

LEIDEN LAW COURSE  
LAW & IT IN EUROPE

# Privacy and the Protection of Personal Data

Gerrit-Jan Zwenne  
Leiden Law Course – Feb 2012



## roadmap

- backgrounds
  - what is privacy anyway?
- European Privacy Law
  - EU Privacy Directive (95/46)
  - rules for the processing of personal data
    - when may 'controllers' process personal data..?
    - what rights have 'data subjects'...?
- \$p@m!
  - EU Privacy e-Comms Directive (2002/58)
    - rules for unsolicited communications



# *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 means, 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
  - the right to be left/let alone
    - the inviolability of the home
- secrecy of communications
  - claims with respect to the secrecy of the medium
    - correspondence
    - telephone
- informational privacy
  - protection of personal data

Westin  
"claims of  
individuals to..."

Westin:  
"viewed in  
terms of the  
relation..."



# European Privacy Law

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



## A New Proposal for a General Data Protection Directive

- accountability
- privacy by design
- data portability
- data minimisation
- data breach notification
- and...

'a right to be forgotten', i.a. where processing is based on consent or contract, or where an individual wishes to remove data posted as a child

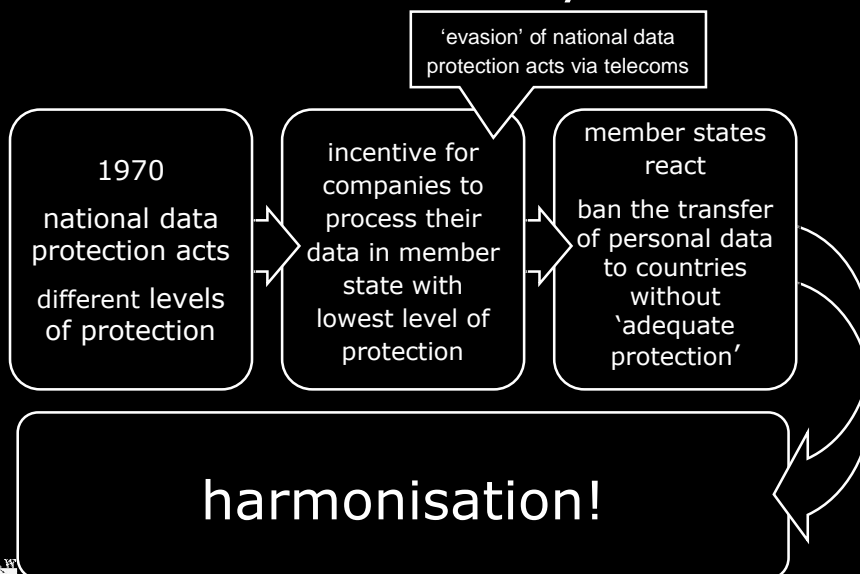


## object of directive 95/46/EC

- protection of fundamental rights and freedoms of natural persons
  - and in particular their right to privacy with respect to the processing of personal data
- no restrictions for the free flow of personal data between Member States
  - for reasons connected with the protection of these rights



## harmonisation... why?



## data protection law is about...

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.)

processing personal data  
by controllers and by  
processors

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

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



## data protection applies to...

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

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

structured set of data relating to different persons

- personal or household 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 state's 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.*



# rules for processing personal data



## data protection obligations...

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

• **valid basis** for processing

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

• **well-defined** purposes and further processing for compatible purposes

*datasubjects' right to know about the processing of their data*

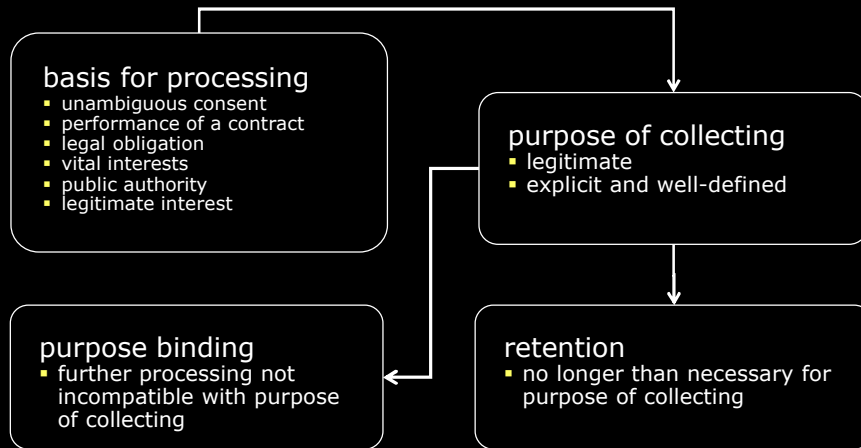
• **transparency** rights

• **security**

*to prevent loss and other unlawful processing*



# rules for processing personal data



# processing is allowed

- *sufficient information*
- *not via acceptance of Terms & Conditions*
- *not in employer-employee relations*
- with **unambiguous consent** of data subject
  - *free expression of data subject's 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 inspector*



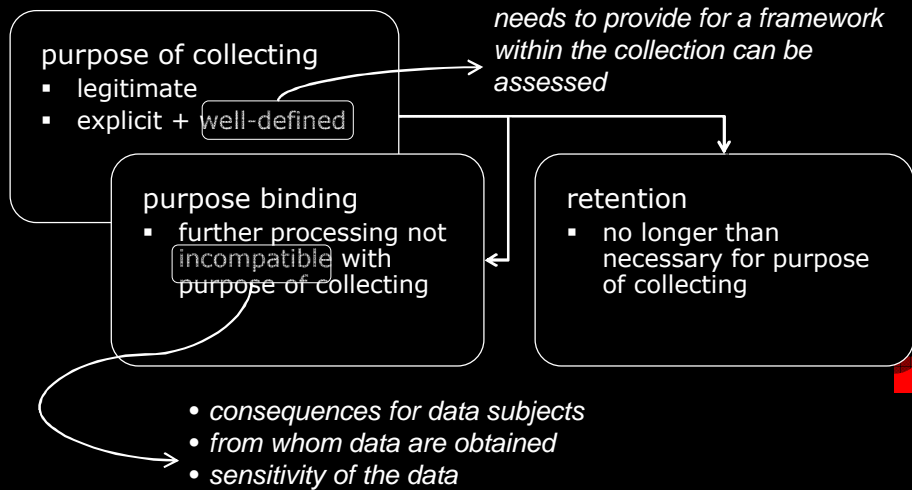
## processing is also allowed...

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

*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

## transparency obligations and rights

### controllers

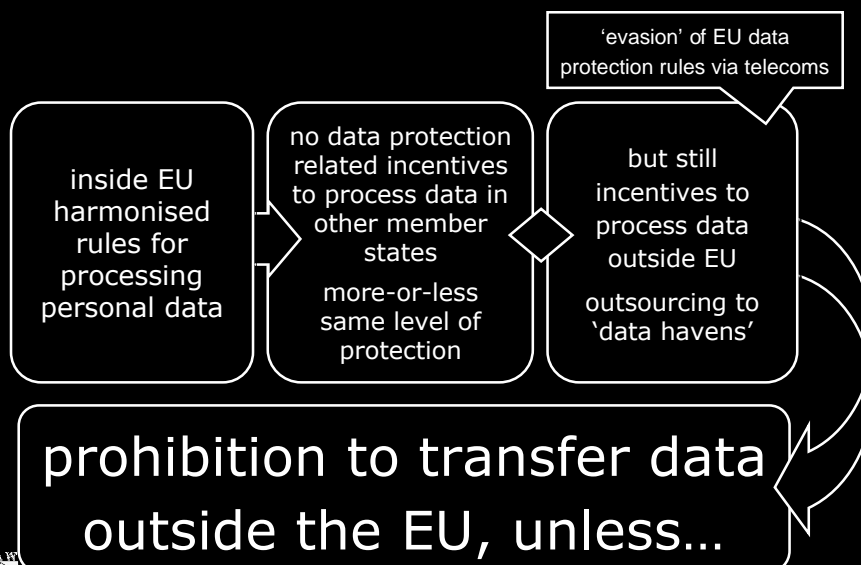
- notification to Data Prot. Authority
- information provision to data subject
- notification to third parties of rectification or erasure or blocking

### 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



## transfer rules: why?



# transfer to third countries

## Article 25-26

- in principle, third country transfer only allowed if the non EU-country provides an adequate level of protection
- US safe harbor principles
- EC Standard Contractual Clauses
- exemptions
- unambiguous consent
- performance of contract
- etc.



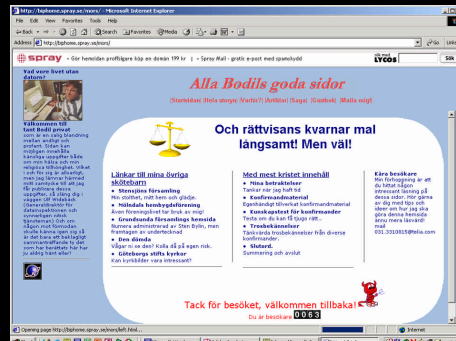
transfer of personal data prohibited



# applicable to websites?

- automated processing of personal data
- exemptions do not apply
  - public security, defence, State security (incl. economic well-being of the State) and the activities of the State in areas of criminal law
  - a natural person in the course of a purely personal or household activity
  - journalism etc

ECoJ 6 November  
2003 Case C101/01



not considered 3rd country transfer

– even if the data can be accessed from third countries, because...

*“given, first, the state of development of the internet at the time Directive 95/46 was drawn up and, second, the absence, in Chapter IV, of criteria applicable to use of the internet...”*

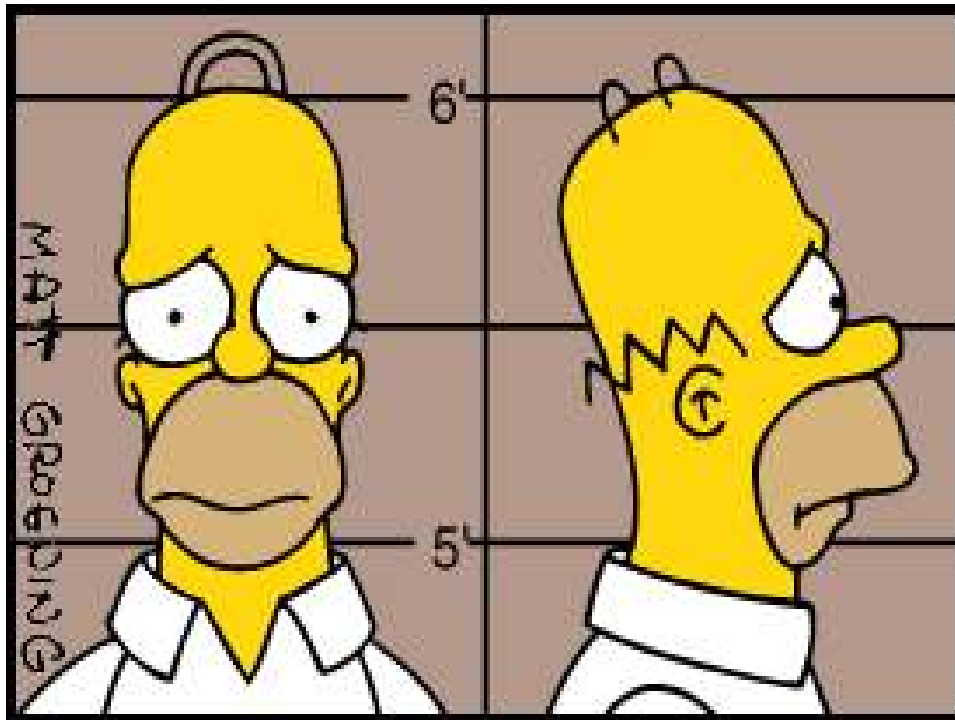
*...one cannot presume that the Community legislature intended the expression transfer [of data] to a third country to cover the loading, by an individual in Mrs Lindqvist's position, of data onto an internet page, even if those data are thereby made accessible to persons in third countries with the technical means to access them”*



# 5p@m!

Directive 2002/58/EC OJ. L201 31.07.2002, p. 37–47





## unsolicited communications

- opt-in
  - automated calling devices without human intervention
  - fax, e-mail, sms
- opt-out
  - use of electronic contact details of persons that are already customer
    - for marketing purposes
    - with respect to the controllers' own similar products or services

*A guaranteed delivery of 50 million e-mails for under a thousand bucks. And you only need one sucker in a million to recover your start-up costs*

## opt-out electr. contact details

– use electronic contact details

- persons that are already customer

- for direct marketing purposes
- with respect to the controllers' own similar products or services

only email and sms, no fax data

What about group companies?  
What are products are similar?

no contact details acquired through price contest etc.



twitter  
#eLaw

# vragen?

zwenneblog • gerrit-jan.zwenne@twobirds.com • @grtjnzwnne

