Data Protection & Privacy

Contributing editors
Aaron P Simpson and Lisa J Sotto

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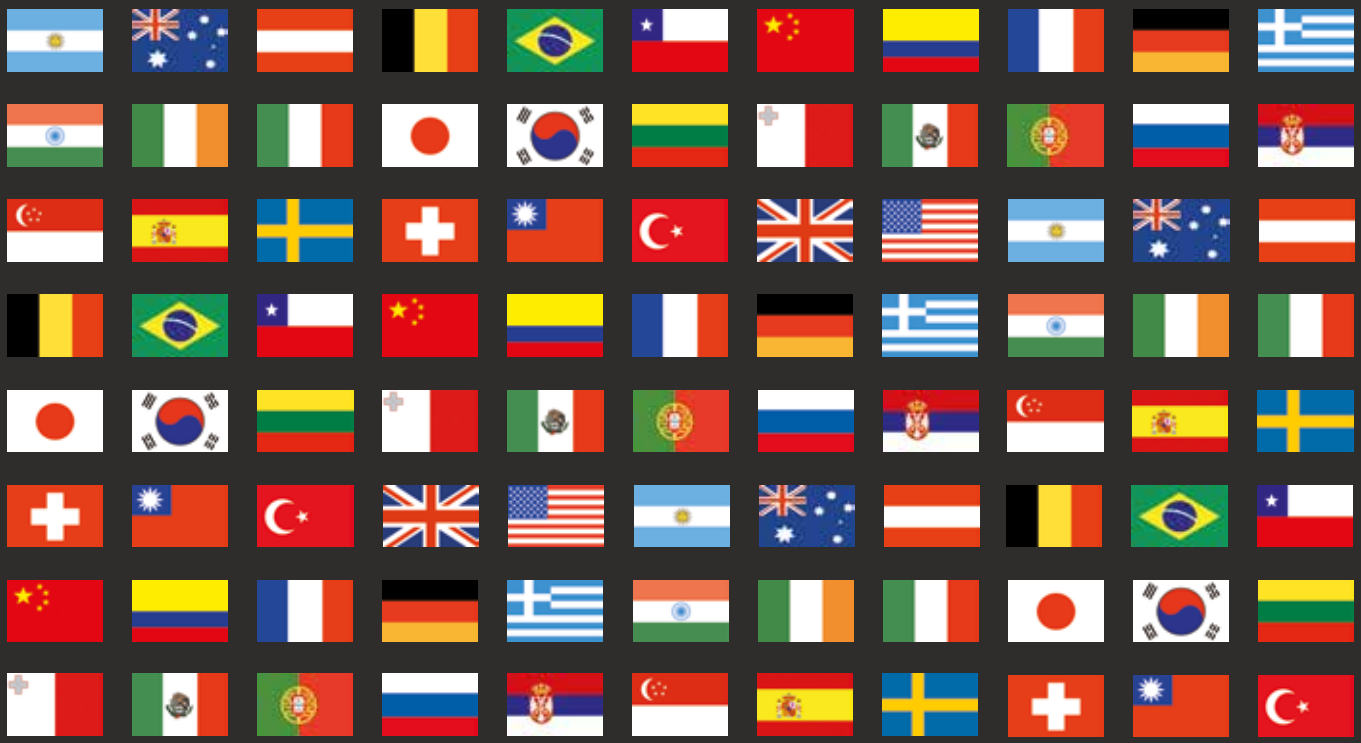

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GETTING THE DEAL THROUGH

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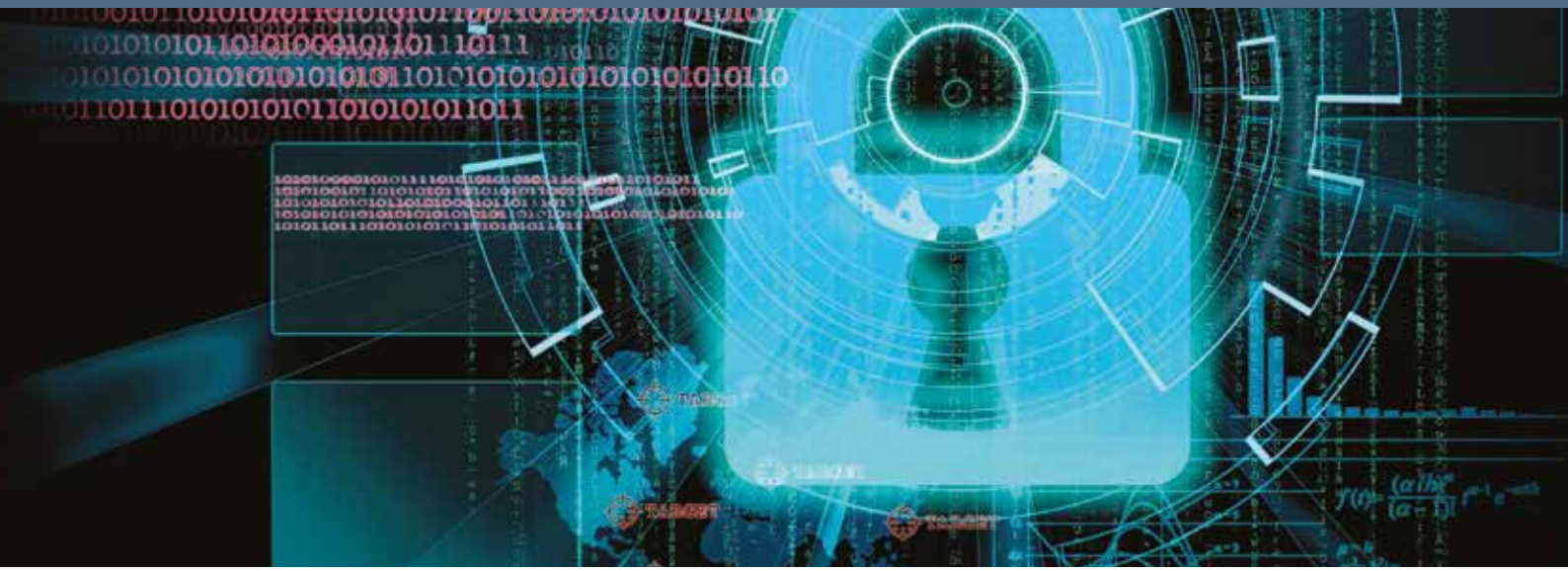

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GETTING THE DEAL THROUGH

Data Protection & Privacy 2019

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Aaron P Simpson and Lisa J Sotto

Hunton Andrews Kurth LLP

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For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

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Preface

Data Protection & Privacy 2019

Seventh edition

Getting the Deal Through is delighted to publish the seventh edition of *Data Protection & Privacy*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Argentina, Colombia, Greece, Korea, Malta and Taiwan.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Aaron P Simpson and Lisa J Sotto of Hunton Andrews Kurth LLP, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
July 2018

Belgium

Aaron P Simpson, David Dumont and Laura Léonard
Hunton Andrews Kurth LLP

Law and the regulatory authority

1 Legislative framework

Summarise the legislative framework for the protection of personally identifiable information (PII). Does your jurisdiction have a dedicated data protection law? Is the data protection law in your jurisdiction based on any international instruments on privacy or data protection?

As of 25 May 2018, the EU General Data Protection Regulation (GDPR) has become directly applicable in Belgium.

In the context of this important evolution of the legal framework, the Belgian data protection supervisory authority (formerly called the Commission for the Protection of Privacy) has been reformed by the Act of 3 December 2017 creating the Data Protection Authority (DPA). This reform was necessary to enable the DPA to fulfil the tasks and exercise the powers of a supervisory authority under the GDPR.

As a second step in adjusting the Belgian legal framework to the GDPR, a draft Bill of a new Data Protection Act (the Bill) was submitted to the Belgian Parliament on 11 June 2018. The Bill is aimed to address the areas where the GDPR leaves room for EU member states to adopt country-specific rules and to implement Directive 2016/680 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 (the Directive). The Bill still needs to be adopted by the Belgian Parliament. Once the Bill is adopted, it will replace the Act on the Protection of Privacy in relation to the Processing of Personal Data of 8 December 1992.

This chapter mainly focuses on the legislative data protection framework for private sector companies and does not address the specific regime for the processing of PII by police and criminal justice authorities in detail. The responses reflect the requirements set forth by the GDPR and the Bill. As the Bill has not been officially adopted by the Belgian Parliament yet, the legislative framework may still change.

In addition to the GDPR, a number of international instruments on privacy and data protection apply in Belgium, including:

- the Council of Europe Convention 108 on the Protection of Privacy and Trans-border Flows of Personal Data;
- the European Convention on Human Rights and Fundamental Freedoms (article 8 on the right to respect for private and family life); and
- the Charter for Fundamental Rights of the European Union (article 7 on the right to respect for private and family life and article 8 on the right to the protection of personal data).

There is also sector-specific legislation relevant to the protection of PII. The Electronic Communications Act of 13 June 2005 (the Electronic Communications Act), for instance, imposes specific privacy and data protection obligations on electronic communications service providers.

2 Data protection authority

Which authority is responsible for overseeing the data protection law? Describe the investigative powers of the authority.

The Belgian Commission for the Protection of Privacy has been replaced by the Belgian DPA. The DPA is responsible for overseeing compliance with data protection law in Belgium. The DPA is headed by a president and consists of six main departments:

- an executive committee that, among others, approves the DPA's annual budget and determines the strategy and management plan;
- a general secretariat that supports the operations of the DPA and has a number of executive tasks, including establishing the list of processing activities that require a data protection impact assessment, rendering opinions in case of prior consultation by a data controller, and approving codes of conduct and certification criteria, as well as standard contractual clauses and binding corporate rules for cross-border data transfers;
- a first line service that is responsible for receiving complaints and requests, starting mediation procedures, raising awareness around data protection with the general public and informing organisations of their data protection obligations;
- a knowledge centre that issues advice on questions related to PII processing and recommendations regarding social, economic or technological developments that may have an impact on PII processing;
- an investigation service that is responsible for investigating data protection law infringements; and
- a litigation chamber that deals with administrative proceedings.

In addition, there is an independent reflection board that provides non-binding advice to the DPA on all data-protection-related topics, upon request of the executive committee or the knowledge centre or on its own initiative.

To fulfil its role, the DPA has been granted a wide variety of investigative, control and enforcement powers. The enforcement powers include the power to:

- issue a warning or a reprimand;
- order compliance with an individual's requests;
- order to inform affected individuals of a security incident;
- order to freeze or limit processing;
- temporarily or permanently prohibit processing;
- order to bring processing activities in compliance with the law;
- order the rectification, restriction or deletion of PII and the notification thereof to data recipients;
- order the withdrawal of a licence given to a certification body;
- impose penalty payments and administration sanctions; and
- suspend data transfers.

Furthermore, the DPA can transmit a case to the public prosecutor for criminal investigation and prosecution. The DPA can also publish the decisions it issues on its website. The investigation powers of the DPA include the power to:

- hear witnesses;
- perform identity checks;
- conduct written inquiries;

- conduct on-site inspections;
- access computer systems and copy all data such systems contain;
- access information electronically;
- seize or seal goods, documents and computer systems; and
- request the identification of the subscriber or regular user of an electronic communication service or electronic communication means.

The investigation service also has the power to take interim measures, including suspending, limiting or freezing PII processing activities.

In addition to the DPA, certain public bodies, such as police agencies, intelligence and security services and the Coordination Unit for Threat Analysis, have a specific authority overseeing their data protection compliance.

3 Legal obligations of data protection authority

Are there legal obligations on the data protection authority to cooperate with data protection authorities, or is there a mechanism to resolve different approaches?

The DPA is required to cooperate with all other Belgian public and private actors involved in the protection of individuals' rights and freedoms, particularly with respect to the free flow of PII and customer protection. The DPA must also cooperate with the national data protection authorities of other countries. Such cooperation will focus on, inter alia, the creation of centres of expertise, the exchange of information, mutual assistance for controlling measures and the sharing of human and financial resources. The rules for ensuring a consistent application of the GDPR throughout the EU set forth in the GDPR will apply in cross-border cases.

4 Breaches of data protection

Can breaches of data protection law lead to administrative sanctions or orders, or criminal penalties? How would such breaches be handled?

The DPA has the power to impose the administrative sanctions set forth in the GDPR. Depending on the nature of the violation, these administrative sanctions can go up to €20,000,000 or 4 per cent of an organisation's total worldwide annual turnover of the preceding financial year. Breaches of data protection law can also lead to criminal penalties, which can, depending on the nature of the violation, go up to €240,000. In addition, violations of Belgian privacy and data protection law may result in civil action for damages.

Scope

5 Exempt sectors and institutions

Does the data protection law cover all sectors and types of organisation, or are some areas of activity outside its scope?

Belgian data protection law is generally intended to cover the processing of PII by all types of organisations in all sectors. That being said, certain types of PII processing are (partially) exempted or subject to specific rules, including the processing of PII:

- by a natural person in the course of a purely personal or household activity; for example, a private address file or a personal electronic diary;
- solely for journalism purposes, or purposes of academic, artistic or literary expression;
- by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties;
- by the intelligence and security services;
- by the armed forces;
- by competent authorities in the context of security classification, clearances, certificates and advice;
- by the Coordination Unit for Threat Assessment;
- by the Passenger Information Unit; and
- by certain public bodies that monitor the police, intelligence and security services (such as the Standing Policy Monitoring Committee and the Standing Intelligence Agencies Review Committee).

6 Communications, marketing and surveillance laws

Does the data protection law cover interception of communications, electronic marketing or monitoring and surveillance of individuals? If not, list other relevant laws in this regard.

The GDPR and the Bill generally apply to the processing of PII in connection with the interception of communications and electronic marketing, as well as monitoring and surveillance of individuals. In addition, these topics are addressed by specific laws and regulations, including:

- the Belgian Criminal Code, the Electronic Communications Act and Collective Bargaining Agreement No. 81 of 26 April 2002 on the monitoring of employees' online communications (interception of communications);
- the Belgian Code of Economic Law, and the Royal Decree of 4 April 2003 regarding spam (electronic marketing); and
- the Belgian Act of 21 March 2007 on surveillance cameras, the Royal Decree of 10 February 2008 regarding the signalling of camera surveillance, the Royal Decree of 9 March 2014 appointing the categories of individuals authorised to watch real-time images of surveillance cameras in public spaces, and the Collective Bargaining Agreement No. 68 of 16 June 1998 regarding camera surveillance in the workplace (surveillance of individuals).

7 Other laws

Identify any further laws or regulations that provide specific data protection rules for related areas.

A significant number of laws and regulations set forth specific data protection rules that are applicable in a certain area, for example:

- the Act of 21 August 2008 on the establishment and organisation of the e-Health Platform (e-health records);
- Book VII of the Belgian Code of Economic Law on payment and credit services containing data protection rules for the processing of consumer credit data (credit information);
- Collective Bargaining Agreement No. 81 of 26 April 2002 on the monitoring of employees' online commincations and the Collective Bargaining Agreement No. 68 of 16 June 1998 regarding camera surveillance in the workplace;
- the Passenger Data Processing Act of 25 December 2016; and
- the Act of 18 September 2017 on the prevention of money laundering and terrorist financing and the restriction on the use of cash.

8 PII formats

What forms of PII are covered by the law?

The GDPR and the Bill apply to the processing of PII, wholly or partly by automatic means, and to the processing other than by automatic means of PII that forms part of a filing system (or is intended to form part of a filing system). 'PII' is broadly defined and includes any information relating to an identified or identifiable natural person.

9 Extraterritoriality

Is the reach of the law limited to PII owners and processors of PII established or operating in the jurisdiction?

Belgian data protection law applies to processing of PII carried out in the context of the activities of an establishment of a controller or processor in Belgium. In addition, Belgian data protection law can also apply to the processing of PII by organisations that are established outside the EU. This is the case where such organisations process PII of individuals located in Belgium in relation to:

- offering goods or services to such individuals in Belgium; or
- monitoring the behaviour of such individuals in Belgian territory.

Belgian data protection law will, however, not apply to the processing of PII by a processor established in Belgium on behalf of a controller established in another EU member state, to the extent that the processing takes place in the territory of the member state where the controller is located. In such case, the data protection law of the member state where the controller is established will apply.

10 Covered uses of PII

Is all processing or use of PII covered? Is a distinction made between those who control or own PII and those who provide PII processing services to owners? Do owners', controllers' and processors' duties differ?

In principle, all types of PII processing fall within the ambit of Belgian data protection law, regardless of who is 'controlling' the processing or merely processing PII on behalf of a controller. The 'controller' is any natural or legal person, public authority, agency or other body that alone or jointly with others determines the purposes and means of the processing of PII. Controllers can engage a 'processor' to carry out PII processing activities on their behalf and under their instructions. Controllers are subject to the full spectrum of data protection obligations. Processors, on the other hand, are subject to a more limited set of direct obligations under Belgian data protection law (including the obligation to process PII only on the controller's instructions, keep internal records of PII processing activities, cooperate with the data protection supervisory authorities, implement appropriate information security measures, notify data breaches to the controller, appoint a data protection officer if certain conditions are met and ensure compliance with international data transfer restrictions). In addition to these direct legal obligations, certain data protection obligations will be imposed on processors through their mandatory contract with the controller.

Legitimate processing of PII

11 Legitimate processing – grounds

Does the law require that the holding of PII be legitimised on specific grounds, for example, to meet the owner's legal obligations or if the individual has provided consent?

Controllers are required to have a legal basis for each PII processing activity. The exhaustive list of potential legal grounds for processing of PII set forth in the GDPR will be available to controllers that are subject to Belgian data protection law:

- the data subject has unambiguously consented to the processing of his or her PII;
- the processing is necessary for the performance of a contract to which the data subject is a party or in order to take steps at the request of the data subject prior to entering into a contract;
- the processing is necessary for compliance with a legal obligation under EU or member state law to which the controller is subject;
- the processing is necessary in order to protect the vital interests of the data subject or another individual;
- the processing is necessary for the performance of a task carried out in the public interest or in the exercise of the official authority vested in the controller; or
- the processing is necessary for the legitimate interests of the controller (or a third party to whom the PII is disclosed), provided that those interests are not overridden by the interests or fundamental rights and freedoms of the data subject.

For certain types of PII, more restrictive requirements in terms of legal bases apply (see question 12). Furthermore, controllers that rely on consent to legitimise the processing of PII that takes place in the context of offering information society services to children below the age of 13 years must obtain consent from the child's legal representative.

12 Legitimate processing – types of PII

Does the law impose more stringent rules for specific types of PII?

The processing of sensitive PII revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union membership, as well as the processing of genetic data, biometric data, health data or data concerning a person's sex life or sexual orientation, is prohibited in principle, and can only be carried out if:

- the data subject has given his or her explicit consent to such processing;
- the processing is necessary to carry out the specific obligations and rights of the controller or the data subject in the employment, social security or social protection law area;
- the processing is necessary to protect the vital interests of the data subject or of another person, where the data subject is physically or legally incapable of giving his or her consent;
- the processing is carried out by a foundation, association or any other non-profit organisation with political, philosophical, religious or trade union objectives in the course of its legitimate activities, and solely relates to the member or former members of the organisation or to persons that have regular contact with the organisation and the PII is not disclosed to third parties without the data subjects' consent;
- the processing relates to PII that has been manifestly made public by the data subject;
- the processing is necessary for the establishment, exercise or defence of legal claims;
- the processing is necessary for reasons of substantial public interest recognised by EU or member state law;
- the processing is necessary for the purposes of preventive or occupational medicine, for the assessment of the working capacity of an employee, medical diagnosis, the provision of health or social care or treatment, or the management of health or social care systems and services on the basis of EU or member state law or pursuant to a contract with a health professional, subject to appropriate confidentiality obligations;
- the processing is necessary for reasons of public interest in the area of public health on the basis of EU or member state law; or
- the processing is necessary for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes based on EU or member state law.

The Bill explicitly lists a number of PII processing activities that (provided certain conditions are met) can be deemed as necessary for reasons of substantial public interest, including PII processing activities of human rights organisations, the Centre for Missing and Sexually Exploited Children (Child Focus), and organisations that assist sex offenders.

Furthermore, the GDPR and the Bill prohibit the processing of PII relating to criminal convictions and offences or related security measures, except where the processing is carried out:

- under the supervision of an official authority;
- by natural persons, private or public legal persons for managing their own litigation;
- by lawyers or other legal advisors, to the extent that the processing is necessary for the protection of their clients' interests;
- by other persons, if the processing is necessary to perform duties of substantial public interest which are determined by EU or member state law; or
- because the processing is required for scientific, historical or statistical research or archiving.

The Bill also sets forth a number of specific measures that must be implemented when processing genetic, biometric, health or PII relating to criminal convictions and offences. In such cases, a list of categories of individuals that will have access to the data, together with a description of those individuals' roles with respect to the processing of the data, must be maintained. This list must be made available to the DPA upon request. Furthermore, the controller or processor must ensure that the individuals who have access to such data are bound by legal, statutory or contractual confidentiality obligations.

Data handling responsibilities of owners of PII

13 Notification

Does the law require owners of PII to notify individuals whose PII they hold? What must the notice contain and when must it be provided?

Controllers are required to provide notice to data subjects whose PII they process. If PII is obtained directly from the data subject, the notice must contain at least the following information and be provided no later than the moment the PII is obtained:

- the name and address of the controller (and of its representative, if any);
- the contact details of the data protection officer (if any);
- the purposes of and legal basis for the processing;

- where the legitimate interests ground is relied upon, the interests in question;
- the existence of the right to object, free of charge, to the intended PII processing for direct marketing purposes;
- the (categories of) recipients of PII;
- details of transfers to third countries or international organisations, the relevant safeguards associated with such transfers (including the existence or absence of an adequacy decision of the European Commission) and the means by which data subjects can obtain a copy of these safeguards or where they have been made available;
- the data retention period or criteria used to determine that period;
- the existence of the right to request access to and rectification or erasure of PII or the restriction of processing of PII or to object to the processing, as well as the right to data portability;
- the existence of the right to withdraw consent at any time if the controller relies on the data subject's consent for the processing of his or her PII;
- the right to lodge a complaint with a supervisory authority;
- whether providing the PII is a statutory or contractual requirement or a requirement to enter into a contract, as well as whether the data subject is obliged to provide the PII and the possible consequences of the failure to provide the PII; and
- information on automated individual decision-making (if any), including information on the logic involved in such decision-making, the significance and the envisaged consequences.

If PII is not obtained directly from the data subject, the controller must provide, in addition to the information listed above, the categories of PII concerned and the source from which the PII originates. This information must be provided within a reasonable period after obtaining the PII (within one month at the latest), or when PII is shared with a third party, at the very latest when the PII is first disclosed or when the PII is used to communicate with the data subject at the latest at the time of the first communication.

14 Exemption from notification

When is notice not required?

Notice is not required if data subjects have already received the information mentioned in question 13. In addition, in cases where PII is not collected directly from the data subject, the controller is exempt from the duty to provide notice if:

- informing the data subject proves impossible or would involve a disproportionate effort, in particular in the context of processing PII for archiving purposes in the public interest, statistical, historical or scientific research, or to the extent that providing notice would seriously impair or render the achievement of the purposes of the processing impossible; or
- PII must remain confidential subject to an obligation of professional secrecy regulated by EU or member state law.

15 Control of use

Must owners of PII offer individuals any degree of choice or control over the use of their information? In which circumstances?

Belgian data protection law includes a number of rights aimed at enabling data subjects to exercise choice and control over the use of their PII. In particular, data subjects are entitled to:

- request the controller to provide information regarding the processing of their PII and a copy of the PII being processed;
- obtain the rectification of incorrect PII relating to them and to have incomplete PII completed;
- obtain the erasure of their PII;
- obtain the restriction of the processing of their PII;
- receive the PII they have provided to the controller in a structured, commonly used and machine-readable format and to have it transmitted directly to another controller where technically feasible;
- object to the processing of their PII, for reasons related to their particular situation, if such processing is based on the ground that it is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or on the basis of the legitimate interests ground, unless the controller demonstrates that it has compelling legitimate grounds that outweigh the interests, rights and freedoms of the data subject or the processing is necessary for the establishment, exercise or defence of legal claims;
- object to the processing of their PII for direct marketing purposes; and
- not be subject to decisions having legal effects or similarly significantly affecting them, which are taken purely on the basis of automatic PII processing, including profiling.

The above mentioned data protection rights are not absolute and typically subject to conditions and exemptions set forth in the GDPR and the Bill.

16 Data accuracy

Does the law impose standards in relation to the quality, currency and accuracy of PII?

Controllers must ensure that the PII they process is accurate and take reasonable steps to ensure that inaccurate PII is rectified or erased without delay.

17 Amount and duration of data holding

Does the law restrict the amount of PII that may be held or the length of time it may be held?

Controllers are required to limit the processing of PII to what is strictly necessary for the processing purposes. In terms of data retention requirements, PII must not be kept in an identifiable form for longer than necessary in light of the purposes for which the PII is collected or further processed. This means that, if a controller no longer has a need to identify data subjects for the purposes for which the PII was initially collected or further processed, the PII should be erased or anonymised.

18 Finality principle

Are the purposes for which PII can be used by owners restricted? Has the 'finality principle' been adopted?

Belgian data protection law incorporates the 'finality principle' and, therefore, PII can only be collected for specified, explicit and legitimate purposes and must not be further processed in a way incompatible with those purposes.

19 Use for new purposes

If the finality principle has been adopted, how far does the law allow for PII to be used for new purposes? Are there exceptions or exclusions from the finality principle?

PII can be processed for new purposes if these are not incompatible with the initial purposes for which the PII was collected, taking into account all relevant factors, especially the link between the purposes for which the PII was collected and the purposes of the intended further processing, the context in which the PII was collected, the relationship between the controller and the data subject, the nature of the concerned PII, the possible consequences of the further processing and the safeguards implemented by the controller (eg, pseudonymising or encrypting the PII). Furthermore, the Bill sets forth specific rules for the further processing of PII for archiving in the public interest, scientific or historical research or statistical purposes.

Security

20 Security obligations

What security obligations are imposed on PII owners and service providers that process PII on their behalf?

Controllers and processors are required to implement appropriate technical and organisational measures to protect PII from accidental or unauthorised destruction, loss, alteration, disclosure, access and any other unauthorised processing.

These measures must ensure an appropriate level of security taking into account the state of the art, the costs of implementation and the nature, scope, context and purposes of processing, as well as the varying likelihood and severity for the rights and freedoms of individuals.

These measures may include:
- the pseudonymisation and encryption of PII;
- the ability to ensure the ongoing confidentiality, integrity, availability and resilience of processing systems and services;
- the ability to restore the availability and access to PII in a timely manner in the event of a physical or technical incident; and
- a process for regularly testing, assessing and evaluating the effectiveness of technical and organisational measures for ensuring the security of the processing.

The more sensitive the PII and the higher the risks for the data subject, the more precautions have to be taken. The Bill, for instance, sets forth specific measures that controllers must implement when processing genetic and biometric data, health data and data relating to criminal convictions and offences, including measures to ensure that persons having access to such PII are under appropriate confidentiality obligations.

21 Notification of data breach

Does the law include (general or sector-specific) obligations to notify the supervisory authority or individuals of data breaches? If breach notification is not required by law, is it recommended by the supervisory authority?

The Electronic Communications Act imposes a duty on providers of publicly available electronic communications services to notify security breaches, under certain conditions, to the DPA. The notification should contain the following information:
- the nature of the security breach;
- the consequences of the breach;
- details of the person or persons who can be contacted for more information concerning the breach;
- measures suggested or implemented by the controller to address the breach; and
- measures recommended to mitigate the negative effects of the security breach.

Where feasible, the notification should be done within 24 hours after detection of the breach. In case the controller does not have all required information available within this time-frame, it can complete the notification within 72 hours after the initial notification. The DPA has published a template form on its website to accommodate companies in complying with their data breach notification obligations. In addition, data subjects must be informed without undue delay when the security breach is likely to adversely affect their privacy or PII.

As of 25 May 2018, mandatory data breach notification obligations are no longer limited to the telecom sector. Controllers in all sectors are now required to notify data breaches to the DPA, unless the data breach is unlikely to result in a risk to the rights and freedoms of individuals. Such notification must be done without undue delay and, where feasible, no later than 72 hours after becoming aware of the breach. Where notifying the DPA within 72 hours is not possible, the controller must justify such delay. A data breach notification to the DPA must at least contain:
- the nature of the data breach, including, where possible, the categories and approximate number of data subjects concerned and the categories and approximate number of PII records concerned;
- the name and contact details of the data protection officer (if any) or another contact point to obtain additional information regarding the data breach;
- a description of the likely consequences of the data breach; and
- a description of the measures taken or proposed to be taken to address the breach, including mitigation measures where appropriate.

In addition to notifying the DPA, controllers are required to notify data breaches to the affected data subjects where the breach is likely to result in a high risk to the rights and freedoms of natural persons. The notification to the affected individuals must contain at least:
- the name and contact details of the data protection officer or another contact person;
- a description of the likely consequences of the data breach; and
- a description of the measures taken or proposed to be taken to address the breach, including mitigation measures where appropriate.

Notifying the affected individuals is, however, not required if the controller has implemented measures that render the affected PII unintelligible to any person who is not authorised to access it (eg, encryption), subsequent measures have been taken to ensure that the high risk to the rights and freedoms of individuals is no longer likely to materialise or where notifying the affected individuals would involve disproportionate effort. In the latter case, a public communication or similar measure should be made to inform the affected individuals about the breach. If a processor suffers a data breach, it must notify the controller on whose behalf it processes PII without undue delay. In Belgium, data breaches can be notified to the DPA via an online form made available on the DPA's website. The DPA is in the process of updating the existing form in light of the data breach notification requirements under the GDPR, but in the meantime controllers can continue to use the existing form.

Internal controls

22 Data protection officer

Is the appointment of a data protection officer mandatory? What are the data protection officer's legal responsibilities?

The appointment of a data protection officer is mandatory where:
- the processing is carried out by a public authority or body;
- the core activities of the controller or processor consist of processing operations that require regular and systematic monitoring of data subjects on a large scale; or
- the core activities of the controller or processor consist of processing sensitive PII on a large scale.

In addition, the Bill provides that the appointment of a data protection officer is required for:
- private organisations that process PII on behalf of a public authority (as data processors) or that receive PII from a public authority and the processing of such PII is considered to present a high risk; and
- controllers processing PII for archiving purposes in the public interest or for scientific, historical or statistical purposes.

The main tasks of the data protection officer are to:
- inform and advise the controller or processor of its data protection obligations;
- monitor compliance with data protection laws, the GDPR and the controller's or processor's policies, including with respect to the assignment of responsibilities, raising awareness and training the controller's or processor's personnel involved in the processing of PII;
- assist with data protection impact assessments; and
- act as contact point for the data subjects and the relevant supervisory authorities.

Although the obligation to maintain internal records of processing ultimately falls on the controller or processor, the data protection officer may also be assigned with the task of maintaining such records.

Controllers and processors must communicate the identity and contact details of their data protection officer to the DPA via an online form available on the DPA's website.

23 Record keeping

Are owners or processors of PII required to maintain any internal records or establish internal processes or documentation?

Controllers and processors are required to maintain internal records of their processing activities. Such records should be in writing, including in electronic form, and should be made available to the DPA upon request.

Controllers' internal records should contain, at least:
- the name and contact details of the controller, joint controller or the controller's representative, if applicable, and the identity and contact details of the data protection officer (if any);

- the purposes of the processing;
- a description of the categories of data subjects and PII;
- the categories of data recipients, including recipients in third countries;
- transfers of PII to a third country, including the identification of such country and, where applicable, documentation of the safeguards that have been put in place to protect the PII transferred;
- the envisaged data retention period or the criteria used to determine the retention period; and
- a description of the technical and organisational security measures put in place, where possible.

Processors' records should contain, at least:
- the name and contact details of the processor and each controller on behalf of which the processor is acting and, where applicable, the controller's or processor's representative and data protection officers;
- the categories of processing carried out on behalf of the controller;
- transfers of PII to third countries, including the identification of such countries and, where applicable, documentation of the safeguards put in place to protect the PII transferred; and
- where possible, a description of the technical and organisational security measures that have been put in place.

Companies that employ fewer than 250 persons are exempted from the obligation to keep internal records of their PII processing activities, unless their processing activities are likely to result in a risk to the rights and freedoms of individuals, are not occasional or include the processing of sensitive PII or PII relating to criminal convictions and offences.

24 New processing regulations

Are there any obligations in relation to new processing operations?

The GDPR introduces the principles of privacy by design and privacy by default. Privacy by design means that controllers are required to implement appropriate technical and organisational measures designed to implement the data protection principles in an effective manner and to integrate the necessary safeguards into the processing in order to meet the requirements of the GDPR. When doing so, controllers must take into account the state of the art, the cost of implementation and the nature, scope, context and purposes of processing. Privacy by default means that controllers must implement appropriate technical and organisational measures to ensure that, by default, only PII that is strictly necessary for each processing purpose is processed.

When engaging in new PII processing activities or changing existing processing activities that are likely to result in a high risk to the rights and freedoms of individuals, controllers are also required to carry out a data protection impact assessment. High-risk PII processing activities triggering the requirement to conduct a data protection impact assessment include:
- automated individual decision-making;
- large-scale processing of sensitive PII or PII relating to criminal convictions and offences; and
- systematic monitoring of a publicly accessible area on a large scale.

Where a data protection impact assessment reveals that the processing would result in a high risk and no measures are taken by the controller to mitigate such risk, the controller must consult the DPA prior to commencing the envisaged PII processing activity. The Bill excludes, under certain conditions, processing activities for journalistic, academic, artistic or literary purposes from such requirement.

The DPA has issued a Recommendation (01/2018) on data protection impact assessments in which it provides guidance to controllers on when a data protection impact assessment is required and what the assessment should contain. The Recommendation also includes a list of PII processing activities that require a data protection impact assessment and a list of PII processing activities that do not trigger the requirement to conduct a data protection impact assessment.

Registration and notification

25 Registration

Are PII owners or processors of PII required to register with the supervisory authority? Are there any exemptions?

As of 25 May 2018, the obligation for controllers to register their data processing activities with the DPA no longer exists. Instead, controllers and processors are required to maintain internal records of their processing activities (see question 23). However, if a controller or processor appoints a data protection officer, such appointment must be communicated to the DPA through a specific online form made available on the DPA's website.

26 Formalities

What are the formalities for registration?

See question 25.

27 Penalties

What are the penalties for a PII owner or processor of PII for failure to make or maintain an entry on the register?

Not applicable, see question 25.

28 Refusal of registration

On what grounds may the supervisory authority refuse to allow an entry on the register?

See question 25.

29 Public access

Is the register publicly available? How can it be accessed?

See question 25.

30 Effect of registration

Does an entry on the register have any specific legal effect?

See question 25.

31 Other transparency duties

Are there any other public transparency duties?

No.

Transfer and disclosure of PII

32 Transfer of PII

How does the law regulate the transfer of PII to entities that provide outsourced processing services?

Under the GDPR, when a controller outsources data processing activities to a third party (ie, a processor), it should put in place an agreement with the processor that sets out:
- the subject matter and duration of the processing;
- the nature and purpose of the processing;
- the type of PII and categories of data subjects; and
- the obligations and rights of the controller.

Such agreement should stipulate that the processor:
- processes the PII only on documented instructions from the controller, unless otherwise required by EU or member state law. In that case, the processor must inform the controller of the legal requirement before processing, unless the law prohibits such information on important grounds of public interest. In addition, if in the processor's opinion an instruction of the controller infringes the GDPR, it should immediately inform the controller thereof;
- ensures that persons authorised to process the PII have committed themselves to confidentiality or are under an appropriate statutory obligation of confidentiality;
- takes all appropriate technical and organisational measures required under the GDPR to protect the PII;

- shall not engage sub-processors without the specific or general written authorisation of the controller. In the case of a general written authorisation, the processor must inform the controller of intended changes concerning the addition or replacement of sub-processors;
- assists the controller by appropriate technical and organisational measures, insofar as this is possible, with data subjects' rights requests;
- assists the controller in ensuring compliance with the security and data breach notification requirements, as well as the controller's obligation to conduct privacy impact assessments;
- at the end of the provision of the services to the controller, returns or deletes the PII, at the choice of the controller, and deletes existing copies unless further storage is required under EU or member state law; and
- makes available to the controller all information necessary to demonstrate compliance with the GDPR and contribute to audits.

33 Restrictions on disclosure

Describe any specific restrictions on the disclosure of PII to other recipients.

In general, there are no specific restrictions under the GDPR or the Bill on the disclosure of PII other than the restrictions resulting from the general data protection principles (such as lawfulness, notice and purpose limitation).

34 Cross-border transfer

Is the transfer of PII outside the jurisdiction restricted?

PII can be transferred freely to other countries within the EEA, as well as to countries recognised by the European Commission as providing an 'adequate level of data protection' (see http://ec.europa.eu/justice/data-protection/international-transfers/adequacy/index_en.htm for a list of countries deemed to be providing an adequate level of data protection).

Transferring PII to countries outside the EEA that are not recognised as providing an 'adequate level of data protection' is prohibited unless:

- the data subject has explicitly given his or her consent to the proposed transfer after having been informed of the possible risks of such transfers;
- the transfer is necessary for the performance of a contract between the data subject and the controller or for the implementation of pre-contractual measures taken in response to the data subject's request;
- the transfer is necessary for the conclusion or performance of a contract concluded or to be concluded between the controller and a third party in the interest of the data subject;
- the transfer is necessary for important reasons of public interest, or for the establishment, exercise or defence of legal claims;
- the transfer is necessary in order to protect the vital interests of the data subject or other persons;
- the transfer is made from a register that is open to consultation either by the public in general or by any person that can demonstrate a legitimate interest; or
- if none of the above applies and no appropriate safeguards have been put in place, the transfer can take place if it is necessary for the purposes of compelling legitimate interests pursued by the controller, but only if the transfer is not repetitive, concerns only a limited number of data subjects, and the controller has assessed all circumstances surrounding the data transfer and has provided suitable safeguards to protect the PII. In this case, the controller must inform the DPA and concerned data subjects of the transfer and the legitimate interests that justify such transfer.

In addition to the exemptions listed above (which should typically only be relied on in limited cases), cross-border transfers to non-adequate countries are allowed if the controller has implemented measures to ensure that the PII receives an adequate level of data protection and data subjects are able to exercise their rights after the PII has been transferred. Such measures include the execution of standard contractual clauses approved by the European Commission or adopted by a supervisory authority, an approved code of conduct or certification mechanism or implementation of binding corporate rules. In addition, transfers of PII can be legitimised by executing an ad hoc data transfer agreement. However, in such cases the prior authorisation of the Minister of Justice (by Royal Decree) must be obtained.

35 Notification of cross-border transfer

Does cross-border transfer of PII require notification to or authorisation from a supervisory authority?

In general, cross-border data transfers do not need to be notified to the DPA.

As mentioned in question 34, prior authorisation by the Minister of Justice is required if the controller relies on an ad hoc data transfer agreement to legitimise the transfer of PII to non-adequate countries. Such authorisation is not required when the controller has guaranteed an adequate level of data protection by executing the standard contractual clauses approved by the European Commission.

36 Further transfer

If transfers outside the jurisdiction are subject to restriction or authorisation, do these apply equally to transfers to service providers and onwards transfers?

The restrictions and authorisation requirements described in questions 34 and 35 apply regardless of whether PII is transferred to a service provider (ie, processor) or another controller.

The restrictions and requirements applicable to onward PII transfers depend on the legal regime in the jurisdiction where the data importer is located and the data transfer mechanism relied upon to legitimise the initial data transfer outside the EEA. For example, the standard contractual clauses and the EU–US Privacy Shield framework contain specific requirements for onward data transfers.

Rights of individuals

37 Access

Do individuals have the right to access their personal information held by PII owners? Describe how this right can be exercised as well as any limitations to this right.

Data subjects have a right to 'access' the PII that a controller holds about them. When a data subject exercises his or her right of access, the controller is required to provide the following information to the data subject:

- confirmation as to whether the controller processes the data subject's PII;
- the purposes for which his or her PII is processed;
- the categories of PII concerned;
- the recipients or categories of recipients to whom PII has been or will be disclosed, in particular, recipients in third countries, and in case of transfers to third countries, the appropriate safeguards put into place by the controller to legitimise such transfers;
- where possible, the envisaged period for which the PII will be stored or, if not possible, the criteria used to determine such period;
- the existence of the right to request the rectification or erasure of PII or restriction of the processing or to object to such processing;
- the right to lodge a complaint with a supervisory authority;
- information regarding the source of the PII; and
- the existence of automated decision-making and information about the logic involved in any such automated decision-making (if any), as well as the significance and the envisaged consequences of such processing.

The controller should also provide a copy of the PII to the data subject in an intelligible form. For further copies requested by the data subjects, controllers may charge a reasonable fee to cover administrative costs.

The right to obtain a copy of PII may be subject to restrictions to the extent it adversely affects the rights and freedoms of others, and the controller may refuse to act on a request of access if the request is manifestly unfounded or excessive, in particular because of its repetitive character.

In addition, exemptions to the right of access apply to PII originating from certain public authorities, including the police and intelligence

Update and trends

Over the past year, the DPA has focused its efforts on preparing for the GDPR, as well as providing guidance to companies about several aspects and implications of the GDPR. The DPA also focused on big data and published its 'Report Big Data', which includes recommendations regarding the application of the GDPR to big data.

services and to PII processed for journalistic, academic, artistic or literary purposes.

38 Other rights

Do individuals have other substantive rights?

In addition to the right of access described above, data subjects have the following rights:

Rectification
Data subjects are entitled to obtain, without undue delay, the rectification of inaccurate PII relating to them.

Erasure ('right to be forgotten')
Data subjects have the right to request the erasure of PII concerning them where:
- the PII is no longer necessary for the purposes for which it was collected or otherwise processed;
- the processing is based on consent and the data subject withdraws his or her consent and there is no other legal basis for the processing;
- the data subject objects to the processing of his or her PII based on the controller's legitimate interests and there are no overriding legitimate grounds for the processing;
- the data subject objects to the processing of his or her PII for direct marketing purposes;
- PII has been unlawfully processed;
- PII has to be erased for compliance with a legal obligation under EU or member state law; and
- PII has been collected in relation to offering information society services to a child.

The right to be forgotten does not apply where the processing is necessary for:
- the exercise of the right to freedom of expression and information,
- compliance with a legal obligation under EU or member state law;
- the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
- reasons of public interest in the area of public health;
- archiving purposes in the public interest, scientific or historical research purposes or statistical purposes; or
- the establishment, exercise or defence of legal claims.

Restriction of processing
Data subjects are entitled to request that the processing of their PII is restricted by the controller, where one of the following conditions applies:
- the data subject is contesting the accuracy of his or her PII, in which case, the processing should be restricted for a period enabling the verification by the controller of the accuracy of the PII;
- the processing is unlawful and the data subject opposes the erasure of the PII and requests the restriction of its use instead;
- the controller no longer needs the PII, but the PII is required by the data subject for the establishment, exercise or defence of legal claims; or
- the data subject has objected to the processing of his or her PII for purposes other than direct marketing, based on grounds relating to his or her particular situation. In this case, the processing should be restricted, pending the verification by the controller as to whether the controller's legitimate interests override those of the data subject.

Objection to processing
Data subjects have the right to object at any time to the processing of their PII for substantial and legitimate reasons related to their particular situation, where the processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or where the controller processes the PII to pursue its legitimate interests. In addition, data subjects are in any event (ie, without any specific justification) entitled to object, at any time, to the processing of their PII for direct marketing purposes.

Data portability
Data subjects are entitled to receive in a structured, commonly used and machine-readable format the PII they have provided directly to the controller and the PII they have provided indirectly by virtue of the use of the controller's services, websites or applications. In addition, where technically feasible, data subjects have the right to have their PII transmitted by the controller to another controller. The right to data portability only applies if:
- the PII is processed on the basis of the data subject's consent or the necessity of the processing for the performance of a contract; and
- the PII is processed by automated means.

The above mentioned rights are subject to certain restrictions, in particular in the case of processing PII originating from certain public authorities, including the police and intelligence services, or processing of PII for journalistic, academic, artistic or literary purposes.

Complaint to relevant supervisory authorities and enforce rights in court
Data subjects are entitled to file a complaint with the DPA (which has been granted with investigative, control and enforcement powers) to enforce their rights. Furthermore, data subjects can initiate proceedings before the President of the Court of First Instance when their rights have not been respected by the controller.

Automated decision-making
Data subjects also have the right not to be subject to decisions having legal effects or significantly affecting them, including profiling, which are taken purely on the basis of automatic data processing, unless the decision:
- is necessary to enter into or for the performance of a contract;
- is based on a legal provision under EU or member state law; or
- is based on the data subject's explicit consent.

39 Compensation

Are individuals entitled to monetary damages or compensation if they are affected by breaches of the law? Is actual damage required or is injury to feelings sufficient?

Data subjects are entitled to receive compensation from controllers if they have suffered material or non-material damages as a result of a violation of the Belgian data protection law. Controllers will only be exempt from liability if they are able to prove that they are not responsible for the event giving rise to the damage. Individuals may choose to mandate an organ, organisation or a non-profit organisation to lodge a complaint on their behalf before the DPA or the competent judicial body.

40 Enforcement

Are these rights exercisable through the judicial system or enforced by the supervisory authority or both?

Enforcement of data subjects' rights is possible through legal action before the Belgian courts (ie, before the President of the Court of First Instance) and via the DPA.

Exemptions, derogations and restrictions

41 Further exemptions and restrictions

Does the law include any derogations, exclusions or limitations other than those already described? Describe the relevant provisions.

No.

Supervision

42 Judicial review

Can PII owners appeal against orders of the supervisory authority to the courts?

Controllers can appeal against certain decisions of the DPA's inspection service (including orders to freeze or limit processing activities, decisions to temporarily or permanently prohibit the processing or decisions to seize or seal goods or computer systems) in front of the DPA's Litigation Chamber. In addition, controllers can appeal the decisions of the DPA's Litigation Chamber in front of a specific section of the Appeal Court of Brussels (ie, *Cour des Marchés* or *Marktenhof*).

Specific data processing

43 Internet use

Describe any rules on the use of 'cookies' or equivalent technology.

In general, cookies or any other type of information can only be stored or accessed on individuals' equipment provided that the individuals have consented after having been informed about the purposes of such storage or access and their rights with regard to the processing of their PII. However, individuals' opt-in consent is not required if the access to or storage of information on their equipment is for the sole purpose of carrying out the transmission of a communication over an electronic communications network, or is strictly necessary to provide a service explicitly requested by the individual.

On 4 February 2015, the DPA issued practical guidance on the cookie consent requirements, which clarifies how companies should inform individuals about and obtain their consent for the use of cookies, as well as the types of cookies that are exempted from the consent requirement.

The cookie requirements under Belgian law result from the legal regime for the use of cookies set forth by the ePrivacy Directive 2002/58/EC (the ePrivacy Directive, as transposed into member state law). The ePrivacy Directive is currently under review and will most likely be replaced by the ePrivacy Regulation in the near future. The exact timing of the adoption of the ePrivacy Regulation has, however, not yet been determined.

44 Electronic communications marketing

Describe any rules on marketing by email, fax or telephone.

Apart from the general rules on marketing practices and specific rules on marketing for certain products or services (eg, medicines and financial services), there are specific rules for marketing by email, fax and telephone.

Marketing by electronic post

Sending marketing messages by electronic post (eg, email or SMS) is only allowed with the prior, specific, free and informed consent of the addressee. However, provided that certain conditions are fulfilled, electronic marketing to legal persons and existing customers is exempt from the opt-in consent requirement. In any event, electronic marketing messages should inform the addressee about his or her right to opt out from receiving future electronic marketing and provide an appropriate means to exercise this right electronically. In addition to the consent requirement, Belgian law sets out specific requirements concerning the content of electronic marketing messages, such as the requirement that electronic marketing should be easily recognisable as such and should clearly identify the person on whose behalf it is sent.

Marketing by automated calling systems and fax

Direct marketing by automated calling systems (without human intervention) and fax also requires the addressees' prior, specific, free and informed consent. Furthermore, the addressee should be able to withdraw his or her consent at any time, free of charge and without any justification.

Marketing by telephone

Belgian law explicitly prohibits direct marketing by telephone to individuals who have registered their telephone number with the Do Not Call register.

As the rules on electronic communications marketing under Belgian law result from the ePrivacy Directive (see question 43), these rules may change once the ePrivacy Directive is replaced by the ePrivacy Regulation (which has not been adopted yet).

45 Cloud services

Describe any rules or regulator guidance on the use of cloud computing services.

There are no specific rules on the use of cloud computing services under Belgian law. However, the DPA has issued advice (Advice No. 10/2016 of 24 February 2016 on the Use of Cloud Computing by Data Controllers) that identifies the privacy risks related to cloud computing services and provides guidelines for data controllers on how to comply with Belgian data protection law when relying on providers of cloud computing services.

Some of the risks identified by the DPA include:

- loss of control over the data owing to physical fragmentation;
- increased risk of access by foreign authorities;
- vendor lock-in;
- inadequate management of access rights;
- risks associated with the use of sub-processors;
- non-compliance with data retention restrictions;
- difficulties with accommodating data subjects' rights;
- unavailability of the services;
- difficulties with recovering data in case of termination of the cloud provider's business or the service contract; and
- violations of data transfer restrictions.

HUNTON ANDREWS KURTH

Aaron P Simpson **asimpson@HuntonAK.com**
David Dumont **ddumont@HuntonAK.com**
Laura Léonard **lleonard@HuntonAK.com**

Park Atrium
Rue des Colonies 11
1000 Brussels
Belgium

Tel: +32 2 643 58 00
Fax: +32 2 643 58 22
www.HuntonAK.com

To address these risks, the DPA has issued a number of guidelines for data controllers that want to migrate data to a cloud environment. The DPA recommends data controllers, among others, to:

- clearly identify data and data processing activities before migrating them to the cloud environment, taking into account the nature and sensitivity of the data;
- impose appropriate contractual and technical requirements on cloud providers (eg, not allowing cloud providers to alter terms and conditions unilaterally, requiring cloud providers to inform about the use of sub-processors and including exhaustive lists of physical locations where data can be stored);
- identify the most suitable cloud solution;
- perform a risk analysis (ideally by an independent body specialised in information security);
- select the appropriate cloud provider, taking into account the risk analysis;
- inform data subjects about the migration of their PII to the cloud; and
- monitor changes to cloud services over time and update the risk analysis in light of such changes.

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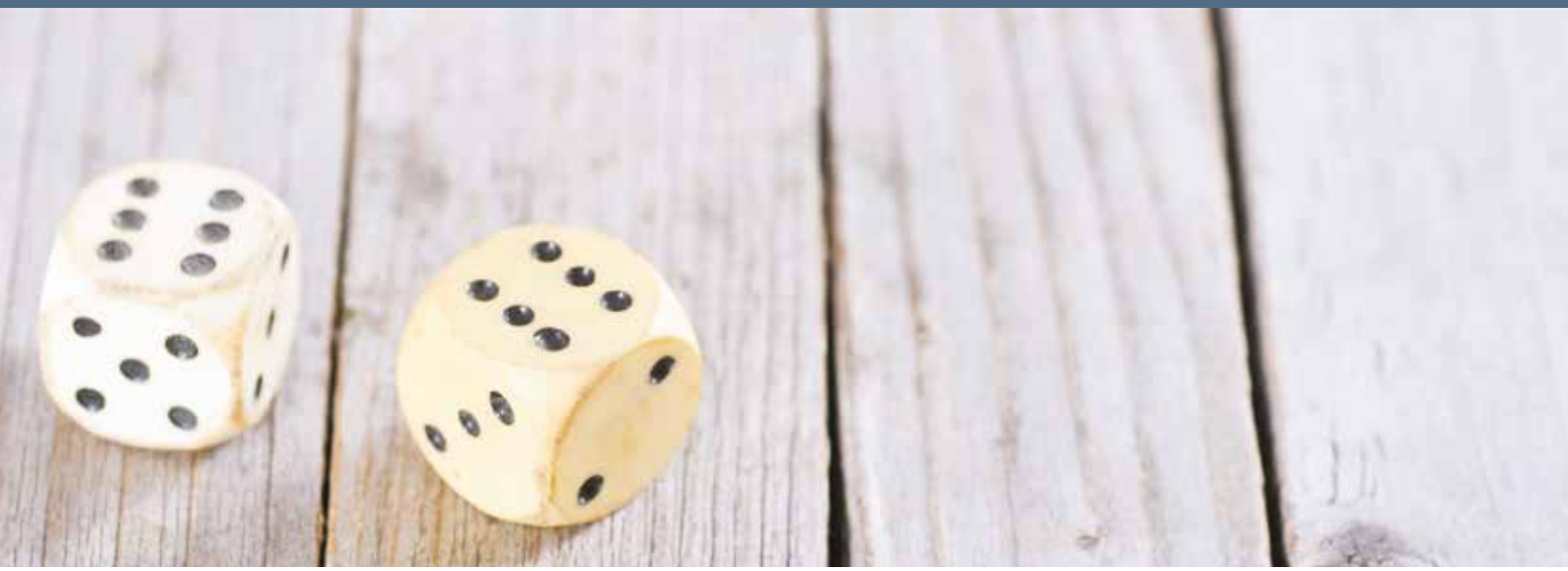

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