SOME THOUGHTS ABOUT THE BELGIAN DATA PROTECTION AUTHORITY

By Jean-Ferdinand Puyraimond
Lawyer at the Brussels Bar, Teaching Assistant and Ph. D. Student at the Université Libre de Bruxelles (ULB)

I-THE BELGIAN DATA PROTECTION FRAMEWORK BEFORE 25 MAY 2018

General data protection in Belgium has been governed for more than twenty years by the Act of 8 December 1992 "on the protection of privacy in relation to the processing of personal data" (here after "Privacy Act")[1], as modified by the Act of 11 December 1998 "transposing Directive 95/46 of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data"[2].

The Privacy Act adopted a monist approach. It contained substantive provisions of data protection law (mainly the principles, rights and obligations flowing from Directive 95/46) and administrative provisions, such as creation of the Belgian Privacy Commission (in French: "Commission de la protection de la vie privé" or "CPVP"; in Dutch: "Commissie voor de Bescherming van de persoonlijke levenssfeer" or "CBPL").

This act was further implemented by two Royal Decrees: the Royal Decree of 13 February 2001 "implementing the Act of 8 December 1992 on the protection of privacy in relation to the processing of personal data"[3] and the Royal Decree of 17 December 2003 "laying down the conditions relative to the composition and the functioning of certain sectorial committees instituted within the Privacy Commission."[4]

II-THE STATE OF PLAY ON 25 MAY 2018

A) Methodology of the Review of the Belgian Data Protection Framework

The Privacy Act had to be repealed and replaced by a new law by 25th of May 2018 (date of application of the GDPR, as set by article 99.2).

Belgium opted this time for a dualistic approach.

Against the advice of the Council of State[5], the Belgian government decided to separate the legislative process concerning the substantive and procedural dispositions of data protection from the administrative dispositions governing the creation of the national supervisory authority.

Although not expressly stated, this decision was most probably influenced by pragmatic considerations (rather than theoretical considerations) i.e. the realization that the making of a comprehensive law would be impossible for Belgium by the deadline of 25 May 2018. As we shall see, this decision proved to be wise.

1 Moniteur Belge, 18 March 1993, p. 5801 (the "Moniteur Belge" – hereafter "M.B." in abbreviated form – is the official journal of Belgium) ; free translation from "loi du 8 décembre 1992 relative à la protection de la vie privée à l'égard des traitements de données à caractère personnel". The acts published in the Moniteur Belge may be consulted online through the webportal http://www.belgiquelex.be.

2 M. B., 3 February 1999, p. 3049; free translation from "Loi transposant la directive 95/46/CE du 24 octobre 1995 du Parlement européen et du Conseil relative à la protection des personnes physiques à l'égard du traitement de données à caractère personnel et à la libre circulation de ces données".

3 M.B. 13 March 2001, p. 07839. Free translation from "Arrêté royal portant exécution de la loi du 8 décembre 1992 relative à la protection de la vie privée à l'égard des traitements de données à caractère personnel".

4 M.B. 30 December 2003, p. 62033. Free translation from "Arrêté royal fixant les modalités relatives à la composition et au fonctionnement de certains comités sectoriels institués au sein de la Commission de la protection de la vie privée".

5 Projet de loi portant création de l'Autorité de protection des données, avis du Conseil d'Etat du 27 juin 2017, *Doc. Parl.*, Ch., 2016-2017, n° 54-2648/001, p. 130-132 (free translation: Draft bill on the Creation of the Data Protection Authority). The "Documents Parlementaires" ("Doc. Parl." in abbreviated form) constitute the register of the preparatory work done in Parliament. The abbreviation "*Ch.*" refers to work done in front of the "Chambre des représentants" ("House of Representatives"), and not in front of the Senate ("Sénat"). The "Documents parlementaires" may be consulted on the website of the House, at the address www.lachambre.be.

B) Belgium managed only to create a supervisory authority on time

Indeed, Belgium succeeded only in the second part of the review of its legislative framework.

Belgium was only able to adopt, on 3rd December 2017, an act "on the Creation of the Data Protection Authority" (in French: "loi portant création de l'Autorité de protection des données" or "APD"; in Dutch: "wet tot oprichting van de Gegevensbeschermingsautoriteit" or "GBA")[6].

Article 110 stated that this law was to enter into force on 25 May 2018, except for Chapter III, which entered into force on the date of publication (10 January 2018). Chapter III contains the nomination procedure for the members of the DPA.

However, this partial success was itself incomplete: the act had to be twice modified.

The first law of 4 March 2018[7] introduced some modifications to the nomination procedure and future status and remuneration of the Executive Committee. This act had retroactive effect from the date of publication of the Act, 3 December 2018[8].

A second law had to be adopted and entered into force on 25th May 2018[9] when it became clear in March - April 2018 that the members of the new Data Protection Authority would not be nominated by the 25th of May 2018 [10]. A quick legislative fix was therefore necessary in order to prevent a legal void on 25th May 2018 and to let the old Privacy Commission temporarily assume the tasks of the DPA, so as to allow Belgium "not to be excluded from the creation process of the European Data Protection Board"[11] (see more details below).

C) Belgium still has to adopt a substantive law implementing the GDPR

Concerning the first part of the implementation of the GDPR, the Belgian Council of Ministers adopted on 16 March 2018 a preliminary draft of an act "on the protection of privacy in relation to the processing of personal data"[12]. This project's main objective is to replace the remaining substantive dispositions of the Privacy Act of 1992 and to implement where needed the GDPR, *inter alia* by putting into use the so-called "open clauses", like article 8, para 1, al. 2 GDPR (the Belgian Secretary of State in charge of this file declared that Belgium should opt for a minimum age of 13 years for a child's consent in relation to the offer from an information society service[13]).

However, the legislative process regarding this preliminary draft could not be completed on time. According to the last publicly available information, the preliminary draft was submitted to the Council of State and came back recently before the Council of Ministers, where it has been adopted after a second review on Friday 25th May 2018[14]. The King must now sign the preliminary draft, which will then become a draft law and will be submitted to the federal House of Representatives[15]. This submission should take place according to all probability in the beginning of the month of June 2018. The Parliamentary legislative procedure will then officially start and it can be hoped that the text will be rapidly adopted.

D) Résumé of the current situation and object of the present communication

Until then, the situation in Belgium is as follows:

- Belgium has at least succeeded in (albeit on the razor's edge and not without a certain "creativity", as we will see) fulfilling the absolute minimum requirements, *i.e.*: possessing a

6 M.B., 10 January 2018, p. 989. See on the new DPA: N. RAGHENO, "La nouvelle autorité de protection des données", *in* Actualités en droit commercial et bancaire, Bruxelles, Larcier, 2017, p. 479-497 ; N. RAGHENO, « RGPD : la Commission vie privée devient l'autorité de protection des données, Cahier du Juriste, 2017, p. 11 ; T. BALTHAZAR, « Privacycommissie wordt Gegevensbeschermingsautoriteit », *Juristenkrant*, 2018, n° 362, p. 2 ; F.J. ZUIDERVEEN BORGESIUS & C. MICHIELSEN, "Wet tot oprichting gegevensbeschermingsautoriteit gepubliceerd in Belgisch Staatsblad", *Computerrecht*, 2018, p. 90.

7 M.B. 17 April 2018, p. 33903.

8 Article 6 of the Act of 4 March 2018 "modifying the Act of 3 December 2017 on the Creation of the Data Protection Authority" (free translation from: "loi modifiant la loi du 3 décembre 2017 portant création de l'Autorité de protection des données").

9 Article 4 of the Act of 25 May 2018 "modifying the Act of 3 December 2017 on the Creation of the Data Protection Authority" (free translation from: "loi modifiant la loi du 3 décembre 2017 portant création de l'Autorité de protection des données").

10 M.B. 28 May 2018, p. 44369.

11 Proposition de loi modifiant la loi du 3 décembre 2017 portant création de l'autorité de protection des données, Développements, *Doc. Parl.*, Ch., 2017-2018, n° 54-3104/001, p. 5 (free translation: Proposal of act "modifying the Act of 3 December 2017 on the Creation of the Data Protection Authority").

12 See the press release of the Council of Ministers of 16 March 2018: www.presscenter.org/fr/pressrelease/20180316/conseil-des-ministres-du-16-mars-2018.

13 See L'Echo, "Philippe De Backer veut fixer à 13 ans 'âge pour accéder aux résaux sociaux", 13 February 2018, https://www.lecho.be/economie-politique/belgique/federal/philippe-de-backer-veut-fixer-a-13-ans-l-age-minimum-pour-acceder-aux-reseaux-sociaux/9981974.html.

14 http://www.presscenter.be/fr/home/pressreleases/cmr/91616.

15 On the Belgian legislative procedure, see for ex. Y. LEJEUNE, *Droit constitutionnel belge*, Brussels, Larcier, 2017, p. 587 et s.

- national supervisory authority in the sense of article 51.1 GDPR on the 25th of May 2018;
- The Act of 8 December 1992 on the protection of privacy in relation to the processing of personal data (hereafter "Privacy Act", as modified by the Act of 11 December 1998 transposing Directive 95/46) is still in force, parallel to the GDPR, while waiting for the (let's hope!) imminent adoption of the new Privacy Act.

The remainder of this paper will focus on some points of interest concerning the new Data Protection Authority, mainly related to its mission.

III-THE ACT OF 3 DECEMBER 2017 "ON THE CREATION OF THE DATA PROTECTION AUTHORITY"

A) The Data Protection Authority: what's in a name?

France chose to keep the (let's recognize it: famous) denomination of the French supervisory authority, *i.e.* the "Commission Nationale de l'Informatique et des Libertés" or "CNIL" in abbreviated form. Belgium decided for its part to rename its Privacy Commission. This organ shall now be known under the name "Data Protection Authority" (or "DPA")[16].

Two reasons were given for this modification during the preparatory work for the law:

- Bringing Belgium in line with the vocabulary "of the GDPR"[17] ; this affirmation does not seem to have any adverse effect on the Belgian compliance with the GDPR but seems still to be questionable as the GDPR uses 449 times the term "supervisory authority" while the term "data protection authority" appears only once in recital 104 (and in the plural form);
- Underlining that "privacy" is a broader concept than "data protection" and that the Belgian DPA deals only with questions relating to the latter notion[18] ; the Data Protection Authority should therefore not handle questions "such as the right to one's image"[19] as this should be regarded exclusively as a part of the right of privacy; this approach is rather confusing as the image of a subject is "personal data"[20] and that the usage of such an image, traditionally protected by the right to one's image, will nearly always also constitute a "processing"[21]; does this mean that in these circumstances the Belgian DPA would not be competent under Belgian law? As underlined, this passage is rather confusing, but it is not up to the Belgian legislature to restrict the scope of the autonomous notions of "processing" and "personal data" under the GDPR[22]: therefore, the Belgian DPA should stay competent to deal with requests related to the use of images, even if these requests could be construed as also falling under the traditional personality right to one's own image.

These two above mentioned considerations are not part of the text of the law and have only an interpretative value[23]; it remains, however, to be seen how they will be used in practice, namely will they be used to try to narrow indirectly the mission imparted to the supervisory authorities by article 51 of the GDPR (more on this below).

B) Generalities and Structure of the Data Protection Authority

1. Generalities

The DPA will have jurisdiction for the whole territory of Belgium[24]. This could change in the not so distant future however, as Belgium has evolved from a unitary State towards a federal one and this process seems to be gaining more traction.

The DPA is the successor of the Privacy Commission[25], which means *i.a.* that it will take over the existing files and bring them, if possible, to an end.

The DPA has legal personality and has its head office in the administrative district of Brussels[26].

Even though it should not have been repeated in the national law, as it was foreseen by the GDPR[27], the

16 Article 2, para 1, 1° of the act of 3 December 2017.
17 Projet de loi portant création de l'Autorité de protection des données, Exposé des Motifs, *Doc. Parl.*, Ch., 2016-2017, n° 54-2648/001, p. 10.
18 Projet de loi portant création de l'Autorité de protection des données, Exposé des Motifs, *Doc. Parl.*, Ch., 2016-2017, n° 54-2648/001, p. 10-11.
19 Idem.
20 Article 4, 1° GDPR.
21 Article 4, 2° GDPR, with certain exceptions like strict personal use (article 2, para , c) of the GDPR) or pure analogical photography not leading to the constitution of a filing system (article 2, para 1 *juncto* article 4, 6 GDPR).
22 Article 4 (2) GDPR.
23 On the interpretative value of parliamentary preparatory work, see P. DELNOY, *Eléments de méthodologie juridique*, Brussels, Larcier, 2006, p. 193.
24 Article 4, para 1 of the act of 3 December 2017.
25 Article 3 of the act of 3 December 2017.
26 Article 3 of the act of 3 December 2017.
27 Article 55, para 3 of the GDPR.

Belgian legislature expressly stated that the DPA is not competent to review the actions of Belgian courts acting in a judicial capacity[28].

As for the police services, "the competences, missions and tasks of supervisory authorities as foreseen by Regulation 2016/679 will be exercised by the Control Organ of Police Information" (in French: "Organe de contrôle de l'information policière" or in Dutch: "Controleorgaan op de politionele informatie")[29] and not by the DPA (which will however represent Belgium in the European Data Protection Board[30]).

2. Structure

The Data Protection Authority consists of six bodies[31]:

- the Executive Committee ("Comité de direction" or "Directiecomité");
- the General Secretariat ("Secrétariat general" or "Algemeen secretariaat");
- the Front-line Service ("Service de première ligne" or "Eerstelijnsdienst");
- the Knowledge Centre ("Centre de connaissances" or "Kenniscentrum");
- the Inspection Service ("Service d'inspection" or "Inspectiedienst");
- the Chamber of Litigation ("Chambre contentieuse" or "Geschillenkamer")

The Data Protection Authority will be supported by an independent thinktank ("Conseil de reflexion" or "Reflectieraad"). This "Reflection Council" is not an organ of the DPA and its members are not part of the DPA[32]. It is meant to represent the various sectors of the civil society and its task is to advise the DPA so that it keeps in touch with the day-to-day reality[33].

C) The Mission of the Data Protection Authority

3. Context of the problem

Article 4 of the preliminary draft submitted to the Council of State, described the mission of the Belgian DPA as follows: "the DPA assumes the competences, missions and powers granted to the supervisory authority by Regulation 2016/679"[34].

This definition seemed in line with the GDPR.

The Council of State remarked[35] however that the DPA, as successor of the Privacy Commission, would have to complete work on the files inherited from its predecessor. The Privacy Commission had, however, a broader competence because the Privacy Act itself had a broader scope than the GDPR. This could lead to a problem for the DPA if one or more of these files falls outside its new scope of competence.

The Council of State therefore urged the government to broaden the scope of competence of the DPA to encompass the same fields of action as the Privacy Commission, "as allowed by article 58, para 6 of the GDPR"[36]. It must be said that the Council of State added that it also considered that the definition of this scope could not be correctly defined as long as the new substantive and procedural dispositions of data protection were not drafted. According to the Council of State, these two aspects were "indissolubly intertwined"[37]: the Belgian State should treat them together. Only then would the Council of State be in a position to render complete and accurate advice.[38]

The Belgian legislature did not listen to the last part of the advice of the Council of State, but tried nevertheless to solve the problem of the scope of the competence of the DPA by rewriting its mission in quite a vague way.

Unfortunately, it may be argued that this rewriting lead to a forbidden restatement of the mission of the supervisory authorities, as set out by the GDPR.[39]

28 Article 4, para 2 of the act of 3 December 2017.
29 Article 4, para 2 of the act of 3 December 2017.
30 Article 116 of the Act of 3 December 2017, as modified by the Act of 25 May 2018.
31 See Chapter 2 of the act of 3 December 2017.
32 Article 35 of the act of 3 December 2017.
33 Projet de loi portant création de l'Autorité de protection des données, Exposé des Motifs, *Doc. Parl.*, Ch., 2016-2017, n° 54-2648/001, p. 27-28.
34 Projet de loi portant création de l'Autorité de protection des données, avis du Conseil d'Etat du 27 juin 2017, *Doc. Parl.*, Ch., 2016-2017, n° 54-2648/001, p. 127.
35 Projet de loi portant création de l'Autorité de protection des données, avis du Conseil d'Etat du 27 juin 2017, *Doc. Parl.*, Ch., 2016-2017, n° 54-2648/001, p. 128-129.
36 Projet de loi portant création de l'Autorité de protection des données, avis du Conseil d'Etat du 27 juin 2017, *Doc. Parl.*, Ch., 2016-2017, n° 54-2648/001, p. 129. It may be asked however if the Council of State was right to consider that the mission of the supervisory authority may be broadened by article 58: the notions of "competence" and the notion of "powers" needed to exercise said competence are not the same.
37 Projet de loi portant création de l'Autorité de protection des données, avis du Conseil d'Etat du 27 juin 2017, *Doc. Parl.*, Ch., 2016-2017, n° 54-2648/001, p. 130, nr. 3.
38 Projet de loi portant création de l'Autorité de protection des données, avis du Conseil d'Etat du 27 juin 2017, *Doc. Parl.*, Ch., 2016-2017, n° 54-2648/001, p. 130-131.
39 As known, Member States « need not adopt any national measures to give effect to a regulation in national law and indeed they may not do so, as this would disguise the Union character of the act

4. The wording of the mission of the Belgian DPA

According to the new article 4, § 1, al. 1, the DPA is now "responsible for the control of the respect of the fundamental principles of personal data protection, in the framework of the present law and of other laws containing dispositions concerning the protection of the processing of personal data."[40]

Article 51 GDPR on the other hand states that the supervisory authorities will be "responsible for monitoring the application of this Regulation, in order to protect the fundamental rights and freedoms of natural persons in relation to processing and to facilitate the free flow of personal data within the Union ('supervisory authority')".

The first observation that comes to the mind when comparing these two texts is that the general mission of the DPA, as stated in article 4, § 1, al. 1 of the DPA-law, is *narrower* than the mission assigned to the national supervisory authorities by article 51 GDPR or *at least* does not correspond to it.

In fact, the Belgian law speaks only of "controlling"[41] "the respect of the fundamental principles of data protection," but what do these "fundamental principles of data protection" refer to? Do they refer to the whole of the GDPR or even beyond? It raises the question of why this peculiar wording has been used. Do they refer to article 5 of the GDPR ("Principles relating to processing of personal data")? Or, do they refer to article 8 of the European Charter of fundamental rights? In addition, why is there a discrepancy between article 51 of the GDPR which states that "the [protection of] the fundamental rights and freedoms of natural persons in relation to processing and the free flow of personal data within the Union" and the wording of article 4, § 1, which refers to "the respect of the fundamental principles of personal data protection"?

Given the ambiguity of the wording in the new article 4, § 1, recourse must be had to the explanatory statement ("exposé des motifs") of the draft of law try to find some clarity (the preparatory work in front of the House of Representatives has an interpretive value). It states that article 4, § 1 of the DPA-law should be understood as meaning that the DPA "is responsible for exercise the missions and mandates of control of the respect of the fundamental principles of personal data protection as laid down in regulation 2016/679"[42].

This is more in line with article 51 GDPR, but remains at odds with it. Indeed, even if this is the correct interpretation of article 4, § 1, it displaces the problem more than it solves it: what does the Belgian legislature refer to by the notion of "the fundamental principles of personal data protection as laid down in regulation 2016/679"? It still seems another notion than "the [protection of] the fundamental rights and freedoms of natural persons in relation to processing and the free flow of personal data within the Union".

The Privacy Commission had issued advice on 3 May 2017 that went in the same direction, as the Council of State later also followed. The Privacy Commission advised that the DPA should have the competences, missions, and powers attributed to supervisory authorities by the GDPR *and* those already attributed to the Privacy Commission plus those that the legislature would impart to the DPA in the future[43]. As we have seen, the Belgian legislature did not follow this path.

Therefore, it may be feared that, when rewriting the mission of the DPA, the Belgian legislature introduced a conflict with provisions in the GDPR. As the GDPR is a regulation, this may constitute an infringement of European Union law.

5. Consequences

What consequences flow from this situation?

As a matter of fact, the definition of the general mission of the supervisory authorities is in itself not a notion of the GDPR that needs further measures of national implementation. It must be the same everywhere in the Union. In this case, Member States "need not adopt any national measures to give effect to a regulation in national law and indeed they may not do so, as this would disguise the Union character of the act (...)"[44].

(...)" (K. St. C. BRADLEY, "Legislating in the European Union" *in* C. BARNARD and S. PEERS (eds.), *European Union Law,* Oxford, Oxford University Press, 2014, p. 99).

40 Free translation from : "L'Autorité de protection des données est responsable du contrôle du respect des principes fondamentaux de la protection des données à caractère personnel, dans le cadre de la présente loi et des lois contenant des dispositions relatives à la protection du traitement des données à caractère personnel."

41 The French version of the Belgian law uses the verb "contrôler" when the French version of the GDPR uses the verb "surveiller", which may be said to have a broader sense. The English version of the GDPR uses the verb "to monitor", which corresponds better to "surveiller".

42 Projet de loi portant création de l'Autorité de protection des données, Exposé des Motifs, *Doc. Parl.*, Ch., 2016-2017, n° 54-2648/001, p. 13.

43 Projet de loi portant création de l'Autorité de protection des données, Avis de la Commission de la protection de la vie privée du 3 mai 2017, *Doc. Parl.,* Ch., 2016-2017, n° 54-2648/001, p. 228, para 26.

44 K. St. C. BRADLEY, "Legislating in the European Union" in C. BARNARD and S. PEERS (eds.), *European Union Law*, Oxford, Oxford University Press, 2014, p. 99. See also D. DE BOT, "De uitvoering van de algemene verordening gegevensbescherming – enkele bemerkingen bij de Belgische context", *Tijdschrift voor Wetgeving,*

The safest option would therefore be to revise the general mission of the DPA in order to bring it in conformity with the GDPR. As the DPA-law has already been modified twice, a third revision is not unthinkable.

As we saw, the mission statement of the Control Organ of Police Information is by the way much more accurate. There, the Belgian legislature foresees that, "the competences, missions and tasks of supervisory authorities as foreseen by Regulation 2016/679 will be exercised by the Control Organ of Police Information" (in French: "Organe de contrôle de l'information policière" or in Dutch: "Controleorgaan op de politionele informatie"). It should be possible to do something along this line, when amending the DPA.

Meanwhile, three options seem open:

- The first, most pragmatic, option would be interpretation of Belgian law in a manner that is consistent with article 51 GDPR.[45] Given that the notion of "fundamental principles of data protection" used in article 4, § 1, is quite vague and that the preparatory work specifies that these principles are "as laid down in regulation 2016/679", it could be argued that, although 'the letter' of this formulation is different, its 'spirit' and goal are the same as article 51 GDPR. Therefore, it can and must be construed as having in fact the same scope as article 51 so as to ensure that the Belgian DPA is competent for the whole range of the mission imparted by this last text.

- The GDPR, as a regulation, is directly applicable[46] and benefits from the primacy of Union law[47]. Article 51 is furthermore sufficiently clear, precise and unconditional so as to have direct effect[48], but only in part.[49] Indeed, Article 51 requires the intervention of the Member States: it cannot by its own force create the national supervisory authorities: they must be created by the national States. Article 51 therefore cannot be said to have full direct effect; it could however be held to have direct effect in part. The only "discretion" that is given to member states is to create the supervisory authorities but, once created, the national supervisory authorities must have the mission set out in article 51 GDPR. The second option could thus be to consider that all that is required from the Member States is the creation of a supervisory authority. Once created, the mission set out in article 51 GDPR is clear, precise and unconditional, applies and can be substituted[50] for the national text.

- The last option could be to consider that article 51 is sufficiently unconditional to justify the exclusion of the Belgian text but not a substitution; this relies on an interpretation of article 51 according to which it would be up to the Member States to create their supervisory authority, herein included the determination of their scope of competence (which could be broader and encompass other missions). On this view, article 51 could only be indirectly sanctioned by the exclusion of the national law; this would however have far-reaching practical downsides, as the Belgian DPA would be deprived of any purpose and could not function.

2016, p. 230-232: as the author underlines it, it is forbidden to transcribe the content of a regulation in national law but for one exception only: when the application of a regulation requires "the combination of a number of provisions adopted at Community, national and regional level. In such special circumstances, the fact that regional laws incorporate, for the sake of coherence and in order to make them comprehensible to the persons to whom they apply, some elements of the Community regulations, cannot be regarded as a breach of Community law." (CJEU, C*ommission of the European Communities v. Italian Republic*, Case 272/83, para 27, ECLI:EU:C:1985:147). A restatement is not even a transcription, so that this exception cannot apply here. Moreover, the rephrasing of the mission of the supervisory authority as laid out in article 51, para 1 GDPR, does not lead to a better comprehension of the regulation and the national implementing act of 3 December 2018 but on the contrary obscures both texts.

45 K. LENAERTS & P. VAN NUFFEL, *Europees recht*, Antwerp-Cambridge, Intersentia, 2017, p. 590. The EU-consistent interpretation must always be the first path to follow in order to avoid a conflict between EU-law and national law (K. LENAERTS & P. VAN NUFFEL, op cit., p.514-515 and p. 516.

46 Article 288 TFEU.

47 CJEU, 15 July 1964, *Costa v. ENEL*, Case 6/64, ECLI:EU:C:1964:66.

48 For ex. CJEU, 5 October 2004, *Pfeiffer*, Cases C-397/01 to C-403/01, ECLI:EU:C:2004:584, para 103.

49 A disposition of EU-law can have direct effect only for a part. When the content of a norm has to be determined by national authorities, said norm has no direct effect. "This can be the case with a norm that obliges the State to take action, *except for the aspects of this norm that do not leave any discretion*." (K. LENAERTS & P. VAN NUFFEL, *op cit*., p. 528, para 697, free translation from Dutch: "Dit kan bijvoorbeeld het geval zijn met een norm die de overheid tot handelen verplicht, tenzij voor die aspecten waarvoor de norm aan de overheid geen beoordelingsvrijheid laat.").

50 Direct effect entails not only the obligation of excluding an inconsistent national norm but may also entail the obligation of directly applying the EU-norm in lieu of the inconsistent national norm (C. BLUMANN & L. DUBOUIS, *Droit institutionnel de l'Union européenne*, Paris, LexisNexis, 2013, p. 585). This applies to EU-norm as regulations (as known, directives do not have, for instance, any horizontal direct effect). On the notion of direct effect, see M. DONY, *Droit de l'Union européenne*, Brussels, P.U.B., 2014, p. 279-290.

This brings us to our following point.

D) Tasks and Powers of the Data Protection Authority

It is not the place here to discuss exhaustively the tasks and powers of the Belgian DPA, which are broadly in line with the GDPR. I would like only to stress here the importance of defining and interpreting correctly the general mission of the Belgian DPA, as, for instance, it also has implications for the conformity of the powers of its Inspection Service to the requirements of the GDPR.

Article 64, § 1 of the DPA-law of 3 December 2018 states indeed that the powers of the Inspection Service (which has not only investigative but also corrective powers[51]) are to be exercised "in view of the control as provided for by article 4, § 1, of the present law". This reinforces the need for the DPA to have a correct mission statement, that is, to ensure that it exercises its powers in line with the GDPR.

E) Some final words concerning the members of the Belgian DPA and interim measures.

If everything had gone to plan, the members of the Executive Committee of the new DPA would have been nominated by the Parliament for the 25th May 2018.

This was essential, as the DPA-law stated that all the mandates of the members of the Privacy Commission would automatically end on 24 May 2018[52].

As mentioned above, the nomination procedure could not be completed on time. The Belgian House of Representatives voted on 25 May 2018 on a law in order to ensure that the Privacy Commission in its current composition will handle the tasks imparted to the DPA as an interim measure.

The current members will remain in post until the nominated members of the future Executive committee take their oath of office[53]... The Privacy Commission is dead, long live the Privacy Commission!

51 See article 70 of the Act of 3 December 2017 on the Creation of the Data Protection Authority.
52 Article 114 of the Act of 3 December 2017 on the Creation of the Data Protection Authority.
53 See point II.B hereabove.