

A copy of the study can be consulted here. The annex containing "Country Fiches" with an overview of Member States' rules on health data in the light of the GDPR can be found here.

European Data Protection Supervisor Comments on Digital Services and Digital Markets Acts

On 10 February 2021, the European Data Protection Supervisor (***EDPS***) published an opinion on (i) the European Commission's proposal for a Digital Services Act (***DSA Opinion***); and on (ii) the European Commission's proposal for a Digital Markets Act (***DMA Opinion***).

The Commission's DSA and DMA proposals are measures that form part of the Commission's 2020-2025 European data strategy (Our note on the European data strategy can be found here). These proposals have two main objectives: (i) to create a safe digital space in which all users of digital services' fundamental rights are protected; and (ii) to establish a level playing field to foster innovation, growth, and competitiveness in the European single market and beyond. In this regard, both EDPS Opinions aim to help the EU legislators shape a digital future rooted in EU values, including a firm protection of individuals' fundamental rights, such as the right to data protection.

DSA Opinion

The proposed DSA covers new rules and responsibilities for online intermediary service providers, including hosting services, online platforms, and network infrastructures. The EU Member States will have the leading role in overseeing the DSA and must appoint a digital services coordinator, *i.e.*, an independent authority designated to supervise the compliance of online platforms established in that Member State.

Overall, the EDPS welcomes the DSA proposal and supports the Commission's aim to promote a transparent and safe online environment, by defining responsibilities and accountability for intermediary services. Furthermore, the EDPS is in favour of the DSA proposal seeking to complement rather than replace existing forms of protection under the General Data Protection Regulation (EU) 2016/679 (***GDPR***). In this regard, the EDPS emphasises that the proposal will clearly have an impact on the processing of personal data and considers it necessary to ensure complementarity in the supervision and oversight of online platforms and other providers of hosting services.

The EDPS' key recommendations to increase the protection afforded by the DSA proposal to individuals, especially concerning content moderation and online targeting, are as follows:

- Activities undertaken by providers of intermediary services aimed at "*detecting, identifying and addressing illegal content or information incompatible with their terms and conditions*", also known as "content moderation", should take place in accordance with the rule of law. Content moderation can – but does not necessarily – involve the processing of personal data in ways that affect the rights and interests of the individuals concerned. The EDPS underlines that, depending on the categories of data that are processed and the nature of the processing, automated content moderation may significantly impact both the right to freedom of expression and the right to data protection. The EDPS therefore recommends specifying that content moderation cannot involve the monitoring or profiling of the behaviour of individuals, unless the online ser-

vice provider can demonstrate, on the basis of a risk assessment, that this is strictly necessary to cover systematic risks explicitly identified by the DSA. Furthermore, the EDPS requests the EU legislators to define the information that must be notified to individuals, especially when using automated means for content moderation.

- Regarding the multitude of risks associated with online targeted advertising, the EDPS urges the legislators to consider additional rules going beyond transparency. Such measures should include a phase-out leading to a prohibition of targeted advertising on the basis of pervasive tracking. Complementary to that, the EDPS invites the legislators to consider further restrictions in relation to (i) the categories of data that can be processed for targeting purposes; (ii) categories of data or criteria on the basis of which ads may be targeted or served; and (iii) the categories of data that may be disclosed to advertisers or third parties to enable or facilitate targeted advertising.

- A "recommender system", defined as "*a fully or partially automated system used by an online platform to suggest in its online interface specific information to recipients of the service, including as a result of a search initiated by the recipient or otherwise determining the relative order or prominence of information displayed*", should by default not be based on profiling. Furthermore, to improve transparency and user control, information concerning the role and functioning of recommender systems should be presented separately, in a manner easily accessible and clear for average users. Users should also have an easily accessible option to delete any profile or profiles used to curate the content which they see.

To enhance platform interoperability, the EDPS suggests drawing up technical standards for interoperability at European level which should be supported by very large online platforms. Such technical standards should comply with European data protection law, not lower the level of security provided by platforms, and not hinder innovation due to an overly detailed interoperability standard.

Finally, the EDPS welcomes the recognition of the cross-sectoral relevance of the aspects regulated in the DSA proposal, including in relation to the protection of personal data processing. However, the EDPS considers it necessary to ensure complementarity in the oversight of online platforms and other providers of hosting services. In this regard, the EDPS recommends that the proposal (i) provide for a clear legal basis for cooperation among the relevant authorities, each acting within their respective areas of competence; (ii) require an institutionalised and structured cooperation between the competent oversight authorities, including data protection authorities; and (iii) make explicit reference to the competent authorities that are involved in the cooperation and identify the circumstances in which cooperation should take place.

DMA Opinion

The proposed DMA contains new rules for gatekeepers in the digital sector. "Gatekeepers" are large digital platforms with significant network effects. Such gatekeepers are said to be entrenched in digital markets, leading to significant dependencies of many business users and negative effects on the contestability of the core platform services concerned. In certain cases, the dependencies lead to unfair behaviour *vis-à-vis* these business users. Gatekeepers can be search engines, social network platforms, messaging services, operating systems, or online intermediation services. The proposed DMA aims to prevent them from imposing unfair conditions on businesses and consumers and to ensure the provision of critical digital services. The Commission will have the power to conduct market investigations to ensure compliance with the DMA and a finding of infringement can result in sanctions.

From a data protection perspective, the DMA calls on gatekeepers to refrain from engaging in unfair behaviour, for instance by using data obtained from business users to compete with them and blocking users from uninstalling any pre-installed software or application.

The EDPS welcomes the DMA proposal and stresses the importance of giving users more control over their data to strengthen contestability in digital markets. The EDPS also emphasises the importance of increased interoperability to address user lock-in and create opportunities for innovating services and offering better data protection.

The key recommendations of the DMA Opinion are as follows: (i) the DMA should truly complement the GDPR; (ii) gatekeepers must provide end-users with an easy-to-use

and accessible solution for consent management; and (iii) the scope of the data portability obligation envisioned in the proposed DMA must be clarified.

Moreover, the EDPS advocates more attention for anonymisation and re-identification tests when sharing query, click and view data concerning free and paid searches generated by end-users on gatekeepers' online search engines. Minimum interoperability requirements for gatekeepers should be introduced to promote the development of technical standards at the EU level.

Finally, the EDPS calls for establishing an institutionalised and structured cooperation between the relevant competent oversight authorities, including national data protection authorities. This cooperation should ensure that all relevant information can be exchanged with the relevant authorities to fulfil their complementary role while acting in accordance with their respective institutional mandate.

The DSA Opinion can be consulted here and the DMA Opinion can be consulted here.

European Commission Publishes Draft UK Adequacy Decision

On 19 February 2021, the European Commission (the ***Commission***) published a draft decision on the adequate protection of personal data by the United Kingdom (the ***Draft Adequacy Decision***). The adequacy decision would significantly facilitate transfers of personal data from the EU to the UK after the current transition period.

Over the past few months, the Commission has assessed the UK's law and practice on personal data protection, including the UK rules on access to data by public authorities. On this basis, the Commission is of the opinion that the UK ensures an essentially equivalent level of data protection to that guaranteed under the General Data Protection Regulation (EU) 2016/679 (***GDPR***).

The Draft Adequacy Decision is a new step to ensure a continued transfer of personal data to and from the UK. Following Brexit, the EU and the UK reached an agreement in principle on the EU-UK Trade and Cooperation Agreement on 24 December 2020. This agreement provided for a further transition period of up to 6 months to enable the European Commission to complete its adequacy assessment of the UK's data protection laws. During this transition period, personal data can continue to be transferred from the EU to the UK without any need for additional safeguards such as standard contractual clauses, binding corporate rules or codes of conduct. The transition period expires on 30 June 2021.

The publication of the Draft Adequacy Decision is only the beginning of the process towards its adoption. The Commission still requires an opinion from the European Data Protection Board and the green light from a committee composed of representatives of the EU Member States. Once adopted, the Draft Adequacy Decision will be valid for a first period of four years, but a renewal will be possible if the level of data protection in the UK will continue to be judged to be adequate.

The Draft Adequacy Decision is available here.

Belgian Data Protection Authority Adopts Recommendations on Data Cleansing and Data Support Destruction Techniques

On 27 January 2021, the Belgian Data Protection Authority (*Gegevensbeschermingsautoriteit/Autorité de protection des données* – the ***DPA***) published recommendations for data controllers concerning the legal, technical, and organisational aspects of data cleansing and data media destruction (the ***Recommendations***). The Recommendations provide comprehensive guidance for data controllers to prevent the unauthorised disclosure of stored data and thus ensure compliance with the General Data Protection Regulation (the ***GDPR***). In particular, the techniques referred to in the Recommendations can either render access to data stored on a specific device impossible (***cleansing techniques***) or result in the destruction of the device on which data is stored (***destruction techniques***).

The Recommendations present a range of existing cleansing techniques such as rewriting, degaussing or cryptographic erasure which can be used for different types of media (*e.g.*, hard disk drive, solid-state drive, mobile phones, SD cards, paper). The Recommendations also give examples of reliable software that can be used for the purpose of data cleansing.

Furthermore, the Recommendations discuss situations in which destruction techniques should be favoured over cleansing techniques. For instance, if the device used to store data is defective, if the type of device makes data cleansing impossible (*e.g.*, non-rewritable CD-ROM) or if the first stage of data cleansing was not effective. The Recommendations furthermore provide guidance on the use of techniques such as deformation (*e.g.*, bending, cutting, or puncturing), shredding, crushing, disintegration, or complete destruction of the device (*e.g.*, incineration), depending on the type of media used to store data.

If data controllers are unable to take care of the data cleansing or the data device destruction themselves, controllers must ensure that the processor agreement provides for the possibility to erase data or destroy media as well as the possibility for data controllers to verify that these techniques were implemented.

Finally, the Recommendations include a table with an overview of the recommended cleansing and destruction techniques, depending on the device at issue, to achieve an appropriate level of confidentiality.

The Recommendations can be consulted in Dutch (here) and in French (here).

Constitutional Court Validates Digital Fingerprints on Identity Cards

On 14 January 2021, the Constitutional Court (the ***Court***) validated the Law of 25 November 2018 on miscellaneous provisions concerning the national register and population registers (*Wet van 25 november 2018 houdende diverse bepalingen met betrekking tot het Rijksregister en de bevolkingsregisters/Loi du 25 novembre 2018 portant des dispositions diverses concernant le registre national et les registres de population* - the ***Law***). The Law requires fingerprints to be included on Belgian e-identity cards. According to the Court, the Law does not violate the right to privacy and data protection rules, including the General Data Protection Regulation (***GDPR***).

Factual Background and Procedure

Article 27 of the Law of 25 November 2018 provides that (two) fingerprints should be taken and incorporated on Belgian e-identity cards. The fingerprints will only be visible digitally. At EU level, Regulation (EU) 2019/1157 on strengthening the security of identity cards of Union citizens and of residence documents issued to Union citizens and their family members exercising their right of free movement (***Regulation 2019/1157***) includes a similar requirement. The Law was challenged before the Constitutional Court for its compliance with the fundamental right to privacy and protection of personal data.

Court's Analysis

The Court started its assessment by observing that the fundamental right to privacy is not absolute. State interference with this right is possible if there is a sufficiently specific legal provision, if there is a pressing social need in a democratic society, and if the interference is proportionate to the legitimate aim pursued.

The Court then analysed how the taking of fingerprints and their storage on the identity cards interfered with fundamental rights. The Court explained that the legal basis is sufficiently clear. Furthermore, the rule pursues a legitimate aim of preventing identity fraud and other related crimes such as human trafficking. The Court also considered the purposes referred to in Regulation 2019/1157 such as the free movement of citizens and the need to reduce the risk of identity fraud. The Court referred to the case Schwarz v Stadt (C-291/12), in which the Court of Justice of the European Union (***CJEU***) held that a Regulation imposing fingerprints on passports pursues general interests that are recognised by the EU. On proportionality, the Court considered that there is no central register containing the fingerprints and that there is a procedure establishing retention periods after which the images will be destroyed. As a result, the Court held that the storage of fingerprints on identity cards passed the proportionality test.

The Court went on to analyse the centralised storage of the digitised image of the fingerprints to manufacture the identity cards. The Court found the proportionality test to be met here as well since it is necessary for security and data integrity to centralise the administration and place of issuance of identity cards. Furthermore, the central storage of images is temporary, *i.e.*, for a maximum of three months.

The Court then considered the argument put forward against the reading of the digitised image of the fingerprints. The Court emphasised, based on the preparatory

works of the Law, that the fingerprints can only be read by authorities whose tasks are determined by law. The authorities can only read the data and not record or store it. Additionally, the Court justified reading the digital fingerprints by the main purpose for which the fingerprints are included in the identity card, *i.e.*, verification of the authenticity of the identity card and the identity of the holder.

Consequently, the Court dismissed all grounds against the Law and validated the measures introduced by the Law of 25 November 2018.

The Court's judgment can be found here (in Dutch) and here (in French).

ENERGY

Constitutional Court Dismisses Request to Suspend Validation Decree Temporarily Safeguarding Flemish Sectoral Environmental Conditions Governing Wind Turbines

On 25 February 2021, the Constitutional Court (the ***Court***) dismissed a request for suspension introduced against the validation decree of 17 July 2020, thus temporarily safeguarding the application of the Flemish sectoral environmental conditions governing wind turbines (the ***Decree***).

Judgment of Court of Justice of European Union of 25 June 2020 and Decree

On 25 June 2020, the Court of Justice of the European Union (the ***CJEU***) held that the Flemish sectoral environmental conditions governing wind turbines (the ***Flemish Provisions***) violate Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment (the ***Strategic Environmental Assessment Directive*** or ***SEA Directive***), on the ground that a planning permit (*stedenbouwkundige vergunning / permis d'urbanisme*) for the installation and operation of wind turbines had not been subject to a prior environmental assessment (*See*, this Newsletter, Volume 2020, No. 6, p. 14).

Since, absent correcting legislation, the judgment would have far-reaching immediate consequences for existing and future wind turbine projects in the Flemish region, the Flemish Parliament decided to adopt the Decree. The Decree entered into force on 24 July 2020 and confirmed the validity of the Flemish Provisions until 24 July 2023 (*See*, this Newsletter, Volume 2020, No. 7, p. 14).

Court judgment of 25 February 2021

Following the adoption of the Decree, several parties, including residents and companies living or established in the proximity of a pending wind turbine project, an environmental action group and the municipality of Aalter, filed a request for annulment and a request for suspension of the Decree before the Constitutional Court (the ***Court***).

In its judgment of 25 February 2021 (the ***Judgment***), the Court confirmed the requirement of the Flemish regulatory framework governing wind turbines to be in conformity with EU law in accordance with the findings of the CJEU. However, the Court added that the applicants had failed to put forward serious grounds for annulment and dismissed the request for suspension of the Decree. The Court confirmed that the Decree, having a temporary and limited scope of application, is the "ultimate remedy" to eliminate the adverse consequences which the judgment of the CJEU would have for existing and future wind turbine projects in the Flemish region, absent correcting legislation. In its reasoning, the Court also considered the targets set for renewable energy in the Flemish region (against the backdrop of the targets defined at EU level) and the security of electricity supply. Given the dismissal of the request for suspension, it is likely that the Court will also reject the request for annulment of the Decree.

At the same time, the Court confirmed that interested parties still have the possibility to bring an action for damages to compensate for the injury which they may incur as a result of the approval of a wind turbine project in the absence of a prior environmental assessment. In addition, the Court stressed that new wind turbine projects are still open to challenge before the Council of State (*Raad van State / Conseil d'Etat*).

INTELLECTUAL PROPERTY

AG Szpunar Offers View on Possible Limitations Put by Database Rights on Activities of Search Engines

On 14 January 2021, Advocate General (***AG***) Szpunar delivered his opinion in Case C-762/19 *SIA 'CV-Online Latvia' v SIA Melons*. The Opinion assesses whether search engines infringe the *sui generis* right of protection of a database under Directive 96/9 of 11 March 1996 on the legal protection of databases (the ***Database Directive***). The *sui generis* right protects the maker of a database who made a qualitatively and/or quantitatively substantial investment in the obtaining, verification, or presentation of the contents of the database.

Factual Background and Procedure

SIA CV Online Latvia (***CV-Online***), a Latvian Company, operates a website containing a regularly updated database of job notices published by employers. The database uses meta tags, making it easier for search engines to identify and index the contents of each page. SIA Melons (***Melons***), another Latvian company, operates a search engine specialising in notices of employment. In its search results, this search engine refers to the websites on which the information sought was initially published by way of hyperlinks. For its searches, Melons also showed results contained in CV Online's website. CV Online sued Melon for extracting and re-using a substantial part of the contents of its database and thus infringing its *sui generis* database right.

AG's Opinion

The AG forms his opinion on the basis of the judgment given by the Court of Justice of the European Union (***CJEU***) in case C-202/12 *Innoweb BV v. Wegener ICT Media BV*. In that judgment, the CJEU identified three criteria for establishing an infringement: (i) a search form that offers the same characteristics as the search forms of the database that are reutilised; (ii) the real-time translation of queries from users; and (iii) the presentation of the results in an order similar to the presentation used by the database.

In the case at hand, the specialist search engine indexes the databases and keeps a copy on its servers, and then allows the user to access the indexed data through its own search form. The AG pointed to the similarity with the *Innoweb* case to the extent that the respective search engines in both cases allow exploring the content of databases and reutilising such content. Moreover, the AG noted that the act of indexing and copying content to one's own servers amounts to extracting the contents of the targeted database. Under Article 7 of the Database Directive, the maker of the Database can prevent such an extraction, if the alleged infringer reutilises the whole or a substantial part of the contents of that database.

The AG is of the opinion that the *sui generis* right for the database producer under Article 7 of the Database Directive is intended to protect investment in the creation of database. By contrast, the AG expresses the view that such a right should not be liable to create a monopoly on information. As a result, the damage caused must be considered in the light of the investment made by the database owner when creating the database. In making this assessment, the national court should consider whether the extraction and reutilisation prevent the database owner from recouping his investment by jeopardising the revenues resulting from the database's exploitation. The AG adds that there is a balance to be struck with the protection offered by the Database Directive and the law on unfair competition.

On this basis, the AG suggests that if the national court finds that Melon's search engine does not adversely affect CV Online's investment in its database, there is no objective justification for refusing access to Melon.

The AG's Opinion is not binding on the CJEU. A copy of the Opinion can be found here.

LABOUR LAW

Belgian National Labour Council Adopts Collective Labour Agreement No. 149 to Regulate Mandatory Telework to Cope with Covid-19

As one of a package of measures to cope with the Covid-19 pandemic, the Belgian government reinstated mandatory telework for all jobs for which this is possible and to the extent it allows the business, the activities, or the services of the employer to continue. The rule started to apply on 2 November 2020.

On 26 January 2021, the National Labour Council adopted new Collective Labour Agreement No. 149 concerning recommended or mandatory telework due to Covid-19 (*Collectieve Arbeidsovereenkomst betreffende aanbevolen of verplicht telewerk omwille van de coronacrisis / Convention collective de travail concernant le télétravail recommandé ou obligatoire en raison de la crise du coronavirus* - ***CLA No. 149***).

Teleworking Arrangements and CLA No. 149

Pursuant to CLA No. 149, employers who did not establish by 1 January 2021 any written arrangements covering teleworking, are required to adopt a written framework which applies to each teleworker and which includes mandatory terms and conditions.

Such a written framework must become part of (i a Collective Labour Agreement concluded at company level; (ii the work rules (in accordance with a specific adoption procedure to amend these work rules; (iii an individual agreement concluded with each teleworker; or (iv a company policy which has been adopted in compliance with the rules on social consultation.

The mandatory arrangements that will make up the written framework can be summarised as follows:

- the employer should provide the equipment and technical support necessary for teleworking (*e.g.*, a laptop and other IT equipment);
- if the teleworker uses his or her own equipment, the employer must reimburse or pay the installation costs of the relevant IT programs and the additional costs of their use, operation, maintenance and depreciation;
- the employer must cover any additional connection costs incurred by the employees. CLA No. 149 leaves employers some freedom to determine how they will deal with the cost of teleworking, for example by providing a lump sum allowance or by paying costs on evidence of individual expenditure;
- the employer has the right to exercise a degree of control – in an appropriate and proportionate manner – over the results and/or the performance of the telework;
- it is possible to agree (minimum) working time arrangements. If nothing is provided in the written framework, then the working schedules contained in the work rules will apply;
- the arrangement will spell out the employer's policy on well-being at work specifically related to telework and may address preventive measures, in particular on adapting the workstation, the proper use of screens and the available technical and IT support; and
- the arrangement will include measures taken by the employer to maintain the psychological and social connection between teleworkers, their colleagues, and the firm, in order to prevent any damaging sense of isolation. Particular attention should be paid to "vulnerable" employees (defined as teleworkers who are confronted with additional tensions on account of their personal, family and/or housing situation).

CLA No. 149 will apply until 31 December 2021, subject to a possible extension.

LITIGATION

European Commission Launches Public Consultation on Modernising Cross-border Judicial Cooperation

On 16 February 2021, the European Commission (the ***Commission***) launched a public consultation to gather the views of stakeholders on its initiative to propose new legislation to digitise all data exchanges and communications in the context of judicial cooperation between EU Member States. The Commission's proposal is expected to be published by the end of 2021.

According to the Commission, the Covid-19 crisis has highlighted the need for digitisation of the judicial systems. The use of paper files and the requirements to be physically present in judicial proceedings hamper effective access to justice within the European Union. The Commission added that enhancing digitisation in civil, commercial, and criminal matters will contribute to making justice more accessible and efficient for EU citizens.

This public consultation is part of the broader policy objective of the Commission to modernise the EU judicial system through the adoption of a digital judicial cooperation package. As part of its initiative, the Commission intends to implement several measures such as (i) making the digital channel mandatory for all the communications and data exchanges between national authorities; (ii) providing individuals, companies and lawyers with the possibility to choose between the use of electronic or paper communications in cross-border procedures; (iii) ensuring the use of electronic signatures and seals in judicial proceedings; and (iv) ensuring interoperability between the different Member States' IT systems.

The public consultation consists of different questions and is available to a wide range of groups and individuals who could be affected by the future initiative. It will run until 11 May 2021.

The Commission's press release can be consulted here.

In the centre of Europe with a global reach

VAN BAEL & BELLIS

Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels
Belgium

Phone: +32 (0)2 647 73 50
Fax: +32 (0)2 640 64 99

vbb@vbb.com
www.vbb.com