

Workshop 1: “What is a legitimate interest?” (GDPR Article 6(1)(f)) and “how can a purely commercial interest be legitimate?” based on case C-621/22”



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Outline

- Setting the stage: concept vs cultural context
- VoetbalTV
- Guidelines Dutch DPA
- Royal Dutch Lawn Tennis Association (KNLTB)
- C-621/22

Setting the stage: concept vs cultural context

- **Dutch (gerechtigd)**: The term conveys a sense of being justified or warranted, often used in legal, ethical, or moral contexts. It implies that there is a good reason or a lawful basis for an action or situation.
- **English (legitimate)**: This term is similar to the Dutch, carrying the meaning of being in accordance with established rules, principles, or standards. It can refer to legal legitimacy, as well as to general acceptance or justification in various contexts.
- **German (legitim)**: Comparable to Dutch and English terms, "legitim" in German means that something is justified, lawful, or proper, based on recognized or established rules or standards.
- **All three terms denote the condition of being lawful or justified. However, nuances in their usage can be specific to each language's legal and cultural contexts.** For example, **German(rechtmäßig)** has an established meaning under German law.

VoetbalTV (1)

ECLI:NL:RBMNE:2020:5111

ECLI:NL:RVS:2022:2173

- The VoetbalTV case revolves around the Dutch DPA fining VoetbalTV for not having a valid legal basis under GDPR for processing personal data.
- The court disagreed with the DPA's stance that monetizing personal data can never be a legitimate interest.
- It highlighted that having a commercial interest doesn't preclude VoetbalTV from having a legitimate interest
- and mandated the DPA to reassess VoetbalTV's legitimate interests in broadcasting amateur football matches, considering the broader European legal context. (however, VoetbalTV went bankrupt along the way)

VoetbalTV (2)

- The Dutch DPA interpreted legitimate interest as having a legal basis in law.
- This interpretation was based on a concept in the Dutch handbook for general administrative law by Van Wijk/Konijnenbelt & Van Male from 2014 (ISBN 9789013119404).
- The handbook does not specifically address the privacy context. The Dutch DPA did not refer to the many authoritative sources on legitimate interest in EU data protection law, which tend to suggest a different direction.

Guidelines Dutch DPA (1)

- **The first condition** for legitimate interest under GDPR requires that the interests of the data controller or a third party are considered legitimate.
- This means such interests must be recognized as a legal interest within general legislation or elsewhere in the law.
- **These interests should be legally protected, considered worthy of protection, and generally respected and enforceable.**

Guidelines Dutch DPA (2)

“What also does **not** qualify as a legitimate interest is, for instance:

serving purely commercial interests, maximizing profits, monitoring employees's behavior without legitimate interest or the (buying) behavior of (potential) customers, (...)”

- Following the announcement of the Royal Dutch Lawn Tennis Association (KNLTB) to share its members' personal data with sponsors, the Dutch DPA received complaints.
- This led to media reports about the KNLTB suspending the sharing of phone numbers under legal pressure.
- Consequently, the Dutch DPA investigated the KNLTB's data-sharing practices with sponsors.

KNLTB (2)

- The Dutch DPA imposed a fine for unlawfully processing the personal data of its members.
- In 2018, KNLTB provided its members' personal data to two sponsors for direct marketing without a lawful basis for such processing.
- Note: At the time of the first provision the Directive 95/46/EC (Wbp) applied, and at the second the GDPR.
- This action violated Articles 5(1)(a) and 5(1)(b) of the GDPR for members who joined before and after 2007, respectively.

KNLTB (3)

- The Amsterdam District Court, as the first Dutch court, discussed the concept of 'legitimate interest', referring to the Advocate General's conclusion in case C-40/17, which seems to support the plaintiff's argument that any interest, including purely commercial ones, can be a legitimate interest.
- However, the court noted that considering the goal of the GDPR to offer high protection, recognizing the desire to earn money from others' personal data without consent as a legitimate interest does not align.

KNLTB (4)

- The court found the defendant's interpretation acceptable, emphasizing that even before the GDPR, the requirement of Article 8 of the ECHR for data protection infringements to be lawful was met.
- Additionally, the GDPR specifies when processing must have a legal basis, like the prohibition of processing certain data types under GDPR Article 9(1), making the plaintiff's interpretation also acceptable.

Facebook (1)

ECLI:NL:RBAMS:2023:1407

- It is also salient that last year, in the mass claim against Facebook, the civil chamber of this same Amsterdam District Court did very clearly reject the Dutch DPA's view of legitimate interest (r.o. 12.68).
- “Unlike the Foundation has argued, for the time being the Court sees no reason to assume that commercial interests could not be regarded as a legitimate interest within the meaning of Article 7 under f of the Privacy Directive and Article 8 opening words and under f of the Wbp.

Facebook (2)

ECLI:NL:RBAMS:2023:1407

- The case law of the CJEU does not show this and neither does the WP29 opinion.
- On the contrary, the WP29 opinion also cites economic interests of companies as examples.
- The requirements mentioned by the ECJ and in the WP29 opinion, that the alleged legitimate interest must be existing, actual (present), not hypothetical (real) and legitimate, the legitimate interest alleged by Facebook Ireland meets in any case.
- The court therefore presumptively assumes that Facebook Ireland had a legitimate interest in processing personal data for advertising purposes and that the first condition is thus met.

C-621/22

Questions referred for a preliminary ruling

1. How should the District Court interpret the term 'legitimate interest'?
2. Should the term be interpreted as the Dutch DPA interprets it? Are these interests which exclusively pertain to the law, constitute law, are enshrined in a law? Or;
3. Can any interest be a legitimate interest, provided that interest is not in breach of the law?

More specifically: should a purely commercial interest, such as the interest at issue here, the provision of personal data in return for payment without the consent of the data subject concerned, be regarded as a legitimate interest under certain circumstances?

If so, what circumstances determine whether a purely commercial interest is a legitimate interest?