

The Netherlands

Administrative Court Judgment on the Interpretation of Commercial Interests as Legitimate Interests

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I. Introduction

In a recent ruling¹, the Dutch lower administrative Court ('the Court') annulled the Dutch Data Protection Authority's strict interpretation of "legitimate interests", as laid down in article 6(1)(f) of the General Data Protection Regulation ('GDPR')². The decision concerned automated recordings of matches by amateur football clubs in the Netherlands. The claimant before the Court is a company called VoetbalTV B.V. ('VoetbalTV'). VoetbalTV is the initiative of media company Talpa Network together with the Dutch Royal Netherlands Football Association ('KNVB')³. The Dutch Data Protection Authority ('the Dutch DPA') had declared the company's processing of personal data to be unlawful. The Court annulled the authority's fine of € 575,000.00 imposed on the compa-

ny VoetbalTV. The authority has appealed the Court's decision and the Dutch Council of State, the highest general administrative court in the Netherlands, has not given a final ruling yet.

II. Facts

From 2017 onwards, VoetbalTV placed cameras next to football fields and recorded video footage of football matches. Its customers are Dutch amateur football clubs which are KNVB members. The matches are played by persons from 13 years of age and older.⁴ The recordings are possible thanks to so-called smart cameras. These are able to register the match in a fully automated manner, eg. by following the ball.⁵ In addition, VoetbalTV provided an online social platform which enabled more than 500.000 users to re-watch, analyze and collect match data as well share the recorded video footage with others. VoetbalTV also has an editorial staff that gathered and broadcasted match highlights. It based its processing activities on its legitimate interests, as mentioned in article 6(1)(f) GDPR.

The defendant is the Dutch DPA. According to the Dutch DPA, VoetbalTV's processing of personal data is unlawful because its commercial interests cannot be qualified as legitimate interests. Therefore, there is a lack of a legal ground to process the personal data as part of the video recordings and to share these images with a large audience via its app and analysis tools. This is not only in breach of articles 5(1)(a) in conjunction with 6(1) GDPR, but also an infringement of fundamental rights, more specifically the rights to privacy and data protection of many data subjects such as (minor) football players. Due to VoetbalTV's processing activities the data subjects (partly) lose control over their personal data. This, according to the Dutch DPA, justifies a substantial fine. Consequently, it imposed a fine of € 575,000.00 on Voet-

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1 Dutch lower administrative Court Midden-Nederland, VoetbalTV B.V. v the Dutch Data Protection Authority, Judgment of 23 November 2020 (ECLI:NL:RBMNE:2020:5111)

2 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

3 The facts are described based on the judgment as well as the press release of the Court and media coverage. The press release is available at: <<https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Midden-Nederland/Nieuws/Paginas/VoetbalTV-hoeft-boete-Autoriteit-Persoonsgegevens-niet-te-betalen.aspx>>

4 In The Netherlands, persons under the age of 16 are considered minors in the context of data protection. See article 5 of the Uitvoeringswet Algemene verordening gegevensbescherming ('the Dutch GDPR Implementation Act'). Cf. on this Breitbarth, 'GDPR Implementation Series Netherlands: The GDPR Implementation Act' (2018) 4(3) EDPL 360-365.

5 For an example of VoetbalTV's camera system in action, see <https://www.dumpert.nl/item/7841133_510e4f84> The author refers to this hyperlink with the consent of the data subject who scores the goal.

balTV. VoetbalTV contests the fining decision before the Court.

III. Judgment

The two main legal issues considered by the Court concern: (1) VoetbalTV's argument that it benefits from the journalistic exception provided in the GDPR and national law and (2) the interpretation of the Dutch DPA which states that commercial interests cannot qualify as legitimate interests.

1. Journalistic Exception

According to VoetbalTV it can invoke the journalistic exception, as provided by article 85 GDPR in conjunction with article 43 of the Dutch GDPR Implementation Act. These articles provide an exception to the applicability of large parts of the GDPR in case of journalistic processing activities.

VoetbalTV argues that this applies to at least a part of its activities. It states that the Dutch DPA is not competent to decide on its entire processing activity since this would cover the activities that benefit from the journalistic exception. Furthermore, the Dutch DPA ignores the fact that VoetbalTV is a media undertaking. Based on Court of Justice of the European Union ('CJEU') case-law, VoetbalTV explains that the Dutch DPA does not correctly value the newsworthiness of its sports broadcasts as well as their relevance to civil society. VoetbalTV also recalls that the CJEU ruled that journalistic activities may be undertaken for profit-making purposes. It contests that the data processing merely aims to satisfy people's curiosity, as stated by the Dutch DPA.

VoetbalTV's arguments in this regard are unsuccessful. The Court recalls that the journalistic exception applies to the processing activities which *solely* take place for journalistic purposes. This must be assessed considering case-law of the CJEU and Court of Human Rights. The Court refers to CJEU judgments *Satakunnan Markkinapörssi and Satamedia*⁶ and *Buivids*⁷. It confirms that in order to take account of the importance of the right to freedom of expression, it is necessary to broadly interpret the journalistic exception. This exception applies not only to media undertakings, but to all journalistic activities as long as these aim to disclose to the public infor-

mation, opinions or ideas. The medium used is not relevant nor the fact that the disclosure to the public has profit-making purposes. The Court also recalls the *Satamedia* judgment of the European Court of Human Rights.⁸ It follows from this judgment that the existence of a public interest in allowing journalists to collect and process personal data does not automatically mean that there is also a public interest in disseminating such data on a large scale.

The Court holds that the recording of the football matches and its broadcasting to the public are, in this matter, not solely carried out for journalistic purposes. The broadcasting of amateur football matches does not qualify as a disclosure to the public of information, opinions or ideas. The matches lack newsworthiness because the broadcasts concern amateur sports and games. Such footage does not contain information about well-known persons, such as famous football players, and do not contribute to a public debate. Rather, this case concerns the unfiltered processing of a large dataset collected by VoetbalTV. The Court also holds that the Dutch DPA was competent to investigate, since the journalistic exception does not apply.

2. Legitimate Interest

The Dutch DPA maintains the view that VoetbalTV's commercial interests can never be legitimate interests. A legitimate interest is an interest which is either mentioned in (general) legislation or other legal sources as a legally protected interest.⁹ In order for an interest to be qualified as legitimate, the Dutch DPA argues, it must have a more or less pressing and specific character resulting from a (written or unwritten) legal rule or principle. In a certain sense, it must be inevitable that the interest is pursued. The Dutch DPA adds that purely commercial interests and prof-

6 Case C-73/07, *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy*, Judgment of 16 December 2008.

7 Case C-345/17, *Sergejs Buivids*, Judgment of 14 February 2019.

8 *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland*, App no 931/13, Grand Chamber of the European Court of Human Rights, 27 June 2017.

9 The author translates the Dutch word 'rechtsbelang' to 'legally protected interest'.

it maximization are not specific enough and lack the character of a pressing lawful need.

VoetbalTV disagrees. It states that the interpretation of the Dutch DPA conflicts with *inter alia* case-law and contradicts earlier statements from the Dutch DPA. The question whether or not an interest is legitimate, should be answered based on a negative test. The term 'legitimate' means: not in contradiction with the law. The Dutch DPA wrongly proposes a positive test by stating that VoetbalTV must have a legally protected interest.

The Court responds as follows: With reference to the CJEU's *Fashion ID* judgment¹⁰, the Court recalls the three conditions for the processing of personal data to be lawful based on article 6(1)(f).¹¹ Based on the case-law of the CJEU, the Court could not confirm the Dutch DPA's interpretation that it must be a legally protected interest. Instead, the Court relies on Advocate General Bobek's interpretation mentioned in his opinion of the CJEU *Fashion ID* judgment. Bobek notes that in Directive 95/46¹² the term 'legitimate interest' appears to be rather elastic and open-ended, based on his opinion in *Rīgas satiksme*¹³ as well as the CJEU's judgments *Volker und Markus Schecke and Eifert*¹⁴, *Rynes*¹⁵, *Promusicae*¹⁶ and *Rīgas satiksme*¹⁷. The Court follows Bobek's opinion when he states that there are no excluded types of interest, as long as they are legal.

The Court also follows Bobek's reference to the Article 29 Working Party's opinion on legitimate inter-

est.¹⁸ According to the Working Party, the notion of legitimate interest includes not only legal, but also all kinds of factual, economic and idealistic interests. Referencing the *ASNEF*¹⁹ and *M5A-ScaraA*²⁰ judgments, the Court recalls that the CJEU confirmed that Member States are not allowed to categorically dismiss or exclude the possibility of processing certain categories of personal data to be based on legitimate interests.

The Court confirms VoetbalTV's notion of a negative test. Also, the Court compares the English, German and French translations of "legal obligation" (mentioned in article 6(1)(c) of the GDPR) with "legitimate interest" as laid down in article 6(1)(f).²¹ Based on this comparison, it observes that the legitimate interest of article 6(1)(f) should not be regarded as a more or less legally protected interest, but as an interest which is lawful. This view corresponds with recital 47 of the GDPR.

Furthermore, the Court notes that the way the CJEU tests the lawfulness of data processing activity based on legitimate interests, deviates from how the Dutch DPA performed its test. This indicates that the Dutch DPA's interpretation is too strict. In this respect the Court refers to the CJEU's judgment of *Google Spain and Google*.²² The Dutch DPA therefore failed to apply the legitimate interest term in an elastic and open-ended manner. The Dutch DPA's explanation that VoetbalTV's main objective is to cash in on personal data and that this could never be a legit-

10 Case C-40/17, *Fashion ID GmbH & Co. KG v Verbraucherzentrale NRW eV*, Judgment of 29 July 2019.

11 The first condition is the data controller or by the third party or parties to whom the data are disclosed pursue a legitimate interest. If that is the case then, as a second condition, there must be a need to process personal data for the purposes of the legitimate interests pursued. This also entails the application of the subsidiarity and proportionality principles. Third, the condition must be met that the fundamental rights and freedoms of the data subject whose data require protection do not take precedence as a result of a balancing test.

12 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281/31.

13 Case C-13/16, *Valsts policijas Rīgas reģiona pārvaldes Kārtības policijas pārvalde v Rīgas pašvaldības SIA 'Rīgas satiksme'*, Judgment of 4 May 2017, Opinion Advocate General Bobek of 26 January 2017.

14 Joined cases *Volker und Markus Schecke GbR (C-92/09)* and *Hartmut Eifert (C-93/09) v Land Hessen*, Judgment of 9 November 2010.

15 Case C-212/13, *František Rynes v Úřad pro ochranu osobních údajů*, Judgment of 11 December 2014.

16 Case C-275/06, *Productores de Música de España (Promusicae) v Telefónica de España SAU*, Judgment of 29 January 2008.

17 Case C-13/16, *Valsts policijas Rīgas reģiona pārvaldes Kārtības policijas pārvalde v Rīgas pašvaldības SIA 'Rīgas satiksme'*, Judgment of 4 May 2017.

18 Article 29 Data Protection Working Party WP 217, 9 April 2014 Opinion 06/2014 on the 'Notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC'.

19 Joined Cases *Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF) (C-468/10)*, *Federación de Comercio Electrónico y Marketing Directo (FECEMD) (C-469/10) v Administración del Estado*, Judgment of 24 November 2011.

20 Case C-708/18, *TK v Asociația de Proprietari bloc M5A-ScaraA*, Judgment of 11 December 2019.

21 The Court observes the expressions 'legitimate interests' (English), 'berechtigten Interessen' (German) and 'des intérêts légitimes' (French). These terms are distinct from the term 'legal obligation' mentioned in article 6(1)(c) GDPR: 'legal obligation' (English), 'rechtlichen Verpflichtung' (German) and 'une obligation légale' (French).

22 Case C-131/12, *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González*, Judgment of 13 May 2014.

imate interest, incorrectly dismisses the CJEU's case-law which forbids to disregard such possibility in advance.

The Court concludes that the Dutch DPA's assessment is based on an incorrect interpretation of the law. It notes that the Dutch DPA did not fully investigate the processing of personal data when it stopped examining the case, based on the incorrect conclusion that VoetbalTV did not have a legitimate interest. Therefore, its fining decision has not been diligently made and cannot be maintained.

The Court annuls the contested fine of € 575,000.00. Consequently, no fine applies and the Court orders the Dutch DPA to compensate VoetbalTV's paid Court registry fee and legal fees.

IV. Comments

The outcome of the case is a victory for VoetbalTV, while the Dutch DPA has to lick its wounds. It was the first published judgment in the Netherlands about a fining decision based on the GDPR. The outcome is not too surprising. Legal observers, including myself, publicly questioned the Dutch DPA's strategy in which it dismissed commercial interests as legitimate.²³ In the following, some procedural aspects will be highlighted that led to public commotion.

On 10 September 2018 the Dutch DPA reacted publicly to VoetbalTV's operation when a concerned 'football dad' tweeted, referring to a Dutch newspaper article about VoetbalTV: "*Dear authority, are you seeing this? (...) Will you be able to play football if you don't want to be filmed and on the internet?*". The Dutch DPA responded: "*The plans of VoetbalTV indeed raise a lot of privacy questions. People are concerned about their privacy. The Dutch DPA will start a conversation with the KNVB.*"²⁴

VoetbalTV tried to contact the Dutch DPA because of this tweet.²⁵ The Dutch DPA formally started its investigation in December 2018. Five and a half months later, on 15 May 2019, its draft investigation report was shared with VoetbalTV. Six months later the report was finalized and on 22 November 2019 the Dutch DPA informed VoetbalTV about its intention to impose a fine. VoetbalTV urged the authority to quickly decide on the matter, yet the Dutch DPA failed to give a timely response. In June 2020 VoetbalTV announced its appeal aimed at the Dutch DPA's failure to decide on the case. Finally, on 16 Ju-

ly 2020 the Dutch DPA imposed the fine. VoetbalTV stated that the Dutch DPA should have issued its fining decision in February 2020.²⁶

The time it took the Dutch DPA to come to its fining decision led to a lot of uncertainty among VoetbalTV and its shareholders. It hindered VoetbalTV to acquire new sponsors and football clubs as customers. VoetbalTV also wanted to sell its concept to football associations abroad, but this idea was halted. According to VoetbalTV, it urged the Dutch DPA numerous times to quickly decide on the matter.²⁷ Eventually, on 11 November 2020 VoetbalTV was declared bankrupt, although based on the latest reporting VoetbalTV tries to continue its operations.²⁸

The slow response of the Dutch DPA did not go unnoticed. Two members of the Dutch Parliament asked several questions about the authority's lack of speed.²⁹ A minister informed the Dutch DPA that VoetbalTV wanted a quick end to the investigation and that there should be a conversation between the two.³⁰ Despite these efforts, the Dutch DPA imposed the fine more than a year after its draft investigation report. Normally a fined party would object the fining decision at the Dutch DPA, but in this case it was possible to appeal to the Court directly because the Dutch DPA exceeded the deadlines.

23 See, for example: J. Gerritsen, 'AP's uitleg 'gerechtvaardigd belang' leidt tot vragen' (translated: the Dutch DPA's interpretation of 'legitimate interest' is questionable), 9 November 2019 <<https://www.linkedin.com/pulse/aps-uitleg-gerechtvaardigd-belang-leidt-tot-vragen-joost-gerritsen>>.

24 Conversation available at: <https://twitter.com/toezicht_ap/status/1039057196485693440>

25 Letter of the Dutch rapporteur dated 15 January 2021, 'Two years regarding the application of the GDPR', <<https://www.tweedekamer.nl/kamerstukken/detail?id=2021Z00788&did=2021D02008>>

26 Het Financieele Dagblad, 'VoetbalTV is het wachten beu', 4 June 2020, <<https://fd.nl/ondernemen/1346699/voetbal-tv-is-wachten-op-privacywaakhond-beu>>

27 Letter of the Dutch rapporteur dated 15 January 2021, 'Two years regarding the application of the GDPR', <<https://www.tweedekamer.nl/kamerstukken/detail?id=2021Z00788&did=2021D02008>>

28 Nieuwsuur, 'De privacywet wordt amper gehandhaafd, is meer geld de oplossing?', 25 March 2021, <<https://nos.nl/nieuwsuur/artikel/2374135-de-privacywet-wordt-amper-gehandhaafd-is-meer-geld-de-oplossing.html>>

29 Response of the minister to the Dutch Parliament regarding the news article 'VoetbalTV daagt privacywaakhond voor de rechter', 10 September 2020, <<https://www.rijksoverheid.nl/documenten/kamerstukken/2020/09/10/beantwoording-kamervragen-over-het-bericht-voetbal-tv-daagt-privacywaakhond-ap-voor-de-rechter-om-uitblijven-besluit>>.

30 Motion from Dutch MP's Von Martels c.s. regarding a meeting between the Dutch DPA and the relevant sports initiatives, 2 July 2020, <<https://www.tweedekamer.nl/kamerstukken/moties/detail?id=2020Z13391&did=2020D28374>>

Articles in the Dutch press blame the Dutch DPA's lack of funding and capacity to enforce the law. Whether or not the Dutch DPA's lack of capacity is to blame, remains an open question. In my opinion, the lack of speed is inexcusable. If the Dutch DPA knew that it could not respect a timely procedure,

then it would have been wiser to choose for another route instead of a fining procedure. However, the Dutch DPA started a fining procedure and executed it poorly. This is also problematic, because the Dutch DPA still maintains the same interpretation of legitimate interest in other publications and another fining procedure.³¹

VoetbalTV's operations raise interesting questions. Do VoetbalTV's interests override the rights and interests of the (young) football players? Which appropriate safeguards were in place? How could the data subjects effectively object to the processing? The Dutch DPA appealed the Court's decision to the highest general administrative court, the Dutch Council of State. Unfortunately, since the case is framed by the fining decision, these questions will most likely remain unanswered.

31 Explanation of the norm 'legitimate interest' dated 31 October 2019, available at: <https://autoriteitpersoonsgegevens.nl/sites/default/files/atoms/files/normuitleg_gerechtaardigd_belang.pdf>; Information letter – rules for facial recognition in supermarkets, dated 1 May 2020, available at: <https://autoriteitpersoonsgegevens.nl/sites/default/files/atoms/files/brief_regels_voor_gezichtsherkenning_in_supermarkten.pdf>; Fining decision KNLTB dated 20 December 2019, available at: <https://autoriteitpersoonsgegevens.nl/sites/default/files/atoms/files/boetebesluit_knlbt.pdf>, see also: <https://edpb.europa.eu/news/national-news/2020/dutch-dpa-fines-tennis-association_en>.