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Implementation of GDPR in Belgium | New Data Protection Law

Today, on 5 September 2018, the new Belgian Data Protection Law¹ (the **New Belgian DPL**), which brings Belgian national law in line with the General Data Protection Regulation (**GDPR**), was published in the Belgian Official Journal. The New Belgian DPL immediately enters into force with this publication.

The New Belgian DPL abolishes the current data protection law of 8 December 1992 and will have a big impact on how the GDPR is applied in Belgium. It also provides for some additional requirements that companies need to take into account. It complements the GDPR and implements Directive 2016/680 which regulates the protection of personal data by law enforcement agencies.² Indeed, while the GDPR intends to provide 'full harmonisation' for the protection of personal data, it leaves some margin of manoeuvre for Member States to implement additional national requirements.

Below, we discuss the most important highlights of the New Belgian DPL for companies within the private sector. The implementation of Directive 2016/680 on the protection of personal data for law enforcement agencies will not be discussed here.

1. Territorial scope

The New Belgian DPL applies to any processing of personal data in the context of an establishment of the controller or processor in Belgium, irrespective of whether the actual processing takes place in Belgium or not. Similar to Article 3.2 of the GDPR, the New Belgian DPL will also apply to non-EU based controllers or processors that offer goods or services to Belgian residents or monitor their behaviour. Moreover, the New Belgian DPL will also apply to controllers who are not located in Belgium but are located in a place where Belgian law is applicable according to public international law.

¹ *Wet betreffende de bescherming van natuurlijke personen met betrekking tot de verwerking van persoonsgegevens/Loi relative à la protection des personnes physiques à l'égard des traitements de données à caractère personnel.*

² *Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.*

However, the New Belgian DPL will not apply if the controller is established in another EU Member State and the controller uses a processor located in Belgium.

2. Children's consent in relation to information society services

Article 8 of the GDPR establishes the conditions for children's consent in relation to information society services. Indeed, if an information society service, such as an online service or an app, relies on consent to process personal data, the GDPR determines that such consent is only lawful if the child is at least 16 years old. However, Member States may provide by law for a lower age for those purposes provided that such lower age is not below 13 years. The Belgian legislator has availed of this possibility and set the bar at 13 years. For children under the age of 13, the consent in relation to information society services must be given or confirmed by a parent or guardian of the child.

The reason for this lower age-limit reflects the current situation regarding online services. In many cases, older teenagers cannot be expected to require parental consent for the online services they use. It is also important to note that this provision does not alter the protection for minors under Belgian contract law.

3. Special categories of personal data

Under the GDPR, Member States may maintain or introduce further conditions, including limitations, with regard to the processing of genetic data, biometric data or data concerning health. The New Belgian DPL uses this possibility under the GDPR to impose a number of additional conditions for processing of "genetic data, biometric data or data concerning health".

In particular, the New Belgian DPL requires the controller or the processor of such data to: (i) designate who is entitled to consult these categories of data; (ii) draft a list of these persons (and keep this list available for the supervisory authority); and (iii) the designated persons must be held by legal or contractual confidentiality obligations. These obligations are not new for Belgian companies as the Royal Decree of 13 February 2001 imposed similar requirements for the processing of sensitive categories of data.

Furthermore, the New Belgian DPL clarifies some substantial public interests that justify the processing of sensitive categories of personal data under Article 9.2 (g) of the GDPR and provides legal grounds, and imposes additional conditions, for using data relating to criminal convictions and offences under Article 10 of the GDPR.

4. Restrictions on right of information and other rights of data subjects

The New Belgian DPL provides limited exemptions where the rights of data subjects can be restricted and controllers do not have to inform data subjects of the processing of their personal data. For instance, for personal data that are transferred

to intelligence agency OCAD/OCAM or obtained by virtue of law from courts or police files.

5. Processing and freedom of expression and information

The New Belgian DPL reconciles the right to the protection of personal data pursuant to the GDPR with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression by limiting certain data subjects rights, including the requirement to inform data subjects about the processing of their personal data.

In addition, international transfers of personal data for journalistic purposes are exempt from the normal restrictions on such transfers under Articles 44 to 50 of the GDPR.

6. Guarantees and derogations for archiving in the public interest, for scientific or historical research purposes or for statistical purposes

Processing for archiving purposes in the public interest, for scientific or historical research purposes or for statistical purposes, must be subject to appropriate safeguards for the rights and freedoms of the data subject under Article 89 of the GDPR. The New Belgian DPL now provides further obligations and a derogation from data subjects' rights.

The main additional obligations for processing personal data for the purpose of scientific or historical research or for statistical purposes consist of:

- the appointment of a data protection officer (DPO),
- additional information to be included in the internal records; and
- additional information to be provided to data subjects.

However, the New Belgian DPL also stipulates that these additional obligations do not apply if the organisation complies with a certified code of conduct with respect to their processing of personal data for these purposes.

The use for scientific or historical research or statistical purposes may constitute a "further processing" (i.e., a processing for a purpose other than the purpose for which the data have been initially collected). If this is the case and the data have been obtained from the initial controller for this purpose, then both controllers must conclude an agreement that must be added to the internal processing record.

Moreover, the New Belgian DPL states that where possible, the controller should only use anonymized data for the abovementioned purposes, and the data must be anonymized after collection. If this is not possible in view of the purposes pursued, the controller can be allowed to use pseudonymized data. In that case, the

pseudonymization can only be undone if this is strictly necessary and after the advice of the DPO.

7. Cease and desist procedure

The New Belgian DPL introduces a cease and desist procedure which allows bringing a claim for infringement of data protection obligations before the President of the Court of First Instance. The President of the Court of First Instance was also competent to hear claims brought under the (old) Data Protection Law of 8 December 1992 (which will be abolished when the New Belgian DPL enters into force). If the Court finds an infringement, it can order the infringing party to cease the infringement and impose a penalty if the party does not comply with the order.

If a data subject also wishes to claim compensation for damages suffered, the data subject will have to bring separate proceedings, since a claim for damages cannot be brought in a cease and desist procedure.

8. Sanctions and penalties

The sanctions, including the administrative fines of the GDPR, also apply for infringement of the obligations of the New Belgian DPL. In addition to the administrative fines, the New Belgian DPL also imposes criminal sanctions, making the infringement of data protection law a criminal offence.

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