The Rectification of Opinions in Dutch Data Protection Law: A Brief Historical Inquiry

by **Stephanie Rossello** *

Abstract: On the basis of EU case-law, guidelines and scholarship, it is unclear whether opinions can be rectified under Article 16 GDPR and, if yes, what rectifying opinions means in practice. Yet, such ambiguity cannot be explained on the basis of the text of Article 16 GDPR, which allows the rectification of any type of personal data. This article inquires into the historical origins of the facts versus opinions dichotomy for the purpose of the right to rectification in Dutch data protection legislation. It examines how and why this distinction emerged during the preparation of the first Dutch data protection law as well as how it influenced the interpretation and application of the right over time by Dutch courts and the Dutch DPA. This study can help explain what distinguishes opinions from so-called facts for the purposes of rectification, why such differentiation exists and how it can affect the interpretation and application of the right. The analysis leads to the conclusion that, at the Dutch level, the facts versus opinions dichotomy is a by-product of two fundamental uncertainties. The first one concerns the notion of accuracy and the standard of proof required to prove an inaccuracy. The second one relates, more generally, to the relation between data protection law on the one hand, and other (often national) legal regimes, such as administrative law or tort law, on the other, with which data protection law will often intersect.

Keywords: Accuracy, Completeness, Facts, Opinions, Rectification

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A. Introduction

1 Consider the following fictitious example. A university student fails an exam in a course named "General Data Protection Regulation (GDPR)".[1] After some initial disappointment, she realizes that the score she received does not accurately reflect her knowledge of the subject. The student, hence, decides to dispute the score before the university's examination board, following the procedure set out by the university regulations. At the same time, she requests the university to correct her grade on the basis of Article 16 GDPR. This provision requires the controller to rectify inaccurate data concerning the data subject and to complete personal data that is incomplete for the purpose of the processing. Based on existing case-law of the Court of Justice of the European Union (CJEU), guidance of European data protection supervisors and international data protection scholarship on the right to rectification of personal data, it is unclear whether the student's rectification request is likely to be granted and, if yes, how rectification should practically take place. The main reason for this is that the request concerns the rectification of personal data in the form of a third-party evaluation (or so-called 'opinion').

2 Whereas rectifying inaccurate 'facts' by substituting them with accurate ones is often uncontroversial, carrying out the same process for opinions is far more contentious. What lies at the core of the discussion is the (un)verifiability of the accuracy of personal data in the form of opinions. In essence, the accuracy

* PhD candidate Open Universiteit and KU Leuven.

1 EU General Data Protection Regulation (GDPR): Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1.

of opinions would often be more difficult to verify and prove, because of the lack of an unambiguous and/or undisputed benchmark against which to assess these data.[2] By contrast, the accuracy of facts (e.g. someone's height) can be more easily verified because there is one clear objective standard against which to evaluate them.[3]

3 Crucially, the distinction between facts and opinions is absent from the wording of Article 16 GDPR and its predecessor, Article 12 (b) of the Data Protection Directive 95/46/EC (DPD).[4] Data protection scholarship on the right to rectification of personal data does not address the origins and rationale of this dichotomy.[5] In this article, I thus explore the roots and justification of this differentiation, using The Netherlands as a case-study.[6] I chose The Netherlands because Dutch courts have, and often still do, hold that the right to correction of personal data "is not intended to correct or erase personal data that represent impressions, opinions or conclusions with whom the data subject does not agree".[7] Against this backdrop, I aim to answer the following research questions. First, why are, in the Dutch data protection legal framework, opinions often said not to be suitable for being corrected or erased through the right to rectification of Article 16 GDPR or its predecessors under Dutch data protection law? Second, what does this imply, in practice, for the rectification of opinions?

4 I answer these questions by looking at the genealogy of the right to rectification in Dutch data protection law, practice (advises, guidance, decisions) of the Dutch Data Protection Authority (DPA) and relevant case-law. Specifically, the paper is based on a review of the main documents used to prepare Dutch data protection laws as well as the laws themselves, namely: the *Wet persoonsregistraties* of 1988 (Wpr),[8] the *Wet bescherming persoonsgegevens* of 2000 (Wbp)[9] and the law implementing the GDPR, the *Uitvoeringswet Algemene verordening gegevensbescherming* of 2018 (UAVG).[10] In parallel, I have conducted a review of a selection of published guidelines, advises, reports and decisions of the Dutch DPA – from its early establishment in the form of the *Registratiekamer*, until today[11] – and published case-law on Article 16 GDPR and its predecessors under Dutch data protection law.[12] Since the review is limited to only published documents and case-law, it may not be entirely representative of these authorities' view on the topic. Moreover, I have not reviewed case-law on the right to rectification in sectorial data protection laws (e.g. laws dealing with the processing of personal data by law enforcement authorities). Additionally, when useful to interpret the preparatory legislative works, laws and decisions and case-law mentioned above, I have consulted academic literature on Dutch data protection law in general, and the principle of accuracy and the right to rectification,

2 Sandra Wachter and Brent Mittelstadt, 'A Right to Reasonable Inferences: Re-Thinking Data Protection Law in the Age of Big Data and AI' (2019) 2 Colum. Bus. L. Rev 494; Diana Dimitrova, 'The Rise of the Personal Data Quality Principle. Is It Legal and Does It Have an Impact on the Right to Rectification?' (2021) 12 EJLT <https://www.ejlt.org/index.php/ejlt/article/view/768/1042> accessed 15 November 2021; Dara Hallinan and Frederik Zuiderveen Borgesius, 'Opinions Can Be Incorrect (in Our Opinion)! On Data Protection Law's Accuracy Principle' (2020) 10 IDPL 1.

3 Wachter and Mittelstadt (n 3) 548; Hallinan and Zuiderveen Borgesius (n 3) 8.

4 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995 L 281/31.

5 Wachter and Mittelstadt (n 3); Bart Custers and Helena Vrabec, 'Tell Me Something New: Data Subject Rights Applied to Inferred Data and Profiles' (2024) 52 CLSR 105956; Dimitrova (n 3); Andreas Nicolas Häuselmann, *EU Privacy and Data Protection Law Applied to AI: Unveiling the Legal Problems for Individuals* (2024, Doctoral dissertation, Universiteit Leiden) <https://scholarlypublications.universiteitleiden.nl/handle/1887/3747996> accessed 15 July 2024.

6 See also: Stephanie Rossello, 'De (on)juistheid en rectificatiemodaliteiten van zachte persoonsgegevens in het Nederlands recht', forthcoming in: (2025) 2 P&I, 72.

7 See paragraph 4.1 below.

8 Wet van 28 december 1988 houdende regels ter bescherming van de persoonlijke levenssfeer in verband met persoonsregistraties (Wet persoonsregistraties) (*Stb* 1988, 665).

9 Wet van 6 juli 2000, houdende regels inzake de bescherming van persoonsgegevens (Wet bescherming persoonsgegevens) (*Stb* 2000, 302).

10 Wet van 16 mei 2018 houdende regels ter uitvoering van Verordening (EU) 2016/679 van het Europees Parlement en de Raad van 27 april 2016 betreffende de bescherming van natuurlijke personen in verband met de verwerking van persoonsgegevens en betreffende het vrije verkeer van die gegevens en tot intrekking van Richtlijn 95/46/EG (algemene verordening gegevensbescherming) (PbEU 2016, L 119) (Uitvoeringswet Algemene verordening gegevensbescherming) (*Stb* 2018, 144).

11 The published decisions, reports, advises and guidelines of the Dutch DPA and its predecessors were found by means of a search on the Dutch DPA's online archives and scholarly contributions that published part of the decisions. The keywords used were the Dutch translations of "correction" and "rectification". The research includes decisions published before 3 July 2024.

12 The case-law was found mainly by means of a search on the online repository of Dutch case-law (rechtspraak.nl). The keywords used were Dutch translations of "correction personal data" in combination with "GDPR" and "rectification personal data" in combination with "article 16 GDPR". In total, approximately 250 cases were reviewed. The research includes cases published before 3 July 2024.

in particular. Finally, it should be stressed that the research concerns only the right to rectification under Article 16 GDPR and its predecessors under Dutch data protection law. Closely related rights, such as the right to erasure of Article 17 GDPR or the right to restriction of Article 18 GDPR, although undoubtedly relevant for the discussion concerning the distinction between the accuracy of facts and opinions, are outside the scope of this study.

5 Before delving into the substance of the paper, I shall offer a final clarification. In this article I use the terms 'facts' and 'opinions' because these are terms that are often used in relevant data protection sources to delineate the different interpretation and application of the notion of accuracy and rectification to two different types of personal data. Other terms that, in the reviewed sources themselves, are used as synonyms of facts are, for instance, 'objective personal data' or 'hard data'. Conversely, opinions are often referred to as or assimilated with 'subjective personal data', 'soft data', 'assessment or evaluation', 'conclusion', 'impression', 'inference' or 'research result'. The work presented in this article consists of looking at how the right to rectification has been applied to personal data that – in the reviewed sources themselves – are defined as 'opinions' (or one of the aforementioned terms), compared to personal data that, in the reviewed sources themselves, are referred to as 'facts' (or one of the aforementioned concepts). At this point, I do not intend to set forth my own definition of facts or opinions for the purposes of the right to rectification. In this article, I chose the facts versus opinions terminology simply because it is the most straightforward one. Yet, I recognize that, in every-day language, the term opinion is not necessarily a synonym of, for instance, 'inference' or 'research result'. I also note that – for the purposes of this article – I do not differentiate between human opinions on the one hand, and algorithmic opinions on the other. However, I do observe that the majority of the sources reviewed at a national level appear – from the facts of the case as described in the document – to refer to human opinions.

6 In Section B, I briefly present how existing CJEU case-law, guidance of EU data protection bodies and international data protection scholarship has approached the rectification of facts and opinions. Subsequently, I expand on the original meaning and the purpose of the right to rectification as interpreted by the Dutch legislator (Section C). Next, I detail how the right has been interpreted and further clarified by the Dutch DPA and courts (Section D).

B. The Rectification of Opinions in EU Data Protection Law

7 Until now, the only case where the CJEU has explicitly (albeit only transversally) dealt with the rectification of (third-party) opinions is the *Nowak* case.[13] The main question raised in that case was whether Mr. Nowak's examination script qualified as his personal data. When dealing with this question, both the Advocate General Kokott (AG) and the Court briefly discussed whether Mr. Nowak's exam answers, the evaluator's comments on the script and the exam questions could be rectified and, if yes, under which circumstances. Both the AG and the Court deemed that the accuracy of personal data under Article 6 (1) (d) Data Protection Directive 95/46/EC (DPD) had to be judged by reference to the purpose of the collection of the data.[14] Since the purpose of collecting exam answers was to assess a candidate's level of knowledge, answers showing gaps in that knowledge did not qualify as inaccurate under Article 6 (1) (d) DPD.[15] Consequently, these answers could not be rectified a posteriori. By contrast, errors such as the attribution of the data subject's answers to another exam candidate or the loss of a part of the answers (i.e. what can be called material errors) would give rise to a right to correction.[16] The AG and the Court came to the same conclusion in relation to the evaluator's comments. Specifically, according to the Court, the comments could be rectified when they would not accurately reflect the examiner's opinion.[17] However, when the comments were not "objectively justified",[18] the AG added, they would not be liable to being corrected under data protection law, since "any objections to the comments had to be dealt with as part of a challenge of the evaluation of the script".[19] Finally, the Court considered that the exam questions were not capable of qualifying as personal data.[20] Neither the Court, nor the AG explicitly distinguished facts, on the one hand, from opinions on the other. Nevertheless, their position on the rectifiability of

13 *Peter Nowak v Data Protection Commissioner* [2017] Court of Justice of the European Union, ECLI:EU:C:2017:994.

14 *Opinion AG Kokott Peter Nowak v Data Protection Commissioner* [2017] ECJ ECLI:EU:C:2017 :582 at para 35; *Peter Nowak v. Data Protection Commissioner* (n 14) at para 53.

15 *Opinion AG Kokott. Peter Nowak v. Data Protection Commissioner* (n 15) at para 35; *Peter Nowak v. Data Protection Commissioner* (n 14) at para 53.

16 *Opinion AG Kokott. Peter Nowak v. Data Protection Commissioner* (n 15) at para 36; *Peter Nowak v. Data Protection Commissioner* (n 14) at para 54.

17 *Peter Nowak v. Data Protection Commissioner* (n 14) at para 54.

18 *Opinion AG Kokott. Peter Nowak v. Data Protection Commissioner* (n 15) at para 54.

19 ibid at para 55.

20 *Peter Nowak v. Data Protection Commissioner* (n 14) at para 58.

the three types of personal data mentioned above is indicative of their standpoint on the question whether opinions (i.e. the evaluator's comments) can be rectified by the data subject. As similarly argued by Wachter and Mittelstadt (see below) and other authors[21], the CJEU's ruling in *Nowak* seems to suggest that opinions can be corrected under data protection law only insofar as the correction concerns a material error. Errors in reasoning, affecting the content of the opinion, by contrast, cannot be rectified. In the earlier *YS and others* case, the Court reached a somewhat similar conclusion.[22] In that case, the CJEU held that the Dutch Immigration Authority's legal analysis, which had been used to support that authority's decision on whether to grant the data subjects a residence permit, did not qualify as personal data under Article 2 (a) DPD.[23] The CJEU explained this by referring to (among others) the objective of the DPD, specifically the rights that the DPD conferred to data subjects.[24] Verification of the accuracy of (the content of a) legal analysis, the latter's rectification (and, consequently, access to it) would be matters which do not, according to the Court, fall within the scope of the right to privacy.[25]

8 The European Data Protection Board (EDPB)'s predecessor, i.e. the Article 29 Working Party (WP29), and the European Data Protection Supervisor (EDPS) have also alluded to a difference between facts and opinions in relation to the right to rectification of personal data. Specifically, in the context of profiling in the sense of Article 4 (4) GDPR, the WP29 appears to suggest that a medical profile that puts an individual into a category that is more likely to get a heart disease would not necessarily be inaccurate under article 16 GDPR, even if the individual never gets such disease. That profile, the WP29 explains, "may still be factually correct as a matter of statistics".[26] According to the WP29, the medical profile could, however, be complemented – taking into account the purpose of the processing – with a supplementary statement based on a more advanced medical examination.[27] Additionally, in its 2014 Guidelines on the rights of individuals with respect to the processing of their personal data under Regulation 45/2001 on the protection of personal data by European Union institutions and bodies[28], the EDPS stated that "the right to rectification applies only to objective and factual data, not to subjective statements (which, by definition, cannot be factually wrong)".[29] Opinions (such as appreciations done in the context of an HR recruitment procedure,[30] HR performance assessments, [31] or medical opinions[32]), the EPDS added, can be rectified to the extent that the correction concerns the fact that the appreciation had been made, not the content of the assessment. According to the EDPS, opinions can, however, be complemented with the viewpoint of the data subject, to ensure their completeness.[33]

9 In academic literature, Wachter and Mittelstadt have interpreted the CJEU's ruling in *Nowak* as meaning that the right to rectification does not apply to the content of what they call subjective inferences, such as the evaluator's exam comments.[34] On the basis of *Nowak* and *YS and others* cases, they conclude that the CJEU does not conceive of guaranteeing the accuracy of inferences (and decisions based on these inferences) as falling within the remit of data protection law.[35] Contrary to Wachter and Mittelstadt, the scholars Ausloos, Mahieu and Veale, have argued that the right to rectification of Article 16 GDPR is also applicable to opinions and inferences.[36] If the controller disagrees with the rectification proposed by the data subject, they submit, the right to rectification should be conceived as a right to add the data subject's perspective on the (in)accuracy, without repealing the original opinion.[37] The scholars Häuselmann and Custers have also contended, on the basis of a teleological interpretation of article 16 GDPR, that the right to rectification should apply to any type of personal data, including personal data in the form of opinions, predictions or emotion data.[38] Similarly, Hallinan and Zuiderveen-Borgesius state that also opinions can be (in)accurate under data protection law. [39] If the interpretative framework

21 Custers and Vrabec (n 6) 9–10.

22 *YS v Minister voor Immigratie, Integratie en Asiel, and Minister voor Immigratie, Integratie en Asiel v Ms* [2014] Court of Justice of the European Union ECLI:EU:C:2014:2081.

23 ibid at para 40.

24 ibid at para 41 and 44.

25 ibid at para 45 and 46.

26 Article 29 Working Party, 'Guidelines on Automated Individual Decision-Making and Profiling for the Purposes of Regulation 2016/679' (wp251rev.01 22 August 2018) 18.

27 ibid.

28 Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, *OJ L 8, 12.1.2001.*

29 EDPS, 'Guidelines on the Rights of Individuals with Regard to the Processing of Personal Data' (2014) 18–19.

30 ibid 19.

31 ibid.

32 ibid 20.

33 ibid 19.

34 Wachter and Mittelstadt (n 3) 534.

35 ibid 550.

36 Jef Ausloos, René Mahieu and Michael Veale, 'Getting Data Subject Rights Right' (2019) 10 JIPITEC 283, 302.

37 ibid.

38 Andreas Häuselmann and Bart Custers, 'The Right to Rectification and Inferred Personal Data' (2024) 15 EJLT < https://ejlt.org/index.php/ejlt/article/view/1004/1097> accessed 2 February 2025.

39 Hallinan and Zuiderveen Borgesius (n 3) 6.

used to produce a certain opinion is not "adequately precise" [40] for a given purpose (the scholars provide the example of the use of smell to diagnose broken ribs), then the personal data contained in the opinion will be inaccurate under the GDPR. What will be adequately precise, the authors argue, will be informed by sector-specific standards (e.g. medical standards) and, where these do not exist, by the specific context of the case.[41] Finally, on the basis of the line of argumentation developed by Hallinan and Zuiderveen-Borgesius, the scholar Dimitrova advocates for a broad interpretation of the right to rectification that encompasses, next to the correction of the input data, also the modification of the interpretative framework that has generated the inaccurate opinion, and the opinion itself.[42]

10 As will be seen below (Sections C and D), elements of the debate concerning the different application and/or interpretation of the right to rectification to facts compared to opinions at the EU level also emerge in the context of discussions on the right to rectification under Dutch data protection law.

C. The Rectification of Opinions in Dutch Data Protection Law

I. Three Generations of Data Protection Laws Containing a Right to Correction

11 An early version of the right to rectification of personal data entered the Dutch legal framework in 1983 through Article 10.3 of the Dutch Constitution. This provision reads as follows: "The law provides rules concerning individuals' requests for access and correction ("*verbetering*") of data about them as well as the use made of such data".[43] Five years later, to implement this constitutional provision, Article 31.1 of the Wpr was adopted. This provision reads as follows: "the person who has been informed about the fact that personal data are being registered [about them] according to Article 29 [of the said law], can request in writing that the holder of such data corrects ("*verbeteren*") them, completes them or erases them, if the data are factually incorrect, incomplete for the purposes of the registration, irrelevant or registered in violation of a legal obligation. [...]".[44]

12 The right to correction as enshrined in Article 36.1 Wbp, which replaced the Wpr and transposed the DPD, underwent little changes compared to its predecessor. Specifically, it provided that "the person who has been informed about the fact that personal data are being processed [about them] according to Article 35 [of the said law], can request that the controller corrects such data ("*verbeteren*"), completes them, erases them or blocks them, if the data are factually incorrect, incomplete or irrelevant for the purposes of the processing or processed in violation of a legal obligation. [...]".[45]

13 Finally, on 25 May 2018, the GDPR became applicable in The Netherlands, with Article 16 GDPR providing the following: "the data subject shall have the right to obtain from the controller without undue delay the rectification of inaccurate personal data concerning him or her. Taking into account the purposes of the processing, the data subject shall have the right to have incomplete personal data completed, including by means of providing a supplementary statement." The GDPR was, moreover, implemented through the UAVG, which does not contain specific provisions on the right to rectification.

II. Meaning and Purpose of the Right to Correction as Originally Conceived by the Dutch legislator

1. The Right to Correction, the Right to Correct Factual Inaccuracies, and the Right to Complete Incomplete Personal Data

14 It appears from the text of the abovementioned provisions and preparatory works of the Wpr and Wbp that the right to correction could carry two distinct meanings. On the one hand, it was an umbrella term used to denote what could be defined as, in fact, distinct data subject rights, namely:

- the right to correct factually inaccurate data;
- the right to complete personal data that were incomplete for the purpose of the processing;

40 Hallinan and Zuiderveen Borgesius (n 3) 9.

41 Hallinan and Zuiderveen Borgesius (n 3) 9.

42 Dimitrova (n 3).

43 Artikel 1.10 of the Dutch Constitution read as follows: "1. Everyone has, except when the law provides otherwise, the right to respect of his personal sphere. 2. The law lays down rules concerning the protection of the personal sphere with respect to the determination and dissemination of personal data. 3. The law lays down rules concerning individuals' requests for access of the data concerning them and the use made of these data, as well as correction of these data". Article 1.10 Gw.

44 Art. 31.1 Wpr (n 9).

45 Art. 36.1 Wbp (n 10).

- the right to erase data that were irrelevant for the purpose of the processing; and
- the right to erase (and under the Wbp block) data that had been registered/processed in contravention of a legal obligation.[46]

15 The right to correction could also, however, carry a more limited meaning, referring, as mentioned above, to the correction of data due to their factual inaccuracy.[47] In the following paragraphs, I will refer to the former as the right to correction and the latter as the right to correct factually inaccurate personal data.

16 It should be clarified that – by the text of the three provisions – the right to correction under Articles 31.1 Wpr and 36.1 Wbp cannot simply be equated with the right to rectification under Article 16 GDPR. Specifically, the wording of the provisions suggests that the right to correction under Articles 31.1 Wpr and 36.1 Wbp is i) either broader than the right to rectification as presented in the text of Article 16 GDPR (encompassing, for instance, also the right to erase irrelevant personal data) or ii) more limited (encompassing only the right to correct factually incorrect data, but not the right to complete them). The text of Articles 31.1 Wpr and 36.1 Wbp on the one hand, and Article 16 GDPR on the other, indicates that these provisions have two common denominators, namely: the right to correct inaccurate personal data and the right to complete incomplete personal data for the purpose of the registration/processing. Below, I will, hence, first clarify the meaning of the right to correction (Section C.II.2.). Subsequently, I will explain the meaning of the right to correct factually inaccurate data (Section C.II.3) and complete incomplete data (Section C.II.4) on the basis of the preparatory works of the Wpr and Wbp.

2. The Right to Correction as a (Merely) Indirect Enabler of Qualitative Decisions Concerning the Individual

17 From its inception, the right to correction was linked to the impact that inaccurate data could have on an individual's "professional career and reputation, without that individual being aware of it".[48] Specifically, it had to be seen in light of the purpose served by the broader right to personal data protection, which it formed a part of. The right to personal data protection was seen as a bundle of entitlements individuals had with respect to the image generated by their personal data.[49] In particular, such image should not be the result of a collection of personal data undertaken for illegal purposes and should not be "misleading"[50], or, in other words, generated on the basis of data that were "inaccurate, irrelevant and/or incomplete"[51]. The creation of a misleading image about a person was seen as particularly problematic when the data could potentially be used for important actions (including decisions) concerning an individual. This appears from the fact that the first draft data protection law proposed by the State Committee Koopmans[52] foresaw an exception to the right to correction in cases where data were collected exclusively for scientific research or statistical purposes. In these cases, the Committee considered, the personal data were not meant to be used to make decisions about an individual.[53] The conceptualization of the right to correction (and the notion of accurate data) as a safeguard for qualitative decisions (on e.g. employment, credit, health) concerning an individual, arguably, remained in later stages of the legislative evolution of the right up until the Wpr[54], and, subsequently, the Wbp.[55]

46 See e.g.: P.J. Hustinx and G. Baert, 'Preadviezen over de bescherming van de persoonlijke levenssfeer bij de toepassing van de computer' (Vereniging voor de Vergelijkende Studie van het Recht van België en Nederland) Zwolle: W.E.J. Tjeenk Willink 1973, p. 36–37; *Privacy en Persoonsregistratie: Interimrapport van de Staatscommissie Bescherming Persoonlijke Levenssfeer in Verband Met Persoonsregistraties* (Staatsuitgeverij, s-Gravenhage 1974), p. 13; *Privacy en Persoonsregistratie: Eindrapport* van *de Staatscommissie Bescherming Persoonlijke Levenssfeer in Verband Met Persoonsregistraties* (Staatsuitgeverij, s-Gravenhage 1976), p. 109; *Kamerstukken II* 1984/'85, 19095, nr. 3, p. 46 (MvT); F. De graaf, *Bescherming van de Persoonlijkheid, Priveleven, Persoonsgegevens*, Alphen aan den Rijn: Tjeenk Willink 1977, p. 217; *Kamerstukken II* 1997/'98, 25892, nr. 3, p. 160 (Mvt).

47 *Kamerstukken II* 1981/ '82, 17207, nr. 3, p. 38–39 (MvT); *Kamerstukken II* 1986/'87, 19095, nr. 6, p. 15 (MvAII).

48 *Eindrapport van de Staatscommissie van advies inzake de Grondwet en de Kieswet* (Staatsuitgeverij 'Gravenhage 1971), p. 239.

49 *Privacy en Persoonsregistratie: Eindrapport* (n 47) p. 26-27.

50 *Privacy en Persoonsregistratie: Eindrapport* (n 47) p. 25; p. 26-27.

51 ibid

52 The State Committee Koopmans was appointed by the Dutch Government in 1972 to advise on legislative or other measures necessary to protect the personal sphere in relation to the use of automated registration systems for personal data. Automated registration systems were later defined by the State-Committee Koopmans itself as "collections of personal data which had been rendered accessible in an automated way" *Privacy en Persoonsregistratie: Eindrapport,* (n 47) p. 97.

53 *Privacy en Persoonsregistratie: Eindrapport* (n 47) p. 83.

54 *Kamerstukken II* 1984/'85, 19095, nr. 3 (n 47), p. 47 (MvT); *Kamerstukken II* 1984/'85, 19095, A-C, p. 7; *Kamerstukken II* 1986/'87, 19095, nr. 6 (n 48) p. 6 (MvAII); Art. 33.a Wpr (n 9).

55 Art. 44.1 Wbp (n 10).

18 Although the right to correction was intended to facilitate qualitative decisions (and consequently, third-party opinions on which decisions are often based), it was originally not (like the broader right to personal data protection) aimed at governing decision-making itself.[56] This also appears from the End-Report of the State Committee Koopmans, which provides explicitly that data protection law was not meant to govern the quality of administrative or private decisions, even if they could have an important impact on an individual's life.[57] The reason for this was that Dutch administrative law already foresaw specific procedures for disputing administrative decisions.[58] Additionally, in the private sector, the Committee went on, the principle of contractual freedom prevailed, which meant that, in principle, when (evaluating and) deciding upon important aspects of an individual's life, private parties were, in general, not bound by any legal obligations.[59] This has important implications for the scope of the right to correction: personal data in the form of 'decisions' would, as originally envisaged by the Dutch data protection legislator, not be liable to being corrected through Article 31.1 Wpr.

19 Compared to the Wpr, the preparatory works concerning the Wbp and Uavg say little about the underlying purpose of the right to correction and, in particular, how such right (and, the Wbp or Uavg, in general) relates to decisions negatively affecting the individual. Specifically, nothing in the preparatory works or text of the Wbp or Uavg indicates that these laws were, contrary to the Wpr, meant to also directly safeguard the quality of decisions (and reasoning underlying them).

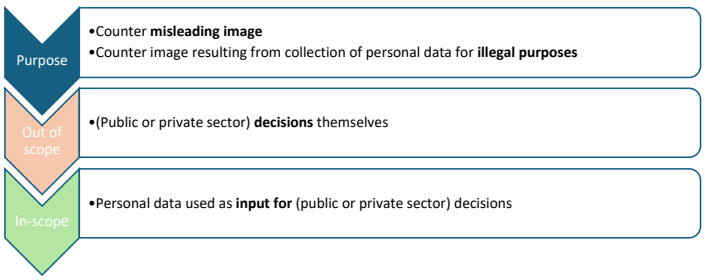

Figure 1. Purpose and material scope of application of the right to correction of Article 31.1 Wpr

3. The Right to Correct Factually Inaccurate Data in the Preparatory Works of the Wpr and Wbp

20 Neither the Wpr or Wbp themselves, nor their preparatory works explain explicitly under which circumstances data would qualify as factually (in) accurate (as opposed to merely (in)accurate). Below I have sought to interpret the meaning of factual (in)accuracy in the Wpr and Wbp on the basis of preparatory works that touch upon the meaning of the right to correct factual inaccuracies. This source indicates that the adjective factual was often used as a proxy for cases where verifying the accuracy would not require complex investigations but could be achieved easily. In other words, data were factually (in)accurate when assessing their accuracy was a (relatively) straightforward task.

21 When discussing the right to correction, the State Committee Koopmans (and some of its individual members) appeared concerned that the (in)accuracy of certain data, also called "soft data",[60] would be difficult to ascertain.[61] One type of data envisaged were evaluative data, such as personal impressions, evaluations or opinions.[62] With respect to these data, the State Committee held that, to the extent possible, it was preferable that the registered data was factual[63] and that the evaluative nature of soft data be clarified in the registration.[64] The second category of data whose accuracy was difficult to verify were (presumably, soft or hard) data that represented decisions that could be contested in the context of specific (national) procedures concerning the substance of the decision.[65] With respect to these data, the assumption was indeed that, in line with the legislator's general conception of data protection law (see above Section C.II.2), if there were other (legal) means to dispute their accuracy, these should be prioritized over the right to correction proposed in the Wpr.[66] In cases where none of the options presented above was viable, it would have been the judge's task to adjudicate, according to standards of reasonableness, upon situations where the accuracy of the data was difficult to verify.[67] Although only the first category of data explicitly concerns opinions, also the second category is relevant for the purposes of correcting opinions. In particular, as will be

56 *Kamerstukken II* 1986/'87, 19095, nr. 9, p. 11.
57 *Privacy en Persoonsregistratie: Eindrapport* (n 47), p. 29–30.
58 ibid.
59 ibid.
60 Hustinx and Baert (n 47), p. 36.
61 Hustinx and Baert (n 47), p. 36; *Privacy en Persoonsregistratie: Eindrapport* (n 47), p. 48.
62 ibid.; *Privacy en Persoonsregistratie: Eindrapport* (n 47), p. 48.
63 *Privacy en Persoonsregistratie: Eindrapport* (n 47), p. 48.
64 Hustinx and Baert (n 47), p. 36; *Privacy en Persoonsregistratie: Eindrapport* (n 47), p. 48.
65 ibid.
66 ibid.
67 *Privacy en Persoonsregistratie: Eindrapport* (n 47), p. 48.

detailed below (Section D.I.), what emerges from the examined case-law is that, (administrative or civil) decisions that can be disputed through specific (national) mechanisms are often based on opinions (e.g. legal assessments) concerning the individual affected by the decision. Consequently, a number of Dutch courts have been inclined to rule that, like the decision itself, the accuracy of opinions used as a basis for decisions that can be contested under other domains than data protection law should be evaluated by making use of the specific national procedure foreseen in those domains (see below Section D.I.3).

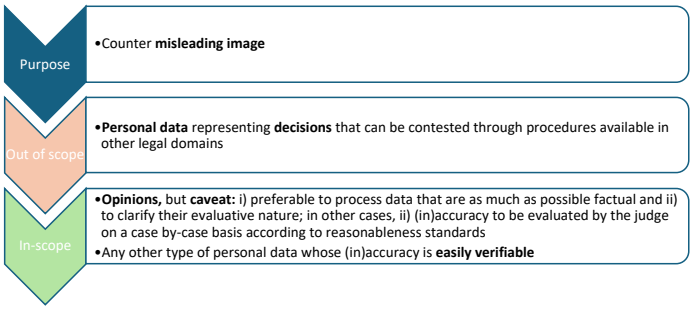

Figure 2. Purpose and material scope of application of the right to correction of factually inaccurate data of article 31.1 Wpr

22 Finally, as will be seen below (Sections D.I. and D.II.), the practice of the Dutch DPA and relevant case-law on the right to correction of factually inaccurate data suggests that this right presumably implied the modification of the inaccurate data, by means of replacing them with accurate data or erasing them altogether.

4. The Right to Complete Incomplete Data in the Preparatory Works of the Wpr and Wbp

23 The preparatory works of the Wpr and Wbp devote little attention to the right to complete personal data that were incomplete for the purposes of the registration / processing. They do, however, indicate that, like the broader right to correction, the right to complete personal data was intended to prevent the data held or processed about an individual would project a misleading image of that individual (see above Section C.II.2). In particular, by giving the data subject the right to add personal data to incomplete data, the legislator aimed to ensure that the personal data did not provide a "one-sided representation" of the data subject.[68] Contrary to factual (in) accuracy, which was arguably a binary concept, the completeness of the data was purpose-dependent.[69] Crucially, the Dutch DPA and courts have relied on this right, when the data subject challenged the accuracy of personal data in the form of opinions. As will be discussed below (Section D.I.2), this right has indeed, on multiple occasions, been understood as including the possibility to add the data subject's perspective to the disputed opinion. Moreover, in some limited instances, it has also been interpreted as granting the right to add new personal data, potentially resulting in a new opinion (Section D.II.2).

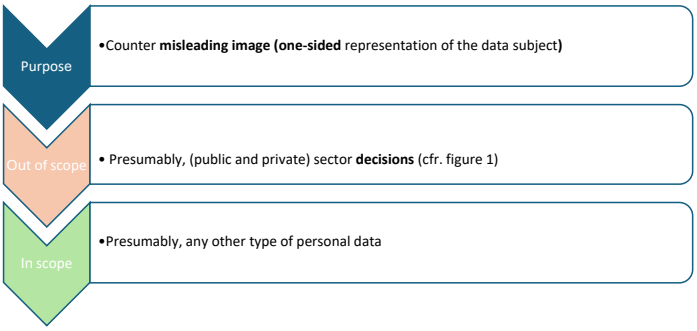

Figure 3. Purpose and material scope of application of the right to complete incomplete data of article 31.1 Wpr

68 *Kamerstukken II* 1981/ '82, 17207, nr. 3 (n 48), p. 39 (MvT).

69 Michael Teekens, 'Privacy En Computer-Registratie' (1975) Ars Aequi, p. 181–29.

D. The Right to Correct Factually Inaccurate Data and Complete Incomplete Data in the Practise of the Dutch DPA and Case-Law

I. The Right to Correct Factually Inaccurate Data as not being "Intended" for the "Correction or Erasure of Opinions with which the Data Subject Does not Agree"

24 Broadly speaking, two main approaches to the rectification of opinions can be detected in the analysed practice of the Dutch DPA and relevant case-law. The approach discussed in this paragraph – which I found in a majority of the reviewed decisions and case-law – consists of interpreting the notion of "factual inaccuracy" as excluding the possibility to correct or erase opinions with which the data subject does not agree, on the basis of Articles 31.1 Wpr and 36.1 Wbp. Below, I first explain how the notion of factual inaccuracy has been interpreted as excluding the correction or erasure of opinions, and as covering only "easily and objectively verifiable inaccuracies" (Section D.I.1). Next, I expand on what this implies for the rectification of opinions in the reviewed practice of the Dutch DPA and relevant case-law (Sections D.I.2 and D.I.3).

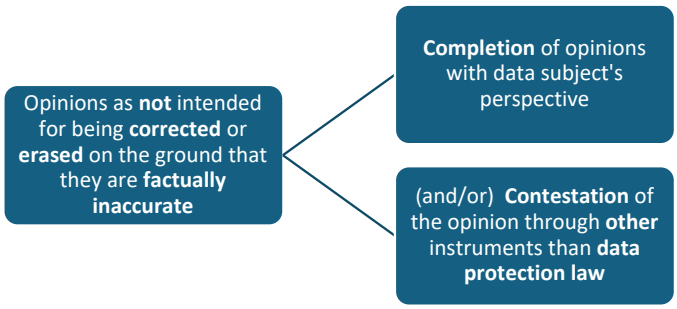

Figure 4. Approach excluding opinions from correction or erasure on the ground that they are factually inaccurate

1. "Factual Inaccuracy" as Excluding the Correction or Erasure of Opinions

25 An analysis of decisions of the Dutch DPA and case-law on the right to correction under the Wpr and Wbp illustrates what data were, often, considered not capable of qualifying as factually (in)accurate. This was often the case for what was defined as "opinions", "(expert) assessments", "impressions", "observations", "conclusions", "research results" "concerning the data subject", "with whom the data subject does not agree". According to a frequently recurring formula which was first introduced by the Dutch DPA in 1995,[70] the right to correction [in the Wpr/[71] Wbp][72] "is not intended to correct or erase" the aforementioned type of personal data. Initially, the Dutch DPA decisions and judgments containing this formula provided little clarification on the reasoning behind it. The first explanation can be found in a judgment by the administrative division of the Council of State of 2006 (the Council).[73] In this case, the data subject, an unemployed individual, sought the correction or erasure of its classification into "category 4" by the administrative authority responsible, among others, for estimating the data subject's likelihood of re-employment. After stating that the right to correction under Article 36.1 Wbp was not intended to erase "impressions, judgments or conclusions, such as the classification of the data subject in category 4", the Council explained that, the aforementioned classification "did not amount to factual data that could qualify as inaccurate under Article 36.1 Wbp".[74] Other examples of personal data that, according to the Dutch DPA and relevant case-law, qualified as "opinions, impressions, or conclusions with whom the data subject did not agree" and that could not be corrected or erased on the ground that they were factually inaccurate were: i) (medical) opinions used in the context of an

70 Registratiekamer 21 June 1995, *z95B027* in *Persoonsgegevens beschermd - uitspraken van de Registratiekamer* (SDU 1997) p. 269.

71 Registratiekamer 23 August 2001, z2001-0423, <https://autoriteitpersoonsgegevens.nl/uploads/imported/z2001-0423.pdf>; Registratiekamer 21 June 1995, *z95.B.027* in *Persoonsgegevens beschermd - uitspraken van de Registratiekamer* (SDU 1997) p. 269 (n 71).

72 Raad van State 3 March 2004, ECLI:NL:RVS:2004:AO4783; Raad van State 16 March 2005, ECLI:NL:RVS:2005:AT0510; College Bescherming Persoonsgegevens 27 May 2005, z2004-1152, p. 3 <https://www.autoriteitpersoonsgegevens.nl/uploads/imported/z2004-1152.pdf>; Raad van State 3 February 2010, ECLI:NL:RVS:2010:BL1852; Raad van State 16 February 2011, ECLI:NL:RVS:2011:BP4759; Raad van State 16 October 2013, ECLI:NL:RVS:2013:1543; Raad van State 20 February 2019, ECLI:NL:RVS:2019:520; Rechtbank Arnhem 24 September 2009, ECLI:NL:RBARN:2009:BK0880.

73 Raad van State 22 February 2006, ECLI:NL:RVS:2006:AV2256.

74 ibid para. 2.3.

evaluation by a municipal agency of the individual's capacity to accept employment opportunities;[75] ii) a governmental file used as a basis for evaluating whether or not the data subject should be entitled to a prolongation of their disability benefits;[76] iii) the classification of a detainee as posing a high flight-risk by the detention facility in which the individual resided.[77]

26 As of 2009, the aforementioned formula was often paired with another one which required the "factual (in)accuracy" under Article 36.1 Wbp to be "easily and objectively verifiable".[78] The case in which this test was first adopted concerned a neurologist whom had been dismissed by its employer on the basis of a third-party advise, which concluded that the neurologist was unfit for his job.[79] The data subject requested the controller and, subsequently, the judge to find that the aforementioned advise was (factually) inaccurate under Article 36.1 Wbp. Interestingly, the neurologist acknowledged using the right to correct inaccurate data as a way to avoid initiating civil liability proceedings against the third party that had provided the disputed advise. The court held that Article 36.1 Wbp could not be used as a substitute for civil (liability) procedures. It, further, specified that the factual inaccuracy triggering the right to correction under Article 36.1 Wbp had to be "easily" and "objectively verifiable", which would, for instance, be the case with "non-disputed facts".[80] The court, hence, concluded that, since the evidence provided by the data subject did not sufficiently prove that the disputed advise was inaccurate, its inaccuracy could not be "easily and objectively" verified. Therefore, the court continued, the inaccuracy of the disputed personal data was merely subjective. Consequently, the individual could not obtain a correction or erasure of these data on the ground that they were factually inaccurate under Article 36.1 Wbp. As frequently done by the Dutch DPA and other courts in cases of subjective inaccuracies (see below Section D.I.2), the court did, however, allow the individual to supplement the disputed data with their perspective on the inaccuracy.

27 Following this ruling, a considerable number of the reviewed cases concerning Articles 36.1 Wbp and 16 GDPR continued to exclude "opinions the data subject disagrees with" from being eligible for correction or erasure, frequently justifying this, either implicitly or explicitly, by stating that the inaccuracy at issue could not be "easily and objectively verified". Personal data that were often treated in this manner comprised (often, professional) third-party opinions concerning the data subject that (often) formed part of a file used as input for a decision with important (legal or other) consequences for the individual. Several examples are offered below:

- the opinion of a social services employee entrusted with making assessments about a child's safety;[81]
- the findings of an investigation carried out by the governmental agency entrusted with inquiring what the best interest of the child are, in the context of judicial proceedings;[82]
- the qualification of the data subject as having a fiscal debt;[83]
- the content of a medical diagnosis concerning the data subject;[84]
- the findings of an inquiry carried out by the competent immigration authority, in the context of the data subject's asylum application; [85]
- a third party's anonymous statement concerning the brother-sister relationship of the data subject and another individual, forming part of an immigration file concerning the data subject;[86]
- information contained in a governmental agency's advice used as basis for determining whether to prolong a catering permit provided to the data subject; [87]
- a doctor's description of the data subject's

75 Raad van State 16 March 2005, ECLI:NL:RVS:2005:AT0510 (n 73).

76 Raad van State 3 March 2004, ECLI:NL:RVS:2004:AO4783 (n 73).

77 Registratiekamer 23 August 2001, z2001-0423 <https://autoriteitpersoonsgegevens.nl/uploads/imported/z2001-0423.pdf (n 72).

78 Raad van State 24 May 2023, ECLI:NL:RVS:2023:2006; Raad van State 26 January 2022, ECLI:NL:RVS:2022:230; Raad van State 12 May 2021, ECLI:NL:RVS:2021:1020.

79 Gerechtshof s'Hertogenbosch 27 May 2009, ECLI:NL:GHSHE:2009:BI6357.

80 ibid.

81 Gerechtshof 's-Hertogenbosch 13 January 2022, ECLI:NL:GHSHE:2022:80.

82 Raad van State 6 October 2010, ECLI:NL:RVS:2010:BN9526.

83 Raad van State 10 April 2024, ECLI:NL:RVS:2024:1437; Rechtbank Den Haag 22 April 2021, ECLI:NL:RBDHA:2021:3984; Raad van State 23 October 2019, ECLI:NL:RVS:2019:3571.

84 Raad van State 24 May 2023, ECLI:NL:RVS:2023:2006 (n 79).

85 Raad van State 3 February 2010, ECLI:NL:RVS:2010:BL1852 (n 73).

86 Raad van State 16 October 2013, ECLI:NL:RVS:2013:1543 (n 73).

87 Raad van State 20 February 2019, ECLI:NL:RVS:2019:520 (n 73).

home situation, in the context of proceedings concerning the individual's entitlement to certain illness benefits;[88]

- the description of the data subject as "being careful about making certain statements", contained in a medical file;[89]
- the description by an administrative authority (entrusted with the management and guidance of unemployed people) of the data subject as "not being willing to apply for jobs underneath the individual's level of education";[90]
- the description by an administrative authority of the data subject as being "unwilling to shake hands" and "shaking because of anger".[91]

28 These cases offer several important insights. First, what, often, matters in the reviewed decisions and case-law is not the nature of the personal data being assessed (i.e. facts versus opinions), but the nature of the inaccuracy that is alleged by the data subject. Specifically, as per the test developed in the aforementioned 2009 case, for an alleged inaccuracy to be eligible for correction or erasure the crucial criteria are (i) the ease with which such inaccuracy can be proven and (ii) whether the inaccuracy can be substantiated according to a somewhat universally agreed upon standard (i.e. is objective). If the data subject cannot prove that the personal data are "manifestly inaccurate"[92], the practice and case-law discussed in this paragraph choose to maintain the status-quo, by not altering (i.e. "correcting or erasing") the personal data at issue.

29 Second, as also pointed out by other scholars,[93] rather than focussing on the nature of the disputed accuracy, certain case-law, focuses on the nature of the personal data that contains the alleged inaccuracy (e.g. easily and objectively verifiable statements, contained in an individual's immigration file).[94] In these cases, the disputed accuracy (e.g. the content of the statements) is conflated with the opinion (e.g. the immigration file) and, at times, subsequent decision to which it gives rise. Consequently, probably also because Dutch data protection law was originally not intended to govern the accuracy of decision-making (and underlying reasoning) (see Sections C.II.2 and C.II.3), the (in) accuracy is treated as uncorrectable or unerasable by default, even in cases where it does meet the standard of being easily and objectively verifiable.

30 Third, and related to the previous points, the reviewed decisions and cases highlight the courts' need to delineate the boundaries between the right to correction of factually incorrect data in data protection law, on the one hand, and remedies allowing to challenge an opinion or decision, foreseen in other legal domains, on the other. Some judgments holding that opinions cannot be corrected or erased because they are factually inaccurate can, indeed, be interpreted as being symptomatic of a certain fear to adjudicate upon matters that (also) pertain to other legal domains (e.g. civil liability[95] or fiscal law[96]). A recent ruling by the Council, arguably, illustrates this.[97] In that case, an individual had been denied a passport because they appeared in the database of the tax administration as having a fiscal debt. The data subject challenged this qualification with the fiscal court on the basis of tax law and, in parallel, sought the controller to correct or erase it on the ground that it was inaccurate under Article 16 GDPR. Upon the controller's refusal to do so, the matter was brought before the Council. The Council held that the controller had rightly rejected the request to correct the description of the data subject as having a fiscal debt under Article 16 GDPR because, at the time at which that request was made, the fiscal judge had not yet ruled on the question brought before them under fiscal law. The Council went on stating that, "since the inaccuracy [of the data] had not been established yet by the fiscal judge [on the basis of fiscal law], the controller could assume that the [disputed] data were accurate [under Article 16 GDPR]".[98] In short, requiring that the (in)accuracy of certain data can lead to the alteration of the data (through correction or erasure) only when the inaccuracy is manifest, minimizes the risks of interference (and, possibly, contradiction) with what may be decided by another court or authority ruling on, fundamentally, the same question, but on the basis of other legal rules than data protection law.

31 To provide an answer to the first research question, the reason why the Dutch DPA and Dutch case-law often exclude opinions from being corrected or erased on the ground that they are inaccurate, very likely lies in the fact that the right to correct

88 Raad van State 16 February 2011, ECLI:NL:RVS:2011:BP4759 (n 73).

89 Rechtbank Arnhem 24 September 2009, ECLI:NL:RBARN:2009:BK0880 (n 73).

90 Raad van State 10 July 2022, ECLI_NL_RVS_2022_2053.

91 Raad van State 20 April 2011, ECLI:NL:RVS:2011:BQ1871.

92 Raad van State 10 April 2024, ECLI:NL:RVS:2024:1437 (n 84).

93 G Overkleeft-Verburg, 'Annotation of: 200903967/1/H3' [2010] JB 2010/66.

94 See e.g.: Raad van State 3 February 2010, ECLI:NL:RVS:2010:BL1852 (n 73).

95 Gerechtshof s'Hertogenbosch 27 May 2009, ECLI:NL:GHSHE:2009:BI6357 (n 80).

96 Raad van State 10 April 2024, ECLI:NL:RVS:2024:1437 (n 84); Raad van State 23 October 2019, ECLI:NL:RVS:2019:3571 (n 84).

97 Raad van State 10 April 2024, ECLI:NL:RVS:2024:1437 (n 84).

98 ibid.

inaccurate personal data has historically, in the text of the Wpr and Wbp, been limited to data that could qualify as factually inaccurate. As of 2009, factual inaccuracy has often been interpreted in the reviewed practice of the Dutch DPA and courts as an inaccuracy that is easily and objectively verifiable. Since personal data in the form of opinions are often (presumed to be) unlikely to meet the standard of being easily and objectively verifiable, they will often not be capable of being corrected or erased on the ground that they are factually inaccurate. Finally, it should also be noted that, despite the fact that the text of Article 16 GDPR does not require data to be factually inaccurate, the Dutch DPA[99] and a considerable number of Dutch courts[100] continue, also under Article 16 GDPR, to exclude opinions from being capable of being corrected or erased on the ground that they are factually inaccurate. This raises the question whether the notion of accuracy triggering an alteration of the disputed data (i.e. in the form of correction or erasure) under Article 16 GDPR should also, like its predecessors under the Wpr and Wbp, be interpreted as being limited to factual accuracy.

2. ... but (in Several Instances) Allowing Data Subjects to Complete the Subjectively Inaccurate Data With Their Perspective

32 As already mentioned above (see Section C.II.4), frequently, when they rejected requests for correction or erasure of an opinion, the Dutch DPA and courts have allowed the data subject to supplement the disputed personal data with their vision on the (in)accuracy.[101] Interestingly, this approach is, at times, linked in the examined practice of the Dutch DPA[102] and case-law,[103] to the right foreseen under Articles 31.1. Wpr and 36.1 Wbp to complete personal data that are incomplete for the purpose of the processing (see above Section C.II.4).

3. ... and/or (in Other Instances) Directing Data Subjects to Dispute Mechanisms Available in Other Legal Domains Than Data Protection Law

33 Another trend detected in practice and case-law denying that opinions could be corrected or erased because of their factual inaccuracy consists in directing data subjects to dispute mechanisms available in other domains than data protection law (mostly, administrative law).[104] Sometimes this is done after granting the data subject the aforementioned right to supplement the subjective inaccuracy with their view, sometimes such right is not granted and the data subject's right to correction (in any form, whether modification, erasure or completion of the data) is simply denied. Most of the case-law I have reviewed that adopted this approach was taken under the Wbp. What seems to resonate throughout this case-law is the aforementioned caveat made by the Wpr's drafters concerning the purpose of the right to correction (and data protection law, more broadly) in relation to decisions affecting the individual (see Sections C.II.2 and C.II..3 above). Since decisions that can be disputed through specific (national) mechanisms are often based on opinions (e.g. medical or legal assessments), some courts have referred disputes concerning the accuracy of these opinions to the same mechanisms available for contesting the decisions based on such opinions.

99 Autoriteit Persoonsgegevens, 'Recht op rectificatie' <https://www.autoriteitpersoonsgegevens.nl/themas/basis-avg/privacyrechten-avg/recht-op-rectificatie>.

100 Rechtbank Zeeland West Brabant 21 April 2021, ECLI:NL:RBZWB:2021:1970; Gerechtshof s'Hertogenbosch 13 January 2022, ECLI:NL:GHSHE:2022:80 (n 82); Rechtbank den Haag 11 April 2024, ECLI_NL_RBDHA_2024_4984; Raad van State 10 April 2024, ECLI:NL:RVS:2024:1437 (n 84); Rechtbank Limburg 22 May 2024, ECLI:NL:RBLIM:2024:2275; Rechtbank Den Haag 25 February 2022, ECLI:NL:RBDHA:2022:2432.

101 Registratiekamer 21 June 1995, *z95B027* in *Persoonsgegevens beschermd - uitspraken van de Registratiekamer* (SDU 1997) p. 269 (n 71); Raad van State 3 March 2004, ECLI:NL:RVS:2004:AO4783 (n 73); Registratiekamer 2000, A ter Linden and CG Zandee, 'Zorg Voor Gegevens Bij Indicatiestelling', p. 58 <https://www.autoriteitpersoonsgegevens.nl/uploads/imported/rap_2000_indicatiestelling.pdf>; College Bescherming Persoonsgegevens 27 May 2005, z2004-1152 <https://www.autoriteitpersoonsgegevens.nl/uploads/imported/z2004-1152.pdf> (n 73); Gerechtshof s'Hertogenbosch 27 May 2009, ECLI:NL:GHSHE:2009:BI6357 (n 80); Raad van State 24 May 2023, ECLI:NL:RVS:2023:2006 (n 79); Rechtbank den Haag 25 February 2022, ECLI:NL:RBDHA:2022:2432 (n 98); Gerechtshof s'Hertogenbosch 13 January 2022, ECLI:NL:GHSHE:2022:80 (n 82); Rechtbank Zeeland West-Brabant 21 April 2021, ECLI:NL:RBZWB:2021:1970 (n 101).

102 College Bescherming Persoonsgegevens 27 May 2005, z2004-1152 <https://www.autoriteitpersoonsgegevens.nl/uploads/imported/z2004-1152.pdf> (n 73).

103 Gerechtshof s'Hertogenbosch 27 May 2009, *ECLI:NL:GHSHE:2009:BI6357* (n 80).

104 Raad van State 10 April 2024, ECLI:NL:RVS:2024:1437 (n 84); Rechtbank Limburg 22 May 2024, ECLI:NL:RBLIM:2024:2275 (n 101); Raad van State 23 October 2019, ECLI:NL:RVS:2019:3571 (n 84); Raad van State 20 February 2019, ECLI:NL:RVS:2019:520 (n 73); Raad van State 16 October 2013, ECLI:NL:RVS:2013:1543 (n 73); Raad van State 3 February 2010, ECLI:NL:RVS:2010:BL1852 (n 73); Raad van State 6 October 2010, ECLI:NL:RVS:2010:BN9526 (n 83).

II. The Right to Correct Factually Inaccurate Data and Complete Incomplete Personal Data as Leading to the Erasure and, at times, Correction of Opinions

34 A limited number of decisions and case-law reviewed under Articles 31.1 Wpr and 36.1.Wbp indicates that personal data in the form of opinions can, under certain circumstances, be modified, i.e. corrected or erased. Broadly speaking, I have detected two different ways in which the Dutch DPA and/or courts reach this outcome. These are discussed below and summarized in figure 5.

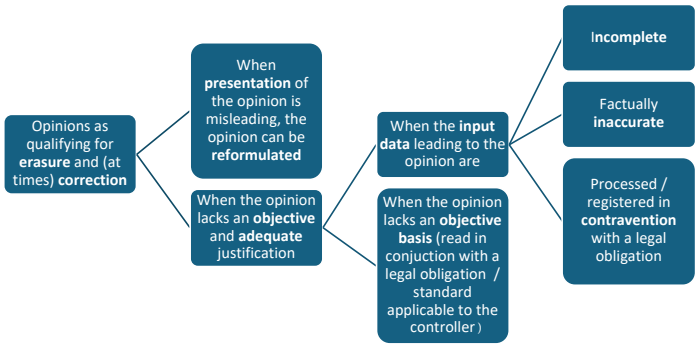

Figure 5. Approach allowing the erasure and, at times, correction of opinions

1. Reformulation of the Opinion

35 One approach consists in reformulating the opinion to better fit the context in which the opinion is processed. Under this approach, it is rather the presentation of an opinion, not its content, that is modified. This approach was adopted, for instance, in a case concerning a request for correction under Article 36.1. Wbp of the data subject's description as being "paranoid".[105] In that case, the court requested the controller to clarify what it precisely meant with this term, specifically whether it should be interpreted as the result of a medical diagnosis. Since the controller specified that this was not the case, but that the adjective was intended to convey its impression of the data subject as someone who appeared "suspicious", the court held that "paranoid" had to be replaced with, for instance, "coming across as suspicious".[106] According to the court, this was necessary to avoid that the use of the adjective would be interpreted as if it were the outcome of a medical diagnosis. In other words, the rewording was required to avoid a misleading image of the individual, considering the context in which their personal data were processed.

36 The approach taken in this case, in my view, only slightly departs from the one discussed in the aforementioned paragraph (Section D.I.). In particular, the opinion at issue was reformulated in accordance with what the controller itself had specified, namely that paranoid should be interpreted as "coming across as suspicious". The content of the opinion, was, thus, fundamentally, not modified, only its presentation was.

2. Erasure or correction of the personal data underlying an opinion leading to the erasure of the opinion itself

37 A second, more far-reaching approach detected in a (very) limited number of decisions of the Dutch DPA and case-law, consists of erasing an opinion on the grounds that it lacks an objective and adequate justification. Contrary to the majority of the cases mentioned above (Section D.I.), the focus in these cases is more granular, as it concerns the processing of the input personal data leading to the contested opinion (and, if applicable, ensuing decision), rather than the opinion itself.

38 One case in which this approach was detected concerned a request for correction brought before the Dutch DPA (presumably under Article 31.1 Wpr) of a person's creditworthiness score.[107] The DPA ruled that the score had been calculated using factually inaccurate and incomplete personal data, because it had been determined on the basis of the person's residence address, without including additions to the person's house number (e.g. house number + A, B, C etc).[108] This skewed the data subject's risk-score towards the scores of other people living on the same house number. Hence, the DPA ruled that, for the sake of accurately determining a person's creditworthiness risk, the person's house number addition also had to be taken into account and added up to the specific processing at hand.[109] De facto, this meant that the data subject's risk score had to be re-assessed.

39 Similarly, in a case concerning a data subject's

105 Raad van State 20 April 2011, ECLI:NL:RVS:2011:BQ1871 (n 92).

106 ibid.

107 Registratiekamer 23 June 1999, *99V036302* <https://archief17.archiefweb.eu/archives/archiefweb/20230427062025/https://autoriteitpersoonsgegevens.nl/sites/default/files/downloads/uit/z1999-0363.pdf>.

108 ibid.

109 ibid.

request for correction under Article 31.1 Wpr of the flight risk that had been assigned to them by the detention facility where the individual resided, the DPA concluded that such risk had been determined on the basis of incomplete data and in contravention with a legal obligation.[110] In particular, the flight risk had been determined solely on the basis of two criteria, namely the individual's wealth and the fact that the they had been found guilty to lead a criminal organisation. After reviewing the procedure that the detention facility had to follow when assessing a detainee's flight risk, the DPA observed that this procedure required the facility to seek the Public Prosecutor's assessment of the detainee's flight risk, particularly in cases where the detainee would – without this additional information – have received a high risk score. In the case at hand, however, the controller failed to request such advice and other additional information (e.g. whether the detainee had been violent when committing criminal activities or whether they had shown good behaviour in the course of the detention) which could have resulted in a lower risk-score. Consequently, the DPA held that the personal data concerning the detainee had not been "adequately" and "diligently" (i.e. fairly) processed.[111] The Authority added that the process leading to the determination of the risk-score had contravened the legal framework applicable to the detention facility.[112] This meant, according to the DPA, that the flight-risk score was "incomplete, alternatively, registered in contravention with a legal obligation."[113] The Authority, hence, advised that the individual's risk score be re-evaluated and, if necessary, modified to take into account the additional information that the controller had initially overlooked.[114]

40 One judgment of the Hoge Raad (i.e. the Dutch Supreme Court) concerning a request for correction or erasure under Article 36.1 Wbp came to a somewhat similar conclusion. Specifically, the case concerned a data subject's request to remove certain passages from a so-called youth support plan, a term used to outline the assistance and support foreseen to a young person.[115] The support-provider who had drafted such plan had come to several conclusions that put the data subject (i.e. the father of the person the plan was meant to help) in a bad light. These unfavourable opinions were based on what another party (i.e. the data subject's ex-wife) had been saying about the data subject and had not been independently verified by the support provider. In so doing, the support provider had violated their professional code of conduct. The court held that impressions of the support-provider were inherently subjective and that, therefore, they could, in principle, not be erased on the ground that they were inaccurate.[116] Nevertheless, it continued, the principle of accuracy as enshrined in Article 11.2 Wbp required opinions to have an "objective basis".[117] Since the support provider had failed to independently verify the accuracy of the opinion expressed by the data subject's ex-wife, before presenting it as if it was their own conclusion, the opinion lacked an objective basis. Therefore, it had to be erased.

41 These cases are remarkable in the sense that they amount to an erasure of opinions under Articles 31.1 Wpr and 36.1 Wbp but not on the formal ground that the opinions were factually inaccurate. A common denominator across these cases is that they required the controller to provide an objective and adequate justification for the opinion. The focus, in other words, lied on the input (personal data) leading to the opinion, not the opinion itself. In particular, the decisions of the DPA revolved mainly around the question whether the opinion at hand was sufficiently justified, in light of the specific circumstances of the case, including the (non-data protection) legal framework applicable to the controller (specifically, in the case concerning the flight risk score, the framework applicable to the detention facility). In the case brought before the Supreme Court, the main issue concerned the lack of an objective justification for the opinion. Whether such justification needed to be provided and what it entailed was determined in accordance with (non-data protection law) standards applicable to the controller, specifically the controller's professional code of conduct, which required it to come to an independent, non-biased assessment of a certain situation.

42 It is important to highlight, once again, that the aforementioned cases relate to Articles 31.1 Wpr and 36.1 Wbp. As I explained above (see Section C.II.1), while these provisions share some commonalities with Article 16 GDPR, they are not the direct equivalent of it. It is, hence, unclear whether the approach consisting in correcting opinions by erasing them on the ground that they lack an objective and adequate justification can be transposed to Article 16 GDPR. In fact, I did not find any Dutch decisions or case-law under Article 16 GDPR corroborating this.

43 To answer the second research question, the tendency of the Dutch DPA and Dutch courts to

110 Registratiekamer 23 August 2001, z2001-0423, <https://autoriteitpersoonsgegevens.nl/uploads/imported/z2001-0423.pdf> (n 72).

111 ibid, p. 9.

112 ibid, p. 10.

113 ibid.

114 ibid, p. 11.

115 Hoge Raad 16 July 2021, ECLI:NL:HR:2021:1169.

116 ibid.

117 ibid.

exclude opinions from correction or erasure on the ground that they are factually inaccurate has not always resulted in the non-rectifiability of this type of data under data protection law. Specifically, these authorities have, often, interpreted the right to correction of opinions as a right to add up the data subject's perspective on the disputed data. Moreover, in other instances, they have allowed opinions to be reformulated to better match the context of the processing. Finally, on other occasions, they have gone one step further, and granted the erasure (and, at times, ensuing correction) of opinions because the processing of personal data leading to the contested opinion was either factually inaccurate, incomplete, and/or, simply, unjustified in light of the specific (legal) obligations and standards applicable to the controller.

E. Conclusion

44 Let us go back to the example presented in the introduction. What emerges from the findings discussed in the preceding paragraphs is that there are several ways in which the Dutch DPA and Dutch courts have, throughout time, dealt with comparable requests. According to a predominant approach, the exam score itself is unlikely to be amended (i.e. corrected or erased) on the ground that it is factually inaccurate. A major reason for this is that such score is likely to qualify as data whose accuracy is not easily and objectively verifiable, hence, subjective. The student could, however, be given the opportunity to correct the score by adding her view to it. Cumulatively or alternatively, she may be given the option to contest the content of the score with the university's examination board. Imagine further that the university guidelines required the examiner to test the student's knowledge of the material, territorial and personal scope of application of the GDPR, principles of data processing, data subject rights and international data transfers. Yet, the exam only contained questions on the GDPR's territorial scope of application. In that case, the student could arguably obtain correction in the form of a reformulation of the title of the exam that she had failed. Her score sheet could report that she had failed an exam concerning the "Territorial scope of application of the GDPR", not the "GDPR". Finally, according to another approach detected in some of the reviewed cases, the student could arguably obtain an erasure of the score, on the ground that the examination procedure established by the university and leading to the assessment had not been followed. In this scenario, the score could be erased because the personal data used to determine it (i.e., the exam answers) were incomplete, given the purpose of the processing, which was to assess the student's knowledge on more aspects of the GDPR than just its territorial scope of application. Additionally, one could argue that the score was the result of a processing in violation of a standard applicable to the examiner (i.e. the university guidelines). Consequently, the score would not be sufficiently justified, in light of such standard.

45 As already mentioned, this research does not show that all the shades of "accuracy", "completeness" and "rectification" present in the reviewed Dutch practice on Article 16 GDPR and its predecessors under Dutch law can simply be transposed to Article 16 GDPR. However, an inquiry into the limited CJEU case law, guidance from EU data protection supervisors, and international scholarship concerning the right to rectification of personal data under Article 16 GDPR and its predecessor under the DPD shows that similar (different and, at times, contradictory) approaches to those identified in Dutch law animate the discussion at the EU level. Hence, one of the most significant questions that needs to be tackled now is, in my view, whether research undertaken into the genealogy of the right to rectification of personal data into other EU Member States leads to comparable results as the one undertaken in this article and whether the latter is useful to interpret Article 16 GDPR.

46 The research also shows that distinguishing facts from opinions for the purposes of rectification is likely to be misleading. When dealing with the right to rectification of personal data, the focus of the debate should not lie on the nature of the personal data being processed (i.e. whether it is a fact or an opinion) but on the notion of accuracy that is liable to being rectified under data protection law. The majority of Dutch case-law and decisions analysed in this article suggest that only easily verifiable and objective inaccuracies can be rectified through correction or erasure, i.e. measures involving a modification of the inaccurate data themselves. One of the questions that, hence, warrants further investigation is whether opinions can meet this standard and, if yes, how this standard should be operationalised.

47 Finally, the study illustrates that the issue of rectification of personal data in the form of opinions is tied to a broader, and more fundamental question concerning the purpose and essence of data protection law, its relation with other legal domains with which it may intersect, and whether, and how Member States have dealt with such intersection. Specifically, ascertaining the accuracy of personal data in the form of an opinion may require the use of normative standards present in other (legal and non-legal) disciplines. Requiring that the inaccuracy of data is easily and objectively verifiable or manifest in order to correct or erase its content may be a strategy adopted by national authorities and courts presented with requests for correction or erasure of personal

data to avoid potential conflicts with other courts confronted with, essentially, the same question but raised under other legal domains. Further research could, therefore, address whether and how national Member States have adopted (procedural) rules to avoid such possible overlap.