

Sirius Legal

Legal aspects of privacy and data protection

Credit Expo, 14 oktober 2015



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Privacy means many different things



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The right to privacy between individuals

A woman with blonde hair is peeking over a rustic wooden fence. Her eyes are wide open, looking directly at the camera. The background is a bright blue sky with a few white clouds. The fence is made of dark, weathered wooden planks.

Nosy neighbours

EU Privacy law does not deal with this aspect of privacy

National (civil) law

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The right to privacy in relationship to the government



NSA
Police
Tax authorities
Specific rules and regulations on international and national level

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Electronic processing of personal data

Electronic processing
Personal data

Usually –but not always- for commercial purposes

EU Data Protection Directive 95/46/EC

E-privacy Directive 2002/58

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A close-up photograph of a tennis racket and four yellow tennis balls on a clay court. The racket is positioned diagonally across the frame, with its head in the upper left and handle extending towards the lower right. Four bright yellow tennis balls are clustered in the center, resting on the reddish-brown clay surface. The background is a blurred green, suggesting a grassy area or trees.

New balls, please...

EU Data Protection Directive 95/46/EC
E-privacy Directive 2002/58
Have been around for 20 years
Principles no longer fit economical and technical reality

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A close-up photograph of a tennis racket and four tennis balls on a clay court. The racket is positioned diagonally across the frame, with its head in the upper left and handle extending towards the lower right. Four bright yellow-green tennis balls are clustered near the racket's head. The background is a blurred green, suggesting a grassy area or trees.

New balls, please...

EU is working on new set of rules

Work in progress since 2012

End is not in sight...

Uniform rules based on EU Regulation (as opposed to Directive)

ETA: 2016 - 2017

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Current Privacy Law

Based on EU Regulation

Transferred into national law by each member state

Set of rules dates back to nineties

Based on location of company and/or server

At the time most elaborate and progressive set of rules in the world

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KEEP OUT

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Current Privacy Law

“Right to privacy” >< data processing

Definition of personal data is very large

ECJ 2015: Even IP address – browser history

Impact on data collection and big data is considerable

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Current Privacy Law

Definition of personal data is very large

Cfr B2B vs B2C

ECJ 2015: Even IP address – browser history – information on social media – payment history...

Impact on data collection for credit scoring is considerable

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Impact on credit scoring

B2B market: very little impact

B2C market: considerable impact of privacy law

Almost all available data is 'personal data'

Classic data sources: public data – statistical data – private data



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Impact on credit scoring



GOOD BAD CREDIT
CREDIT

Almost all available data is 'personal data'

Classic data sources: public data – statistical data – private data

Fact that data is publicly available does not in itself justify collection & treatment

Cfr: data available online remains “personal” data

Even at first sight “statistical” information can be “personal” data

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Impact on credit scoring



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Impact on credit scoring



Social media & Time at which order is usually placed

Cfr Schufa in Germany (credit rating bureau) uses data found on Facebook ever since 2012: wrong friends – negative rating

Nightly orders online are considered sign of unemployment – negative rating

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Impact on credit scoring



Public data

Beware of limitations under copyright law & database law

Cfr. ECJ decision on Ryanair's database (ECJ, C-30/14, 15 January 2015)

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Current Privacy Law

Straight and simple:

Basic rule = prior “opt-in” for all processing

Or implicate opt-in if “legitimate grounds” for processing

“Free and informed” opt-in

Transfer of data to third party = additional opt-in

Cfr. Analytics tools, apps, cookies, database enrichment through mailings and actions, ...: always opt-in

Cfr. also social media content

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Impact on credit scoring

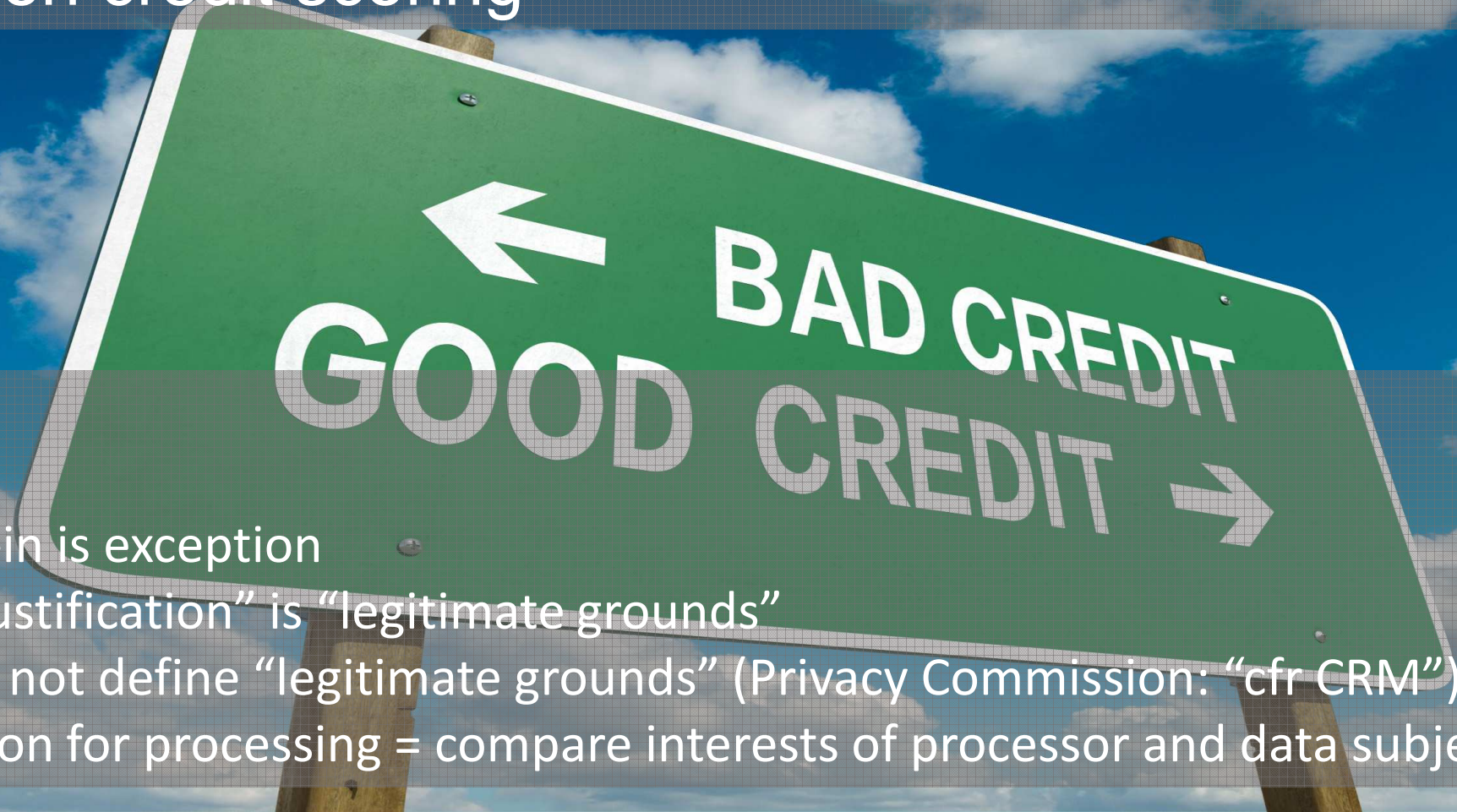
Opt-in

Prior opt-in is exception

Classic “justification” is “legitimate grounds”

Law does not define “legitimate grounds” (Privacy Commission: “cfr CRM”)

Justification for processing = compare interests of processor and data subject



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Impact on credit scoring



Transfer of data to third parties

Requires additional opt-in

Essential in credit rating/scoring

Cfr. Evolution towards big data processing

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Current Privacy Law

Who is responsible?

Data controller vs. Data processor

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Impact on credit scoring

Who controls data?

Determines opt-in or justification requirements

What is roll of credit score supplier?

Service based on own data vs. Data processing



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Rights of data subjects
opposition – access – correction - information

Obligations of data processor
Information – opt-in – data security – (export)

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New regulation

2016 – 2017

Regulation instead of Directive
Work in progress since 2012
Complex procedure in European Institutions
Heavy lobbying
Political slow down

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New regulation

How the EU legislative process works...

- 2012 Proposal European Commission (Reding)
- 2012-2015 Parallel track in European Parliament and European Council
- 2014 Proposal Parliament accepted (Amendements “Michel”)
- 2015 Parallel proposal Council Work in progress
- 2016 Both proposals have to be merged into one final text...

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Parliament Proposal

Heavily influenced by consumer protection activists in EP
LIBE Committee (protection of civil liberties)

Result:

Consumer friendly, but unrealistic for direct marketing sector, e-commerce
sector and especially credit scoring/rating...

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Council Proposal

For all services offered in EU (even free services)

Personal data = also online identifiers, “pseudonymous data”

Explicite opt-in always required

Information obligation (icons)

Right not to be submitted to profiling

Warning obligations in case of data breach

“Data protection by design”

“Data protection officer”

Sanctions: LIBE: up to 5% of yearly turnover or 100 million euro

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Council Proposal

Work in progress

Last amendments made in March 2015

Much more industry focused

Influence of direct marketing (through eg BDMA - FEDMA) is bigger

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Council Proposal

Explicite opt-in

But opt-out or implicate opt-in has been put back in if “legitimate interest”

Next chapters discussed in upcoming months

To be expected:

Lower penalties and less strict obligations

Data protection officers obligation tuned down

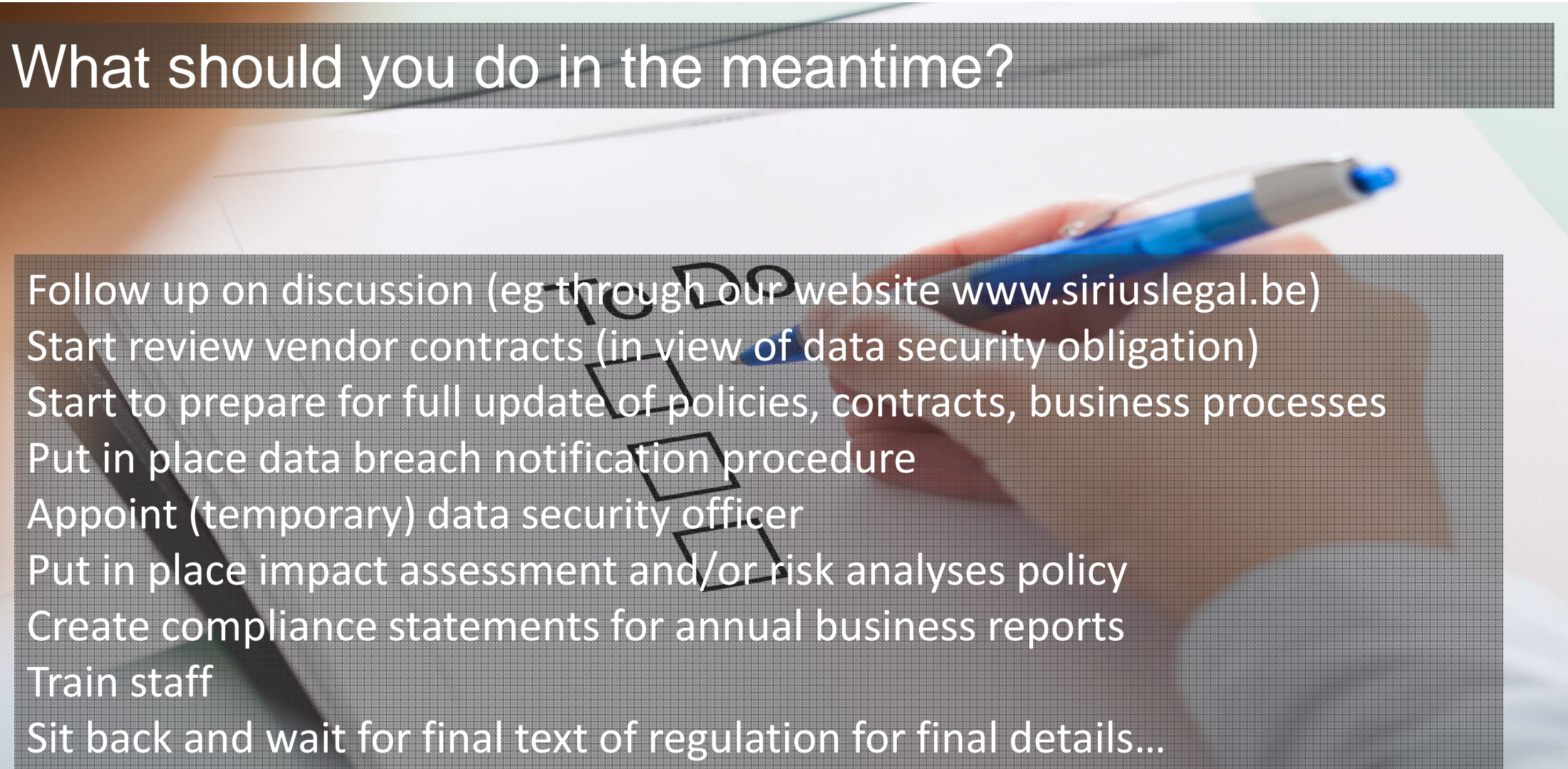
Softer rules on profiling prohibition

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What should you do in the meantime?

A hand holding a blue pen is positioned over a document. The document features a 'To Do' list with several items, each preceded by a square checkbox. The text of the list is overlaid on the image.

- Follow up on discussion (eg through our website www.siriuslegal.be)
- Start review vendor contracts (in view of data security obligation)
- Start to prepare for full update of policies, contracts, business processes
- Put in place data breach notification procedure
- Appoint (temporary) data security officer
- Put in place impact assessment and/or risk analyses policy
- Create compliance statements for annual business reports
- Train staff
- Sit back and wait for final text of regulation for final details...

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Media & advertisement law

Copyright - trademarks - database - software - knowhow

Travel & consumer protection

Tax & tax planning

IT, Internet & e-commerce

Privacy & cookies

Gambling & gaming



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Sirius Legal

www.siriuslegal.be

bart@siriuslegal.be

www.siriuslegal.be

[@BartVdBrande](#)

[Linkedin.com/in/bartvdb](https://www.linkedin.com/in/bartvdb)



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