

Aiming for effective co-regulation of data protection: policies and practices of the Dutch DPA

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The Dutch Data Protection Authority plays various roles as a public watchdog in the privacy arena. They include providing guidance to the public, acting as an adviser, conducting research and imposing sanctions. The DPA's position as an independent supervisory authority must be safeguarded in each of these roles. Failing to clearly separate these functions would undermine trust in the DPA.

Our central policy question is how to fulfil our range of personal data protection tasks in the most effective way. Over the past few years we have developed a strategy for making practical policy decisions and using our resources and staffing effectively. Two terms sum up our strategy: a four-track policy and a second-line position.

1. Four-track policy

The Dutch DPA has opted for effective performance of its tasks by protecting personal data through four closely-related tracks. They are to raise awareness, develop rules, watch technology and enforce laws. We have a systematic approach that builds on the possibilities created by our chosen policy. Each year we set down an adequate mix of attention to the four tracks – divided across the distinct fields of society – in a plan of action that forms part of our multi-year policy plan. One example is the use of video cameras for surveillance of public places.

Raising awareness

The Dutch DPA endeavours to raise privacy awareness and spotlight rules by providing the public with guidance and communicating with various target groups. Our front office plays an important role in this regard by answering questions via email and through a telephone helpdesk. There are approximately 7,000 contacts each year. We use different forms of communication to reach different target groups and raise their awareness of privacy issues. The authority's website is pivotal to this communication strategy to allow organisations and intermediaries get the information they need to make informed decisions on privacy-related issues. The Dutch DPA participates in an advisory role in all kinds of public and private projects to ensure early consideration of data protection when new information structures are developed. In the second half of the 1990s, for example, we received numerous questions and requests for information about surveillance cameras installed in public places. A great need existed for rules. The DPA examined the matter and issued a set of guidelines plus a 1997 report called *In beeld gebracht (In the picture)* that became a 'bestseller'.

Developing rules

The Dutch DPA develops rules and norms by conducting preliminary surveys that address wide-ranging subjects. We usually publish our guidance as part of the series of studies we undertake. They include recommendations for government departments and parliamentary committees on new legislation. We also hold talks with various branches of industry on new

codes of conduct and issue formal decisions on individual cases that raise new or important questions. Decisions of the DPA are not binding. In practice, however, they are widely regarded as a quality hallmark.

In this same setting, the Dutch DPA encourages self-regulation by industries and their different sectors. The Dutch Data Protection Act embodies provisions for developing codes of conduct as a vehicle for implementing self-regulation with a possibility to seek the DPA's approval. Twelve codes of conduct were formally approved under the old Data Protection Act that covered major sectors like banking, insurance, direct marketing, health and pharmaceutical research. These codes still enjoy considerable respect. Most of the existing codes are being revised to bring them into line with the new Data Protection Act introduced in 2001. These provisions of our Act served as a model for Article 27 of Directive 95/46/EC that provides for implementation through sectoral codes of conduct at national and European levels. A European code for the direct marketing sector will be approved soon.

Another task of the Dutch DPA is to oversee enforcement of the Data Protection (Police Files) Act. We are closely involved in determining the rules for police files and regulations for allowing data subjects to exercise their rights with regard to such files. Besides these formal tasks, the DPA has developed guidance specifically for fields where abstract privacy rules require clarification. Our guidelines for the use of surveillance cameras are a good example. Based on the DPA rules, the Dutch Government has now submitted a Bill to Parliament. Another issue concerns rules for monitoring and checking the use of e-mail and the Internet by employees.

Technology

It is now broadly recognised that besides creating new challenges for privacy and data protection, information technology offers solutions for solving or reducing problems in this regard. The Dutch DPA endeavours to examine critical issues rooted in the technological organisation of information and communication systems and to indicate ways of embedding data protection rules in the technology. This matter touches on future usage possibilities and their impact on data protection. Face recognition and early warning systems are important issues in rules for using video surveillance systems, for example. The DPA invested early in developing Privacy Enhancing Technologies (PET) and continues to exercise considerable efforts to promote their use at the earliest possible stage. Technologically, our emphasis is on "privacy by design".

Enforcement

The ultimate data protection test is the degree of adherence to rules in the interests of data subjects. Written complaint processing, official, if necessary on-site, investigations and, as a last resort, enforcement powers or imposition of administrative measures and fines constitute the instruments available to the DPA for promoting or exacting compliance. Ways of measuring the extent of attainment of that goal include privacy audits and other kinds of systematic research. Together with professional organisations and EDP auditors, we have developed standard tools for measuring compliance with data protection rules. The project's explicit aim was to allow market players to provide and use services that responsible organisations need in order to ensure their compliance and that the DPA can build upon. Our new enforcement powers highlight the need to ensure compliance. In the case of video surveillance, the DPA is going to conduct field research into the use of cameras notably by local government and, where necessary, we will seek to force through changes.

Policy cycle

Collectively, the four tracks of our policy amount to a quality cycle usable for enhancing data protection in different sectors and individual organisations. They provide a strategic model that the DPA uses to develop its own policies and measure the quality of data protection at organisations. The four tracks are a logical extension to each other and may be regarded as distinct phases in a policy cycle. The policy cycle is a continuous process in which enforcement of data protection rules helps raise awareness and influences the way organisations protect data. The tougher enforcement powers we have had since 1st September 2001 will reinforce the strength and cohesion of our four-track policy provided that the instruments are used in a balanced way. It is essential for the DPA never to lose sight of the consequences of adopting a particular approach or view of its role. Our work must be characterised by careful and verifiable action embedded in policy rules.

2. Pursuit of a second-line position

The Dutch Data Protection Act makes the public and private sectors responsible for the proper protection of data. The Act sets out criteria in a set of rights and obligations. The obligation of the data controller to provide information is designed to allow members of the public to exercise their rights. The DPA encourages fulfilment of these responsibilities by both sides by conducting public guidance campaigns, developing rules and stimulating privacy-friendly technology. Steps appropriate to self-regulation include setting down codes of conduct and appointing in-company data protection officers. These matters figure prominently in the Act. Since September 2001, companies and organisations in the Netherlands have appointed approximately 100 data protection officers. Our Privacy Audit project has developed instruments that enable organisations to implement their own policy on privacy quality. We see the use of our enforcement powers and the imposition of administrative measures and fines as a last resort after all other means have failed or proved unsuitable.

The Dutch DPA looks upon authorities and companies as stakeholders in proper data protection. Consumer organisations, trades unions and other organisations that protect the interests of members of the public and consumers are important allies in this regard. We are firmly committed to co-operating with industry associations because they are ideally placed to draw up codes of conduct. This is why the DPA is endeavouring, wherever possible, to take up a second-line position to implement its four-track policy. We are convinced that other stakeholders will share our view that adopting the right approach to data protection is a critical success factor for achieving their goals. They will see that providing information, raising awareness and developing rules must lead to the improved organisation of systems and, subsequently, processes and techniques for promoting compliance.

In this overall setting, the Dutch DPA wants to leave activities of this kind as far as possible to other players and to pull back from being a frontline watchdog. From a second-line position, we want to support other stakeholders and, possibly with partners, undertake activities that benefit society as a whole. This will allow the DPA to concentrate on the elements of its task requiring its specific experience or powers.

Against this background, there is likely to be a shift within the four tracks over the coming years towards supervision and enforcement. The shift will also reflect the complexity of conducting investigations for enforcement purposes. These investigations currently take up a lot of manpower. What's more, companies and organisations will in many cases seek legal protection by lodging objections and appealing to the courts.

By means of the outlined strategy and a gradual shift in emphasis towards enforcement, the Dutch DPA hopes to achieve a multiplier effect. As more organisations start to take on board their data protection responsibilities, the total amount of attention devoted to this issue will increase and we will be able to focus on the elements of our task that are logically our responsibility.

3. Organisation of the Dutch DPA

Several conditions must be fulfilled if this strategy is to succeed. Above all, the Dutch DPA needs to be independent and, importantly, constantly aware of developments unfolding in its environment, or the opportunities and threats created by other actors in society in the setting of the authority's mission. Special attention and a systematic approach are needed in order to develop relations with other stakeholders and organisations capable of playing a first-line role.

The authority will need to adopt a level-headed and selective policy. Level-headed means that we will work in a result-driven way with as little improvisation as possible. We will weigh up what we want to achieve and the means necessary to achieve the end. The use of standards promotes efficiency and quality. A focus on results produces a realisation of the necessity of making choices to deploy manpower and resources as effectively as possible. The keyword is selectivity in our work. The return on intensive involvement in a certain project will need to be properly weighed up against other priorities. Once a certain choice has been made after thorough consideration, it will have to be carried out conscientiously. For that reason, we are pressing ahead with the further professionalisation of the organisation and working methods of the DPA. The knowledge we possess must be carefully managed, developed and shared.

The DPA, established in 1989, is managed by a three-member board. An organisation consisting of approximately 65 civil servants working under a director supports the board.

The thrust of support from the civil service organisation is provided by a group of university-educated policy planners. They include lawyers, engineers and auditors. Many are specialists in one or more sectors of society like local government, police, law enforcement, healthcare, social security, trade and services (including direct marketing), technology, telecommunications and the international aspects of data protection. As a back office, they deal with the more complex matters, write recommendations for legislation and carry out research.

Every year the Dutch DPA receives large numbers of requests for information from data subjects and data controllers alike. Many are dealt with by the front office. In 2001 we received some 8,900 enquiries by telephone, more than 900 written requests for information, 180 complaints and 140 requests for mediation. We also submitted about 30 recommendations for legislation.

The vast majority of telephone enquiries and – since 2002 – emailed requests for information are dealt with by the front office, part of our Communication department, whose other tasks include maintaining the website and acting as a press office. The front office operates a telephone helpdesk and deals with routine business. Information material is developed and published on the website to answer frequently asked questions. A separate department processes notifications of the processing of personal data and publishes them in a public register viewable on the website.

Selectivity, systematic working, standardisation and a careful distribution of work across the back and front offices summarises the approach we have adopted at the Dutch DPA in order to cope with the steadily growing demand for information and our services. So far we have succeeded in reserving some of our resources for dealing with requests and others for addressing our own priorities. As in many other fields, organisation and inspiration go hand in hand in our everyday work.

4. Some policy recommendations

Although data protection customs and practices differ considerably in the various EU member states, the policies and practices of the Dutch DPA may provide some useful policy pointers.

Be selective and take initiative

The numerous relevant social sectors, ceaseless technological progress and enormous volume of processed personal data exert permanent pressure on a DPA's staffing and resources, no matter how big the authority may be. A Data Protection Authority that adopts merely a reactive stance and uses all its staffing to address only matters that happen to come its way will quickly lose its overview and influence on unfolding information structures and the real-life handling of personal data. In contrast, selectivity provides a focus and creates scope for the authority's own initiative. So be selective, because it's the only way to survive as a DPA and thus the best way of protecting people's privacy.

Invest in a website

Awareness among data subjects and data controllers can be raised by providing guidance, briefing the press and publishing information about the rights and obligations attached to the use of personal data. Indirectly, guidance contributes to compliance with and enforcement of data protection laws. A website is the most efficient and most flexible instrument for this purpose.

Find allies

Instead of taking direct action, the most effective policy for data protection authorities is in many cases to get stakeholders to adopt the right course of action. A DPA needs to highlight its role as a second-line institution whenever possible. From this position, an authority will be better-placed to focus on subjects that need its primary attention and for which it has received special powers and resources. The result will be the gradual creation of co-regulation with the other players across the entire field of data protection.