SPOTLIGHT ON BELGIUM

TRENDS IN THE LEGAL LANDSCAPE

ISSUE 6, FALL 2014

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INTRODUCTION

Welcome to the sixth issue of Spotlight on Belgium, the publication through which DLA Piper's Belgian team brings you up-to-speed with the latest legal updates. And as we are freshly out of the holiday period – it may not come as a surprise that many of our contributions have an international angle. What are the highlights?

- Employment lawyer Frederic Brasseur decodes the **analytical report on the remuneration structure**, to be used as an instrument to combat the remuneration gap between male and female workers within the company, which, since 25 May 2014, has become obligatory for all undertakings who count at least 50 workers.
- Partner Patrick Van Eecke sheds light on the European Court of Justice's landmark ruling of 13 May 2014, which held that data subjects in the European Union have the right to **compel Internet search engines to remove search results** linking to websites containing personal information about them.
- Together with IPT lawyer Antoon Dierick, Patrick also discusses the **cloud standardization guidelines** issued by the European Commission to boost the offering and the uptake of Europe-based cloud computing services – which should result in several billions of euros income by 2020 as well as a substantial amount of job creation.
- Patrick Van Eecke and Raf Schoefs discuss the new Regulation of the European Parliament and the Council on **electronic identification and trust services**.
- In their contribution **'A New Round of Sanctions Against Russia'**, our Trade & Government Affairs partner Jeroen Jansen and experts Valerijus Ostrovskis and Michael Marelus discuss how the sanctions imposed on Russia change the legal and compliance risks and costs of EU and international companies and individuals doing business in Russia, Crimea and Sevastopol.
- Competition partner Bertold Bär-Bouyssière discusses whether the French legislation to block the planned GE-Alstom deal as a step back for the freedom of contract in Europe in his article **'Back to the Future? Back to the Past!'**
- Our Litigation & Regulatory lawyer Michael Marelus **interviews Mr Willard Mwemba**, the head of mergers and acquisitions at the Common Market for Eastern and Southern Africa's Competition Commission. They look back at the CCC's first year, as well as ahead to upcoming developments in the field.
- Lastly, real estate partner Michael Bollen outlines the **Regulated Real Estate Company**, a newly created statute which distinguishes itself from the *vastgoedbevak/sicafi* to avoid certain obligations and restrictions associated with the statute of alternative investment funds.

That concludes the overview of our articles, but it does not mean we are all out of international news. Indeed, quite the opposite is true, as we end with what is perhaps our most exciting news of all – the new premises of **DLA Piper's Luxembourg office further developing our Luxembourg offering**.

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THE PRACTICAL MODALITIES IN RELATION TO THE REPORT ON THE REMUNERATION STRUCTURE ARE PUBLISHED

The Act of 12 July 2013 *amending various Act in order to combat the remuneration gap between male and female workers* introduced the duty to draft an analytical report on the remuneration structure and to consult the works council on this report, notably in order to examine whether an action plan should be drafted in order to combat the remuneration gap between male and female employees within the company.

While this Act is now nearly one year old, the Royal Decrees necessary for actually executing it were only published in the Belgian Official Journal of 25 May 2014.

The duty to issue such an analytical report applies to all undertakings that normally count at least 50 employees. Whether or not this threshold is met should be calculated in accordance with the Act of 20 September 1948 *on the organisation of the economy*. This implies the threshold is assessed at the level of the technical operating unit and not each company separately. It is nevertheless less clear whether by referring to the 1948 Act the legislator also intended a reference to the provision in this Act stating that the threshold for establishing a works council or committee for prevention and protection at work is assessed on the basis of the number of employees in the calendar year preceding the social elections.

The report should normally be made every 2 years. However, the first report should cover a period of one single year, which should be the financial year closed in 2014.

The analytical report should be communicated to the works council and discussed within 3 months following the end of the last financial year it relates to. There is in this regard a legal lacuna for the companies that closed their financial year in the first half of 2014, e.g. on 31 March 2014. These companies should indeed also follow the 3 month rule, notwithstanding the fact the Decrees necessary for doing so have only been published a couple of weeks ago.

The analytical report should be drafted on the basis of the forms included in the Royal Decree of 25 April 2014. There is a form for technical operating units with at least 100 employees, and a reduced form for technical operating units with between 50 and 100 employees where a union delegation has been established.

The form includes not only information on the remuneration in the strict sense of the word, i.e. the basic remuneration and the variable remuneration, but also on the employer contributions to complementary social security coverage (pension schemes, hospitalisation insurance, etc.) and other benefits in kind (company cars, etc.).

The reduced form states that if a particular group only includes 3 employees or less, the employer is not obliged to disclose the average remuneration for this group, since, bearing in mind the privacy legislation, the employer is evidently not allowed to disclose the remuneration of individual workers to the works council. We do in this regard nevertheless point out that:

- **Disclosing an average for a group of employees only allows to leave uncertainty on the amounts for individual employees** if there are sufficient reasons for thinking there are relevant differences within the group concerned (e.g. if one knows the remuneration scales mainly depend on the period of continuous employment, and that the 3 or 4 employees within the group have a comparable period of continuous employment, then one can have a quite clear idea of the remuneration for the individual employees concerned).
- **The threshold of 3 employees also applies if these employees are works council members**, although in that case, it is for this person obviously even easier to have an idea of the amounts for the 2 other members of their group.

Once the analytical report has been drafted and communicated to the works council, it is up to the works council to decide whether or not it is appropriate to draft an action plan for ensuring a remuneration structure independent of gender. In companies which have to draft an analytical report but do not have a works council, this decision should be taken by the union delegation "in consultation with the employer", which raises the question what should happen if the union delegation and the employer disagree.

An employer who fails to draft the required analytical report can be imposed a sanction of level 2 in the sense of the Social Criminal Code, i.e. a fine of up to EUR 3.000, to be multiplied by the number of employees involved (subject to a cap of 100 employees).

The same sanction can be imposed on a member of the works council or union delegation who illegally discloses the content of the analytical report outside the company. This requires, however, that there is sufficient evidence of who precisely leaked the report, which tends in practice to be notoriously difficult to establish, as it concerns information given to all members of a works council.

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PRIVACY LAW WATCH:
BLOOMBERG INTERVIEWS DLA PIPER PARTNER PATRICK VAN EECKE

In a May 13 landmark ruling, the European Court of Justice held that data subjects in the European Union have the right to compel Google Inc. and other Internet search engines to remove search results linking to websites containing personal information about them.

Bloomberg BNA Privacy & Security Law Report Senior Legal Editor **Donald G. Aplin** posed a series of questions to **Patrick Van Eecke**, partner and co-chair of the Privacy and Data Protection practice at DLA Piper in Brussels. Van Eecke has consulted for the European Commission, and before joining DLA Piper, he, among other things, served as information technology and Internet adviser to the Belgian minister of justice. Van Eecke is also a professor in European IT law, teaching at the University of Antwerp. He provided his insights June 3.

BLOOMBERG: Now that you have had a couple of weeks to analyze the European Court of Justice's May 13 right to be forgotten ruling in Google Spain S L v. Agencia Espanola de Proteccio´n de Datos, No. C-131/12 (E.C.J. May 13, 2014), and to mull over its implications, what do you think is the biggest business compliance challenge posed by the opinion?

PATRICK VAN EECKE: Many people across Europe may wish to remove search results concerning them in the wake of the *Google Spain S L* decision. Search engines, but also other Internet services, could be flooded with requests to evaluate whether personal information available through their services is "inadequate, irrelevant or no longer relevant."

There is also a balance to be made with the public interest. According to the European Court of Justice's ruling, this balance m ay depend "on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life." However, the court does not say how the assessment is to be made in practice by businesses. Such assessments may prove to be complicated.

Not only is "relevance" highly subjective, but it also fluctuates over time. Not all information about someone becomes less relevant over time. For example, information concerning someone's conduct in the past may be considered no longer relevant, only to become relevant again if that conduct is repeated on a later date.

Not only is "relevance" highly subjective, but it also fluctuates over time. Not all information about someone becomes less relevant over time.

If the search engine refuses to remove search result links, then the decision can be appealed before national data protection authorities or national courts. However, search engines could also refuse to make the assessment regarding the relevance of the data and forward many, or most, requests to data protection authorities or the national courts. The search engine could also systematically appeal decisions. This could mean additional delays in obtaining an order to remove search results, and this would limit the practical effectiveness of the court's ruling. The impact of the *Google Spain S L* decision for businesses will depend on its practical interpretation.

Google launched its Right to be Forgotten Request Procedure last week, in an attempt to meet the requirements of the Court of Justice. In order to evaluate the request, Google requires the applicant to: **(a)** provide the URL for each link appearing in a Google search for your name that you request to be removed; **(b)** explain, if not clear, why the linked page is about you; and **(c)** explain how this URL in search results is irrelevant, outdated or otherwise inappropriate. Google will then assess the request and "attempt to balance the privacy rights of the individual with the public's right to know and distribute information." When evaluating the request, Google will look at whether the results include outdated information about you, as well as whether there's a public interest in the information—for example, information about financial scams, professional mal practice, criminal

convictions or public conduct of government officials. Google states that this procedure and the form are still an initial effort and may be "refined" in the future.

BLOOMBERG: In the age of big data processing and analytics, do you think the ECJ's focus on how the easy "interconnectivity" of data sets enables search engines to make formerly more difficult-to-connect personal data a threat to privacy demonstrates, to some extent, a failure to recognize the reality of how the Internet works— such as to make research useful, help ensure the information presented is credible and allow companies to monetize the process through things like targeted advertising?

PATRICK VAN EECKE: One of the aims of European data protection law is to enable transparency for the data subject into the collection of personal information, in order to be able to exercise rights of access, rectification and to oppose certain forms of processing, such as processing for marketing purposes. The court ruled in the *Google Spain S L* case that search engines are allowed to create "a detailed profile" of an individual and are responsible as controllers of the personal data they index. The court ruled that data subjects may therefore direct requests to the search engine regarding this profile.

It should be noted that in the U.S., the Federal Trade Commission has recently issued a report in which it raises concerns about the collection of sensitive profile data about consumers by data brokers. Under European data protection law, data subjects have more rights with regards to such profiles about them. What is striking about the *Google Spain S L* decision is that it applies European data protection laws to Google Inc. based in the U.S. The court ruled that the establishment of Google's subsidiary in Spain, which is engaged in selling advertising services to Spanish businesses, was sufficient to apply European data protection law. This results in a very wide territorial scope of application of European data protection law, since many businesses offering services over the Internet could also be found to fall under its scope of application. The fact that Google was held to be a "controller" of personal data is significant, since other Internet services using third-party data sources could also be found to have similar responsibilities as a controller, as opposed to being mere processors. The *Google Spain S L* decision could have broad consequences for Internet services using personal data obtained from third parties.

BLOOMBERG: Do you think that the creation of a case-by-case balancing test between data subject privacy and legitimate interests of Internet users is a realistic, or is more detailed guidance required?

Can it be a workable standard for search engines faced with the prospect of hiring hundreds of new workers just to process initial requests from data subjects and for generally under resourced data protection authorities considering appeals?

PATRICK VAN EECKE: Companies receiving many right to be forgotten requests will have to create internal guidelines to handle such requests. Since the criteria surrounding the concept of relevance are vague and subjective, companies may face significant hurdles in designing a workable process.

The practical interpretation of the *Google S pain S L* decision by national data protection authorities and before local courts will be key in determining how the balance between privacy rights and other legitimate interests, including the right to access information, to conduct a business and the freedom of expression is to be done in practice. We could also see proceedings against national governments before the European Court of Hum an Rights if the national courts or national data protection authorities do not provide an effective way to enforce the right to be forgotten. Finding the right balance may prove difficult for companies faced with many right to be forgotten requests. Google already received 12,000 requests since it launched its takedown service!

BLOOMBERG: In strict terms, the ECJ ruling applies only to Google and similar search engines and only to the application of the Spanish statute with the right to be forgotten provision, but it clearly has real and implied implications beyond that. So how far do you think the ruling may go to sweep in not only search engines but other online businesses such as social media websites that com pile and cross-reference personal information?

PATRICK VAN EECKE: The *Google Spain S L* decision does not explicitly address the situation where people start sharing links that are omitted from a search result on social media sites such as Twitter. It is unclear whether the filtering of search results by Google would also need to operate on indexed public social media posts (as new links are posted).

It is unclear whether the search functionality of social media sites, such as Twitter, would fall under the same criteria established by the court as for search engines.

The *Google Spain S L* decision raises many practical questions with regard to other Internet services that remain largely unanswered at this time. Depending on its application, the judgment could have limited effectiveness, due to the many ways in which information can be surfaced, including through social media. Similarly, regarding news aggregators and search engines run by media companies, newspapers and other journalism outlets, it is unclear how the court's judgement should be interpreted. Such services could be regarded as falling under the journalism exemptions of data protection law, as interpreted in each member state. We will have to wait and see how the decision is interpreted before national courts.

It is equally unclear whether the search functionality of social media sites, such as Twitter, would fall under the same criteria established by the court as for search engines.

BLOOMBERG: Some have said that multinational companies may reconsider their willingness to do business in Europe, or at least may be more selective in evaluating the laws of a particular country – as many did when they relocated EU headquarters to Ireland over the last few years. Do you think concerns are well founded over the potential broad extraterritorial scope of the ECJ's ruling and how little contact a multinational company might need with a particular EU member state to find itself subject to a particular right to be forgotten statutory provision?

PATRICK VAN EECKE: The concerns are understandable, because the main factor that the court used to apply European data protection law was the establishment of Google's subsidiary on Spanish territory. This could lead some to believe that if an Internet service is not established in any European country, then the reasoning of the *Google Spain S L* decision would not apply. However, reading the court's decision, it is clear that the activity of selling advertising services to Spanish businesses through stable arrangements was an important factor in the court's decision.

It is unclear what the court would have ruled if such activities took place without a physical office or employees in Spain. Additionally, although not explicitly mentioned by the court, European data protection law can also be found to be applicable if the processing occurs through the use of equipment in a member state, such as servers in a data center. According to previous opinions of the Article 29 Working Party, the advisory body on the European Union Data Protection Directive (95/ 26/EC), such equipment can also include the use of cookies on a user's computer. Therefore, depending on the interpretation of the ruling, not having established offices in a European member state may not be enough to avoid the application of European data protection law.

BLOOMBERG: The Article 29 Working Party of data protection officials from the 28 EU member states has said it will be discussing the ECJ ruling at its June plenary session, and the group's chairwoman has said the goal is to reach a harmonized response. Do you think that is a realistic goal given the differences in perceived willingness of various bloc members to be more favorable to business interests and ongoing arguments about deference by DPAs to each other brought to a head in the one-stop-shop discussions regarding the proposed data protection regulation?

PATRICK VAN EECKE: The interpretation of the *Google Spain S L* decision will depend in large part on its interpretation by national data protection authorities. If the data protection authorities do not reach a harmonized response, the decision could be applied in an inconsistent manner in different European member states. This would have negative consequences for Internet companies offering services in Europe due to uncertainty regarding the uneven application of the decision.

BLOOMBERG: Speaking of the European Commission's proposed data protection regulation – which contains the now renamed right to erasure provision – do you believe Google and others affected by the ECJ right to be forgotten ruling might now rally to change the provision during negotiations between the Council of the European Union and the European Parliament?

PATRICK VAN EECKE: The *Google Spain S L* decision changes the dynamic with regards to the prospects to change the proposed data protection regulation, because the right to erasure provision will be more firmly anchored as a consequence of the ruling.

Internet companies may want to have they voices heard now in discussions with regards to the right to erasure in light of the *Google Spain S L* decision, since the Council aims for adoption of the text before the end of the year.

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EUROPEAN CLOUD STANDARDISATION GUIDELINES:
WHAT'S IT ABOUT?

It is no secret that the European Commission wishes to boost the offering and the uptake of Europe-based cloud computing services.

End of 2012, in its Communication on the "Unleashing the Potential of Cloud Computing in Europe", the Commission announced that it will take the necessary steps to undertake three key action points which should, according to the Communication, result in several billions of euros income by 2020 as well as a substantial amount of job creation.

Cutting through the jungle of standards is the first Commission action point, which aims at establishing common standards to increase the level of interoperability, data portability and reversibility. Proposing safe and fair contract terms and conditions is a second key action point, of which the below discussed guidelines form a part. Lastly, a European Cloud Partnership has been set up with the intent of bringing together the cloud industry and the public sector, the EU's largest buyer of IT services, and this aimed at working on common procurement requirements for cloud computing.

For each of these actions points, the Commission has set up different expert working groups which must pave the way to concrete initiatives in order to achieve certain goals. It is in that framework that the Cloud Select Industry Group (so-called "C-SIG") on Service Level Agreements (SLA) has recently made public its "Cloud Service Level Agreement Standardisation Guidelines" (hereinafter referred to as the guidelines).

First things first: the C-SIG on SLA was established under the second key action (safe and fair contract terms and conditions) and had its first meeting in February 2013. This C-SIG is composed of industry representatives, both from the customer and provider side, and other specialists on cloud computing, such as DLA Piper. The aim of this C-SIG is to explore opportunities for setting out model terms for cloud computing service level agreements which can be used between cloud providers and their professional users. The C-SIG therefore focusses on a B2B environment.

This C-SIG is composed of industry representatives and other specialists on cloud computing, such as DLA Piper.

Now what are these above-mentioned guidelines about and what do they stipulate? According to the document, the guidelines aim to "*provide a set of SLA standardisation guidelines for cloud service providers and professional cloud service customers, while ensuring the specific needs of the European cloud market and industry are taken into account*". Next to providing a clear list of definitions in relation to key elements of service level agreements, the guidelines set out several service level objectives (SLO) that could be stipulated in a typical B2B cloud computing SLA.

These SLO are sub-divided into four main categories: performance, security, data management and personal data protection.

Each of those main categories is further sub-divided into typical service levels which can be found in service level agreements. Examples of performance sub-categories are service levels on availability (the service's property of being accessible and usable upon demand by the user) and response time (the time lapse between a customer-initiated event and the provider-initiated response to that event). For the security category, examples are service reliability levels (the performance of the cloud service without failure) and authentication & authorisation (authentication being the verification of the claimed identity of a user and authorisation being the process of verifying that a user has permission to access and use the service).

The document goes further in identifying per each of those individual service levels, why a service level objective could be useful, and which SLO could be relevant in the context of that particular service level. The document does not set out individual and concrete service levels; however, one can hardly see how it could do given the diverse nature of cloud computing and taking into account the cloud provider's discretion to determine service levels.

What the guidelines do provide are descriptions of technical, operational and/or legal concepts which can generally be found in service level agreements. They explain in clear and plain language what these concepts mean and how they can impact the service. As a result, this will be important for the cloud user, in order to fully understand to which service levels his service adheres.

According to the press release on the guidelines, issued on 26 June 2014, these guidelines will help the professional users to ensure that essential elements are included in plain language in the contract with the cloud provider. Both Commissioners Kroes and Reding welcomed the guidelines and pointed out that they are likely to increase trust towards cloud offerings, especially from smaller firms. And more trust could signify greater uptake which on its turn could be a driving force for innovation and development. In other words, one step closer to the objectives set out in the Cloud Communication.

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EUROPE BOOSTS ELECTRONIC IDENTIFICATION AND TRUST SERVICES WITH NEW REGULATION

Building trust in the online environment is key to the development of the European digital market. To enable secure and seamless cross-border electronic transactions between consumers, businesses and administrations, an enhanced and extended EU-wide legal framework governing electronic identification and trust service will be put in place.

Due to the internationalisation of the market and the rise of the digital economy, businesses were in need of tools to safeguard and secure electronic transactions. In this regard reliable electronic identification schemes (eID) and trust services have been developed.

On the one hand, eID schemes allow the authentication and identification of users (for instance with an eID card). On the other hand, trust services, including the creation, verification and validation of electronic signatures (indicating that a person adopted the content of an electronic message), electronic seals (ensuring the origin and integrity of data), electronic time stamps (establishing that data existed at a particular time), electronic registered delivery services and certificates for website authentication, permit to increase trust and confidence in an online environment.

While all those technologies have been available for some time, no comprehensive EU cross-border and cross-sector framework existed, with the exception of an imperfect and outdated directive on electronic signatures. As a consequence, the market for such services became very fragmented, and divergent national rules across Europe impeded the cross-border use and provision of trust services. Moreover, many businesses had the impression that there were fewer legal safeguards available in an online environment than with physical interaction. To overcome those obstacles and to strengthen the effectiveness of public and private online services in the EU, a new regulation on electronic identification and trust services has been adopted in July 2014.

EASIER AND MORE SECURE ELECTRONIC TRANSACTIONS

The regulation aims to provide a predictable regulatory environment for trust services. As the regulation will be directly applicable in all EU countries, businesses will no longer be confronted with a patchwork of national legislations, Instead, they will only need to comply with one common set of rules, which is expected to give a boost to the cross-border use and provision of trust services.

As regards content, one of the most important innovations of the regulation is that people and businesses will be able to use and leverage their own national eID schemes to access at least public services in other EU countries where eIDs are available. Such mutual recognition and interoperability of eID schemes will for instance allow a Belgian student to enrol at a German University, or permit an Estonian citizen to fill out online tax returns in Germany.

Furthermore, and in addition to enhancing and expanding the existing rules on electronic signatures, the regulation introduces, for the first time, EU-wide rules concerning trust services. Said services may circulate freely within the EU, and should, under conditions, be recognised in all other EU countries. More specifically the new regulation will allow businesses to participate electronically to a public call for tenders launched by the administration of a different EU country, without incurring any interoperability problems. Similarly, a business will be able to sign contracts electronically with a counterparty based in another EU country, without fearing divergent legal requirements. Furthermore, also a notice of default may be delivered electronically from one EU country to another. And finally, e-commerce and e-banking will become more trustworthy when consumers will be able to verify that they indeed access the website of the merchant of their choice instead of a fake one.

As 13 million EU citizens work in another EU country, and more than 8 million SME's engage in cross-border activities, the impact and benefits of this new regulation should not be underestimated. We expect this new regulation to be welcomed by the large majority

of all stakeholders which will be able to reduce their costs and increase efficiency, and we consider it to be an important and welcome step towards a digital single market as it offers legal certainty to those engaging in pan-European transactions. Although most of the provisions of the new regulation will only apply as from 1 July 2016, leaving businesses and governments plenty of time to adapt, it is recommended to adopt a future-proof approach and already implement solutions that comply with the new regulation.

Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.

http://eur-lex.europa.eu

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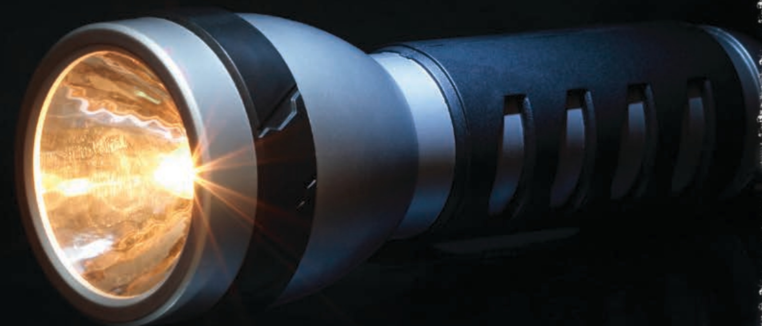
ENERGY BLACKOUTS



ARE YOU READY FROM A LEGAL POINT OF VIEW?

Companies face various uncertainties and risks in light of the energy blackouts that may occur during this winter, including the following:

- *Can anyone in the **energy supply chain be held liable** for blackouts due to energy shortage?*
- *Can blackouts be considered as a case of force majeure for your customer or supplier in your **services and other commercial contracts?***
- *Is there a difference between **public and private** contracts?*
- *Is the **owner of the building** you are leasing responsible for electricity delivery? Can you, as owner or lessor, disclaim liability for blackouts?*
- *How must you handle a situation where **employees are unable to work** due to a blackout?*
- *Does your **insurance** cover losses suffered due to a blackout?*

The situation not only **necessitates** an operational risk analysis and operational back-up measures, but also a **legal assessment** of your position, including your position vis-à-vis your (energy and other) suppliers, your customers, your employees assessment of your position and your insurers.

WHAT CAN WE DO?

DLA Piper can assist you in **preparing your company** to face the energy blackouts and can assist you to **mitigate your legal exposure** in case a blackout would occur.

1. BEFORE

- Conducting a **risk assessment** of your contracts with customers, (energy and other) suppliers, insurers and lessors/lessees
- Assisting you with drafting **communications** to your customers and/or suppliers

2. BLACKOUT

- Protecting your rights with our First Line Legal Assistance – call our Emergency Line to receive first line legal assistance in case of urgent adverse events due to the energy blackout impacting your company.

3. AFTER

- Helping **protect you against claims** from your customers
- **Managing your claims** against your suppliers, insurers, etc.
- Conducting a confidential **internal investigation** to document how adverse events took place

DLA Piper UK LLP is an experienced law firm in first line legal assistance in case of business adverse events related to manufacturing, pollution, dawn raids by the authorities, and breach of contracts.

CONTACTS

DLA Piper has created a **First Line Legal Assistance Team**, comprised of lawyers with **various legal and sector expertise**, to provide you with full service support for all questions and concerns relating to the blackouts.

For more information, please contact any of the following key contacts or any of your usual DLA Piper contacts:

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A NEW ROUND OF SANCTIONS AGAINST RUSSIA

On Friday 12 September 2014, an additional set of EU sanctions measures entered into force against the Russian Federation.

On 31 July 2014, the European Union adopted Regulation 833/2014, imposing an additional set of economic sanctions against Russia, in response to "Russia's actions destabilising the situation in Ukraine". These measures imposed for the first time sectoral economic sanctions in such areas as the financial sector, exports of oil-related technologies and exports of military and dual-use equipment and technologies.

The EU had previously imposed sanctions predominantly targeting certain individuals and entities in Russia and Ukraine, in response to the annexation of Crimea and Sevastopol, and the subsequent escalation of the crisis in Eastern Ukraine. The original measures mainly involved asset freezes and travel bans.

On 8 September 2014, the EU agreed on a new round of sanctions, and after extensive diplomatic negotiations, the additional sanctions measures were published in the Official Journal of the European Union on 12 September 2014. They seek to restrict Russia's access to EU capital markets, and target in particular the Russian defence, energy and financial sectors. These new so-called "Phase Three-Plus" sanctions complement the earlier sanctions, and came into force immediately.

EU sanctions measures imposed by EU Council Regulations are directly applicable in their entirety in all EU Member States.

The sanctions imposed on Russia significantly change the legal and compliance risks and costs of EU and international companies and individuals doing business in Russia, Crimea and Sevastopol or with partners from that region.

The sanctions imposed by the EU against Russia to date now include:

1. **An asset freeze for certain individuals and entities and a travel ban for certain individuals** – imposed by EU Decision 2014/145 and EU Regulation 269/2014 of 17 March 2014. The individuals and companies subject to restrictions are listed in Annex I to EU Regulation 269/2014, as subsequently amended by additional EU regulations, including on 12 September 2014 by EU Regulation 959/2014. These latest sanctions add another 24 individuals to list, expanding the "blacklist" to contain 119 individuals and 23 entities.

In addition to the requirement to freeze all funds and assets of blacklisted persons, EU citizens and EU-incorporated companies are prohibited from "making any funds and economic resources available, directly or indirectly" to such persons and to "natural and legal persons, entities or bodies associated with them". The latter restriction is interpreted very broadly and limits significantly the possibility for EU companies and individuals to do business with blacklisted persons and companies and individuals associated with them.

2. **Sectoral sanctions** imposed by EU Decision 2014/512 and EU Regulation 833/2014 of 31 July 2014 have now been expanded and amended by EU Decision 2014/659 and EU Regulation 960/2014 of 8 September 2014. The sectoral sanctions currently include:

- **Expanded restrictions on access to capital markets** for certain Russian government-controlled banks and companies and their non-EU subsidiaries. These restrictions include a prohibition on EU citizens and EU-incorporated companies to purchase, sell or otherwise deal in bonds and other securitised debt and money-market instruments with a maturity exceeding 30 days issued by Russian controlled credit institutions, Russian controlled defence companies, and Russian controlled energy companies. The targeted companies are identified in EU Regulation 960/2014 and include United Aircraft Corporation, Rosneft, Transneft, Gazprom Neft, Sberbank, VTB Bank, Gazprom Bank, Vnesheconombank and Rosselkhozbank, amongst others. In addition, any financial services related to such transactions are prohibited.

The sanctions have also been expanded to prohibit EU citizens and EU-incorporated companies from making new loans available or providing credit with a maturity exceeding 30 days to any of the banks and companies identified in Regulation 960/2014 of 8 September 2014 and mentioned above, except in certain limited circumstances.

- **Expanded restrictions on export of oil-related equipment, technologies and related services, including financial services, and technical assistance.** Crucially, the sanctions now prohibit the provision of a wide range of oil-related services. This builds on the existing requirement of requiring a binding authorisation for the sale/supply/transfer/export of certain equipment and technologies, listed in the Annex to EU Regulation 833/2014 to any natural or legal person, entity or body in Russia or for use in Russia.

Financing and other financial services (e.g. loans, grants, export insurance), as well as technical assistance or brokering services related to the sale/supply/transfer/export of such equipment and technologies are also subject to a prior authorisation requirement. The competent authorities are required to reject the authorisations application if such sale/supply/transfer/export of the equipment or technologies is intended for projects pertaining to deep water oil exploration and production, Arctic oil exploration and production or shale oil production.

The new prohibitions are without prejudice to the execution of contracts that were concluded before 12 September 2014.

- **Expanded restrictions on exports of military and dual-use equipment and technology and related financial services and technical assistance.** It is prohibited to sell/supply/export/transfer military equipment to Russia or for use in Russia or purchase such equipment from Russia, as well as to provide financing or financial assistance.

As regards dual-use equipment and technologies, the sanctions now provide a blanket prohibition on the export of dual-use equipment and technologies to any of the nine Russian enterprises listed in EU Regulation 960/2014. Any technical or financial assistance to any of the nine listed Russian enterprises in relation to dual-use equipment and technologies is also prohibited.

All exports of dual-use equipment and technologies are subject to a prior authorisation by competent authorities. The restrictions also include a prohibition to provide financial services or technical assistance for the sale/supply/export/transfer of military equipment or technologies or dual-use equipment and technologies for military use.

3. **Sanctions targeting trade with Crimea and Sevastopol.** These sanctions were imposed by EU Decision 2014/386 and EU Regulations 692/2014 and 825/2014, and continue to remain in force. They were introduced in response to the annexation of Crimea and Sevastopol by Russia, considered illegal by the EU. These sanctions include:

i) **A prohibition of imports of goods originating in Crimea and Sevastopol.**

ii) **An export ban on certain key equipment and technologies for infrastructure** in such sectors as transport, telecommunications, energy and the exploitation of oil, gas and mineral reserves in Crimea and Sevastopol. The equipment and technologies covered by the prohibition is listed in the annex to EU Regulation 825/2014.

iii) **A prohibition on investments in the transport, energy and telecommunication sectors** in Crimea and Sevastopol.

iv) **A prohibition of financial services, brokering and technical assistance** related to the above activities.

The EU regulations imposing EU sanctions against Russia are directly applicable and are binding for all companies, entities, businesses and individuals in the territory of the EU. EU-incorporated companies and EU citizens are bound by these provisions also in respect of their activities outside the EU.

In EU Member States, the sanctions are enforced by national competent authorities. The national legislation imposes significant penalties for violations of the EU sanctions regime, ranging from substantial administrative and criminal fines to imprisonment.

With regards to the future developments in the scope of the EU sanctions against Russia, they will depend on the evolution of the Ukrainian crisis and the EU's assessment of Russia's role in it, and in particular the stability of the current cease-fire. The EU is prepared to rollback sanctions if the developments on the ground are positive, although it cannot be excluded that more far-reaching sanctions could be imposed on Russia in the coming months, targeting further sectors of Russia's economy and additional companies and individuals.

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BACK TO THE FUTURE? BACK TO THE PAST! LOOKING AT THE GE-ALSTOM DEAL

We live again in interesting times. In June and July, most of us feverishly asked ourselves which soccer team would win the World Cup. During the same period, observers following international business developments around the world, were placing their bets on whether or not the French government would allow General Electric to acquire French industrial giant Alstom.

Difficult to say which of the two questions was more difficult to answer, but now we know the answer to both. Germany vs. Argentina 1:0; Competition vs. Industrial Policy 0:1.

From a competition law and policy point of view, the proposed link-up between the US and French firms should not raise any conceptually novel issues. Competition law and policy are no longer novel disciplines. The existing tool-box is sufficient to deal with whatever issue there may be to preserve competition. US law now has 125 years of experience in dealing with mergers, the EU roughly 25, if you do not take into account older merger control rules at member state level. Since the Sherman Act was adopted in 1890, and soon followed by the Clayton Act in 1914, much debate has dealt with the question of whether antitrust law and policy should tolerate business combinations and to what extent. Different economic policy schools have emerged over the decades, focussing on the quest for allocative efficiency, or on maintaining a sufficiently competitive market structure.

However, under all historically relevant antitrust doctrines that have ever been applied in the US or Europe, the GE-Alstom deal could be properly analysed.

GE-ALSTOM DEAL

So why not let the regulators do their job? Instead, the French government, rushed to pass a decree that allows the French government to block virtually every acquisition of a French company. Under EU law, which favours the freedom of capital throughout the EU, such "golden shares" are allowed, provided they satisfy the criteria established by the EU Court of Justice: **(i)** the state's veto right has to be motivated by overriding requirements of the general interest (which as an exception to the rule have to be interpreted narrowly); **(ii)** the exercise of the veto right must be proportionate and **(iii)** procedurally the veto right can only be exercised within a defined window of opportunity following advance notification of the planned investment.

Until recently, French law provided for strategic veto rights in the fields of security and defence only. The new decree extends these veto rights to five new sectors: water, health, energy, transport and telecommunications. In fact, the same government member who pushed the new decree only recently threatened an undesired third country investor with a tax audit, should he not abandon its plan to acquire a French telecoms operator.

The French government´s concern over the GE-Alstom deal is, there is no other word for it, protectionist in the most literal sense of the word. And the French government makes no attempt to hide it. After having favoured a link-up with Siemens (that was reportedly rejected because of Siemens' partnering with Mitsubishi), the French government has also been working on a Plan C, a purely Franco-French solution to the problem: a nationalisation. Now the final outcome appears to be a mix of the GE bid with a large State-owned share giving the French government far-reaching veto rights. The French government even had to persuade current Alstom shareholder Bouygues to cede its shares to it, and secured the voting rights as of now pending the acquisition of the shares over the next two years. It remains to be seen whether the government will succeed in financing this investment by selling other holdings, as it has promised the taxpayers.

It also remains to be seen whether the French legislation to block the planned transaction satisfies the requirements of the Court of Justice´s case law. In the meantime, from a competition law and policy point of view, the French government´s move brings the 19th century back to the front page. For decades, the question as to whether a particular merger control regime leaves room for non-competition and industrial policy considerations has been used by academics, policy makers and organisations such as the OECD, as a benchmark to assess whether emerging markets were ripe for the big game alongside their more developed peers.

That it is, out of all governments around this globe, the French government that pulls out the protectionist stick so bluntly, is quite shocking although it does not really come as a surprise. France has always had a strongly developed culture of industrial policy and State interference in business, but normally things were done in a slightly more subtle, more discreet and more elegant way.

From a transatlantic viewpoint, this chapter will certainly add to the feud, and become a topic on the TTIP agenda. Supporters of sound merger control policies now ask themselves a third question: is this just a short-term flash in the pan as retaliation for BNP, or a new, longer chapter in the story of tortuous government interference in the freedom of contract in Europe?

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INTERVIEW WITH THE COMESA COMPETITION COMMISSION

DLA Piper's Michael Marelus sat down with Mr Willard Mwemba, head of mergers and acquisitions at the CCC, to talk about the CCC and its latest developments.

The Common Market for Eastern and Southern Africa's (COMESA) Competition Commission (CCC) has been reviewing mergers and acquisitions for almost nineteen months, having commenced operations on 14 January 2013. The CCC is the supranational competition authority of the COMESA free-trade bloc of 19 member states. Growing pains are inevitable, and the newest competition authority of Africa is about to undergo a first round of reform.

MICHAEL MARELUS: Let us start with the genesis: the Competition Regulations were published in 2004, and it took nine years for the CCC to enter into operation. What took so long?

WILLARD MWEMBA: Once the Competition Regulations were adopted in 2004, the institution to administer them needed to be set up. Setting up the CCC required overcoming political and financial hurdles. There were long political discussions between the member states concerning which member state will host the CCC. The second issue was financial: the CCC needs financial support by the member states. This all proved tricky, but ultimately, was successful. The CCC is established in Malawi, and we have been operational for approximately eighteen months. Work is busy, and over the past few months there has been an exponential boom in the number of notifications we are receiving. Between January and December last year we received twelve notifications; between January 2014 and today, we received over eighteen notifications, making it a total of more than thirty notifications submitted to the CCC.

MICHAEL MARELUS: I understand the CCC is reviewing its current rules and guidelines. You are seeking to improve its merger control regime. You have also recently engaged external advisors to assist you with this. Please tell us more about this review and what to expect.

WILLIARD MWEMBA: We have engaged external advisors to review the current rules and guidelines, and to propose improvements to our merger control regime. We want to bring the CCC merger control regime in line with international best practice. The external advisors' recommendations have now been completed, and we expect to introduce several changes to the Guidelines this fall. The revised Guidelines will remain within the scope of the current Regulations and Rules. The changes to the Regulations and Rules are still being worked on and will enter into force at a later date. The new Rules and Regulations will require amendments, and these can only be approved by the COMESA Council of Ministers.

MICHAEL MARELUS: The notification thresholds are currently set to zero. Any merger or acquisition where at least one party operates in two or more COMESA member states must be notified to the CCC. This threshold has a very wide reach and catches transactions between parties with minimal activities in the COMESA region.

WILLARD MWEMBA: The current thresholds for notification are indeed set at zero. We are well aware that this is not ideal, and we intend to amend the Rules on the Determination of Merger Notification Threshold. This is included in our current review, and we intend to propose more suitable thresholds. However, the thresholds are set out in the Rules. As explained, the Rules can be amended only by the COMESA Council of Ministers. The Council of Ministers generally meets once a year, and opposition to a proposal by one member state is generally sufficient to postpone a decision on the matter. We will shortly propose to the Council of Ministers an amendment to the Rules, and I very much hope the Council of Ministers will approve it by consensus at one of their next meetings. I can however not put any timing on the adoption of new notification thresholds as it is beyond the mandate of the CCC.

MICHAEL MARELUS: Until the Rules on the Determination of Merger Notification Threshold are amended by the Council of Ministers, I understand the CCC has found a way to limit the number of transactions falling within the scope of the

notification requirement by implementing an "appreciable effects" test and by offering so-called "comfort letters".

WILLARD MWEMBA: Indeed. Article 3.2 of the Competition Regulations states that the merger control regime applies to transactions having an appreciable effect on trade between COMESA member states and which restrict competition in the COMESA Common Market. We have recently issued comfort letters to notifying parties, confirming that their transaction, while satisfying the current notification thresholds, do not have an appreciable effect on trade.

In determining what amounts to having an appreciable effect, the upcoming revised Guidelines will include a turnover test. Where the turnover test is not met, it is presumed that the transaction will not have an appreciable effect on trade. The CCC is competent to issue Guidelines, and these will come into force with immediate effect this fall.

Similarly, we are reducing the number of notifiable transactions by including guidance on what qualifies as "operating" in two or more COMESA member states. As you pointed out, mergers and acquisitions are currently notifiable where at least one of the parties operates in two or more COMESA member states. We will include in the revised Guidelines a turnover test to determine whether a company is considered as having operations in a member state. This will exclude transactions between parties with limited activities in the COMESA region from needing to be notified. We hope these measures will limit the scope of transactions needing to be notified, at least until the new Rules on the Determination of Merger Notification Threshold are adopted by the Council of Ministers.

MICHAEL MARELUS: Some have also criticised the high notification fee of up to USD 500.000. What is your view on this?

WILLARD MWEMBA: Many believe that for each and every notified transaction the filing fee is USD 500.000. That is not the case: the filing fee is a 0,5 percentage of the combined parties' assets or turnover in the COMESA region, capped at USD 500.000. For some transactions, the filing fee will thus be well below USD 500.000. However, when companies and their lawyers complain that the fees are high, we should not be defensive simply because we are a regulator. I think it is important to get feedback from the market, and if the market says the fees are high, we should be looking into it. We are looking into it, and the current fee will most likely be reduced in the near future. I believe we need to come up with a mechanism whereby the filing fee is proportionate to the amount of work the CCC must undertake in reviewing the transaction.

MICHAEL MARELUS: A lot of transactions that fall within the scope of the Competition Regulations are not notified, particularly with the low thresholds currently in force. What are your enforcement priorities?

WILLARD MWEMBA: Our focus has so far been on two more important aspects. First of all, we want to make sure we clear notified transactions within the shortest period of time possible. We want to assist the notifying companies as much as possible, and we want to provide clearance – where possible – as swiftly as possible. Secondly, we want to make sure we identify the lacunae in the current legislation and that we develop into a first-class merger control regime. These are our two priorities at the moment.

As you know, I worked for the Zambian competition authority for quite some time. It took the Zambian competition authority a long time before it started using its enforcement powers to fine companies. This was, in fact, also the practice of the other competition authorities in Africa. The Zambian competition authority commenced its operations in 1997, and the first time it imposed a fine was in 2010. At the start of its operations, it was focused on ensuring the law was robust, its decisions were proper, and that it did not frustrate businesses by unnecessarily delaying transactions.

Having said that, should we become aware of someone blatantly disregarding the Competition Regulations, we will act accordingly. We will not hesitate to use our enforcement powers. Fining one erring firm may be needed to ensure the Competition Regulations are respected.

MICHAEL MARELUS: The notification form currently seems to require much information, including on markets on which the parties have no overlap. This might place a significant burden on notifying parties, yet be of limited help to the CCC.

WILLARD MWEMBA: I agree, and we will look at this issue. Once the current review is over, we will most likely look at reforming the notification forms. We want to make the procedure as easy and efficient for companies as possible.

MICHAEL MARELUS: The substantive test of the review is whether the concentration would substantially prevent or lessen competition, in particular through the creation or strengthening of a dominant position. The current Guidelines state that there is a rebuttable presumption that concentrations are anti-competitive. What is the purpose of including this presumption, and is it at all correct?

WILLARD MWEMBA: That reference in the Guidelines will be removed. As a matter of fact, the contrary is true: most mergers and acquisitions are not anti-competitive. This presumption will thus be removed from the Guidelines as part of the upcoming changes this fall.

MICHAEL MARELUS: As part of the CCC's substantive review of a notified concentration, the CCC may take into account public interest factors. These public interest factors are currently listed in a Draft Public Interest Guideline. The list contains only market interests, and thus not interests such as employment issues, nationalist motivations and the like. Could you confirm this?

WILLARD MWEMBA: Definitely. The CCC has no intention to take into account any non-market public interest factors. An interpretation of the rules to imply that the CCC has the right to take into account non-market public interest factors, I think, may be *ultra vires* of the current rules. The substantive test the CCC conducts is whether the proposed concentration substantially prevents or lessens competition, in particular through the creation or strengthening of a dominant position. This by definition already itself includes taking into account the public interest factors listed in the Draft Guideline. Nothing more.

MICHAEL MARELUS: I understand that, in the past, a member state has required concentrations notified to the CCC to be notified also to its national competition authority. Is the CCC a one-stop-shop?

WILLARD MWEMBA: Some issues have arisen in the past, but we are in the process of smoothing the procedural rules between review by the CCC and review by the national competition authorities of COMESA member states. I am glad to state that currently we are working smoothly with almost all COMESA member states. The Competition Regulations make clear that the review of mergers and acquisitions by the CCC is a one-stop-shop, and this has been confirmed by the COMESA Court of Justice. What is important at this stage is that the CCC enjoys the support and the confidence of all COMESA member states.

MICHAEL MARELUS: Mr Mwemba, I thank you for having taken the time to sit with us and talk to us about the recent experiences of the CCC and the upcoming developments in its merger control regime.

WILLARD MWEMBA: It has been my pleasure. We have some issues that need ironing out, such as the notification thresholds, and the like. However, we are in a pretty good place at the moment. We have the luxury of having existing merger control regimes to learn from, and we are developing quickly. I see the recent surge in the number of notifications since January as a sign that people are accepting and recognising the CCC's jurisdiction, and that the CCC is gaining wide acceptance by the corporate world, the legal fraternity and consumers.

COMESA MERGER CONTROL IN A NUTSHELL

- **COMESA member states**: Burundi, Comoros, Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe.
- **Concentrations**: The direct or indirect acquisition or establishing of a controlled interest. Includes full function joint ventures.
- **Notification thresholds**: One or more of the parties have operations in two or more COMESA member states. Revisions to the Guidelines are expected this fall, and include a turnover test for determining whether a party has "operations" in a member state. The size of the parties currently does not matter as the turnover thresholds are set at zero, although a proposal to change these will be submitted to the COMESA Council of Ministers shortly.
- **Local nexus**: Currently not required, as long as the notification thresholds are met. The revised Guidelines expected this fall will set out a turnover test for determining whether a concentration has an appreciable effect on trade in the COMESA region. Obtaining comfort letters from the CC is in the meantime possible.
- **Notification fee**: 0.5% of the merging parties' combined annual turnover or assets in the COMESA region (whichever is higher) and is capped at US$500,000.
- **Notification period**: No later than 30 days from the parties' decision to merge. The revised Guidelines may clarify that these are calendar days.
- **Review period**: Phase I is 60 days, Phase II extends the review to 120 days. The revised Guidelines may clarify that these are calendar days.
- **Substantive test**: The merger would substantially prevent or lessen competition, in particular through the creation or strengthening of a dominant position.
- **Failure to notify**: Transaction is unenforceable in the COMESA region, and fines may be imposed of up to 10% of parties' combined turnover in the COMESA region.
- **One-stop shop**: Notification to the CCC is a one-stop-shop and in theory requires no further notification to the competition authorities of individual member states. However, notably Kenya, seems to currently insist on the transaction being notified also to its national competition authority.

Willard Mwemba

Mr Willard Mwemba began his career in competition law at the Competition and Consumer Protection Commission in Zambia. He worked at the Competition Authority in Zambia for close to seven years before he joined the CCC. While at the Competition Authority in Zambia, Mr Mwemba rose to the position of director of the Mergers and Monopolies Department. During his employment at the Competition Authority in Zambia, Mr Mwemba handled some high-profile cases and initiated investigations into prominent cartels. Mr Mwemba joined the CCC in January 2013 and became its first head of the Mergers and Acquisitions Department.

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FROM *VASTGOEDBEVAK/SICAFI* TO REGULATED REAL ESTATE COMPANY

The new Regulated Real Estate Company ("GVV"/"SIR") benefits from a separate legal and tax regime, which is however very similar to that of the existing *vastgoedbevaks/sicafis*.

Since their conception in 1995, the Belgian closed-end real estate investment funds ("*vastgoedbevaks*"/"*sicafis*") have been considered as a specific category of investment funds, known today as "undertakings for collective investment" ("*instellingen voor collectieve belegging*"/"*institutions pour placement collectif*").

As from the moment the Law of 19 April 2014 became effective, implementing the Alternative Investment Fund Managers Directive (AIFMD) 2011/61/EU of 8 June 2011 which regulates the management of alternative investment funds ("*alternatieve beleggingsinstellingen*"/"*institutions de placement alternative*"), *vastgoedbevaks/sicafis* should in principle also be considered as alternative investment funds. Such statute brings along particular additional obligations and restrictions, which are considered as being undesirable and without added value for the current *vastgoedbevaks/sicafis*.

A new Law was adopted on 12 May 2014 in order to remedy this (Belgian State Gazette, 30 June 2014). This Law, which became effective on 16 July 2014, introduces a separate *sui generis* statute of "Regulated Real Estate Company" ("*Gereglementeerde Vastgoedvennootschap*" or "GVV"/"*Société Immobilière Réglementée*" or "SIR"), in addition to the statute of *vastgoedbevaks/sicafis*, which will continue to exist (however possibly just as a purely theoretical concept). The vastgoedbevaks/sicafis will remain regulated by the legislation on undertakings for collective investment, whereas the GVV/SIR will benefit from a separate regime, which will however be very similar to that of the existing *vastgoedbevaks/sicafis*.

The GVV/SIR will be subject to obligations and restrictions as to diversification and spreading of risks, dividend payout ratio, corporate governance, a specific accounting framework, appointment of an independent real estate expert(s), maximal indebtedness (65 %) and leveraged financing, statutory capital etc., all of which are in many ways identical or at the least very similar to the regulations determined in the Royal Decree of December 7, 2010 applicable to *vastgoedbevaks/sicafis*. In addition, a public (i.e. listed) GVV/SIR also has the possibility of incorporating institutional GVV/SIR's, together with qualifying investors, but remaining under the control of the public GVV/SIR. Moreover, the requirements which apply to all listed companies will also hold for the GVV/SIR. Likewise, the GVV/SIR is submitted to the prudential supervision of the FSMA ("*Autoriteit voor Financiële Diensten en Markten*"/"*Autorité des Services et Marchés Financiers*").

On a tax level, there are no material differences to report either: the GVV/SIR will – in a nutshell – also only be taxed on disallowed expenses and abnormal or gratuitous advantages.

Nevertheless, some aspects deserve special attention. In this contribution we will briefly deal with some of these topics.

ACTIVE REAL ESTATE MANAGEMENT

The statutory purpose and the authorized activities of the *vastgoedbevaks/sicafis* on the one hand and those of the GVV/SIR on the other hand are not entirely similar. Whereas *vastgoedbevaks/sicafis*, as undertakings for collective investment, have the single purpose to *collectively invest in real estate*, as legally defined, in the exclusive interest of its shareholders, the public GVV/SIR should perform activities which consist of the *placing at disposal of real estate to end users*, including constructing, rebuilding, renovating, developing, acquiring, selling, managing and operating real estate.

The GVV/SIR must pursue a business strategy enabling it to hold its real estate on a long-term basis and focus on active management. This implies that the GVV/SIR will itself be responsible for the development and property management of its real estate, without possibility of delegation to third parties.

The GVV/SIR can also hold indirect real estate investments (such as shares in *vastgoedbevaks/sicafis* and real estate certificates, or options on the same), as far as the fair value of these investments does not exceed 20% of the consolidated assets of the public GVV/SIR. Under certain conditions additional or temporary investments in other securities are also permitted.

ONLY NATURAL PERSONS IN CHARGE

The law on GVV/SIR further states that all members of the direction of the public GVV/SIR, the persons in charge of the effective leadership over the GVV/SIR, as well as the persons with a function relating to independent control (internal audit, compliance and/or risk management), can be natural persons only. Therefore it will no longer be possible to exercise those roles through a separate legal entity or management company (however, the current mandates of the legal entities exercising those functions can be continued until their termination date).

The possibility for a public GVV/SIR which has taken the legal form of a limited liability (*commandite*) share partnership ("Comm. VA"/"SCA") to appoint a legal entity as its business manager is being retained, whereby the abovementioned rule will apply at the level of the legal entity-business manager. It should be noted that the abovementioned rule will also be introduced for the *vastgoedbevaks/sicafis* that opt to preserve their current statute.

FACULTATIVE

Any company that wishes to adopt the statute of public GVV/SIR should apply for the relevant approbation with the FSMA and needs to comply with the approbation conditions as imposed by the Law. A Royal Decree of 13 July 2014 prescribes the content of the application file in detail.

The obligation to receive approbation also applies to the current public *vastgoedbevaks/sicafis* that wish to adopt the statute of public GVV/SIR. This is however not obligatory: a public *vastgoedbevak/sicafi* may opt to preserve its statute and therefore to be qualified as alternative investment undertaking under the AIFMD-provisions (subject to approbation under those provisions). The public *vastgoedbevak/sicafi* opting to convert itself into a public GVV/SIR (which at present already the majority of the current vastgoedbevaks/sicafis have indicated to prefer) needs to adapt its articles of incorporation to the provisions of the new Law and it further needs to submit the request for approbation within four months as from the date the Law became effective, i.e. before 16 November 2014.

EXIT RIGHT

An additional point of attention is that the current shareholders of a public *vastgoedbevak/sicafi* – to some extent at least – are not obliged to accept the conversion into a public GVV/SIR as such.

Any shareholder who, at the general meeting of the public *vastgoedbevak/sicafi* which approves the conversion into a GVV/SIR, votes against that decision benefits from a right to exit, at a share price to be determined in accordance with the Law. This right can only be called upon for a number of shares representing a maximum of EUR 100,000, taking into account the price at which the exit has been exercised and only for those shares for which the shareholder has voted against the proposal. In addition, the shareholder should have been owner of the shares continuously at least from the 30th day prior to the general meeting (as the case may be, with insufficient quorum) where the conversion was on the agenda and until the end of the general meeting which approves the conversion. The proposal to amend the articles of incorporation may also be subject to a condition stating that the conversion will only take effect when the number of shares for which the withdrawal right is called upon does not exceed a certain percentage of the share capital.

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20 November 2014, 12:00 – 14:00 hours – ANTWERP

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This session will be held in Dutch.

25 November 2014, 12:00 – 14:00 hours – BRUSSELS

DLA Piper Academy: The new European Directives related to public procurements (public sector and utilities sectors) and to concession contracts

This session will be held in English.

16 December 2014, 12:00 – 14:00 hours – BRUSSELS

DLA Piper Academy: Legal rules of thumb when launching marketing campaigns

This session will be held in Dutch.

18 December 2014, 12:00 – 14:00 hours – ANTWERP

DLA Piper Academy: Rules on emissions trading and the promotion of renewable energy and their impact on companies

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UPCOMING EVENTS

- 13 and 20 October 2014, Kortrijk: **Johan MOURAUX, Partner – Finance & Projects**, will speak on PPP financing at a two day training organized by the Confederatie Bouw.
- 14 October 2014: **Michael BOLLEN, Partner – Real Estate**, will give an online seminar on Vastgoed Due Diligence: juridische aandachtspunten en gevolgen. www.lexalert.net/nl/seminar
- 14 October 2014, Brussels and 23 November 2014, Luxembourg: **D.-E. PHILIPPE, Senior Lead Lawyer – Tax**, Utilisation des véhicules sociétaires luxembourgeois par des résidents belges. La SPF, la SICAV SIF et la SOPARFI, Formation Larcier.
- 3 November 2014, Brussels: **Arnaud LECOCQ, Lawyer – Finance & Projects,** will speak at a seminar organized by the Catholic University of Leuven (K.U. Leuven) and the Catholic University of Louvain (U.C.L.) on the new legal status of Financial Planners.
- 5 November 2014, Brussels 'Fiscale Hogeschool': **Mark DELANOTE, Senior Lead Lawyer – TAX**, will give a lecture on the rights and privileges of the tax administration in recovering non-paid tax debts.
- 24 and 25 November 2014, Amsterdam: **Johan MOURAUX, Partner – Finance & Projects**, will speak at the Benelux Infrastructure Forum.
- 25 November 2014: **Julie DE BRUYN** will give a presentation on legal points of attention to consider in terms of privacy when developing Apps, to a group audience of app developers, organized by Innovatiecentrum Antwerp.
- 27 November 2014, Zaventem: **Patrick VAN EECKE, Partner – IPT**, will discuss the privacy issues arising from e-commerce during the Contract Law Seminars organized by Larcier publishing group. www.contrast-lawseminars.be/seminaries
- 1-5 December 2014, London: **Koen VANDERHEYDEN, Partner – Finance & Projects**, will speak at the Global Custody Forum 2014 in London. www.globalcustodyforum.com
- 2 December 2014, London: **Johan MOURAUX, Partner – Finance & Projects** will give a one-day masterclass organized by SMI on secondary markets for infrastructure and energy projects.
- 16 December 2014, Brussels**: Koen VANDERHEYDEN, Partner – Finance & Projects** and **Arnaud LECOCQ, Lawyer – Finance & Projects**, will speak at an IFE Benelux conference on 'MiFiD II/MiFIR & EMIR: How to ensure effective compliance at all levels'.
- 22 and 23 January 2015, Brussels: **Kristof DE VULDER, Partner – IPT**, will speak at the conference 'Legal risks and new technologies: challenges for the modern enterprise'. www.ibanet.org

EVENTS

PAST EVENTS

DLA Piper lawyers are regular speakers at industry events and conferences. Here is where you may have seen us in the past months.

- 7 June 2014, Luxembourg: **Koen VANDERHEYDEN, Partner – Finance & Projects,** participated in the Luxembourg Depositary Conference 2014, organized by IFE Benelux. He discussed the topic of cross border securities holding and custody liability. www.ifebenelux.lu
- 18 June 2014, Brussels: **Carole MACZKOVICS, Lead Lawyer – Litigation & Regulatory**, spoke about price regulation in railways at the conference launching the new Belgian Journal on the law of regulated network industries (Revue du droit des industries de réseau/Tijdschrift voor het recht van netwerkindustrieën).
- **Geert VAN CALSTER, Senior Lead Lawyer – Litigation & Regulatory**, has been guest speaker at various events:
  - 25 June 2014, Barcelona: European Consortium for Political Research (ECPR): 'Regulation and Enforcement through EU agencies';
  - 11 July, Canberra, Australia National University, Fenner School of Environment & Society: 'All that glitters is not gold? The EU as a regulatory frontrunner';
  - 26 August 2014, The Hague, Asser Institute: 'Trade, regulatory autonomy and the WTO: An update on the case-law';
  - 5 September 2014, London, International Bar Association Conference: 'On the role of science in international law. From whales via Paintball to Plain Packaging'.
- **Patrick VAN EECKE, Partner – IPT,** has been guest speaker at various events on the topics of European privacy laws, cloud computing, and electronic signatures, including:
  - 12 May 2014, Trier, Germany: presented the topic of innovations and challenges of the online market place during the ERA Conference on e-Commerce in a digital single market; www.era.int
  - 5 June 2014, Antwerp: discussed privacy laws and compliance during a seminar hosted by the Vlaams Innovatiecentrum; www.innovatiecentrum.be
  - 6 June 2014, Antwerp: clarified the legal aspects of cloud computing before the International Federation of Computer Law Associations; http://ifcla2014.com/
  - 18 June 2014, Brussels: spoke at the European Commission workshop on eID and Trust Services, discussing the future regulation on these topics. http://ec.europa.eu/
  - 24 June 2014, Brussels: recyclagemiddag 'De grenzen van het intellectuele eigendomsrecht', with **Alexis FIERENS – Lead Lawyer – IPT**

USEFUL PUBLICATIONS

DLA Piper is always at the forefront of legal thought, bringing you know-how and legal updates. Below is a selection of legal handbooks and insights you may find useful.

Employment:

Be Global – September 2014 (EPB)

- The latest issue of DLA Piper's snapshot into key global employment law developments.

Finance:

Global Financial Markets Insight – Issue 4, Q3 2014

- Change continues to be the main theme running through Summer 2014. There is the usual raft of new regulations to contend with but also welcome noises from policy makers including the European Central Bank and the Bank of England that the steps to regulate certain markets may be damaging not only to those markets but to the efforts being made to generate growth in the large global economies.

Banking and Finance Litigation update – Issue 79

- Latest summary from our Banking and Finance Litigation team.

Intellectual Property & Technology:

Intellectual Property and Technology News (United States), Issue 23, Q3 2014

- Our Intellectual Property and Technology News reports on worldwide developments in IP and technology law, offering perspectives, analysis and visionary ideas.

Sports, Media and Entertainment Intelligence – October 2014

- The September issue discusses broadcasters' ownership, television advertising, data protection, the Video Recordings Act 1984, FIFA and more.

IP Rights in Data Handbook

- DLA Piper has launched an 'IP Rights in Data' Handbook which a high level overview of the IP and related rights affecting data and databases in 20 key jurisdictions across the world.

Litigation & Regulatory:

International Arbitration Newsletter Q3 2014

- Our look at international arbitration news from around the world.

EU law on cookies

- A guide detailing how the 'Cookies Regulation' (Article 5(3) of the E-Privacy Directive) has been implemented into the law of the EU member states.

Real Estate:

Real Estate Gazette Issue 17

- Welcome to Issue 17 of DLA Piper's Real Estate Gazette. For this edition we have asked our team around the world to share their knowledge of the logistics real estate market and examine some legal issues that especially affect it.

Tax:

International Tax News – September 2014

- Our look at tax news from around the world.

Global VAT Guide – June 2014

- DLA Piper's Global VAT Guide on cross border supplies of intangible services, rights and digital content.

These and other DLA Piper legal updates and handbooks can be found on www.dlapiper.com – *"Insights"*

PUBLICATIONS AND INSIGHTS

EXTERNAL PUBLICATIONS

Below are some of the external publications our lawyers have recently contributed to.

Finance:

- Article on new legislation on 'pand op handelszaak'/'gage sur fonds de commerce' and the impact on real estate, in *Expertise News* on 13 June 2014.
  Yves BROSENS, Partner – Finance & Projects
- The second edition of the 'Code de droit de l'entreprise' (Larcier 2014).
  (co-author) **Arnaud LECOCQ, Lawyer – Finance & Projects**
- 'Compétences d'enquête et de sanction de la FSMA et de la DGCM dans le contexte du nouveau livre VI du Code de droit économique' in the book *Le cycle de vie des produits bancaires, d'investissement et d'assurance – De levenscyclus van bank-, beleggings-, en verzekeringsproducten* (Larcier 2014).
  (co-author) **Arnaud LECOCQ, Lawyer – Finance & Projects**

IP & Technology:

- 'Stroompannes en overmachtclausules' ('Black outs and force majeure clauses') in *De Juristenkrant* 2014, afl. 294, p. 16.
  Kristof DE VULDER, Partner – IPT, and **Elisabeth VERBRUGGE, Lead Lawyer – IPT**
- 'Stroompannes: waar zijn uw overmachtsclausules?' in *Data News* 2014, afl. 14, p. 30.
  Kristof DE VULDER, Partner – IPT, and **Elisabeth VERBRUGGE, Lead Lawyer – IPT**
- 'Napoleontische invloeden op de vervoersovereenkomst – artikelen 1782 et seq. BW'. in *Rechtspraak Antwerpen Brussel Gent* 2014/9, p. 579 – 583.
  Pieter NEELS, Lawyer – IPT
- 'De hervorming van de wetgeving inzake de continuïteit van ondernemingen' in *NNK* 2014, afl 2, p. 16 – 21.
  Isabelle VAN DEN BOSCH, Lead Lawyer – IPT
- Chapters 'Public sales (including 'Relevant e-commerce aspects')' and 'Other laws and regulations on market practices e-commerce and e-communication' in *Commercial practices* (Larcier 2014).
  (co-authors) **Patrick VAN EECKE, Partner – IPT,** and **Carmen SCHELLEKENS, Lawyer – IPT**
- 'Het gebruik van domeinnamen en metatags als reclame. De Belgische rechtspraktijk getoetst na BEST v. Visys' in *Tijdschrift voor Belgisch Handelsrecht* 2014/5, p. 493 – 497.
  Patrick VAN EECKE, Partner – IPT, and **Antoon DIERICK, Lawyer – IPT**

Litigation & Regulatory:

- 'The fourth railway package: double track competition?', in *Revue du droit des industries de réseau*, 3/2014 upcoming.
  Carole MACZKOVICS, Lead Lawyer – Litigation & Regulatory
- 'Charges for the use of railway infrastructure: time for action' in *Revue du droit des industries de réseau*, 2/2014, p. 209 – 223.
  Carole MACZKOVICS, Lead Lawyer – Litigation & Regulatory
- 'De Europese IPR regels inzake bevoegdheid en toepasselijk recht bij schadeloosstelling na mededingingbeperkende gedragingen', in D. Arts, W. Devroe, R. Focqué, K. Marchand, and I. Verougstraete, *Mundi et Europae Civis: Liber Amicorum Jacques Steenbergen*, Brussel, Larcier, 2014, p. 543 – 554; (*The European conflict rules with respect to jurisdiction and applicable law in competition litigation*).
  Geert VAN CALSTER, Senior Lead Lawyer – Litigation & Regulatory
- 'La pratique du droit international et européen en matière de déchets dangereux', in M. Faure et al; (eds.), *Les mouvement transfrontières de déchets dangereux*, Brussel, Bruylant, 2014, forthcoming, p. 251 – 259; (*The reality of international and European regulation of hazardous wastes*).
  Geert VAN CALSTER, Senior Lead Lawyer – Litigation & Regulatory

PUBLICATIONS AND INSIGHTS

DLA PIPER

- 'Regulatory instruments: Sustainable Materials Management, Recycling and the Law', in Worrell, E., and Reuter, M., *Handbook of Recycling*, Elsevier, New York, 2014, p. 527 – 535.
  Geert VAN CALSTER, Senior Lead Lawyer – Litigation & Regulatory
- 'Opportunities and pitfalls for sustainable materials management in EU waste law', in I. Panoussis and H. Post (eds.), *Waste Management in European Law*, The Hague, Eleven, 2014, p. 97 – 105.
  Geert VAN CALSTER, Senior Lead Lawyer – Litigation & Regulatory

Real Estate:

- Article on the nullity of a purchase agreement under condition precedent of obtaining an allotment permit, in *Expertise News* on 12 September 2014.
  MIichael BOLLEN, Partner – Real Estate and **Mathieu HIGNY, Lead Lawyer – Real Estate**

Tax:

- 'Rechtsplegingsvergoeding: waarom fiscaliteit toch anders is dan een bouwovertreding', in *Fiscale actualiteit 2014*, nr. 29, p. 14-17.
  Marc DELANOTE, Senior Lead Lawyer – Tax
- 'Utilisation des véhicules sociétaires luxembourgeois par des résidents belges. La SPF, la SICAV SIF et la SOPARFI', Brussels, Larcier, 2014, 230 pp.
  D.-E. PHILIPPE, Senior Lead Lawyer – Tax

DLA PIPER

DLA Piper is a global law firm with 4,200 lawyers located in more than 30 countries throughout the Americas, Asia Pacific, Europe and the Middle East, positioning us to help companies with their legal needs anywhere in the world. In Belgium, the firm has over 120 lawyers operating from offices in Antwerp and Brussels.

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QUESTIONS OR COMMENTS?

We very much hope that you have enjoyed this issue of Spotlight on Belgium. Should you have questions about issues raised in any of the articles, you can get in touch with the authors directly. Alternatively, feel free to contact the **editorial team** at NewsletD@dlapiper.com

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