

The GDPR in The Netherlands, a higher threshold for penalties?

Although the GDPR (Regulation (EU) 2016/679) is not a directive, it still does not fully harmonize EU data protection law. With regard to some aspects, such as exceptions for processing of health data, the age of consent for minors, and consent in the employment context, there is still some room for manoeuvre for the member states. As a consequence, the member states are currently developing national laws (implementation acts) that will apply along with the GDPR. This does not make things easier for companies working hard to become compliant with the GDPR as from 25 May 2018.

Besides the fact that there will still be some differences in legislation, one may expect that Data Protection Authorities will not take an identical approach in all member states. In this article I would like to focus on what may be expected when it comes to penalties for breaches of the GDPR in The Netherlands.

Current Dutch legislation

The possibility to impose substantial administrative penalties is not entirely new for The Netherlands. As from 1 January 2016 the Dutch Data Protection Act (DPA) already contains this possibility for the Data Protection Authority ("the Authority") to impose penalties up to EUR 820,000.00. However, the DPA requires (except for deliberate violations or situations of serious negligence) that the Authority, before imposing a penalty first issues a binding order in which a time limit may be set within which the offender must comply with the order. This element was added to the law on the basis of the advice of the Council of State (which can be seen as the highest advisory body for the government, advising on all legislation). The Council of State was of the opinion that given the large amount of open norms and vague definitions in the data protection legislation, imposing immediate sanctions without a warning would be in breach of the *lex certa* principle.

It is interesting to note that on the basis of the current legislation the Authority has not yet imposed any penalty in the past year. In a recent news article, the Authority communicated that it does not see imposing penalties as a goal but as a final remedy to ensure compliance.

The Dutch Implementation Act

Given the advice of the Council of State with regard to the introduction of penalties in the DPA in 2016, one would expect the Dutch implementation Act for the GDPR (the Implementation Act), to contain a similar obligation for the Authority to issue binding orders before imposing penalties. After all, the GDPR still contains many vague and open norms which create uncertainty for organizations trying to comply with the GDPR in good faith and the GDPR does not explicitly contain an option for a binding order.

At the moment of publication of this article, the Dutch Implementation Act is not yet finalized. The main preparatory steps (including the advice of the Authority and the Council of State) have already been taken however.

In the preparatory phase, the Authority has taken the position that the GDPR does not leave room for an obligation for the Authority to first issue a warning or binding order before imposing a penalty. The Council of State did not agree with this. It was of the opinion that the binding order could be included in the Implementation Act without acting in breach of the GDPR. In that regard it referred to article 83 (8) of the GDPR which says that the exercise by the supervisory Authority of its powers shall be subject to appropriate procedural safeguards in accordance with Union and Member state law.

The proposal of the Secretary of State subsequently however did not follow this advice of the Council of State, as a result of which the current proposal of the Implementation Act does not contain the binding order. The Secretary of State however does emphasize on behalf of the government that imposing a penalty without previous notice, may be in contravention with principles of proper administration in case of open norms for which there has not yet been provided enough clarity by the supervisory authorities.

The most recent step in the legislation process has been the publication of a report of the committee for Justice and Security. This report contains various critical notes from different political parties on the possibility for the Authority to impose penalties without a binding order. It will therefore be interesting to see how the debate will develop.

Conclusion

The last word has not yet been said about penalties and binding orders in the Implementation Act. When the proposal for the Implementation Act remains unchanged, the Authority will no longer have the obligation to first issue binding orders before imposing administrative penalties. However, based on the current practice and the background of the Implementation Act, we expect that the Authority in The Netherlands will exercise restraint in case it finds a breach of the law, but the organization acting in breach can show that it has acted on the basis of a good faith interpretation of open norms in the data protection law. Undoubtedly the Dutch Authority will however be influenced by the approach taken in other countries after 25 May 2018.