# BELGIUM

FRANET Contractor

Ad Hoc Information Report

Data protection: Redress mechanisms and their use

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# Mapping of Redress mechanisms in the area of data protection

| Redress Mechanism Number | Type of possible outcomes of procedure | first Instance | Total Number of times this procedure was initiated in 2009 (please provide source of information in footnote) | Total Number of times this procedure was initiated in 2010 | Total Number of times this procedure was initiated in 2011 |
|---|---|---|---|---|---|
| **1. Data Protection Authority procedure (Mediation process by the Commission for the Protection of Privacy)** | **- access to data granted by the other party after mediation;<br>- verification and possible erasure of personal data after mediation;<br>- refraining from processing the data after mediation;<br>- amicable settlement;<br>- no amicable settlement (opinion of the Commission on the legitimacy of the complaint);<br>- submission by the Privacy Commission's President of the claim to the Court of First Instance[1]<br>- submission by the Commission's President of the case to the Public Prosecutor[2]** | **Commission for the Protection of Privacy** | **391[3]** | **348[4]** | **296[5]** |
| **2. Criminal court procedure[6]** | **- Court order for the defendant to grant the data subject to access to the personal data; prohibition to process** | **Court of First Instance** | **669[7]** | **577** | **No data available** |

[1] Article 32 § 3 of the 1002 Privacy Act.

[2] The Privacy Commission shall inform the Public Prosecutor of any offence it is aware of (Art. 32 § 2 of the 1992 Privacy Act).

[3] Commission for the Protection of Privacy, Annual Report 2009, p.59. It is important to note that this number reflects both complaints (requests for mediation) regarding the right to access as the right to object against the processing of personal data). The Commission has not provided numbers for each individual procedure. The data in the Annual Report do confirm that in 1.559 cases, the outcome of the procedure was the "providing of information", which shows the largest part of requests received were information requests and not complaints (requests for mediation). The Annual Report does show that the Commission received 104 complaints in 2009 about the access to personal files registered in police databases, however this does not reflect the total number of times the procedure for access to personal data was initiated.

[4] Commission for the Protection of Privacy, Annual Report 2010, available at http://www.privacycommission.be/nl/static/pdf/annual-reports/jaarverslag_2010_cbpl_nl.pdf. Again, the numbers provided reflect both requests for mediation regarding access to personal data as well as objection to the processing of personal data.

[5] The numbers were obtained by e-mail from the Commission for the Protection of Privacy and have not yet been published in an annual report. Again, the numbers provided reflect both requests for mediation regarding access to personal data as well as objection to the processing of personal data.

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|---|---|---|---|---|---|
| | **the personal data; order to rectify the personal data; order to erase the personal data;**<br>**- periodic penalty payments;**<br>**- compensation;**<br>**- a fine of one hundred euros to one hundred thousand euros;**<br>**- entire or partial publication of the judgment in one or more newspapers at the expense of the convicted person;**<br>**- seizure of the media containing the personal data or erasure of the data;**<br>**- prohibition to manage any processing of personal data, directly or through an intermediary, for a maximum of two years;**<br>**- a three-month to two-year imprisonment and/or a fine of one hundred euros to one hundred thousand euros;**<br>**- Compensation.** | **(criminal division)** | | | |
| **3. Civil court procedure[8]** | **- Court order for the defendant to grant the data subject to access to the personal data; prohibition to process the personal data; order to rectify the personal data; order to erase the personal data;**<br>**- Court order for the controller to inform the third parties concerned of the rectification or erasure of the data;[9]**<br>**- Compensation;**<br>**- Periodic penalty payments** | **Court of First Instance** | **No data available[10]** | **No data availab le** | **No data available** |

[6] The Commission's President will inform the Public Prosecutor of the offence (see supra, footnote 3). The defendant can also make a complaint to the Public Prosecutor himself.

[7] Written Question nr. 5-853 in the Senate to the Minister of Justice, 27 January 2011. The numbers of judicial procedures are the number of cases the Public Prosecutor received regarding "a violation of privacy".

[8] The Privacy Commission's President can submit the dispute to the Court (see supra, footnote 2). The complainant can also make a complaint to the President of the Court of First Instance of his or her place of residence ("as in preliminary proceedings", see Article 14 § 1 of the 1992 Privacy Act).

[9] If incorrect, incomplete or irrelevant data or data that must not be stored has been disclosed to third parties, or if the disclosure took place after the authorized data retention period expired, the President of the Court can order the controller to inform the third parties concerned of the rectification or erasure of the data. See Article 14 § 6 of the 1992 Privacy Act.

[10] Up until now, the Privacy Commission has never submitted a dispute to the Court of First Instance. There are no data available on the number of times a civil procedure was initiated before the President of the Court of First Instance by the complainant himself. However, from research and use of several legal databases for the purposes of this report, it is clear that there is very little case law by the President of the Court of First Instance on the use of personal data. The Privacy Commission has also confirmed that complainants usually refrain from submitting their case to the a court.

## Detailed information

**1.** DPA Procedure: mediation led by the Commission for the Protection of Privacy

- Range of possible outcomes:

Through mediation procedure led by the Commission for the Protection of Privacy (hereafter referred to as the "Privacy Commission") the following outcomes can be reached: access to data granted by the other party; verification and possible erasure of personal data; no amicable settlement reached, in which case the Commission gives advice on the merits of the complaint[11]; submission by the Privacy Commission's President of any litigation to the Court of First Instance[12]; informing the Public Prosecutor of any criminal offence.

- Legal basis:

Regarding the right to access data (right to information), Articles 10 and 13[13] of the Act of 8 December on the protection of privacy in relation to the processing of personal data (hereafter referred to as the "Privacy Act") provide the legal basis for claims.
Regarding the right to object to the processing of personal data[14]: Article 12§1 of the Privacy Act.
Article 31 of the Privacy Act grants the Privacy Commission competence to receive claims.

- : non-judicial complaint procedure before the Privacy Commission.

- : There is no appeal possible as the Commission's decisions are not binding.

- Burden of proof and available mechanism to lower the burden of proof:

the Privacy Commission's role is limited to mediation, the burden of proof is not formally regulated. The Commission will, however, base its decisions on the Privacy Act, including the burden of proof as regulated in that Act (see infra).

- Requirement of legal representation: No legal representation is required.

- Is there free legal advice/representation available from a public body?

There is primary and secondary "legal assistance" available for those who do not have sufficient financial resources.[15] Primary legal assistance is granted by the Commission for Legal Assistance,[16] set

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[11] The advice may be accompanied by recommendations to the controller. Article 31 of the Privacy Act. The Commission's advice and recommendations are not legally binding instruments.
[12] The Privacy Commission can refer the case to the Court of First Instance (civil procedure), and thereby become a party before the Court. However, only the complainant himself (the data subject) can refer the case to the President of the Court of First Instance ("in summary proceedings", Article 14 of the Privacy Act).
[13] Article 13 provides a right to indirect access to the personal data referred to in Article 3, §4-6. In these cases access is only possible through the Privacy Commission.
[14] Including the right to rectification, erasure or prohibition to use data.
[15] Articles 446bis and 508/1 to 508/23 of the Judicial Code. "Primary legal assistance" means legal assistance in the form of practical information, legal information, an initial legal opinion or referral to a specialized body or organisation. "Secondary legal assistance" means legal assistance to an individual in the form of a detailed legal opinion or legal assistance, whether or not in the context of formal proceedings, and assistance with a court action, including legal representation. More information is available on European Judicial Network in civil and commercial matters, Legal Aid – Belgium, available at http://ec.europa.eu/civiljustice/legal_aid/legal_aid_bel_en.htm#3
[16] Commissies voor Juridische Bijstand.

up in each court district. Secondary legal assistance is provided by the Bureau for Legal Assistance,[17] set up within each bar.

- Is there locus standi for DP authorities, civil society organisations and associations to initiate/be active in procedure?
  Yes, there is locus standi for DP authorities, civil society organizations and associations.[18]

- : Mediation procedure before the Privacy Commission is free of charge.[19]

- Average duration of procedure:
  The average processing time is 43 days and approximately 90% of the cases closed in 2010 were handled within 3 months. See Annex II. Average duration of procedure in 2010.

- Outcomes:

In 2009, the Privacy Commission received 104 requests for mediation regarding indirect access to their personal data stored in a police database. That year, 143 verifications of personal data were completed. In 25% of these 143 verifications, the personal data were completely erased and in another 11% of the cases the data were partially erased. In 12% the registration of the data was correct and the data were kept. In 51% the supposed data subject turned out not to be registered in the database.
In 2009, the Privacy Commission handled 241 cases regarding consumer credits. In 65 cases the personal data were completely erased and in 11 cases the data were corrected.[20]
In 2010, the Privacy Commission was of the opinion in 131 requests for mediation, that there was a violation of the provisions of the Privacy Act. This led to a partial erasure of the personal data in 4 cases; the complete erasure in 37 cases; and a correction in 18 cases. In 70 cases there was an amicable settlement between the parties.[21]
In 2011, the Privacy Commission handled 178 requests for mediation. The personal data were completely erased in 41 cases; the data were partially erased in 5 cases; the personal data were corrected in 4 cases; and in 71 cases the parties came to an amicable agreement.[22]

**3. Civil Court procedure**

- Range of possible outcomes:

The Court can order the data controller to (i) not process the personal data (prohibition); (ii) to correct the personal data; (iii) to erase the personal data (iv) to award the complainant financial compensation.[23] In addition, the Court can impose periodic penalty payments.[24] In certain cases, the

[17] Bureau voor Juridische Bijstand.
[18] The President of the Privacy Commission, for example, may submit any dispute relating to the application of this Act and its corresponding measures to the Court of First Instance. Article 32, §3 of the Privacy Act.
[19] See Article 12 §1 of the 1Privacy Act
[20] In the other cases the claim was unfounded or the Commission was not competent to handle the claim. Commission for the Protection of Privacy, Annual Report 2009, p. 76.
[21] Commission for the Protection of Privacy, Annual Report 2010, p. 75.
[22] Source: e-mail from the Privacy Commission of 20 May 2012.
[23] It should be noted that there is discussion on the competence of the Court of First Instance to award financial compensation. The Court of First Instance of Brussels (Rb. Brussel 22 maart 1994, J.T. 1994, 841) and Nijvel, for example (Rb. Nijvel 15 november 1994, J.T. 1995, 284) have awarded financial compensation ("damages") based on article 14 of the Privacy Act. In a different case, however (Rb. Brussel 12 april 1995, J.T. 1996, 238, nr. 78, foot note 377), the Brussels Court of First Instance rejected the request for financial compensation.
[24] As noted before, there is discussion on whether the President of the Court of First Instance has the competence to award financial compensation.

President of the Court can order the controller to inform the third parties concerned of the rectification or erasure of the data.[25]

- Legal basis: Article 587, 4° Judicial Code and Article 14 of the Privacy Act.

- Type of procedure: A judicial procedure (civil law) as in summary proceedings[26]

- Possibilities of appeal: There are two levels of appeal on the decision of the Court of First Instance: (1) the Court of Appeal; (2) the Court of Cassation (Supreme Court).

- The complainant will have to prove (i) his or her identity[27], (ii) the violation of the provisions of Article 10 or 12 of the Privacy Act, (iii) in case of a claim of rectification or erasure of incorrect personal data, that the personal data are incorrect, (iv) in case of a claim for the prohibition to use the data: substantial and legitimate reasons for claiming that prohibition, related to his particular situation (v) the damages he or she incurred from violation of the Privacy Act.[28]

The complainant will also have to demonstrate that he or she has already made a request to the data controller to exercise his or her rights, and that the request was ignored or without a response for the prescribed period of time.[29]

- Available mechanism to lower the burden of proof:

The data controller[30] may be held liable for any damage as a result of an action in violation of the provisions of the Privacy Act. He may be exempted from liability if he proves that the fact which caused the damage cannot be ascribed to him.[31]

- Requirement of legal representation:

In Court, parties may plead their case in person or they may be represented by an attorney. However, the judge may restrict the right of a party to conduct his own defense if he finds that the excitement or inexperience of a party will prevent them from presenting their case with proper decorum or the necessary clarity.[32]

- Is there free legal advice/representation available? Yes (see supra under DPA procedure).

- Is there locus standi for DP authorities, civil society organisations and associations to initiate/be active in procedure? Yes there is (see supra under DPA procedure).

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[25] If incorrect, incomplete or irrelevant data or data that must not be stored has been disclosed to third parties, or if the disclosure took place after the authorized data retention period expired. Article 14 § 6 of the Privacy Act.
[26] When the case is submitted to the Court by the complainant, he or she can submit it directly to the President of the Court, in which case the procedure will be "in summary proceedings", while the President decides on the merits of the case.
[27] See Article 10 of the Privacy Act. To exercise the right of access, the data subject must submit a request to the controller and include proof of his identity. The controller has to reply at the latest 45 days after receipt of the request. If not, this is when the person has the option of filing a complaint with the Privacy Commission.
[28] More information on the different means of proof is available on the website of the European Judicial Network in civil and commercial matters, http://ec.europa.eu/civiljustice/evidence/evidence_bel_en.htm#1.a%29.
[29] Article 14 § 5 of the Privacy Act.
[30] "Controller" means any natural or legal person, un-associated organization or public authority which alone or jointly with others determines the purposes and means of the processing of personal data. (Article 1, § 4 of the 1992 Privacy Act).
[31] Article 15bis of the 1992 Privacy Act.
[32] Article758 of the Judicial Code (10 October 1967).

- Cost of procedure:

There are no data available on the average cost of a judicial procedure. The cost of the procedure before the court of first instance includes: costs of the bailiff,[33] expert reports, court fees (including enrolment rights), the fees and expenses of the lawyers. The losing party has to reimburse the winning party for legal costs.[34] Since 1 January 2008, a winning party in judicial procedure is entitled to (part of) the fees and costs of his lawyer to be reimbursed by the losing party.[35] For the amounts of the reimbursement, see Annex I. Legal costs. Articles 664 to 699 of the Judicial Code contain provisions on financial support to cover legal costs ("legal aid").[36]

- Average duration of procedure:

There are no specific data available on the average duration of the judicial procedure. Article 1035 and 1036 of the Judicial Code apply to cases "in summary proceedings", which provide a more speedy procedure: the defendant has to answer the writ served on him within two days,[37] which can be reduced by the president of the court in particularly urgent case.[38]

- Outcomes :

On 5 March 2009, the Brussels Labour Court of Appeal ordered a health insurance company to grant the defendant access to his complete medical file and all his registered personal data within 15 days after the Court's ruling.[39] The Court imposed periodic penalty payments of 50 Euro per day as well as compensation for the data subject of 100 Euro and moral damages (250 Euro) for the violation of the person's right to access his data as regulated by the Privacy Act and the Patients' Rights Act.[40]

**4. Criminal Court procedure**

- Range of possible outcomes:

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[33] The fees of bailiffs in civil and commercial proceedings are regulated by a Royal Decree of 30 November 1976. More information and rates are available on the website of the National Chamber of Judicial Officers of Belgium

[34] Article 1017 Judicial Code.

[35] This is called 'recoverability of fees'. This reimbursement consists of a flat-rate amount; the judge will determine the exact amount. The amount, both the basic amount as the minimum and maximum amount of compensation for legal costs are determined in the Royal Decree of 26 October 2007 on fixing the rates of compensation for legal costs referred to in Article 1022 of the Judicial Code and establishing the date of entry into force of Articles 1 to 13 of the Act of 21 April 2007 concerning the recoverability of the fees and the costs associated with the assistance of an attorney.

[36] Legal aid consists consists of full or part exemption from stamp duties and registration charges and other costs of proceedings and is available to litigants who do not have adequate income to cover the cost of judicial or extra judicial proceedings. European Judicial Network in civil and commercial matters, Legal Aid – Belgium, available at http://ec.europa.eu/civiljustice/legal_aid/legal_aid_bel_en.htm#3.

[37] Art. 1035 § 2 of the Judicial Code.

[38] Art. 1036 of the Judicial Code. In 2007 the Judicial Code was amended to simplify and accelerate procedures before the courts (Act of 26 April 2007 amending the Judicial Code in order to reduce the judicial backlog). On 31 May 2011, however, the Minister of Justice stated in the Commission of Justice meeting, that the Permanent Bureau of Statistics and Workload Measurement did not have data that allowed for an assessment of the impact of the new legislation on the judicial backlog.
www.dekamer.be/doc/CCRI/html/53/ic247x.html. Article 584(1) of the Judicial Code also provides that, in cases of absolute necessity, a plaintiff can seek interlocutory measures from the President of the Court of First instance on an ex parte basis.

[39] With the exception of the personal notes of the expert and the data relating to third parties.

[40] Act of 22 August 2002 on Patients' Rights. Labourt Court of Appeal, Brussels, nr. 50.697, *Onderlinge ziekenkas van de maatschappij voor onderlinge bijstand v. K.E.*, 5 March 2009. Extensive research and use of various legal databases for the purposes of this report have shown that there is very little case law on the use of personal data as regulated by the Privacy Act.

Court order for the defendant to grant the data subject access to the personal data; periodic penalty payments; a fine of one hundred euros to one hundred thousand euros[41]; entire or partial publication of the judgment in one or more newspapers at the expense of the convicted person[42]; seizure of the media containing the personal data or erasure of the data; prohibition to manage any processing of personal data, directly or through an intermediary, for a maximum of two years; a three-month to two-year imprisonment and/or a fine of one hundred euros to one hundred thousand euros (recidivism or violation of prohibition to manage personal data); financial compensation (if the data subject filed a civil claim).

- Legal basis: Article 32 § 2 of the Privacy Act and Article 179 of the 1808 Code of Criminal Procedure. [43]

- Type of procedure: judicial, criminal procedure.

- Burden of proof: in case the Public Prosecutor summoned the data controller, it will be the former that will have to prove the violation of the provisions of the Privacy Act (see supra). The data subject can also become a party to the dispute before the court by filing a civil claim ("burgerlijke partijstelling"), in which case he or she will have to provide the damages he or she suffered resulting from the violation of the Privacy Act. The data subject can also initiate the criminal procedure himself, in which case he or she will have to carry the burden of proof alone.

- Cost of procedure: In case of acquittal, the civil party (the data subject) can only be ordered to compensate the legal costs of the defendant, if he or she initiated the criminal procedure.[44] However, the civil party cannot be ordered to pay the legal costs if the public prosecutor initiated the procedure.

- Average duration of procedure: No specific data available.

- For requirement of legal representation, available mechanism to lower the burden of proof, locus standi, free legal advice, and possibilities of appeal please see the information on civil law procedures, as the same applies here.

- Outcomes: there are no representative data available on the outcome of the criminal procedures based on a violation of the 1992 Privacy Act, as the number of criminal cases based on such a violation in the most important Belgian legal databases (Jura, Jurisquare, Juridat) for the last three years are practically non-existing. Whether this means that few cases exist or that few cases are included in the database is hard to determine.[45]

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[41] Article 39, 5°-6° of the Privacy Act.
[42] Article 40 of the Privacy Act.
[43] The first Article states that states that the Commission shall inform the Public Prosecutor of any offence it is aware of. The latter determines the competence of the Criminal Court (Criminal Division of the Court of First Instance).
[44] To ensure that the civil party will be able to pay the legal costs, he or she has to pay a deposit before the start of the Court procedure. The costs are determined in the Court's Judgment. See Articles 162 and 194 of the Criminal Procedure Code.
[45] As mentioned before, the number provided in Annex I reflects the number of cases that the Public Prosecutor received. This is, however, no guarantee that in all of these cases a judicial procedure was initiated as the Public Prosecutor may decide to dismiss the case. The complainant then still has the possibility to initiate the procedure himself, but there are no data available either on the number of such cases.

Annex 1. Legal costs

| Legal claim in monetary terms | **Basic amount** | **Minimum amount** | **Maximum amount** |
|---|---|---|---|
| Up to 250,00 | 150 | 75 | 300 |
| From 250,01 up to 750,00 | 200 | 125 | 500 |
| From 750,01 up to 2.500,00 | 400 | 200 | 1.000 |
| From 2.500,01 up to 5.000,00 | 650 | 375 | 1.500 |
| From 5.000,01 up to t 10.000,00 | 900 | 500 | 2.000 |
| From 10.000,01 up to 20.000,00 | 1.100 | 625 | 2.500 |
| From 20.000,01 up to 40.000,00 | 2.000 | 1.000 | 4.000 |
| From 40.000,01 up to 60.000,00 | 2.500 | 1.000 | 5.000 |
| From 60.000,01 up to 100.000,00 | 3.000 | 1.000 | 6.000 |
| From 100.000,01 up to 250.000,00 | 5.000 | 1.000 | 10.000 |
| From 250.000,01 up to 500.000,00 | 7.000 | 1.000 | 14.000 |
| From 500.000,01 up to 1.000.000, | 10.000 | 1.000 | 20.000 |
| More than 1.000.000,01 | 15.000 | 1.000 | 30.000 |

Legal costs consist of (Article 1018 Judicial Code):

- the various registry and registration fees. Registry fees consist of fees for register entry, drafting and copy execution and are set out in the Code on Registration, Mortgage and Registry Fees, under Article 268 et seq.;
- the cost of and emoluments and salaries for judicial documents;
- the cost of executing a copy of the judgment;
- the costs of all measures of investigation, in particular witness and expert allowances. With regard to witnesses, a Royal Decree of 27 July 1972 determines the amounts of the allowance and of reimbursements.
- travel and subsistence costs for members of the national legal service, registrars and parties when their journey has been ordered by the judge, and document costs, when these have been produced solely for the proceedings;
- the case preparation allowance referred to under Article 1022;
- the fees, emoluments and costs of a mediator appointed in conformity with Article 1734.

Annex 2. Average duration of procedure in 2010[46]

| **Duration of procedure (days)** | **Number of cases closed[47]** | **Percentage of cases closed** |
|---|---|---|
| ≤ 30 | 1.249 | 11.60 |
| 31-60 | 574 | 12.58 |
| 61-90 | 160 | 9.64 |
| 91-180 | 184 | 24.18 |
| 181-270 | 37 | 18.95 |
| 271-365 | 16 | 20.42 |
| > 365 | 0 | 2.61 |
| **Total** | **2.220** | **100** |

[46] Commission for the Protection of Privacy, Annual Report 2010, p.74.
[47] The cases include not only complaints, but also information requests and cases of inspection by the Privacy Commission.