Rechtsbescherming tegen bestuurlijke gegevensverwerkingen: toegang, toetsing en schadevergoeding

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ENGLISH SUMMARY

This dissertation addresses the following question: to what extent can the General Data Protection Regulation (GDPR) have an effect within the Dutch legal order? More specifically, it analyzes how data subjects can access administrative justice to challenge the governmental processing of their personal data on the basis of the Implementation Act GDPR and the General Administrative Law Act (GALA).

Since the 1990s, data protection law has been increasingly Europeanized. The GDPR represents a pivotal step in this Europeanization. Yet, its application and enforcement are still carried out by national administrative bodies and courts, whose actions are regulated by national procedural laws. This particularly applies to access to justice. In accordance with the principle of procedural autonomy, Member States are, within the limits of Union law and especially the *Rewe* principles, free to establish which procedures data subjects must follow to exercise their data protection rights, how these procedures are structured, and which court has jurisdiction over the GDPR's enforcement and application.

Part I of the dissertation analyzes the main principles underpinning the GALA and the GDPR. This analysis shows that their foundations differ significantly.[1] Dutch Administrative law is primarily concerned with 'decisions' of the administration as mentioned in Article 1:3 GALA (e.g. environmental permits, welfare allowances, tax benefits). Their lawfulness can be reviewed in a preliminary administrative procedure (Article 7:1 GALA) and in judicial procedures (Articles 8:1 and 8:104 GALA). It is important to note in this respect that administrative courts have no authority to review 'administrative deeds of fact'. Indeed, the GALA has a blind spot for such deeds. In contrast, the GDPR has a fundamentally different focus. It lays down rules on the processing of personal data with regard to the free movement of such data and aims to protect fundamental rights, in particular that of data protection (Article 1 GDPR). According to the rationale of the GALA, the governmental processing of personal data constitutes an administrative deed of fact.

The above analysis ultimately results in a '*typology of administrative data processing*'.[2] It serves as an analytical tool to help clarify how data subjects can access administrative justice to enforce the GDPR. The typology distinguishes between *autonomous* and *accessory* challenges. Autonomous challenges concern situations in which data subjects only seek to contest the lawfulness of factual personal data processing by the administration. In this case they have access to justice on the basis of Article 34 Implementation Act GDPR.[3] This

1 Chapter 2.
2 Chapter 3.
3 In Dutch: de Uitvoeringswet Algemene verordening gegevensbescherming.

procedure starts with an information request of the data subject, in which he invokes an information right as mentioned in Articles 15-22 of the GDPR. Article 34 Implementation Act GDPR states that the written reaction of the administration to such a request qualifies as an appealable administrative decision. Using the GALA, a data subject can then lodge an appeal, challenge this decision and access justice. Accessory challenges, on the other hand, occur when a data subject aims to challenge an administrative decision (e.g. permit, allowance, benefit) because their personal data was unlawfully processed in the decision-making procedure. Provided that the processing falls within the scope of this decision, data subjects can challenge its lawfulness solely via the GALA. They are required to first start a preliminary administrative procedure.[4] Once this procedure is completed, they can request the administrative judge to review the decision.[5] In short, the GDPR can take effect within the system of administrative legal protection in two ways: through the Implementation Act GDPR or the GALA.

Nevertheless, the typology of administrative data processing has its limitations. It assumes that it is clear *ex ante* whether such processing has an autonomous or accessory character, so that data subjects know how they can obtain access to justice. However, this is not always the case, as the (algorithmic) processing of personal data for risk-profiling purposes shows.[6] Such profiling does not in itself qualify as an administrative decision. Rather, it is an instrument used by public bodies to determine which applications (e.g. for welfare, tax benefits, permits) are risky and therefore require extra governmental scrutiny. Yet, the processing of personal data for risk-profiling purposes does *relate* to administrative decisions within the meaning of Article 1:3 GALA. Consequently, it remains ambiguous whether data processing for risk-profiling purposes has an autonomous or accessory character, and how it can be challenged.

Part II of the dissertation examines the extent to which data subjects can access justice via the Implementation Act GDPR to challenge autonomous data processing. While legal protection against accessory processing generally proceeds via the GALA, causing little friction in the administrative legal system, this is different for autonomous processing. Unlike the GALA, which centers on administrative decisions, the GDPR focuses on the regulation of a purely factual act, namely the processing of personal data. The Dutch legislator aimed to bridge this difference by codifying the '*information request-decision model*' in Article 34 Implementation Act GDPR.[7] By invoking this Article, data subjects can, in theory, obtain access to administrative justice. Therefore, this model plays a crucial role in the framework of legal protection against administrative data processing.

The legislative history of the '*information request decision model*' shows that the legislator intended to give administrative courts the authority to review the lawfulness of factual

4 Article 7:1 GALA.
5 Article 8:1 GALA.
6 Chapter 4.
7 Between September 2001 and May 2018, this model was implemented in Article 45 of the Dutch Data Protection Act (In Dutch: Wet bescherming persoonsgegevens). This Act implemented Directive 95/46.

data processing.[8] However, a closer examination of this model and the case law in which it is applied reveals that it has only been partially achieved. Article 34 Implementation Act GDPR does not grant them this authority. Strictly speaking, the provision only determines that the written decision of a public body on a GDPR-information request of data subjects qualifies as an appealable decision. The legislator has, either consciously or unconsciously, failed to codify that administrative courts have the authority to scrutinize the lawfulness of administrative data processing. Consequently, they can only review such processing on an *exceptional* basis, specifically when a data subject invokes the right to erasure. There is, after all, a connection between the right to erasure and the question of whether a data processing activity is lawful. The lawfulness of the processing is relevant for the exercise of this right (Article 17, paragraph 1, subsection d, GDPR).[9]

This shortcoming of Article 34 Implementation Act GDPR has led to various lawsuits regarding the authority of administrative courts to scrutinize the lawfulness of data processing.[10] These cases are analyzed in chapters 5, 6 and 7. Before elaborating on these cases, the dissertation shortly delves into the way in which the authority of administrative courts is defined. Dutch administrative courts do not have unlimited jurisdiction to review actions of public bodies. Instead, they only have the authority to review the lawfulness of a *primary decision* of a public body as set out in Article 1:3 GALA. This decision determines the scope of review that administrative courts can conduct.

This also has implications for judicial review of personal data processing. As explained before, the question whether such processing is lawful, is relevant for the application of Article 17 GDPR. Yet, case law analysis shows that there are data subjects that do not manage to follow these procedural steps. First, there are data subjects who directly challenge the processing of their data without invoking Article 34 Implementation Act GDPR and Article 17 GDPR.[11] In these cases, administrative courts ruled that they had no competence to scrutinize the lawfulness of this data processing, since the processing as such does not qualify as a decision within the meaning of Article 1:3 of the GALA. Hence, these data subjects were unable to access justice and invoke the GDPR. Second, the case law analysis also shows that procedurals hurdles arise in situations in which data subjects invoke the 'wrong' GDPR-information right. For example, there are cases where data subjects tried to challenge the lawfulness of data processing in procedures initiated through invocation of

8 Chapter 5.2.2 and Chapter 5.2.3.

9 According to Article 17(1)(d) GDPR, the data subject has the right to obtain from the controller erasure of personal data concerning him if the data have been unlawfully processed. Chapter 6.3.

10 Chapter 5.4 and Chapter 6.5.

11 Or Article 45 of the Dutch Data Protection Act (2001-2018). See, for example: Administrative Division of the Council of State April 26 2016, ECLI:NL:RVS:2016:1114 (*Arnhemse afvalpas*); Administrative Division of the Council of State August 28 2019, ECLI:NL:RVS:2019:2846 (*X/College van B&W Oldenzaal II*); Administrative Division of the Council of State August 28 2019, ECLI:NL:RVS:2019:2847 (*X/College van B&W Oldenzaal I*); District Court of Gelderland June 23 2015, ECLI:NL:RBGEL:2015:4106 (*Arnhemse afvalpas*); District Court of Noord-Nederland April 14 2017, ECLI:NL:RBNHO:2017:11737 (*Schrapping tableau*).

the right to access (Article 15 GDPR) or the right to object (Article 22 GDPR).[12] In these cases too, administrative courts ruled that they had no authority to scrutinize data processing as such. They stated that the question whether such processing is lawful, is irrelevant for the exercise of Articles 15 and 22 GDPR. Third, there are data-subjects who assume that the notification letter in which a public body informs them about data processing on the basis of Articles 13 or 14 GDPR qualifies as an administrative decision. They then attempt to gain access to justice via het GALA. However, their challenges are often declared inadmissible, as a GDPR-notification letter does not qualify as an appealable decision.[13] In theory, those who fail to access administrative justice can still request civil law courts to review the legality of administrative data processing. Yet, it is highly questionable whether this would result in effective legal protection. In the Dutch legal order differences exist between administrative and civil systems of justice. Generally, administrative courts are more accessible than civil courts, partly because administrative proceedings do not require legal representation. Moreover, the court fee in administrative proceedings is significantly lower compared to civil proceedings. Finally, unlike civil law courts, administrative courts have several procedural instruments to compensate for the inequality between litigants resulting from the fact that public bodies are 'repeat players' whereas citizens usually are 'one shotters'.

In recent years, administrative courts have issued multiple rulings that mitigate the aforementioned procedural obstacles. The most prominent of these are the 'first-of-April-judgments' issued by the Administrative Jurisdiction Division of the Council of State in 2020.[14] Although these judgments raise significant constitutional questions, they confirm that administrative courts indeed have authority to assess the lawfulness of factual data processing by administrative bodies. This body of case law has further evolved in subsequent rulings.[15] The procedural complications resulting from the *information request decision model* can therefore be partially avoided. The question whether the lawfulness of data processing can be challenged not only through the right to erasure but also through the rights of access or objection is, for example, no longer a pressing one.

12 Administrative Division of the Council of State June 10 2020, ECLI:NL:RVS:2020:1375 (*Scheefwonen IV*); District Court of The Hague September 28 2022, ECLI:NL:RBDHA:2022:10545 (*Inzageverzoek Zorg- en Veiligheidshuis Haaglanden*); District Court of Rotterdam January 11 2023, ECLI:NL:RBROT:2023:168 (*Gegevensuitwisseling Rotterdam – Stichting Woonbron*); District Court of Rotterdam February 17 2023, ECLI:NL:RBROT:2023:1184 (*Reikwijdte inzagerecht FSV I*).

13 Administrative Division of the Council of State November 28 2018, ECLI:NL:RVS:2018:3866 (*Treiteraanpak I*); Administrative Division of the Council of State April 17 2019, ECLI:NL:RVS:2019:1230 (*Treiteraanpak II*); District court of Amsterdam February 13 2018, ECLI:NL:RBAMS:2018:797 (*Treiteraanpak I*); District court of Amsterdam April 18 2018, ECLI:NL:RBAMS:2018:2471 (*Treiteraanpak II*).

14 Administrative Division of the Council of State April 1 2020, ECLI:NL:RVS:2020:898 (*Pieter Baan Centrum*); Administrative Division of the Council of State April 1 2020, ECLI:NL:RVS:2020:899 (*X/College van B&W Deventer II*); Administrative Division of the Council of State April 1 2020, ECLI:NL:RVS:2020:900 (*X/College van B&W Borsele*); Administrative Division of the Council of State April 1 2020, ECLI:NL:RVS:2020:901 (*X/College van B&W Harderwijk*).

15 Administrative Division of the Council of State February 2 2022, ECLI:NL:RVS:2022:319 (*X/BFT I*); Administrative Division of the Council of State July 3 2024, ECLI:NL:RVS:2024:2715 (*Treiteraanpak IV*); District Court Midden-Nederland February 2 2021, ECLI:NL:RBMNE:2021:3645 (*Family Supporters*).

The challenge to provide administrative legal protection against factual actions is not unique to European data protection law. Other areas of Dutch law struggle with it as well. The report *Broadening of Administrative Jurisdiction* by the Commission *Design of Administrative Legal Protection* of the Dutch Association on Administrative Law illustrates this well.[16] This Commission advocates for the introduction of a general petition procedure to bring the lawfulness of various factual administrative actions within the jurisdiction of administrative courts. This could mark the onset of a new era in Dutch administrative law, with increased emphasis on the organization of legal protection against administrative deeds of fact. However, in recent years, albeit under the radar, legal protection against factual administrative actions by administrative courts has already taken root when it comes to the application of European data protection law. The idea that administrative courts can only review the legality of administrative decisions seems thereby to have been cautiously abandoned. As a result, data protection law has evolved from an area of law forgotten by many public lawyers into a driver of change in administrative law.

16 Report of the Committee on the competence of the administrative judge from the Administrative Law Association, *Broadening competence: need and consequence of a growth-model for legal protection in administrative law,* The Hague: Boom juridisch 2024.