

Summary

Background

On 10 October 2010 the country of the Netherlands Antilles was abolished and the constitutional structure of the Kingdom of the Netherlands was changed. Curaçao, Aruba and Sint Maarten are now independent countries within the Kingdom. Bonaire, Sint Eustatius and Saba, (Caribbean Netherlands) have become part of the European Netherlands as public bodies.

When the Caribbean Netherlands became part of the European Netherlands, the Dutch Constitution also came into force there. Part of the Constitution is respect for personal privacy. The operation of the Strasbourg Data Convention and the Additional Protocol was also extended to the Caribbean Netherlands. These changes required the introduction of a legal regulation on the protection of personal data and the rights of data subjects. Therefore since 10 October 2010, the Personal Data Protection Act Bonaire, Sint Eustatius and Saba, or BES (Wbp BES) applies to the Caribbean Netherlands.

Article 55 of the Wbp BES contains an evaluation provision which states that the act must be evaluated five years after its entry into force. Due to the delayed establishment of the regulator, the BES Personal Data Protection Supervision Committee (CBP BES) decided that the evaluation would be completed five years after the commission was set up, i.e. in 2019. This is the reason for this research.

Research question

This research answers the following main question:

How do the Wbp BES and the CBP BES work in view of the principles and objectives set out in the Act, what problematic issues are involved, how does the implementation of the Dutch General Data Protection Regulation (AVG) affect the processing and exchange of personal data between the European Netherlands, Caribbean Netherlands and the Caribbean countries and what recommendations can be made for the future given the problematic issues that have been identified?

Research methods

To answer the main question, various methods of data collection and analysis were used: To obtain a clear picture of the legislation introduced and the aims and principles of the Wbp BES, the act and the accompanying parliamentary documents were studied. By studying relevant literature, we examined the role of EU law in the Caribbean Netherlands and what relevance and possible consequences the introduction of the AVG in the European Netherlands has for the Caribbean Netherlands.

At the start of the investigation, exploratory talks were held with (policy) officials from various ministries, the secretary of the CBP BES, employees of the Privacy and Security Service Centre, the Personal Data Authority and the public entity Bonaire.

On all six Caribbean islands, discussions were held with the (deputy) governors, those involved in the executive services on the islands, employees of the public bodies, employees of the Department for the Netherlands in the Caribbean (Rijksdienst Caribisch Nederland), and the Shared Service Organisation and representatives of companies (such as airports), utilities, telecom service providers, banks and hospitality organisations) and social organisations and institutions (in the field of work, care and housing). The interviews focused on the experiences of those involved with (the implementation of) the Wbp BES and the CBP BES.

To increase the involvement of the residents of the Dutch Caribbean in the research, two calls were posted on Facebook. These asked people to tell the researchers (anonymously) about examples of situations in which (too) much information had to be provided and data was shared without permission, or of situations in which privacy was well protected.

Additional interviews were held in the European Netherlands and on Bonaire. Interviews were held with, among others, Jacques van Eck (quartermaster and member of the BES Personal Data Protection Supervision Committee), employees of the trade union umbrella organisation USIBO, a law firm in Bonaire and Mental Health Caribbean Bonaire.

The findings of the research were discussed in a focus group. The focus group met via Skype with participants on Bonaire, Saba and Aruba. The participants were (representatives of) the Liaison JenV, the Public Entity Bonaire, the BES Personal Data Protection Supervision Committee, one of the banks on Bonaire, a law firm on Bonaire and Mental Health Caribbean Bonaire.

After the research had been completed, the CBP BES and the Dutch Data Protection Authority, among others, responded in writing to the draft conclusions and recommendations.

The Personal Data Protection Act Bonaire, Sint Eustatius and Saba (Wbp BES)

With the introduction of the Wbp BES, the legislator intended to comply with the Constitution and to introduce an adequate level of protection during the processing of personal data. An adequate level of protection must on the one hand be understood to be a nomenclature that prescribes the careful handling of (special) personal data and, on the other hand, the establishment of an independent supervisory authority that supervises the safeguarding of the standards.

The main objective, adequate protection of personal data, has been operationalized by looking at how (government) institutions and companies implement the legal requirements, the information provided about the act, the familiarity of residents, (government) institutions and companies in the Caribbean Netherlands with regard to the (content of the) Wbp BES and how residents are aware of their rights, the experiences of residents, (government) institutions and companies with regard to complaints and legal protection, how supervision is arranged and how supervision is carried out.

Implementation of the act

How the act is implemented differs between sectors and between the islands. The general picture is that organisations in the public and private sector on Bonaire and Saba have largely taken steps to implement the act, but that there is still much to be done. It is clear that most information regarding the act comes from the activities of the CBP BES. Organisations and institutions that are partly established in (or frequently collaborate with) the European Netherlands and the rest of the world are further with the implementation of the privacy rules than comparable organisations and institutions that do not have a relationship with the European Netherlands and other countries such as the US.

Small scale

The small scale and special nature of the islands form a special context and make it sometimes very difficult or even impossible to protect privacy. At the same time, the small scale and local privacy culture are also the main arguments for the protection of personal data.

BES Personal Data Protection Supervision Committee (CBP BES)

The CBP BES has so far placed the emphasis on information activities to ensure that the standards set out in the act become known to residents and the organisations affected by it. It is clear that the information and activities of the committee have contributed positively to the implementation of the legislation. However, the limited capacity of the CBP BES and the emphasis on information activities means that little or no time is available for supervisory actions. There is also insufficient capacity available for advisory activities. The funding of the committee is very insufficient to allow it to properly fulfill the duties of the committee. Budget (and capacity) is needed for its role in providing information, its advisory and supervisory (and enforcement) roles and for granting licences, etc.

Third countries and the Dutch GDPR (AVG)

The question is whether the protection level introduced is sufficiently adequate for the exchange of data with the European Netherlands. The gap between the Wbp BES and the AVG is substantive. In this context, attention is drawn to the fact that the level of protection in the European Netherlands has been increased by the AVG, while at the same time it has been established that the Wbp BES is less complete than the Dutch predecessor of the AVG, the Personal Data Protection Act (Wbp). The European Commission has not (yet) commented on the appropriateness of the protection and the level at which supervision is carried out. So it cannot simply be assumed that the level is sufficiently appropriate for obtaining an adequacy decision (or some other legal basis for the transfer with GDPR countries as appropriate guarantees). At the moment there does not seem to be a legal basis, such as a licence, for the exchange of data from the European Netherlands and other EU countries.

Caribbean countries

Whether or not there is an 'appropriate and adequate' level of protection in the Caribbean countries is also very questionable. A recent case shows that this can be doubted since the level of protection of the legislation seems to be at a lower level and there is no question of independent supervision. This also causes problems for the exchange and processing of personal data between the Caribbean Netherlands and the Caribbean countries. Attention was requested for this problem during the Judicial Four-Party Consultation. Because there is an exchange of information without an appropriate level of protection or a licence from the Dutch Data Protection Authority (AP) and/or the CBP BES, the exchange can in some cases be regarded as unlawful.

Conclusion

With the introduction of the Wbp BES on 10 October 2010, the aim to establish a legal regulation for the protection of personal data and the rights of data subjects (to comply with Article 10 of the Constitution and European treaties) has been achieved.

The paradoxical link between the small-scale and culture of the Dutch Caribbean and the protection of personal data means that the act is sometimes difficult to implement in practice. This also complicates the implementation of the legal rules.

The CBP BES has fulfilled its supervisory role barely or not at all. The committee has, however, put a lot of effort into providing information and promoting awareness. The information provided by the CBP BES has made a major contribution to the understanding of and compliance with the act.

The regulations in the European Netherlands, the Caribbean Netherlands and the Caribbean countries differ. Supervision is also different and not all countries have a supervisory body. This means that the exchange of personal data between the parts of the Kingdom is not automatically permitted, while the exchange of data between countries and public bodies is necessary on a large scale for the performance of public duties.

The introduction of the AVG has increased the level of protection in the European Netherlands, while the Wbp BES is less complete than the Dutch predecessor of the AVG, the Wbp. It cannot simply be assumed that the level is sufficiently appropriate for obtaining an adequacy decision (or some other legal basis for the transfer with GDPR countries as appropriate guarantees).

The second objective of the legislator was to introduce an adequate level of protection. This must on the one hand be understood to be a nomenclature that prescribes the careful handling of (special) personal data and, on the other hand, the establishment of an independent supervisory authority that supervises the safeguarding of the standards. In practice, insufficient attention has been paid to the protection of personal data and the associated rules set out in the Wbp BES. Indeed, the legislation is not even known everywhere. This is not surprising; whereas the European Netherlands was already familiar with the legal predecessor of the Wbp, the Personal Registration Act, the Wbp BES came to the islands in 2010 as an entirely new regulation. The privacy rules in the European Netherlands only really came to the fore with the introduction of the AVG in 2018. Although much has been changed and achieved in the Caribbean Netherlands, the rules are still not being complied with sufficiently. What is more, in practice, the designated regulator does not supervise but focuses mainly on providing information. And additional measures are still being taken to increase privacy awareness in the European Netherlands situation as well. This justifies the conclusion that an even greater commitment to information, monitoring and enforcement is needed in the Caribbean Netherlands in order to increase privacy awareness and adequately protect personal data.