<table>
<thead>
<tr>
<th>Page</th>
<th>Section</th>
</tr>
</thead>
<tbody>
<tr>
<td>03</td>
<td>Employment, Benefits and Pensions</td>
</tr>
<tr>
<td>05</td>
<td>Real Estate</td>
</tr>
<tr>
<td>07</td>
<td>Regulatory</td>
</tr>
<tr>
<td>09</td>
<td>Finance</td>
</tr>
<tr>
<td>11</td>
<td>Intellectual Property Technology</td>
</tr>
<tr>
<td>15</td>
<td>Upcoming Events</td>
</tr>
<tr>
<td>16</td>
<td>Publications</td>
</tr>
</tbody>
</table>
Update on the implementation of the government programme

In its government programme, the new government announced its intention to introduce numerous modifications, including in the field of employment and social security.

A first number of measures announced in the governmental agreement of 1 December 2011 were concretized in the Programme Acts of 28 December 2011 and a number of Decrees of the same date. The most important measures of these in the field of human resources were, besides the much talked about changes in relation to the taxation of company cars, the modifications in relation to the bridge pension regime and the changes to the possibility to take up the retirement pension before reaching the age of 65.

Unemployment with an extra company allowance

Bridge pension will from now on be known as 'unemployment with an extra company allowance’. This alternative name should better reflect that the system is from a legal point of view indeed a type of unemployment benefits, notwithstanding the fact it is generally perceived as being a form of retirement.

The conditions for accessing the regime of bridge pension were moreover restricted, whereby the most important changes are:

- The general rule remains that bridge pension requires that the person involved is aged at least 60 at the moment of the effective termination of the employment contract.

As of 1 January 2012, a professional career of at least 35 years as employee is, however, required for male workers and a career of 28 years for female workers.

For “new” collective bargaining agreements, i.e. those signed for the first time on 1 January 2012 or later, a professional career as an employee of at least 40 years is required. An uninterrupted extension of an existing collective bargaining agreement, is, however, not considered to be a “new” collective bargaining agreement, even if the collective bargaining agreement is only signed in 2012.
The exception whereby bridge pension is possible as of the age of 58 remains, but the required professional career as an employee is increased to 38 years for male workers and 35 years for female workers. This requirement will be increased to 40 years by respectively 2015 and 2017.

As of 1 January 2012, it is moreover no longer possible to enter into “new” collective bargaining agreements making use of this exception.

The exception whereby bridge pension is possible as of the age of 58, subject to the condition that the person was a certain number of years occupied in a so-called “demanding profession”, is closed for “new” collective bargaining agreements. For “existing” collective bargaining agreements, the required professional career remains for the moment 35 years, but this will gradually be increased to 40 years by 2017. Indirectly, this exception will thus disappear, since it will become subject to the same conditions as the “general” exception set out in the previous paragraph.

The specific regime of bridge pension for companies who are by the Minister of Employment recognised as “company in difficulties” or as “company in restructuring” is also substantially modified.

For companies in difficulties who obtained this status after 31 December 2011, the minimum age for having access to the regime of bridge pension can only be lowered to 52 (contrary to 50 previously). This will moreover gradually be increased to 55 years by 2018.

For companies in restructuring who will obtain this status after 31 December 2012, the minimum age for having access to the regime of bridge pension can only be lowered to 55 (contrary to 50 previously).

Given the considerable difference in conditions for “existing” and “new” collective bargaining agreements, it is thus clear that an employer who wants to make use of the regime of bridge pension, should make sure that his collective bargaining agreement does indeed continue to apply without any interruption.

In the meantime, a draft programme act stipulating a draconian (since, in certain cases, the contribution due equals 100%) change of the employer social security contributions has been introduced in Parliament.

### EARLY RETIREMENT

The minimum age for early retirement will be gradually raised in yearly six month increments from 1 January 2013 until 1 January 2016. Specific exceptions remain possible for those with long careers.

The applicable ages and conditions will evolve in accordance with the table below:

<table>
<thead>
<tr>
<th>Year</th>
<th>Minimum age for early retirement</th>
<th>Career condition</th>
<th>Exception long career</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012</td>
<td>60</td>
<td>35 years</td>
<td>60 if 40 year career</td>
</tr>
<tr>
<td>2013</td>
<td>60 and 6 months</td>
<td>38 years</td>
<td>60 if 40 year career</td>
</tr>
<tr>
<td>2014</td>
<td>61</td>
<td>39 years</td>
<td>60 if 41 year career</td>
</tr>
<tr>
<td>2015</td>
<td>61 and 6 months</td>
<td>40 years</td>
<td>60 if 42 year career  or 61 if 41 year career</td>
</tr>
<tr>
<td>2016</td>
<td>62</td>
<td>40 years</td>
<td>60 if 42 year career  or 61 if 41 year career</td>
</tr>
</tbody>
</table>
Building on third party’s land and the option right of the landowner

*Whenever a landowner sells the constructions built on his land by a third person, he is deemed to definitely waive his right to claim for the removal of these constructions and his option right by virtue of article 555 of the Belgian Civil Code lapses. As a consequence, compensation is due by the landowner to the third party builder.*

The ownership of land includes the ownership of any construction built thereon (art. 552 of the Belgian Civil Code (“C.C.”), i.e. the so-called right of accession). In the event the constructions are not erected by the landowner himself, but by a third party with the materials owned by that third party and without that third party being beneficiary of a so-called right of superficies/right to build ("opstalrecht"/"droit de superficie"), the landowner may on the basis of art. 555 C.C. opt to either retain the constructions, or to demand the *mala fide* third party to remove these constructions. This rule may for instance apply when a company erects a building on another company’s land with the intention to acquire the land during the works. If the purchase agreement regarding the land is annulled afterwards and the contemplated acquisition of the land does not succeed, the relationship between the landowner and the constructor of the building is governed by the provisions of art. 555 C.C.

In the event the landowner choses to keep the constructions, he acquires the property rights over these constructions by virtue of his right of accession. Nevertheless, the landowner is due to compensate the third-builder for his building costs, by virtue of art. 555 § 3 C.C. As a result, the accession of the constructions does not occur automatically but only at the moment that the landowner expresses his wish to acquire the ownership of said constructions. This choice is irrevocable.

The law does however not expressly prevent that the landowner sells the constructions built on his land by a third person. The question has raised whether the landowner-seller at that time also transfers to the land purchaser his option right on the constructions together with the land, or whether he remains liable to compensate the builder of the constructions.
By way of parenthesis, reference could be made to leases. In the event of a lease, the lessee holds a right to build ("opstalrecht"/"droit de superficie") as an accessory right to his right to lease, implying that the lessee has the ownership of the constructions erected by him on the leased premises (but only) as long as the lease is in force. Therefore, the right of accession of the landowner with respect to constructions erected by the lessee only takes effect at the end of the lease. Until that moment, the landowner cannot exercise his option right by virtue of art. 555 C.C. (unless otherwise agreed with the lessee). The sale to a third party of the leased premises during the lease (whenever opposable to the purchaser of the premises) consequently entails the transfer to the purchaser of said option right, implying that the obligation to compensate based on art. 555 § 3 C.C. – if not ruled out in the lease agreement – shall be supported exclusively by the purchaser.

In its judgment of 3 February 2011, the Supreme Court of Belgium has examined whether above mentioned option right could also be transferred to the new owner, in cases other than leases.

In casu, the claimant had erected a building on the land of the defendant with the intention to subsequently acquire the ownership of the land. However, the purchase agreement with respect to the land had been annulled and the defendant had proceeded to the sale of the land as well as of the building erected by the claimant, to a third party. Following that, the claimant had filed a claim against the initial landowner in order to obtain compensation for the building costs in conformity with art. 555 § 3 C.C.

The Supreme Court considers that the sale by a landowner of a building erected on his land by a third-builder, entails that this landowner waives his right to claim for the removal of said building and, as a consequence, that he implicitly has chosen to keep the building. By choosing to maintain said building, the landowner is considered to acquire the ownership rights over that building, at the latest at the moment of the sale.

As a consequence, the initial landowner/seller has (implicitly) exercised his option right by virtue of art. 555 C.C. and is due to compensate the third party-builder in accordance with art. 555 §3 C.C.

The Supreme Court is of the opinion that the exception in case of leases is not to be extended to other hypotheses. In case of a lease, the possibility to acquire the constructions by accession is delayed until the end of the lease, whereas in the present case, the landowner has acquired the ownership of the building at the moment that he (implicitly) expressed his will to become owner of that building (i.e. by selling it).

Notwithstanding the above, this judgment does not exhaust the question whether the option right by virtue of art. 555 C.C. could be transferred to the purchaser in case of sale of only the land, without the constructions, provided that the landowner has not yet exercised his option right and therefore has not yet acquired the ownership of the constructions.

In the event that the landowner only sells his land and does not in any way express his wish to acquire the constructions built by a third party on his land (and he did not claim their removal either), it could be argued that his unexercised option right is being transferred to the purchaser together with the ownership of the land. In this hypothesis, if he chooses to keep the building, the new owner of the land is compelled to compensate the third-builder on the basis of art. 555 §3 C.C., to the exclusion of the initial landowner/seller.

In order to avoid any possible discussion, it is recommended, however, to have the builder of constructions on another person’s land to sign the purchase agreement as well and, as the case may be, to have him sell his constructions simultaneously with the land.

For more information, please contact

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In December 2008 the European Parliament and the European Council adopted a new Waste Framework Directive, which had to be implemented in Belgian regional law by 12 December 2010. However, none of the three Regions succeeded in obtaining a timely implementation.

With regard to the Flemish Region, the delay was mainly due to the fact that the Flemish legislator aimed at regulating the entire life cycles of materials, rather than limiting himself to mere waste management.

This resulted in the Flemish Decree of 23 December 2011 on sustainable management of material cycles and waste materials. The Flemish Government further implemented the Decree by an executive order of 17 February 2012 (known as Vlarema). The new Decree and its executive order will enter into force on 1 June 2012.

This contribution highlights some of its important consequences on the operation of businesses in Flanders.

**Basic idea: introduction of the ‘life cycle’ thinking**

The new Decree is applicable to materials, covering all substances which have been mined, extracted, grown, processed, produced, divided, commissioned, decommissioned, or reused, including the waste materials produced during the operation. Materials are in essence all material substances used in our economy. In other words, all waste streams are materials, but not all materials are waste.

The introduction of the term ‘materials’ is a consequence of the ‘life cycle’ thinking of the Flemish legislator who aimed at creating a regulatory framework covering the totality of consecutive operations over a life cycle or substance flow, ranging from the mining or extraction until the moment they result in a waste material not available for reuse.

As a consequence, a material can run through the life cycle process multiple times if reusable.

**Hierarchy of material management**

To obtain the creation of sustainable material cycles, the Flemish legislator has renewed the hierarchy for material management (the so-called ‘Ladder van Lansink’). While the old waste hierarchy covered three levels of management, the current one consists of five.

1. waste prevention, and a more efficient, less environmentally harmful use of consumption of materials through changes in patterns of production and consumption. This occurs before the ‘waste phase’;
2. preparation of waste for reuse;
3. recycling of waste materials and use of materials in closed material cycles;
4. other forms of utilization of waste materials, such as energy recovery and use of materials as a source of energy;
5. removal of waste materials, with dumping as a last resort. Incineration with low waste recovery is regarded as removal of waste.

It is important to note that this hierarchy is not absolute, but rather relative. The underlying idea is that only those options should be encouraged which produce the best overall result for the environment and human health. Therefore, one has the possibility of requesting an exemption on the hierarchy from the Flemish Government for a particular specific material. If granted, the exemption will not only be valid for that specific material stream, but also for equivalent material streams.
Introduction of criteria for ‘end-of waste-phase’ and by-products

The introduction of the ‘life cycle’ thinking of substances includes more than regulating the mere ‘waste phase’. Nevertheless, it is important to know when the ‘waste-phase’ commences, since it will give rise to compliance with specific obligations (waste register, permit for removal of waste and preparatory actions for removal,...).

The waste phase of a material will start at the moment the holder disposes, intends to dispose, or must dispose of a material. This will be a question of fact.

With regard to the end of the waste phase, the new Decree provides a dual regime. On the one hand there is a legal basis for the transposition of ‘end-of-waste’ criteria which have been established on a European level (e.g. aluminium) and on the other hand, it provides a legal basis for the Flemish Government to determine specific criteria for particular waste streams not regulated on the European level.

A similar regime is provided to determine when a substance or object which is the result of a production process but was not primarily intended to be produced, shall be regarded as a by-product of the production process rather than waste. Where the criteria for ‘end-of-waste’ or by-products have been met, the materials will be regarded as ‘resources’ which can be used in a material cycle once more.

It is important to note that the Flemish Government may require for specific waste streams that a resource certificate is issued by the Flemish Waste Management Agency (OVAM) before a material can be regarded as ‘end-of-waste’ or a by-product. Such a certificate will demonstrate compliance with the afore-mentioned European or Flemish criteria.

Possibility of imposing operational requirements on the use of materials

Since the objective of the new Decree is the creation of sustainable material cycles, the Flemish Government is entitled to lay down requirements for the use of particular materials. Vlarema provides provisions on the management of specific materials which cannot be regarded as waste, for instance the use of rubber granulates originating from recycled tyres in artificial grass turf.

In addition, OVAM will also be able to suggest specific conditions of the use of a particular material in its advice rendered during environmental permit procedures.

Extended producer responsibility

Another measure to create sustainable material cycles is the extension of the producer’s responsibility. The new Decree provides a legal basis to impose measures to foster the prevention, reuse, recycling and other utilizations of waste natural on a legal person who professionally develops, manufactures, processes, treats, sells or imports products (producer of the product). It will be the Flemish Government who will determine which products or waste streams will be subject to this extended producer responsibility.

It is already clear that the Flemish Government make use of the possibility. Noteworthy is the upcoming introduction of an acceptance duty for discarded photovoltaic cells.

The material register

At present, a natural or legal person who manage waste is obliged to keep a chronological waste register which lists, among other things, the incoming and outgoing quantities and the origin of the waste.

In addition to the existing waste registers, the new Decree provides a legal basis for the Flemish Government to determine the specific materials for which a material registration has to be kept, in order to monitor efficient and lawful use of reusable materials (which must not be registered in the waste register).

CONCLUSION

The adoption of the new Decree on on sustainable management of material cycles and waste materials has once again reaffirmed Flanders top spot in Europe with regard to waste management. The transition of a waste management policy to a sustainable material management policy is however a work in the long run which will be realized step by step.

The new Decree has provided the legal basis for this transition. It will be interesting to follow up the further implantation by the Flemish Government. Companies are advised to follow up to what extent the new Decree will impact their business.

FOR MORE INFORMATION, PLEASE CONTACT

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Pension Fund Investment in Infrastructure

In the previous edition of our newsletter, we highlighted the introduction of the EU Project Bonds Initiative and the increased interest of pension funds in investing in infrastructure. In this edition, we will briefly be setting out the opportunities for pension funds to invest in infrastructure in Belgium.

General

As indicated in the previous edition, up to USD 1.3 trillion will need to be invested in Europe’s infrastructure (transport, energy and telecommunication networks) between now and 2030 in order for Europe to remain an efficient and competitive economy.

However, the financial crisis has caused infrastructure investment to lag behind even further as the crisis has reduced the amount of public funding available for such investments and as it has put greater liquidity constraints on commercial banks, causing them to experience restrained credit growth, which limits their ability to invest in infrastructure projects. It has also caused commercial banks to adjust their ability and willingness to provide bank loans with long maturities, with typical mid-or post-crisis maturities not in excess of eight to ten years. Pension funds on the other hand, though affected by the financial crisis, have large amounts of assets under their control. For example, the combined pension assets of the Netherlands in 2009 were USD 1,028 billion or 130% of its GDP, and all pension funds in OECD countries combined managed a whopping USD 17 trillion in assets in 2009.

Moreover, infrastructure is an attractive investment class for pension funds due to that (a) it presents an opportunity to diversify their portfolio, (b) has a low correlation with the other investment classes in their portfolio, (c) it provides for the option of inflation linkage, and
(d) the long-term steady returns of infrastructure assets match up nicely with the typically long-term liabilities of pension funds.

In light of the above, it is clear that there is great potential for pension funds as important institutional investors to become more involved in infrastructure.

Pension Fund Market in Belgium

Contrary to the situation in, for instance, the Netherlands, the United Kingdom and Sweden, the Belgian pension fund market has yet to reach its full maturity. This is due to the fact that to this day, the repartition-based, government-run public pension system (“the first pillar”) still accounts for a large share of people’s old-age pension, as a result of which there has been less need for and consequently less growth of, private pensions. Indicative of the less mature Belgian pension fund market is the rather recent regulation of the complementary private pensions, which came into being in 2004 (“Wet op de Aanvullende Pensioenen”/”Loi sur les pensions complémentaires”). The short history of Belgian complementary private pension funds, which are set up either at a company, sector or profession level, results in the majority of Belgian pension funds being of a relatively small size. Consequently, these funds may often not be able to yield the same investment power as other pension funds from countries which have a well-established tradition of private pension funds. Furthermore, due to their smaller size and more limited means, fewer of these pension funds will be able to muster the required in-house expertise and resources required for effective direct investments in infrastructure.

Due to the aforementioned limitations, when these pension funds do invest in infrastructure, they will do so indirectly: either by investing in an infrastructure fund (such as the PMF Infrastructure Fund recently created by the Participatiemaatschappij Vlaanderen) to benefit from the experience and expertise of the infrastructure fund manager or by acquiring stock in infrastructure companies.

The situation is markedly different in the Netherlands, which has a long history of private pension funds and correspondingly, a mature pension fund market. Two of the largest Dutch pension funds, Algemene Pensioen Groep (APG) and PGGM are the only ones which currently have the resources in place to be able to invest in infrastructure directly. Nevertheless, there are several other large European pension funds, such as the Danish Arbejdsmarkedets Tillægs pension (ATP) or the British University Superannuation Scheme (USS) which also occasionally invest directly or co-invest.

The Belgian infrastructure network is extensive and of a high quality, but as the rest of Europe, it needs to be upgraded and updated in order to be able to take on the challenges of tomorrow and to remain competitive in an ever more globalized world. In light of the limited investment potential of the commercial banks and of the Belgian private pension funds, the Belgian infrastructure therefore represents substantial investment opportunities for foreign pension funds looking to diversify their investment portfolio.
An insight into the European Commission’s Proposal for a new EU Data Protection Regulation

On January 25, 2012, Viviane Reding (European Commission Vice-President and Commissioner responsible for justice, fundamental rights and citizenship), presented the long awaited Proposal for a new Data Protection Regulation. The Proposal1 is currently being reviewed by the European Parliament and the EU Council of Ministers, who will jointly decide on the final version of the text through the Ordinary Legislative Procedure2 (previously co-decision procedure). The final Regulation shall become applicable two years after its entry into force. It could be estimated that the Regulation will enter into force in 2014, implying its applicability as of 2016.

The Proposal contains significant changes to the existing Data Protection Directive which business communities will need to understand and adapt to. In many ways the new Regulation should make compliance more achievable, but businesses will have to take more active steps to demonstrate compliance and the penalties for non-compliance will become much more severe than is currently the case. What follows is an overview of what we see as the most significant changes to be expected in the data protection landscape.

1. A Regulation instead of a Directive

As had been widely speculated, the European Commission has chosen to implement the new rules into a Regulation rather than a Directive. This is intended to increase harmonisation and coherence of the data protection legal framework within the European Union as a regulation.

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1 Two legal instruments were introduced on January 25, namely the “Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data” (General Data Protection Regulation) and the “Proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of intervention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data” (Police and Criminal Justice Data Protection Directive). This article only discusses the Proposal for a General Data Protection Regulation.

2 Based on the position of the European Parliament, the European Commission has the possibility to change its original proposal to bring it in line with the European Parliament’s position and to facilitate an agreement between the European institutions. The Council finalises its position on the basis of the Commission’s proposal, amended where necessary, in the light of the European Parliament’s first reading and resulting amendments.
is binding in its entirety and – contrary to a directive which first has to be implemented by the Member States – directly applicable in all 27 Member States without the requirement to implement their own interpretation of the Directive through a national law.

2. Territorial Scope
The Proposal changes the rules governing the jurisdictional reach of EU data protection laws. The existing law is applied based on the place of establishment of the controller and/or the equipment used by the controller to process the data. The Proposal goes beyond that in applying the law to any processing of personal data that is directed to data subjects residing in the EU, or “serves to monitor the behaviour” of such data subjects. Recital 15 clarifies that, in this context, ‘directed to’ implies that it should be ascertained whether it is apparent from the controller’s overall activity that the controller was envisaging processing of personal data of data subjects residing in the EU. This will be of particular significance to non EU websites directed towards EU citizens. A non-EU controller caught by this provision would be required to designate an EU representative to act on behalf of the controller and to be answerable to the EU data protection authority on behalf of the controller.

3. Definitions
A number of new definitions are introduced by the Proposal, such as ‘personal data breach’, ‘genetic data’, ‘biometric data’, ‘data concerning health’, ‘main establishment’, ‘representative’, ‘group of undertakings’, ‘binding corporate rules’ and ‘child’.

Furthermore, the Proposal also modifies existing definitions. For example, the definition of ‘data subject’ now explicitly refers to ‘online identifiers’ (such as IP addresses or cookie identifiers) as one of the factors which may entail direct or indirect identification of a data subject. Also, the proposed definition of ‘controller’ refers to an additional criterion: the controller is the person determining the purposes, means and conditions of the processing of personal data. The Proposal further confirms, albeit only in its recitals, that the law should not apply to “data rendered anonymous in such a way that the data subject is no longer identifiable”.

4. Explicit consent
In order to avoid confusion between consent and unambiguous consent, and in order to have one single, consistent definition, the definition of ‘consent’ included in the Proposal requires consent to be explicit and states that silence or inactivity will not constitute consent.

Moreover, the Proposal clarifies that consent should be given by any appropriate method enabling a freely given specific and informed indication of the data subject’s wishes, based on an affirmative action by the data subject or a statement by the individual, including by ticking a box when visiting a website or by any other statement or conduct which clearly indicates the data subject’s acceptance of the proposed processing of their personal data. As to processing personal data for purposes of commercial direct marketing, the prior consent of the data subject is no longer required, however, the opt-out right remains.

Specifically regarding children, the Proposal foresees that for the processing of the personal data of any child below the age of 13 years old, the prior consent or authorisation of the child’s parent or custodian should be obtained. Remarkably, in a previous leaked draft of the Regulation, this age threshold was originally set at 18 years old.

5. New concepts
The Proposal introduces some new concepts drastically changing both the data subject’s rights and the data controller’s obligations:

- Right to be forgotten – The new Regulation would formalize the data subjects’ “right to be forgotten”. Data subjects will be entitled to require data controllers to erase their personal data where they have withdrawn their consent for processing or where they object to the processing of personal data concerning them. The Proposal stresses that this new right is particularly relevant to data provided by children. Whereas this right is aligned with the principles already included in the Directive, the question arises how the right to be forgotten as currently foreseen in the Proposal can be implemented in practice.

- Privacy impact assessment – There is a mandatory requirement for data controllers or processors to carry out impact assessments before carrying out processing that is likely to present “specific risks”.

- Privacy by design and by default – The Proposal contains a mandatory requirement for privacy by design and privacy by default. This would require that (i) the controller prior to and during the processing, implements appropriate technical and organisational measures and procedures in such a way that the processing will meet the requirements of the Regulation and ensures the protection of the data subject’s rights; and (ii) the controller must implement mechanisms that ensure that, by default, only those personal data are processed which are necessary for
each specific purpose of the processing, and that such data is not collected nor retained beyond the minimum necessary for those purposes.

- Data portability – Data subjects would be given a new right to obtain a copy of their data in a “structured and commonly used format” and the right to transfer data from one automated processing system (for instance a social network) to another, without being prevented from doing so by the controller.

- One-stop-shop – The Proposal contains significant “one-stop-shop” provisions that would have a major impact on international organisations with operations across a number of EU member states. The data protection authorities in the “main establishment” of the controller would be responsible for decisions relating to the controller across its EU operations. This could see, for example, the UK operations of a UK business, falling under the control of the Spanish, French or German regulator. This should offer greater harmonisation and certainty for controllers. However, bearing in mind the very different approaches to enforcement shown by EU regulators to date it will be very interesting to see how this develops in practice.

- International transfers – There is a significant change to the existing law which would enable controllers to make certain transfers of data outside of the European Economic Area (EEA) where it is in the legitimate interests of the controller or the processor. This would only apply where the transfer is not “frequent, massive, or structural” but will, nevertheless, be very welcomed by international businesses.

6. New obligations

If the Proposal for a new Data Protection Regulation becomes law, many of the obligations that are currently imposed by the Directive only on data controllers would also be imposed on data processors. This will be of some concern to the service provider and outsourcing community and is likely to require a reassessment of the standard approach to the allocation of obligation and liability in standard outsourcing arrangements.

In addition, a number of new obligations are introduced by the Proposal:

- Documentation – One of the key issues under the current European data protection regime is the administrative burden which is borne by controllers, as the Directive requires that all data processing activities are notified with the local data protection authority. The new Regulation would replace this notification duty with an obligation for data controllers and processors to keep extensive documentation to demonstrate that the processing operations under their responsibility are compliant. This stems from the “accountability principle” which has been much discussed in the review of the Directive leading up to the release of the draft Regulation.

- Data protection officer – For processing activities carried out by the public sector, or by the private sector in the event it concerns a large enterprise (over 250 employees) or where the core activities of the controller or processor consist of processing operations which require regular and systematic monitoring, a mandatory data protection officer must be appointed to monitor whether the processing activities are carried out in compliance with the data protection policy and the Regulation. A group of undertakings is allowed to appoint one single data protection officer for all the undertakings.

- Security breach notification – There is a new mandatory requirement to notify data protection authorities and the data subjects without undue delay and where feasible within 24 hours of a data security breach, although the requirement to notify data subjects does not apply where the controller can demonstrate that all the data was encrypted.

- Agreement between joint controllers – Joint data controllers will have to sign an agreement allocating responsibility between them. In the absence of such agreement, the controllers will be jointly liable for all processing activities.

- Data subject’s requests – In the event the data subject introduces a request to exercise its rights, the controller is obliged to respond to such request within a fixed deadline. In the event the controller does not comply with the data subject’s request, he must do so by motivating his response.

7. Enforcement

One of the key objectives of the Regulation is to harmonise the enforcement powers of the local data protection authorities, and to make remedies and sanctions more effective, the draft Regulation introduces new fining powers. The sanctions in the previous draft (up to 5% of the annual worldwide turnover) caused a true shockwave when the text was leaked, and effective last minute lobbying helped the sanctions in the current draft Regulation decrease to 250,000 EUR (or 0.5% of the annual worldwide turnover) and maximum 1,000,000 EUR (or 2% of the annual worldwide turnover).
PRACTICAL IMPACT OF THE NEW REGULATION

Summarised, the following provisions foreseen in the Proposal are expected to have a substantial practical impact on companies processing personal data:

1. Structural impact: the Regulation would introduce new concepts such as “privacy by design” and “privacy by default”, implying that companies will have to pro-actively review their data protection infrastructure so as to proactively protect the data subjects and their personal data;

2. Impact on data subjects’ rights: by formalizing the “right to be forgotten”, companies will be obliged to erase the data subject’s personal data when the latter has withdrawn its consent for the processing of its personal data. In addition, data controllers will be required to answer to data subjects’ requests within a fixed deadline.

3. Impact on consent: data controllers must obtain the “explicit” consent from data subjects and can no longer rely on “implied” consent. In the event the consent of a minor is required, such consent needs to be authorized by the minor’s parent or custodian in the event the minor is younger than 13 years old. For purposes of commercial direct marketing, no prior consent is required but the opt-out right remains;

4. Impact on profiling: under the new Regulation, profiling would be prohibited, in particular regarding the person’s performance at work, creditworthiness, economic situation, location, health, personal preferences, reliability or behaviour. Only in exceptional circumstances, namely when the explicit consent was obtained, when profiling occurs for the performance of a contract, or when implementing regulations, would profiling be allowed.

5. Administrative impact: the current notification duty would be replaced by the obligation to keep extensive documentation to demonstrate that processing operations are compliant;

6. Security impact: in the event of a data security breach, the data protection authority as well as the data subject (in the event the data was not encrypted) must be notified without undue delay and where feasible within 24 hours of the breach;

7. Financial impact: the Regulation intends to strengthen enforcement and create a deterrent by foreseeing fines that could rise up to 2% of the company’s annual worldwide turnover;

8. Cross-border impact: international data transfers will be facilitated by the “one-stop-shop” principle whereby one data protection authority in the country of main establishment will be the go-to instance regarding decisions on data controllers.

FOR MORE INFORMATION, PLEASE CONTACT

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On the

24 April Denis-Emmanuel Phillipe will speak about “Les outils de planification fiscal international”, in IFE Luxembourg

19 and 26 April Denis-Emmanuel Phillipe will speak about “Responsabilité” au Centre des Facultés Catholiques pour le recyclage en droit in Mons.

4 May a seminar will be organised by the Universities of Ghent and Antwerp. Pierre Van Ommeslaghe will present “Vers un nouveau droit économique?”

10 May Koen De Maeyer, partner at DLA Belgium, will be a key speaker about the Director’s liability at a legal lunch in Sint Niklaas, organised by VOKA Waasland.

15 and 22 May Johan Mouraux will speak about «Publiek-Private Samenwerking, financing aspects» at a two-evening seminar organised by Confederatie Bouw in Ghent.

24 May Tom Villé & Evelien De Raeymaecker will speak about “Recente ontwikkelingen wetgeving en actuele rechtspraak Overheidsoopdrachten” (Kluwer), in Ghent NH Ghent

16 June a seminar about “Le nouveau code pénal social: Nouveautés et changements apportés par le nouveau Code pénal social” is presented by Damien Stas de Richelle, partner Employment, Pensions and Benefits at DLA Piper Belgium. IFE Benelux, Brussels

29 September Denis-Emmanuel Philippe will present «La fiscalité des operations de M&A: capita selecta». IFE Benelux, Brussels
Carole Maczkovics wrote an article on “Remedies in Rail-related Services”, ECLR, 3/2012, 116-123.

Kris Beirnaert is one of the authors who contributed to the new annotated Criminal Code of the publisher Larcier, in the new series ‘Wet en Duiding’. In this Code, Kris annotated about 20 articles, amongst which the articles concerning bribery (bribery of officials as well as bribery of private persons) and claims for damages.

Van Den Bosch Isabelle wrote “De bestrijding van reclameronselaars”, NNK 2011, afl. 4, 19

Van Den Bosch Isabelle wrote “Het algeheel verbod op de afwerving van cliënteel is in strijd met de Dienstenrichtlijn” NNK 2011, afl. 4, 42-43

Kevin De Greef has written an article on the tenant’s duty to maintain and repair leased premises with reference to article 605 and 606 of the Civil Code, in Expertise News of 8 December 2011

Mathieu Higny wrote an article about “La déficience des installations électriques en droit du bail” in the TBBR/RGDC 2012/1 (pp. 45-56).

Our Real Estate team was elected “Real estate law firm of the year” for the second time (after a first win in 2007) at the Belgian Legal Awards on 15 March.
If you have finished with this document, please pass it on to other interested parties or recycle it, thank you.

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