

PRIVACY AND EU DATA PROTECTION

Seminar III.

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

prof. dr. Gerrit-Jan Zwenne



November 16th, 2022

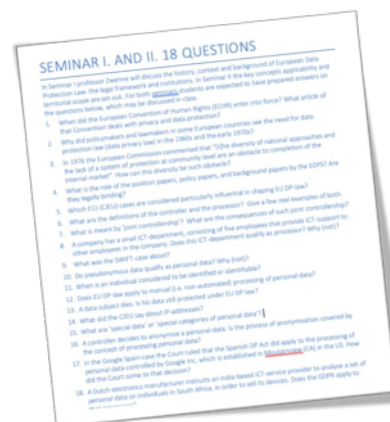
1

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*

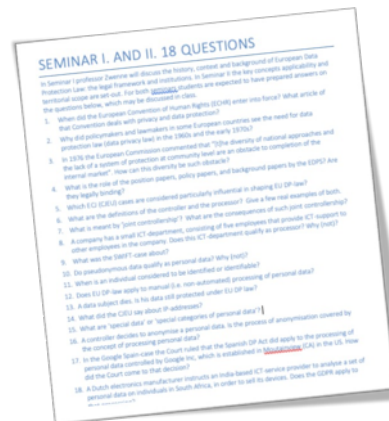


2

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.*

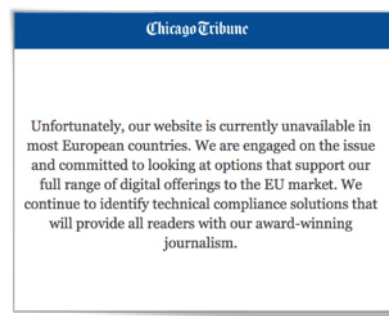


3

QUIZ

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

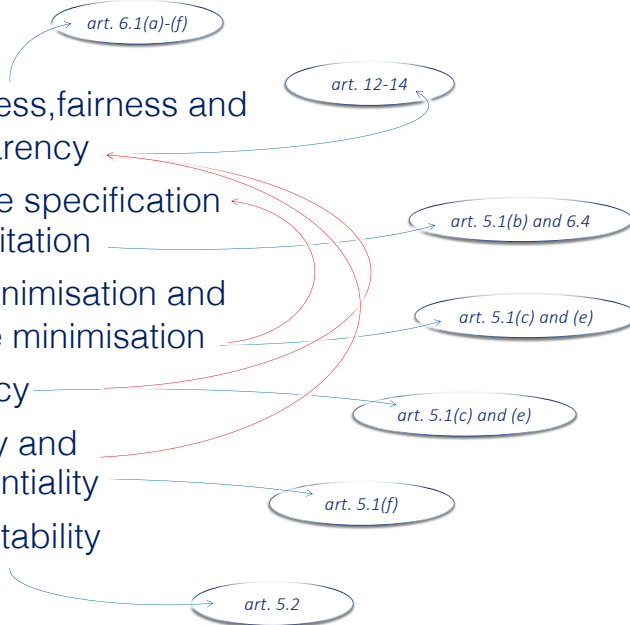
- A. *The newspaper does not have an establishment in the EU and consequently it is not allowed to provide services to EU-residents*
- B. *The US does not provide an adequate level of data protection and therefore it cannot transfer personal data to member states*
- C. *The newspaper wants to demonstrate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



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principles

- lawfulness, fairness and transparency
- purpose specification and limitation
- data minimisation and storage minimisation
- accuracy
- integrity and confidentiality
- accountability



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Recital 39
Art. 5.1(a) GDPR

'fair relationship between controller and data subject'

"lawfulness, fairness and transparency" means personal data is processed lawfully, fairly and in a transparent manner in relation to the data subject

eg. a privacy statement, intranet employees' handbook, QR-code, icons, etc.

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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)

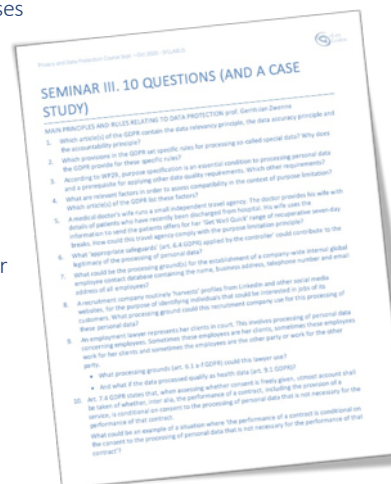


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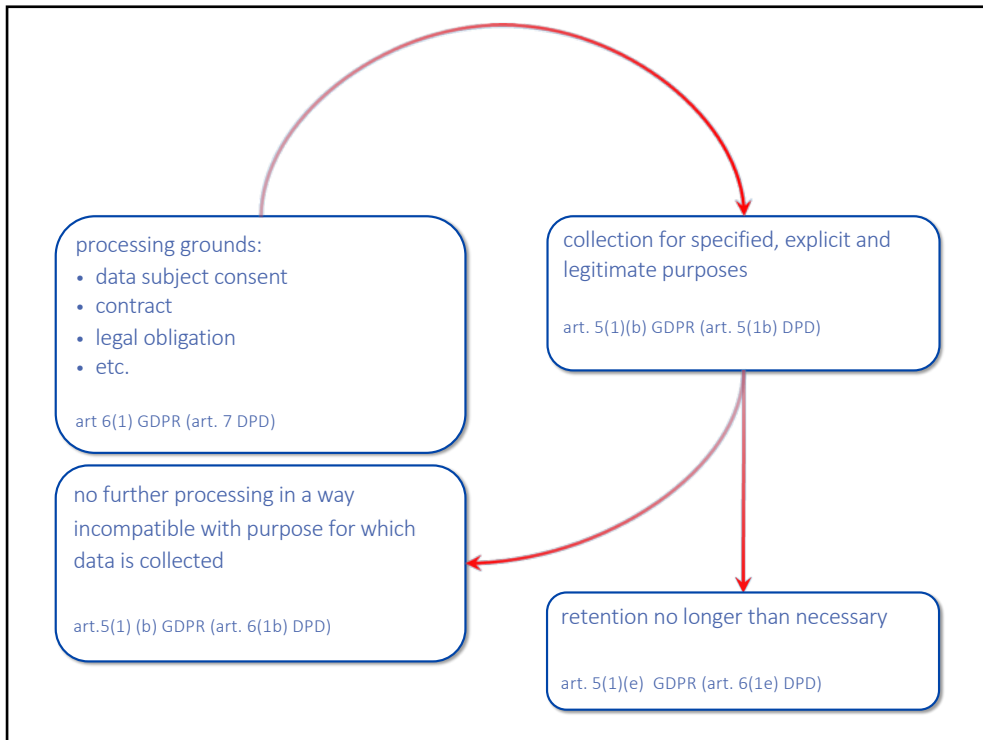
QUIZ

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

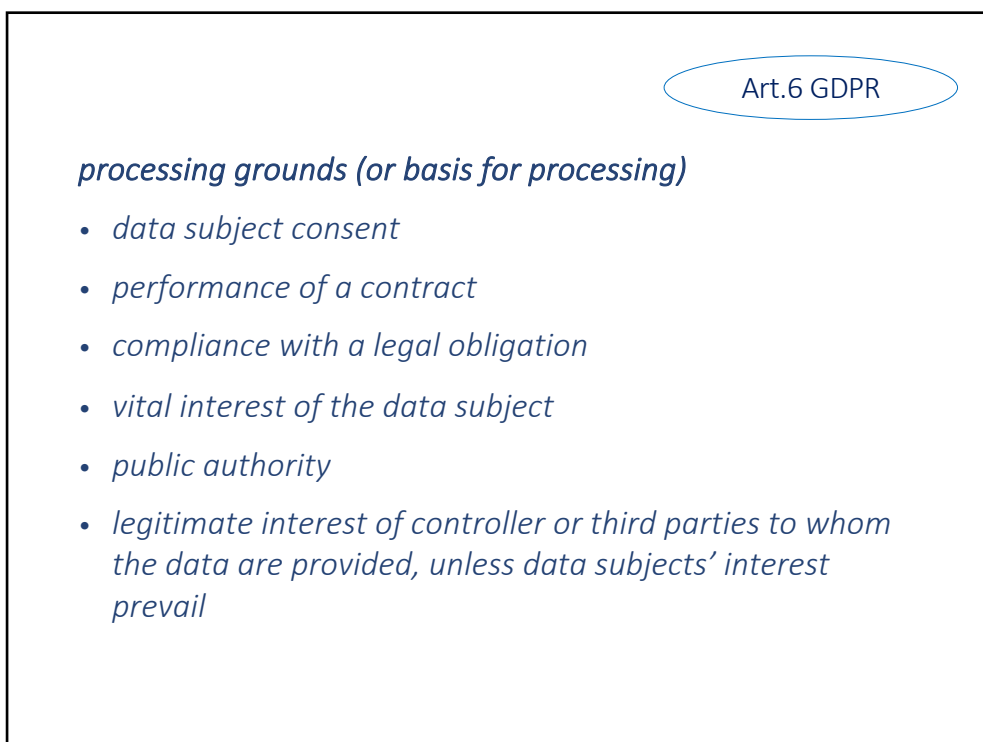
- A. the link between the purposes for which the personal data have been collected and the purposes of the intended further processing
- B. the context in which the personal data have been collected, in particular regarding the relationship between data subjects and the controller
- C. the nature of 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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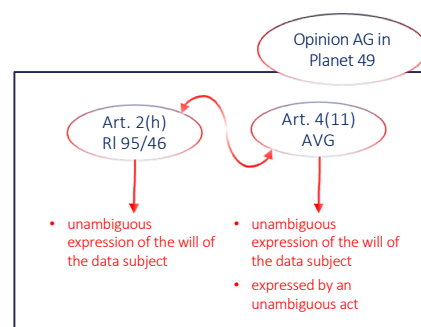


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consent

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."

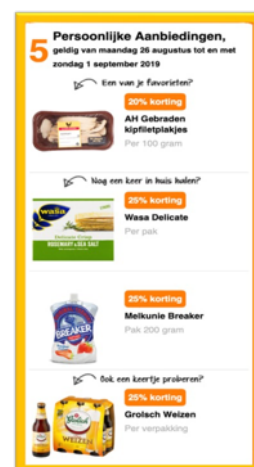
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without detriment....

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**

24

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.

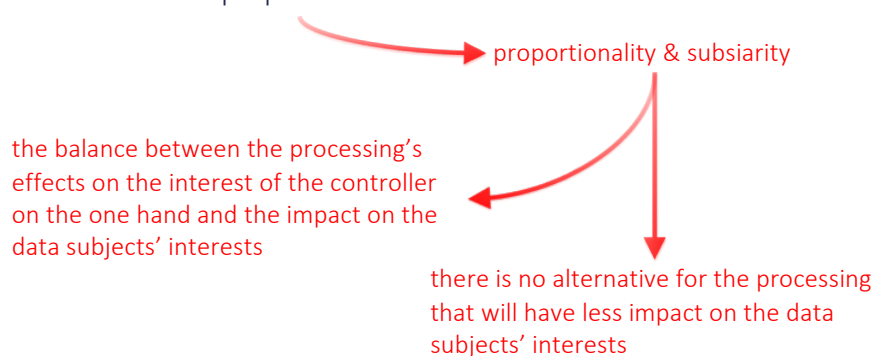
It should also be for Union or Member State law to determine the purpose of processing.

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.

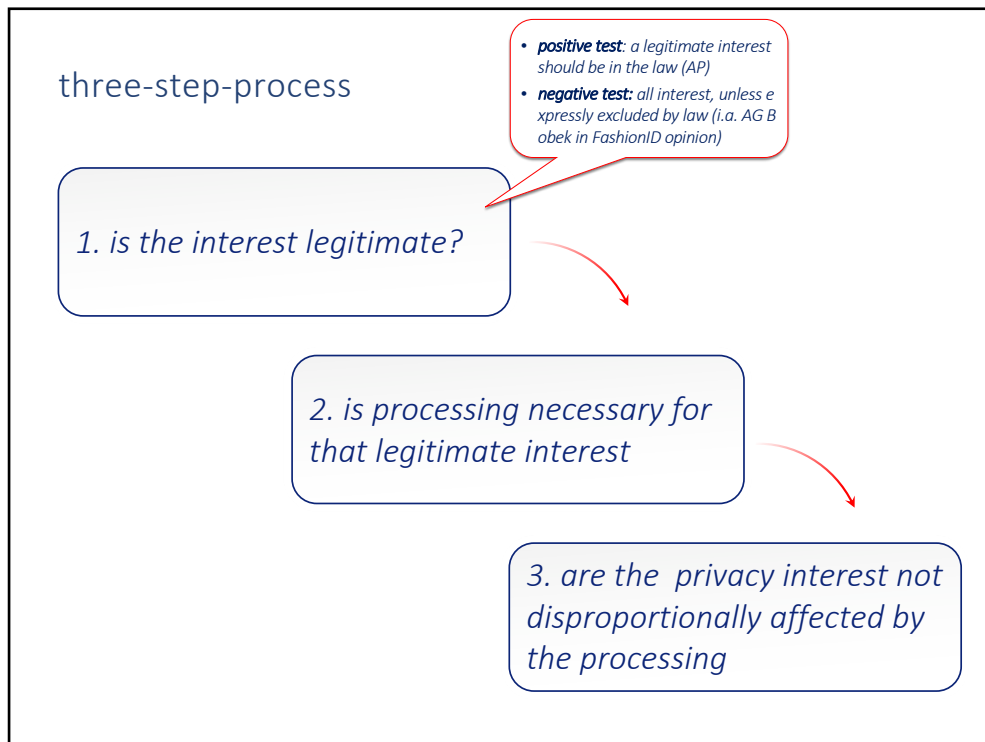
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legitimate interest...

- 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

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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 norms 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:

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

By Odia 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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[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

[...]

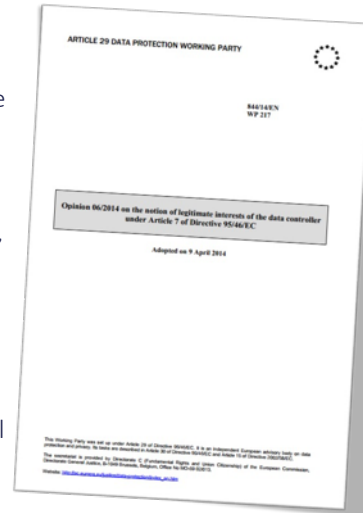
it is difficult to reconcile the strict interpretation of the Dutch DPA of what can constitute a legitimate interest with the intended effect that the EU legislators wanted to attribute to Article 6(1)(f) GDPR. It should also be borne in mind that the fact that a pure commercial interest is 'legitimate' 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?

- data subject consent (art. 6.1(a) GDPR)
- performance of a contract (art. 6.1(b) GDPR)
- general interest task (art. 6.1(e) GDPR)
- legitimate interest (art. 6.1(f) GDPR)
- 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

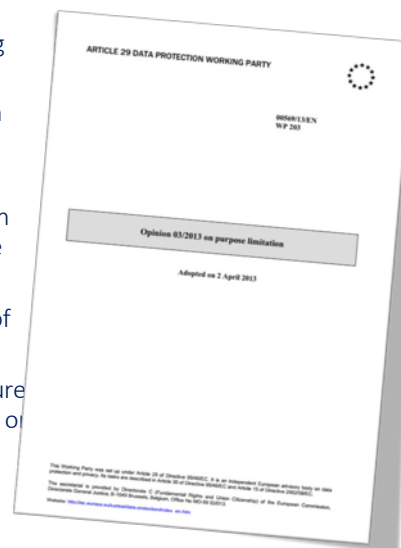


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purpose limitation

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

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.

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 — dataminimization (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



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questions?

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