

Eerste fase evaluatie Wet bescherming persoonsgegevens

Literatuuronderzoek en knelpuntenanalyse

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Summary

This report concerns the first evaluation phase of the Dutch Data Protection Act (*Wet bescherming persoonsgegevens* hereinafter ‘DPA’ or ‘the act’), as referred to in section 80 DPA. First, an inventory has been made of the objectives stated upon the introduction of the DPA. In addition – to the extent to which these objectives are related to the implementation of privacy directive 95/46/EC – it was checked what the intentions of the community legislator were (inventory of the objectives). Subsequently, it has been investigated which obstacles were observed in literature and case law upon the implementation and application of the act (obstacle analysis). The purpose of this investigation is to make recommendations for the further formulation of research questions for the second evaluation phase (formulation of questions).

The DPA consists in the implementation of privacy directive 95/46/EC in the Dutch legal system. This is why the first part of the objective inventory covers the intentions of the community legislator (chapter 2). Through this directive, the community legislator intends to contribute to the realization of the general objectives of the community. It does so by contributing to the realization and operation of the internal market on the one hand and by providing warranties for the protection of fundamental rights and freedoms on the other hand. The contribution to the internal market is vested in the removal of internal market barriers that may arise from the differences between national statutory regimes for the processing of personal data. This is why the community legislator opted for a broad application scope for the directive that particularly, but not exclusively, concerns automated processing. To guarantee fundamental rights and freedoms, the directive intends to reach an equal and high level of protection for all member states through harmonization of laws. In connection with the realization of a high level of protection, the directive refers to the European Convention on Human Rights and Fundamental Freedoms (ECHR) and the privacy principles that have been laid down in the Council of Europe’s Convention 108 on the protection of individuals with regard to automated processing of personal data (Convention on data protection). Furthermore, the high level of protection must be reached by improving the transparency of data processing and by providing warranties for the persons involved. In order to reach an equal level of protection, the directive intends to harmonize the national privacy acts of member states, and to provide that in different member states similar arrangements and obligations apply to the protection of personal data.

Finally, the community legislator also wanted to meet the peculiarities of certain categories of data or processing. This is why he provides ‘a certain bandwidth’ to the national legislator in particular cases. That flexibility is also expressed in the objective to take as much as possible account of the specific circumstances and needs of a sector or line of business. Therefore, the directive provides the option that codes of conduct are drawn up at the level of the sector or line of business.

The second part of the inventory of the objectives covers the intentions of the national legislator with the introduction of the DPA (chapter 3). A distinction was made between the procedural and substantive objectives of the DPA. The procedural objectives arise from the obligations to which the legislator is bound pursuant to higher laws such as the EC Treaty and the privacy directive. The substantive objectives concern the ways in which the procedural objectives have been realized.

The first procedural objective of the DPA is the implementation of the directive and the further materialization of the conditions under which processing is lawful. It is the intention of the

national legislator that a further realization of the standards from the DPA must take place in sectoral legislation and self-regulation, and in case law. The second procedural objective concerns the implementation of the instruction by the constitutional legislator to lay down rules in connection with the recording and provision of personal data. Finally, the third procedural objective is the implementation of the Convention on data protection and the connection to the relevant case law of the European Court of Human Rights.

With respect to the substantive objectives, the DPA first intends to provide warranties that provide a balance between privacy protection and other fundamental rights. The legislator opted for using open standards, because through this, a set of instruments is provided by means of which the interests involved in the data processing can always be weighed. In that respect, it is of interest to the legislator that the DPA is well embedded in the legal system and links up with existing case law.

Furthermore, the DPA concerns the reinforcement of the controllers' position by clarifying the controller concept and by increasing the transparency of the data processing. For this, the act grants rights to the persons involved and imposes corresponding obligations on controllers. For the supervision and monitoring of the compliance with the act, the Dutch Data Protection Authority (*College bescherming persoonsgegevens* hereinafter 'the Authority') has been set up. In addition to this central regulatory authority, the act also provides the option to appoint a Data Protection Officer (DPO). The object of this is to promote the development of knowledge on data protection and privacy awareness in controllers. The notification obligation can also be regarded as a way of stimulating self-regulation at the controller level.

In the inventory of the obstacles, first the most striking general obstacles with respect to the application and implementation of the DPA have been mapped on the basis of literature study (chapter 4). Some authors first see the lack of clarity and vagueness of the statutory concepts as obstacles, because they impede the compliance with the law and may obstruct technological development and innovation. Other authors on the contrary plead for the preservation of the broad application scope.

In literature, reference is further made to obstacles arising from the general, comprehensive character of the act. These particularly concern the complexity and inflexibility of the act. On the other hand, some other authors think that this comprehensive aspect is necessary in order to regard all interests involved in their cohesion. It turned out that the domain experts consulted in the scope of this investigation had little support for a sectoral approach instead of the current all comprising approach.

In addition, in literature, obstacles have been observed concerning the determination of which person is the controller to whom the substantive standards of the law are primarily applicable. These problems especially occur in joint venture constructions, and in the context of the internet. According to some authors, the act has a unilateral procedural character and does not provide sufficiently firm substantive standards. According to other authors, the act is too unpractical because it assumes that each processing is tested against the (too vague) standards of the DPA. They also criticize the designation of a whole category of data as special data. In practice, this leads to obstacles because the sensitivity of special data depends on the context.

With respect to the realization of codes of conduct, some authors regard the influence which the DPA has pursuant to its approving power as an obstacle. According to them, drafting codes of conduct is a long-term, time-consuming and expensive process which does not have many concrete advantages. Literature also has doubts about guaranteeing the independence of the

DPO. The professional association for DPO's insists upon more DPO's being appointed in the private sector. Also with regard to the DPO's contribution to increasing the transparency of processing, the opinions vary. In literature, a discussion has arisen on the question whether the Authority has sufficient or insufficient powers. The obstacles with respect to the compliance with the act and obstacles in the field of enforcement are emphasized. In this line, critical comments are also made on the system of legal protection. Drawbacks are connected to the multiple administrative and civil law proceedings, such as forum shopping. The multiple legal competences may also affect the unity of law.

With respect to the international transfer of personal data, especially the permit requirement is experienced as an obstacle. This particularly applies to the transfer of personal data from an office of a controller within the EU to an office of the controller beyond the EU. This 'internal' transfer does not fall under the exceptions to the transfer prohibition. Arguments are also advanced for decreasing the compliance cost for controllers through the abolishment of the license obligation when model contracts destined for that purpose are used.

In the private sector (chapter 5), with respect to the conceptual framework of the DPA obstacles are mainly found in multinationals. Particularly the obscurities and vagueness of important concepts, such as personal data, processing, controller and processor, give rise to problems in international data streams, mergers and acquisitions. Further obstacles are observed with respect to the connection of the DPA to other legislation, like the Database Act (*Databankenwet*) and the Act Electronic Commerce Directive (*Aanpassingswet inzake richtlijn elektronische handel*). A difference in the use of the concepts leads to confusion there. Other application problems are related to the formulation of the prescriptive framework of the DPA. In the private sector, this results therein that the DPA does not give a clear picture in all cases of what is allowed and what is not. Literature shows in any case that there are obstacles in the private sector with regard to the concept of 'consent' and 'justified interest', and the (un)lawful access to (special) data by third parties.

An important objective of the DPA concerns the transparency and reinforcement of the position of the persons involved. From literature, the picture arises that there are obstacles in the private sector regarding the notification of personal data processing and the impossibility to use the exemption from the notification obligation included in the Exemption Decree (*Vrijstellingsbesluit*). These comments concern the electronic notification system that is categorized as inconvenient; the inefficacy of the exemption decree due to the many details, and a compulsory public access of the data in the notification system as a direct consequence of the notification. Furthermore, literature shows that there are obstacles in the design of and compliance with the obligation to provide information. Informing the persons involved beforehand is labour-intensive and sometimes clashes with the confidential character of the data processing in question. In addition, the obligation to provide information is considered to be hard to apply through the use of open standards. With respect to the rights of the persons involved, there are obscurities in the scope of the right to information.

An interested party may appeal against certain decisions of the controller with the district court. In literature, a number of obstacles are observed with regard to this 'new' legal action. The unfamiliarity of judges with the DPA and the ambiguity and high threshold of civil proceedings are pointed to. The checking of and supervision over data processing in the private sector initially are the responsibility of the DPA. This Authority seems to be inclined to make use of an active publication policy within the scope of its supervisory responsibilities ('naming and shaming').

With respect to the public sector (chapter 6), literature shows obstacles similar to those found in the private sector. In the public sector there are also obscurities on the interpretation and application of concepts like controller and personal data, and on the relationship between the DPA and other acts, such as the Government Information Public Access Act (*Wet openbaarheid van bestuur*) and the Public Administration Probity in Decision-making Act (*Wet bevordering integere besluitvorming openbaar bestuur*). Especially, the presence of many sectoral rules on the use of personal data, such as Municipal Database Personal Files Act (*Wet gemeentelijke basisadministratie persoonsgegevens*), Police Files Act (*Wet politieregisters*), is typical for the public sector. This restricts the DPA's application scope in this sector.

With respect to the material norms in the Act obstacles arise in the public sector particularly with regard to the prohibition of the processing of special data. This particularly applies to the monitoring of the compliance with legislation for which special data like health data are kept. Further, with respect to the theme of self-regulation it is striking that in the public sector relatively many DPO's have been appointed, but that no codes of conduct exist. An informal way of self-regulation does exist, such as networks or platforms within which arrangements are made on data processing or best practices are exchanged for example.

In the public sector the inspection and correction rights do not seem to be very common. There are indications that procedures and measures are missing for enabling the implementation of these rights in a careful way within the statutory term.

With respect to the subject supervision and legal protection, a number of specific obstacles have been observed in the public sector. The processing time of the preceding investigation, which is carried out compulsorily in some cases by the DPA, may constitute an obstacle, particularly for collaborative projects. The exercise of the supervision by PDO's barely creates obstacles in the public sector. This does not apply to legal protection, which has been regulated differently in the public sector than in the private sector. According to some authors, this is detrimental to the unity of law and the privacy protection.

In the semi-public sector (chapter 7), some of the act's core concepts also lead to problems. For example, the vagueness of the concept of personal data implies obscurity on the scope of the act and this leads to divergent interpretations. The concepts of controller and processor are regarded as unclear. It is also indicated that the application of the DPA in the semi-public sector is impeded by a multitude of sectoral regulations. In combination with the high abstraction of the DPA, this leads to an incomprehensible system of rules. In addition, in practice the DPA is considered as impeding the effectiveness of policy in which a 'customer-friendly' service provision is aimed at, by asking citizens' data only once. In connection with this, literature shows that social workers in collaborative projects and 'chain care' (*ketenzorg*) are unaware of the interpretation space of the DPA. In some cases, this unfamiliarity results in social workers erroneously assuming that particular forms of data processing are not allowed. The prescriptive frameworks of the DPA raise some specific questions in the semi-public sector, for example in the social service and health care sector. Where acts are performed without the consent of the person involved, the DPA raises impediments.

With respect to the theme of self-regulation it appears that the code of conduct that is applicable to health care insurers increases the density of rules, but is not sufficiently able to react adequately to new developments within the social service sector. With respect to the transparency objective and the rights of the persons involved, similar obstacles are observed in the semi-public sector as in the other sectors. The implementation of the inspection right for both the person involved and the controller is impeded by a number of practical problems that are regarded as a

consequence of the high abstraction level and the too rigid standard in the so-called Costs Decree (*Vrijstellingsbesluit*). Furthermore, there are signs that the obligation to provide information and the requirement of consent result in relatively high effecting costs for large implementing organizations.

In case law and literature, little obstacles are observed that specifically refer to the legal protection, enforcement and supervision within the semi-public sector. The various pieces of legislative advice and decisions by the DPA raise the impression that the supervision over, and the enforcement of the law have been regulated properly. In this respect, the danger of pseudo-legislation is pointed to. With respect to legal protection, the unfamiliarity with and the interrelated false application of the opposition right form the most striking obstacles.

Finally, on the basis of the inventory of the obstacles it has been checked to which extent the objectives of the DPA and, if relevant, of the directive have been made (chapter 8). For this, the different obstacles which were found in literature were linked to the objectives of the Dutch legislator. Subsequently, the most important conclusions were regarded from three evaluation perspectives.

First, the legal perspective points to the most important obstacles arising from the difficult connection of the DPA with the Dutch legal system. The layered and compartmented system for the protection of personal data has become very complex and sometimes tends to overregulation. In addition, the conceptual system and set of instruments of the DPA as such are too abstract and leave too much space for interpretation to form a clear framework for the assessment of concrete questions and situations. With this, the objective of the determination of a conceptual system that can be used for legal formation and for the weighing of interests is not fully realized.

Secondly, from the perspective of enforcement and compliance the unilateral character of the enforcement can be pointed to, as the emphasis mainly lies on the usually followed administrative law process. In addition, the intended system of checks and balances is only shaped to a restricted extent by the lack of factual legal review of the principles from the DPA. Furthermore, self-regulation within the scope of the DPA leaves much to be desired. It can also be concluded that particularly the objectives of the legal review of the powers granted to the Authority and the further interpretation of substantive standards through self-regulation have only been realized to a restricted extent.

Thirdly, from the perspective of awareness and familiarity, it is striking that many rights and obligations of controllers and persons involved that arise from the DPA are not effectively exercised through a lack of familiarity with these rights and obligations. One of the central objectives of the DPA, i.e. increasing the transparency of data processing through the granting of rights and obligations and the introduction of a regulatory authority seem to have been (partially) unrealized. Finally, the overview from the three perspectives constitutes the starting point for the determination of relevant questions for the second phase of the evaluation in which the effectiveness of the DPA will be researched empirically.