

*Informal translation*¹

Conclusions Dutch Data Protection Authority [Autoriteit Persoonsgegevens] of the investigation into KPN and XS4ALL digital interactive TV - 20 June 2016²

The Dutch Data Protection Authority [Autoriteit Persoonsgegevens, hereinafter: AP] has launched an investigation on its own initiative, based on Article 60 of the Dutch Data Protection Act [Wet bescherming persoonsgegevens, hereinafter: Wbp], into the processing of personal data by XS4ALL Internet B.V. and its mother company KPN related to interactive television .

XS4ALL (a subsidiary of KPN) had [confidential] subscribers for its interactive television services on 1 July 2015. In order to provide the services, XS4ALL uses the infrastructure and services of KPN.

As part of the investigation, the DPA has requested information and conducted two inspections. As a result of the questions and inspections from the DPA, KPN and XS4ALL have made or announced many changes, to end infringements of the Dutch Data Protection Act. In this report, the facts are described and assessed up until 31 May 2016, including a description of the changes the two companies have already made.

Joint controllership

Though XS4ALL initially took the position that it was the only data controller for the processing, the DPA has established, based on the investigation, that KPN and XS4ALL are joint controllers for the processing of personal data related to viewing behaviour. As a consequence of the investigation, KPN and XS4ALL have closed an agreement on 5 October 2015 in which they acknowledge their joint controllership for most of the data processing.

Personal data viewing behaviour

KPN and XS4ALL process personal data about the viewing behaviour of the customers of XS4ALL's subscribers in five different ways. KPN and XS4ALL process these data when they:

1. subscribe to the service;
2. watch (linear) TV through the Set Top Box ('ordinary TV');
3. watch (linear) TV through a website (WebTV);
4. use the interactive options such as Video on Demand, and watch programs at times outside of the regular schedule, such as delayed or forward watching;
5. use personal storage space on servers of KPN (network video recorder).

When subscribers use the last two options, KPN and XS4ALL also register and store whether they forward recordings, and if so, at what speed.

These data about the viewing behaviour, and the data that are related to it, are personal data as defined in Article 1, sub a, of the Wbp. They are also personal data of a sensitive nature, which may provide an intrusively revealing overview of someone's behaviour and interests.

¹ No rights can be derived from this informal translation in English.

² KPN and XS4ALL have taken further measures upon receipt of this final report of findings. They have revised their privacy policies in July and August 2016, and have thereby ended all infringements of the Dutch Data Protection Act.

Purposes of the processing of viewing behaviour

The AP has investigated four purposes for which KPN and XS4ALL process data about the viewing behaviour of XS4ALL-subscribers:

1. for the installation, activation and delivery of the service;
2. for operational and tactical system operations, including customer support;
3. to send invoices to subscribers;
4. to create TV ratings of viewing TV via the settopbox for market research, Video on Demand ratings to settle bills with the content providers and for market research , as well as to provide WebTV ratings to the Stichting KijkOnderzoek (SKO, a foundation created by content providers in the Netherlands).

Information

At the start of the investigation, the privacy policy of XS4ALL did not contain any explanation about the processing of personal data through interactive TV, either by XS4ALL or by KPN. The policy stated: "*XS4ALL does not observe, analyse or inspect what individual users are doing online.*" The AP has concluded that the privacy policy had failed to provide essential information about the identity of the joint controllers and the purposes of the processing.

The privacy policy of XS4ALL did not provide any further information about the categories of personal data related to the viewing behaviour - as processed by XS4ALL or by KPN - , nor about the retention periods for those data. Such further information is necessary to allow the affected people (data subjects) to assess the impact of the data processing, and by that, to make a conscious choice whether they want to use the service, or not.

In a blog posting dated 10 June 2015, XS4ALL announced that it analysed anonymous data about the viewing behaviour, to determine whether a TV channel is popular, and to create TV ratings for content providers, as well as for SKO. The investigation shows that this blog posting was factually incorrect, and incomplete insofar as XS4ALL stated that the data could not be linked to individuals. During a period of 14 days XS4ALL maintains a log file with data about individual WebTV viewing behaviour. The processing of these data to create (anonymous) TV ratings (ceased on 3 March 2016) in itself constituted an analysis of what individual users do online. Moreover, XS4ALL omitted to inform its subscribers that KPN also collected and processed information about TV viewing behaviour (ceased on 5 October 2015), in the case of KPN through the Set Top Box, for its own market analysis purposes.

KPN and XS4ALL have since published new privacy policies (respectively on 24 February and on 20 April 2016), with which they inform users about their joint controllership, the different purposes of the processing related to interactive TV, the most important categories of data processed for these purposes, and the retention periods.

KPN and XS4ALL in principle provide the necessary further information, as required by Articles 33 and 34 of the Wbp, through their new policies. However, the privacy policies still contain incorrect information insofar as they address 'consent' for 'trend analysis' and 'marketing' (KPN), and insofar as they addresses 'anonymous data' (XS4ALL). The data about the viewing behaviour can only be considered 'anonymous' after the original data have been deleted (thus, in the case of paid Video on Demand, after 3 months). That is why KPN and XS4ALL are still acting in breach of Articles 33 and 34 of the Wbp with regard to these statements.

Both KPN and XS4ALL have added a statement to their new privacy policies that they may change the policy whenever new developments give rise to that, and that customers may find the most up to date version of the policy on their website. Both companies fail to provide an overview of material changes in the purposes of the data processing, compared with earlier versions of their policies. These earlier version are also no longer available on their websites.

Through these disclaimers, KPN and XS4ALL reserve the right to silently change their privacy policies. However, the Articles 33 and 34 of the Wbp require that data controllers must inform data subjects on their own initiative about the existence of, and possible material changes to, the data processing. Such changes may have a substantial impact on the private life of data subjects. Data subjects are not required to investigate. Because the new privacy policies have thus become conditional, and do not contain guarantees ensuring that subscribers will be informed about material changes in the purposes of the processing, data subjects do not have a framework to assess the fairness of the processing of their data. Therefore, KPN and XS4ALL are acting in breach of Article 6 of the Wbp, the obligation to process personal data in a fair and lawful manner.

Legal grounds and retention periods

KPN and XS4ALL have based their processing on the legal grounds of Article 8, under b or f, of the Wbp. The companies thereby have claimed a necessity for the processing in order to execute a contract with a customer, or a necessity to process for their legitimate interest. The companies have not claimed unambiguous consent (Article 8, under a, of the Wbp).

The DPA has assessed the legal grounds for the processing in relation to the applied retention periods (Article 10, first paragraph, of the Wbp). Because there is a legal concurrence with provisions from the Dutch Telecommunication Act [Telecommunicatiewet, hereinafter: Tw], the DPA has also assessed whether an exception on the consent requirement from Article 11.5 of the Tw did apply.

1. Watching TV through the Set Top Box and WebTV

KPN and XS4ALL collect and store personal data related to TV viewing behaviour through both the Set Top Box and through WebTV.

System operations and customer support

KPN stores personal data about regular TV viewing behaviour via the Set Top Box for a period of 14 days, for the purposes of customer support, to investigate interferences and to solve problems with image quality. XS4ALL also stores personal data about WebTV viewing behaviour for 14 days, for the similar purposes of customer support and maintenance of the integrity and security of the network.

For the processing for this purpose (system operations) KPN and XS4ALL can appeal to an exception on the consent requirement laid down in Article 11.5 of the Tw. However, being able to claim such an exception does not exempt the companies from needing a legal ground as laid down in Article 8 of the Wbp.

Because KPN and XS4ALL did not inform data subjects about this processing (including for the purpose of customer support, about which they must provide specific information according to Article 11.5 of the Tw), a successful appeal to any of the legal grounds contained in Article 8 of the Wbp was not possible.

Measures taken

KPN and XS4ALL have published new privacy policies (on 24 February and 20 April 2016 respectively). These privacy policies contain an adequate explanation of the personal data that they are processing for system operations and customer support. Through this, they have ended the ascertained breach of Article 8 of the Wbp, juncto Article 11.5 of the Tw for this specific purpose of the processing (system operations).

TV ratings

KPN used to collect and store personal data about the TV viewing behaviour via the Set Top Box until 5 October 2015 for a period of 60 days, respectively 6 months (a copy of this log file). KPN translated these data in TV ratings, to be able to negotiate with the broadcasting organisations and to determine the channel package.

XS4ALL created an extract from the data on its webserver to create WebTV ratings until 3 March 2016, and provided the ratings to SKO. Because XS4ALL stores personal data about the WebTV viewing behaviour in the log file of the webserver, there was no effective, irreversible anonymisation in generating the ratings.

Both types of data processing concerned a form of market analysis.

The creation of TV ratings was and is not (strictly) necessary for the transmission of the communication, and TV ratings were and are not used for billing. There was no effective anonymisation, because the original personal data were still available for a period of 6 months, respectively (WebTV) for a period of 2 weeks. Therefore the exception on the consent requirement from Article 11.5 Tw did not apply to the data processing for this purpose (TV ratings, purpose 4). For this processing consent was (Set Top Box) and is (WebTV) required, as laid down in Article 11.5 Tw. KPN en XS4ALL did not ask for the consent of the data subjects. With regard to other legal grounds from the Wbp, the processing must comply with necessity requirements, amongst which the principles of proportionality and subsidiarity.

The data processing that consists of the anonymisation of personal data about TV viewing behaviour was not necessary to be able to fulfil the contract with individual data subjects (Article 8, sub b, of the Wbp). KPN en XS4ALL can also deliver the service without analysing the TV ratings.

Considering the collection of TV ratings via Set Top Boxes, SKO makes TV ratings available from people that voluntarily collaborate with this collection of data, by allowing SKO to install a TV set meter. Because there is an alternative, less infringing method of collecting the TV ratings (the principle of subsidiarity), the processing by KPN and XS4ALL did not comply with the necessity requirement as laid down in the Wbp.

With regard to WebTV ratings, the AP has asked SKO to explain the necessity of the collection of personal data about the WebTV viewing behaviour. SKO did not provide additional arguments for this necessity, because she assumed the ratings were aggregated data, which could no longer be linked to individual persons. However the investigation has shown that the data were not anonymous during the two weeks that XS4ALL was able to relate the ratings to the identifiable data about the WebTV viewing behaviour.

Furthermore, it follows from the investigation that there was no factual necessity for XS4ALL to create the WebTV ratings, since SKO had stated that she had not or only rarely used the data.

TV viewing behaviour concerns personal data of a sensitive nature, which reveal the preferences and interests of people. The retention of TV viewing behaviour on an individually identifiable level, for 6 months at KPN, for other purposes than strictly necessary technical purposes, may lead to a *chilling effect*. That is, that people may feel embarrassed to watch certain channels or programs. They may be confronted with their viewing behaviour in a different context. Because of the sensitive nature of the data about the TV viewing behaviour, and because of the lack of guarantees such as adequate information, effective (immediate and irreversible) anonymisation or an opt-out possibility, the interests of KPN and XS4ALL to generate TV ratings did not prevail over the right of data subjects to the protection of their private life (as laid down in Article 8, sub f, of the Wbp).

Because KPN and XS4ALL could not successfully claim a legal ground in Article 8 Wbp for the processing of personal data about the TV viewing behaviour into ratings, they have infringed Article 8 of the Wbp, juncto Article 11.5 Tw and Article 10, first sentence, of the Wbp (retention periods).

Measures taken

On 5 October 2015 KPN has ended the processing of personal data to generate ratings about TV viewing via the Set Top Box. On 1 March 2016 KPN has irreversibly deleted all historical TV ratings from all its systems. This way, KPN has ended all infringements for the processing for this purpose.

XS4ALL has ended the processing of creating WebTV ratings from its technical log file on 3 March 2016. On 25 February 2016, XS4ALL has stopped providing these ratings to SKO. This way, XS4ALL has ended the infringement of Article 8 of the Wbp, juncto Article 11.5 Tw.

2. Video on Demand

KPN stores detailed information about the delayed viewing of TV, previews of programs and Video on Demand on an individually identifiable level in several log files, including the use of options such as the pausing and forwarding of programs. This includes free content and 'zero euro' transactions, such as watching missed broadcasts (catch up TV) or a missed beginning (playback TV) of programs from the public broadcasting organisation. KPN stored a copy of these log files during 6 months.

KPN and XS4ALL process the data about Video on Demand for system operations (purpose 2); for billing by XS4ALL (purpose 3); to create ratings to settle bills with content providers (purpose 4a) and for market research (purpose 4b).

System operations and customer support

KPN and XS4ALL have argued convincingly that it is technically necessary for a small group of system operators of KPN to be able to use personal data about Video on Demand (including the 'free' and 'zero euro' transactions) for a period of 30 days for the daily maintenance of the network, and to be able to deal with complaints from XS4ALL-customers as a tertiary help desk. KPN no longer provides data about viewing behaviour for the purpose of tactical system operations.

Because the data processing is necessary for the delivery of the service (the transmission of the communication), KPN and XS4ALL can appeal to the exception on the consent requirement from Article 11.5 Tw. That however does not give the companies a legal ground for the processing of personal data as laid down in Article 8 of the Wbp. Because of the lack of information (including the information about the purpose of

complaints handling specifically required by Article 11.5 Tw), they could not successfully appeal to a legal ground in Article 8 of the Wbp.

Measures taken

KPN and XS4ALL have published new privacy policies on 24 February, respectively, 20 April 2016. These policies contain an adequate explanation about the personal data they process for the purposes of system operations and customer support. Thereby they have ended the infringement of Article 8 of the Wbp, juncto Article 11.5 Tw.

KPN has reduced the retention period of the log files to 30 days. Thereby, KPN has also ended the infringement of Article 10, first sentence, of the Wbp (retention periods).

Billing

It is necessary for KPN and XS4ALL to process the sales of paid services for billing purposes. Because customers receive a monthly invoice, and they must be enabled to contest the invoice, a retention period of 90 days for this specific purpose is justified. KPN and XS4ALL can therefore successfully appeal to the legal ground in Article 8, sub b or f, of the Wbp for the data processing concerning paid services. On the other hand it is not necessary to register 'zero euro' transactions on the invoice of customers, or to process the viewing of free broadcasts for billing purposes. KPN and XS4ALL can therefore not appeal to the legal grounds of Article 8, sub b or f, of the Wbp with regard to free broadcasts.

At the start of the investigation XS4ALL retained the personal data about the viewing behaviour contained in the invoices for an indeterminate period of time. This was an infringement of Article 10, first sentence, of the Wbp (retention period).

Measures taken

5 October 2015 XS4ALL has reduced the retention period of billing data to 3 months. XS4ALL has also ended the inclusion of free broadcasts in the invoices, such as watching Catch-Up TV from the public broadcasting organisation. Thereby XS4ALL has ended the infringement of Article 8 of the Wbp, juncto Article 11.5 Tw, and Article 10, first sentence of the Wbp.

Ratings

KPN has stated that [confidential]. Because viewers increasingly watch on demand (in stead of linear viewing), and because the economical model is based on advertising, according to KPN recordings on an individual level are necessary to determine the price per viewer. [confidential]. Even though this provides a legitimate interest for KPN and XS4ALL, the data processing did not comply with the requirement of proportionality. KPN and XS4ALL could have also informed the content providers in a different, less infringing way, about the ratings for free Video on Demand.

The processing concerns personal data of a sensitive nature, about individual viewing behaviour to specific broadcasts. Because the data were stored for 6 months, it was possible to detect individual viewing patterns over time, and obtain an intimate picture of a person's preferences and interests. Until October 2015, the retention period of Video on Demand was 6 months, not only for the paid programs, but also including viewing behaviour to free or 'zero euro' programs. Because KPN and XS4ALL included viewing of free and 'zero euro' recordings in these ratings, and because of the sensitive nature of the data, the processing did not comply with the requirement of proportionality.

Because of the lack of guarantees such as anonymisation, adequate information and an opt-out possibility, because the retention period was longer than necessary, and because data about viewing behaviour are data of a sensitive nature, the interests of KPN and XS4ALL to collect data about the viewing behaviour of video on demand and to process these data into ratings did not prevail over the right of data subjects to the protection of their private life. Therefore KPN and XS4ALL infringed Article 8 of the Wbp. By storing the viewing behaviour to free and 'zero euro' broadcasts for a period of 6 months, without necessity, KPN and XS4ALL also infringed Article 10 of the Wbp.

Measures taken

- KPN has reduced the retention period of data about free Video on Demand to 30 days, on 16 October 2015. On 5 April 2016, KPN has also reduced the retention period of 'zero euro' transactions to 30 days.
- In the data warehouse, a distinction is made since March 2016 between information about paid video on demand on the one hand, and free and 'zero euro' transactions on the other. The data warehouse immediately upon receipt removes identifying data from the files with personal data about free Video on Demand. The data about viewing behaviour of free and 'zero euro' transactions are only further processed (transferred to the internal department IDS) after the period of 30 days has transpired (that is, since 10 April 2016) and the original personal data no longer exist. This way, the aggregated data can no longer be linked to personal data about the viewing behaviour.
- The retention period at the internal department IDS has been reduced from 6 to 3 months.

As a result of these technical measures, the legitimate interest of KPN and XS4ALL prevails over the rights of data subjects. KPN en XS4ALL may therefore in principle successfully appeal to the legal ground of Article 8, sub f, of the Wbp. However, KPN still needs to revise the incorrect information in its table in its privacy policy that data about Video on Demand are only processed with the consent of the data subjects for the purposes of 'trend analysis' and marketing purposes.

3. Network video recorder

System operations and customer support

KPN processes personal data about the use by XS4ALL customers of the network video recorder in two different log files, for the purpose of system operations. KPN has argued convincingly that a (reduced) retention period of 30 days is necessary because customers only view their recordings with some delay, and then discover that something has gone wrong.

Because a retention period of 30 days sufficed, KPN and XS4ALL infringed Article 10, first sentence of the Wbp by storing the data for 6 months.

Because the data processing was not transparent, it did not comply with the requirement of proportionality in both legal grounds (Article 8 sub b and f, of the Wbp). Because this processing concerns data of a sensitive nature, and because insufficient guarantees had been provided, the legitimate interest of KPN and XS4ALL to process personal data with regard to the network video recorder did not (yet) prevail over the right of data subjects to the protection of their private life. KPN and XS4ALL therefore could not successfully appeal to the legal ground of Article 8, sub f, of the Wbp.

Measures taken

- KPN has reduced the retention period of the log file with data about the use of Video on Demand (including data about forwarding and pausing) from 60 to 30 days. The retention period of the log file with data about the use of the network video recorder has also been reduced from 90 to 30 days. Through these measures, the infringements of Article 10, first sentence, of the Wbp, have been ended.
- KPN and XS4ALL have published new privacy policies on 24 February, respectively, 20 April 2016. These policies contain an adequate explanation about the personal data they process for these purposes. Thereby they have ended the infringement of Article 8 of the Wbp, juncto Article 11.5 Tw.

Reports about the usage of the network video recorder

The investigation by the AP has shown that KPN used to share aggregated personal data about the amount of recordings via the network video recorder per customer internally (via the internal department IDS) with other divisions and departments within KPN. KPN has stated that data from XS4ALL customers were excluded from these reports. KPN has not provided arguments why this processing was necessary, and has terminated the processing on 7 September 2015. KPN has thereby ended the violation of Article 8 of the Wbp.