DUTCH DATACENTER ASSOCIATION

In cooperation with ICTRECHT

2017 FACTSHEET

THE VALUE PROPOSITION OF DUTCH AND EUROPEAN DATA PROTECTION LEGISLATION

The time that businesses let their location choice depend upon national tax laws has already been banned to the past for a long time. Nowadays, the really interesting and valuable good seems to be the protection of privacy and personal data. The aim of this factsheet is, therefore, to provide (potentially) interested companies with a short overview of the most important topics within current and upcoming Dutch and European data protection legislation.

GENERAL DATA PROTECTION REGULATION (GDPR)

Currently, data protection is within the Netherlands arranged by the 'Wet bescherming persoonsgegevens' (Wbp). The Wbp will be replaced on the 25th of May 2018 by new European data protection legislation; the GDPR. The GDPR is aimed at creating a, fragmentation free, legal data protection system within all the Member States of the European Union (EU). For companies, the EU will become one large playing field that provides for obstacle-free cross-border flows of personal data within the Union.

GROUNDS FOR THE PROCESSING OF PERSONAL DATA

Data processing has, on the basis of the Wbp and the GDPR, to be based on one of the legal grounds mentioned within this legislation. Examples of these legal grounds are explicit consent of the data subject or need for the entering into force or the execution of a performance or contract. Processing outside the scope of these legal grounds is not allowed.

PRINCIPLES RELATING TO THE PROCESSING OF PERSONAL DATA

On the basis of the, within the GDPR introduced, principle of Privacy by Design, privacy has to be taken in mind while developing products and services (e.g. by implementing privacy enhancing technologies) and organising standard settings. Relevant data protection principles in this regard are the principles of purpose limitation and data minimisation. With purpose limitation is meant that it is not allowed to process data for other (incompatible) purposes than for which it was originally collected.
The aim of the principle of data minimisation is to process as little data as possible. These principles are interesting to take in mind as they are applicable on data processing by both private organisations and public organisations (e.g. the government).

CONTROLLER VS. PROCESSOR AND SUB-PROCESSOR

Depending upon the role a company plays within the processing of personal data, a division is made between the controller, the processor and the sub-processor. The controller is the company that determines the purpose of data processing. The processor is the company that processes personal data on behalf of the controller. The sub-processor is a third party that is enabled by the processor (with consent of the controller) to process personal data. Data centers are, almost always, (sub) processor when personal data is stored or transmitted via servers in the data center. Even when the data center has no knowledge about the storage or transmission. This division of roles is relevant as, within data protection legislation, different responsibilities are attached to these different roles.

PROCESSING AGREEMENT

On the basis of both the Wbp and the GDPR, a controller is obliged to conclude a Processing Agreement with any processor. Thereby, the processor is obliged to conclude a comparable Processing Agreement with a sub-processor. More information about the Processing Agreement can be found on our Weblog.

SECURITY OF PROCESSING

Both the controller and the processor have to make sure that they secure their data processing on an adequate level.
The 'adequateness' of a security level is based on the likelihood of risks, current state of the art, costs of implementation and the nature, scope, context and purposes of processing. The general rule is that the controller is responsible for the security level provided for by the processor, and the processor for the security level provided for by the sub-processor. Further arrangements, in this regard, can be made within the Processing Agreement.

RIGHTS OF THE DATA SUBJECT

Within the upcoming legal data protection system, data subjects can exercise the following rights with regard to the controller: the rights of access, rectification, erasure, restriction of processing, data portability, objection and to be no subject to an automated decision. The role of the processor, in this regard, is to assist the controller based on arrangements laid down in the Processing Agreement.

INFORMATION OBLIGATION

A controller has the obligation to inform data subjects if it processes data from it. This information obligation can be fulfilled by, inter alia, addressing information about the data processing in a privacy policy.

NOTIFICATION OBLIGATION FOR DATA BREACHES

In case of a data breach, the controller has to notify the supervisory authority (the Dutch supervisory authority is the Autoriteit Persoonsgegevens), within 72 hours after discovery of the breach. In some cases the data subjects have to be informed as well. Notification obligations for the processor can be arranged within the Processing Agreement. More information about data breaches, and the related notification obligation, can be found here.

SANCTIONS

Non-compliance with the data protection rules, as laid down in the GDPR, can be sanctioned by the Autoriteit Persoonsgegevens with fines of a maximum amount of €20 million or 4% of the worldwide annual turnover of a company.

INVESTIGATION AND LAW ENFORCEMENT

Dutch investigative and law enforcement authorities have the competence to demand (personal) data, but only if this is based on a legal ground. Thereby, investigators must adhere to certain formalities, during the investigation. One of these is, that personal data may only be requested from the parties who have access to the data; the authorities are not obliged to address the 'owner' of the data. In some cases, depending upon the offence and the data needed for the investigation, a court order or an order from the public prosecutor or other relevant authority is required.

Depending upon the circumstances of the particular investigation, authorities are allowed to search the suspects' devices or physical servers containing the data (as long as the servers are located in The Netherlands). In some cases, service providers might be obliged to cooperate in investigations and to dispense information regarding a suspect, as well (for instance, a customer of the service provider).

CONCLUSION

The Dutch legal data protection system is (and will be even more) arranged in a way that respects the privacy of companies and data subjects vested within it, while also providing for a system which enables obstacle-free cross-border flows of personal data between all the Member States of the EU.

BIO

Stijn Grove

Managing Director Dutch Datacenter Association

Stijn Grove is an industry veteran with a genuine interest in the dynamics of the digital economy. Being the Managing Director of the Dutch Datacenter Association, he represents the data center industry in the Netherlands.

At the same time he promotes the Netherlands to foreign companies - ranging from multinationals to start-ups. When expanding, organisations should consider the Netherlands and make use of its stable digital infrastructure. As Managing Director of the Digital Gateway to Europe, he is an ambassador for the renowned Dutch data hub with a reach that stretches far beyond the borders of our country.

Michelle Wijnant

Legal adviser ICTRecht

Michelle Wijnant is legal adviser at ICTRecht and specialises in legal aspects concerning privacy.

Prior to her position at ICTRecht, Michelle studied "Law and Technology" at the Tilburg University. While studying for her master degree she completed internships at two law firms. The subject of her master's thesis: the effects of the European law "General Data Protection Regulation" on the Dutch legal system. For this, she thoroughly studied both the Dutch and European legal systems. Michelle holds a Cambridge Advanced English (CAE) certificate.

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