

## Dutch Court Annuls the Fine imposed by the Dutch Data Protection Authority on an Amateur Football Streaming Service



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→ **Data protection - Personal Data - Data collection - General Data Protection Regulations (GDPR) - Broadcasting rights - National courts - National law - Social media - Fine - European Court of Justice (ECJ)**

*District Court Midden-Nederland, 23 November 2020, ECLI:NL:RBMNE:2020:5111*

In the Netherlands, an amateur football streaming service, VoetbalTV, has won an important legal battle against the Dutch Data Protection Authority, Autoriteit Persoonsgegevens (AP). The AP had imposed a fine of EUR 575,000 on VoetbalTV, which was annulled by the District Court Midden-Nederland (Court) on 23 November 2020. The reason for this is that the AP had applied an incorrect interpretation of the General Data Protection Regulation (GDPR). The AP had incorrectly assumed that a purely commercial interest can never qualify as a legitimate interest ground for the purposes of data processing under the GDPR.

The interpretation of the legitimate interest established by the Court in these proceedings is relevant in a broad context. The GDPR applies throughout the European Union, and the interpretation of the term "legitimate interest" should be the same in every Member State. Therefore, the interpretation of the Dutch Court is also relevant to the other Member States. In addition, the ground of legitimate interest is a frequently used ground for processing personal data, both by sports clubs and other relevant parties. The *VoetbalTV* judgment confirms that the threshold for an interest to be "legitimate" is low. In this article, we will explain the decision of the Court and its consequences in more detail.

### Background

*VoetbalTV* is a video platform for Dutch amateur football that makes video recordings of amateur football matches of seniors and youth players older than 13 years, on instructions of football clubs. *VoetbalTV* was founded in 2018. The matches are recorded *via* smart cameras, provided by *VoetbalTV* to the football clubs and installed around the pitch. Football clubs that participate have to pay a monthly fee to *VoetbalTV* and the camera's installation cost. At the beginning of 2020, about 2,500 to 3,000 matches were recorded and broadcasted per month. The *VoetbalTV* platform enables users, such as players and their family and friends, to watch amateur matches live and watch the recording afterwards. The platform also shows "highlights" of matches, such as goals and

goal-scoring opportunities, which are selected by the platform's own staff. Users can also analyse matches, collect and share data with other users. *VoetbalTV* also offers an analytical tool that can be used by trainers and analysts. The *VoetbalTV* app is being used by more than 500,000 people *VoetbalTV*.

The AP is an administrative body responsible for supervising the GDPR and the Dutch GDPR Implementation Act (UAVG). In mid-2018, the AP launched an investigation into *VoetbalTV* and the privacy of players. On the basis of its investigation, on 16 July 2020, the AP decided to impose a fine on *VoetbalTV* in the amount of EUR 575,000 for the unlawful processing of personal data. The AP accused *VoetbalTV* of having made video recordings of a great number of amateur football

<sup>1</sup> District Court Midden-Nederland 23 November 2020, ECLI:NL:RBMNE:2020:5111.



matches without a legitimate ground, and subsequently disseminated these recordings to a large audience *via* the *VoetbalTV* app and its analytical tools. In the AP's opinion, *VoetbalTV* acted contrary to Article 5(1)(a), in conjunction with Article 6(1), of the GDPR. The AP accused *VoetbalTV* of having infringed the right to respect individual privacy and the right to the protection of personal data of a great number of data subjects, including many minors (*i.e.* underage football players who were recorded). As a result of the acts of *VoetbalTV*, these data subjects have (partly) lost control over their personal data. The AP considered this to be a serious violation that justified a high fine. *VoetbalTV* appealed against this decision to the Court.

### Journalism Exemption

In the appeal proceedings, *VoetbalTV* relied first of all on the exemption for journalism.<sup>2</sup> *VoetbalTV* argued that the AP is not competent to impose a fine for the processing of personal data because of this exemption. According to *VoetbalTV*, it follows from European case-law that the journalism exemption must concern activities that have as their objective the disclosure to the public of information, opinions or ideas, regardless of the transmission medium. *VoetbalTV* believes that this exemption is applicable here. According to *VoetbalTV*, the AP disregarded the informative value and the social relevance of (integral) sports broadcasts when it imposed the said fine.

The Court considered that the journalism exemption applies to the processing of personal data

that takes place only (exclusively) for journalistic purposes.<sup>3</sup> In this case, the Court concluded that recording football matches and broadcasting them to the public did not exclusively serve a journalistic purpose. The broadcasting of amateur football matches could not be regarded as a disclosure to the public of information, opinions or ideas, as European case-law requires. The matches had insufficient informative value to meet this requirement since they concerned amateur sports and games. The images did not provide any information on celebrities (such as famous football players), nor do they contribute to any public debate. The Court concluded that, even though some newsworthy information could be found among the images *VoetbalTV* collected, the overall number of thousands of matches that had been broadcasted could not be regarded as "*journalism*". Therefore, the Court decided that the making of recordings and broadcasting of all these matches was not justified based on the exemption for journalism.

### Legitimate Interest

The fine was imposed by the AP on the ground that *VoetbalTV* did not need to process personal data in order to defend the legitimate interests of any party. Therefore, in the opinion of the AP, *VoetbalTV* was processing personal data unlawfully and failed to comply with Article 6 (1)(f) of the GDPR. According to the AP, a legitimate interest is an interest that has been identified as a legal interest in (general) legislation or elsewhere. Such an interest must be protected by law, be considered worthy of protection, and must be respected and enforceable. For an interest

to be designated as a legitimate interest, it must have a more or less urgent and specific nature that arises from a (written or unwritten) rule or principle of law; in a way, it has to be inevitable for such a legitimate interest to be defended. Purely commercial interests and the interest of maximum profitability are not specific enough and lack an urgent "*legal*" nature. Therefore, the AP believes that they cannot be designated as legitimate interests. The core of the activities of *VoetbalTV* is the processing of personal data; it earns money with this processing. The AP believes that this can never be a legitimate interest. If the performance of this core activity could be designated as a legitimate interest, this would mean that the subsequent test of necessity and weighing of interests would become devoid of substance.

*VoetbalTV* disputed this position in Court. *VoetbalTV* believes that a negative test should be used to answer the question of whether it has a legitimate interest. In a negative test, "*legitimate*" means "*not contrary to law*", The AP applies a positive test by arguing that *VoetbalTV* must have a legal interest, which is wrong according to *VoetbalTV*.

The Court considered first of all that three conditions must have been met for a legitimate interest to serve as a ground for data processing.<sup>4</sup> The first condition is that the interest pursued by *VoetbalTV* must be a legitimate interest. If it is, it must be assessed whether the processing of personal data is *necessary* to defend that legitimate interest. A test must also be applied against the principles of proportionality and subsidiarity. The third condition is that the interests of the controller and those of the data subjects must be weighed against each other.

<sup>2</sup> Art. 85 GDPR in conjunction with Art. 43 of the Dutch GDPR Implementation Act (UAVG).

<sup>3</sup> Recital 153 in the GDPR; Art. 43 of the UAVG.

<sup>4</sup> See *inter alia* [judgment of the ECJ, 29 July 2019, Case no. C-40/17, ECLI:EU:C:2019:629](#).



The Court then considered that in the case-law of the European Court of Justice (ECJ), no clear definition of “*legitimate interest*” can be found. The Court could therefore not retrieve from this case-law the AP’s interpretation that - in summary - the interest should be a legal interest. However, the Court considered the opinion of the Advocate General in the ECJ’s ruling in the Fashion ID case ECJ’s ruling<sup>5</sup> to be relevant. The Advocate General held in that matter that a legitimate interest must be interpreted in such a way that no type of interest is excluded per se, as long as the interest is legal itself. The Advocate General based this opinion, among other things, on the opinion of Article 29 of the Working Party (WP29, the predecessor of the European Data Protection Board - EDPB). This led the Court to conclude that the question as to whether an organization that processes personal data has a legitimate interest must be answered by applying a negative test. The essence of this test is that the controller is not allowed to pursue an interest contrary to law. According to the Court, the legitimate interest must be assessed based on a negative test, corresponding with recital 47 of the GDPR, which mentions “*direct marketing*” as an example of possible legitimate interest. This interpretation matches that of *VoetbalTV*.

As a consequence, the Court found that the AP should have interpreted the legitimate interest in a more open and flexible way, rather than adhering to a strict application. The AP ignored the fact that the term “*legitimate*” interest should not serve as a threshold but as an outer boundary. The AP’s interpretation that *VoetbalTV* is basically only interested in capitalizing on personal data, and

that this interest can never be a legitimate interest disregards the fact that the ECJ precisely prohibits the exclusion of specific legitimate interests in advance.

According to the Court, the AP had to examine the interests of *VoetbalTV* and then consider whether *VoetbalTV*, by broadcasting the amateur football matches, was unacceptably infringing the privacy of the data subjects. How the AP had to perform this test follows from the judgments of the ECJ. In brief, this means that *VoetbalTV* must itself assert its legitimate interest in processing personal data and must act according to the said interest. Next, it is the AP’s task to assess, on the basis of the objectives asserted by *VoetbalTV*, whether the processing of personal data is necessary for these objectives. It is then up to *VoetbalTV* to explain the extent to which it collects and processes personal data, which legal arrangements it has made to do this, and how it ensures that there is an appropriate relationship between the infringement of the privacy of the data subjects and the interest *VoetbalTV* pursues (proportionality and subsidiarity). After that, the AP will have to weigh the asserted interests against the infringement of privacy of the data subjects, including, in this case, minors. The aim is that the AP looks at the actual acts of *VoetbalTV*, checks whether its objectives match with its articles of association and whether the processing of personal data is actually pursuing its objectives. If the AP starts from the interests asserted by *VoetbalTV*, it can - unlike the AP assumes - indeed perform a test of necessity and a balancing of interests.

On the basis of the foregoing, the Court considered *VoetbalTV*’s appeal to be well-founded. The Court annulled the decision of the AP in which the fine was imposed.

### **Bankruptcy of VoetbalTV**

Before discussing the decision in more detail, we will briefly describe the run-up to this fine. Around May 2019, the AP contacted *VoetbalTV* for the first time with an investigation report about the processing of personal data by *VoetbalTV*. After that, on 6 November 2019, the AP concluded in a final investigation report that *VoetbalTV*’s data processing violated the GDPR. This led to a pre-notification of enforcement on 22 November 2019. On that date, *VoetbalTV* was threatened with a fine, but no fine was actually imposed, and a long period of uncertainty began. *VoetbalTV* had no possibility of lodging an objection or appeal against the pre-notification, but only against the actual decision to impose a fine. This decision took so long - with all the commercial consequences - that *VoetbalTV* went to court on 20 May 2020 because the AP failed to make the said decision within a reasonable timeframe. This happened six months after the initial pre-notification, and one full year after the AP had first contacted *VoetbalTV*. Such a judicial process is unusual, as normally, supervisory authorities can be expected to make decisions without such a long delay. Two months later, on 16 July 2020, the AP finally announced its decision: it imposed a fine of EUR 575,000 on *VoetbalTV*. This fine automatically became the focus of the proceedings that *VoetbalTV* had initiated. In the course of these proceedings, on 11 September 2020, *VoetbalTV* filed for bankruptcy, giving as reasons the COVID-19 crisis and the continuous clashes with the AP. According to *VoetbalTV*, the slow decision-making process contributed to its bankruptcy. At this moment, it is uncertain whether there will be a restart after bankruptcy.

<sup>5</sup> [Judgment of the ECJ, 29 July 2019, Case no. C-40/17, ECLI:EU:C:2019:629.](#)



## Relevance

The focal point of this judgment is the interpretation of the ground of legitimate interest in the GDPR. A debate had been ongoing for quite some time in the Netherlands about the scope of that legal basis. On 1 November 2019, the AP published an “*explanation of the standard of legitimate interest*” on its website. In this explanation, the AP wrote: “*Another example of something that does not qualify as a legitimate interest is the mere serving of purely commercial interests, maximum profitability [...]*.” This was broadly met with dissenting opinions from the market. As has also been made apparent by the Court in the *VoetbalTV* judgment, this interpretation finds little support in the text and explanation of the GDPR, the case-law of the highest European Court, or Article 29 of the Working Party guidelines, the predecessor of the EDPB. The AP appears to have applied a stricter interpretation on its own initiative, which the Court summarized as a “*positive test*”: there has to be a legal provision under which the interest is legitimate. This is at odds with the prevailing opinion in favour of a “*negative test*”: the interests may not be contrary to law. Based on this judgment, the negative test has become the provisional starting point. Provisional, because the AP may still appeal against this judgment. It is unknown whether the AP will do so, but it seems likely, as the fine was annulled and the AP’s interpretation was rejected.

The decision is also relevant because a legitimate interest serves as an important ground for data processing in sport. Although we have to await the outcome of a possible appeal and *VoetbalTV*’s future is uncertain due to its bankruptcy, according to the Court, a commercial interest as the

sole reason for the processing of data can no longer be rejected in advance. The decision could also be relevant in respect of other fines that are and continue to be imposed by the AP. In March 2020, the AP imposed a fine of EUR 525,000 on the *Royal Dutch Lawn Tennis Association* for the unlawful sale of members’ data to sponsors. In that decision, the AP also relied on the “*positive test*” and on the position that purely commercial interests cannot qualify as legitimate interests. It will be interesting to see whether the *VoetbalTV* judgment will have any effect on the *Royal Dutch Lawn Tennis Association*’s case.