

ECLI

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Content  
Indication

By decision dated July 16, 2020, the Authority for Personal Data imposed a fine of € 575,000.00 on [other party] for unlawfully processing personal data.

Full text

202100045/1/A3.

Date of judgment: 27 July 2022

ADMINISTRATIVE LAW  
DEPARTMENT

Ruling on the appeal of:

The Personal Data Authority (hereinafter referred to as  
the AP), appellant,

Against the judgment of the court of Midden-Nederland of 23 November 2020 in case no.  
20/2315 in the case between:

VoetbalTV B.V. (hereafter:

VoetbalTV) and

the AP.

Proceedings

By decision dated July 16, 2020, the AP imposed a fine of €575,000 on Football TV for  
unlawful processing of personal data.

In a judgment dated November 23, 2020, the court declared inadmissible the appeal filed by  
SoccerTV for failure to make a timely decision, upheld the appeal filed by SoccerTV against  
the July 16, 2020 decision, annulled that decision, and determined that this judgment  
supersedes the annulled decision. This judgment is attached.

The AP has appealed this ruling. FootballTV made a written  
submission.

Soccer TV has filed a conditional incidental appeal. The AP has  
filed a view.

SoccerTV submitted a further document.

The Division heard the case at a hearing on 23 May 2022, where the AP, represented by Mr E. Nijhof and Mr O.S. Nijveld, assisted by Mr T.N. Sanders and Mr M.H.L. Hemmer, both lawyers in Rotterdam and Breda respectively, and VoetbalTV, represented by [authorised representative A], and [authorised representative B], shareholder, assisted by Mr Q.R. Kroes, lawyer in Amsterdam, appeared.

## Considerations

### Introduction

1. VoetbalTV was established on 17 July 2018. It is an initiative of the Royal Dutch Football Association (hereafter: KNVB) in cooperation with the media company Talpa Network B.V, both of which hold 50% shares in this joint venture. VoetbalTV is a video platform for amateur soccer and makes video recordings of matches in amateur soccer on behalf of soccer clubs. At the beginning of 2020, 153 soccer clubs participated in VoetbalTV and approximately 2,500 to 3,000 matches were recorded and broadcast monthly. In addition, VoetbalTV is a social platform. The VoetbalTV app is used by an estimated 520,000 people. The VoetbalTV platform allows people to watch soccer moments back, analyze matches, collect data and share them with others. An in-house editorial team further collects "highlights" such as goals and chances and displays them. In addition, trainers/analysts can use an analysis tool.

The recording and distribution of the video footage by VoetbalTV is a processing of the personal data of (minor) athletes to which the General Data Protection Regulation (EU) 2016/679 (hereinafter: AVG) applies. VoetbalTV is the data controller as referred to in Article 4, introductory paragraph, and under 7, of the AVG for this processing of personal data.

2. The AP conducted an investigation into the privacy of players and spectators. This investigation resulted in a draft investigation report dated May 15, 2019 and, after a review process, a final investigation report dated November 6, 2019. In it, it is concluded that VoetbalTV unlawfully processes personal data. In response, the AP issued an intention to proceed with enforcement. Because a decision to do so was not forthcoming, VoetbalTV - after a notice of default - filed an appeal for failure to decide in time with the court. On July 16, 2020, the AP issued a substantive decision. Soccer TV has appealed against this decision.

### Decision-making

3. In that decision, the AP imposed a fine on VoetbalTV in the amount of € 575,000.00, because it has unlawfully processed personal data. The processing is not necessary for the protection of the legitimate interests of the controller or of a third party, which does not comply with Article 6, paragraph 1, opening words and under (f) of the AVG. The processing of VoetbalTV does not serve (exclusively) a journalistic purpose. The AP further concludes that the interest of VoetbalTV in structurally making video recordings of large numbers of amateur football matches, the further distribution thereof via the VoetbalTV app and the further use/distribution via the analysis tools for the soccer clubs, does not qualify as justified. The AP further argues that FootballTV also fails to meet the second and third steps that are part of the test against Article 6(1)(f) of the AVG. As this processing also cannot be based on any other legal basis as mentioned in article 6, paragraph 1,

of the AVG, the AP concludes that the processing took place in violation of the AVG. The AP finds that this is a serious violation, which justifies a high fine.

Attacked judgment

4. The court ruled that VoetbalTV no longer had an interest in adjudicating its appeal against the untimely decision.

The court further held that recording the soccer matches and broadcasting them to the public, in this case, does not exclusively serve a journalistic purpose. Therefore, the journalistic exception does not apply to the data processing that is the subject of these proceedings.

Furthermore, the court ruled that the AP's test in this case is based on an incorrect interpretation of the concept of "legitimate interest" and is therefore contrary to Article 6(1)(f) of the AVG. The case law of the Court of Justice of the European Union does not provide a clear description of what exactly constitutes a legitimate interest and the AP's interpretation that - in short - it should be a legal interest, is therefore not found as such in that case law. This interpretation is also inconsistent with the opinion of the Article 29 Working Party (WP29, the predecessor of the European Data Protection Board) from 2014, and with the view of Advocate General M. Bobek, who in his opinion on the Fashion ID judgment of 29 July 2019, no. C-40/17, ECLI:EU:C:2019:629, states that this is an open flexible concept. Moreover, it follows from the case law of the Court of Justice of the European Union that member states are not free to exclude in advance or categorically a reliance on the legitimate interest for certain categories of processing. Partly on the basis of foreign translations of this concept, the District Court is of the opinion that a negative test applies. This test comes down to the fact that the processor may not pursue an interest that is contrary to the law; it must be a legitimate interest. According to the court, VoetbalTV itself must state its legitimate interest and must act accordingly in fact. The processing may not be contrary to the law and may also not go beyond its statutory purpose, or in other words: not be contrary to the law. The AP will, taking into account consideration 47 of the AVG (e.g. direct marketing), on the basis of the goals set by VoetbalTV, have to assess whether it is necessary to process personal data for this purpose. This has not happened. The investigation that forms the basis for the fine stopped at the conclusion that VoetbalTV has no legitimate interest and did not address the necessity. There was also no balancing of the competing rights and interests at issue. In view of this, the decision has otherwise not been taken with sufficient care and is therefore in violation of Article 3:2 of the General Administrative Law Act (hereinafter: Awb). The imposition of the fine can therefore not be upheld. Applying Article 8:72a of the General Administrative Law Act, the District Court saw reason to decide the case itself, in the sense that it would not take another decision in place of the annulled decision. This means that the fine is completely off the table, according to the court.

Legal Framework

5. The relevant regulations are included in the appendix that forms part of the ruling.

Appeal of the AP

Violation of article 6:20, paragraph 4, of the Awb?

6. The AP argues that the court erred in not remanding the appeal for treatment as an objection. This is in violation of section 6:20(4) of the Awb and the

system of that law. This is all the more true given that the court found that there were deficiencies in the July 16, 2020 decision, which could be remedied in the appeal.

6.1. By decision of 16 July 2020, the AP imposed a fine on Football TV. Since the appeal against the failure to take a decision in time also relates to the decision as yet taken and the decision of 16 July 2020 does not fully meet the appeal, this appeal is, in view of Article 6:20(3) of the Awb, also considered to be an appeal against this decision. It follows from the fourth paragraph of this provision, read in conjunction with Section 7:1(1) of the Awb, that in a situation such as this, the court may refer an appeal to the administrative body to be handled as an objection. The court has a certain freedom to give substance to this power itself. Article 7:1a of the Awb also offers the possibility of direct appeal. This is based on agreement by the parties.

6.2. In a letter to the court dated July 22, 2020, the AP announced that it was referring to the opinion of the court as to whether Article 6:20(3) of the Awb should be applied. This does not reveal any objections on the part of the AP to the court dealing with the content of the July 16, 2020 decision. Also, in the defense document filed by the AP with the court on October 1, 2020, it was requested that the appeal be declared unfounded. It follows from the record of the hearing before the court that both parties intended to skip the objection phase. This was confirmed by both parties when asked.

Under these circumstances, the court was able to decide not to refer FootballTV's appeal, which arose by operation of law, against the July 16, 2020 decision back to the AP for consideration as an objection.

This argument does not succeed.

Legitimate interest, Article 6(1)(f) AVG

7. According to the AP, a "legitimate interest" is an interest that follows from the law and not, as VoetbalTV - and with it the court in the contested judgment - believe, that "legitimate interest" is any interest that is not contrary to the law. In doing so, the court has misinterpreted the concept of "legitimate interest". According to the AP, in view of a grammatical, law-historical and law-systematic interpretation, no legitimate interest arises here. The interest of VoetbalTV is purely commercial in nature. Soccer TV serves only a commercial interest with its activities. Partly in view of the objective of the AVG it is not logical to interpret this concept broadly. Moreover, this would also clash with the interpretation of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter: ECHR), which must also guarantee privacy. The Court of Justice has not yet ruled on this point. The AP therefore requests the Division to ask preliminary questions. Moreover, if there is a legitimate interest, the processing is not necessary according to the AP. Moreover, the balancing of interests should be in favor of the players.

7.1. For a successful reliance on Article 6(1)(f) of the AVG, three conditions must be met. This follows, among other things, from the Fashion ID judgment of 29 July 2019, No. C-40/17, ECLI:EU:C:2019:629, in which the Court of Justice interpreted Article 7(f) of Directive 95/46, which is substantively the same as Article 6(1)(f) of the AVG. The first step is that the interest pursued by VoetbalTV is a legitimate interest. If so, it must then be assessed whether the

processing of the personal data is necessary for the fulfilment of that legitimate interest (the second step). This involves a test of proportionality and subsidiarity: is the infringement on the data subjects proportionate to the purpose to be served by the processing and can the purpose be achieved in a way that is less detrimental to the data subjects? The third step is to weigh the interests of the controller and the data subjects.

7.2. According to Article 6(1)(f) of the AVG, in a case such as this, it must be established that the processing is necessary for the purposes of pursuing the legitimate interests of the controller or of a third party, except where the interests or fundamental rights and freedoms of the data subject which require protection of personal data outweigh those interests, in particular where the data subject is a child.

7.3. The AP takes the position that in this case, VoetbalTV does not have a legitimate interest because its interest is purely commercial in nature. This is not an interest laid down in law and can therefore not be qualified as legitimate. VoetbalTV wants to make money with the processing of images of random (underage) amateur footballers who have not given permission. According to the AP there is no right to earn money with the personal data of others. According to the AP the test therefore ends at the first step.

VoetbalTV argues that the AP has wrongly qualified its interest as purely commercial. It has argued that its interest in the processing of personal data lies in a. the increase in the involvement and enjoyment of soccer fans, including that of players who are shown in the picture, b. the ability to perform technical analyses for/by trainers and/or analysts of the soccer clubs and third parties and c. offering players, friends and family members, among others, the opportunity to watch or review matches from a distance, for example if they cannot be physically present. In addition, VoetbalTV has a channeling function, because it contributes to a higher level of privacy protection by preventing the recording of matches via other channels.

8. It is up to the data controller to state what the interest in the processing is, why that processing is necessary and that it must act accordingly. It is up to the AP to assess what the data controller actually does, to see whether stated interests correspond with this and are actually promoted by the processing and whether they are justified. In the opinion of the Division, this test should take place in step 1 and the District Court was therefore right to consider it this way. The Court agrees that in this case, in view of the other interests mentioned by VoetbalTV, which are not of a commercial nature, there is no question of a purely commercial interest. The question of whether an exclusively commercial interest can in itself be a legitimate interest within the meaning of Article 6, paragraph 1, opening words and under (f) of the AVG, therefore does not need to be answered. The AP was wrong not to take into account the interests asserted by VoetbalTV, as shown above under 7.2, when assessing the first condition. In view of the nature of the activities of VoetbalTV - making images of soccer matches and making these available to third parties, including those who wish to be filmed - the processing of personal data is necessary for more than just the commercial interests of VoetbalTV. The AP has therefore determined on incorrect grounds that VoetbalTV has acted in violation of Article 6, paragraph 1, opening words and under (f) of the AVG.

9. It follows from the foregoing that answering the question raised by the AP is not necessary for the assessment of this case. In view of the judgments of the Court of Justice of 6 October 1982, Cilfit, ECLI:EU:C:1982:335, paragraph 10, and 6 October 2021, Consorzio Italian Management, ECLI:EU:C:2021:799, paragraph 34, there is no need to ask preliminary questions.

10. It further follows from the foregoing that the court was correct in its assessment to stop at step 1. The AP has not sufficiently investigated steps 2 and 3 so that the fine imposed cannot be upheld. The Division sees no reason in this case about a fine, also in view of what has been considered above under 6.2, for the opinion that - as the AP has argued on appeal - the district court should have given the AP the opportunity to repair the defect in the decision of 16 July 2020.

Conclusion on the AP's appeal

11. The foregoing means that the AP's appeal is unfounded. The judgment under appeal should be affirmed.

Conditional incidental appeal by Football TV

12. VoetbalTV has lodged an incidental appeal under the condition that the appeal lodged by the AP is well-founded. Because this appeal is unfounded, this condition is not met and the Division does not get to assess the content of the incidental appeal of VoetbalTV.

13. The AP must reimburse litigation costs.

Decision

The Administrative Jurisdiction Division of the Council of State:

I. Affirms the judgment under appeal;

II. orders the Personal Data Authority to reimburse the costs incurred by VoetbalTV B.V. in connection with the handling of the appeal up to an amount of € 1.518,00;

III. Determines that a court registry fee of € 541.00 shall be levied from the Personal Data Authority.

Thus established by E.J. Daalder, chairman, and C.C.W. Lange and W. den Ouden, members, in the presence of B. Ley-Nell, registrar.

W.G.

Daalder

Chairman

The Registrar is prevented from signing the judgment

Pronounced in public on 27 July 2022

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## **ANNEX | LEGAL FRAMEWORK**

General Administrative Law Act

#### Article 6:20

[-]

3. The appeal against the failure to make a decision in time shall include the decision made as yet, unless it fully satisfies the appeal.

4. However, the decision on the appeal may be referred to another body to which an objection or appeal against the decision taken as yet is pending, or can or could be made or lodged.

#### Article 7:1a

1. In the notice of objection, the petitioner may request the administrative body to agree to direct appeal to the administrative court, notwithstanding article 7:1.

#### General Data Protection Regulation Article 4

For the purposes of this regulation, the following definitions shall apply:

1) personal data: any information relating to an identified or identifiable natural person (the data subject); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more elements specific to the physical, physiological, genetic, psychological, economic, cultural or social identity of that natural person;

[...]

#### Article 6

1. Processing is lawful only if and to the extent that at least one of the following conditions is met:

a) the data subject has consented to the processing of their personal data for one or more specific purposes;

b) the 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 the conclusion of a contract;

c) the processing is necessary for compliance with a legal obligation incumbent on the controller;

[...]

(f) the processing is necessary for the purposes of pursuing the legitimate interests of the controller or of a third party, except where the interests or fundamental rights and freedoms of the data subject which require protection of personal data outweigh those interests, in particular where the data subject is a child.

#### General Data Protection Regulation Implementation Law Article 43

1. This Act, with the exception of Articles 1 to 4 and 5, first and second paragraphs, shall not apply to the processing of personal data for exclusively journalistic purposes and for the purpose of exclusively academic, artistic or literary expression.

[...]

Considerations for the AVG

(47) The legitimate interests of a controller, including those of a controller to whom 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, taking into account the reasonable expectations of the data subject based on his/her relationship with the controller. Such a legitimate interest may

for example, be present where there is a relevant and appropriate relationship between the data subject and the controller, in situations where the data subject is a customer or is employed by the controller. In any case, a careful assessment is required to determine whether there is a legitimate interest,

as well as to determine whether, at the time and in the context of the collection of the personal data, a data subject could reasonably expect that processing could be carried out for that purpose. In particular, the interests and fundamental rights of the data subject may outweigh the interests of the controller where personal data are processed in circumstances where data subjects would not reasonably expect further

processing expectation. Since it is up to the legislator to create the legal basis for personal data processing by public authorities, that legal basis should not apply to processing by public authorities in the course of the performance of their duties. The processing of personal data that is strictly necessary for

fraud prevention is also a legitimate interest of the controller in question. The processing of personal data for the purpose of direct marketing can be considered as carried out for the purpose of a legitimate interest.