

***YOUR PRIVACY IS IMPORTANT TO US!***

**Jan Trzaskowski**

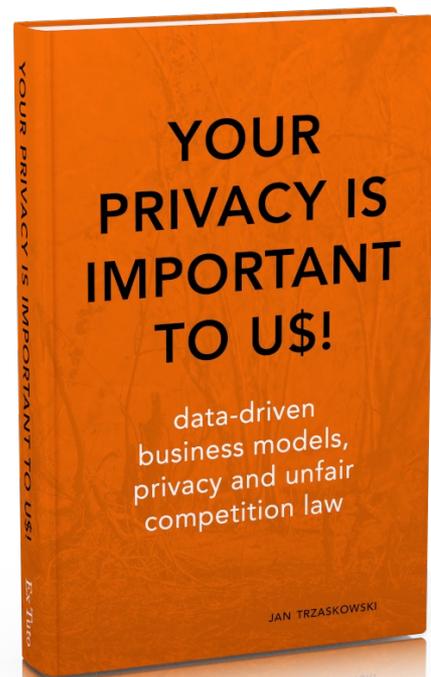
Human Being, Professor, PhD

Copenhagen Business School and Aalborg University



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# *WORK IN PROGRESS*



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# *DATA-DRIVEN BUSINESS MODELS*

- **Attention economy (Herbert A. Simon 1971)**
- **Characteristics**
  - Personalisation and surveillance
  - Value extraction and manipulation
  - 'Free'
- **Melvin Kranzberg, first law of technology (1986)**
  - 'Technology is neither good nor bad; nor is it neutral'

# *EUROPEAN DATA PROTECTION SUPERVISOR, OPINION 7/2015*

- **[...] the Digital Single Market cannot uncritically import the data-driven technologies and business models [...] The internet has evolved in a way that surveillance – tracking people’s behaviour – is considered as the indispensable revenue model for some of the most successful companies.**
  - Calls for critical assessment and search for other options.





# *EU CHARTER OF FUNDAMENTAL RIGHTS*

- **Article 7. Respect for private and family life**
  - [...] private and family life, home and communications.
- **Article 8. Protection of personal data**
  - 1. Everyone has the right to the protection of personal data concerning him or her.
  - 2. [...] must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law [...]

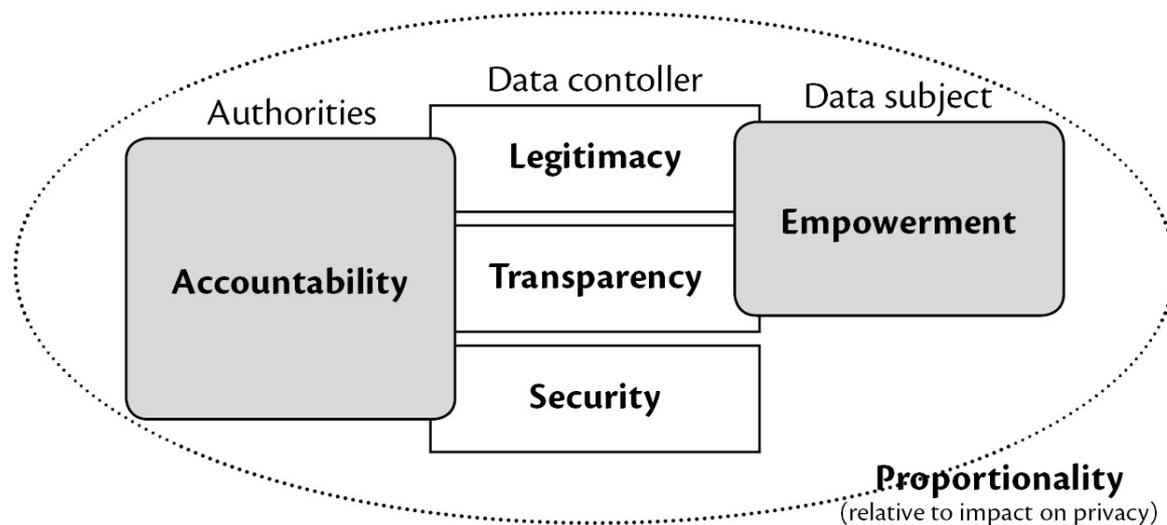


# *LEGITIMATE/LEGAL BASIS*

- **Lawful processing for marketing purposes**
  - (a) consent for one or more specific purposes
  - (b) Performance of a contract to which the data subject is party [...]
  - (f) The balancing test (not overridden by the interests or fundamental rights
    - Compare to 'further processing'
- **Sensitive data (Article 9)**
  - Special categories; exhaustive list



# DATA PROTECTION LAW DISTILLED



Jan Trzaskowski, 'GDPR Compliant Processing of Big Data in Small Business', in Adam Lindgreen, Thomas Ritter, Carsten Lund Pedersen & Torsten Ringberg (eds), *Big Data in Small Business: Data-Driven Growth in Small and Medium-Sized Enterprise* (Edward Elgar 2021)

# *PROHIBITION OF UNFAIR COMMERCIAL PRACTICES*

- **Informed economic decisions**
  - Personal goals, values and preferences
  - Who – the consumer or the trader – bears the risk of ‘bad consumption’
- **Empowerment**
  - Absence of aggressive commercial practices
- **Transparency**
  - Not omit material information
  - Absence of misleading commercial practices





# MANIPULATION

- **Agency and empowerment**
- **Cass Sunstein (2016)**
  - '[Whether the effort in question] does [...] sufficiently engage or appeal to [...] the consumer's] capacity for reflection and deliberation'
- **Behavioural sciences**
  - The role of 'friction'/'cognitive ease'
  - B.J. Fogg (2020): Motivation, Ability and Prompts
- **Persuasive Technology, B.J. Fogg (2003)**
  - Computers can (a) go where humans cannot go or may not be welcome and (b) evoke feelings through social cues without getting tired or requiring reciprocity, etc.
- **Example: cookie consent pop-up (GDPR Art. 25)**



## *CASE C-673/17, PLANET 49*

• **55. In that regard, it would appear impossible in practice to ascertain objectively whether a website user had actually given his or her consent to the processing of his or her personal data by not deselecting a pre-ticked checkbox nor, in any event, whether that consent had been informed. It is not inconceivable that a user would not have read the information accompanying the preselected checkbox, or even would not have noticed that checkbox, before continuing with his or her activity on the website visited.**



# *AGGRESSIVE COMMERCIAL PRACTICES*

- **Use of harassment, coercion, including the use of physical force, and undue influence**
  - Timing, location, nature or persistence
- **... means exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision.**



## *CASE C-628/17, ORANGE POLSKA*

- **46-47. Aggressive practices include conducts that 'put pressure on the consumer such that his freedom of choice is significantly impaired' or establish an attitude that is 'liable to make that consumer feel uncomfortable' such as to 'confuse his thinking in relation to the transactional decision to be taken**



# *TRANSPARENCY*

- **The information paradigm**
  - Information does not equal transparency
    - Frank Luntz (2007): 'it's not what you say, it's what people hear'
  - Substance and form (what and how)
    - Case C-195/14, Teekanne
- **Information asymmetries and attention economy**
  - 1. The product and the trader
  - 2. Behavioural sciences (consumers in general)
    - Including persuasive technology
  - 3. The individual consumer (personal data)



# *UNDERSTANDING THE DEAL*

- **Automated decisions (GDPR Art. 22):**
  - 'Significance and the envisaged consequences for the data subject'
- **Case C-673/17, Planet49**
  - 74. 'clear and comprehensive information' implies that a user is 'in a position to be able to determine easily the consequences of any consent' and that the information must be 'sufficiently detailed so as to enable the user to comprehend the functioning of the cookies employed.'
- **Understanding 'externalities'**

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- **Blacklist point 20**
- **Case C-54/17, Wind Tre**
  - 46–47. ‘the price is, in principle, a determining factor in the consumer’s mind when it must make a transactional decision, it must be considered information necessary to enable the consumer to make such a fully informed decision.’
- **‘Paying with personal data’ ... misleading?**
  - When, in fact, paying with attention and agency



# *THE PROTECTION OF PRIVACY*

- **ePrivacy (confidentiality and cookies)**
- **UCPD Professional Diligence?**
  - Due care 'commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity.'
- **What can be achieved by means of 'transparency'**
  - Consider (1) the complexity, (2) the envisaged consequences (impact), (3) the user's reasonable expectations and (4) the trader's effort to establish genuine transparency, including (5) by engaging the user's capacity for reflection and deliberation.
- **And what should be unlawful privacy infringement**
  - In the context of marketing

# *CASE C-203/15 AND C-698/15, TELE2 SVERIGE*



- **100. The interference [...] is very far-reaching and must be considered to be particularly serious. [...] without the [...] user being informed is likely to cause the persons concerned to feel that their private lives are the subject of constant surveillance**
- **102. Given the seriousness [...] only the objective of fighting serious crime is capable of justifying such a measure**
- **103. [...] the effectiveness of the fight against serious crime [...] [...] cannot in itself justify [...] general and indiscriminate retention of all traffic and location data [...]**

# *THE FREEDOM TO CONDUCT A BUSINESS (CHARTER ART. 16)*



- **Art. 52(1). Proportionality, including the availability of less intrusive means. Balance against:**
  - Human dignity (Art. 1)
  - Respect for physical and mental integrity (Art. 3(1))
  - Privacy and data protection (Art. 7 and 8)
  - Freedom of expression/right to information (Art. 11)
  - Consumer protection (Art. 38)
  - Non-discrimination (Art. 21)
- **Individualised realities and accountability**
  - Democracy and human well-being

*THANK YOU FOR YOUR ATTENTION*



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