

Electronic administrative communications in The Netherlands

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The Dutch government has implemented a part of its action plan *Legislation for the electronic highway* by adapting the Act on Electronic Administrative Communications (the Act).¹ The Act has entered into force on July 1, 2004.²

Objective

In its action plan *Legislation for the electronic highway*, the Dutch Cabinet has outlined that hindrances against electronic decision-making should be overcome, without harming doctrines of due care and legal certainty.³ The Act provides a framework for the use of electronic channels between citizens (both natural persons and legal entities) and administrative authorities.

Scope

The Act provides rules for electronic communications between citizens and administrative authorities and among administrative authorities. The Act determines:

- when electronic communication between administrative authorities and citizens is allowed;
- in which situations electronic communications can be considered the equivalent of conventional communication;
- which requirements for such electronic communications must be met.

The Act stipulates certain changes to the Act on General Administrative Law, which concerns the relation between citizens and administrative authorities. For multiple requests or acts, the Act on General Administrative Law stipulates that communication with or from administrative authorities should be in writing. The explanatory memorandum, accompanying the legislative proposal for the Act, stipulates that the requirement 'in writing' should be given a broad perspective.⁴ The explanatory memorandum refers to the government report *Electronic performance of juristic acts*, which defines a written instrument as any carrier containing letters and symbols, which express - in mutual connection - a thought which can be made audible.⁵ The government simply chose a definition of the term writing, which includes both the paper and electronic format. The explanatory memorandum sets out this interpretation for procedures based on the Act on General Administrative Law and provides examples.

The Act does not relate to the use of electronic communications with the Dutch administrative courts. Appeal proceedings with the administrative courts will be revised in conjunction with civil and criminal prosecution proceedings. The Act also does not concern complaints relating to proceedings with the national ombudsman, since the latter is not an administrative authority. The Act does not provide rules for the registration and archiving of electronic documentation. Such stipulations can be found in the Archive Decree based on the Archive Act of 1995.⁶

¹ Act of April 29, 2004, supplementing the Act on General Administrative Law with regard to rules for the communications between citizens and governmental authorities in the amendment of certain other legislation in this regard (Act on Electronic Administrative Communications), Dutch reference: *Wet van 29 april 2004, houdende aanvulling van de Algemene wet bestuursrecht met regels over verkeer langs elektronische weg tussen burgers en bestuursorganen en daarmee verband houdende aanpassing van enige andere wetgeving (Wet elektronisch bestuurlijk verkeer)*.

² Decree of May 25, 2004, determining the date of entry into force of the Act on Electronic Administrative Communications, Bulletin of Acts and Decrees 2004, 260, Dutch reference: *Besluit van 25 mei 2004 tot vaststelling van het tijdstip van inwerkingtreding van de Wet elektronisch bestuurlijk verkeer*, Staatsblad 2004, 260.

³ Letter of the Minister of Justice dated September 15, 1999 pertaining to *Legislation for the electronic highway*, Dutch reference: *Brief van de minister van Justitie inzake Wetgeving voor de elektronische snelweg*, Kamerstukken 1998-1999, 25 880, nr. 8.

⁴ Explanatory Memorandum, Parliamentary Documents 2001-2002, 28 483, no. 3, Dutch reference: *Memorie van Toelichting*, Kamerstukken 2001-2002, 28 483, nr. 3.

⁵ Parliamentary Documents 1997-1998, 24 036, no. 84, Dutch reference: *Kamerstukken II 1997-1998, 24 036, nr. 84*.

⁶ Act of April 28, 1995 with regard to the replacement of the Archive Act of 1962, Dutch reference: *Wet van 28 april 1995, houdende vervanging van de Archiefwet 1962 (Stb. 313) en in verband daarmee wijziging van enige andere wetten, als laatst gewijzigd bij wet van 8 maart 2001 tot wijziging van de Archiefwet 1995 in verband met een andere positionering van de rijksarchiefinspectie (Stb. 2001, 131), (Archiefwet 1995)*.

Lastly, the Act does not provide liability provisions, for instance with regard to unreliable communications, since these provisions are taken up in the Dutch Civil Code. Book 6 of the Civil Code has been amended with regard to the liability of certification service provider.⁷

Electronic versus conventional communications

One principle of the government is that the use of new techniques should not suppress the use of conventional channels in interactions with administrative authorities. The Act does not contain an obligation for administrative authorities to implement electronic channels. A requirement for the applicability of the Act is that the administrative authority has opened the channel of electronic communications. The use of electronic communications cannot be enforced.

An administrative authority can thus refuse to communicate via electronic channels, as long as it has not implemented the necessary tools and notified the public of its intent to communicate electronically. In 2001 a citizen filed an administrative appeal over an administrative sanction by way of e-mail and in writing. The appeal by e-mail was filed within the appeal term, although the written statement was filed after the appeal term had expired. The sub district court disallowed the administrative appeal, since the appeal was lodged too late. Subsequently, the court of Appeal confirmed the sub district court's decision on appeal.⁸ The court of Appeal ruled that the public prosecutor could refuse the administrative appeal via e-mail, since it had not notified the public that electronic communications were permissible, although an e-mail address of the public prosecutor's office was available. The court of Appeal based its decision on the Act in an anticipatory ruling.

The starting point of the Act is that the citizen chooses which channel they wish to deal with the administrative authorities, when both conventional and electronic methods are available. Consequently, if only the conventional mode is available, the citizen has no choice but to use conventional channels.

Administrative authorities are not allowed to

dispense conventional channels and only work with electronic channels, unless all parties involved consent to the use of electronic channels only. However, the Dutch Cabinet created the first statutory exception to this rule. As of January 1, 2005 all corporations are obligated to submit their tax declarations electronically with the Tax Authority. The government further intends only to accept electronically submitted declarations for turnover tax for the tax periods after January 1, 2005 and wage taxes as of January 1, 2006.⁹

Apart from the above mentioned statutory exceptions, the mere knowledge of an e-mail address of a citizen is not sufficient to dispense with conventional channels of communications. The citizen will have to notify the relevant administrative authority that an electronic exchange of messages is possible, permissible and at which address. An administrative authority is obliged to verify whether electronic channels of communications are available and acceptable to the citizen. In October 2003 an administrative authority summoned a citizen for a hearing via e-mail. The summons was dismissed, since the citizen had not indicated that he could be reached via e-mail.¹⁰ Once a citizen has declared that he is available via electronic channels for all communications, the citizen has an obligation of due care to notify the administration of changes of its electronic address.

Requirements for electronic communications

Pursuant to article 2:15 of the Act on General Administrative Law, an administrative authority can refuse an electronic communication, which is not sufficiently reliable or confidential, or would lead to a disproportionate burden for the administrative authority. The administrative authority has to notify the citizen of its refusal. Should an applicant file a request without the required forms, the processing of the application may be refused. This refusal to process such a request cannot be appealed.¹¹ However, according to 4:5 of the Act on General Administrative Law, the applicant should be provided with the opportunity to remedy the faulty request.

The extent of reliability and confidentiality may

⁷ Parliamentary Documents II 2000-2001, 27 743, no. 1-3, Dutch reference: Kamerstukken II 2000-2001, 27 743, nrs. 1-3.

⁸ Court of Appeal of Leeuwarden, decision of July 9, 2003, Dutch reference: Gerechtshof Leeuwarden, 9 juli 2003, WAHV 02/01106, LJN: AI0434.

⁹ Taxplan 2004, Parliamentary Documents 29 367 no. 2, 3 and 7, Dutch reference: Belastingplan 2004, Kamerstukken 29 367, nrs. 2, 3 en 7.

¹⁰ District Court of Leeuwarden, section administrative law, decision of February 27, 2004, Dutch reference: Rechtbank Leeuwarden, sector bestuursrecht, 27 februari 2004, LJN-nummer: AO4848.

¹¹ Article 8:4 of the Act on General Administrative Law has been changed accordingly.

vary depending on the message or act involved. Three levels of reliability and confidentiality are identified, as respectively maximum, sufficient and pro forma levels. The maximum threshold is determined by the state of the art and financial means available to the administrative authority. The pro forma threshold may be the mere notice that trespassing is prohibited, while no measures are taken to prevent unauthorized access. Electronic communications have to provide a sufficient measure of reliability and confidentiality. According to the government, a starting point is the level of reliability and confidentiality provided by conventional channels of communications. Sufficiency may vary depending on the nature of the acts involved. In this regard the Act refers to the European Union Directive on electronic signatures,¹² which has been implemented in the Civil Code. However, the requirement of an electronic signature does not equal the extent of reliability and confidentiality required according to the Act. The electronic signature may - strictly speaking - secure the authenticity of the message; although the reliability of the message may entail that more measures should be taken. Thus article 2:14 and 2:15 of the Act on General Administrative Law create an open standard for reliability and confidentiality, while article 2:16 of the Act on General Administrative Law, referring to the use of electronic signatures, provides the means to contribute to the reliability.

The explanatory memorandum to the Act mentions several view points which should be taken into account for establishing concrete measures based on the open standards of both reliability and confidentiality. According to the explanatory memorandum, the standards of reliability and confidentiality take into account a multitude of principles such as:

- **authenticity** (referring to the source of the document);
- **integrity** (the surety that data has not been changed);
- **irrefutability** (the prevention of refuting the data was sent);
- **transparency** (possibility of tracking changes to the data)
- **availability** (access and availability of the document);

- **flexibility** (extent to which new and old usage requirements can be maintained);
- **confidentiality** (exclusivity of use by authorized personnel).

The government has set up a taskforce for building a governmental (virtual) counter for citizens and a Public Key Infrastructure (PKI), in order to stimulate the uniform provision of administrative services and the use of electronic signatures by administrative authorities in The Netherlands.¹⁴ The implementation of a uniform and government-wide PKI may prevent discussions on appropriate levels of reliability and confidentiality for separate administrative authorities.

Since communications should be sufficiently reliable and confidential, the administrative authority may need to stipulate requirements for access to electronic channels of communications. Such requirements may also be set with a view to a uniform processing and safe data traffic. Examples of such requirements range from access to specific data ports or the use of a specific data format. High-tech requirements may prove too high a threshold for natural persons to have effective access to the government via electronic channels, while corporations may find it cost effective.

Principles of proper administration dictate that the use of electronic communications should not create unfair hindrances for electronic data traffic. The administrative authority has to weigh interests of uniform, safe and practically applicable and payable applications versus the interest of the citizen of easy or at least affordable access to the government. For several years, the Tax Authority has implemented separate channels, via paper, floppy disk or on-line, for filing tax declarations. In 1999 the national ombudsman processed a complaint that the Tax Authority only provided a software application for the Windows operating system. The national ombudsman decided that the use of a software application for electronic tax filings did not require the Tax Authority to provide a separate version of its software application for the Apple Macintosh platform.¹⁵

Following the principle of legitimate expectations, a change or expiration of techniques used for electronic communications should be

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¹² Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures (OJ 19.1.2000 L13/12).

¹³ In this regard the explanatory memorandum refers to the principles of proper IT-use of H. Franken, Dutch reference: H. Franken, Kanttekeningen bij het automatiseren van beschikkingen, in: Beschikken en automatiseren, VAR-reeks 110, Alphen aan den Rijn, 1993.

¹⁴ Action plan Electronic Government, Parliamentary Documents II, 1999 - 2000, 26 387, no. 5, Dutch reference: Actieprogramma Elektronische Overheid, Kamerstukken II 1999/2000, 26 387, nr 5.

¹⁵ Decision of the national ombudsman of August 27, 1999, Dutch reference: Nationale ombudsman, 27 augustus 1999, AB 435.

notified in a timely manner by the administrative authority. The Tax Authority, for instance, has set up a support program for software developers in order to safeguard compatibility with financial software applications.

Conclusion

The Act does not obligate administrative authorities to communicate via electronic channels or to provide such channels as an alternative to conventional channels. The widespread use of the Act is dependent on the willingness and means of administrative authorities to implement and open electronic channels for interacting with citizens. However, the first exception to this rule has been presented in separate tax legislation with the introduction of compulsory electronic tax declarations for corporations.

The principle implication of the Act is that in dealing with the administrative authorities via electronic channels, the new provisions have to be taken into account. The Act provides a framework for the standards of reliability and confidentiality to be used, which may not be simply equal to the use of (qualified) electronic signatures. Standards of reliability and confidentiality, and its subsequent technical requirements, may not create a threshold for citizens to have (cost) effective access to the government. ■

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