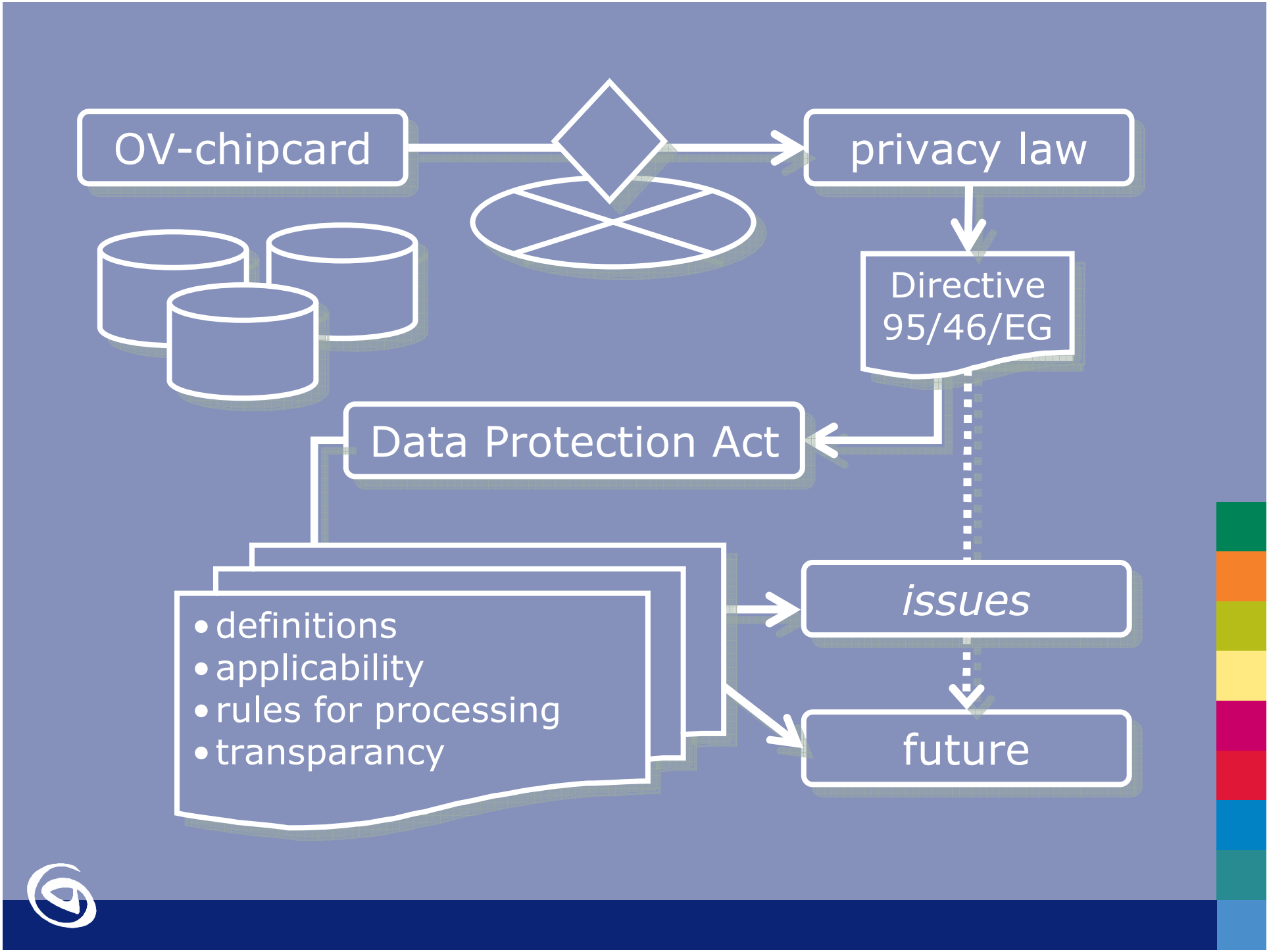
CYBERSPACE & CYBERLAW

privacy and protection of personal data

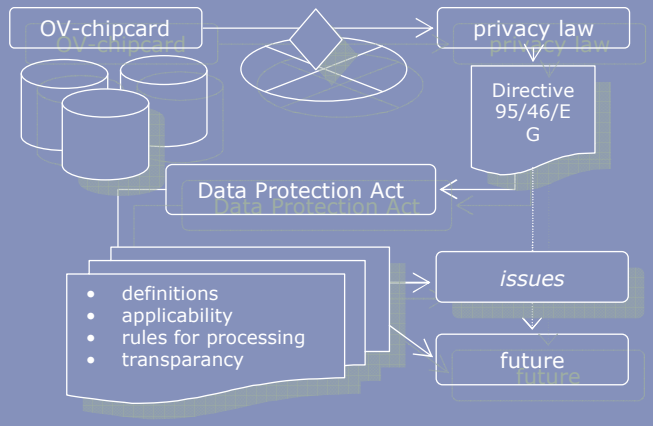
Gerrit-Jan Zwenne – March 2011

eLaw Leiden

Bird & Bird


OV-chipcard
privacy law
Directive
95/46/EG
Data Protection Act
• definitions
• applicability
• rules for processing
• transparancy
issues
future

roadmap



A. the OV-chip case

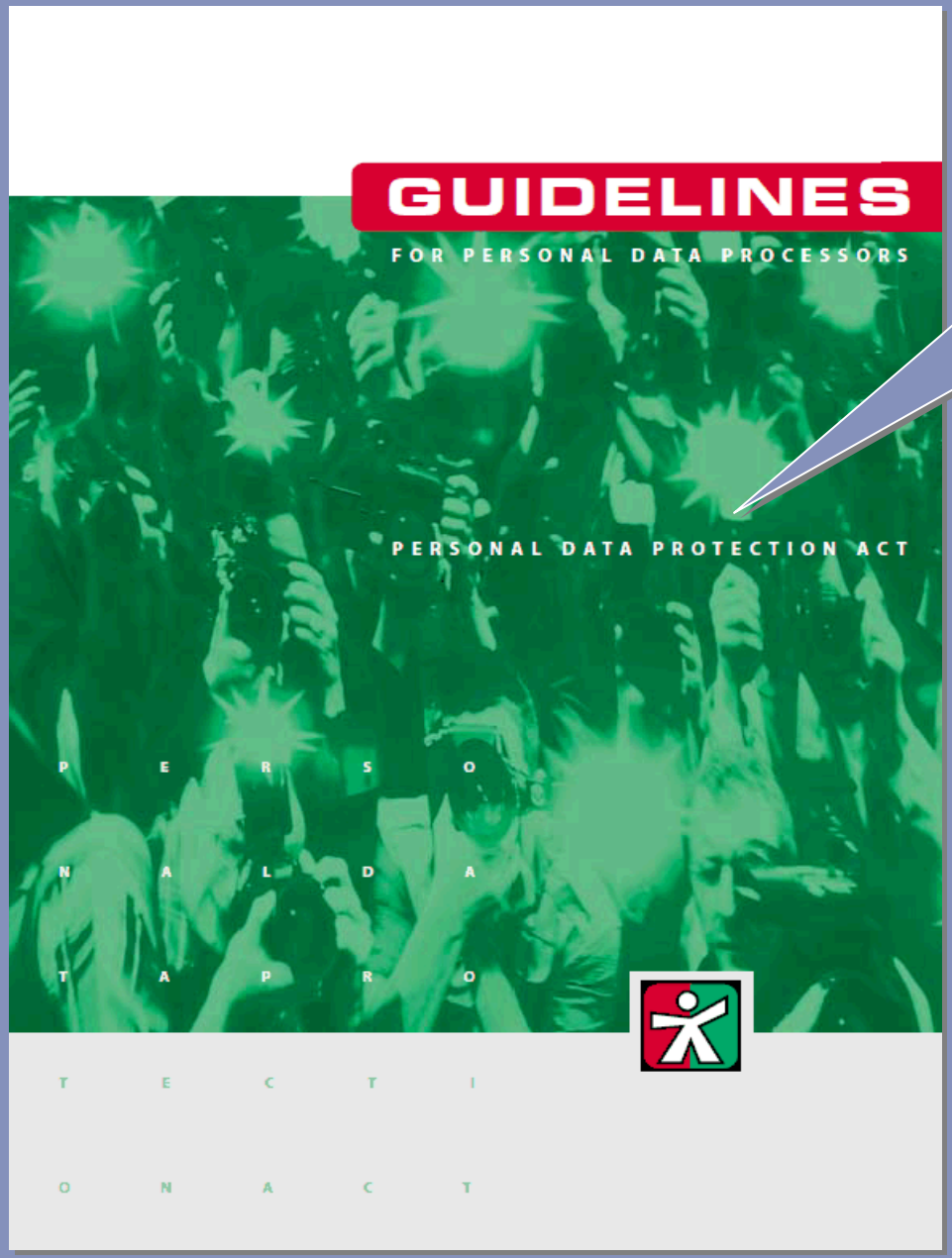
- Dutch Public Transport Chip Card
- Quick Scan

B. privacy and data protection

- what is privacy anyway?

C. privacy and data protection law

- Directive 95/46/EC and (Dutch) Data Protection Act
- rules for the processing of personal data



nevermind the remarks about previous Dutch Data Registration Act (Wet persoonsregistraties)

A.
OV-chipcard

OV-chipcard

Radio Frequency Identification or RFID

although an increasing number of experts now have serious doubts

- contactless smart card system that eventually will operate on all public transport and replaces paper tickets
- allows for card integration and price differentiation, and reduces fare dodging
- and

by company, time of day, day of the week, etc.

same card used for multiple companies

Trans Link Systems

- joint venture initiative of five large public-transport operators
- all other public transport companies eventually have to implement the system

quickscan

There are a lot of discussions about the protection of the users' privacy in the OV-chipcard system. Usually in these discussions the privacy of non-Dutch speaking users does not get much attention

- do your own desktop research on www.ns.nl and TLS or one other website of a public transport company, restricting yourself to the English sections of these website
- then review if, and to what extent, the companies in your view comply with the requirements pursuant to the data protection rules discussed in this and the following lectures
- present the results of your quickscan in bulleted-form and include recommendations for the public transport companies

max. 1-2 pages

B.
privacy and data protection

to define the province of privacy distinctly is impossible

James Fitzjames Stephe

the most striking thing about the right to privacy is that nobody seems to have any clear idea of what it is

Thompson 1975

privacy means many things to many people and different things in different contexts

Berman & Mulligan 1999

the concept of
is elusive
ill–define

o
Posner 1978

s about privacy
rcent of us are
about privacy.
s is that we do
what we mean

Branscomb 1994

you have zero privacy anyway
get over it

Scott McNealy CeO Sun Microsystems

the right to be let alone

Samual D. Warren & Louis D. Brandeis 1890

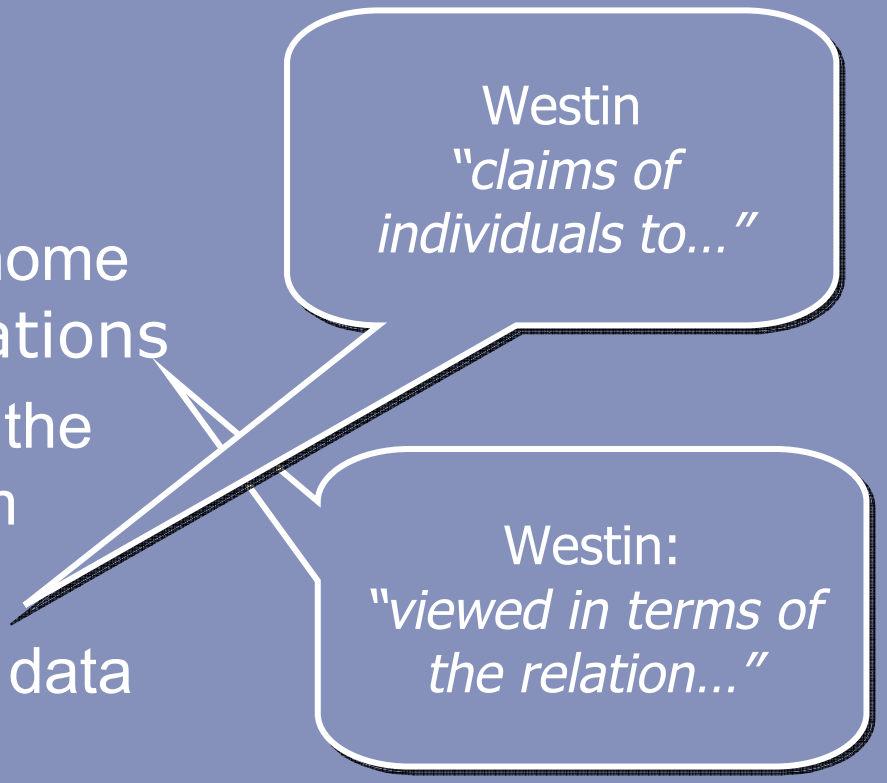
viewed in terms of the relation of the individual to social participation, privacy is the voluntary and temporary withdrawal of a person from the general society through physical or psychological me ans, either in a state of solitude or small group intimacy or, when among larger groups, in a condition of anonymity or reserve…

…the claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about themselves is communicated to others

Alan F Westin 1967

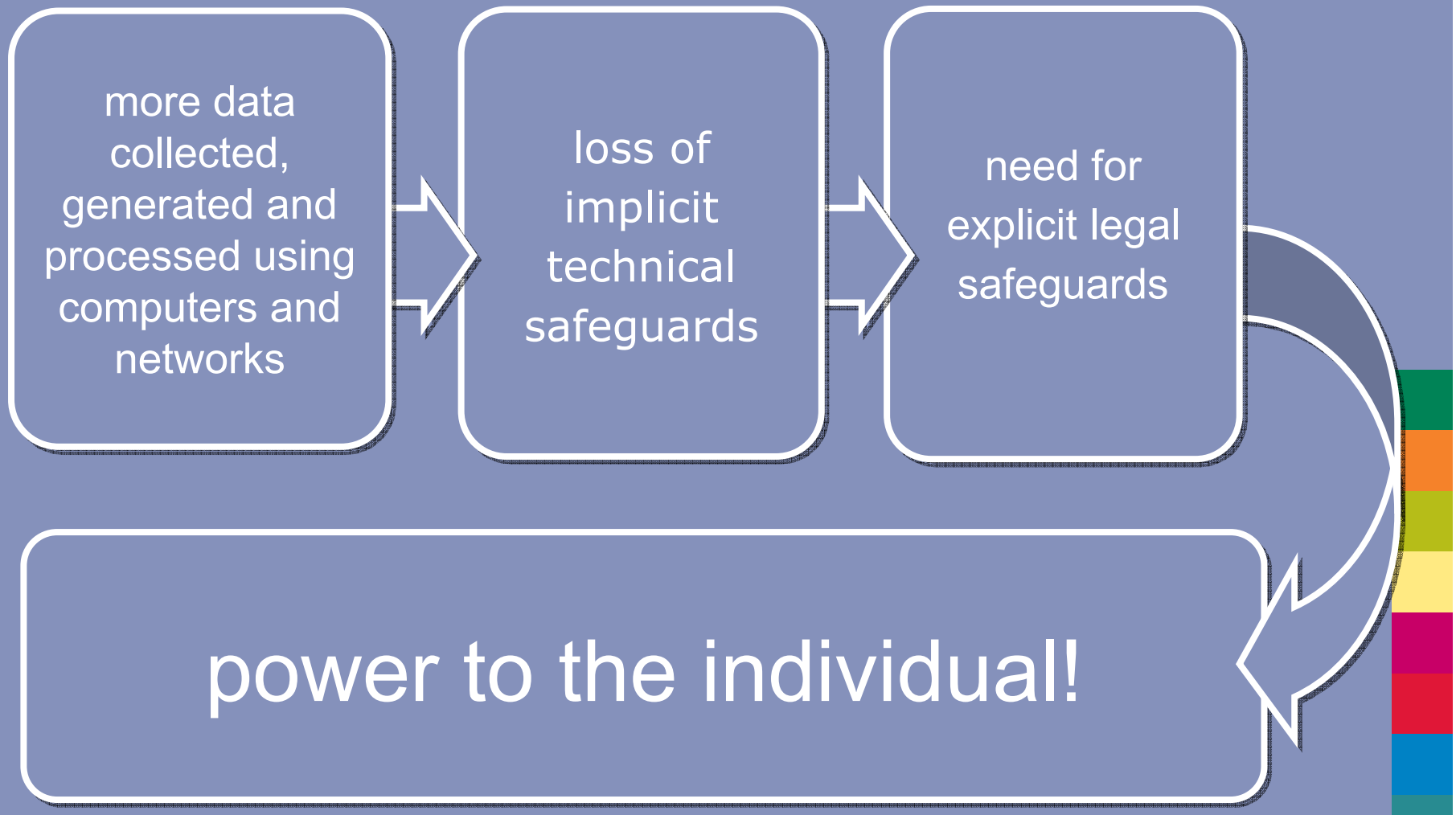
privacy

- relational privacy
  - eg inviolability of the home
- secrecy of communications
  - claims with respect to the secrecy of the medium
- informational privacy
  - protection of personal data




MATT GROENING

informational privacy, why?



jargonwatch

- controller
  - determines and/or has the formal authority to determine the purposes and means of processing
  - to whom the processing must be attributed according to generally accepted socio-economic standards
- processor
  - on behalf of controller, without being under his direct authority
- data protection authority
  - supervises compliance with the Data Protection Act

owner of the datae

eg. Infosys, Peoplesoft, EDS or other third party IT-supplier

College Bescherming Persoonsgegevens, CNIL, Information Commisioner, etc.

C.
data protection law

Directive 95/46/EC *OJ*. L281,
23.11.1995, p. 31 – 50

data protection law is about...

processing personal data by controllers and by processors

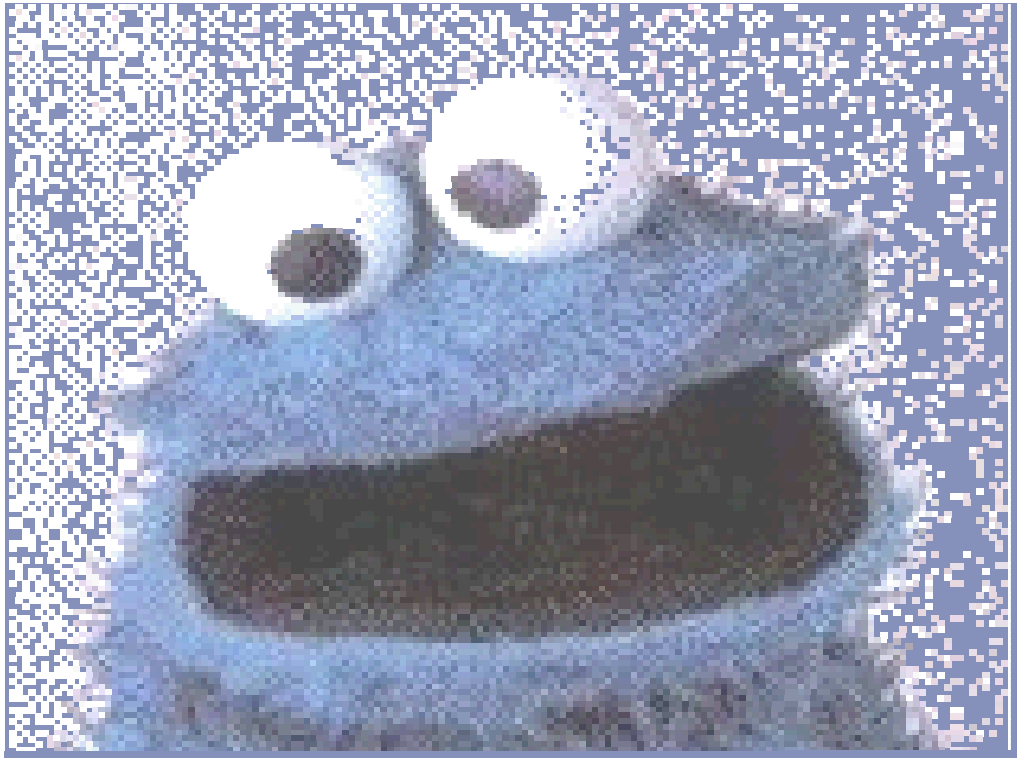
anything that can be done with personal data, incl. collecting, using, deleting, altering etc.

any information about identified or identifiable natural persons (text, image, voice etc.)

legal or natural person that determines purpose and means of processing (ie the ownerr of the data)

legal or natural person that processes personal data on behalf of a controller

cookies!



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algemeen

data protection obligations...

- valid basis for processing
- well-defined purposes and further processing for compatible purposes
- transparancy rights
- security

• consent • execution of contract • legal obligation • vital interest • public authority • balanced legitimate interest

the purpose of collection determines to what extent further processing is allowed

datasubjectsr right to know about the processing of their data

to prevent loss and other unlawful processing

data protection applies to…

- processing of personal data wholly or partly by automatic means, and
- data in a filing system
- unless exempted

electronically, ie something with a computerchip: pc, Mac, Blackberry, iPhone, TomTom, etc.

structured set of data relating to different persons

- *personal or houshold activities*
- *specific laws: police, voting registers, etc.*
- *limited exemption for processing for artistic or journalistic purposes*

territorial scope…

economic activities: legal entity, branch, office etc.

a member staters data protection act applies to:

- processing in the context of the activities an establishment of the controller in that member state

the entity or natural person that determines means and processing of the personal data

and territorial scope…

economic activities: legal entity, branch, office etc.

member states data protection act also applies if

- no establishment in EU and
- use is made of equipment in memberstate
- unless only used for transit

server, backup facilities etc.

fiber cables, etc.

some questions…

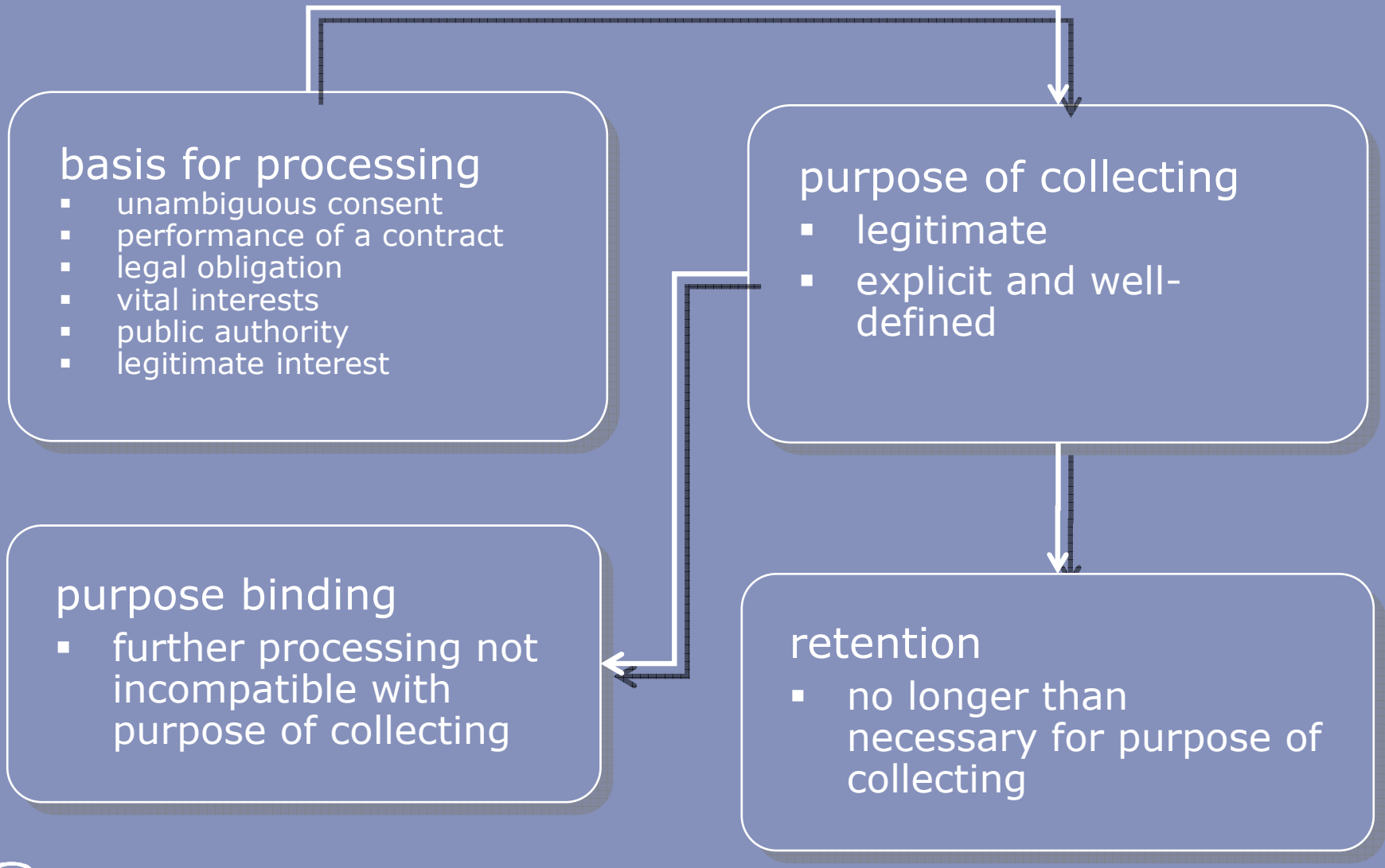
- does the Dutch Data Protection Act apply to Philips processing of its customer data?
- what if the customers are from China?
- and what if the data are processed in India?

Wet bescherming persoonsgegevens (Wbp)

established in Eindhoven Netherlands

rules for processing personal data

rules for processing personal data



processing is allowed

- with unambiguous consent of data subject
  - *sufficient information*
  - *not via acceptance of Terms & Conditions*
  - *not in employer-employee relations*
  - *free expression of data subjectrs wish*
- necessary for performance of a contract with data subject
  - *including pre-contractual phase*
  - *and everything that is done in the course of a normal contractual relationship (eg newsletter)*

processing is allowed

- necessary for compliance with legal obligation → *eg tax act*
- necessary to protect vital interests of the data subject → *life and dead situations*
- necessary for performance of a task carried out in the public interest or in exercise of official authority... → *eg tax inspctor*

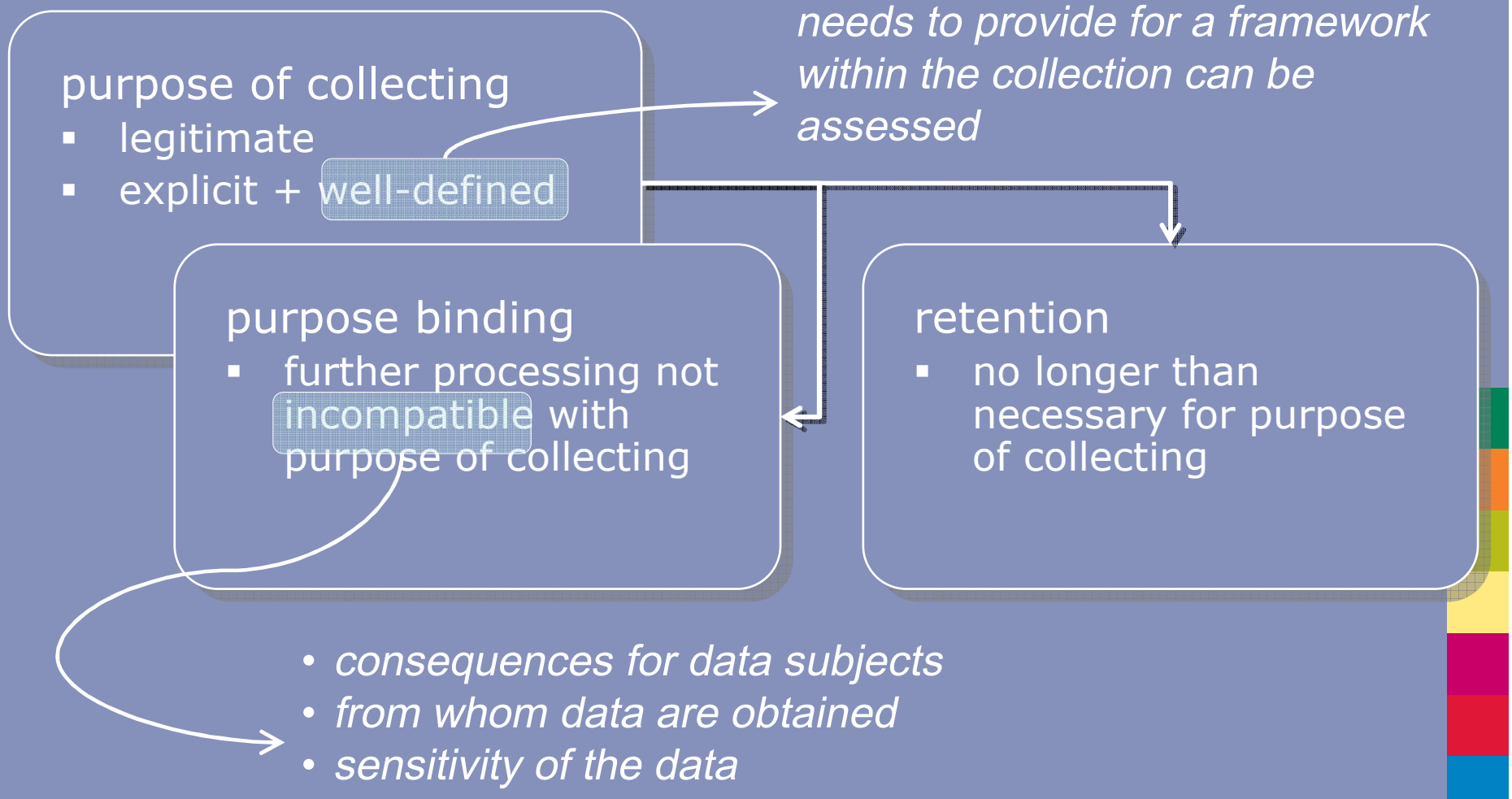
processing is also allowed…

- if necessary for the purposes of the legitimate interests pursued by controller or by third party or parties to whom the data are disclosed… except where such interests are overridden by the data subjects (privacy) interests
-

- *eg direct marketing, credit management,*
- *fraude prevention*
- *etc.*

need to balance interest, eg by implementing safegurads

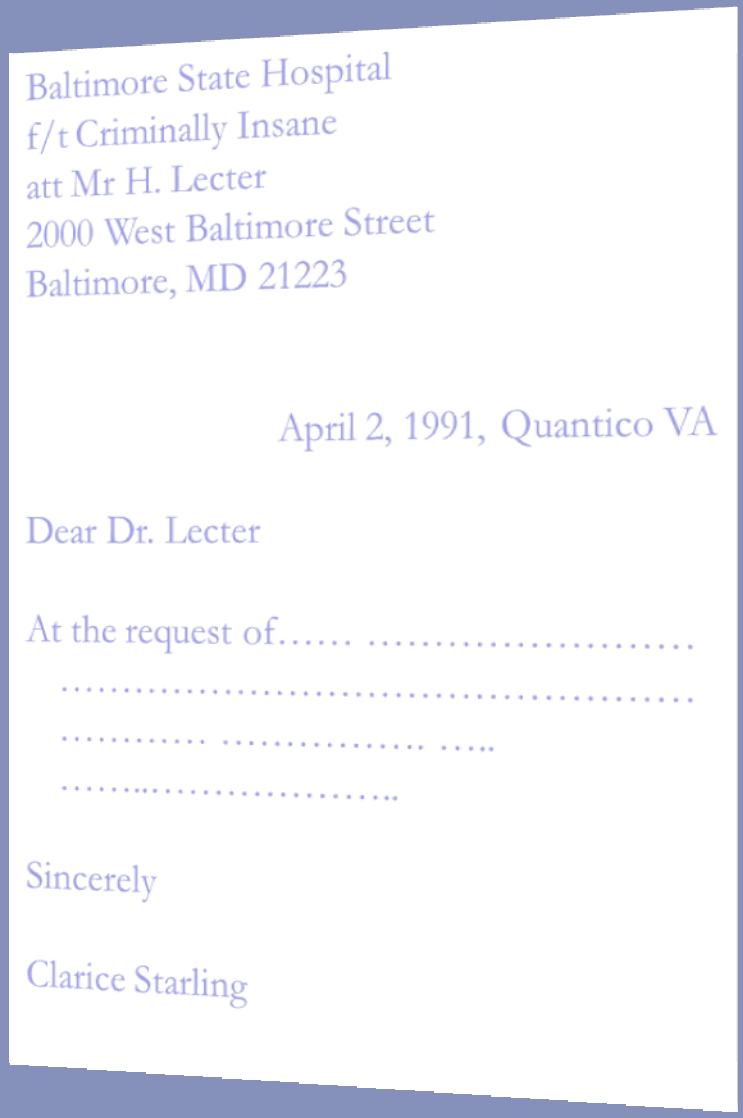
collection and further processing



special data

- racial or ethnic origin
- sex life
- political opinions
- religious or philosophical beliefs
- trade union membership
- health

- social security number


Baltimore State Hospital
f/t Criminally Insane
att Mr H. Lecter
2000 West Baltimore Street
Baltimore, MD 21223

April 2, 1991, Quantico VA

Dear Dr. Lecter

At the request of..... .....
.....
....
.....

Sincerely

Clarice Starling

security

guarantee an appropriate level of security, taking into account the state of the art and the costs of implementation, and having regard to the risks associated with the processing and the nature of the data to be protected

appropriate technical and organizational measures to secure personal data against loss or against any form of unlawful processing

aim at preventing unnecessary collection and further processing of personal data.

The Register

Data protection watchdog distributes email mailing list

Friday 29th October 2004 09:51 GMT. The Dutch Data Protection Authority (Dutch DPA), which supervises the compliance with acts that regulate the use of personal data, was rather red-faced this week when it sent out a newsletter with all of the recipients in the Cc: field instead of the Bcc: field.

DPA's news letter goes out to 4000 subscribers. The DPA, which supervises the compliance with the Dutch Personal Data Protection Act and the Dutch Municipal Database Personal Records Act, was lucky that 'only' a thousand subscribers received the letter, but it managed to make the mistake twice. In a message it apologised for sending the first letter, again putting all recipients to the Cc list, so a second apology had to be sent.

transparency obligations and rights

controllers

- notification to Data Prot. Authority
- information provision to data subject
- notification to third parties of rectification or erasure or blocking

data subjects

- access rights
- right to rectification, removal or blocking
- right to object
  - processing based on art. 7(e) - (f)
  - processing for direct marketing purposes

notification

Meldingsformulier
Verwerking persoonsgegevens

Vraag 4 Wat meldt u aan?

4.1 Hoe luidt de naam of de omschrijving van de verwerking van persoonsgegevens?

.....

.....

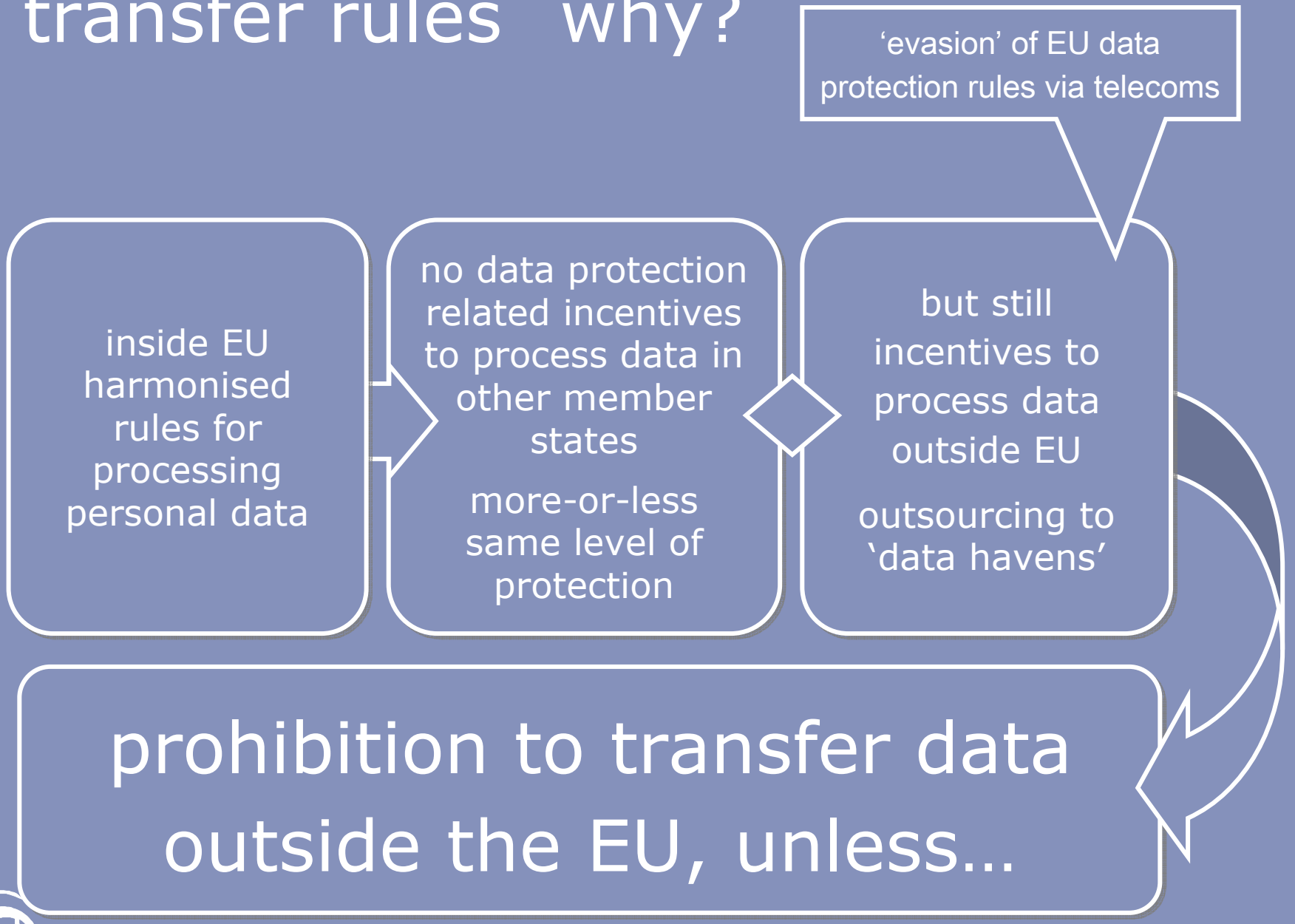
Vraag 5 Doel van de verwerking

5.1 Voor welk doel of voor welke samenhangende doeleinden verwerkt de verantwoordelijke persoonsgegevens?

1. .....
2. .....
3. .....

transfer of personal data
prohibited (art. 76 Wbp)

transfer rules why?



transfer to third countries

Article 25-26

- in principle, transfer is only allowed if the non EU-country provides an adequate level of protection
  - US “safe harbor principles”
    - www.export.gov/safeharbor
  - “EC Standard Contractual Clauses”
    - europa.eu.int/comm/internal market
- exemptions
  - unambiguous consent
  - performance of contract
  - etc.

tot ziens!

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http://zwennblog.weblog.leidenuniv.nl