



DURABLE MEDIUM: CONCEPTUAL / LEGAL HARMONISATION

DECEMBER 2018

Since the late 1990s, the Belgian legislator has been referring to the notion of ‘durable medium’ in order to indicate a bearer of information. The concept of ‘durable medium’ originally stems from European consumer law¹. However, various definitions as well as different use cases, often in combination with a link to paper, could be found spread across a variety of Belgian laws.

The Law of 20 September 2018², harmonising the concept of durable medium, should end this double shortage of legal coherence, with regard to the definition of a durable medium on the one hand and regarding its coexistence with paper on the other.

Harmonisation of the concept ‘durable medium’

The conceptual ambiguity caused by the diversity of definitions across a wide range of regulations³ gave rise to questions on what might be considered as a durable medium, as well as to questions with regard to regulatory disclosure, the use of innovative media such as videos for that purpose and the validity of electronically concluded - paperless - contracts.

This should be solved now through the Belgian legislator’s general adoption of the European definition of a durable medium and the

implementation thereof in article I.1, 15° of the Code of Economic Law (**CEL**), being:

“any instrument which enables a natural or legal person to store information addressed personally to the natural or legal person in a way accessible for future reference for a period of time adequate to the purposes of the information and which allows the unchanged reproduction of the information stored”⁴.

The legislator adds that, in so far as these functionalities are preserved, paper or, in a digital environment, an e-mail received by the addressee or an electronic document stored on a storage device or added to an e-mail received by the

¹ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees

² Law of 20 September 2018 on the harmonisation of the concepts of electronic signature and durable medium and on the withdrawal of restrictions with regard to the conclusion of electronic contracts.

³ Different definitions could be found in the Civil Code, in various books of the Code of Economic Law and in several other laws such as those on financial securities or on pensions and social security.

⁴ In our [Newsletter of February 2017](#) we referred to the decisions of the European Court of Justice in *Content Services* (ECJ 5 July 2012, C-49/11, *Content Services Ltd v Bundesarbeitskammer*) and *BAWAG* (ECJ 5 January 2017, C-375/15, *BAWAG PSK Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse AG v Verein für Konsumenteninformation*), setting out the conditions to meet this definition and with regard to the qualification as durable medium of emails and hyperlinks.

addressee can be considered as a durable medium.

The general definition shall apply to any notion of durable medium in any Belgian legal or statutory provision. As a consequence, a durable medium referred to in, for instance, the Civil Code also needs to be understood in accordance with the definition laid down in the CEL.

Erasure of explicit references to paper

Before the aforementioned Law of 20 September entered into force, apart from the presence of multiple definitions, the various references to durable medium in relation to paper also caused a lack of clarity.

The legislation mentioned the obligation to provide certain documents differently, namely '*in writing, or in another durable medium*', '*on paper, or in another durable medium*', or simply '*on a durable medium*'. Following this recent law, these wordings have now all been modified (hence harmonised) to '*by means of a durable medium*'.

This modification was adopted throughout the Belgian CEL, the Civil Code, the Company Code, the Code governing miscellaneous duties, levies and taxes and the Social Criminal Code (as well as other laws and Royal Decrees) and will hence affect the conclusion of contracts across different sectors.

It should be noted that a durable medium and paper should both perform the same three functions, which are the following:

1. To ensure the continued existence of the information so that it remains accessible in the future;
2. To ensure the protection of the integrity of the information so that an identical reproduction of the information is possible and changes are prevented as much as possible;
3. To ensure readability of the information so that the information can be read and referred to.

Paper and durable medium are therefore generic terms, forming two functionally equivalent solutions, both usable for different methods

deployed in a traditional environment (on paper) or in a digital context (on 'another' durable medium, e.g. an e-mail).

The harmonisation of the use of the concept of durable medium led to the removal of explicit references to paper as well as to '*another*' durable medium, which is consistent with the fact that paper is considered a durable medium and further explicit distinction appears unnecessary.

Adaptation to modern times?

The erasure of the explicit reference to written, paper documents could be seen as an attempt of the Belgian legislator to (further) enter into the digital era. Contracts are more and more concluded electronically, without information or other documents being provided in paper form. By removing any such a reference to documents on paper or in writing, there should no longer be any doubt about the possibility to use another medium as long as they respect all necessary functionalities inherent to a durable medium.

Exceptions: circumstances in which paper has the upper hand

Unfortunately, the harmonisation has not been implemented in the same way throughout all Belgian laws. In the 2014 Insurance Act for instance, the legislator maintains a reference to the provision of information '*in paper or in another durable medium*'. For the purpose concerned therein, it is, however, only permitted to provide information on a durable medium in those cases in which the consumer has '*specifically chosen for the other medium*'. Nonetheless, in practice, this specific 'choice' will not be a problem when the contract is concluded in an online environment.

Furthermore, a written contract will continue to be required in those cases where a judge ascertains practical barriers to meet a legal or statutory formal requirement in the context of the conclusion of an electronic contract (art. XII.16 BCEL).

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