

# INTERNET PRIVACY AND EU DATA PROTECTION

*Seminar III.*

**Main principles. Lawful processing. Purpose specification and purpose limitation.**

*prof. dr. Gerrit-Jan Zwenne*



November 9<sup>th</sup>, 2022

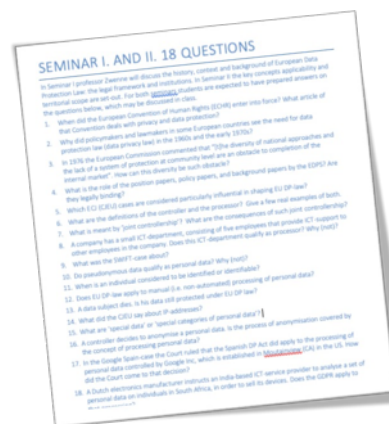
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## QUIZ

Question 12 preparation  
assignment questions

*Does EU DP-law apply to manual (i.e. non-automated) processing of personal data?*

- A. *No, the GDPR applies only to the processing of personal data wholly or partly by automated means*
- B. *Yes, the GDPR also applies to processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system*
- C. *No, because such non-automated processing falls outside the scope of Union law*
- D. *Yes, because the non-automated processing does not affect the free movement of personal data within the Union*

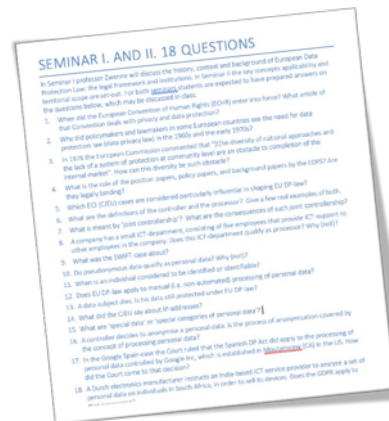


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## QUIZ

Is an IP-address personal data?

- A. It could be if the entity that has access to that IP-address has the legal means which enable it to identify the data subject with additional data which the internet service provider has about that person
- B. Yes, because an IP-address allows the identification, directly or indirectly, of the internet-user
- C. No, because an IP-address identifies a device connected to the internet (e.g. a tablet, computer or a mobile phone), but not necessarily the user of that device
- D. No, but a so-called MAC-address is.

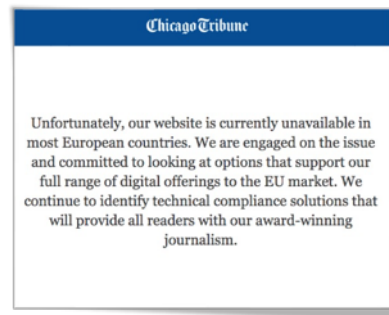


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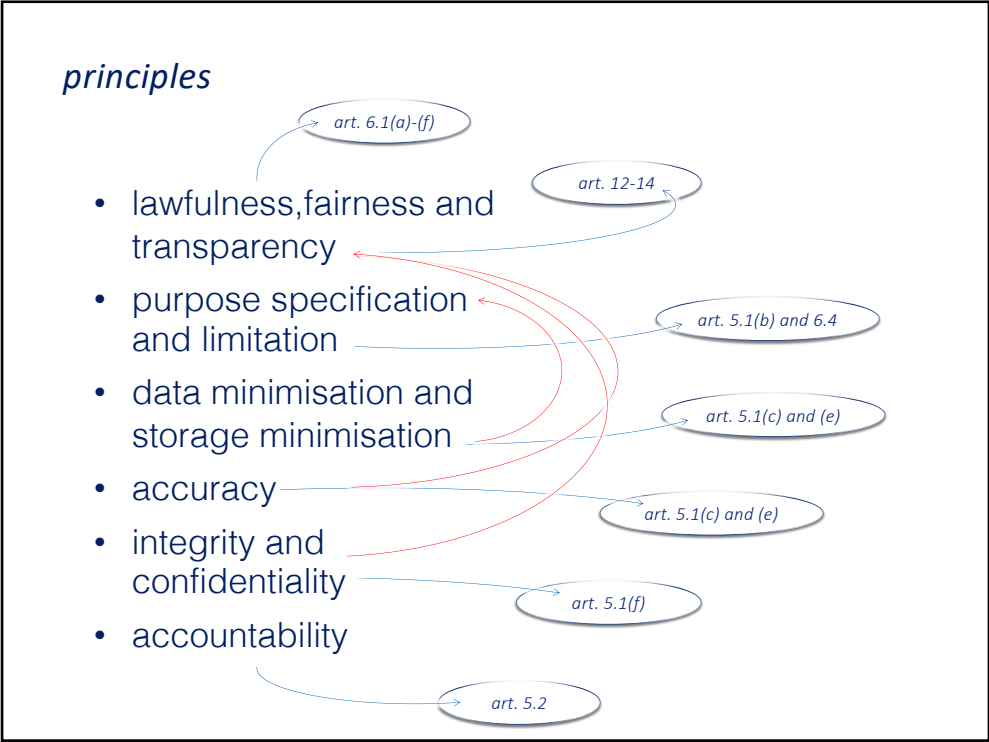
## QUIZ

Why would this US newspaper show this pop-up to EU-based internet-users that want to access an article on its website

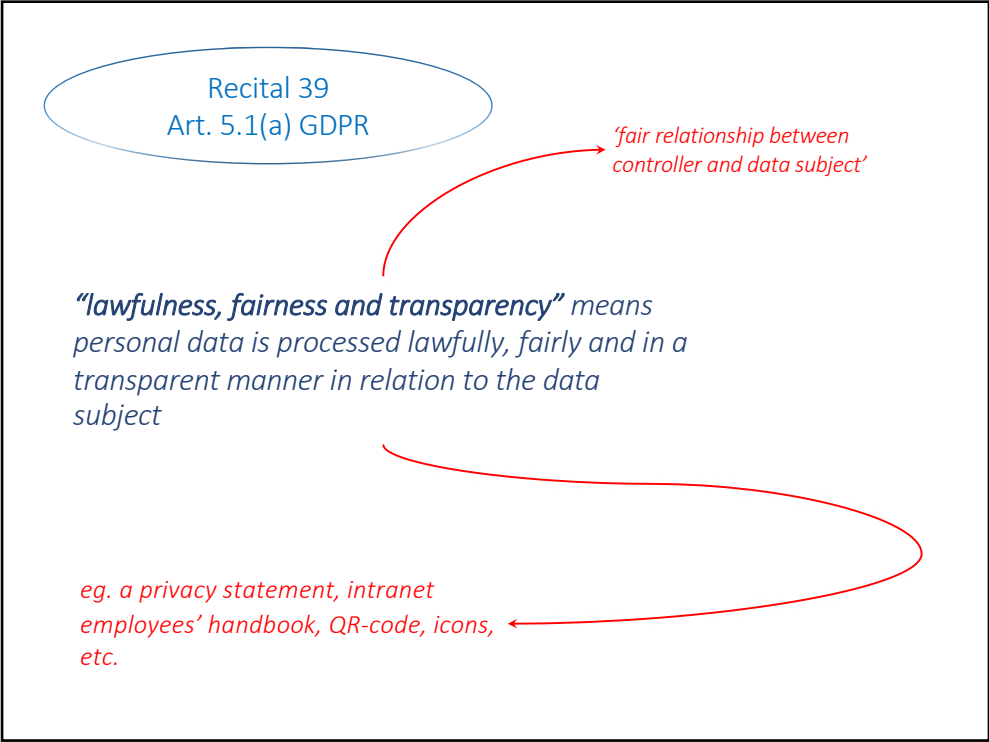
- A. The newspaper does not have an establishment in the EU and consequently it is not allowed to provide services to EU-residents
- B. The US does not provide an adequate level of data protection and therefore it cannot transfer personal data to member states
- C. The newspaper wants to demonstrate it does not offer services to data subjects in the EU. Consequently, the GDPR does not apply



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Art. 5.1(d) GDPR

*“accuracy” means personal data is accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay*

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Art. 5.2 GDPR

*“accountability” processed under the responsibility and liability of the controller, who shall ensure and be able to demonstrate the compliance with the provisions of this Regulation*

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## QUIZ

Which article(s) of the GDPR contain(s) the the data accuracy principle and the accountability principle?

- A. Art. 5.1(a) and Art. 5.2
- B. Art. 5.1(d) and Art. 5.1(f)
- C. Art. 5.1(e) and Art. 5.(f)
- D. Art. 5.1(d) and 5.2

Which provisions in the GDPR set specific rules for processing so-called special data?

- A. Art. 10
- B. Art. 9
- C. Recital 51
- D. Art. 6.4(c)



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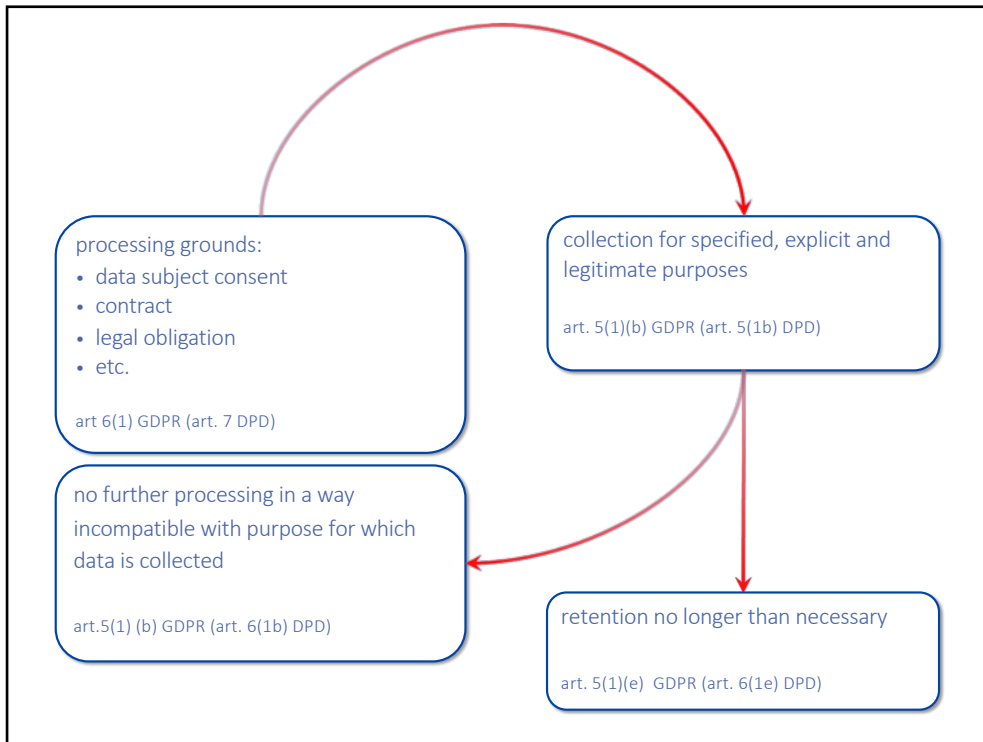
## QUIZ

What are relevant factors to be used in order to assess compatibility in the context of purpose limitation?

- A. the link between the purposes for which the personal data have been collected and the purposes of the intended further processing
- B. the context in which the personal data have been collected, in particular regarding the relationship between data subjects and the controller
- C. the nature of the personal data, in particular whether special categories of personal data are processed
- D. the possible consequences of the intended further processing for data subjects
- E. existence of appropriate safeguards, which may include encryption or pseudonymisation
- F. All of the above



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Art.6 GDPR

***processing grounds (or basis for processing)***

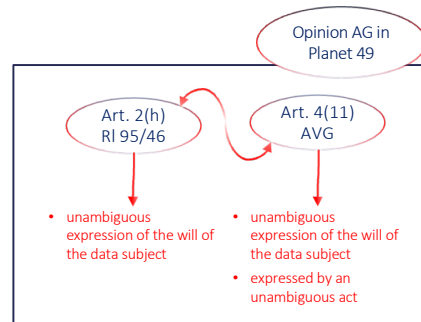
- *data subject consent*
- *performance of a contract*
- *compliance with a legal obligation*
- *vital interest of the data subject*
- *public authority*
- *legitimate interest of controller or third parties to whom the data are provided, unless data subjects' interest prevail*

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## consent

any freely given, specific, informed and *unambiguous indication* of the data subject's wishes by which he or she, by a statement or by a *clear affirmative action*, signifies agreement to the processing of personal data relating to him or her

Art. 4 (11) GDPR



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Art. 7 GDPR

## conditions for consent

- *burden of proof*
- *written declaration which also concerns another matter*
- *withdrawal of consent*

*consent must be presented clearly distinguishable in its appearance from this other matter*

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(32) Consent should be given by a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject's agreement to the processing of personal data relating to him or her, such as by a written statement, including by electronic means, or an oral statement. This could include ticking a box when visiting an internet website, choosing technical settings for information society services or another statement or conduct which clearly indicates in this context the data subject's acceptance of the proposed processing of his or her personal data. Silence, pre-ticked boxes or inactivity should not therefore constitute consent. Consent should cover all processing activities carried out for the same purpose or purposes. When the processing has multiple purposes, consent should be given for all of them. If the data subject's consent is to be given following a request by electronic means, the request must be clear, concise and not unnecessarily disruptive to the use of the service for which it is provided.

not implied...

browser settings

consent should cover all purposes – but should consent be granular...?

not disruptive..

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(42) Where processing is based on the data subject's consent, the controller should be able to demonstrate that the data subject has given consent to the processing operation. In particular in the context of a written declaration on another matter, safeguards should ensure that the data subject is aware of the fact that and the extent to which consent is given. In accordance with Council Directive 93/13/EEC (10) a declaration of consent pre-formulated by the controller should be provided in an intelligible and easily accessible form, using clear and plain language and it should not contain unfair terms. For consent to be informed, the data subject should be aware at least of the identity of the controller and the purposes of the processing for which the personal data are intended. Consent should not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment.

burden of proof

data subjects' awareness

clear an plain language

what constitutes detriment...?

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(43) In order to ensure that consent is freely given, consent should not provide a valid legal ground for the processing of personal data in a specific case where there is a clear imbalance between the data subject and the controller, in particular where the controller is a public authority and it is therefore unlikely that consent was freely given in all the circumstances of that specific situation. Consent is presumed not to be freely given if it does not allow separate consent to be given to different personal data processing operations despite it being appropriate in the individual case, or if the performance of a contract, including the provision of a service, is dependent on the consent despite such consent not being necessary for such performance.

asymmetry

seems much stricter than art. 7.4 GDPR

When assessing whether consent is freely given, utmost account shall be taken of whether, inter alia, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract

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(43) Consent is **presumed not to be** freely given if [...] the performance of a contract, including the provision of a service, is dependent on the consent despite such consent not being necessary for such performance.

Article 7  
4. When assessing whether consent is freely given, **utmost account shall be taken** of whether, inter alia, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract.

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71. [T]he **recitals** of Regulation 2016/679 are particularly illuminating. Because I shall make extensive reference to the recitals, I feel compelled to recall that they obviously do not have any independent legal value, but that the Court frequently resorts to them in interpreting provisions of an EU legal act. **In the EU legal order they are descriptive and not prescriptive in nature.** Indeed, the question of their legal value does not normally arise for the simple reason that, typically, the recitals are reflected in the legal provisions of a directive. Good legislative practice by the political institutions of the EU tends to aim at a situation in which the recitals provide a **useful background** to the provisions of a legal text.

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*freely given...*

*In order to ensure that consent is freely given, consent should not provide a valid legal ground for the processing of personal data in a specific case where there is a **clear imbalance** between the data subject and the controller, in particular where the controller is a public authority and it's therefore unlikely that consent was freely given in all the circumstances of that specific situation*

*by definition not freely given?*

- *municipality vis-à-vis citizen*
- *drivers license agency vis-à-vis motorist*
- *employer vis-a-vis employee*
- *student vis-a-vis university*
- *etc.*

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without detriment....

(42) Consent should not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent **without detriment**.



The Dutch data protection authority, the Autoriteit Persoonsgegevens, announced cookie walls are not compliant with the EU General Data Protection Regulation, TechCrunch reports. The AP issued guidance on the topic after it received complaints from internet users who were not allowed to go on a website after they refused to accept tracking cookies. The DPA said it has informed a number of the organizations in the complaints to stop the practice. "Cookie walls are non-compliant with the principles of consent of the GDPR," an AP spokesperson said. "Which means that any party with a cookie wall on their website has to be compliant ASAP, whether or not we will check that in a couple of months, which we certainly will do."

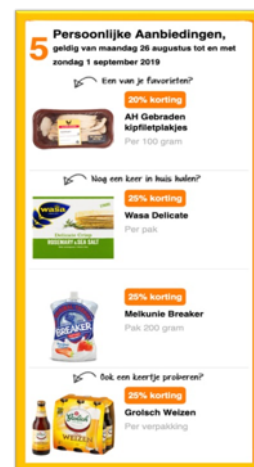
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without detriment....

A supermarket asks for your consent to send you their weekly newsletter with substantial personal discounts.

You can withdraw your consent, but if you do so, you will no longer get these substantial personal discounts.

Is this consent valid in terms of the GDPR? **Can you withdraw your consent without detriment?**



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granularity...

Consent is presumed not to be freely given if it does not allow *separate consent* to be given to different personal data processing operations *despite it being appropriate* in the individual case [...]



I consent to the processing of my data for

- providing you our services
- informing you about our services
- informing you about our other services
- product development

I consent to the processing of my data for

- providing you our services
- informing you about our services
- informing you about our other services
- product development

23



**PLEASE DO NOT TICK  
THE BOX IF YOU DO  
NOT WANT TO RECEIVE  
OUR DAILY OFFERS IN  
YOUR INBOX**

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vital interests



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public authority task or legitimate interest..?

art. 6.1(e) or 6.1(f) GDPR..?

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(41) Where this Regulation refers to a legal basis or a legislative measure, this does **not necessarily require a legislative act adopted by a parliament**, without prejudice to requirements pursuant to the constitutional order of the Member State concerned.

However, such a legal basis or legislative measure should be **clear and precise and its application should be foreseeable** to persons subject to it, in accordance with the case-law of the Court of Justice of the European Union (the 'Court of Justice') and the European Court of Human Rights.

(45) Where processing is carried out in accordance with a legal obligation to which the controller is subject or where processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority, the processing should have a basis in Union or Member State law.

**This Regulation does not require a specific law for each individual processing.**

A law as a basis for several processing operations based on a legal obligation to which the controller is subject or where processing is necessary for the performance of a task carried out in the public interest or in the exercise of an official authority may be sufficient.

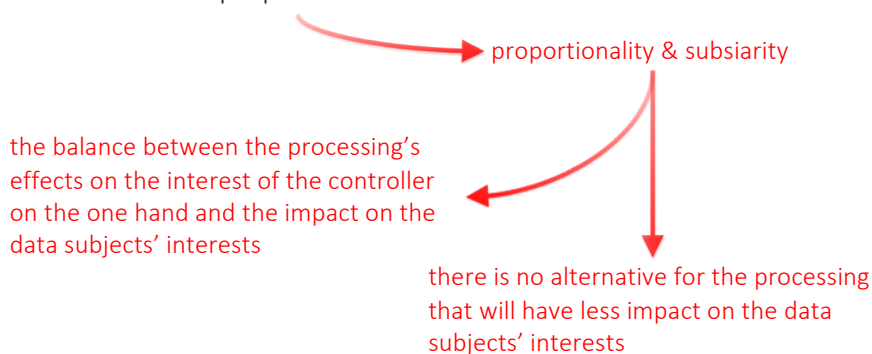
**It should also be for Union or Member State law to determine the purpose of processing.**

Furthermore, that law **could** specify the general conditions of this Regulation governing the lawfulness of personal data processing, establish specifications for determining the controller, the type of personal data which are subject to the processing, the data subjects concerned, the entities to which the personal data may be disclosed, the purpose limitations, the storage period and other measures to ensure lawful and fair processing.

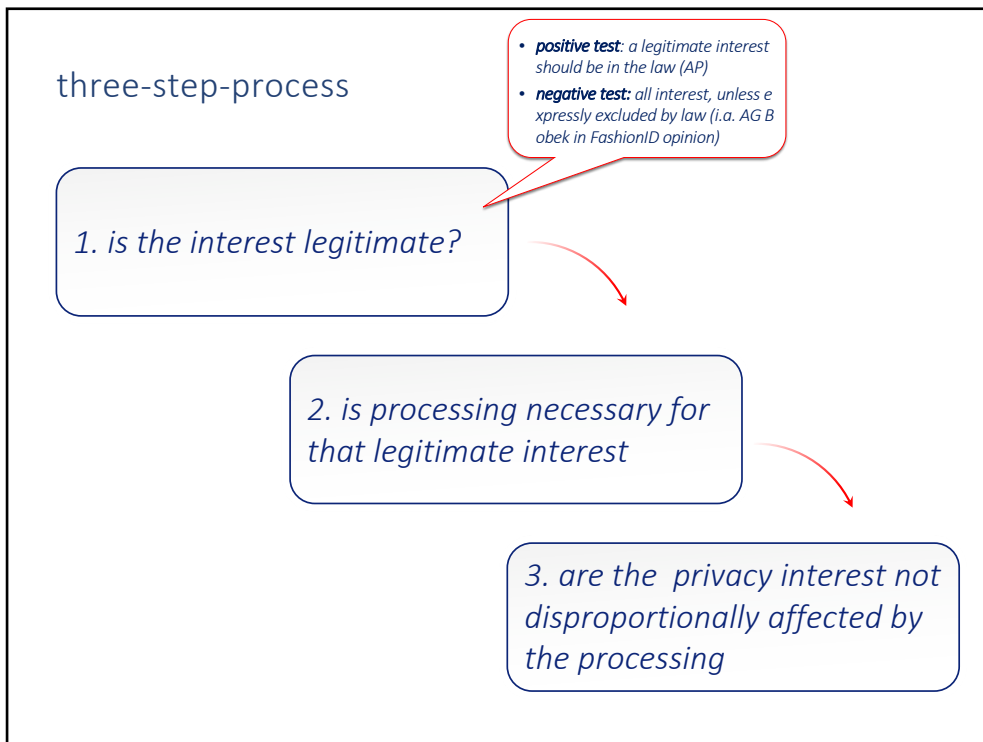
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## legitimate interest...

- has controller a legitimate interest?
- is the processing necessary for that interest?
- what is the impact on the data subjects interests, rights or freedoms, and to what extent is that proportionate?



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AG Bobek 19 December 2018, Case C-40/17 (Fashion ID)

122. Directive 95/46 does not define or enumerate 'legitimate interests'. That notion appears to be rather elastic and open-ended. There is no type of interest that is excluded per se, as long of course as they are themselves legal.

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**Privacy Regulator Takes a Noticeable Distance From Market Forces**  
*Het Financieel Dagblad, 2019*  
 2 Pages - Posted: 16 Jan 2020  
 Rob van Eijk  
 London University, London Law School  
 Gerrit-Jan Zwenne  
 London University - Center for Law in the Information Society  
 Date Written: December 24, 2019

**Abstract**  
 The Autoriteit Persoonsgegevens, the Dutch Data Protection Authority (DPA), is the competent authority for compliance with privacy legislation, i.e., the General Data Protection Regulation (GDPR). Due to the open nature in the legislative framework, it is sometimes unclear how the rules apply. That is why the authority regularly provides guidance. Last month the Dutch DPA published guidance on legitimate interest as a legal ground for processing personal data. There was, and is, much discussion about that. The guidance is noteworthy, if not controversial. What is the controversy? In the newspaper article, we explain why we disagree.

**Keywords:** gdpr, data protection, privacy

**Suggested Citation:**  
 Eijk, Rob van and Zwenne, Gerrit-Jan, Privacy Regulator Takes a Noticeable Distance From Market Forces (December 24, 2019), *Het Financieel Dagblad*, 2019, Available at SSRN: <https://ssrn.com/abstract=3509663>



**Dutch Data Protection Authority Offers Its Take on "Legitimate Interest" Data Processing Authority**


By Oded Kagan on November 4, 2019  
 POSTED IN GENERAL PRIVACY & DATA SECURITY NEWS & DEVELOPMENTS

The Dutch DPA has issued guidance on the use of "legitimate interest" as a legal basis for processing data under GDPR.

Key takeaways on what constitutes "legitimate":

- The interest needs to be pursuant to a written or unwritten legal principle.
- Merely serving the interests of society or pure commercial interests, profit maximization, following the behavior of employees or the (buying) behavior of (potential) customers, etc. is not legitimate interest.
- This position seems not to be in line with previously expressed positions in the EU.
- For example, per the United Kingdom Information Commissioner's Office, individual interests or broader societal benefits may all be legitimate.
- The Article 29 Working Party in its opinion WP217 recognized legitimate interest as applying to certain types of marketing activities.

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**EUROPEAN COMMISSION**  
 DIRECTORATE-GENERAL JUSTICE AND CONSUMERS  
 Directorate C - Fundamental rights and Rule of Law  
 Brussels, 06/03/2020  
 JUST-CJ-00000000

Mr Alisd Wulfson  
 Autoriteit Persoonsgegevens  
 Postbus 93374  
 2509 AP Den Haag/The Hague  
 The Netherlands

Dear Mr Wulfson,

The Commission follows with great attention the work carried out by the data protection authorities (DPAs) as regards, *inter alia*, the publication of national guidelines and opinions on matters related to the General Data Protection Regulation (EU) 2016/679 (GDPR).

The Commission supports the issuance of national guidelines addressed to controllers and processors, including in particular SMEs, which contribute to enhancing the understanding of the application of the GDPR in practice. However, it is of utmost importance that the national guidelines are in line with the case law of the CJEU and with the guidelines adopted on the European Data Protection Board (EDPB) level.

In this context, we are contacting you regarding the standard explanation note issued by the Dutch DPA on the legitimate interest ground in Article 6(1)(f) GDPR. In particular, we are concerned by the strict interpretation in the explanation note stating that interests such as a pure commercial interest does not qualify as a "legitimate" interest as regards Article 6(1)(f) GDPR.

For the reasons spelled out below, we are of the opinion that such a strict interpretation is not in line with the GDPR, the guidelines of the Article 29 Working Party/EDPB and the case law of the European Court of Justice (ECJ):

a. *The notion of "legitimate" interests*

In case C-13/16, *Riga unīdome*, the CJEU recalled<sup>1</sup> that the predecessor to Article 6(1)(f) GDPR in Directive 95/46/EC (Article 7(f)) consisted of a three-part test, (i) establishment of the existence of a legitimate interest behind the processing, (ii) assessment of whether the processing in question is necessary, and (iii) undertaking a balancing in order to establish whether the legitimate interests of the controller is overridden by the fundamental rights and freedoms of the data subject. In this regard, it is

<sup>1</sup> Para 1 of the standard explanation note: "What are the considered legitimate interest either: would be the following examples: processing personal data for purely commercial interests, profit maximization, marketing purposes, etc." without legitimate interest or tracking the (potential) behavior of (potential) customers, etc."

<sup>2</sup> Case C-13/16, *Riga unīdome*, para 28, see also Case C-48/17, *Facebook*, para 95.

*[W]e are contacting you regarding the standard explanation note issued by the Dutch DPA on the legitimate interest ground in Article 6(1)(f) GDPR. In particular, we are concerned by the strict interpretation in the explanation note stating that interests such as a pure commercial interest does not qualify as a "legitimate" interest as regards Article 6(1)(f) GDPR*

*[...]*

*it is difficult to reconcile the strict interpretation of the Dutch DPA of what can constitute a legitimate interest with the intended effect that the EU legislators wanted to attribute to Article 6(1)(f) GDPR. It should also be borne in mind that the fact that a pure commercial interest is 'legitimate' does not entail that the data controller can immediately rely on Article 6(1)(f) GDPR. In fact, this will depend on the outcome of the second and third leg of the three-part test*

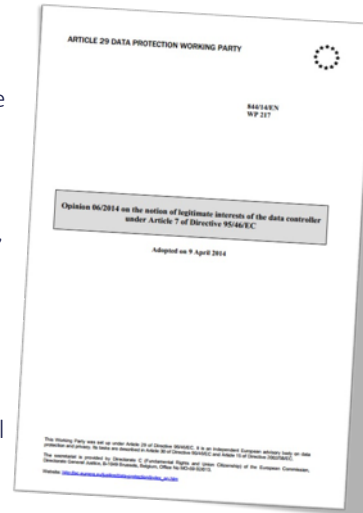
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# legitimate interest...

factors to consider when carrying out the balancing test :

- nature and source of the legitimate interest and whether the data processing is necessary for the exercise of a fundamental right, is otherwise in the public interest, or benefits from recognition in the community concerned;
- impact on the data subject and their reasonable expectations about what will happen to their data, as well as the nature of the data and how they are processed;
- additional safeguards which could limit undue impact on the data subject, such as data minimisation, privacy-enhancing technologies; increased transparency, general and unconditional right to opt-out, and data portability



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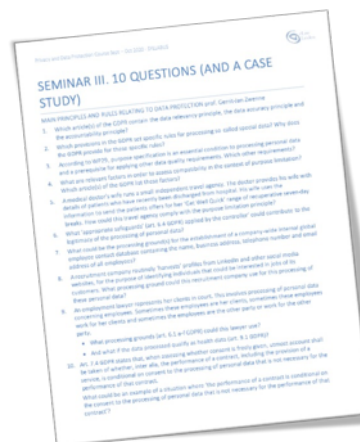
# QUIZ

A recruitment company routinely 'harvests' profiles from LinkedIn and other social media websites, for the purpose of identifying individuals that could be interested in jobs of its customers.

What processing ground could this recruitment company use for this processing of these personal data?

- A. data subject consent (art. 6.1(a) GDPR)
- B. performance of a contract (art. 6.1(b) GDPR)
- C. general interest task (art. 6.1(e) GDPR)
- D. legitimate interest (art. 6.1(f) GDPR)
- E. All of the above

Question 8 preparation assignment questions



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## QUIZ

Question 9 preparation  
assignment questions

An employment lawyer represents her clients in court. This involves processing of personal data concerning employees.

Sometimes these employees are her clients, sometimes these employees work for her clients and sometimes the employees are the other party or work for the other party.

What processing grounds (art. 6.1 a-f GDPR) could this lawyer use?

- A. data subject consent (art. 6.1(a) GDPR)
- B. legal obligation (art. 6.1(c) GDPR)
- C. vital interests (art. 6.1(d) GDPR)
- D. legitimate interest (art. 6.1(f) GDPR)



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## Recital 39 Art. 5(1)(b) GDPR

*“purpose specification” and “purpose limitation” means personal data collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes*

- personal data which airlines gathered about their passengers for flight purposes cannot subsequently be used by immigration services at the destination
- Achmea and Albert Heijn

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## purpose specification and limitation

collection for specified, explicit and legitimate purposes

not further processed in a manner that is incompatible with those purposes

Art. 5(1) b en  
6(4) AVG

- relation between the purposes for which the personal data have been collected and the purposes of the further processing
- context in which the personal data have been collected, in particular regarding the relationship between data subjects and the controller (expectations)
- nature of the personal data, in particular whether special categories of personal data are processed,
- consequences of the intended further processing for data subjects;
- appropriate safeguards

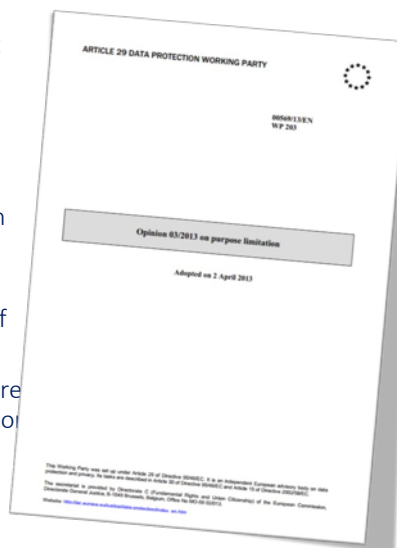


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## purpose limitation

A substantive compatibility assessment requires an assessment of all relevant circumstances. In particular, account should be taken of the following key factors:

- the relationship between the purposes for which the personal data have been collected and the purposes of further processing;
- the context in which the personal data have been collected and the reasonable expectations of the data subjects as to their further use;
- the nature of the personal data and the impact of the further processing on the data subjects;
- the safeguards adopted by the controller to ensure fair processing and to prevent any undue impact on the data subjects.



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### purpose limitation

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- the relationship between the purposes for which the personal data have been collected and the purposes of further processing;
- the context in which the personal data have been collected and the reasonable expectations of the data subjects as to their further use;
- the nature of the personal data and the impact of the further processing on the data subjects;
- the safeguards adopted by the controller to ensure fair processing and to prevent any undue impact on the data subjects.

### legitimate interest...

factors to consider when carrying out the balancing test :

- nature and source of the legitimate interest and whether the data processing is necessary for the exercise of a fundamental right, is otherwise in the public interest, or benefits from recognition in the community concerned;
- impact on the data subject and their reasonable expectations about what will happen to their data, as well as the nature of the data and how they are processed;
- additional safeguards which could limit undue impact on the data subject, such as data minimisation, privacy-enhancing technologies; increased transparency, general and unconditional right to opt-out, and data portability

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### *presumption of compatibility*

*processing for*

- *archiving purposes in the public interest*
- *scientific or historical research purposes*
- *statistical purposes*

*in accordance with art. 89(1) GDPR*

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## The Problem with Big Data (Or: with Data Protection Law)

transparency (art. 12-14 AVG)

- use of algorithms — profiling (art. 22 AVG)
- opacity of the processing
- tendency to collect 'all data'
- repurposing of data, and — data minimization (art. 5.1c)
- use of new types of data — purpose limitation (art. 5.1b)

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### Art. 9 GDPR

#### special (categories) of data

- race or ethnic origin
- political opinions
- religion or philosophical belief
- sexual orientation or gender identity
- trade union membership
- genetic data
- biometric ID-data
- health
- sex life

processing not allowed, unless

- specific exceptions e.g. use of health data by a medical doctor
- general exceptions such as explicit data subject consent, manifestly made public by data subject, legal proceedings, etc.

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*The processing of special categories of personal data is allowed...*

- *data subject explicit consent*
- *employment and social security and social protection law*
- *data subjects' or other individuals' vital interests*
- *foundation, association or any other not-for-profit body with a political, philosophical, religious or trade union aims...*
- *manifestly made public by data subject*
- *establishment, exercise or defence of legal claims*
- *substantial public interest, preventive or occupational medicine, assessment of the working capacity employees, medical diagnosis etc.*
- *public health or archiving purposes in the public interest, scientific or historical research purposes etc.*

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Vyriausioji tarnybinės etikos komisija

H/EU 1 August 2022,  
C-184/20,  
ECLI:EU:C:2022:601



*Article 8(1) of Directive 95/46 and Article 9(1) of Regulation 2016/679 must be interpreted as meaning that the publication, on the website of the public authority responsible for collecting and checking the content of declarations of private interests, of personal data that are liable to disclose indirectly the sexual orientation of a natural person constitutes processing of special categories of personal data, for the purpose of those provisions.*

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## Meta vs Bundeskartellamt

AG Rantos 20 September  
2022, C-252/21,  
ECLI:EU:C:2022:704



*such as flirting apps, gay dating sites, political party websites or health-related websites*



*Article 9(1) of Regulation 2016/679 must be interpreted as meaning that the prohibition on processing sensitive personal data may include the processing of data carried out by an operator of an online social network consisting in the collection of the user's data when that user visits **other websites or apps or enters such data into those websites or apps, linking the data to the user account on the social network and then using the data**, provided that the information processed, considered in isolation or aggregated, allows user profiling based on the categories that emerge from the types of sensitive personal data mentioned in that article.*

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*(51) The processing of photographs should not systematically be considered to be processing of special categories of personal data as they are covered by the definition of biometric data only when processed through a specific technical means allowing the unique identification or authentication of a natural person.*

*Such [special data] personal data should not be processed, unless processing is allowed in specific cases set out in this Regulation, taking into account that Member States law may lay down specific provisions on data protection in order*

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*criminal data*

Art. 10 GDPR

- data on criminal convictions and offences
- or related security measures

*processing only by official authorities, unless*

***an official public register that shows a medical doctor has been reprimanded (disciplinary measure)...?***

*national law:*

- specific exceptions e.g. use of criminal data by probation services
- general exceptions such as explicit data subject consent, manifestly made public by data subject, legal proceedings, etc.

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dentist

- a lot of children do not go to the dentist, because their parents think the dentist is not covered by their health insurance
- but it is!
- can health insurers inform their customers about the dentist coverage?

*preferably only customers that did not claim children's dentist cost...*

*basis for processing?*

*purpose specification*

*processing health data?*

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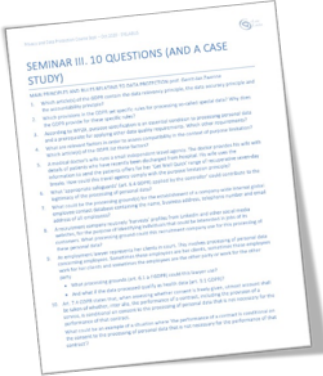


# QUIZ



9 The Dutch DPA (DDPA) imposed a fine on tennis association KNLTB for selling the personal data of its members.  
In 2018, according to the DDPA, KNLTB unlawfully provided personal data of a few thousand of its members to two sponsors. What was the amount of the fine?

- A. 20 million euro
- B. 10 million euro
- C. 525,000 euro
- D. 52,500 euro



questions?

[g.j.zwenne@law.leidenuniv.nl](mailto:g.j.zwenne@law.leidenuniv.nl)