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Advogados

20 January 2017

His Excellency  
mr. dr. K.H.D.M. Dijkhoff  
Deputy minister of Security and Justice  
Postbus 20301  
2500 EH DEN HAAG

Your ref: DP\_AMSWOS

## Public consultation draft bill of act executing the GDPR in the Netherlands

Your Excellency,

The data privacy team of Baker McKenzie Amsterdam would like to provide some viewpoints on the draft Act on the execution of the GDPA ("*Uitvoeringswet Algemene verordening gegevensbescherming*") that was made available for public consultation on 9 December 2016, hereinafter referred to as the "**Draft Bill**".

As the premier international law firm Baker McKenzie is often asked to analyse new business initiatives, innovations and processes against applicable regulations in many, if not all, EU member states. Ever so often this concerns scenarios that have not been tested by courts or the Article 29 Working Party - in other words situations where clear cut guidance from the legislator, the courts or the regulator is absent.

Multinational companies are generally keen to get clarity on their rights and obligations and generally spend considerable more time and effort on compliance with data protection laws. The investments made in this regard are considerably higher than those made by national companies and start-ups, who more often simply accept the risk of being non-compliant if the rule of law is not clear and / or the regulator remains silent. Although the GDPR will harmonise the statutory rules, it will take many years, if not decades, until all there is a comprehensive framework of jurisprudence of the European Court of Justice that is sufficiently detailed to give reliable guidance individual cases.

Where the law is unclear, companies have limited options to ensure compliance and assess their regulatory exposure. Law firms can analyse the law, but cannot predict how a regulator would view a certain scenario absence of clear case law.

A lack of certainty as to one's legal position ("*rechtsonzekerheid*") is already a serious concern for many international companies doing business in Europe.

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In most EU member states this problem is to a certain extent addressed by the regulators - in this case that national Data Protection Authorities ("**DPAs**"). In the first decade of the current personal data protection act ("*Wet bescherming persoonsgegevens*", "**PDPA**"), the Dutch DPA also issued guidance and responded to queries of individual companies and used to opine on matters of interpretation of the PDPA. This has resulted a series of valuable written opinions and in addition has it enabled thousands of companies who in good faith sought guidance on how to achieve data protection compliance in real life matters.

However, some ten years ago the Dutch DPA decided to change its policy and decided it would no longer respond to queries of individual data controllers. Ever since the Dutch DPA - as a matter of policy - only speaks with industry associations and not with individual data controllers. For clarity, this change of approach is not based on a change of the law. It is the Dutch DPA who decided to stop the dialogue with data controllers for internal reasons.

This position is highly exceptional in the EU: the DPAs in France, Belgium, the UK, Spain, Italy, Austria, Switzerland, Poland, Ireland and many other Member States opine on questions from individual companies. This may take place either in the form of a written advice or the sharing of informal viewpoint on matters presented to them - sometimes on a no names basis and sometimes to named data controllers only. Apart from that, general guidance is issued if multiple data controllers indicate that they have difficulties applying the law in certain specific situations or if similar questions are posed to the authority in question.

In the Netherlands, many other regulators also provide guidance and respond to questions of businesses who come across issues when attempting to deal with regulatory requirements. Examples are the ACM, the AFM and the DNB.

The spectacular change in the regulatory landscape of data protection has caused a wave of attention, which gives awareness a boost. However, it also created significant uncertainty for businesses, which calls for action. The national DPAs play a crucial role in enabling and empowering companies that deal with personal data on a day to day basis and use their best endeavours to ensure their operations are compliant with the GDPR and national laws.

Compliance with data protection regulations requires more than laws and enforcement. The data controllers are the key subject of the GDPR. Many data controllers are genuinely committed to achieving compliance, but get frustrated for they cannot get clear answers on whether their solutions satisfy the regulatory requirements or what else they should consider.

The risks and exposure of such companies depends on the priorities and preferences of national DPA. If active in the Netherlands, their DPA is not prepared to tell in advance whether they are "in the clear" (or at least give some non-binding guidance) as they no longer considers this as its task. As a result, such companies have no choice but to accept the risk of singled out by the DPA at one point in time and face sanctions. Certification may in the future help in certain cases, but will not be of much value for small and medium businesses and for ad hoc issues.

In view of the increased fines under the GDPR, this will become even a greater concern for companies doing business in the Netherlands. This has an adverse effect on innovation, on the international competitive position of the Netherlands and - last but not least - on the establishment of best industry practices for data protection compliance in specific situations in Dutch society.

We at Baker McKenzie Amsterdam believe that the Dutch government should consider the importance of having a data protection authority that responds to requests of individual companies / data controllers. This should hence, in our view, be one of the statutory tasks of the Authority. To achieve this a specific provision should be inserted in Chapter 2 of the Draft Bill.

For clarity, the task of providing advice or guidance on request to data processors is consistent with the existing data protection act (Chapter 9), with the Data protection directive *and* with the GDPR. Article 75 GDPR is not intended to disincentive authorities DPAs to provide guidance in individual cases. In contrary, the national DPAs in many member states have gotten more active and actively assist controllers who have increased their efforts to understand and comply with every detailed data protection requirement.

Engaging in an active dialogue with data controllers (not just data subjects) is one of the cornerstones of implementing the new data protection regulation and achieving compliance with its requirements. This is a crucial task of the Dutch DPA, which cannot be substituted or taken over by the market, the courts or the government. Acknowledging this in the Draft Bill is necessary and - from a legislative perspective - "policy neutral". This follows from the fact that the Dutch DPA also performed this task in the first decade after the PDPA was enacted. In other words, an unwritten rule / best practice that used to apply in the Netherlands and has continued to exist in the rest of the EU is merely codified and rehabilitated.

From an efficient legislation perspective this is also the right thing to do, since it supports those companies who are willing to "lead by example". Moreover, this is in line with the ambition of the Dutch government to ensure that the Netherlands remains in the top of the lists of countries that are the most attractive for foreign companies to open businesses.

We do realise that responding to queries of data controllers may have time and budget implications for the Data Protection Authority. However, it seems that in other Member States, the relative amount of time and budget spent on the "active dialogue" with data controllers on their own request is not very significant. The CNIL for instance, is known for taking this task very seriously and seems to be able to cope with the associated occupation of resources. More exact details on time spent on informing data controllers on request could probably be obtained from the DPAs in other Member States.

Should you have any questions in connection with the above, please do not hesitate to contact us.

Yours faithfully,

on behalf of data privacy team of Baker McKenzie Amsterdam,



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