

NETHERLANDS TO ADOPT DATA PROTECTION ACT BY YEAR END

A Netherlands data protection act is fast approaching. It is expected to be adopted by the States General (legislative assembly) in the next few months and to start coming into force in mid-1988. A previous bill was dropped in 1983 and the current bill is a completely new version. The Dutch bill shares a common approach with Finland in demanding that companies exercise self-regulation within a framework of law.

Scope

The bill covers:

1. both automated and manual personal data related to "an identified or identifiable individual." For manual records, this is defined as "any organized collection of personal data relating to different persons which is systematically arranged in such a way as to facilitate access to the data."
2. data protection rights for physical persons but not legal persons.
3. standards for the protection of privacy, for example, that data must be collected lawfully and with due care.
4. an effective right of inspection and correction.
5. The bill minimizes the role of criminal enforcement, although the Registration Chamber retains certain powers in this area.

How self-regulation will work

The concept of a centralized licensing system for name-linked data files has now been dropped. Instead, for companies the central feature of the current bill is the requirement for them to make a public declaration of the existence of name-linked files by notifying the Registration Chamber. The crucial distinction between the former licensing system and the current notification system is that now the Registration Chamber does not have the job of approving the company data controller's registration document

The aim is that self-regulation should implement the general standards set out in the bill, should be easily and publicly monitored, but may vary from one sector to another. To help ensure that privacy standards are maintained, companies, industries and other interest groups are invited to ask the Registration Chamber for its advice on these sectoral codes.

If self-regulation is shown to be ineffective for a particular sector, for example if a sectoral code is too weak or if an industry has not agreed a written code by a certain date, then sanctions will be applied. In such cases, the government may use an

Order in Council to impose rules on certain categories of files.

The Justice Minister may decide that certain categories of files may be exempt from notification if they are managed following certain rules. These categories, which would be given in an Order in Council, might include routine applications like payroll and subscription files.

The details to be included in the public declaration by companies will be given on a form which will be drawn up by the Justice Minister and published in a General Administrative Order. It is likely that the details will be similar to those required for public sector personal data files. This notification is therefore likely to include the following details:

- a. the purpose of the data file
- b. the categories of persons on whom information is included in the data file
- c. the types of information which are included in the data file and the way in which it is obtained
- d. the circumstances in which personal data is deleted from the data file
- e. the categories of persons or organizations to which name-linked data may be transferred
- f. the types of data which may be transferred to the above persons or organizations
- g. the methods of gaining direct access to the data file (for example, use of passwords, security methods, rules on access by a third party who is also bound by the notification document)
- h. any links between the data file and any other collection of data (for example, computer matching of credit cards with lists of stolen cards, or computer matching of tax and social security files by government)
- i. the way in which data subjects may obtain information on and, where appropriate, have information on them corrected
- j. the way in which data subjects may be informed, on request, after data on them is transferred to another organization
- k. a description of the way a data file is managed.

In addition to this public declaration, a data controller must keep records of where and when data is transferred to a third party and to correct data if a data subject makes a justified complaint.

Informing the data subject of a file's existence

The data user must inform the data subject that data on him is recorded on the file within one month of first recording the information. This information must be given in writing and must include the purpose of the file and the name and address of the data controller.

There are exceptions to the above rule:

1. if the data subject is aware or can reasonably be expected to be aware that such data has been filed (for example, a subscriber to a magazine will know that the magazine publishing company keeps a record of his subscription details); or
2. if it is clearly in the data subject's interests that no such notification be given (this category of exceptions has been discussed in parliament and the government will give more information about them at a later stage -- it includes, for example, certain medical files); or
3. if a company data controller refuses a right of access on grounds of protecting the company's "vital interests." (This is a clause which will be strictly interpreted -- for example, the government says that employees should have access to career planning files but major companies say that such files should come under the "vital interests" exemption. If necessary, the courts will decide the issue.

Sanctions

In the first instance, the bill assumes that if people with complaints against a data controller are not satisfied by his response, they will take their complaint to the Registration Chamber.

If the Registration Chamber is not able to resolve the problem, the complainant has recourse to a civil court. The judge will have the power, for example, to issue an injunction to prevent further use of data which has been unlawfully collected.

Groups of people with common interests, such as labor unions and consumers have the possibility of fighting a class action by asking a judge to issue an injunction. In addition, individuals may sue for material and immaterial damage. Examples of the latter would include violation of privacy and distress caused by improper access to data, or use of the data for a purpose not stated in the company's declaration to the Registration Chamber.

The bill states that fines of up to 10,000 guilders (£3,000) will be imposed on organizations:

1. processing name-linked data but which have not submitted a

notification to the Registration Chamber or informed it within four weeks of a data controller's change of name or address

2. importing or exporting name-linked data to or from the Netherlands contrary to a General Administrative Order that "such a transfer of data would have a serious adverse effect on the privacy of the persons concerned."

In addition, any person deliberately infringing these parts of the law will be liable to a maximum six month prison sentence or a fine of 25,000 guilders (£7,500). The Registration Chamber will have staff to investigate the above offences.

Sensitive data

Unlike data protection legislation in other countries, the Netherlands bill has no specific rules, at this stage, for the collection and processing of sensitive data. The rationale for this policy is to permit all parties to gain experience in working with the law as it applies to name-linked data in general, and not clutter it with particular categories of data.

However, the bill states that within one year of the law coming into force, a General Administrative Order will lay down rules for including in a data file information on an individual's "religious beliefs or philosophy of life, race, political persuasion, sexuality or intimate private life and of personal information of a medical, psychological, criminal or disciplinary nature." Within a further three years, a bill on the subject must be submitted to the States General following consultation with the Registration Chamber and any other interested parties.

International Data Transfers

There are no specific rules on receiving a license from the Registration Chamber for data exports. This is consistent with the overall self-regulatory philosophy of the law for data processing within the Netherlands. However, the law does have certain rules in this area.

1. The data protection act will apply to name-linked files located outside the Netherlands but controlled from within the country and holding data on persons resident in the Netherlands.

2. The Justice Minister may after consulting the Registration Chamber exempt a file described above from complying with the act if legislation in the other country provides "equivalent protection for the privacy of the data subjects."

3. The Justice Minister may after consulting the Registration Chamber exempt personal data files where their controller is not established in the Netherlands from complying with the act "providing there are adequate safeguards for the protection of the

privacy of the data subjects in relation to that file."

4. Any person gaining access from the Netherlands to a personal data file outside the country and to which the act does not apply "shall ensure the security of that access and of the personal data obtained by that means."

5. Data shall not be transferred between the Netherlands and any data file in another country to which the act does not apply where a General Administrative Order has declared that such a transfer of data "would have a serious adverse effect on the privacy of the persons concerned."

Timetable

The data protection bill is expected to be passed by the lower chamber of the States General by June this year, to be passed by the upper chamber by the end of the year, and to start to come into force by mid-1988. The government will sign the Council of Europe Convention when a separate Council of Europe ratification bill is introduced into the States General, probably in autumn this year. The intention is to ratify the Convention when the legislation has come fully into force, expected in mid-1989.

Privacy Laws and Business will keep track of any changes in the bill as it passes through its final legislative stages.