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GDPR-compliance issues in the Netherlands

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The
Ceylon
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Commerce

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Legal500 2022

an absolute authority in his field of expertise



One of the leading experts in the Netherlands for data protection matters. A popular choice with both public and private sector clients. A "great lawyer" and a "strong leader."



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PERSONAL DATA, OR NOT?

using telecoms locations data to monitor the corona pandemic

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Using telecoms location data in times of Corona

Objectives

- to assess effectiveness of measures (social distancing etc.)
- and to monitor how the pandemic evolves

Eg. When restaurants and bars open in the Netherlands, and Belgium is still in a lock-down

Not

- to track individuals



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rules for telecoms location data

Article 6 Directive 2002/58/EC

Traffic data

1. Traffic data relating to subscribers and users processed and stored by the provider of a public communications network or publicly available electronic communications service **must be erased or made anonymous** when it is no longer needed for the purpose of the transmission of a communication

ePrivacy Directive

the data have to be anonymized and provided in aggregate form

No problem. Or is it?

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EDPB on anonymisation...



Anonymisation refers to the use of a set of techniques in order to remove the ability to link the data with an identified or identifiable natural person against any “reasonable” effort. This “reasonability test” must take into account both objective aspects (time, technical means) and contextual elements that may vary case by case (rarity of a phenomenon including population density, nature and volume of data). If the data fails to pass this test, then it has not been anonymised and therefore remains in the scope of the GDPR.

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Dutch Supervisory Authority disagrees...

Location data not anonymous

According to both the GDPR and the Telecoms Act, telecom companies cannot simply share customer data with the government. Unless all those customers have given their own consent or the data is anonymous.

Asking permission from all Dutch citizens in this case is too cumbersome. And making this kind of data anonymous is not possible because it is never irreversible.

Anyone who knows where someone lives or works and combines that data with the 'anonymized' location data of very many people can use that combination to find out who used which location data.

'That turns these data into personal data and you can't just share them,' Wolfsen said.

Mr. Aleid Wolfsen, current chair of the Dutch Data Protection Authority

Locatiegegevens niet anoniem

Volgens zowel privacywet AVG als de Telecommunicatiewet mogen telecombedrijven niet zomaar gegevens van klanten delen met de overheid. Tenzij al die klanten daarvoor zelf toestemming hebben gegeven of de gegevens anoniem zijn.

Toestemming vragen van alle Nederlanders is in dit geval te omslachtig. En het anoniem maken van dit soort gegevens kan niet, omdat dat nooit onomkeerbaar is.

Wie weet waar iemand woont of werkt en die gegevens combineert met de 'geanonimiseerde' locatiegegevens van heel veel mensen, kan met die combinatie achterhalen wie bij welke locatiegegevens hoort.

'Dat maakt van deze gegevens persoonsgegevens en die mag je niet zomaar delen,' zegt Wolfsen.

Locatiegegevens kunnen helpen

De AP ziet dat het beeld bestaat dat het beperkt en onder strenge voorwaarden gebruiken van locatiegegevens de overheid mogelijk kan helpen om de verspreiding van het virus in te dammen.

but what about the EDPB's "reasonability test" ...?

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Meet the Dutchman who cried foul on Europe's tracking technology

The record privacy watchdog has repeatedly broken ranks with EU peers over tracking technology. His approach suggests to be winning.

By VINCENT MANAUCOURT | 5/20/20, 5:00 PM CEST | Updated on 5/20/20, 5:08 PM CEST

As European governments rushed to embrace technology to fight the coronavirus, a plainspoken Dutchman emerged as a thorn in their side. Aleid Wolfsen's message: Don't pretend your solutions are privacy-friendly.

In a group that normally keeps disagreements quiet, Wolfsen stands out. A former politician and mayor of Utrecht who had no formal training in data protection when he took on his role in 2016, he has repeatedly been at odds with other watchdogs, most of whom do not share his political background.

The official in charge of Europe's grouping of privacy regulators was also keen to play down any disagreements. There is **"no difference in the positions"** of different privacy regulators and the **"Dutch case was a specific case,"** Andrea Jelinek said, while a spokesperson for the group, the European Data Protection Board, added: "The legal concept of anonymization is not an absolute concept."

Europe's Data Protection Supervisor, who had OK'd the Commission's use of telecoms data to track the coronavirus, said: **"There is a difference between the technical impossibility of doing something to the very end, and something which we would call an effective anonymization."** !

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CONSENT, OR NOT?

contact tracing via an app

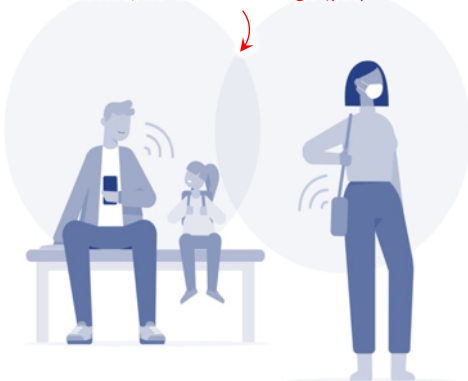
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1.

App registers on device that User A was in close proximity of User B for longer than 15 minutes, using non-identifying and frequently changing tokens

in principle, no processing of personal data, only anonymous tokens on users device, no central storage (yet)



2.

medical doctor diagnoses infection with COVID19
asks patient for 6 digit code generated by the app
if patient provides the code, doctor sends that code to central server



3.

only if patiënt also uploads the 6 digit code (i.e. validate the code uploaded by the doctor), the central server sends a broadcast to all user devices that were in close proximity of User A



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Privacy by design, but identification may still be possible, sometimes

Art. 24 GDPR, art. 12 DP Act 2022



Art. 6.1
GDPR

cg. Schedule I of the
DP Act 2022

serious debate on the **legal basis** of the processing of possible personal data in anticipation of a specific Act, can the processing be based on **user consent**..?

cf. Schedule III of
the DP Act 2022

Art. 4.11 GDPR

any **freely given**, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her;

Recital 42 GDPR

Consent should not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment.



door de Volkskrant bericht op 18 augustus 2020

De door de minister geraadpleegde landsadvocaat is **nogal kritisch** op uw advies. Zo zou u weinig aandacht hebben voor de buitengewone omstandigheden die de app **te kritiek?**

'Die zit op de grens van het ongepaste. Over de ernst van corona bestaat bij ons geen twi- fel. Juist in tijden van crises moet je kritisch blijven en helder nadenken. De Nederlandse burger moet zeker weten dat niemand bij zijn persoonlijke gegevens kan komen, ook al is de app vrijwillig.'

Journalist:

The state's attorney is quite critical about your advice

Reply

'That is verging on the inappropriate'



DATA SUBJECT ACCESS RIGHTS

many unresolved issues

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Data Subject Access Rights (DSAR's)

Article 15 GDPR

- (1) The data subject shall have the right to obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed, and, where that is the case, access to the personal data and the following information:
- a) the purposes of the processing
 - b) the categories of personal data concerned
 - c) the recipients or categories of recipients to whom the personal data have been or will be disclosed, in particular recipients in third countries or international organizations
 - d) etc.

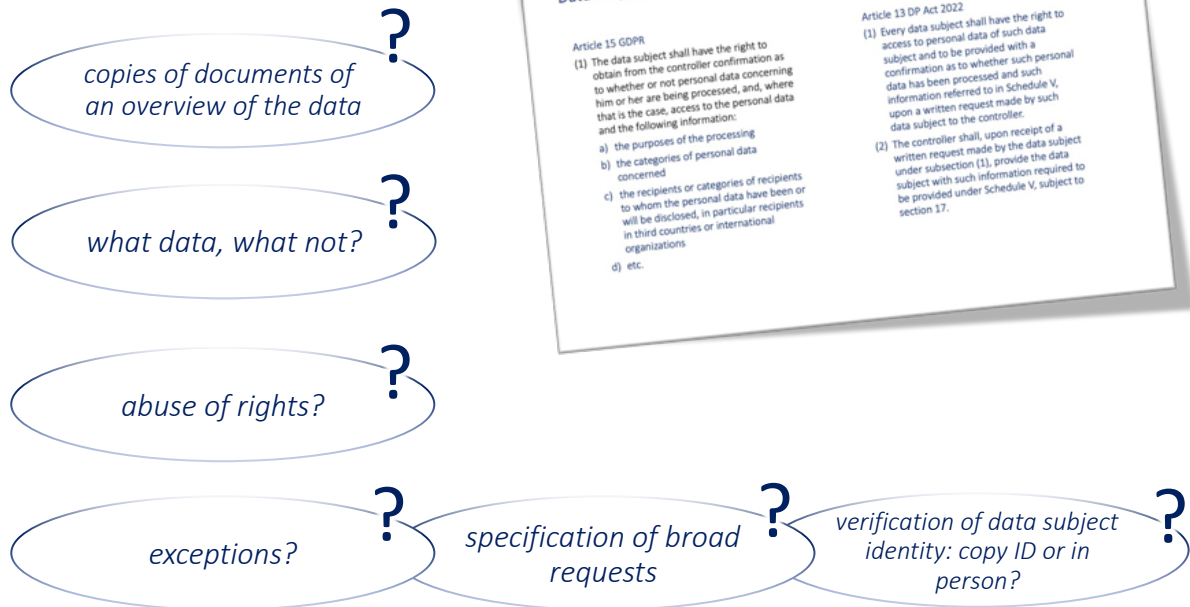
Article 13 DP Act 2022

- (1) Every data subject shall have the right to access to personal data of such data subject and to be provided with a confirmation as to whether such personal data has been processed and such information referred to in Schedule V, upon a written request made by such data subject to the controller.
- (2) The controller shall, upon receipt of a written request made by the data subject under subsection (1), provide the data subject with such information required to be provided under Schedule V, subject to section 17.

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Issues...



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questions?

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