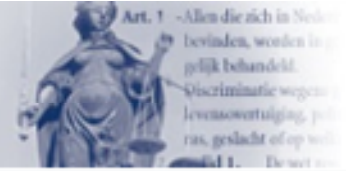




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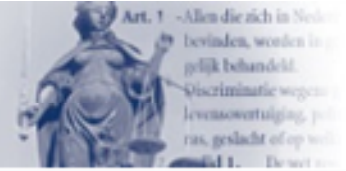
# Privacy and the Protection of Personal Data

Law & Information Technology in Europe  
Leiden December 2005

eLAW

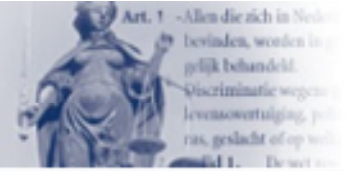


LEIDEN



# Gerrit-Jan Zwenne

- University of Leiden
- Bird & Bird Den Haag

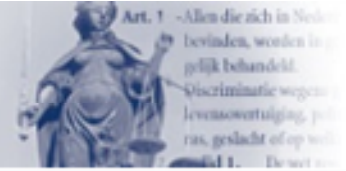


# roadmap

- backgrounds
  - what is privacy anyway?
- European Privacy Law
  - EU Privacy Directive (95/46)
  - rules for the processing of personal data
    - when may 'controllers' process personal data..?
    - what rights have 'data subjects'...?
- Spam!
  - EU Privacy e-Comms Directive (2002/58)
    - rules for unsolicited communications



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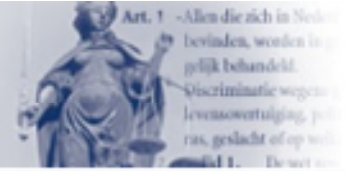


# background

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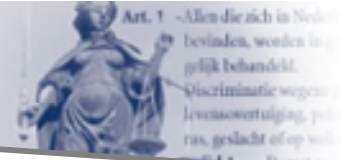


wat is 'privacy'..?



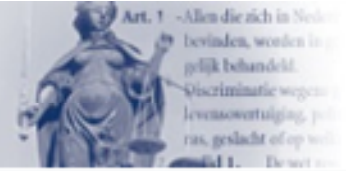
“to define the province of privacy distinctly is impossible”

Stephen 1873



"the most striking thing about the right to privacy is that nobody seems to have any clear idea of what it is"

Thompson 1975



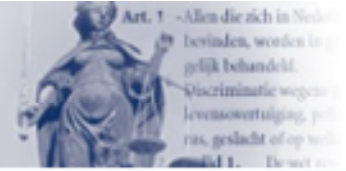
"the concept of privacy is elusive and ill defined"

Posner 1978



**“The good news about privacy is that 84 percent of us are concerned about privacy. The bad news is that we do not know what we mean”**

Branscomb 1994



“privacy means many things to many people and different things in different contexts”

Berman & Mulligan 1999



“the right to  
privacy is the  
right to be  
let alone”

Samual D. Warren &  
Louis D. Brandeis 1890



"the claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about themselves is communicated to others"

Alan F. Westin 1967

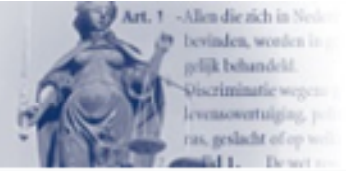
“Viewed in terms of the relation of the individual to social participation, privacy is the voluntary and temporary withdrawal of a person from the general society through physical or psychological means, either in a state of solitude or small group intimacy or, when among larger groups, in a condition of anonymity or reserve”

Alan F. Westin 1967



**"You have zero  
privacy  
anyway. Get  
over it"**

Scott McNealy



# privacy concepts

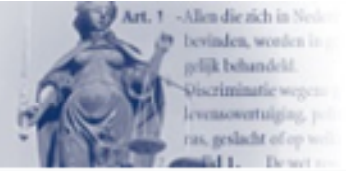
**relational privacy**  
the right to be let alone  
(*e.g.* in your home)

**secrecy of communications**  
the claims with respect to the secrecy or  
the confidentiality of the means of  
communication (*e.g.* correspondence)

**informational privacy**  
the claims of individuals to determine for  
themselves to what extent information on  
them is communicated to others (*e.g.* use of  
ITC)



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# European Privacy Law

Directive 95/46/EC *OJ. L 281,*  
23.11.1995, p. 31 – 50

eLAW



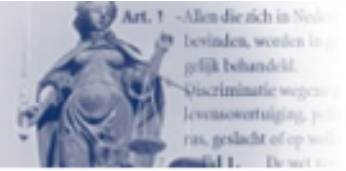
LEIDEN



# object of the Directive

- protection of fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.
- no restrictions for the free flow of personal data between Member States for reasons connected with the protection of these rights

harmonisation levels of protection, *i.e.* internal market



# 'personal data'

## Article 2(a)

- any information relating to an identified or identifiable natural person ('data subject')
  - name, address, (mobile) telephone number, email address, *cookies*, DNA, 'AH bonuskaart', bank account number, social security number, license plate number etc...





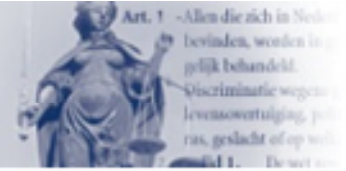
**“Microsoft does provide certain user information in aggregate form to third parties, including its advertisers, for demographic**

*MSN Hotmail terms of service*



Uiteindelijk heeft alles een prijs.

Microsoft Internet Explorer



## < cookies />

*(i)*

Postcode  
2334  
www.ah.nl  
036453995  
292823632  
356260482  
282162

*(ii)*

GOOD\_COOKIE  
84E59D5C\_242  
5\_SYS=NL\_N=4  
57489\_DATE=1  
6\_Jul\_99  
hyperbanner.  
net/  
031722397442  
931376166822  
7936

*(iii)*

Atf  
1\_2510734239  
flycast.com/  
0  
2865430528  
30124157  
3794627936  
29282159





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Faculteit der Rechtsgeleerdheid

amazon.com



YOUR ACCOUNT

HELP

WELCOME

DIRECTORY

Amazon.com is now calculating thousands of specialised best-seller lists. No matter where you work, live, or go to school, we'll likely have a **Purchase Circle** for you. For example, check out the Purchase Circles for Oracle in California, Massachusetts Institute of Technology in Cambridge, Massachusetts, and New York University in New York City.



Click [here](#) to learn how we provide an enhanced shopping experience based on your location and other information yet maintain your privacy

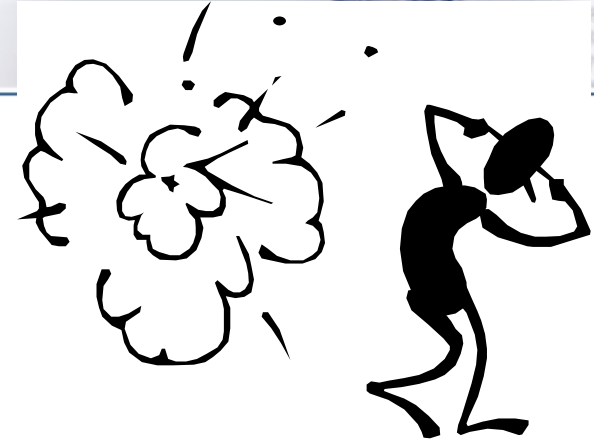


Purchase Circles



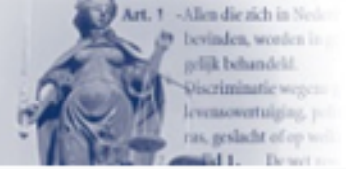


# processing



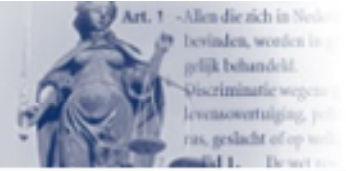
## Article 2(b)

- any operation or set of operations which is performed upon personal data, whether or not by automatic means
  - collection, recording, organisation, storage, adaptation, alteration, retrieval, consultation, use, disclosure, transmission, dissemination, alignment, combination, blocking, erasure, destruction (etc.)

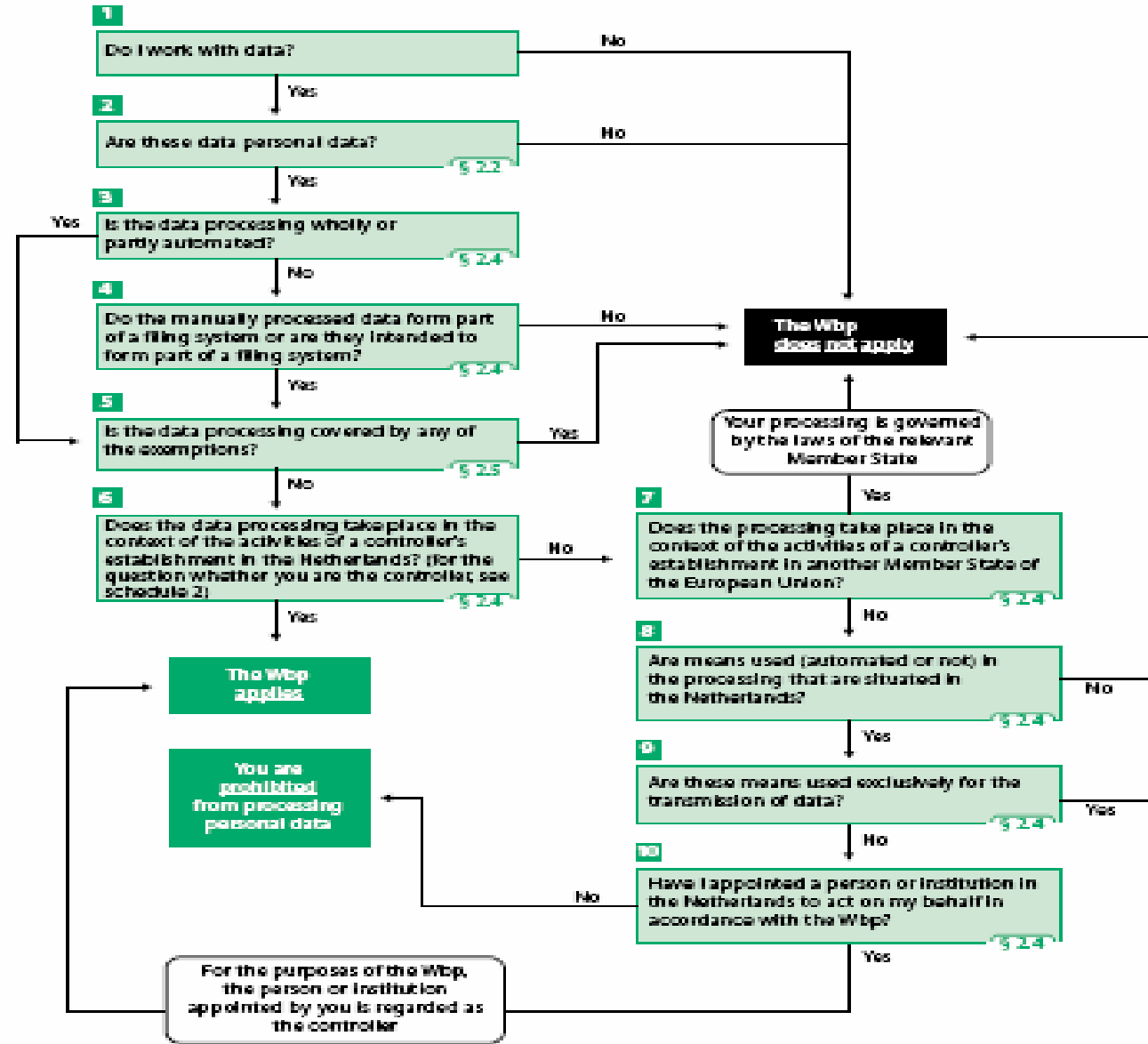


# applicability

- processing of personal data
  - wholly or partly by automatic means
  - otherwise than by automatic means if the data form part of a filing system or are intended to form part of such system
- exemptions
  - processing by a natural person in the course of a purely personal or household activity
  - public security, defence, state security (incl. economic well-being of the state), criminal law



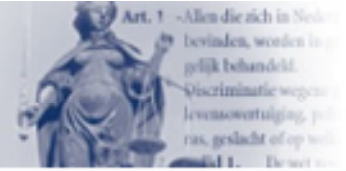
## Applicability of the Dutch Data Protection Act





# rules for *processing* personal data



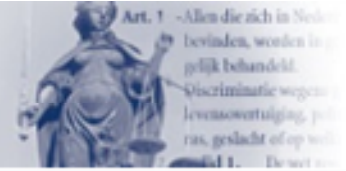


# legitimate processing

## Article 7

- processing is only allowed...
  - with unambiguous consent of the data subject
  - necessary for the performance of a contract
  - necessary for compliance with a legal obligation
  - necessary in order to protect the vital interests of the data subject
  - necessary for the performance of a task carried out in the public interest or in the exercise of official authority...

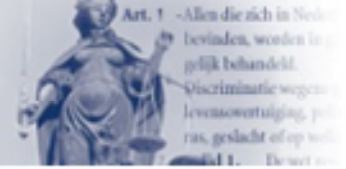




→ and processing is allowed...

## Article 7

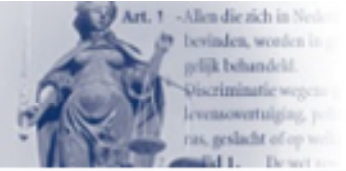
- processing is also allowed...
  - if the processing is necessary for the purposes of the **legitimate interests** pursued by the controller or by the third party or parties to whom the data are disclosed...
  - except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject



# collection and further processing

## Article 6(1)(b)

- collection of personal data is allowed for purposes that are
  - specified and explicit
  - and legitimate
- further processing is allowed
  - if this is done in a way that is not incompatible with the purposes for which the data are collected



# special data

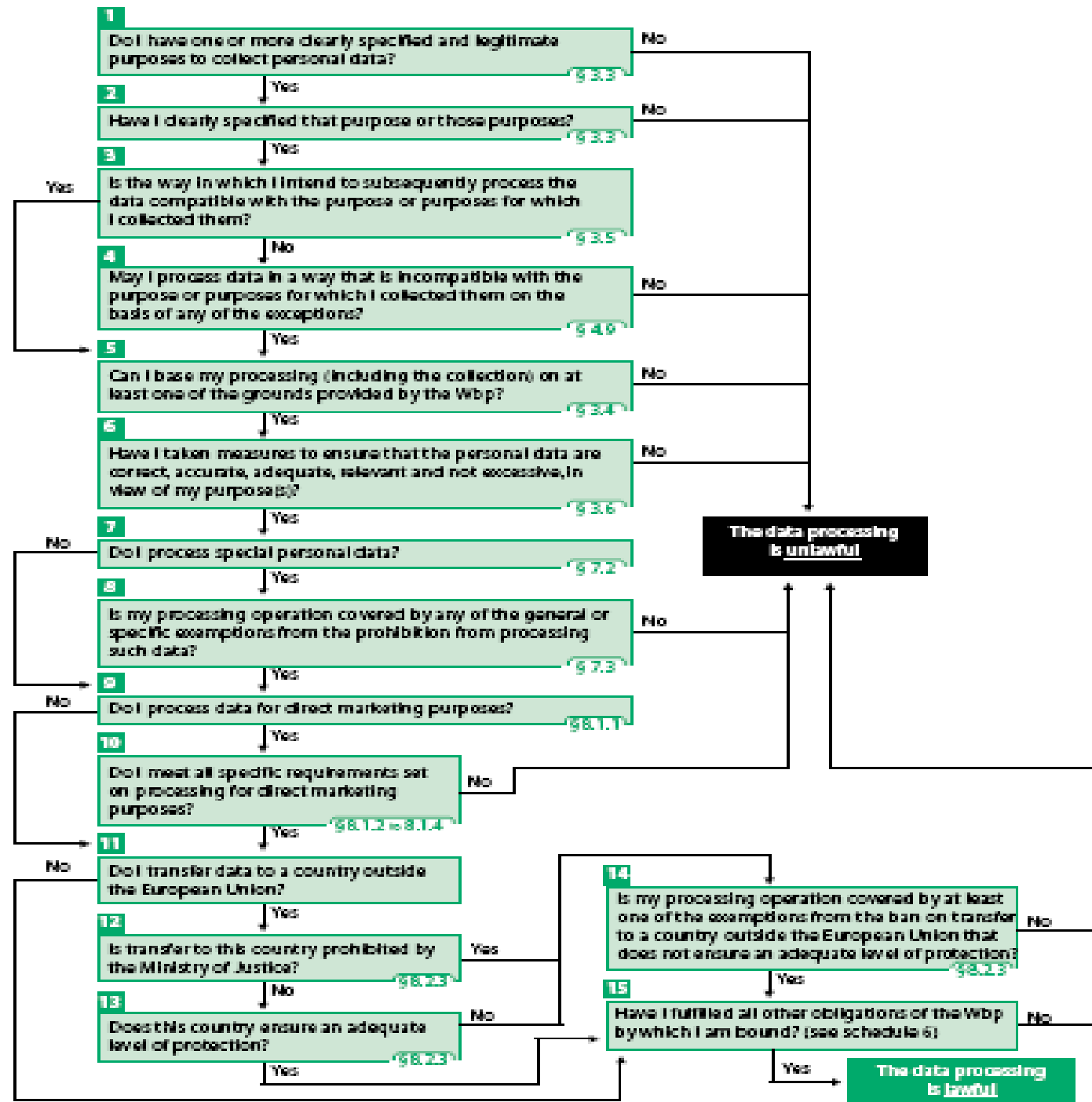
## Article 8

- data on racial or ethnic origin, sex life, political opinions, religious or philosophical beliefs, trade union membership, health,
  - and social security number
- may not be processed, unless
  - by certain controllers
  - for certain purposes
- or with explicit consent of the data subject (etc.)



# lawful processing

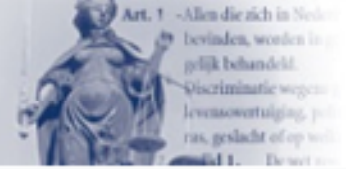
## Lawful processing



## Data protection watchdog distributes email mailing list

**Published Friday 29th October 2004 09:51 GMT.** The Dutch Data Protection Authority (Dutch DPA), which supervises the compliance with acts that regulate the use of personal data, was rather red-faced this week when it sent out a newsletter with all of the recipients in the Cc: field instead of the Bcc: field.

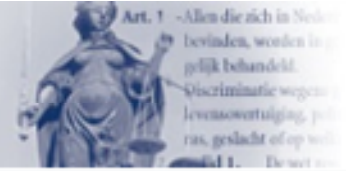
DPA's news letter goes out to 4000 subscribers. The DPA, which supervises the compliance with the Dutch Personal Data Protection Act and the Dutch Municipal Database Personal Records Act, was lucky that 'only' a thousand subscribers received the letter, but it managed to make the mistake twice. In a message it apologised for sending the first letter, again putting all recipients to the Cc list, so a second apology had to be sent.



# transfer to third countries

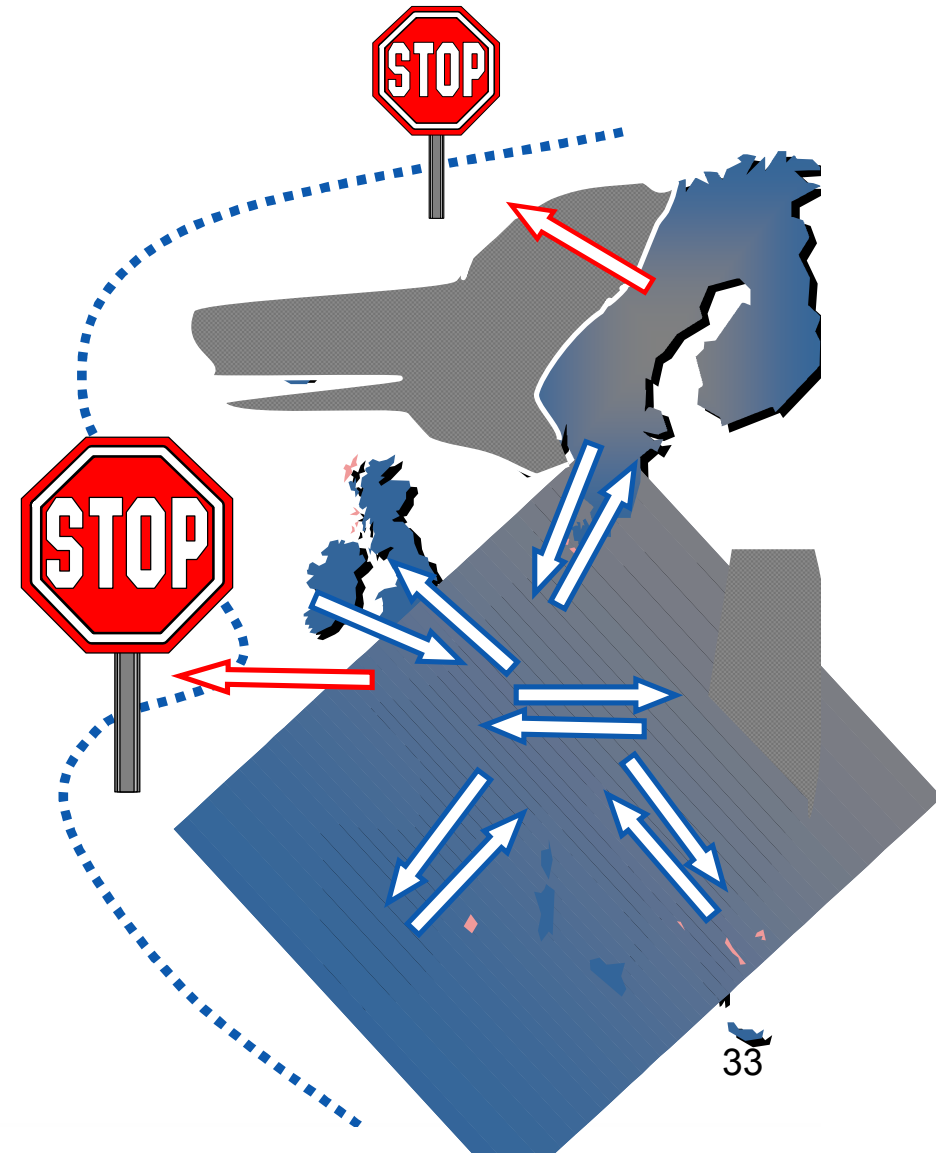
## Article 25

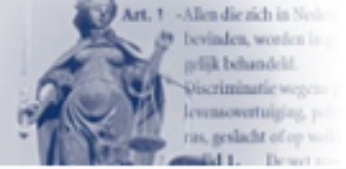
- in principle, transfer is only allowed if the non EU-country provides an adequate level of protection
  - US "safe harbor principles"
    - [www.export.gov/safeharbor](http://www.export.gov/safeharbor)
  - "EC Standard Contractual Clauses"
    - [europa.eu.int/comm/internal\\_market](http://europa.eu.int/comm/internal_market)



# transfer rules

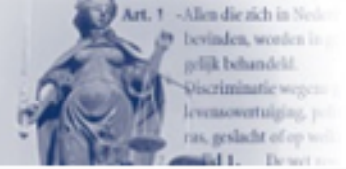
- inside the EU
  - no restrictions regarding cross border transfer
- outside the EU
  - restrictions regarding data transfer





# why transfer rules?

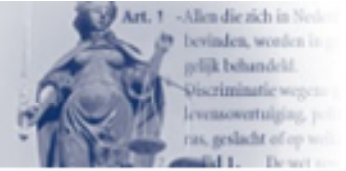
- inside the EU harmonised data protection rules
  - more-or-less same level of protection
  - no data protection related incentives to process data in other EM-members
- outside the EU lower level of protection
  - less costs for processing data
    - 'data havens'
- prevent evasion of EU data protection rules through outsourcing to third countries
  - India, Philippines, etc.
- prohibition transfer of data, unless.....



# no adequate protection in the US

- complex system of sector specific regulations
  - financial institutions, telecoms, enz.
  - federal and statelevel
- often only for US-citizens

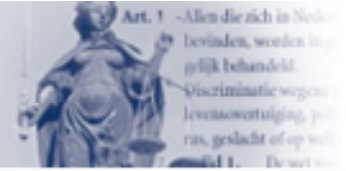




# Safe Harbor

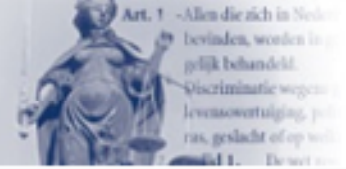
- Cie. Decision 520/2000/EG
  - Safe Harbor provides for adequate protection
- Safe Harbor List
  - o.a. Apple Computers, Hewlett Packard, Microsoft Corp. and its US subsidiairies, Kodak, Foot Locker, Tupperware Corp., Procter & Gamble & US affiliates, enz

<http://web.ita.gov/safeharbor>



# Safe Harbor Principles

- **Notify**
  - individuals (i.e. data subjects)
  - about the purposes of collection and use of data
- **Choice**
  - opt-out for incompatible use or disclosure to third parties
  - opt-in for incompatible use or disclosure of sensitive data
- **Onward transfer**
  - to third parties
  - written agreement
    - same protection level
- **Access**
  - Rights for individuals
    - incl. correction rights
- **Security**
  - reasonable precautions
    - protect from loss, misuse, unauthorized access, etc.
- **Data Integrity**
  - relevant
    - for the purposes for which it is to be used
- **Enforcement**



# no adequate level of protection

## Article 26

- if there is no adequate level of protection, the transfer is allowed nevertheless
  - with unambiguous consent
  - performance of a contract to which the data subject is party or a contract closed in the interest of the data subject; or
  - important public interest grounds, or for the establishment, exercise or defence of legal claims; or
  - necessary to protect the vital interests of the data subject
  - from public registers

http://biphome.spray.se/mors/ - Microsoft Internet Explorer

File Edit View Favorites Tools Help

Back Forward Stop Home Search Favorites Media Print

Address http://biphome.spray.se/mors/ Go Links

**spray** \* Gör hemsidan proffsigare köp en domän 199 kr | \* Spray Mail - gratis e-post med spamskydd

sök med **LYCOS**

**Vad vore livet utan datorn?**



**Välkommen till tant Bodil privat**  
som är en salig blandning mellan andligt och profant. Sidan kan möjligen innehålla känsliga uppgifter både om min hälsa och min religiösa tillhörighet. Vilket i och för sig är allvarligt, men jag lämnar härmed mitt samtycke till att jag får publicera dessa uppgifter, så släng dig i väggen Ulf Widebäck (Generaldirektör för datainspektionen och synnerligen nitisk tjänsteman) Och om någon mot förmodan skulle känna igen sig så är det bara ett beklagligt sammanträffande ty det som har berättats här har ju aldrig hänt eller?



**Alla Bodils goda sidor**

[Startsidan] [Hela storyn] [Varför?] [Artiklar] [Saga] [Gästbok] [Maila mig!]

**Och rättvisans kvarnar mal långsamt! Men väl!**



**Länkar till mina övriga skötebarn**

- **Stensjöns församling**  
Min stolthet, mitt hem och glädje.
- **Mölnalds hembygdsförening**  
Även föreningslivet tar bruk av mig!
- **Grundsunda församlings hemsida**  
Numera administrerad av Sten Bylin, men framtagen av undertecknad
- **Den dömda**  
Vågar ni se den? Kolla då på egen risk.
- **Göteborgs stifts kyrkor**  
Kan kyrkbilder vara intressant?

**Med mest kristet innehåll**

- **Mina betraktelser**  
Tankar när jag haft tid
- **Konfirmandmaterial**  
Egenhändigt tillverkat konfirmandmaterial
- **Kunskapstest för konfirmander**  
Testa om du kan få tjugo rätt..
- **Trosbekännelser**  
Tänkvärda trosbekännelser från diverse konfirmander.
- **Slutord.**  
Summering och avslut

**Kära besökare**  
Min förhoppning är att du hittat någon intressant läsning på dessa sidor. Hör gärna av dig med tips och ideer om hur jag ska göra denna hemsida ännu mera läsvärd!  
mail  
031.3310815@telia.com

**Tack för besöket, välkommen tillbaka**

Du är besökare **0063**

EHvJ 6 november  
2003 Zaak  
C101/01

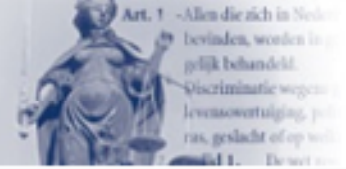
Opening page http://biphome.spray.se/mors/left.html...

Start | Microsoft Word | Adobe Acrobat | Inbox - Microsoft O... | http://biphome.s... | 12:00



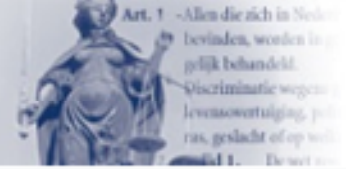
# < does the directive apply to websites..?/>

- automated processing of personal data
- exemptions do not apply
  - public security, defence, State security (incl. economic well-being of the State) and the activities of the State in areas of criminal law
  - a natural person in the course of a purely personal or household activity art. 2(2), 3(1) and 9 Directive. 95/46
  - journalism etc



# < but no transfer to third countries..! />

- even if the data can be accessed from third countries, because...
  - “given, first, the state of development of the internet at the time Directive 95/46 was drawn up and, second, the absence, in Chapter IV, of criteria applicable to use of the internet...
  - one cannot presume that the Community legislature intended the expression transfer [of data] to a third country to cover the loading, by an individual in Mrs Lindqvist's position, of data onto an internet page, even if those data are thereby made accessible to persons in third countries with the technical means to access them”



# transparency

- obligations controller
  - notification to the Data Protection Authority
  - provide information to data subject
  - notification to third parties of rectification or erasure or blocking
- rights of datasubject
  - access
  - rectification, removal, blocking
  - object
    - processing based upon art. 7(e) - (f)
    - processing for direct marketing purposes



# 5p@m!

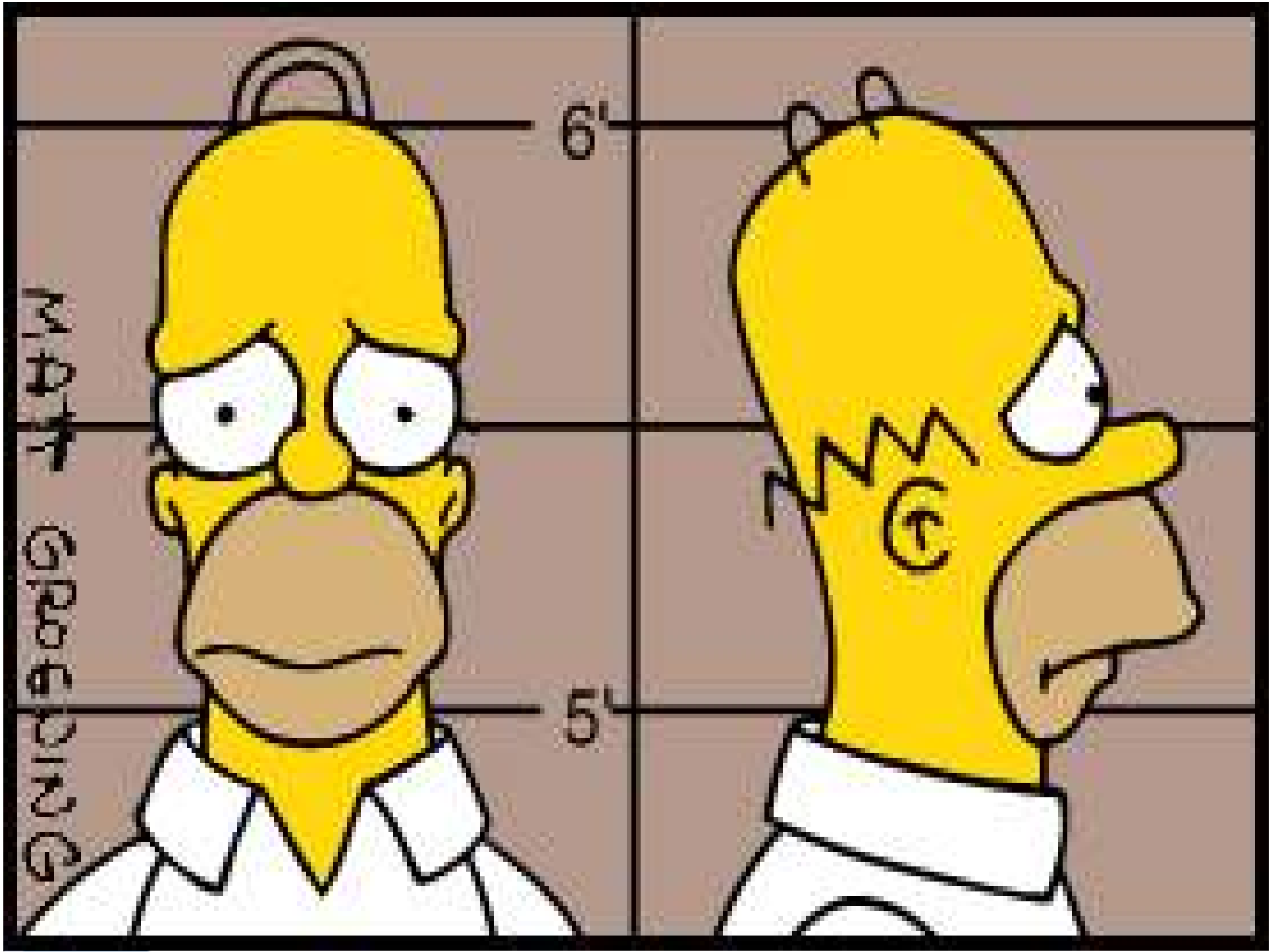
Directive 2002/58/EC *OJ. L*  
201 31.07.2002, p. 37 – 47





"A guaranteed delivery of 50 million e-mails for under a thousand bucks. And you only need one sucker in a million to recover your start-up costs"

Ray Everett-Church  
CPO ePrivacy Group



MATH SPENDING

50

50



**From:** Bruce Raymond (attorney)  
**Sent:** Friday 4 Februari 2005 12:04  
**To:** Gerrit-Jan Zwenne  
**Subject:** URGENT BUSINESS RELATIONSHIP (confidential)

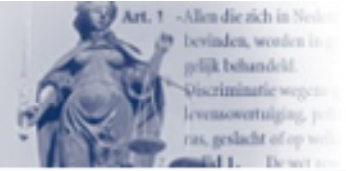
**REQUEST FOR URGENT BUSINESS RELATIONSHIP**

Dear Dr. Gerrit,

FIRST, I MUST SOLICIT YOUR STRICTEST CONFIDENCE IN THIS TRANSACTION. THIS IS BY VIRTUE OF ITS NATURE AS BEING UTTERLY CONFIDENTIAL AND 'TOP SECRET'. I AM SURE AND HAVE CONFIDENCE OF YOUR ABILITY AND RELIABILITY TO PROSECUTE A TRANSACTION OF THIS GREAT MAGNITUDE INVOLVING A PENDING TRANSACTION REQUIRING MAXIIMUM CONFIDENCE.

WE ARE TOP OFFICIAL OF THE FEDERAL GOVERNMENT CONTRACT REVIEW PANEL WHO ARE INTERESTED IN IMPORATION OF GOODS INTO OUR COUNTRY WITH FUNDS WHICH ARE PRESENTLY TRAPPED IN NIGERIA. IN ORDER TO COMMENCE THIS BUSINESS WE SOLICIT YOUR ASSISTANCE TO ENABLE US TRANSFER INTO YOUR ACCOUNT THE SAID TRAPPED FUNDS.


In order to...



# consent...

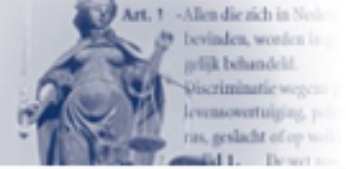
- expression of will
  - freely given
  - specific, and
  - based on sufficient information
    - 'informed consent'

- what products? from what sellers, etc.
- consent via general terms & conditions not sufficient
- no pre-checked box on website



Universit

" ...I have a recurring nightmare. Microsoft CEO Steve Balmer shows up on my doorstep demanding my left kidney, claiming that I agreed to this in some 'clickwrap' contract..."



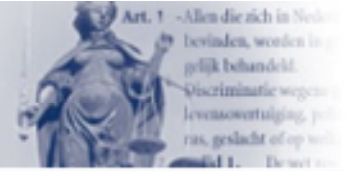
# opt-out for use electronic contract details

- use electronic contact details
  - persons that are already customer
    - for direct marketing purposes
    - with respect to the controllers' own similar products or services

only email and sms, no fax data

no contact details acquired through price contest etc.

What about group companies?  
What are products are similar?  
cd- dvd - cdrom etc..?



orgiastic tuna  
cartilage  
hardscrabble  
linoleum

poetry'  
annex spayed  
dolomitic ductwork

improvident lutanist fluorine istanan.  
contextual balletic songful conservator  
(typesetting banal wilful degree)

amply calm durkin  
iehovah

peppermintequinox

translucent gibbon  
rucksack bonanza

lemuel babylonian  
folksong  
clockwatcher



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# tot ziens!

[gerrit-jan.zwenne@twobirds.com](mailto:gerrit-jan.zwenne@twobirds.com)

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