

THE GDPR IMPLEMENTATION ACT IN THE NETHERLANDS



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I-A NEW LAW, THE SAME RULES

On 22 May 2018, the GDPR Implementation Act (hereafter: the Implementation Act) was published in the Official Journal of the Kingdom of the Netherlands¹, thereby completing the legislative process that officially started on 12 December 2017. In the accompanying Royal Decree², the Minister for Legal Protection announced that the Act would apply as of 25 May 2018, the same date the GDPR would kick into full force. The Netherlands therefore completed their main legislative procedure for the GDPR just in time, unlike the implementation of Directive 95/46/EC, which was implemented three years late, or the Police and Justice Data Protection Directive (EU) 2016/680, for which a legislative proposal is still pending in Parliament³. Also the GDPR Adaptation Bill, adapting references to the previous Dutch Data Protection Act to the GDPR and the GDPR Implementation Act, is still in the progressing through the legislative process in Parliament.

The old Dutch Data Protection Act, which was in force since 2001, did not contain many provisions outside the scope of the former Directive 95/46/EU. The most notable exceptions are the Exemption Decree 2001, which listed the exemptions to the obligation to notify data processing operations to the Dutch DPA based on article 29 Dutch Data Protection Act, and article 43a Dutch Data Protection Act which introduced a data breach notification obligation as of 1 January 2016.

To facilitate the transfer from the old to the new data

1 <https://www.officielebekendmakingen.nl/stb-2018-144.html> (link last verified 4 June 2018)

2 <https://www.officielebekendmakingen.nl/stb-2018-145.html> (link last verified 4 June 2018)

3 Legislative proposal 34.889 *amending the Police Data Act and the Judicial and Criminal Procedural Data Act to implement European rules on the processing of personal data for the purpose of the prevention, investigation, detection and prosecution of criminal offences or the execution of criminal penalties* - A legislative monitor is available on the website of the Senate: https://www.eerstekamer.nl/wetsvoorstel/34889_verwerking_persoonsgegevens (link last verified 4 June 2018)

protection regime, the Dutch Government decided to build on the existing norms from Directive 95/46/EC and the Dutch Data Protection Act while implementing GDPR. The smaller the differences, the easier the transfer from the existing to the new [data protection] regime will be⁴. The way the GDPR is embedded in Dutch law is therefore considered to be policy-neutral. This approach fits the general approach to implementing EU legislation in the Netherlands. Both the House of Representatives and the Senate have in the past criticised the practice of gold plating EU legislation with additional national requirements, since this would impinge on the level playing field that is supposed to exist in EU member states.

The GDPR Implementation Bill (hereafter: Implementation Bill) was not the first time the Members of Parliament got to discuss GDPR. On the contrary, from the moment the GDPR was published in January 2012, both Houses of Parliament have discussed the GDPR on many occasions, in order to provide input to the Government on the position the Netherlands should take during the negotiations on the text. This is not exceptional, since both Houses of Parliament have a long-standing tradition of being involved with EU legislation early on, having realised that European legislation can only be influenced if you get involved in time. Specific procedures have been set up to deal with EU legislative proposals, allowing both the House and the Senate to mark proposals as important, requiring a more in-depth consideration. The GDPR received this status. During the negotiations, the Government therefore sent quarterly updates to Parliament, discussing the state of play in the negotiations.⁵

a) The Legislative Process

The legislative process to implement the GDPR in

4 Parliamentary Documentation - Kamerstukken II 2017-2018, 34851 nr. 3, p. 4

5 A full file on Parliament's involvement on the GDPR is available on the European website of the Senate (file E120003): https://www.eerstekamer.nl/eu/edossier/e120003_voorstel_voor_een (link last

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the Netherlands was started in parallel to the final negotiations on the text of the Regulation. The Ministry of Justice and Security (at the time still the Ministry of Security and Justice), which is responsible for data protection, started the inventory of legal provisions that would require an update in light of GDPR. Also, the first drafts of what would become the Implementation Bill were created.

As to the material scope of the GDPR, the Dutch Government confirmed in the explanatory memorandum to the Implementation Bill that data processing in the light of national security and by the armed forces are considered to be out of scope. This would also include the (mandatory or voluntary) transfer of personal data to the Intelligence and Security Services. However, data processing by other public authorities in the light of national security, including by the Minister of Justice and Security for counter-terrorism purposes, would indeed fall under the GDPR. Also other exemptions of the material scope of GDPR, as included in the Regulation itself, have been taken over under Dutch law. The national implementation in the Netherlands would not cover the Common Foreign and Security Policy of the EU, nor processing for personal or household purposes. The deceased do not enjoy any data protection rights under the GDPR. Data processing by the police and judicial authorities are covered by a *lex specialis*, Directive (EU) 2016/680, which will be implemented at a later date.⁶

1. Public Consultation

Contrary to what is customary for legislation implementing directly applicable EU provisions, the draft Implementation Bill was subjected to a public consultation via the internet⁷. This consultation started on 9 December 2016, and was concluded on 20 January 2017. In total, 111 responses were received, which mainly called for further clarification of the material provisions of the bill and the GDPR. According to the government, the public consultation however did not lead to major changes in the text of the draft bill. After the public consultation, the Dutch DPA and the Council for the Judiciary were also consulted. Finally, the Government's official legal advisor, the Council of State, was asked for its views on the draft Implementation Bill.

In his advice, the Dutch DPA raised quite a number of

points, mainly of a technical nature. On some issues, including the relation between the Implementation Bill, the DPA's powers and the Netherlands' administrative procedural legislation, further clarification was recommended. Most of the recommendations of the Dutch DPA were followed by the government in the final draft of the Implementation Bill. The Government did not however follow two main points regarding the position of the Dutch DPA. The first concerns the independent position of the Authority, including his wish for a separate budget. The debate on this point is described in more detail below. On another point, the discussion has not been concluded yet.

In the past, the Dutch DPA has, in conversations with the competent Minister for data protection, indicated multiple times that he would like to enshrine in law the principle that all investigatory reports are to be made public upon conclusion. This principle is included in the guidelines of the Authority⁸. Because of the policy-neutral character of the Implementation Bill, the Government decided not to include the requested provision in the Bill. It is however not excluded that it will follow at a later date, once a more general discussion on government transparency and the debate on the Members Initiative Bill on Open Government⁹ has been concluded.

Once the official consultation process was concluded and the desired technical and substantive changes to the draft bill were made, the Government could finally propose the bill to Parliament. This was done a little later than foreseen, because of the prolonged negotiations for a new Dutch Government following the 21 March 2017 general elections. With a new Government in place, and clarity regarding who would be the Minister responsible for data protection, the Implementation Bill was sent to the House of Representatives for its consideration on 12 December 2017.

2. The House of Representatives

In the Netherlands, a bill proposed to Parliament is first examined in the House of Representatives by one of the standing committees. In the case of the Implementation Bill, the standing committee on

verified 4 June 2018)

6 Parliamentary Documentation - Kamerstukken II 2017-2018, 34851 nr. 3, p. 13-14

7 <https://www.internetconsultatie.nl/uitvoeringswetavg/details> (link last verified 4 June 2018)

8 Guidelines on Publication by the Dutch Data Protection Authority, Stcrt. 2016, 1380: https://autoriteitpersoonsgegevens.nl/sites/default/files/atoms/files/beleidsregels_openbaarmaking_door_de_autoriteit_persoonsgegevens_staatscourant.pdf (link last verified 4 June 2018)

9 Initiative Bill by the Members Voortman and Van Weyenberg on Open Government - https://www.eerstekamer.nl/wetsvoorstel/33328_initiatiefvoorstel_voortman (link last verified 4 June 2018)

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justice and security took the lead, starting off with a round of written questions. In the so-called Report, all political parties represented in the House get the opportunity to ask the Government to clarify why certain choices were made in the Bill. Many parties also use this opportunity to float ideas to amend the Bill, for example to impose additional restrictions, or to provide more clarity to stakeholders.

Notably, in the Report, many parties raised the issue of the proposed age of consent for Internet communication services (article 8 GDPR). Other questions concerned the rules surrounding profiling, the role, tasks and size of the supervisory authority, and the administrative burdens caused by the GDPR, especially for small and medium sized enterprises (SMEs) and small associations. It is clear that some of the questions raised and amendments proposed led to changes, because together with the written responses to the questions, the Government published a Memorandum of Amendment.¹⁰ Apart from several technical changes, the Memorandum also contained an exception to the age limit for online services offering counselling or advice to minors, as well as the possibility for the Dutch DPA to issue an order under threat of a financial sanction to foster compliance.

The plenary debate on the Implementation Bill took place on 8 March. A large part of the debate concerned the independent position, work and budget of the supervisory authority. This is discussed in more detail below. Also the age of consent was discussed at length. Many Members of Parliament referred to the fact that because the GDPR is norms-based legislation, it is not as clear as many would have hoped. Especially for SMEs, but also for sports clubs and other non-profit organisations, it is a challenge to understand their legal requirements and meet them. The Minister understood these concerns, but had to refer to the Dutch DPA, which provides guidance on a variety of issues. Another topic raised by multiple parties was the need to appoint a DPO and to maintain a processing activities register: i.e. whether this obligation would also apply to SMEs, and the need for further guidance on the do's and don'ts to be issued by the DPA to organisations?

At the end of the debate, several Members proposed further amendments to the Implementation Bill, of which two gained a majority. One amendment covered the need to take into account the specific character of SMEs when enforcing the law, while the other made it

mandatory to appoint a college of three commissioners at the top of the Dutch DPA – the Bill had proposed appointing 'up to' three commissioners.

The latter amendment is likely to be put into practice shortly. The need for the urgent appointment of a third commissioner became apparent when, on the eve of the entry into application of the GDPR, the newspaper FD, the main economic daily in the Netherlands, reported on unrest at the Dutch DPA.¹¹ Allegedly, the current Chair and Vice-Chair do not always see eye to eye on the merits of the law or the enforcement strategy. Also the loss of experienced staff members in the run up to 25 May 2018 was considered a bad sign. It is hoped that a third Commissioner will be able to rebalance the situation. The Minister for Legal Protection confirmed to the newspaper that the procedure to appoint a third Commissioner has indeed been started.¹² Parliament has indicated that the third Commissioner should preferably have an entrepreneurial background, but an open application procedure will be followed.

During the vote on the Implementation Bill, Parliament also passed two resolutions, the first one calling upon the Dutch DPA to be lenient with enforcement during the initial phase, issuing warnings rather than fines if no deliberate breaches were discovered. The second resolution called on the Dutch DPA to provide more clarity on the position of the DPO, especially in smaller organisations. The Dutch DPA will likely take note of this expression of the will of the House of Representatives, but given his independent statute, these resolutions are not binding.

3. The Senate

With the vote on 13 March 2018, the legislative process in the House of Representatives was concluded. From this moment on, the text of the Implementation Bill was also final, since in the Netherlands the Senate can only adopt or reject a Bill. It does not have the right to propose further amendments, or to send the Bill back to the House to make changes. The main role of the Senate of the Netherlands in the legislative debate, is to assess the lawfulness, the enforceability and the practicality of a Bill.

Because of the Senate's involvement with the negotiations on the GDPR and the fact that the

¹⁰ Parliamentary Documents - Kamerstukken II 2017-2018, 34851, nr. 8

¹¹ <https://fd.nl/economie-politiek/1254871/onrust-bij-privacywaakhond-autoriteit-persoonsgegevens> (link last verified 4 June 2018)

¹² <https://fd.nl/economie-politiek/1255876/d66-wil-uitleg-van-minister-over-leegloop-autoriteit-persoonsgegevens> (link last verified 4 June 2018)

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Implementation Bill was largely policy-neutral, the debate on the Implementation Bill was limited. Only four of the 12 political groups in the Senate prepared questions for the Report, and no plenary debate was deemed necessary. One of the interesting issues raised by multiple parties, that did not get as much attention in the House, is the so-called journalistic exception. The Netherlands have chosen to provide a specific provision in the Implementation Bill, Article 43, which is similar to a provision that existed under the Dutch Data Protection Act. The provision states that the GDPR Implementation Act does not apply for exclusive journalistic purposes. At the request of the Senate, the Government confirmed this will include the preparatory work a journalist needs to do before a publication. Also, it was confirmed this is considered to be a broad exception, in order to allow the free press to do their work.¹³

Another matter raised in the Senate, is the role of the European Data Protection Board (hereafter: EDPB). One of the parties voiced a concern that the amount of soft law coming from the EDPB, without any possibility for Parliament, the main legislator, to influence the decisions, even though these may have far-reaching effects. The Government confirmed this is a broad competence of the Board, which is also the result of the independence of data protection authorities. However, since all decisions, guidelines and opinions will be made public, everyone has the opportunity to access information on their obligations, and so it is reasonable to expect them to understand what it is they are expected to do. Also, the consultations by the Board on draft guidelines, would allow all interested parties, including national parliaments, to present their views.¹⁴

II-THE NATIONAL IMPLEMENTATION OF GDPR IN THE NETHERLANDS

As mentioned before, the Government has chosen a policy-neutral introduction of the GDPR in the Netherlands. This means that many of the so-called opening clauses have not or not yet been used. This is also clear from the conversion table included in the Explanatory Memorandum to the Implementation Bill.¹⁵ During the plenary debate, the Minister of Legal Protection advised it is likely a second GDPR Implementation Bill will be proposed to Parliament in 2019.

Nevertheless, some of the opening clauses have been used. The following is an overview of some of the situations where the Dutch Government has decided to use an exception offered by the GDPR:

- The prohibition on processing data concerning health does not apply for processing that is relevant in social security related matters;
- The Implementation Act offers multiple examples of a substantial public interest, overriding the prohibition to process special categories of personal data
- The processing of special categories of personal data for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes (ex Article 9(2)g GDPR) will be allowed, but is tied to specific conditions enshrined in Article 24 GDPR Implementation Act.
- The Dutch DPA has been given additional powers in line with Article 58(6) GDPR. As is the case under the Dutch Data Protection Act, the supervisory authority will be able to issue an order under threat of a fine or administrative coercion. Also, the staff of the DPA will be able to not only enter the premises of a data controller, but also private houses if there is a legitimate reason to do so. Prior notification or a warrant from the court or not required – the provision in the law will suffice.

The opening clauses that have been used, generally allow for the continuation of practices that already existed under the Dutch Data Protection Act. In that regard, the Dutch Government has indeed fulfilled its intention to embed the GDPR in national law in a policy-neutral manner. Nevertheless, there are some notable elements in the Implementation Act, mainly due to the attention that was given to the issues during the parliamentary debate.

a) The Age of Consent

One of the most debated issues during the legislative process in the Netherlands, was the age of consent for minors when using information society services. Article 8 GDPR determines 16 as the relevant age, but allows Member States to lower the age to 13 years. Many Member States have done so¹⁶, but not the Netherlands.

¹³ Parliamentary Documents – Kamerstukken I 2017-2018, 34851 D, p. 7, 15 and 25-26

¹⁴ Parliamentary Documents – Kamerstukken I 2017-2018, 34851, D, p. 12-14

¹⁵ Parliamentary Documents – Kamerstukken II 2017-2018, 34851, nr. 3, p. 83-89

¹⁶ At the latest count, 11 countries have included 13 years as the age of consent in their implementing laws, whereas 9 have chosen 16 years. Source: <https://www.betterinternetforkids.eu/web/portal/practice/awareness/detail?articleId=3017751> (link last verified 4

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In the Explanatory Memorandum, the Government explained it proposed to maintain the age of consent at 16 years, as was already the case under the Dutch Data Protection Act, because of the policy-neutral implementation of GDPR. This was despite the fact that during the consultation of the Implementation Bill, various parties had requested a lower age of consent, since the social views on children's capacity to consent have changed over the years. This was also the opinion of multiple political parties in Parliament. Both during the written exchange of views and during the plenary debate, the issue was raised.

In the Memorandum on the Report, the Government explained again that in the Implementation Bill, the age of consent was indeed set at 16 years, both for the use of information society services, and for other situations as well. This is in line with the previous data protection legislation, as well as with other laws in the Netherlands, for example the application of adolescent criminal law and sexual self-determination. Furthermore, the Government reminded the Members of Parliament that the consent would only apply to the processing of personal data. For all other acts with legal consequences, such as entering into a contract, parental consent would still be required until the age of 18.

One of the main reasons some members of Parliament pushed for a lower age of consent, is the need for children to be able to get (online) advice for things they cannot discuss with their parents. This would for example include telephone hotlines and forum websites where children can talk with their peers, or professional counsellors, about their sexuality, bullying or other problems they encounter. With the stricter enforcement regime of the GDPR, several of the existing support website had indicated they were concerned they could no longer offer their services without parental consent, where the child's relationship with the parents often was a reason for the child to come to the website in the first place. The government appreciated this concern, and even though recital 38 GDPR states that the consent of the holder of parental responsibility should not be necessary in the context of preventive or counselling services offered directly to a child, it agreed to add a specific provision in the Implementation Bill. In a Memorandum of Amendment¹⁷, Article 5(5) was introduced, stipulating that the age of consent does not apply to support and counselling services offered directly and at no cost to a child.

This is however not the end of the discussion. The Minister for Legal Protection in the plenary debate on the Implementation Bill in the House of Representatives, also stated that he is willing to review the age of consent at a later date. Because of the policy-neutral implementation of the GDPR, he considered the Implementation Bill was not the moment to change the age, but with further study into the consequences and legal effects of lowering the age threshold, he is open to continuing the debate. This will likely take place in 2019, on the basis of a – still to be drafted – GDPR Implementation Bill II.¹⁸

b) The Role and Independence of the Dutch Data Protection Authority

In its legislative advice, the Dutch DPA asked the Government to create a separate budget for the Authority, instead of including it in the general budget of the Ministry of Justice and Security, as has been the situation for many years. By creating a separate budget, the independence of the supervisory authority would be emphasised. The Government did not agree with this proposal, stating that the independence was sufficiently assured by the stipulation in Article 52 GDPR and the applicability of various provisions of the Framework Law on Independent Regulatory Bodies. In the Memorandum on the Report of the House of Representatives, the Government further elaborated on this issue. Once again, the formal independence of the Dutch DPA as stipulated by law was highlighted in response to multiple questions. However, legal independence doesn't mean the responsible ministry would have no say at all regarding the DPA's budget. On the contrary – the need to ensure sufficient means for the DPA as well as the requirements to ensure supervision of the spending of government funds require involvement of the ministry in the budget, it was explained. These arguments did not however end the debate.

The Memorandum on the Report was published on 13 February 2018, about one month before the plenary debate on the Implementation Bill in the House of Representatives. What happened during that month is not completely clear, but it can safely be assumed that lobbying to allow for further independence for the Dutch DPA, including a separate budget, was continued by both the Members of Parliament involved and the Dutch DPA itself. This is not part of the public record, but on the eve of the plenary debate, on 7 March 2018, the Government suddenly published a second

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17 Parliamentary Documents - Kamerstukken II 2017-2018, 34851, nr. 8

18 Parliamentary Documents – Handelingen II 2017-2018, 59, p. 18-19

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Memorandum of Amendment¹⁹. Without explaining their sudden turn, the Government now proposed some further changes to the Implementation Bill to make the independent position of the Dutch DPA perfectly clear, including the attribution of legal personality and commitment to a separate budget.

Another point that was addressed at length during the legislative debate on the GDPR, is the budget of the Dutch DPA. To prepare for the Regulation, the supervisory authority has commissioned a report from Andersson Elffers Felix²⁰, providing insight in various growth scenarios due to the additional tasks and responsibilities attributed by the GDPR. It was predicted the number of staff of the DPA should grow from 73 fte late 2016 to somewhere between 185 and 270 fte, which corresponds to a budget increase from around €8 million budgeted for 2017 to an amount somewhere between €20-30 million. In the 2018 Annual Budget, it was announced that the budget for the Dutch DPA would indeed grow by €7 million per annum as of 2019. However, the total amount – around €15 million – would still fall short of the lowest calculated scenario. Many Members of Parliament questioned this decision of the Government and made an argument for a further increase of the Dutch DPA's financial means. On this issue, the government did not budge. During the debate, the Minister for Legal Protection explained that, for now, the increased budget should suffice because hiring the right people for the right positions at the Dutch DPA is a real challenge. Also, new employees need to be trained and integrated in the daily work, and that can't be done with a big bang!. The Minister did however confirm that he would closely monitor the budgetary situation, in order to be able to amend the budget if a lack of funds is established.

All in all, following the entry into force of the GDPR Implementation Act, the Dutch DPA has gained legal personality and complete independence. As of 2019, it will also enjoy a fully separate budget, the size of which may further grow in years to come. This should allow for an effective application of the GDPR in the Netherlands, both from a raising awareness and enforcement perspective.

III-CONCLUSION

The Netherlands have concluded the main legislative process to enshrine the GDPR in their legislation just in

time. However, a lot still remains to be done. First of all, the GDPR Adaptation Bill, amending existing sectoral legislation to bring it in line with GDPR, needs to be finalised. And secondly, the discussion on a second GDPR Implementation Bill will likely start in the Fall, based on the initial experiences of the GDPR and the further reflection the Government promised on a number of issues, including the age of consent. The legislative work is never done!

¹⁹ Parliamentary Documents - Kamerstukken II 2017-2018, 34851, nr. 9

²⁰ <https://autoriteitpersoonsgegevens.nl/nl/nieuws/nieuwe-europese-privacywetgeving-vereist-groei-autoriteit-persoonsgegevens> (link last verified 4 June 2018)