

INTERNET 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 1st, 2023



lecturers



*G-J. (Gerrit-Jan) ZWENNE
Full Professor Leiden University
Partner Pels Rijcken & Drooglee
ver Fortuijn N.V.*



*B.H.M. (Bart) CUSTERS
Full Professor Leiden
University*



*H.U. (Helena) VABREC
Guest Researcher eLaw
Legal Counsel Palantir
Technologies*



*P.j. (Peter) HUSTINX
non-executive director ICO, Board
of Directors IAPP, former chair of
Dutch DPA and EDPS*



*Eva LACHNIT
Utrecht University and Autoriteit
Persoonsgegevens*



*A.M. (Alan) SEARS
Researcher & Lecturer at eLaw*



*O.M. (Oliver) TUAZON
Researcher at eLaw*

overview

1 November

I. Introduction. History, Context and Background of EU DP Law. DP Institutions *prof. Gerrit-Jan Zwenne*

II. The significance of EU DP law in Europe and the Rest of the World *Peter Hustinx*

6 November

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

8 November

IV. The Main Principles and Rules relating to Data Protection *prof. Gerrit-Jan Zwenne*

V. Data subject rights and controller transparency obligations *prof. Bart Custers*

13 November

VI. The Data Protection Officer or DPO *prof. Gerrit-Jan Zwenne*

VII. IoT, Datafication, Big Data, AI, Machine Learning etc. *prof. Gerrit-Jan Zwenne*

15 November

VIII. Workshop on the Right to be Forgotten *Alan M. Sears*

20 November

IX. Data Protection Authorities *Eva Lachnit*

22 November

X. Third Country Data Transfers (incl. Schrems II) *Helena Vrabc*

XI. Genetic data protection and privacy: a closer look into your most intimate personal data *Oliver Tuazon*

Exam Training *Alan M. Sears*

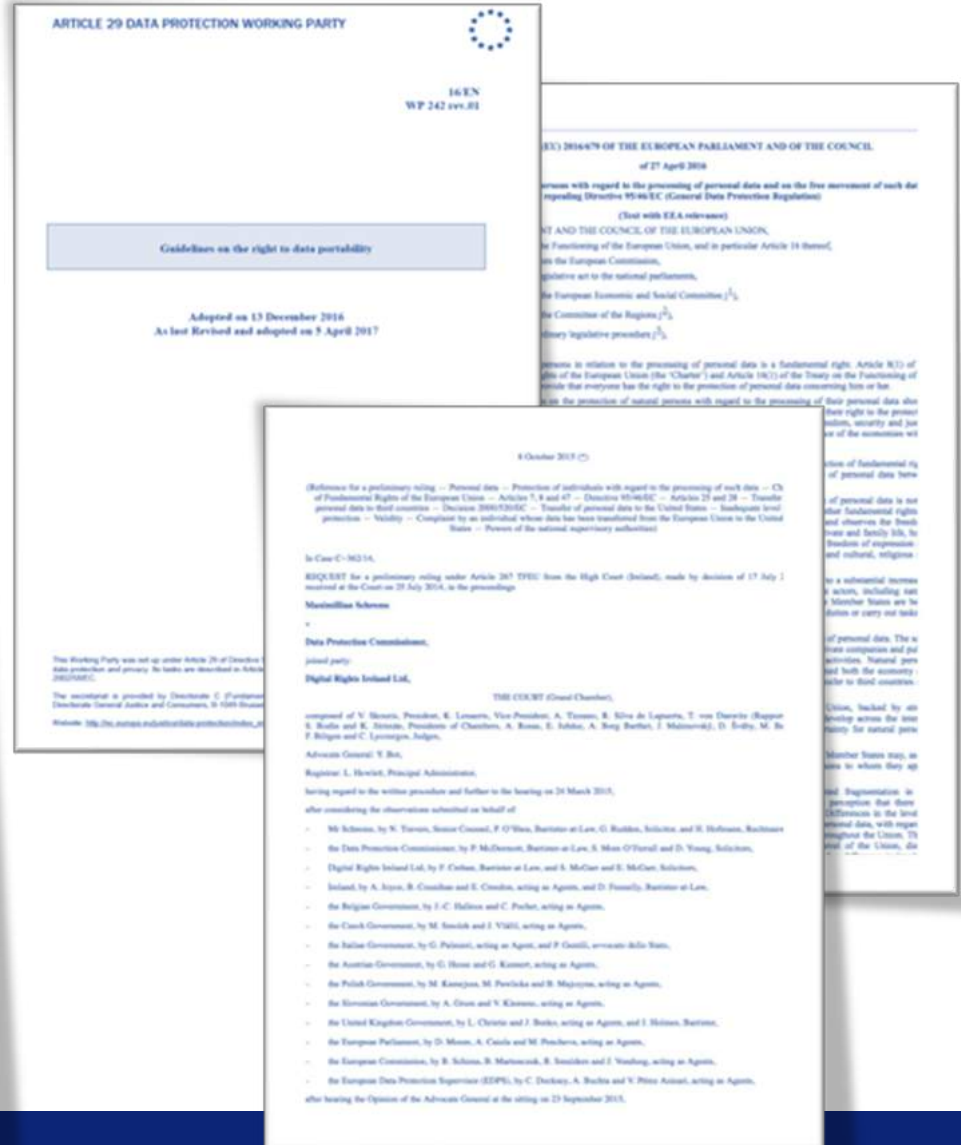
★ 1 December 9:00-12:00 USC

Written Exam *prof. Gerrit-Jan Zwenne & Alan M. Sears*

★ 11 December

Written group assignment due!

recommended literature
is **not** required reading





group assignment

- short paper, approx. 3000 - 4000 words
- pre-defined structure & template
- explains the facts, questions and significance of a specific CJEU-decision

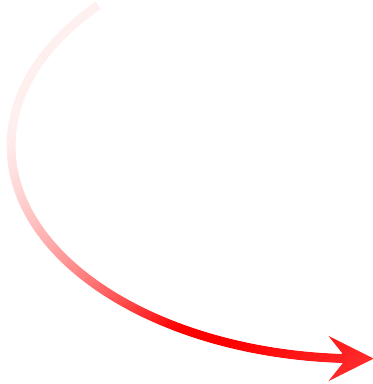
§1 facts of the case in a concise manner (approx. 500 words)

§2 discusses the legal questions the Court had to answer and its answers (approx. 500 words)

§3 provides context (e.g. relation with other relevant court decisions or literature), explains the significance of the decision, its relation with other court decisions, and allows the authors to give their opinion on whether or not it's a good or bad decision, the implications, etc. (2000-3000 words)



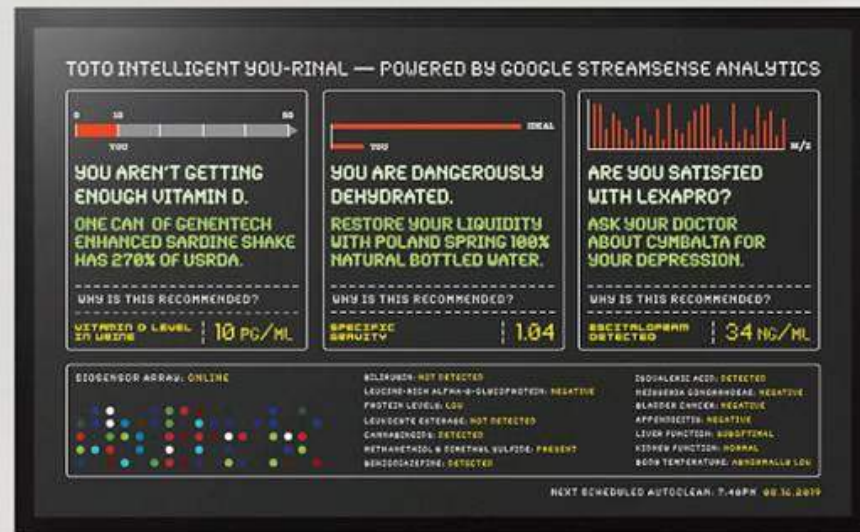
exam



- 1 December
- written, through Ans (on chromebooks)
- at University Sports Center
- probably three or four (or possibly five) questions
- at least one case with questions

introduction

Total U-rinal



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



HIT TARGET TO OPT OUT
OF PERSONALIZED ADS

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

! personal data? profiling?

third country transfer..?

health data.!

religious data..?

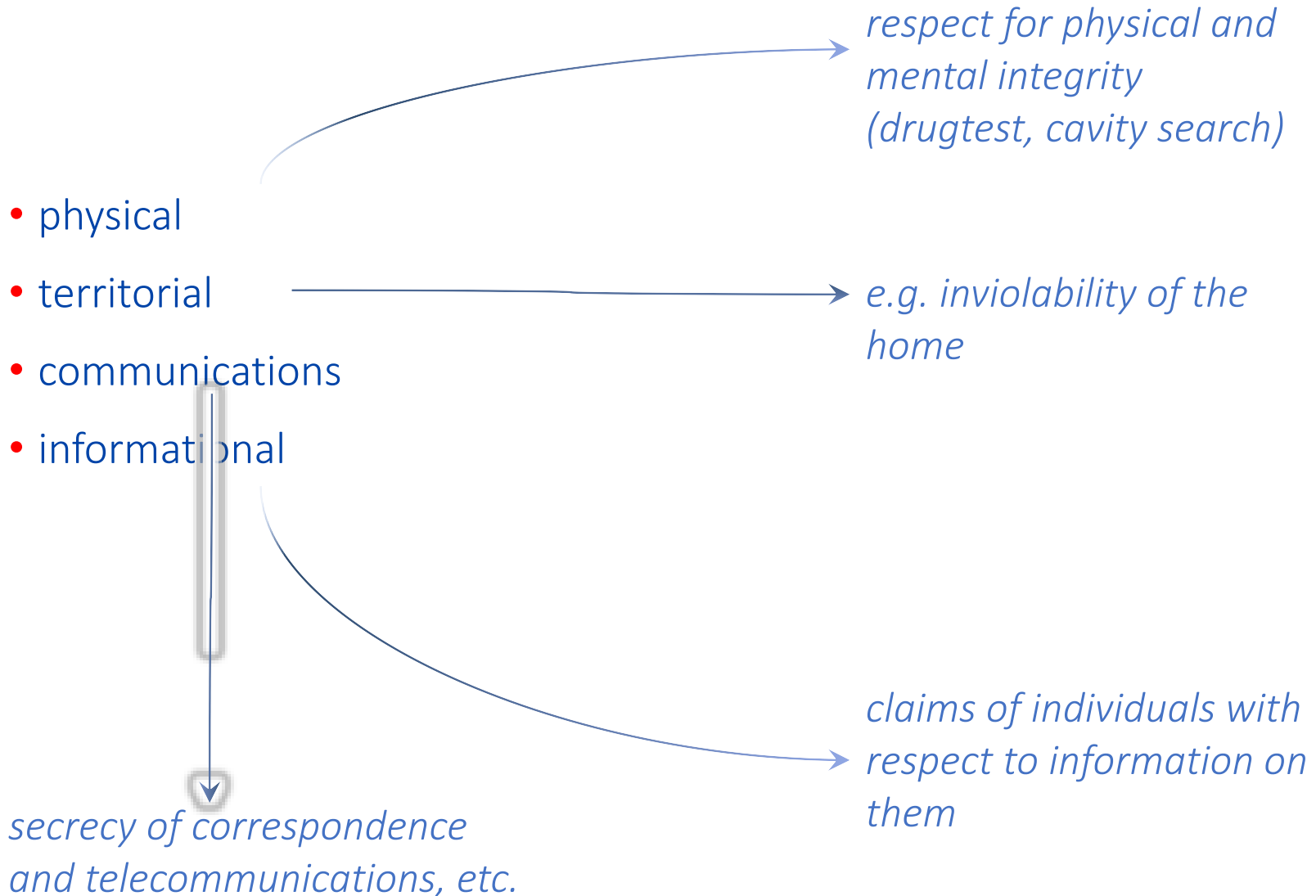
gender..?

employee relationship: consent?

legitimate interest?



privacy dimensions



history

“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



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 GVBl. II 900-10	625
7. 10. 70	Gesetz zur Änderung beamtenrechtlicher und besoldungsrechtlicher Vorschriften GVBl. II 321-20	628
7. 10. 70	Gesetz über vermögenswirksame Leistungen für Beamte GVBl. II 323-48	633
7. 10. 70	Zweites Gesetz zur Änderung des Hessischen Personalvertretungs- gesetzes Ändert GVBl. II 326-2	634
7. 10. 70	Gesetz über die Aufwandsentschädigung und den Ehrensold der ehren- amtlichen Bürgermeister und der ehrenamtlichen Kassenverwalter der Gemeinden GVBl. II 321-21	635
7. 10. 70	Gesetz zur Änderung des Hessischen Architektengesetzes Ändert GVBl. II 50-6	638
7. 10. 70	Drittes Gesetz zur Änderung des Gerichtsorganisationsgesetzes Ändert GVBl. II 210-16	639
7. 10. 70	Gesetz zur Änderung des Hessischen Schiedsmannsgesetzes Ändert GVBl. II 29-1	640
7. 10. 70	Gesetz über die Ermächtigung zur Bestimmung von Zuständigkeiten nach der Acetylenverordnung GVBl. II 923-11	641
7. 10. 70	Gesetz über die Weinbergsrolle GVBl. II 83-21	641

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.

*) GVBl. II 900-10

§ 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,

fundamental rights (inc. privacy rights)

harmonisation of national privacy law

fundamental rights (inc.
privacy and data protection
rights)

harmonisation and
more

Council of Europe
European Convention
on Human Rights

Council of Europe
Convention for the
Protection of Individuals
with regard to Automatic
Processing of Personal
Data

European
Communities
Directive 95/46/EC on the
protection of individuals
with regard....

European Union
Charter on
Fundamental Rights

European Union
Regulation 2016/679 on the
protection of natural
persons...

Gesetz- und Verordnungsblatt
für das Land Hessen - Teil I

1950

1981

1995

2009

2018



data processing 1960's



1970 verabschiedete Hessen das weltweit erste Datenschutzgesetz



the need for regulation

'evasion' of national data protection acts via telecom



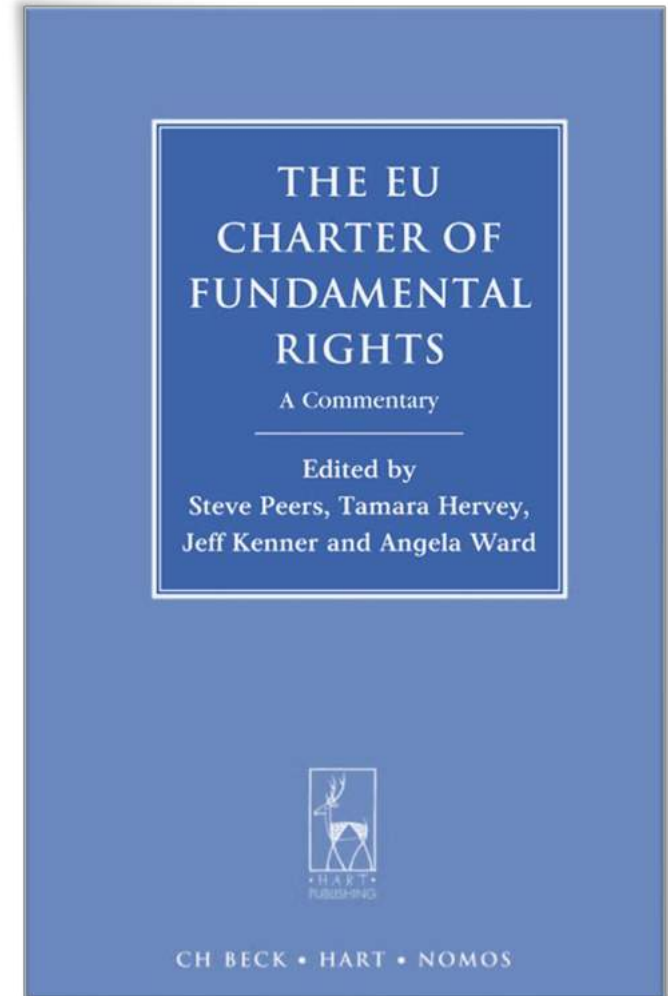
(9) The objectives and principles of Directive 95/46/EC remain sound, but it has not prevented fragmentation in the implementation of data protection across the Union, legal uncertainty or a widespread public perception that there are significant risks to the protection of natural persons, in particular 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

EU Charter of Fundamental Rights (2000)

- art. 7 privacy
- art. 8 data protection
- art. 11 freedom of information



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

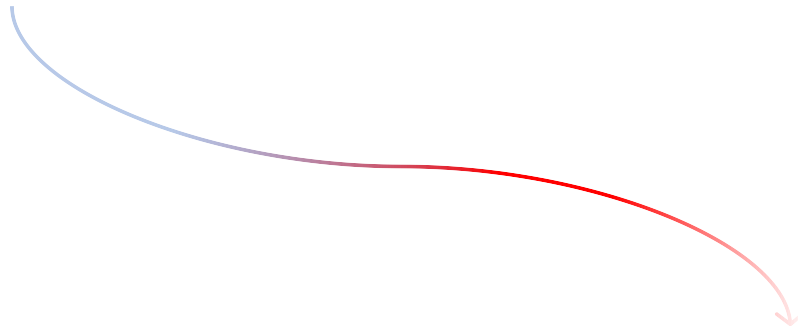
The European Parliament and the Council shall [...] adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.



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

ePrivacy Directive 2002/58/EC

security, spam & telemarketing, calling line identification, traffic data, directory services

retention of traffic data for the purpose of prevention of terrorism and serious crime

strict rules for cookies, breach notification

work-in-progress: rules for OTT

European Communities

Directive 97/66/EC concerning the processing of personal data and the protection of privacy in the telecommunications sector

European Union

Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)

European Union

Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic ...

European Union
Directive 2009/136/EC amending Directive 2002/58/EC

European Union
New ePrivacy Directive or Regulation (?)

1997

2002

2006

2009 2019?

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*)

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

interesting discussions...



Meet the Dutchman who cried foul on Europe's tracking technology

The national privacy watchdog has repeatedly broken ranks with EU peers over tracing technology. His approach seems to be winning.

By VINCENT MANANCOURT | 5/20/20, 1:00 PM CET | Updated 5/24/20, 5:08 PM CET

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."



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?
12. Does EU DP-law apply to manual (i.e. non-automated) processing of personal data?
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 ~~Mountain View~~ (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 that ~~processor~~?

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

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?
12. Does EU DP-law apply to manual (i.e. non-automated) processing of personal data?
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 ~~Mountain View~~ (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 that processor?

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)

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?
12. Does EU DP-law apply to manual (i.e. non-automated) processing of personal data?
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 ~~Mountain View~~ (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 that processor?

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

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?
12. Does EU DP-law apply to manual (i.e. non-automated) processing of personal data?
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 ~~Mountain View~~ (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 that ~~processor~~?

institutions

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*

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,
RBS/EDPS etc.*



COURT OF JUSTICE
OF THE EUROPEAN UNION


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”*



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)

