

Stibbe

Your legal responsibility in managing digital content

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1. Introduction : going digital

- **Developments**

- Quantitative: hyper-communication, information avalanche
- Qualitative: electronic data, e-commerce, e-invoicing, e-signature

- **Drivers : competition, efficiency, costs, knowledge management ...**

→ **Quest for rational and flexible solutions**

Beware for the legal framework!

- Permissibility of digital archiving (as alternative to paper) ?
- (Sector specific) archiving obligations
- Corporate governance/transparency obligations
- Rules on evidence and prescription periods
- Privacy regulations
- Rules for providers of “trust services”

Why should you care?

- The image and reputation of your organization
- The liability of the company
- Your own legal responsibility

2. Permissibility of digital archiving

- **No general rule allowing it (as alternative to paper)**
- **Increasing endorsement in various recent legal texts:**
 - Sector specific regulations
 - E-commerce / e-government

Permissibility (...)

- **Principle of functional equivalence:**
- E-Commerce Dir. and Belgian Laws of 11.03.03
 - The “electronic contracting process” (incl. archiving! Cons. 34 Dir.)
 - Concept of a “writing”: i) succession of readable signs, ii) subsequent consultation, iii) independent of support
- E-invoicing, VAT Directive 17.12.04
 - Implementation since 01.01.04
 - Free choice of place and method of storage:
but: data re authenticity of origin + integrity of content must be included
 - Since 01.01.2010 freedom to determine the authenticity method (EDI certificate or electronic signature is no longer required)
 - Restrictions on storage outside MS of tax subject
 - Additional restrictions possible if outside EU

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Permissibility (...)

- Program Law 24.12.03: e-government
 - Art. 409: King to take measures to enable electronic fulfilment of administrative process and electronic communications between citizens and government
- Law on Banque Carrefour 15.01.03
- Law on Banque Carrefour Entreprises 16.01.03
 - Presumes electronic archiving
 - Period of 30 years (art. 6)
 - Obligation for those managing to ensure security, and integrity of data (art. 29)

3. Archiving obligations

| | |
|---|--|
| Income tax (ITCode art. 315, 3) | up to expiration of the 7th y. or accounting period following the taxable period (incl. IT system). |
| VAT (VAT Code art. 60) | 7 y. (starting point may vary) |
| Accounting (Law 17.07.75) Art. 6 & 8 | during 7y and be filed methodically. 7y starting from the first January of the year which follows their closing |
| Company documents Comp. Code art. 195 | 5 y. from publication of closing of the liquidation |
| Social documents RD of 8 August 1980 Art. 25 | personnel registers, individual accounts and student contracts: 5 y under any form of reproduction, provided i) well legible and ii) form used allows efficient supervision |

Archiving obligations (...)

Banking

- **Law of 11 January 1993 on money laundering:**
- Certain institutions (credit institutions, insurance firms...) must verify identity of clients via a convincing document - a copy must be made at start of business relation (art. 7-13).
- Copy to be kept: at least 5y. after end of relation, on any support

Archiving obligations (...)

- **Law of 2 August 2002 on the supervision of the financial sector:**
- RD to determine, on advice of the Banking and Finance Commission (BFC), the obligations of the financial intermediaries on conservation of data (art. 9 Law).

Archiving obligations (...)

- *Law of 4 December 1990 on financial operations and financial markets:*
 - The photographic, micrographic, magnetic, electronic or optical copies of the documents held by financial intermediaries or institutions **have similar value as the originals**, of which they are presumed, except contrary proof, to be an accurate copy, when they have been established by these financial intermediaries or institutions or under their control (article 103 bis).
- *Law of 17 June 1991 on the public credit sector (art. 196)*

Archiving obligations (...)

Insurance

- *Law of 9 July 1975 on the control of the insurance firms, art. 21:*
- Insurance firms must keep documents related to the contracts subscribed by their Belgian institution, either at the social seat of the Belgian firms, or at the Belgian seat of the agencies and branches of foreign firms, or in any other place first accepted by CBFA.
- CBFA may fix a mandatory conservation period; has not been done so far.

Archiving obligations ...

Telecoms

- *Law of 13 June 2005 on electronic communications, art. 122 § 2:*
- An operator can process certain data up to the end of the period of dispute of the invoice or until the end of the period in which payment can be enforced.
- *EC Directive of 24 March 2006 on the retention of electronic communications data (2006/24/EC):*
- ISP's, telecom operators and providers of public e-mail addresses, should retain communications traffic data for a period of 6 – 24 months.
but: Not yet transposed into Belgian law

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Archiving obligations (...)

Healthcare business

- **Royal Decree of 3 May 1999 determining the general minimum conditions for the medical file**
 - Medical file may be in an electronic form if satisfies all the conditions of the RD.
 - Must be kept at least 30y in the hospital.

Archiving obligations (...)

Government

- Variety of specific formats and modalities

- Paper format, size, seals, colours, number of originals...

- Law of 24 June 1955 on the archives:

- Documents deposited at the archive can't be destroyed without the agreement of the authority which deposited them.
- Authorities can't destroy any documents without the agreement of the archives.

4. Corporate governance/transparency obligations

Sarbanes-Oxley Act 2002

- **Vast recordkeeping, information and control obligations**
- **Applies broadly:**
 - companies listed in the US, subject to reporting obligations in the US, their financial and legal advisors
 - “any person associated with a public accounting firm”: any partner, shareholder or employee, and any other independent contractor or entity that, in connection with the issuance of an audit report i) receives compensation, OR ii) participates as agent in the activity of such firm
 - any foreign public accounting firm having played a “substantial role” in preparing audit report or performed material services upon which public accountant has relied

Corporate governance (...)

- **Examples of obligations:**

- Public accountants must be equipped to meet request for production of any work documents over period of 7y after filing report
- Any corporate officer signing annual or quarterly report warrant to have put in place “such controls to ensure that material information relating to the issuer and its consolidated subsidiaries is made known” (Sec. 302)
- Annual report to contain internal control report which “shall state the responsibility of management for establishing and maintaining an adequate internal control structure and procedures for financial reporting...” (Sec. 404)
- Certain real time disclosure obligations (Sec. 409)

Corporate governance (...)

Basel II

- EU Directive of 14/06/06 on the capital adequacy of investment firms and credit institutions.
- Capital adequacy rules for banks and investment funds, which set down the amount of capital a bank or credit institution must hold.
- Obliges control procedures to assess in real-time capital adequacy requirements and provide information

Corporate governance (...)

MIFID

- EU-Directive of 21 April 2004 on markets in financial instruments + Implementing Directive and Commission Regulation of 10 August 2006
- 3 objectives:
 - complete the process of creating a single EU market for investment services
 - respond to changes and innovations which have occurred in securities markets
 - protect investors by making markets more competitive and more robust against fraud and abuse.

5. Periods of prescription

- **Concept (“verjaring” / “préscription”)**
- **Main prescription periods : 30y, 10y , 5y, 1y**

6. Privacy laws

- **Privacy Law of 8 December 1992 (EU Dir)**

- may not be conserved beyond the period necessary to the fulfilment of the purpose for which the data were obtained or for which they are treated subsequently (art.4).
- management on personal records level

- **Law of 12 June 1991 on consumer credit, art. 69:**

- RD 20 November 1992 defines the conservation periods: 15 days, 1y., 2y. or 10 years after expiration of credit contract depending on presence of payment facilities, payment delay and contract performance (article 5)

7. Rules for providers of “trust services”

Law of 15 May 2007 on the legal framework for certain providers of trust services

- E-archiving is qualified as a “trust service”
- 6 key obligations for providers of trust services:
 1. **impartiality** towards customers and third parties
 2. **personal data** may only be used and consulted to the extent necessary for the provision of the services
 3. **protection of data** against unauthorized third parties
 4. **information obligation** (e.g. on insurance coverage, security measures, complaints service, liability etc.)
 5. work with **qualified and skilled personnel**
 6. Obligation of **confidentiality** for supplier personnel
 7. Sufficient **financial resources** and proper **insurance**

8. How to manage the risk ?

- **Determine objectives of the digital content management (type, term, location, technology,...)**
- **Assess the applicable legal rules and limitations**
- **Adjust objectives where necessary**
- **Formulate accurate policy ensuring all involved understand objectives and limitations**

Q & A

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