

LAW AND DIGITAL TECHNOLOGIES

Internet Privacy and Data Protection

Seminar V and VI

Key concepts of EU Data Protection Law and
its applicability *prof. dr. Gerrit-Jan Zwenne*

November 2nd, 2016



program

→ *seminar I*

context

- privacy and privacy law
- the need for harmonisation

players

- data subject
- controller
- processor
- DPA and DPO

playing field

- processing of personal data and filing system
- personal or household activities
- journalism
- the territorial scope

→ *today's seminars*

→ *seminar VII*

rules of the game

- processing grounds
- purpose limitation
- storage and retention
- security
- special categories of data
- social security numbers
- etc.



datasubjects, controllers, processors, dpo's and dpa's, art. 29 WP

PLAYERS

players

Art. 4 GDPR &
Art. 2 95/46/EC

data subject (or 'individual')

- an identifiable person (ie a natural person who can be identified, directly or indirectly)

controller

- controls the purposes and means of processing
- natural person, legal person, or government institution

processor

- processes data for the controller, without being directly under its authority

DPA

- authority overseeing the processing of personal data

DPO

- data protecting officer



"controller"

Art. 4(7) GDPR &
Art. 2(d) 95/46/EC

the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data.

both factually and legally

"processor"

Art. 4(8) GDPR &
Art. 2(e) 95/46/EC

a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller.

eg. Infosys, WorkDay, Salesforce
etc.

But not Internal IT department!

*The Working Party recognizes that the concrete application of the concepts of data controller and data processor is becoming **increasingly complex**. This is mostly due to the increasing complexity of the environment in which these concepts are used, and in particular due to a growing tendency, both in the private and in the public sector, towards **organisational differentiation**, in combination with the development of ICT and globalisation, in a way that may give rise to new and difficult issues and may sometimes result in a lower level of protection afforded to data subjects.*

- a Facebook (Instagram, Twitter) user uploads photo's to her profile page or feed
- A university uses Gmail for Business
- the tax authorities require that you submit your income details in an electronic form and via its online tax portal
- to fight health insurance fraud municipalities and insurers construct a fraud detection system: each participant uploads data ('signals') on possible fraudulent behavior

Who are the data subjects? Who is (are) controller(s)? and processor(s)?



THE PLAYING FIELD

"processing"

Art. 4(3) GDPR &
Art. 2(b) 95/46/EC

means any operation or set of operations, which is performed upon personal data or sets of personal data, whether or not by automated means

electronically

such as collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, erasure or destruction

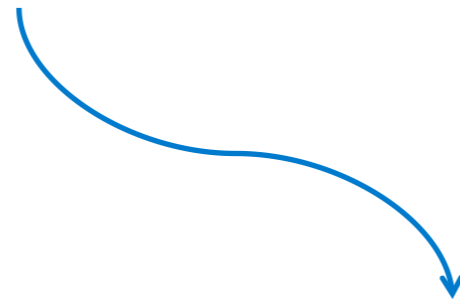
question

can you name an activity with respect to personal data that is *not* covered by the definition of 'processing of personal data'

"personal data"

Art. 4(2) (cons. 23) GDPR &
Art. 2(a) 95/46/EC

any information relating to an identified or identifiable natural person (“data subject”)

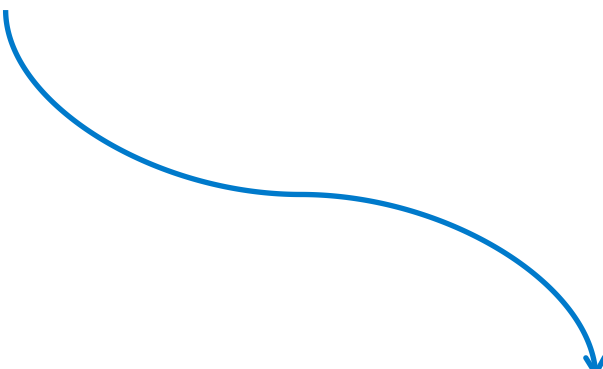


an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, unique identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social or gender identity of that person

"anonymous data"

Art. 4(2) (cons. 23) G
DPR

information that does not relate to an identified or identifiable natural person



an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, unique identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social or gender identity of that person

"pseudonymous data"

Art. 4(5)
GDPR

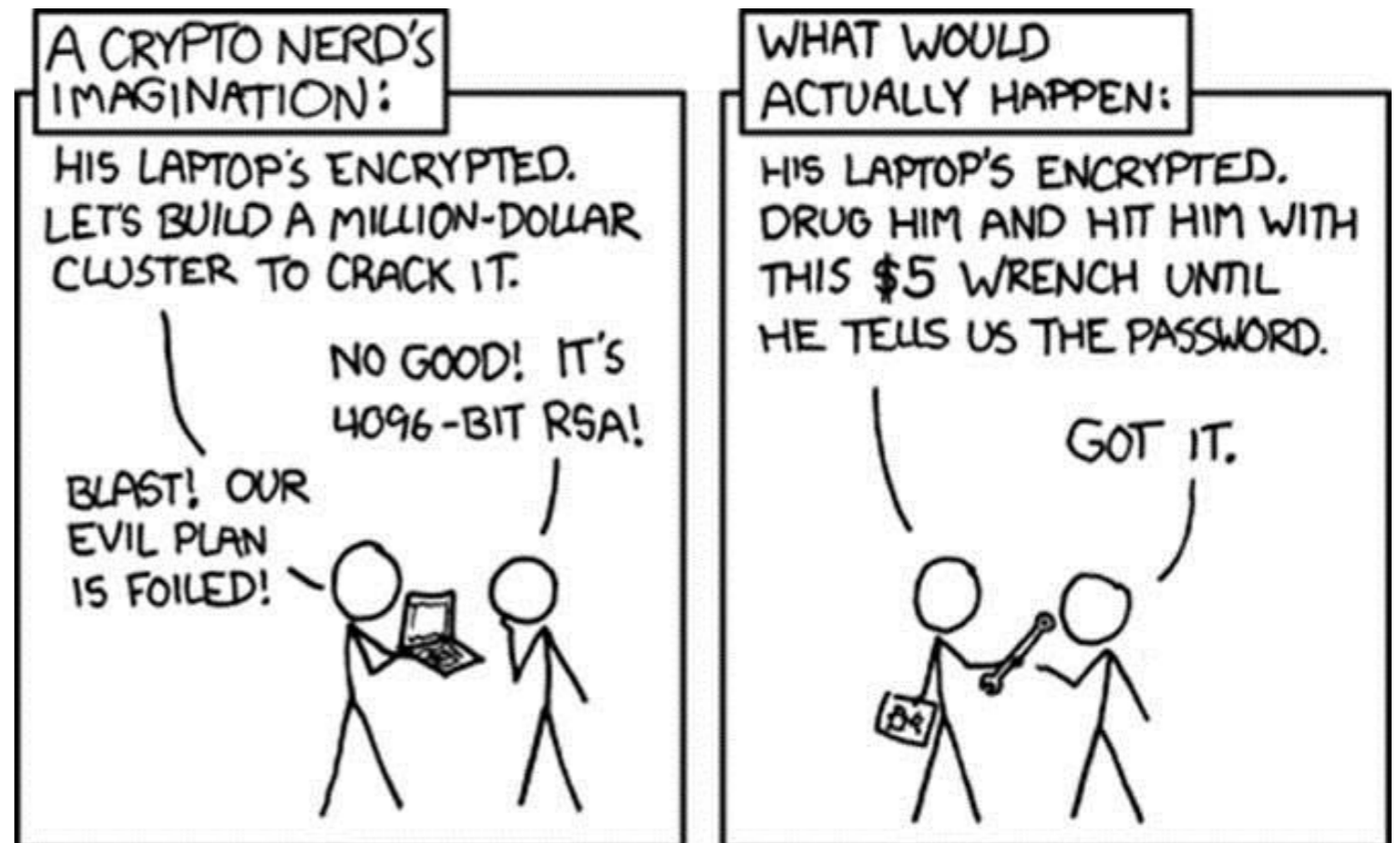
personal data that cannot be attributed to a specific data subject without the use of additional information



as long as such additional information is kept separately and subject to technical and organisational measures to ensure non-attribution

"encrypted data"

personal data, which through technological protection measures is rendered unintelligible to any person who is not authorised to access it



"single out"

*“A very common family name will not be sufficient to identify someone – i.e. **to single someone out** – from the whole of a country’s population, while it is likely to achieve identification of a pupil in a classroom.*

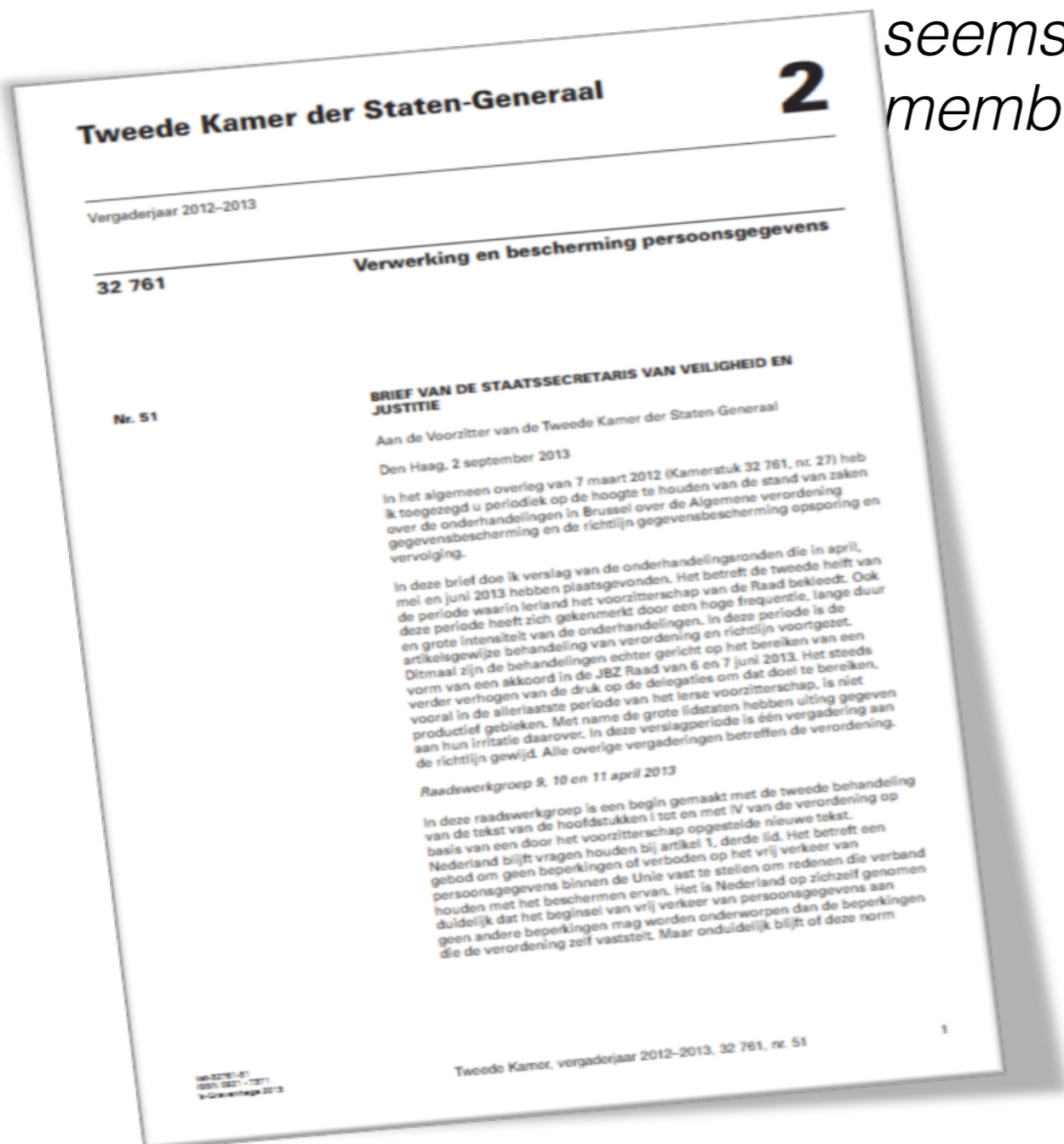


Even ancillary information, such as “the man wearing the black suit” may identify someone out of the passers-by standing at a traffic light.”

WP29 opinion on the concept of
personal data 20th June 2007

“*[There] is no support at all for further refining the concept 'personal data' with categories like 'singling out'.*”

The proposed definition [without singling-out] seems to the Netherlands and many member states complicated enough.”



CJEU 19 October 2016 C-582/14 (Breyer)

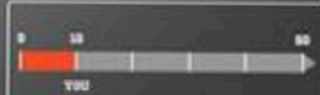
a (dynamic) IP-address can be personal data
(but only) if...

- there are indeed legal means available that allow for the possibilities to obtain and use additional data needed to identify the data subject



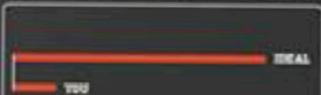
singling-out is not identification!

TOTO INTELLIGENT YOU-RINAL — POWERED BY GOOGLE STREAMSENSE ANALYTICS



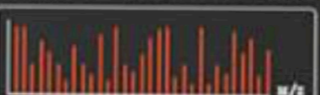
YOU AREN'T GETTING ENOUGH VITAMIN D.
 ONE CAN OF GENENTECH ENHANCED SARDINE SHAKE HAS 270% OF USRDA.

WHY IS THIS RECOMMENDED?
 VITAMIN D LEVEL IN URINE: **10 PG/ML**



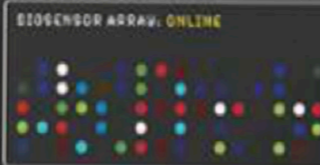
YOU ARE DANGEROUSLY DEHYDRATED.
 RESTORE YOUR LIQUIDITY WITH POLAND SPRING 100% NATURAL BOTTLED WATER.

WHY IS THIS RECOMMENDED?
 SPECIFIC GRAVITY: **1.04**



ARE YOU SATISFIED WITH LEXAPRO?
 ASK YOUR DOCTOR ABOUT CYMBALTA FOR YOUR DEPRESSION.

WHY IS THIS RECOMMENDED?
 SSCITALOPRAM DETECTED: **34 NG/ML**



BIOSENSOR ARRAY: ONLINE
 BILEFURIN: NOT DETECTED
 LEUCINE-RICH ALPHA-2-GLOBULIN: NEGATIVE
 PROTEIN LEVELS: LOW
 LEUCOCYTE ESTERASE: NOT DETECTED
 CARBAZEPINE: DETECTED
 METHAMPHETAMINE SULFATE: PRESENT
 BENZODIAZEPINE: DETECTED

ISODIALENSIC ACID: DETECTED
 HELICOBACTER GASTRORUM: NEGATIVE
 BLADDER CANCER: NEGATIVE
 APPENDICITIS: NEGATIVE
 LIVER FUNCTION: SUBOPTIMAL
 KIDNEY FUNCTION: NORMAL
 BODY TEMPERATURE: ABNORMALLY LOW

NEXT SCHEDULED AUTOCLEAN: 7:40PM 08.16.2019



ALL BENNIGANS EMPLOYEES MUST PERFORM COLD PLASMA STERILIZATION OF HANDS BEFORE RETURNING TO WORK.



HIT TARGET TO OPT OUT OF PERSONALIZED ADS

*social security
number*

*info@companyname
.com*

ip-adres

@zwnne

*zip code, street or
house nr.*

*cookies, device
fingerprints*

070 3538800

+31(6)2251 8337

material scope

any structured set of personal data which form part of a filing system or are intended to form part of a filing system

processing of personal data wholly or partly by automated means

- sometimes also non-automated processing

exception

- activities outside scope of EU law
- Ch. 2 Title V of Treaty on EU
- prevention investigation detection or prosecution of criminal offences
- processing for purely personal or household activity

common security and defence

processing of records of non-EU citizens, not in EU Member State, by non EU-based controller

*exception for journalistic, artistic, or literary ends
Art. 85 GDPR & Art. 9 (cons. 37)
95/46/EC*

when access to profile information extends beyond self selected contacts, such as when access to a profile is provided to all members within the SNS or the data is indexable by search engines, access goes beyond the personal or household sphere. [WP29 opinion on social networks 2009]

*the operation of a camera system, as a result of which a video recording of people is stored on a continuous recording device such as a hard disk drive, installed by an individual on his family home for the purposes of protecting the property, health and life of the home owners, **but which also monitors a public space**, does not amount to the processing of data in the course of a purely personal or household activity, for the purposes of that provision.*



CJEU 11
December 2014
C-212/13



territorial scope

1. *Who is the controller?*
2. *does the controller have an establishment in a Member State?*
3. *is processing taking place in the context of the activities of that establishment?*

main rule (95/46/EC)

- processing in the context of the activities of an establishment of a controller in a Member State

sub rule

- if the controller is not established on Community territory and,
- for purposes of processing personal data makes use of equipment, automated or otherwise, situated on the territory of [a] Member State,
- unless such equipment is used only for purposes of transmitting data to or from the territory of the Community



Google Spain

- 1. Who is the controller?*
- 2. does the controller have an establishment in a Member State?*
- 3. is processing taking place in the context of the activities of that establishment?*

55 In the light of that objective of Directive 95/46 and of the wording of Article 4(1)(a), it must be held that the processing of personal data for the purposes of the service of a search engine such as Google Search, which is operated by an undertaking that has its seat in a third State but has an establishment in a Member State, is carried out 'in the context of the activities' of that establishment if the latter is intended to promote and sell, in that Member State, advertising space offered by the search engine which serves to make the service offered by that engine profitable.

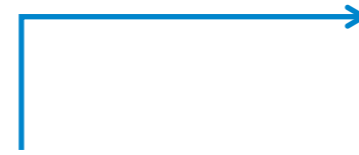
territorial scope under the GDPR

main rule

- processing in the context of the activities of an establishment of a controller **or a processor** in a Member State

sub rule

- offering of goods or services to such data subjects in the union;
or
- the monitoring of their behaviour as far as their behaviour takes place within the EU



- 1. Who is the controller?*
- 2. does the controller have an establishment in a Member State?*
- 3. is processing taking place in the context of the activities of that establishment?*



question

generally we assume that the territorial scope of the GDPR covers more than that of Directive 95/46/EC. Can you think of a situation where the Directive does apply and the GDPR does not?

questions?

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