PRIVACY AND EU DATA PROTECTION

Seminar I.

Introduction. History, Context and Background of EU DP Law. And DP Institutions

prof. dr. Gerrit-Jan Zwenne

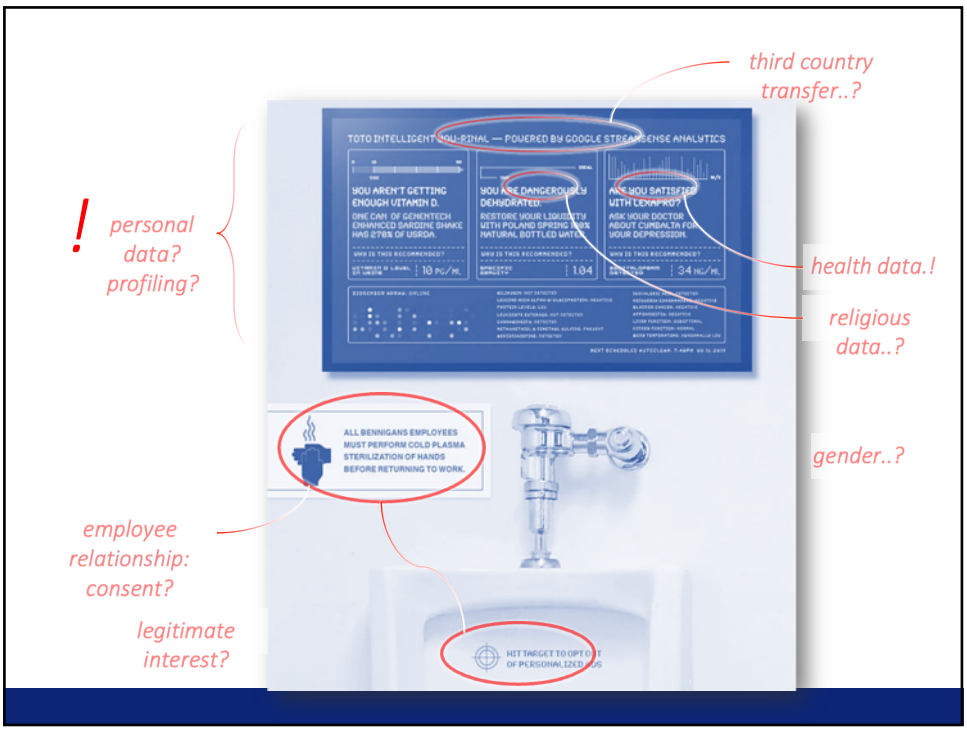
November 9, 2022

eLaw Leiden

1

What do think of this innovative toilet? Is it acceptable? Would you use it? Why? Or why not..?

2



3

privacy dimensions

- physical
- territorial
- communications
- informational

respect for physical and mental integrity (drugtest, cavity search)

e.g. inviolability of the home

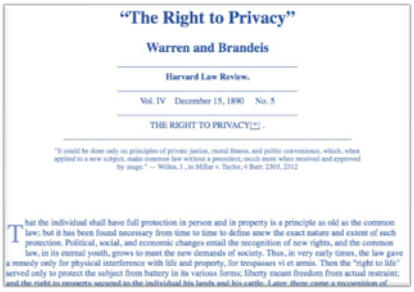
claims of individuals with respect to information on them

secrecy of correspondence and telecommunications, etc.

4

history

5



"The Right to Privacy"

Warren and Brandeis

Harvard Law Review.

Vol. IV December 15, 1890 No. 5

THE RIGHT TO PRIVACY[*] .

"It could be done only on principles of private justice, moral fitness, and public convenience, which, when applied to a new subject, make common law without a precedent; much more when received and approved by usage." — Willes, J., in Millar v. Taylor, 4 Burr. 2303, 2312

That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the new demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses vi et armis. Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of

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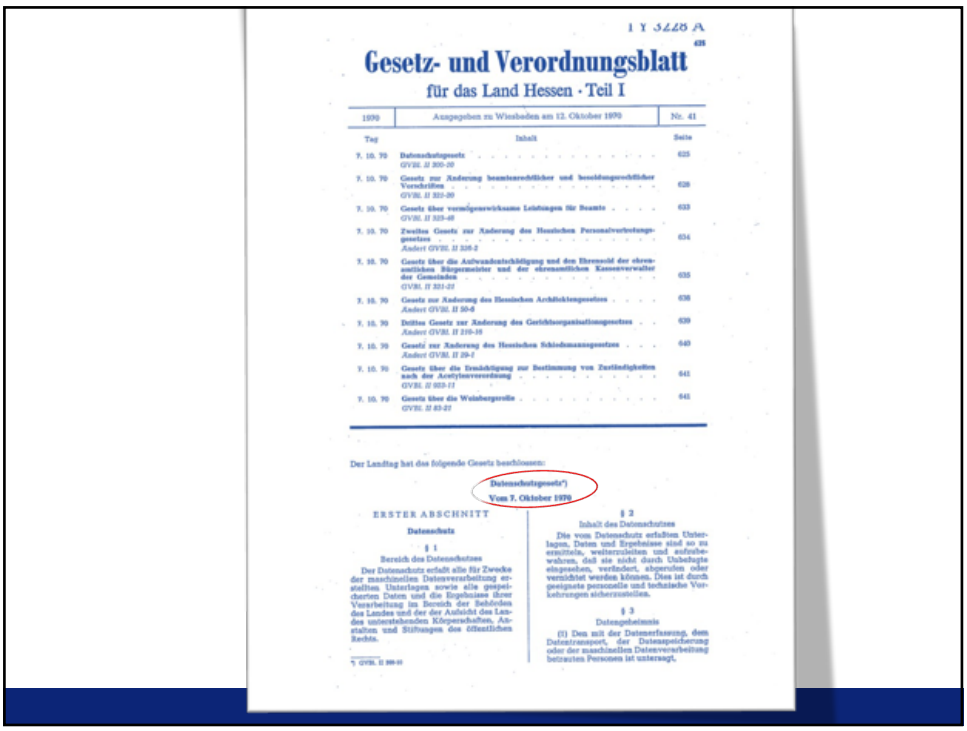

Gesetz- und Verordnungsblatt
für das Land Hessen · Teil I

1970 | Ausgegeben zu Wiesbaden am 12. Oktober 1970 | Nr. 41

Tag | Inhalt | Seite

7. 10. 70 Datenschutzgesetz . . . 625
GVBl. II 300-10

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7. 10. 70 Gesetz zur Änderung des Hessischen Architektengesetzes . . . 638
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7. 10. 70 Drittes Gesetz zur Änderung des Gerichtsorganisationsgesetzes . . . 639
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7. 10. 70 Gesetz über die Ermächtigung zur Bestimmung von Zuständigkeiten nach der Acetylenverordnung . . . 641
GVBl. II 853-11

7. 10. 70 Gesetz über die Weinbergrolle . . . 641
GVBl. II 83-21

Der Landtag hat das folgende Gesetz beschlossen:

Datenschutzgesetz*)
Vom 7. Oktober 1970

ERSTER ABSCHNITT

Datenschutz

§ 1
Bereich des Datenschutzes

Der Datenschutz erfaßt alle für Zwecke der maschinellen Datenverarbeitung erstellten Unterlagen sowie alle gespeicherten Daten und die Ergebnisse ihrer Verarbeitung im Bereich der Behörden des Landes und der der Aufsicht des Landes unterstehenden Körperschaften, Anstalten und Stiftungen des öffentlichen Rechts.

§ 2
Inhalt des Datenschutzes

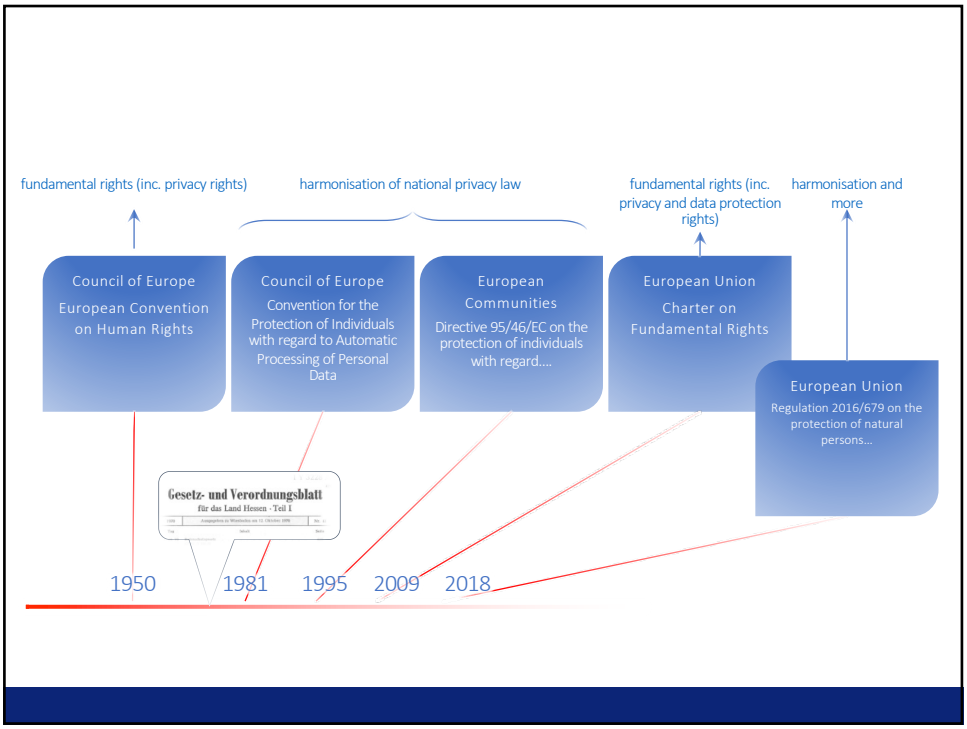
Die vom Datenschutz erfaßten Unterlagen, Daten und Ergebnisse sind so zu ermitteln, weiterzuleiten und aufzubewahren, daß sie nicht durch Unbefugte eingesehen, verändert, abgerufen oder vernichtet werden können. Dies ist durch geeignete personelle und technische Vorkehrungen sicherzustellen.

§ 3
Datengeheimnis

(1) Den mit der Datenerfassung, dem Datentransport, der Datenspeicherung oder der maschinellen Datenverarbeitung betrauten Personen ist untersagt,

*) GVBl. II 300-10

7



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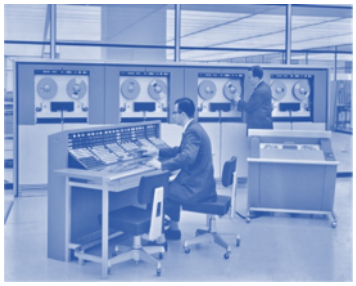


data processing 1960's

1970 verabschiedete Hessen das weltweit erste Datenschutzgesetz

SIEMENS

9

the need for regulation

'evasion' of national data protection acts via telecom

1970

national data protection acts

different levels of protection

incentive for companies to process their data in member state with lowest level of protection

member states ban the transfer of personal data to countries without 'adequate protection'

harmonisation!

10

(9) The objectives and principles of Directive 95/46/EC remain sound, but it has not prevented fragmentation in the implementation of data protection across the Union, legal uncertainty or a widespread public perception that there are significant risks to the protection of natural persons, in particular with regard to online activity. Differences in the level of protection of the rights and freedoms of natural persons, in particular the right to the protection of personal data, with regard to the processing of personal data in the Member States may prevent the free flow of personal data throughout the Union. Those differences may therefore constitute an obstacle to the pursuit of economic activities at the level of the Union, distort competition and impede authorities in the discharge of their responsibilities under Union law. Such a difference in levels of protection is due to the existence of differences in the implementation and application of Directive 95/46/EC.

(13) […] The proper functioning of the internal market requires that the free movement of personal data within the Union is not restricted or prohibited for reasons connected with the protection of natural persons with regard to the processing of personal data.

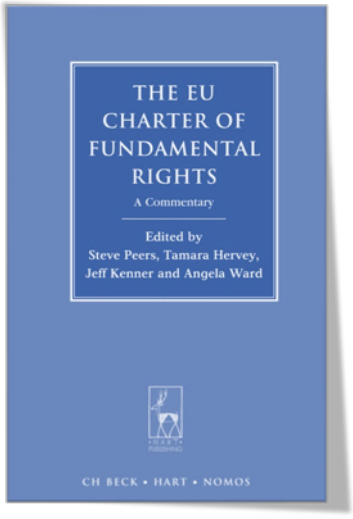
General Data Protection Regulation

11

EU Charter of Fundamental Rights (2000)

- art. 7 privacy
- art. 8 data protection

- art. 11 freedom of information



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legal basis

Article 16(2) TFEU

The European Parliament and the Council [..] shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. [...]

Article 114(1) TFEU

The European Parliament and the Council shall [..] adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

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horizontal effect

'there may be positive obligations inherent in an effective respect for private or family life [...].

These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves'

I. v. Finland 2008

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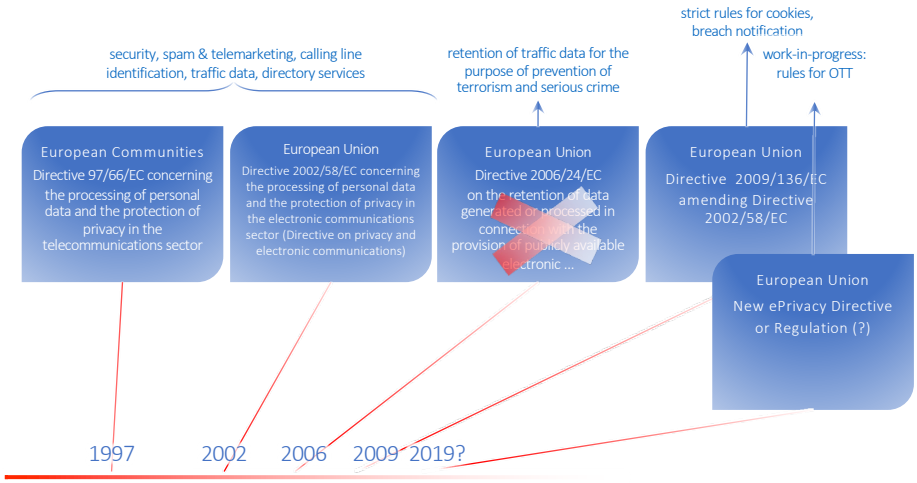
ePrivacy Directive 2002/58/EC



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national DP-law

- special data and criminal data
- health care and social security
- exemptions for the press (freedom of information)
- establishment and organisation of the supervisory authority

In the Netherlands:
GDPR Implementation Act
(*Uitvoeringswet AVG* or *UAVG)*

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rules with a very broad scope in a very dynamic concept

therefore open concepts and general or vague norms

because that is flexible and future-proof

but not too much court decisions (yet)

so many legal concepts are not clear

(activist) supervisory authorities got a lot to say…

European Data Protection Board

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interesting discussions…

POLITICO

As European governments rushed to embrace technology to fight the coronavirus, a plainspoken Dutchman emerged as a thorn in their side. Aleid Wolfsen's message: Don't pretend your solutions are privacy-friendly.

In a group that normally keeps disagreements quiet, Wolfsen stands out. A former politician and mayor of Utrecht who had no formal training in data protection when he took on his role in 2016, he has repeatedly been at odds with other watchdogs, most of whom do not is political background.

The official in charge of Europe's grouping of privacy regulators was also keen to play down any disagreements. There is "no difference in the positions" of different privacy regulators and the "Dutch case was a specific case," Andrea Jelinek said, while a spokesperson for the group, the European Data Protection Board, added: "The legal concept of anonymization is not an absolute concept."

Europe's Data Protection Supervisor, who had OK'd the Commission's use of telecoms data to track the coronavirus, said: "There is a difference between the technical impossibility of doing something to the very end, and something which we would call an effective anonymization."

!

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QUESTIONS

1. When did the European Convention of Human Rights (ECHR) enter into force?

A. 1946

B. 1949

C. 1953

D. 1966

Question 1a preparation assignment questions

2. And what article of that Convention deals with privacy and data protection?

A. Article 6

B. Article 8

C. Article 10

D. Article 12

Question 1b preparation assignment questions


SEMINAR I. AND II. 18 QUESTIONS

In Seminar I professor Zwenne will discuss the history, context and background of European Data Protection Law: the legal framework and institutions. In Seminar II the key concepts applicability and territorial scope are set-out. For both seminars students are expected to have prepared answers on the questions below, which may be discussed in class.

1. When did the European Convention of Human Rights (ECHR) enter into force? What article of that Convention deals with privacy and data protection?
2. Why did policymakers and lawmakers in some European countries see the need for data protection law (data privacy law) in the 1960s and the early 1970s?
3. In 1976 the European Commission commented that "[t]he diversity of national approaches and the lack of a system of protection at community level are an obstacle to completion of the internal market". How can this diversity be such obstacle?
4. What is the role of the position papers, policy papers, and background papers by the EDPS? Are they legally binding?
5. Which ECJ (CJEU) cases are considered particularly influential in shaping EU DP-law?
6. What are the definitions of the controller and the processor? Give a few real examples of both.
7. What is meant by 'joint controllership'? What are the consequences of such joint controllership?
8. A company has a small ICT-department, consisting of five employees that provide ICT-support to other employees in the company. Does this ICT-department qualify as processor? Why (not)?
9. What was the SWIFT-case about?
10. Do pseudonymous data qualify as personal data? Why (not)?
11. When is an individual considered to be identified or identifiable?
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13. A data subject dies. Is his data still protected under EU DP law?
14. What did the CJEU say about IP-addresses?
15. What are 'special data' or 'special categories of personal data'?
16. A controller decides to anonymise a personal data. Is the process of anonymisation covered by the concept of processing personal data?
17. In the Google Spain-case the Court ruled that the Spanish DP Act did apply to the processing of personal data controlled by Google Inc, which is established in Mountainview (CA) in the US. How did the Court come to that decision?
18. A Dutch electronics manufacturer instructs an India-based ICT-service provider to analyse a set of personal data on individuals in South Africa, in order to sell its devices. Does the GDPR apply to

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QUESTION

3. Why did policymakers and lawmakers in some European countries see the need for data protection law (data privacy law) in the 1960s and the early 1970s

A. Because, at that time the ARPANET, a precursor of the internet, was created and subsequently specific DP-law was needed

B. Because, particularly government and multinationals started using computers for processing personal data and as a result new threats to privacy emerged

C. Because of Alan F. Westin's influential books on Privacy and Freedom (1967) and Databanks in a Free Society (1972)

Question 2 preparation assignment questions


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QUESTION

4. In 1976 the European Commission commented that

"[t]he diversity of national approaches and the lack of a system of protection at community level are an obstacle to completion of the internal market".

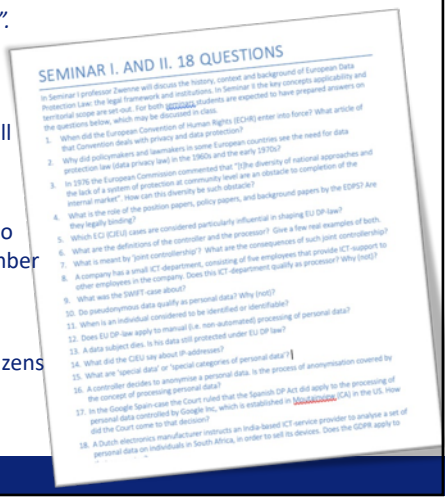
How can this diversity be such obstacle?

A. Because companies don't have sufficient knowledge of all data protection rules in all member states

B. Because member states that have data protection rules cannot allow companies to avoid these rules by using facilities in member states without these rules

C. Because it is immoral that some European citizens are protected, and some other citizens are not

Question 3 preparation assignment questions)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QUESTION

5. What is the role of the position papers, policy papers, guidelines and background papers published by WP29, EDPB and EDPS? Are they legally binding?

A. The position papers, policy papers and background papers are not binding; the guidance is binding

B. All documents published by these authorities are binding

C. None of these documents are binding

D. These documents only bind the authorities that published these

Question 4 preparation assignment questions


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institutions

23

European Court of Human Rights (ECtHR)

- broad interpretation of privacy (art. 8 ECHR)

  the concept of "private life" is a broad term not susceptible to exhaustive definition

e.g. S. and Marper v. UK 2008

HUDOC European Court of Human Rights

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Court of Justice of the EU (CJEU)

- Luxembourg
- highest authority on interpreting EU law
- national courts can ask CJEU advice on interpretation EU law

Lindqvist, Data Retention, Google Spain, Weltimmo, Schrems I and II, Breyer, GC/CNIL, Schrems I and II, etc.

COURT OF JUSTICE OF THE EUROPEAN UNION

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independent authorities

CNIL, AP, GBA, etc.

- National: Data Protection Authorities ("DPAs") or Supervisory Authorities ("SAs")
- European Data Protection Board ("EDPB") Advisory body: opinions, working documents etc.
- European Data Protection Supervisor ("EDPS") Supervises processing by EU bodies (Reg 45/2001, art 41-48)

former so-called "Article 29 Working" Party or "WP29"

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QUESTIONS

1. Which ECJ (CJEU) cases are considered particularly influential in shaping EU DP-law?

A. CJEU 13 May 2014, C-131/12, (Google Spain) and CJEU 24 September 2019, C-507/17 (Google/CNIL) and CJEU 24 September 2019 C-136/17 (GC/CNIL)

B. CJEU 17 July 2014, C-141/12 and C-372/12 (IND) and CJEU 20 december 2017, C 434/16, (Nowak)

C. CJEU 6 October 2015, C-362/14 (Schrems I)

D. All of the above (and many more)


SEMINAR I. AND II. 18 QUESTIONS

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PRIVACY AND EU DATA PROTECTION

Seminar II.

Key concepts of EU Data Protection law and its applicability (incl. territorial scope)

prof. dr. Gerrit-Jan Zwenne

November 2nd, 2022

eLaw Leiden

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if I go to a pub one evening…

AG Bobek Opinion 6 October 2021, C-245/20 X v AP

56. If I go to a pub one evening, and I share with four of my friends around the table in a public place (thus unlikely to satisfy the private or household activity exception [..]) a rather unflattering remark about my neighbour that contains his personal data, which I just received by email (thus by automated means and/or is part of my filing system), do I become the controller of those data, and do all the (rather heavy) obligations of the GDPR suddenly become applicable to me? Since my neighbour never provided consent to that processing (disclosure by transmission), and since gossip is unlikely ever to feature amongst the legitimate grounds listed in Article 6 of the GDPR, (30) I am bound to breach a number of provisions of the GDPR by that disclosure, including most rights of the data subject

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program

Today

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*

next week

rules of the game
- *processing grounds*
- *purpose limitation*
- *storage and retention*
- *special categories of data*

30

players

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

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players

Art. 4 GDPR

data subject ('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 (SA)
- authority overseeing the processing of personal data

DPO
- data protecting officer

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"controller"

Art. 4(7) GDPR

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

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”processor"

Art. 4(8) GDPR

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

e.g. Infosys, WorkDay, Salesforce etc. But not an I nternal IT department!

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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.

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who is in control..?

who determines retention terms?

who decides on DSAR's

who decides on outsourcing?

which party enters into contracts with the data subjects

who notifies a data breach?

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CJEU 5 June 2018, C-210/16, ECLI:EU:C:2018:388 (*Wirtschaftsakademie*)

- *in view of the objectives of DP-law, the concept of 'controller' must be interpreted broadly*
- *Wirtschaftsakademie created a fanpage on Facebook and is considerd a joint controller with Facebook, as they do have a part to play in the means and purposes of processing personal data.*
- *A key factor in this finding is that non-Facebook users could be brought to the Facebook fan-page of Wirtschaftsakademie, which may otherwise not have been within Facebook's sphere of influence*

CJEU 29 July 2019, C-40/17 ECLI:EU:C:2019:629 (*FashionID*)

- *in view of the objectives of DP-law, the concept of 'controller' must be interpreted broadly*
- *Fashion ID can be considered to be a controller jointly with Facebook Ireland in respect of the operations involving the collection and disclosure by transmission to Facebook Ireland of the personal data at issue*
- *as Fashion ID and Facebook Ireland determine jointly the means and purposes of those operations.*

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- a Facebook user uploads photo's to her profile page or feed
- the tax authorities require that you submit your income details in an electronic form and via their online tax portal
- to discover and prevent health insurance fraud municipalities and insurers construct a fraud detection system: each participant uploads data ('signals') on possible fraudulent behaviour

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

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- a provider of modular HR cloud solutions uses a third party to provide a tool that enables its customers (employers) to calculate the (max) compensation they can pay employees for travel expenses
- business information bureaus such as Experian or Dun & Bradstreet generate credit scores and scorecards of companies and individuals, which customers use to assess the solvency of these companies and individuals.
- Cambridge Analytica processed personal data of US citizens
- what other example can you think of?

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

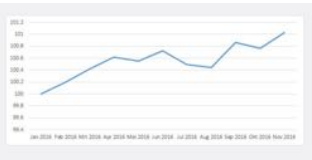
39

The Raet Job Index refers to the jobs of employees who are employed by their employer and are active that month. The index does not include FTEs but the number of persons employed by an employer. Paid trainees and holiday workers are included. Temporary agency workers, volunteers, freelancers and unpaid trainees are not included.

The figures are based on transactional data about the number of actually paid employees of Raet's customers. The figures are therefore not dependent on the accuracy and completeness of surveys or polls. The figures are based on more than 1 million employees and extrapolated to the size of the Dutch labour force.

[translated with www.DeepL.com]

raet



0.3% **up in November**

In November The Raet Jobs Index shows that the number of jobs of employees in the Netherlands increased in November 2016. The index stands at 101.0.

40

QUESTIONS

1. A company has a small ICT-department, consisting of five employees that provide ICT-support to other employees in the company. Does this ICT-department qualify as processor? Why (not)?

A. Yes, because the five employees do process personal data on behalf of the company

B. No, they are part of the organisation of the controller

C. No, but the department could be a joint controller

Question 8 preparation assignment questions


SEMINAR I. AND II. 18 QUESTIONS

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15. What are 'special data' or 'special categories of personal data'?
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17. In the Google Spain-case the Court ruled that the Spanish DP Act did apply to the processing of personal data controlled by Google Inc, which is established in Mountainview (CA) in the US. How did the Court come to that decision?
18. A Dutch electronics manufacturer instructs an India-based ICT-service provider to analyse a set of personal data on individuals in South Africa, in order to sell its devices. Does the GDPR apply to

41

QUESTIONS

2. What was the SWIFT-case about?

A. About an enormous data breach at the EMEA-headquarters of car manufacturer Toyota. In essence, the case was about the territorial scope of EU DP-rules

B. This was about unauthorised data processing by the Society for Worldwide Interbank Financial Telecommunication, as a result of which SWIFT was deemed to be processor, acting on behalf of the banks

C. This was about unauthorised data processing by the Society for Worldwide Interbank Financial Telecommunication, as a result of which SWIFT was deemed to be controller for that processing

Question 9 preparation assignment questions)


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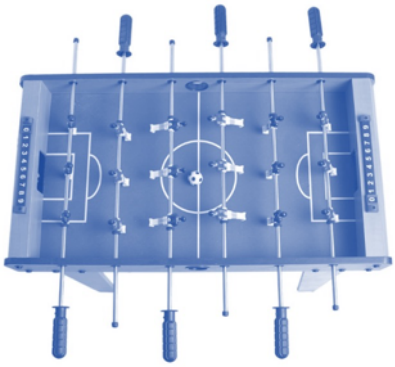
42



The playing field

43

"processing"

Art. 4(2) GDPR

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

44

question

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

45

"personal data"

Art. 4(1) recital 26 GDPR

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

46

"anonymous data"

Art. 4(1) recital 26 GDPR

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

47

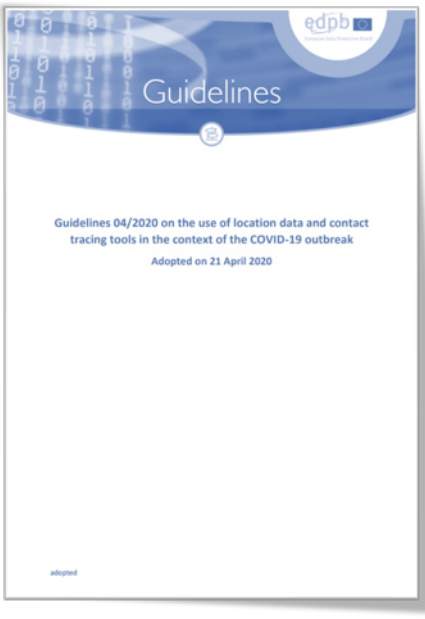
"pseudonymous data"

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

48



Anonymisation refers to the use of a set of techniques in order to remove the ability to link the data with an identified or identifiable natural person against any "reasonable" effort. This "reasonability test" must take into account both objective aspects (time, technical means) and contextual elements that may vary case by case (rarity of a phenomenon including population density, nature and volume of data). If the data fails to pass this test, then it has not been anonymised and therefore remains in the scope of the GDPR.

!

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As European governments rushed to embrace technology to fight the coronavirus, a plainspoken Dutchman emerged as a thorn in their side. Aleid Wolfsen's message: Don't pretend your solutions are privacy-friendly.

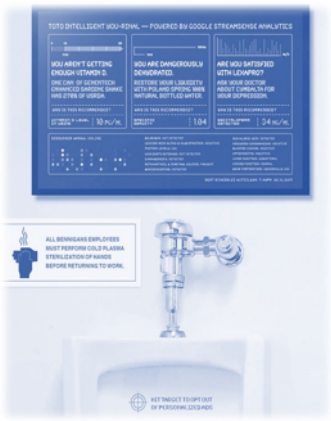
In a group that normally keeps disagreements quiet, Wolfsen stands out. A former politician and mayor of Utrecht who had no formal training in data protection when he took on his role in 2016, he has repeatedly been at odds her watchdogs, most of whom do not is political background.

The official in charge of Europe's grouping of privacy regulators was also keen to play down any disagreements. There is "no difference in the positions" of different privacy regulators and the "Dutch case was a specific case," Andrea Jelinek said, while a spokesperson for the group, the European Data Protection Board, added: "The legal concept of anonymization is not an absolute concept."

Europe's Data Protection Supervisor, who had OK'd the Commission's use of telecoms data to track the coronavirus, said: "There is a difference between the technical impossibility of doing something to the very end, and something which we would call an effective anonymization."

!

50



info@companyname.com

social security number

@zwnne

ip-address
MAC–address

cookies, device fingerprints

zip code, street and/or house nr.

070 515 3000

+31(0)6 2251 8330

51

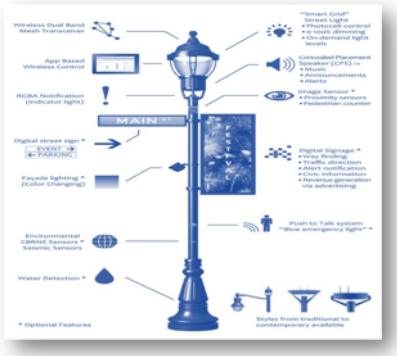
"a dynamic IP address registered by an online media services provider when a person accesses a website that the provider makes accessible to the public constitutes personal data within the meaning of that provision, in relation to that provider, where the latter has the legal means which enable it to identify the data subject with additional data which the internet service provider has about that person"

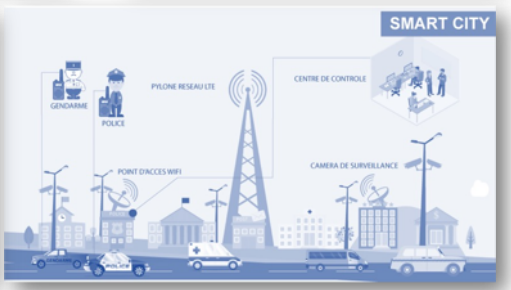
CJEU 17 June 2021, C-597/19 (Mircom)

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

ISP	additional subscriber information required to identify the internet user
website	dynamic IP-address

52





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QUESTIONS

1. Do pseudonymous data qualify as personal data? Why (not)?

A. No, because such data can no longer be attributed to a specific data subject without the use of additional information

B. Yes, because such data could be attributed to a natural person by the use of additional information and consequently should be considered to be information on an identifiable natural person

C. No, because such data is encrypted, implying that there are no means that are reasonably likely to be used to identify the natural person

Question 1a preparation assignment questions)


SEMINAR I. AND II. 18 QUESTIONS

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QUESTIONS

2. A data subject dies. Is his data still protected under EU DP law?

A. Yes

B. No

C. Sometimes

Question 13 preparation assignment questions


SEMINAR I. AND II. 18 QUESTIONS

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

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 → common security and defence
- prevention investigation detection or prosecution of criminal offences
- processing for purely personal or household activity

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]

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

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This Regulation does not apply to the processing of personal data by a natural person in the course of a purely personal or household activity and thus with no connection to a professional or commercial activity. Personal or household activities could include correspondence and the holding of addresses, or social networking and online activity undertaken within the context of such activities. However, this Regulation applies to controllers or processors which provide the means for processing personal data for such personal or household activities.

Recital 18 GDPR

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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 (Reynes)

59

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

What if the continuous recording device also monitors parts of another individuals space (e.g. a garden)

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territorial scope under the GDPR

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?*

first rule

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

second rule (if no establishment in the EU)

- 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

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territitorial scope (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.*

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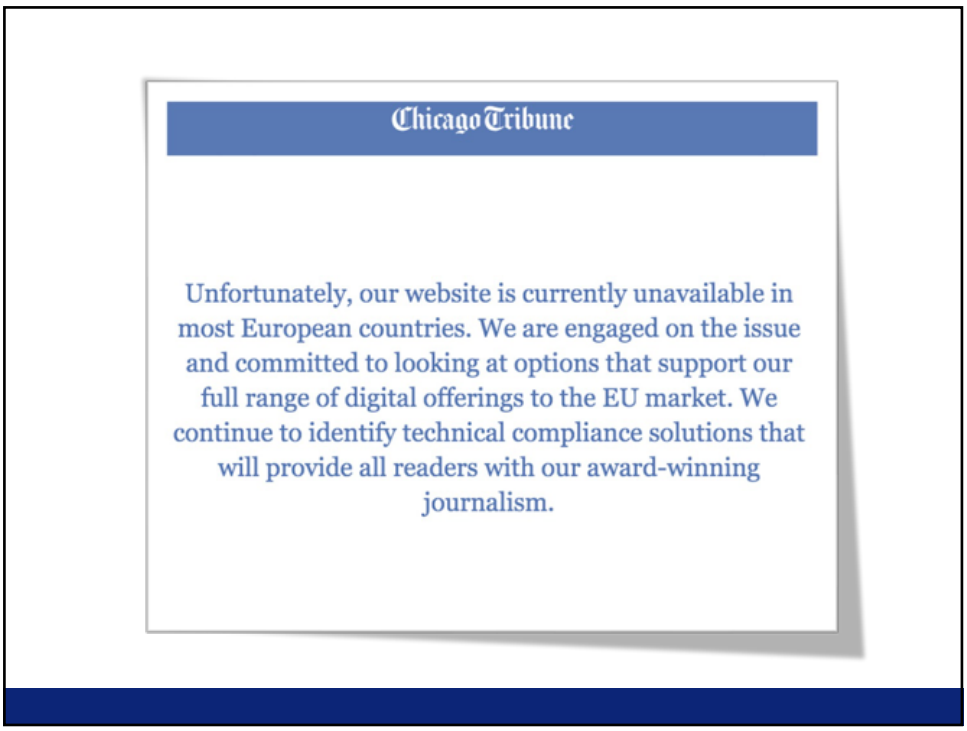
- Koninklijke Philips N.V., a Dutch multinational tech company headquartered in Amsterdam (NL), intends to sell MRI-scanners and LED-lights in China. For that purpose Philips requests the data science department of the University of Mumbay (India) to analyse personal data of board members of Chinese health clinics.
- Cambridge Analytica Ltd based in London (UK) processed personal data of US citizens.
- As of 1st of January 2020, the successor of Cambridge Analytica processes personal data of Dutch citizens, living in Canada.
- An internet advertising network uses cookies to obtain data from internet-users, inter alia in the Netherlands

Is the GDPR applicable? Why (not)..?

63



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QUESTIONS

1. A controller decides to anonymise a personal data. Is the process of anonymisation covered by the concept of processing personal data?

A. Yes, anonymisation is processing

B. No, anonymisation is not processing

C. It depends, anonymisation can be processing, but not necessarily

Question 16 preparation assignment questions)

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QUESTIONS

2. A Dutch electronics manufacturer instructs an India-based ICT-service provider to analyse a set of personal data on individuals in South Africa, in order to sell its devices. Does the GDPR apply to that processing?

A. No, because no goods or service are offered to data subjects in the EU and/or there is no monitoring of their behaviour (as far as their behaviour takes place within the Union)

B. No, the individuals are not in the EU, nor are the residents or citizens of member states, and consequently they are not protected by the GDPR

C. Yes, as the GDPR applies to the processing of personal data in the context of the activities of an establishment of a controller in the Union, regardless of whether the processing takes place in the Union or not.

(Question 18 preparation assignment questions)


SEMINAR I. AND II. 18 QUESTIONS

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g.j.zwenne@law.leidenuniv.nl

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