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1. European Commission Guidance on Data Protection

On 24 January the European Commission published guidance on the changes to the rules on data protection due to the General Data Protection Regulation (GDPR) which becomes applicable across the EU on 25 May 2018. The guidance outlines what the Commission, national data authorities and national administrations must still do to ensure the successful application of the new rules. As a regulation, the GDPR is directly applicable in all Member States. However, legislation will still be required to amend existing rules and cover areas in respect of which discretion is allowed to Member States in applying the Regulation such as employment and social security. So far, only two Member States have already adopted the relevant national legislation (Austria and Germany).

The Commission has also launched an online tool to help citizens and businesses comply with the new rules. The Commission will engage in events being organised across the EU to help stakeholders prepare for the changes. The guidance recalls the main elements of the new data protection rules:

- one set of rules across the EU;
- the same rules apply to all companies offering services in the EU (even if they are based outside the EU);
- stronger and new rights for citizens: to information, access and the right to be forgotten, with a new right to data portability which allows citizens to move their data from one company to the other;
- stronger protection against data breaches: if a company suffers a data breach which puts individuals at risk it must notify the data protection authority within 72 hours;
- fines with deterrent effect: data protection authorities will have the power to impose fines of up to EUR 20 million, or up to 4% of its annual worldwide annual turnover in the case of a company.

The GDPR framework is built on existing data protection legislation but will bring about significant changes. The Article 29 Working Party (which will become the European Data Protection Board) has already published a series of guidelines for companies and other stakeholders. Member States have to set up national data protection authorities, choose an accreditation body and lay down rules for the reconciliation of freedom of expression and data protection. The European Data Protection Board should be operational as of 25 May 2018. It will issue guidelines on the interpretation of the Regulation and decide disputes concerning cross-border processing.

The guidance stresses that the core concepts and principles of the GDPR remain the same as those of the original data protection legislation put in place in 1995. It emphasises a number of points concerning the application of the new rules to businesses:

- The Regulation impacts most on operators whose core business is data processing and/or dealing with sensitive data, and those that regularly and systematically monitor individuals on a large scale. Such operators will probably have to appoint a data protection officer, conduct a data protection impact assessment and notify data breaches if there is a risk to the rights and freedoms of individuals.
- It is important for controllers and processors to undertake thorough reviews of their data policy cycle to identify what data they hold, for what purpose and on what legal basis. They should also assess the contracts in place, in particular those between controllers and processors, the avenues for international transfers, what IT and organisational measures to have in place, including the appointment of a Data Protection Officer. The highest level of management should be involved in such reviews.

- The Regulation provides new tools to demonstrate compliance in the form of codes of conduct and certification mechanisms.

After 25 May 2018 the Commission will monitor the application of the rules. One year after the Regulation becomes applicable the Commission will organise an event to take stock of the experiences of stakeholders of implementing the Regulation. This will feed into a report the Commission will produce by May 2020 on the evaluation and review of the Regulation. In the meantime the Commission will support the ongoing work on the implementation of the Regulation with funding and administrative support.

2. Regulation on E-Privacy

The Regulation concerning the respect for private life and the protection of personal data in electronic communications, or e-Privacy Regulation (ePR), was originally intended to come into force simultaneously with the GDPR. The proposal for a regulation was published in January 2017 to replace the existing ePrivacy Directive (Directive 2005/58/EC) and provide special privacy rules for e-communication services. However the draft ePR is still working its way through the legislative process. Its objectives include:

- enhancing security and confidentiality of communications, while reducing unjustified barriers to the free flow of data;
- defining better and clearer rules on tracking technologies such as “cookies”;
- addressing fragmentation of legislation across Europe;
- consistent enforcement of e-Privacy rules by independent supervisory authorities already competent to enforce the GDPR.

The Council of the EU raised a number of concerns about the original proposal including: the interaction of the new e-Privacy rules with the GDPR and e-Communications Code; its extension to so-called “over-the-top” internet-based services (e.g. web-based email and online messaging apps) and ‘ancillary services’; the protection of information stored in, or emitted by, users’ terminal equipment. The Council published a redraft of the proposal with amendments on 8 September 2017 and adopted a new consolidated text in December 2017. Discussions remain ongoing and it is very unlikely that it will be possible for it to enter into force on 25 May 2018 as originally proposed. It appears more likely that it will be finalised later this year, and so come into force in late 2018 or early 2019.

The ePR is intended to complement the GDPR and also provides that “electronic communications” under the ePR will generally be considered personal data for GDPR purposes. When the ePR becomes applicable there is likely to be significant overlap between the two pieces of legislation, both of which will be enforceable by the data protection supervisory authorities and will carry similar levels of sanctions. The level of consent required under the GDPR will also apply to the ePR, so that consent must be freely given, specific, informed and capable of withdrawal at any time. The use of “cookies” and other online trackers and such technologies must be based on informed consent.

3. EU Proposal on VAT Rates

On 18 January the European Commission made a proposal to introduce more flexibility for Member States to change the VAT rates they apply to different products. At the moment EU rules allow Member States to apply reduced VAT rates to certain specified products and services. The proposal would allow Member States to put in place (in addition to a minimum standard VAT rate of 15%):

- two separate reduced rates of between 5% and the standard rate chosen by the Member State;
- one exemption from VAT (or ‘zero rate’);
- one reduced rate set at between 0% and the reduced rates.

The current list of goods and services to which reduced rates can be applied would be abolished and replaced by a new list of products (such as weapons, alcoholic beverages, gambling and tobacco) to which the standard rate of 15% or above would always be applied. There is no mention of real estate in this proscribed list, so that Member States which at present apply reduced rates, for example to newly built properties, will be able to continue to choose to do so.

The proposal is also intended to reduce the VAT burden for SMEs. Under the current rules, Member States can exempt sales of small companies from VAT provided they do not exceed a given annual turnover. The new proposals would introduce:

- A €2 million revenue threshold across the EU, under which small businesses would benefit from simplification measures, whether or not they have already been exempted from VAT;
- The possibility for Member States to free all small businesses that qualify for a VAT exemption from obligations relating to identification, invoicing, accounting or returns;
- A turnover threshold of €100,000 which would allow companies operating in more than one Member State to benefit from the VAT exemption.

SMEs will also benefit from simplification measures concerning their VAT registration and record keeping as well as the possibility of benefitting from less frequent filing of VAT returns. In addition, VAT-exempt companies will enjoy relief from VAT registration or simplified registration and from invoicing obligations.

These proposals are part of the VAT Action Plan presented by the European Commission in 2016 which aims to create a robust single European VAT area. They will now be discussed with the European Parliament and Council.

4. Overcoming the Split Incentive Barrier in the Building Sector

The problem of split incentives (often referred to in the past as the landlord/dilemma) between building owners and tenants has long been recognised as a barrier to the completion of energy efficient renovation in the building sector. It is recognised in legislation, as Article 19 of the Energy Efficiency Directive requires Member States to take appropriate measures concerning this barrier. Possible solutions have now been summarised for the European Commission by the Joint Research Centre in a report entitled “Overcoming the split incentive barrier in the building sector”.

Split incentives refer to any situation where the benefits of a transaction do not accrue to the actor who pays for the transaction. In the context of buildings, normally these arise because the person who pays the capital cost of the investment required to improve the energy efficiency of a building is not the person who pays the energy bills and so does not benefit directly from any savings in cost. There are also problems associated with the collective decision-making required in the case of multi-tenanted or owned apartment buildings.

A number of possible solutions have been put forward and these include:

1. Regulatory solutions: mandatory minimum standards for rental properties; revisions in rent and property laws.
2. Information tools: energy labelling; individual metering, sub-metering and direct feedback.
3. Financial incentives and models: financial and fiscal incentives; on-bill finance (where repayments are made through energy bills); property assessment clean energy (specific bonds offered to investors).
4. Voluntary approaches: green leases (which split the costs and benefits between the parties so both can benefit and allow a property owner to increase the rent to finance energy efficiency improvements).

The report includes summaries of presentations given at a workshop held to discuss the possible alternative solutions. It concludes that:

- in order to align incentives, redistribution of costs and savings between involved parties should be considered;
- agreements between involved parties should be structured in such a way that the energy efficiency investment benefits all of them;
- to overcome accuracy issues between actual and predicted energy savings in cost recovery models, a performance correction factor, derived from empirical evidence, should be considered;
- energy use and costs need to be made more transparent;
- building occupants, whether owner-occupiers or tenants, need to be more closely engaged in energy efficiency;
- attaching the energy efficiency upgrade to the property rather than the owner or tenant offers the flexibility of engaging in energy efficiency upgrades the payback time of which is longer than the occupancy or ownership duration;
- owners and tenants are required to take expert decisions and engage in complex projects despite their lack of technical knowledge. The involvement of an independent energy expert is necessary in order to facilitate and co-ordinate the process.

Useful links

www.cepi.eu

Commission guidance on data protection

https://ec.europa.eu/commission/sites/beta-political/files/data-protection-communication-com.2018.43.3_en.pdf

EP procedure file on respect for private life and the protection of personal data in electronic communications

[http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2017/0003\(COD\)&l=en](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2017/0003(COD)&l=en)

Action Plan on VAT

https://ec.europa.eu/taxation_customs/business/vat/action-plan-vat_en

Overcoming the split incentive barrier in the building sector

<https://publications.europa.eu/en/publication-detail/-/publication/ae5716d7-fb39-11e7-b8f5-01aa75ed71a1/language-en/format-PDF>