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## European national news

**Mark Turner***Herbert Smith Freehills LLP, London, United Kingdom*

### ABSTRACT

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The regular article tracking developments at the national level in key European countries in the area of IT and communications – co-ordinated by Herbert Smith LLP and contributed to by firms across Europe. This column provides a concise alerting service of important national developments in key European countries. Part of its purpose is to compliment the Journal's feature articles and briefing notes by keeping readers abreast of what is currently happening “on the ground” at a national level in implementing EU level legislation and international conventions and treaties. Where an item of European National News is of particular significance, CLSR may also cover it in more detail in the current or a subsequent edition.

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## 1. Belgium

### 1.1. Belgium finally adopts the second E-Money Directive

On the 27th of November 2012, the Belgian parliament finally adopted the second E-Money Directive by amending the initial E-Money Act of 21 December 2009. Accordingly, where E-Money institutions were previously not allowed to carry on activities other than the issuance of E-Money or activities closely linked to it, they can now carry on unrelated activities. This could, for example, prove useful for mobile phone operators, which can now become hybrid E-money institutions.

The prudential requirements provided for by the Belgian E-Money Act and which concern, amongst other things, minimum capital, authorisation and registration with the FSMA, will apply regardless of the hybrid or non-hybrid qualification of an E-Money institution. Further, the maximum amounts of anonymous E-Money have also been reviewed to a maximum of €250 for non-rechargeable devices (e.g. electronic gift vouchers) and for rechargeable devices (e.g. Proton or PayPal) to a total amount transacted within a calendar year of up to €2500, except in instances where €1000 or more are redeemed within a calendar year.

Moreover the minimum capital requirement is reduced from an initial and ongoing capital of 1 million Euros to an initial and on-going capital of €350,000 Euros. Furthermore,

the amendment extends the exemptions provided under the previous Act. Henceforth, the prudential requirements of the E-Money Act might not apply to E-Money institutions of which the average outstanding amount of E-Money does not exceed €5 million. In addition, payment institutes may be exempted from the prudential requirements if the total average of the payments made during the last 12 months does not exceed €3 million per month.

It is hoped that with this adoption of the E-Money Directive and the removal of some of the regulatory barriers that were instigated by the first E-Money Directive, the E-Money market can now also take off in Belgium.

The complete E-Money Act of 21 December 2009 can be found at: <http://www.ejustice.just.fgov.be/loi/loi.htm>.

**Cedric. Lindenmann**, Associate ([cedric.lindenmann@stibbe.com](mailto:cedric.lindenmann@stibbe.com))  
from the Stibbe Brussels (Tel. +32 2533 53 51).

## 2. Denmark

### 2.1. Regulation of outsourcing contracts to have retrospective effect

The outsourcing process of certain activities of financial services companies was thoroughly regulated by the Danish Executive Order on the Outsourcing of certain activities in the

Financial Services Industry (“Executive Order”) on 1 March 2010. The Executive Order only applied to “new” contracts (i.e. contracts entered into after 1 March 2010). However, the Executive Order will apply retrospectively from 1 March 2013.

This means that all outsourcing contracts will be subject to the Executive Order from 1 March 2013, including “old” outsourcing contracts entered into before 1 March 2010. The only exception is outsourcing contracts entered into before 1 March 2010 that do not allow for renegotiation and that do not expire before 2014. These contracts remain exempted from regulation until 1 March 2015.

Financial services companies may therefore need to have “old” outsourcing contracts renegotiated and redrafted to fit the requirements in the Executive Order.

The Executive Order applies to contracts for the outsourcing of activities such as IT services, administration services, portfolio management, processing of claims etc.

The Executive Order contains certain requirements to the content of outsourcing contracts. These requirements are primarily directed at the obligations of the supplier, including description of the obligations in relation to delivery of the outsourced service, on-going reporting requirements and obligations in relation to termination of the contract. It is also required that financial services companies approve any sub-suppliers in the contract and that the Danish Financial Supervisory Authority is duly informed about the outsourced activities.

The Danish Financial Supervisory Authority has authority to issue penalties or demand the termination of a contract if it does not fulfil the requirements set out in the Executive Order.

**Carsten Raasteen**, Partner, [cr@kromannreumert.com](mailto:cr@kromannreumert.com) and **Peter Hejler**, Assistant Attorney, [phl@kromannreumert.com](mailto:phl@kromannreumert.com) from Kromann Reumert, Copenhagen office, Denmark (Tel. +45 70 12 12 11).

### 3. France

#### 3.1. Price comparison websites must indicate to the consumers which referenced websites are in fact commercial links (Cour de cassation, Com. 4 December 2012)

In this case, Pewterpassion and Saumon’s had entered into a paid-referencing contract with the price comparison and search engine website [leguide.com](http://leguide.com) whereby they were granted a priority over the referenced websites in displaying the search engine results.

After termination of the contract, Pewterpassion and Saumon’s unsurprisingly saw their websites pushed below other search engine results and requested that the Court condemn [Leguide.com](http://Leguide.com) for unfair commercial practices in the context of article L.120-1 of the Code of consumers, for failing to inform the consumers that certain results were in fact commercial links (i.e. advertisements).

Conforming to the ECJ decision of 5 July 2012 (Content Services Ltd), the Court held that a mere link to a webpage describing the modalities of displaying of the results was not sufficient. [Leguide.com](http://Leguide.com) had to clearly identify the advertisement as such, and failing to do so has been considered by the Court to be a breach of article L.120-1 of the Code of Consumers.

#### 3.2. French data protection authority expands the scope of its simplified norm n.48 on consumer and prospects data processing (decision n° 2012-209 of 21 June 2012)

Adopted by the CNIL in 2005, the simplified norm n.48 allows companies to proceed to data processing concerning their customers and prospects pursuant to a simplified declaration procedure before the CNIL, subject to compliance with certain prerequisites.

This processing can now encompass customer loyalty schemes; consumer surveys and statistics; organisation of lotteries and promotion contests; management of outstanding debts and disputes; consumers opinions on services and products; and sales or location of consumer databases; including when the data processing involves data transfers outside the EU in the framework of adequate protection decisions or standard contractual clauses.

The scope of the data that can be collected and the categories of data recipients have also been extended. A more precise retention period scheme has also been set forth:

- 1 year for identity cards;
- 13 months for credit card details;
- 6 months for cookies;
- 3 years after collection for prospects etc.

Additional requirements also apply as regards the consent of the consumer and security measures. Companies who have filed a norm n.48 declaration before 13 July 2012 have until 13 July 2013 to comply with those new requirements or to make a new standard declaration.

**Alexandra Neri**, Partner, [alexandra.neri@hsf.com](mailto:alexandra.neri@hsf.com) and **Jean-Baptiste Thomas-Sertillanges**, Avocat, [Jean-Baptiste.Thomas-Sertillanges@hsf.com](mailto:Jean-Baptiste.Thomas-Sertillanges@hsf.com), from the Paris Office of Herbert Smith Freehills LLP (Tel.: +33 1 53 57 78 57).

### 4. Germany

#### 4.1. Damages for the unavailability of internet access

In January 2013, the German Federal Court of Justice (*Bundesgerichtshof* – BGH) ruled on the liability of an internet service provider for the unavailability of internet access. The defendant (a telecom company) provided the plaintiff with the technical infrastructure for accessing the internet. Due to a mistake made by the defendant in the course of converting its rates, the plaintiff was not able to access the internet for about two months. The plaintiff demanded damages for his inability to access the internet.

The Federal Court of Justice found that the unavailability of internet access meets the requirements for an indemnification claim as part of a compensation for loss of use. As a general rule, German courts only grant compensation for the loss of use of an asset if it is of crucial and essential significance for a person’s standard of living.

The Federal Court of Justice clarified that access to the internet constitutes such an essential and crucial asset. Internet access is of central importance in our society today

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