Brinkhof

ADVOCATEN

DISTRICT COURT MIDDEN-NEDERLAND

Location Utrecht

Administrative law

case number: UTR 20/2315

ECLI:NL:RBMNE:2020:5111

judgment of the three-judge division of 23 November 2020 in the case between

VoetbalTV B.V., in Amsterdam, claimant

(represented by its attorneys: Q.R. Kroes and M. Oostveen),

and

Autoriteit Persoonsgegevens, defendant

(represented by its attorneys: E. Nijhof and O.S. Nijveld).

Course of the Proceedings

On 20 May 2020, the claimant lodged an appeal with the court against the defendant for failure to give a timely decision, because the defendant did not take an enforcement decision, in spite of an earlier letter of intent to this end.

In its decision of 16 July 2020 (the contested decision), the defendant imposed a fine of €575,000 on the claimant for unlawful processing of personal data.

The appeal against the failure to give a timely decision also relates to the contested decision pursuant to section 6:20(3) of the General Administrative Law Act (Algemene wet bestuursrecht, Awb).

The defendant lodged a statement of defence.

The hearing took place on 12 October 2020. On behalf of the claimant, its directors M. Hoffer and M. Balken, and its attorneys, appeared. The defendant was represented by its attorneys.

Assessments

Introduction

1. On 11 September 2020, the District Court of Midden-Nederland ordered the bankruptcy of the claimant. However, the parties were invited to a court hearing before the claimant was

declared bankrupt and therefore, in view of section 8:22(2) of the Awb, section 27(2) of the Dutch Bankruptcy Act does not apply. The claimant's appeal can therefore be heard by the court despite its bankruptcy.

2. This judgment concerns a fine imposed by the defendant on the claimant. The legal framework is set out in the annex which forms part of this judgment.

3. VoetbalTV is a video platform for amateur football. On behalf of football clubs, the claimant makes video recordings of matches in amateur football. At the beginning of 2020, 153 clubs participated in VoetbalTV, at which approximately 2,500 to 3,000 matches are recorded and broadcast every month. In addition, VoetbalTV is a social platform. The VoetbalTV app is estimated to be used by 520,000 people. On the VoetbalTV platform, people can view football moments, analyse matches, collect data and share it with others. A claimant's own editorial team also collects and displays 'highlights' such as goals and opportunities. In addition, trainers/analysts can use an analysis tool.

4. The defendant has investigated the privacy of players and spectators. This investigation resulted in a draft investigatory report dated 15 May 2019 and, after the claimant submitted its views, in a final investigatory report dated 6 November 2019, in which the defendant concluded that the claimant was unlawfully processing personal data. On 22 November 2019, the defendant announced its intention to proceed with enforcement. In the absence of an enforcement decision, on 20 May 2020, the claimant lodged an appeal against the failure to give a timely decision. The defendant then adopted the contested decision on 16 July 2020.

On the appeal against the failure to give a timely decision

5. The action brought by the claimant against the failure to give a timely decision ipso jure pertains to the contested decision. The claimant no longer has any interest in an assessment of its appeal against the failure to give a timely decision, since a decision has now been given. For that reason, the court declares the appeal against the untimely decision inadmissible.

On the contested decision

6. The defendant has imposed a fine of € 575,000 on the claimant for unlawfully processing personal data. The defendant accuses the claimant of having made video recordings of a large number of amateur football matches without a lawful basis and of having further distributed those images to a large audience via the VoetbalTV app and via the analysis tools. In doing so, it infringed article 5(1)(a) in conjunction with article 6(1) of the General Data Protection Regulation (GDPR). According to the defendant, the claimant infringed the right to respect for privacy and the right to the protection of personal data of a large number of data subjects, including many minors. As a result, these data subjects have (partially) lost control of their personal data. The defendant considers this to be a serious infringement which justifies a high fine.

Journalistic exemption

7. The claimant does not agree. Firstly, it argues that the defendant is wholly (or partly) incompetent to impose a fine for the processing of personal data, because the journalistic exemption of article 85 GDPR in conjunction with section 43 of the Dutch Implementation Act for the General Data Protection Regulation (Uitvoeringswet Algemene Verordening Databescherming, UAVG) applies to

the data processing in this case. According to the claimant, the defendant itself also considers that this applies - at least to part of the processing of personal data - because the investigatory report does not refer to the editorial articles of VoetbalTV. The claimant will first have to make video recordings of amateur football matches before it can compile and distribute images with newsworthy value. According to the claimant, the defendant cannot therefore judge the entire processing of the claimant's video footage. Moreover, according to the claimant, the defendant applies the journalistic exemption too rigidly and uses an incorrect standard. Although the defendant refers to the established case law of the European Court of Human Rights (ECHR) and the Court of Justice (ECJ) and thus appears to acknowledge that the journalistic exemption must be interpreted broadly, it ignores the fact that the claimant is a media company and that the processing takes place in that context. According to the claimant, European case law implies that the journalistic exemption must concern activities aimed at disclosing information, opinions or ideas to the public, irrespective of the medium of transmission. According to it, this is the case here. The defendant disregards the newsworthiness and social relevance of (integral) sports broadcasts. The ECJ has explicitly ruled that having a commercial (secondary) purpose does not impede this qualification. The defendant is wrong to take the position that the processing of these data only leads to the satisfaction of curiosity. According to the claimant, the case-law to which the defendant refers is irrelevant to this situation.

8. The court does not follow the claimant in its view that the defendant itself is also of the opinion that the editorial activities would fall under the journalistic exemption. Defendant asserted that the claimant's editorial activities were not involved in the investigation and that this processing of personal data therefore did not lead to the fine. The defendant did not comment at all on the question whether the journalistic exemption applies to this processing of personal data. The fine imposed on the claimant concerns the unlawful making of video recordings and their large-scale distribution, according to the defendant. The court sees no indication of a different viewpoint in the investigatory report and the fine decision.

9. The journalistic exemption applies to the processing of personal data that takes place solely for journalistic purposes.[1] In answering the question whether the processing of personal data fined by the defendant falls within the scope of the journalistic exemption, the court is consistent with European case law, as laid down, inter alia, in the judgments by the ECJ concerning Satamedia[2] and Buidvids[3] and the judgment by the ECtHR concerning Satamedia.[4] These judgments imply that the journalistic exemption must be interpreted broadly in the interest of freedom of expression. This exemption applies not only to media enterprises, but to all journalistic activities, as long as their purpose is the disclosure to the public of information, opinions or ideas. The transmission medium is irrelevant here. Furthermore, it is for the court to assess whether the processing of personal data pursues a solely journalistic purpose. It is irrelevant that the disclosure to the public is also for profit. Moreover, the Satamedia judgment by the ECtHR implies that the fact that there is a public interest in allowing journalists to collect and process personal data for a publication that contributes to a public debate does not mean that the unfiltered publication of these collected personal data also serves a public interest.[5]

[1] Recital 153 to the GDPR, section 43 of the UAVG.
[2] Judgment by the ECJ, 16 December 2008, no. C-73/07, ECLI:EU:C:2008:727.
[3] Judgment by the ECJ, 14 February 2019, no. C-345/17, ECLI:EU:C:2019:122.
[4] Judgment by the ECtHR, 27 June 2017, no. 931/13, ECLI:CE:ECHR:2017:0627JUD000093113.
[5] See legal finding 175 of the judgment.

10. The court is of the opinion that the recording of football matches and their transmission to the public, in this case, does not serve a solely journalistic purpose and thus follows the position of the defendant. Indeed, the broadcasting of amateur football matches cannot be regarded as the disclosure to the public of information, opinions or ideas. The matches have too little newsworthy value for that purpose; they are the broadcasting of amateur sports and games. The images do not provide information about well-known people, for example well-known football players, nor do they contribute to any social debate. It concerns the unfiltered processing of a large amount of personal data collected by the claimant itself. The processing as a whole is not for journalistic purposes only. The fact that all the images collected by it may contain newsworthy information does not mean that all the thousands of competitions broadcast can be regarded as journalistic and does not justify the recording and broadcasting of all these competitions. The claimant's argument therefore fails, and the defendant is authorised to investigate the claimant's data processing in its capacity as regulatory authority. The journalistic exemption therefore does not apply to the data processing operations which are the subject of these proceedings. The claimant's argument therefore fails.

Legitimate interest

11. The defendant has based the fine on the fact that the claimant's processing is unlawful, because such processing is not necessary for the attendance to the legitimate interests of the controller or of a third party, which means that article 6(1) opening words and (f) GDPR have not been met. The defendant takes the position that a legitimate interest is an interest that is designated as a legal interest in (general) legislation or elsewhere in the law. It must therefore be an interest that is also protected in law, that is considered worthy of protection and that in principle must be respected and can be 'enforced'. For an interest to qualify as a legitimate interest, it must have a more or less urgent and specific character deriving from a rule of law or principle of law (written or unwritten); it must to some extent be unavoidable that these legitimate interests should be attended to. Purely commercial interests and the interest of profit maximisation are not specific enough and lack an urgent 'legal' character, and therefore cannot be qualified as legitimate interests. The processing of personal data forms the core of the claimant's activities, and it earns money from that processing. It therefore has a purely economic interest in the processing of personal data. According to the defendant, this can never be a legitimate interest. If the performance of that core activity could be regarded as a legitimate interest, it means that the subsequent necessity test and balancing of interests would become devoid of substance.

12. The claimant argues that this interpretation by the defendant contradicts the interpretation of authoritative European working groups and committees, case law, experts and, finally, the defendant's own earlier explanations. According to the claimant, the question whether a processing entity has a legitimate interest should be subject to a negative test, which means that 'legitimate' means not contrary to the law. The defendant wrongly applies a positive test by asserting that the claimant must have a legal interest. According to the claimant, this is incorrect.

13. The court determines that personal data may only be processed if there is a basis for such processing. The grounds for processing are exhaustively listed in article 6(1) GDPR. It is not in dispute between the parties that the claimant does not have the consent of all data subjects whose personal data are processed for the purpose of making video recordings and distributing images. There is also no question of processing that is necessary for the performance of an agreement. The court will

therefore have to assess whether the claimant has a legitimate interest for which processing of personal data is necessary, as referred to in article 6(1), opening words and (f) GDPR.

14. Three conditions must be met for successful reliance on article 6(1) and (f) GDPR. The judgment by the ECJ on Fashion ID,[6] in which the ECJ interprets article 7(f) of Directive 95/46,[7] which is identical to article 6(1), opening words and (f) GDPR as regards contents, inter alia implies this. The first condition is that the interest pursued by the claimant is a legitimate interest. If that is the case, an assessment must be made as to whether the processing of the personal data is necessary in order to attend to that legitimate interest, including in the light of proportionality and subsidiarity: is the infringement for the data subjects proportionate to the purpose to be served by the processing? And can the purpose not be achieved in a way that is less harmful to the data subjects? The third condition is that a balance must be struck between the interests of the data controller and those of the data subjects.

15. The case law of the ECJ does not clearly define what constitutes a legitimate interest and the interpretation of the defendant that it should - in short - be a legal interest has not, therefore, been reflected as such in that case law. Nor did the defendant refer to specific judgments endorsing this interpretation. In his Opinion on the abovementioned judgment by the ECJ on Fashion ID, Advocate General M. Bobek[8] explains that Directive 95/46 does not contain a definition or enumeration of what constitutes a legitimate interest either. According to Bobek, this concept is rather flexible and open and he refers to his own opinion in the ECJ judgment on Rīgas satiksme,[9] in which he mentions the ECJ judgments on Volker und Markus Schecke and Eifert,[10] and Ryneš.[11] Furthermore, in his opinion in the Fashion ID case, Bobek refers to the Promusicae,[12] and Rīgas satiksme,[13] to substantiate his position. As examples of legitimate interests, Bobek mentions 'transparency' and 'protection of property, health and family life'. The Fashion ID case concerned the collection and transmission of personal data in order to advertise in the best possible way, and that, too, could be a legitimate interest, according to Bobek. Provided it it legitimate, according to Bobek, there is no type of interest that is excluded per se. Bobek bases this conclusion, inter alia, on the opinion of the Article 29 Working Party (WP29, the predecessor of the European Data Protection Board (EDPB)). In its opinion of 2014,[14] WP29 wrote that the legitimate interest should be interpreted as a concept that can cover a range of different interests, whether trivial or overriding, and whether they are obvious or more controversial, provided that it is real and present (and therefore not speculative). Therefore, not only legal interests, but also all kinds of factual, economic and idealistic interests can qualify as legitimate interests.

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[6] Judgment by the ECJ, 29 July 2019, no. C-40/17, ECLI:EU:C:2019:629.
[7] 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.
[8] Opinion A-G ECJ, 19 December 2018, no.C-40/17, ECLI:EU:C:2018:1039.
[9] Opinion A-G ECJ, 27 January 2017, no. C-13/16, ECLI:EU:C:2017:43.
[10] Judgment by the ECJ, 9 November 2010, nos. C-92/09 and C-93/09, ECLI:EU:C:2010:662, para. 77
[11] Judgment by the ECJ, 11 December 2014, no. C-2012/13, ECLI:EU:C:2014:2428, para. 34.
[12] Judgment by the ECJ, 29 January 2008, no. C-275/06, ECLI:EU:C:2008:54, para. 53
[13] Judgment by the ECJ, 4 May 2017, no. C-13/16, ECLI:EU:C:2017:336, para. 29
[14] Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC, Article 29 Data Protection Working Party, 9 April 2-14, p. 24.

The ECJ has repeatedly confirmed that Member States are not free to preclude or categorically exclude any reliance on the legitimate interest for certain categories of processing.[15]

16. In the light of the European case-law cited above, the Advocate General's Opinions and the opinion of WP29, the court endorses the claimant's view that the question whether a processor of personal data has a legitimate interest must be assessed on the basis of a negative test. This test means that the processor may not pursue an interest contrary to the law. The fact that the legitimate interest in article 6(1), opening words and (f) GDPR should not be regarded as a more or less legal interest, as the defendant believes, but much more as a legitimate interest, is also in line with the foreign translations of this concept, i.e. 'gerechtvaardigd belang' (Dutch), 'berechtigten Interessen' (German) and 'des intérêts légitimes' (French). A clear distinction has thus been made with the legal obligation mentioned in article 6(1), opening words and (c) GDPR, 'wettelijke verplichting' (Dutch), 'rechtlichen Verpflichtung'(German) and 'une obligation légale' (French). The fact that the legitimate interest has to be assessed on the basis of a negative test is also in line with recital 47 GDPR which mentions 'direct marketing' as an example of a possible legitimate interest. In the court's opinion, when designating this interest as a legitimate interest, no legal interest, as interpreted by the defendant, can be mentioned as a basis.

17. What its legitimate interest in the processing of personal data is, must then be asserted by the claimant itself and it must act accordingly. The processing of personal data must not contravene the law or go beyond its statutory purpose. In short, it must not be contrary to the law. The way in which the ECJ subsequently assesses the admissibility of the processing of personal data also differs from the assessment by the defendant in this case, which is yet another indication that the defendant's approach is too strict. As an example, the court refers to the ECJ's judgment on Google Spain and Google.[16] In that judgment, the ECJ held that the processing of personal data at issue there may fall within the scope of article 7(f) of Directive 95/46 if such processing is necessary in order to attend to the legitimate interests of the controller or of the third party or parties to whom the data are disclosed, provided that the interests or fundamental rights and freedoms of the data subject, and in particular their right to privacy with regard to the processing of personal data, which must be protected under article 1(1) of that directive, do not prevail. Thus, the ECJ considers that the application of article 7(f) necessarily entails a balancing of the conflicting rights and interests at stake, which must take account of the importance of the data subject's rights under the articles 7 and 8 of the Charter.

18. With the strict application that the defendant applied here, it has not arrived at such an assessment as the ECJ describes here. The defendant has not interpreted the legitimate interest in an open and flexible manner, as it should have done. In so doing, it disregards the fact that the concept of 'legitimate interest serves primarily serves as an external border for the assessment and not as a threshold. Furthermore, the court is not aware of any judgments in which the ECJ, without further assessment of the interests of both the processor and the data subject(s), finds that the processor has no legitimate interest at all in the processing and, for that reason alone, is acting unlawfully. The defendant's interpretation that the core of the claimant's interest purely is the monetisation of personal data and that that interest can never be a legitimate one ignores the fact that the ECJ

[15] See for example the judgment by the ECJ, relating to ASNEF, 24 November 2011, nos. C-468/10 and C-469/10, ECLI:EU:C:2011:777, para. 48 and the judgment relating to M5A-ScaraA, 11 December 2019, no. C-708/18, ECLI:EU:C:2019:1064, para. 53.
[16] Judgment by the ECJ, 13 May 2014, no. C-131/12, ECLI:EU:C:2014:317, para. 73 and further.

exactly prohibits the prior exclusion of certain legitimate interests. Nor does the court follow the defendant's conclusion that the necessity test and the balancing of interests are meaningless if it is assumed that the interest pursued by the claimant is a legitimate interest. The court will explain below why it does not agree with that position.

19. The defendant takes the position that the interest pursued by the claimant in processing personal data is of a purely commercial nature, exploiting personal data of others, including many minors. However, this is not the interest which the claimant itself claims to pursue with VoetbalTV. It argues that its legitimate interest in broadcasting the footage lies in a. increasing the level of involvement and enjoyment of football fans, including players who are being portrayed, b. being able to carry out technical analyses for/by trainers and/or analysts of the football clubs and third parties, and c. offering the possibility to, among others, players, friends and family members to watch matches remotely (later), for example if they cannot be physically present.
In addition, the claimant has a channelling function which is a legitimate interest for itself and the Royal Dutch Football Association, because it contributes to a higher level of privacy protection and counteracts the recording of matches via other channels.

20. As the court has already assessed in paragraph 17, it is up to the entity that processes the personal data to state its legitimate interest. The court sees no basis for the defendant's conclusion that its interpretation of the claimant's interest should be leading. Bearing in mind recital 47 GDPR, the defendant will have to assess whether it is necessary to process personal data for the purposes set by the claimant. It is up to the claimant to explain the extent to which it collects and processes data, how it has arranged this legally and how it ensures that there is an appropriate relationship between the interference with the privacy of the data subjects and the interest it pursues (proportionality and subsidiarity). Subsequently, the defendant will have to balance the interests at stake against the violation of the privacy of data subjects, including, in this case, minor children. This involves the defendant looking at what the claimant is actually doing, whether the purposes are in line with its articles of association and whether the processing actually serves those purposes. If the defendant takes the interests of the claimant as a starting point, it can - contrary to what it assumes - carry out a necessity test and a balancing of interests.

21. In summary, the court concludes that the test of the defendant in this case is based on an incorrect interpretation of the concept of 'legitimate interest' and is therefore contrary to article 6(1), opening words and (f) GDPR. In the contested decision, the defendant also carried out, in the alternative, a necessity test and a balancing of interests and took the position that that assessment also leads to the data having been unlawfully processed and that the fine was therefore correctly imposed.

22. The court determines, however, that the investigation carried out by the defendant and the investigatory report subsequently drawn up by the defendant do not deal with the question whether it is necessary for the claimant to process the personal data for the purposes set by it. Proportionality and subsidiarity did not form part of that assessment. Nor did the defendant balance interests at that stage of the investigation. Since the defendant therefore did not fully investigate the processing of personal data and stopped at the conclusion that the claimant had no legitimate interest, the decision was for the other part not taken with sufficient care and is therefore contrary to section 3:2 Awb. The fine can therefore not be upheld.

23. The appeal is well founded and the court annuls the contested decision of 16 July 2020. Pursuant to section 8:72a Awb, the court sees reason to provide for the case itself, in the sense that it will not take any other decision in place of the annulled decision. As a result, the fine is dismissed in its entirety. As the court declares the appeal to be well-founded, the court determines that the defendant will reimburse the claimant for the court fee it has paid.

24. The court orders the defendant to pay the costs incurred by the claimant. On the basis of the Administrative Law Costs Decree (Besluit proceskosten bestuursrecht), these costs are set by the court at € 1,575 (1 point for filing the notice of appeal, 1 point for appearing at the hearing with a value per point of € 525 and a weighting factor of 1.5). According to established case law, the handling of a case in objection and appeal is in principle considered to belong to the category 'average' with a weighting factor of one, unless there are clear reasons to deviate from this principle. In this case, the court finds that these reasons are present. The complexity of this case means that the court considers the case to be 'heavy', which means that the weighting factor in this case is set at one and a half.

Decision

The court:

- declares the appeal against the decision of 16 July 2020 inadmissible;
- declares the appeal against the decision of 16 July 2020 well founded;
- annuls the decision of 16 July 2020 and determines that this decision substitutes the annulled decision;

- orders the defendant to compensate the claimant for the court fee of € 354;
- orders the defendant to pay the claimant's legal costs up to an amount of € 1,575.

This judgment was rendered by J.J. Catsburg, presiding judge, and P.J.M. Mol and M. Eversteijn, members, in the presence of M.E.C. Bakker, court clerk. The decision was pronounced on 23 November 2020 and will be made public by publication on rechtspraak.nl.

court clerk presiding judge

Copy sent to parties on:

Legal remedy

An appeal may be lodged against this decision with the Administrative Law Division of the Dutch Council of State within six weeks of the day it was sent.

Annex

Dutch General Administrative Law Act
Section 6:2
For the purposes of the provisions of law on objections and appeals, the following are equated with a decision:
[...]
b. failure to take a timely decision.

[unofficial translation]

Section 6:20
[...]
3 The appeal against the failure to take a timely decision will also be directed against the subsequent decision, unless the latter fully satisfies the appeal..

General Data Protection Regulation

Article 5
1. Personal data shall be:
a) processed lawfully, fairly and in a transparent manner in relation to the data subject ('lawfulness, fairness and transparency'); [...}.

Article 6
1. Processing shall be lawful only if and to the extent that at least one of the following applies:
a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes; (b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;
(c) processing is necessary for compliance with a legal obligation to which the controller is subject
[…]
f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

Article 85
1. Member States shall by law reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression.
2. For processing carried out for journalistic purposes or the purpose of academic artistic or literary expression, Member States shall provide for exemptions or derogations from Chapter II (principles), Chapter III (rights of the data subject), Chapter IV (controller and processor), Chapter V (transfer of personal data to third countries or international organisations), Chapter VI (independent supervisory authorities), Chapter VII (cooperation and consistency) and Chapter IX (specific data processing situations) if they are necessary to reconcile the right to the protection of personal data with the freedom of expression and information.
[…]

Article 83
[...]
8. The exercise by the supervisory authority of its powers under this Article shall be subject to appropriate procedural safeguards in accordance with Union and Member State law, including effective judicial remedy and due process.
[…].

Implementing Act on General Data Protection Regulation
Section 43

[unofficial translation]

1. This Act, with the exception of the sections 1 up to and including 4 and section 5(1) and (2), does not apply to the processing of personal data for journalistic purposes only and for the sole purpose of academic, artistic or literary expression.
[…]

Recitals to the GDPR
(47) The legitimate interests of a controller, including those of a controller to which the personal data may be disclosed, or of a third party, may provide a legal basis for processing, provided that the interests or the fundamental rights and freedoms of the data subject are not overriding, taking into consideration the reasonable expectations of data subjects based on their relationship with the controller. Such legitimate interest could exist for example where there is a relevant and appropriate relationship between the data subject and the controller in situations such as where the data subject is a client or in the service of the controller. At any rate the existence of a legitimate interest would need careful assessment including whether a data subject can reasonably expect at the time and in the context of the collection of the personal data that processing for that purpose may take place. The interests and fundamental rights of the data subject could in particular override the interest of the data controller where personal data are processed in circumstances where data subjects do not reasonably expect further processing. Given that it is for the legislator to provide by law for the legal basis for public authorities to process personal data, that legal basis should not apply to the processing by public authorities in the performance of their tasks. The processing of personal data strictly necessary for the purposes of preventing fraud also constitutes a legitimate interest of the data controller concerned. The processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest.