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# THE LEGAL LIMITS TO THE MONETISATION OF ONLINE EMOTIONS

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# ABSTRACT

Emotions play a key role in decision making. Technological advancements are now rendering emotions detectable in real-time. Building on the granular insights provided by big data, such technological developments allow commercial entities to move beyond the targeting of behaviour in advertisements to the personalisation of services, interfaces and other consumer-facing interactions, based on personal preferences, biases and emotion insights gleaned from the tracking of online activity and profiling. Although emotion measurement is far from a new phenomenon, technological advancements are increasing the capacity to monetise emotions. Despite the fact there are many applications of such technologies which appear morally above reproach (i.e. at least in terms of their goals (e.g. healthcare or road safety) as opposed to the risks associated with their implementation, deployment and their potential effects), their use for advertising and marketing purposes raises clear concerns in terms of the rationality-based paradigm inherent to consumer protections (e.g. in the form of data protection and privacy and consumer protection law) and thus the autonomous decision-making capacity of individuals. Indeed, one must question the effects of combining such means of personalisation with consumer-facing interactions that are driven by emotion insights and how their wide scale adoption would be affected by (and indeed affect) the law.

As such, this thesis examines the emergence of such technologies and their use for commercial advertising and marketing purposes (construed broadly). More specifically, the purpose is to explore the challenges they present for EU data protection, consumer protection and advertising specific law. In so doing, the thesis examines the focus and limitations of current advertising and marketing protections (Chapter 2) and assesses the inherent rights and interests at stake before then analysing the rights to privacy and data protection as potential avenues for protection (Chapter 3). Building on this, the focus turns to a detailed assessment of the definition of personal data and its limitations (Chapter 4), before moving to a more concrete analysis of the protective confines of both the *ex ante* and *ex post* protections provided in EU law (Chapter 5). The final part of the thesis explores the future assessment of how and where the lines should be drawn in relation to the ongoing legitimacy of emotion monetisation given the increasing prevalence of emotional artificial intelligence (AI). The transversal nature of the analysis, across the consumer protection and privacy and data protection frameworks in particular, reveal a number of challenges associated with the increasing alignment of these respective policy agendas. These illustrate and inform the ongoing debates at the policy, enforcement and academic levels as to how the problems associated with the digital economy more broadly should be regulated in practice. Indeed, it is clear that the emergence of emotional AI fits squarely into the moves towards 'ethical AI' at the policy level, the criticism of such developments, and more specifically, the ongoing debates regarding to challenges and restrictions of legal protections.

With this in mind, the research reflects on the broader issues dominating the policy discourse as well as the nuanced analysis of the compatibility of existing frameworks within the applicable legislative patchwork and how they can work together. The thesis

concludes that there needs to be a discussion around what specific applications of emotional AI in the context of the monetisation of online emotions should simply be prohibited. Indeed, at a fundamental level such developments arguably further undermine the rationality paradigm as a 'functional fiction' in the law. Although deciding precisely what falls within the realms of manipulation is something requiring further interdisciplinary analysis, the thesis proposes a manner in which such commercial purposes could be banned *ex ante* in light of the complex overlaps between the respective data protection and privacy and consumer protection frameworks. Such questions need to be brought into the mainstream discussions on the future of legislative protections designed for a world of emotional AI and technologically mediated choices.

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# 1

# INTRODUCTION – EMOTION MONETISATION AND ITS (LEGAL) LIMITS

## INTRODUCTION

**[1]** BUZZWORDS, PROMISES AND AI – Artificial intelligence (AI)[1] is a topic on the lips of industry representatives, policy makers, academics and enforcement agencies across the European Union (EU).[2] AI is the acronym 'buzzword' used to denote the emergence of a whole range of technological innovations which promise unprecedented technical progress largely based on machine learning techniques (see below). Although the hyperbolic promises linked to the development of such technologies should definitely be taken with a grain of salt, such innovations do present challenges associated with their effective regulation.[3] This thesis will explore the rise of 'emotional AI' or the buzzword now used to refer to the affective computing sub-discipline and more specifically, technologies that are capable of

[1] AI is extremely difficult to define, for the purposes of this thesis the definition adopted by the European Commission will be adopted given the focus of the analysis on EU law and policy, where AI is defined as, 'Artificial intelligence (AI) refers to systems that display intelligent behaviour by analysing their environment and taking actions – with some degree of autonomy – to achieve specific goals. AI-based systems can be purely software-based, acting in the virtual world (e.g. voice assistants, image analysis software, search engines, speech and face recognition systems) or AI can be embedded in hardware devices (e.g. advanced robots, autonomous cars, drones or Internet of Things applications). We are using AI on a daily basis, e.g. to translate languages, generate subtitles in videos or to block email spam. Many AI technologies require data to improve their performance. Once they perform well, they can help improve and automate decision making in the same domain. For example, an AI system will be trained and then used to spot cyberattacks on the basis of data from the concerned network or system.' See: European Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Artificial Intelligence for Europe Brussels, COM(2018) 237 Final'.

[2] See: 'European Commission - Press Release Member States and Commission to Work Together to Boost Artificial Intelligence "Made in Europe" Brussels, 7 December 2018' <http://europa.eu/rapid/press-release_IP-18-3041_en.htm> accessed 20 June 2018; Paul Nemitz, 'Constitutional Democracy and Technology in the Age of Artificial Intelligence' (2018) 376 Philosophical Transactions of the Royal Society A: Mathematical, Physical and Engineering Sciences 20180089; 'Ethically Aligned Design: A Vision for Prioritising Human Well-Being with Autonomous and Intelligent Systems' (Institute of Electrical and Electronic Engineeers (IEEE) 2019) 082-02–19.

[3] See: Nemitz (n 2).

detecting, classifying and responding appropriately to users' emotional lives thereby appearing to understand their audience.[4] Such developments are arguably crucial to the development of AI more generally. Indeed, as observed by McStay,

> '[…] in as far as AI systems interact with people, one might reason that AI has no value until it is sensitive to feelings, emotions and intention. This includes home assistants and headline grabbing humanoid robots, but the important development is how emotion recognition systems are progressively permeating human-computer interactions.'[5]

There is therefore, a clear value to understanding emotional AI from a technical user-experience perspective and the emergence of the affective computing sub-discipline is clear evidence of this importance.[6]

**[2]** TARGETING EMOTION MONETISATION – More specifically however, the economic effects and value associated with such insights are also of clear value to the advertising and marketing industry. Indeed, it is well-known that advertising and marketing go hand in hand with emotions. The emergence of emotional AI or more specifically, technologies that can detect emotions, seemingly allow for the generation of emotional insights or the tracking and targeting of consumer emotions in real-time.[7] This is a significant development. There is a growing need therefore, to assess the legal limits imposed on the monetisation of online emotions in EU law considering the potential impact on decision-making and more fundamentally, the supposed rationality of consumers' choices.

## 1.1 EMOTIONS, RATIONALITY AND THE EMERGENCE OF 'EMOTIONAL AI'

**[3]** SOME BACKSTORY TO SET THE EMOTIONAL TONE – Although the study of emotions has a long history in philosophy for instance, the quest to understand the effects of emotions on decision-making (and thus judgements) has only recently emerged (or arguably re-emerged) into the mainstream in many key disciplines. As described by Lerner *et al.* economics, traditionally the dominant field for the study of decision-making, is an interesting example in this context. Despite the early recognition of the importance of emotion in the 18th and 19th centuries, modern economics has largely ignored the effects of emotion until recently. This is perhaps best characterised by the fact that despite the fact that Adam Smith, the father of modern economics, highlighted the importance of emotion for decision-making over 250 years ago, this aspect of Smith's writing was largely

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[4] Andrew McStay, *Emotional AI: The Rise of Empathic Media* (1 edition, SAGE Publications Ltd 2018) 3.
[5] ibid.
[6] See: Rosalind W Picard, *Affective Computing* ("The" MIT Press 1997); Rosalind W. Picard, 'Toward Machines with Emotional Intelligence' in Gerald Matthews, Moshe Zeidner and Richard D Roberts (eds), *The Science of Emotional IntelligenceKnowns and Unknowns* (Oxford University Press 2008) <https://affect.media.mit.edu/pdfs/07.picard-EI-chapter.pdf> accessed 23 May 2018.
[7] For a discussion of the technical capacities see: Christopher Burr and Nello Cristianini, 'Can Machines Read Our Minds?' [2019] Minds and Machines; Christopher Burr, Nello Cristianini and James Ladyman, 'An Analysis of the Interaction Between Intelligent Software Agents and Human Users' (2018) 28 Minds and Machines 735.

ignored[8] with the interpretation of his work which has gained most notoriety seemingly at odds with his more general contentions in *The Theory of Moral Sentiments*.[9] More specifically, the popular interpretation of Smith's *invisible hand* theory teaches that a competitive free-market is *Pareto optimal*, meaning that when an economy is in equilibrium the economic welfare of every citizen is impossible to improve as any interference will result in negative consequences for at least a portion of that citizenship.[10] As a result, according to this theory specific protections for consumers are for the most part deemed unnecessary as such interventions would act as a restriction on the freedom to trade, thereby denying individuals the chance to improve their circumstances.[11] Smith's theory focuses on contractual autonomy and therefore, the notion that the more individuals are free to choose and hence, reap the rewards of their efforts (via the *division of labour*), the more the State benefits in turn.

**[4]** ECONOMICS AND EMOTIONAL BEHAVIOUR – Indeed, as per Becker, according to the standard economic approach, 'all human behavior can be viewed as involving participants who maximize their utility from a stable set of preferences and accumulate an optimal amount of information and other inputs in a variety of markets.'[12] As such, through such an approach an individual's behaviour is accepted as a given and is constrained by prices and incomes.[13] Although the *modern* interpretation of Smith's theory does recognise the possibility of impediments to its success – such as the effects of externalities, bad distributions of income and that markets can become anti-competitive – it rests on the

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[8] Indeed, attention has focused on the invisible hand theory. Smith, the father of modern economics, first referred to the invisible hand theory to describe the unintended benefits of self-serving individual actions in his work The Theory of Moral Sentiments (1759). Adam Smith, *The Theory of Moral Sentiments* (6th Edition, 1690) 165 <https://www.ibiblio.org/ml/libri/s/SmithA_MoralSentiments_p.pdf>. Despite being developed more thoroughly in Smith's magnum opus, Adam Smith 1723-1790, *The Wealth of Nations / Adam Smith ; Introduction by Robert Reich ; Edited, with Notes, Marginal Summary, and Enlarged Index by Edwin Cannan* (New York : Modern Library, 2000 2000) <https://search.library.wisc.edu/catalog/999905503902121>., it took more than a century for his reflections to be fully appreciated and understood. This theory dominated the economic policy of western countries during the nineteenth century. Although this dominance has evolved somewhat through the emergence of consumer mobilisation in the second half of the twentieth century (in response to the acknowledgement of consumer-business asymmetries), the theory still provides the bedrock upon which the current economic realities are based having been embedded in western socio-economic thought. See: Simon Clarke, 'The Neoliberal Theory of Society' in Alfredo Saad-Filho and Deborah Johnston (eds), *Neoliberalism: a critical reader* (Pluto Press 2005).

[9] To clarify, in contrast with the rational self-interest espoused in The Wealth of Nations, The Theory of Moral Sentiments argues a theoretical approach to human behaviour determined on the basis of a struggle between what Smith referred to as "passions" and the "impartial spectator". See generally: Stefano Fiori, 'Individual and Self-Interest in Adam Smith's Wealth of Nations' (2005) 49 Cahiers d Économie Politique 19; Amartya Sen, 'Adam Smith and the Contemporary World' (2010) 3 Erasmus Journal for Philosophy and Economics 18; Karl Moene, 'The Moral Sentiments of Wealth of Nations' (2011) 6 The Adam Smith Review 109.

[10] George Akerlof and Robert Shiller, *Phishing for Phools: The Economics of Manipulation and Deception* (Princeton University Press 2015) 5.

[11] Iris Benöhr, *EU Consumer Law and Human Rights* (OUP Oxford 2013) 12–13.

[12] Gary S Becker, *The Economic Approach to Human Behavior* (University of Chicago press 1976) 14.

[13] Mark Leiser, 'The Problem with "Dots": Questioning the Role of Rationality in the Online Environment' (2016) 30 International Review of Law, Computers & Technology 191, 194.

capacity of the individual to act in their own best interests.[14] As noted by Lerner *et al.* however, the less emphasised aspect of Smith's 'wisdom has resurfaced in light of several developments, including (a) breakthroughs in the methodology for studying emotion […]; (b) solid evidence that emotion drives economic behaviour […]; and (c) the failure of rational choice models to predict or explain the worldwide economic crisis that began in 2008.'[15] The first two of these drivers for change refer to the research in psychology and neuroscience in particular and are of clear significance for this thesis. Indeed, and as will be explored, the monetisation of emotion challenges the rationality paradigm which echoes the above understanding of economic decision-making within legal protections, especially considering the developments in emotion detection technology. This reflects the key role that contemporary studies in neuroscience, psychology and decision-theory give to emotions. It seems uncontroversial to say that emotions and decision-making go hand in hand. Hence, although there is a long history of the advertising and marketing industry exploring emotions and indeed, emotion detection technologies, the move to real-time detection and monetisation through everyday consumer-facing devices presents an important challenge to the capacity of the consumer to act rationally and therefore, autonomously due to the apparent traditional juxtaposition of 'reason' from the 'passions' in legal protections. Indeed, in law emotions appear to be more readily categorised as irrationalities or bad influences over rational decision-making, or at best, something that an individual strives towards in their decision-making (i.e. a welfare goal). The emergence of the ability to detect emotion therefore, presents a real challenge to this underlying assumption.

**[5]** EMOTION DETECTION AND EMOTIONAL AI – The expansion of technological capabilities provides new methods of assessing emotions in real-time with everyday consumer technology. Empathic media or 'technologies that track bodies and react to emotions and intentions'[16] are being implemented as a feature in *inter alia,* the future smart home (adjusting of lighting or music depending on mood), health or *pseudo*-health care (the tracking of mood for the purposes of improving mental well-being) and automobile safety (counteracting the potential effects of road rage and drink driving[17]). AI, or more narrowly machine learning, typically underpins these developments. Although it is

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[14] Akerlof and Shiller (n 10) 5.

[15] Jennifer S Lerner and others, 'Emotion and Decision Making - Supplementary Text' (2015) 66 Annual Review of Psychology 1. This also appears to reflect the understanding of Ashraf et al., who note that in many ways Smith's argumentation in The Theory of Moral Sentiments exemplifies strong connections with modern behavioural economics, conclude that '[…] Adam Smith's world is not inhabited by dispassionate rational purely self-interested agents, but rather by multidimensional and realistic human beings.' Nava Ashraf, Colin F Camerer and George Loewenstein, 'Adam Smith, Behavioral Economist' (2005) 19 Journal of Economic Perspectives 131, 145.

[16] Andrew McStay, 'Empathic Media: The Rise of Emotion in AI' <https://www.researchgate.net/publication/317616480_EMPATHIC_MEDIA_THE_RISE_OF_EMOTION_AI>.

[17] Jasper Jolly, 'Volvo to Install Cameras in New Cars to Reduce Road Deaths' *The Guardian* (20 March 2019) <https://www.theguardian.com/business/2019/mar/20/volvo-to-install-cameras-in-new-cars-to-reduce-road-deaths> accessed 24 March 2019.

outside the scope of this thesis to explore machine learning in all its technical detail, here it suffices to say that in simple terms, machine learning allows for the prediction and classification of phenomena by training models through labelled data from the real world[18] with the 'learning' aspect relating to the fact that the software is written in a manner which allows for the algorithm to self-adjust depending on the incoming training data with varying levels of human involvement.[19] Through such techniques therefore, emotions have become measurable.

**[6]** EMOTION INSIGHTS, THEIR VALUE AND DELINEATING THE FOCUS – Although the development of such techniques presents interesting legal concerns regarding the various deployments outlined above, the focus of this thesis is fixed on the effects of such developments in terms of the use of emotion insights in advertising and marketing *vis-à-vis* how their deployment challenges existing legal protections. That is not to say however, that the above applications are not of interests herein. On the contrary, and as will be explained in this thesis, the gap between the commercialisation of emotion detection as a product or service feature and the subsequent or simultaneous monetisation of the emotion insights gathered by such products and services for advertising or marketing purposes, is a very small step technically-speaking. This points towards the potential for function creep. Therefore, the thesis will explore more granularly the effects associated with the availability of data revealing emotions given the potential for such insights to be exploited commercially in a technologically mediated society. To clarify, here it is necessary to more explicitly delineate the scope of the analysis somewhat in that the research is restricted to (1) an analysis of the EU legal framework (albeit with some cross-references to national Member State law where relevant) and, (2) the use of emotions purely for commercial business-to-consumer purposes. As such, the hot topics of political micro-targeting[20] and fake news[21] are outside the scope here, as are all business-to-business applications of emotional AI which may in turn have an effect on citizens. Although these contexts are certainly worthy of more detailed analysis, they raise many substantively distinct issues that merit a more targeted examination of areas of law which are not within the scope of this thesis.

## 1.2 MAPPING THE LEGAL LIMITS AND PLOTTING THE EMOTION ANALYSIS

[18] Reuben Binns, 'Fairness in Machine Learning: Lessons from Political Philosophy' [2018] Journal of Machine Learning Research 1, 1.
[19] McStay, *Emotional AI* (n 4) 18–19.
[20] See: Bethany Shiner, 'Big Data, Small Law: How Gaps in Regulation Are Affecting Political Campaigning Methods and the Need for Fundamental Reform' [2019] Public Law 362; Tom Dobber and others, 'Spiraling Downward: The Reciprocal Relation between Attitude toward Political Behavioral Targeting and Privacy Concerns' [2018] New Media & Society 146144481881337.
[21] Harambam Jaron, Helberger Natali and van Hoboken Joris, 'Democratizing Algorithmic News Recommenders: How to Materialize Voice in a Technologically Saturated Media Ecosystem' (2018) 376 Philosophical Transactions of the Royal Society A: Mathematical, Physical and Engineering Sciences 20180088; Vian Bakir and Andrew McStay, 'Fake News and The Economy of Emotions: Problems, Causes, Solutions' [2017] Digital Journalism 1.

**[7]** EU CONSUMER AND DATA PROTECTION LAW – As this thesis focuses on the use of such technologies for advertising and marketing purposes, the EU consumer law *acquis* clearly plays a significant role in determining the legitimacy of any particular deployment. Indeed, as mentioned above, emotions have always been key to advertising. Hence, any assessment of the emergence of such technologies must first be understood within the legislative requirements and literature analysing the Unfair Commercial Practices Directive (UCP Directive)[22] and the Audiovisual Media Services Directive (AVMS Directive).[23] That being said, at least at first sight, emotion detection also squarely fits into the domain of data protection law and the General Data Protection Regulation (GDPR)[24] more specifically, as the detection of emotions will seemingly require the processing of personal data. However, as will be analysed in this thesis emotional AI challenges the boundaries of protection resulting in the application of a patchwork of requirements. This presents a significant challenge.

### 1.2.1 THE *MONETISATION* OF *ONLINE* EMOTIONS – AIM OF THIS RESEARCH

**[8]** RATIONALITY AND THE UNDERLYING ASSUMPTION – As alluded to above, the key underlying assumption of this thesis is that the emergence of emotion detection technologies may challenge the rationality paradigm inherent to protection given that emotions are key drivers in the decision-making processes. The monetisation of emotions hence, brings with it a number of associated risks but also benefits from the perspective of commercial actors. Underlying these perceived risks and benefits lie competing fundamental rights and values. From the consumer's perspective, individual autonomy may be potentially threatened through the emergence of emotion detection and monetisation techniques. For the purposes of this thesis, it is significant to note that the delayed recognition of the importance of emotions legally speaking, is particularly interesting when one considers that their categorisation as a key stimulus in provoking sales is hardly controversial and has been long recognised. The aim of this thesis is thus narrowly defined in terms of its focus in that it aims to more elaborately spell out the potential effects of the emergence of emotional AI on individual decision-making and consumer autonomy. The objective therefore, is to deepen the understanding of the legal issues associated with the use of emotional appeals and the current and desirable legal limits to such practices considering

[22] Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') 2005 22.

[23] Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities OJ L 303, 28.11.2018, 69–92.

[24] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) OJ L 119, 1–88.

the advancements in technology and the challenges they pose to the existing legal framework.

**[9]** EMOTION DETECTION MONETISATION – Put simply, the commercial motivation behind the monetisation of emotions is to increase end product/services sales or the continued usages of such products/services, and it is thus necessary to analyse the consequences of such activities from a legal perspective. Importantly, emotion can be harnessed in this sense *via*,

- the emotional appeal of the product as highlighted or created by the content and/or effect of a commercial communication (i.e. emotional appeals in advertisements);
- the emotional appeal of the means of delivering the commercial communication (i.e. advergames, personalised recommender systems);
- the ability to leverage emotion detection as a selling point (i.e. the integration of emotion detection in *pseudo*-healthcare devices or applications); and/or
- a combination of all these categories including the increased capacities facilitated by technological advancements.

As mentioned above, although the purpose of this thesis does not aim to specifically deal with the ability to leverage emotion detection as a selling point or feature,[25] the emotion insights revealed by such commercial applications and thus their re-purposing for advertising and marketing purposes is of clear importance for this analysis. An assessment of the respective interests (i.e. consumer versus commercial), requires a fine balancing between effective regulation and the stifling of economic growth and technological innovation. Inevitably therefore, this involves the application of the principle of proportionality.[26] The research aims to provide clarity in respect of the factors that are important for any such balancing and the various legal instruments which may have an impact in light of the complex divisions between Member State and EU competences in the EU legal order.

**[10]** EMOTIONS AND THEIR PERSUASIVE IMPACT – The thesis thus targets an assessment of the regulation of the harnessing of emotion and its persuasive impact under privacy and data protection, consumer protection and advertising specific law (i.e. in relation to deceptive or misleading advertising) and examines the limits imposed with respect for the important values, principles (such as transparency and proportionality) and fundamental rights which these frameworks aim to protect. To reiterate, although there are also clearly

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[25] The key concern where emotion detection is a key part of the service provided will be the conformity of the goods being offered. Although this is an important discussion it remains outside the scope of this thesis. It is covered however by: Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC OJ L 136, 28–50.

[25] Andrew McStay, 'Empathic Media and Advertising: Industry, Policy, Legal and Citizen Perspectives (the Case for Intimacy)' (2016) 3 Big Data & Society 1.

[26] The principle of proportionality refers to the fact that any measure to be imposed must be strictly necessary to the public interest to achieve its purpose. See: Article 5(3) of the Treaty on European Union (TEU) and Protocol (No 2) on the application of the principles of subsidiarity and proportionality.

other applications of such technologies (for example the tracking of emotion for health-related applications), this analysis does not come within the scope of the thesis. Instead the research will focus on the commercial uses of emotions to nudge consumers towards certain commercially exploitable actions. With this in mind, the research will answer the following key research question,

> Do the current EU legal protections found in advertising, consumer protection and data protection and privacy law, adequately counteract and sufficiently balance the existing power asymmetries and the resulting competing business and consumer interests, in the context of the monetisation of online emotions?

In order to better respond to the subtleties contained within this key question it has been further divided into the following sub-questions:

1. Do the existing protection mechanisms regulating the use of emotion in advertising and marketing provide adequate safeguards to balance the consumer's weaker position *vis-à-vis* the business, given the effect of emotions on decision making and the potentially manipulative personalisation of online content/services? And what are the key underlying rights and interests which must be balanced?
2. Given the proliferation of internet technologies and the increased personal data gathering/processing, how and why does privacy and data protection law aim to balance the asymmetries in power in order to protect consumers? What are the specific concerns/limitations associated with this framework in the context of profiling for the purposes of commercial personalisation in light of emotion detection technologies?
3. How do the protections provided by the patchwork of legislative protections work together? What are the difficulties associated with the alignment of the data protection and consumer protection policy agendas in particular? And having outlined the gaps and uncertainties, how might the legislative framework adapt in order to respond to the potential negative effects of emotion monetisation?

Given that this research will offer a transversal analysis, it will provide a unique angle on the discussion as this issue has not been previously similarly analysed in the context of EU law. Hence, the core of the research aims to assess the balance between paternalistic and empowerment-based methods of protection and thus whether the current consumer-empowering mechanisms are sufficient to adequately protect the fundamental rights and interests of consumers in relation to the challenges posed by the technological developments. Furthermore, it should also be noted that the research will not expand upon the specific consumer protection considerations relevant for the promotion of particular products or services. Instead the thesis aims to focus more on the means of delivery rather than the specific product or service being advertised or marketed (e.g. the rules relating to the advertising of tobacco or alcohol).

### 1.2.2 OUTLINE AND METHODOLOGY

**[11]** ADVERTISING LAW AND EMOTION – The analysis has been divided into five chapters. These chapters elucidate the consumer protection mechanisms as provided for by privacy and data protection, consumer protection and advertising specific law in relation to the role of emotions. Chapter 2 introduces the rules on advertising and marketing provided in the

EU legal order and thus more specifically, examines the UCP and AVMS Directives in detail. The Chapter explores how new advertising formats which aim to harness emotions challenge the existing protections focused on the identification of commercial content and the provision of information to the consumer. In this vein, the Chapter assesses the role of emotion in the EU law protections and also examines the role of national law, self-regulatory mechanisms, cultural disparities and the moves within literature and policy-making to map a more accurate understanding of consumer behaviour. Building on this analysis, the Chapter explores the interdisciplinary insights on the role of emotion in decision-making and uses these to critique the traditional position of emotion in the provided protections, thereby forming the conceptual basis for rest of the thesis.

**[12]** FUNDAMENTAL RIGHTS AND INTEREST AND DATA PROTECTION – Chapter 3 then plots the fundamental foundations behind the secondary law protections by providing an assessment of the freedom of (commercial) expression, individual autonomy and the requirement to fairly balance competing rights and interests. Through this analysis the relationship between individual autonomy as an overarching value, and the right to privacy is explored with reference to the specific risks posed by the emergence of emotion detection technology. In building on this analysis, the right to data protection as a distinct right in the EU legal order is introduced. The insights gathered in this analysis are then used to explore the role of secondary law and how the EU legal order shapes the protection of fundamental rights in light of its underlying policy objectives (i.e. the functioning of the internal market). More specifically, the Chapter explores the development of both consumer protection and data protection law in the EU through the lens of emotional AI to better illustrate the significance of the data protection and privacy framework and the GDPR in particular.

**[13]** PERSONAL DATA AND DECISION-MAKING PROTECTIONS – Chapter 4 assesses the application of the right to data protection and focuses on the definition of personal data as a key element in the material scope of the GDPR. Through a detailed analysis of this definition, insights are gathered *vis-à-vis* the limitations of data protection in the context of emotion monetisation, and in this vein, reference is also made to other protections provided in the ePrivacy Directive.[27] Chapter 5 then analyses the role of consent and its limitations as defined in data protection but also in relation to the protections provided in consumer protection frameworks (i.e. the Unfair Terms Directive(UCT)[28] and the UCP Directive). This analysis presents the potential to make use of such frameworks to bolster protection in light of emotion monetisation with respect for the commodification of personal data and the challenges this presents from a fundamental rights perspective. The Chapter then assesses the potential for consumer protection to mitigate the negative *ex post* effects of personalisation on the basis of emotion insights and thus the difficulties associated with

[27] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201, 37–47.
[28] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 29).

properly aligning the *ex ante* protections in the GDPR and *ex post* personalisation protections provided for in the UCP Directive.

**[14]** MITIGATING THE RISK OF EMOTIONAL AI – The final Chapter then explores the outcomes of the analysis in the previous Chapters and reflects upon the potential regulatory response to the monetisation of emotion. The analysis starts with a more jurisprudential examination of the role of emotions in the rationality paradigm inherent to legal protection and the autonomous decision-making capacity of individuals through the lens of a philosophical understanding of individual autonomy. This broader perspective is used to better position the reliance on rationality as a normative anchor in legal protections. By concluding that rationality is necessary to the liberal conception of individual autonomy, the Chapter then explores how this rationality anchor could be rendered more functional in light of the potential challenges posed by the emergence of emotional AI. In this vein, the Chapter examines the bolstering of data subject control and the role of the emerging discussions on the 'ethics of AI' at the policy level. This analysis is then used to suggest more normative insights into the future regulation of emotional AI with the Chapter then assessing how more paternalistic means of protection could be legitimised in EU law to ensure the ongoing viability of the autonomous decision-making capacity of consumers and, in doing so, further specifying what is deemed fair regarding the monetisation of emotion.

**[15]** METHOD AND IMPACT – A doctrinal legal research methodology is applied throughout with reference to the relevant legislative frameworks. The methodology therefore, relies on a desktop research analysis of how the legal framework is challenged via the emergence of emotional AI through the lens of advertising and marketing as a particular means through which these technological developments could be harnessed commercially. Inherent to this analysis is the alignment of the data and consumer protection frameworks and the challenges to the existing paradigms associated with the policy agendas which respectively aim to counteract the inherent data subject/consumer-controller asymmetries. The legal instruments have been selected based on their substantive and material scope and the interdisciplinary insights have been gathered through a literature review of key insights into the role of emotions in the decision-making process, the relationship between emotion and rationality and the technological capacities of AI to truly detect and target emotions based on machine learning techniques.

**[16]** RESEARCH IMPACT – The findings of the research provide insights on the use of emotional appeals and the issues associated with consumer manipulation and nudging in a commercial setting. However, the research also allows for the drawing of conclusions on the economic architecture of the internet in general, which is an issue at the very core of the structure of the digital economy. To clarify, many of the services users enjoy today are open due to the advertising revenue generated from their visits that are personalised through the use of recommender systems and similar technologies. Accordingly, any conclusions made relating to the way these business models generate their revenue also aims to affect the discussion on the economic architecture of the internet. Given that this research will offer a transversal analysis across the data protection, consumer protection and advertising specific provisions, it will provide a unique angle on the discussion as this issue has not been previously analysed in a systematic manner in the context of EU law.

Indeed, the impact of emotion insights, and behavioural analytics more generally, on the manipulation of consumers towards commercial transactions and the protections that should be afforded to EU consumers is an area which is yet to be assessed in a meaningful way, despite some recent developments in literature and enforcement.[29] The research therefore, provides fundamental insights into the legitimacy of such business models.

[29] See Chapter 6 and 'Deceived by Design: How Tech Companies Use Dark Patterns to Discourage Us from Exercising Our Rights to Privacy' (Forbrukerrådet (Norwegian Consumer Council) 2018) <https://fil.forbrukerradet.no/wp-content/uploads/2018/06/2018-06-27-deceived-by-design-final.pdf> accessed 25 April 2019; Christoph Bösch and others, 'Tales from the Dark Side: Privacy Dark Strategies and Privacy Dark Patterns' (2016) 2016 Proceedings on Privacy Enhancing Technologies 237; Régis Chatellier and others, 'Shaping Choices in the Digital World From Dark Patterns to Data Protection: The Influence of Ux/Ui Design on User Empowerment' (Commission nationale de l'informatique et des libertés 2019) IP Reports Innovation and Foresight N°06; Colin M Gray and others, 'The Dark (Patterns) Side of UX Design', *Proceedings of the 2018 CHI Conference on Human Factors in Computing Systems - CHI '18* (ACM Press 2018) <http://dl.acm.org/citation.cfm?doid=3173574.3174108> accessed 25 April 2019.

# 2

# CAPITALISING (ON) EMOTIONS AND THE LEGAL PROTECTION OF THE INFORMED CONSUMER

## INTRODUCTION

**[17]** ADVERTISING AND EMOTIONS – Advertisers have long understood the importance of emotions.[30] In 1958 Wood, a historian of advertising noted that 'advertising is basically emotional, emotional in its creation, in its operation, and in its effects.'[31] Indeed, as early as 1957 the role of emotion appeared to be already well established with Martineau clarifying that '[p]sychologists unhesitatingly state that the main appeal which advertising uses and the one which we can place our main reliance is the emotional, in the sense that we are trying to create suggested association with strong motive power.'[32] But how does EU law on advertising and marketing treat emotions and how do legal protections cater for its key role in consumer decision-making. As will be described in this Chapter, legal protections focus on the identification of commercial communications, information requirements and thus the ability of consumers to make rational decisions. Underlying these points is the premise that consumers should be protected from 'irrational' decision-making, which is very much linked to the information provision obligations and the underlying rationality paradigm. Through such an understanding,

[30] Karolien Poels and Siegfried Dewitte, 'How to Capture the Heart? Reviewing 20 Years of Emotion Measurement in Advertising' (2006) 46 Journal of Advertising Research 18. The authors note in the introduction that the role of emotions has always been recognised as an important factor in the "advertising process". They note that even in the earliest advertising model AIDA (attention, interest, desire, and action) there was reliance on an emotion reaction – in this instance desire and that this only happened after the consumer had experienced interest for the advertisement or the product. This led to the conception that the sequence went Attention, Information, Desire and then Action – generally referred to as the "hierarchy of effects" model.

[31] James Playsted Wood, *The Story of Advertising* (Ronald Press Co 1958).

[32] Pierre Martineau, 'Motivation in Advertising' [1957] Journal of Marketing Research 35. as cited by O Lee Reed Jr and John L Coalson Jr, 'Eighteenth-Century Legal Doctrine Meets Twentieth-Century Marketing Techniques: FTC Regulation of Emotionally Conditioning Advertising' (1976) 11 Ga. L. Rev. 733, 735.

emotions are positioned as irrational influences. The purpose of this Chapter therefore, is to explore the requirements in EU law, as specified in particular the Unfair Commercial Practices Directive and the Audiovisual Media Services Directive with a specific emphasis on the emergence of new forms of advertising and marketing online. Engaging and interactive advertising formats can have a strong impact on the effectiveness of commercial messages. An example of this can be seen in the context of advergames and other formats incorporating the mixing of commercial and non-commercial (i.e. editorial) content or gamification techniques.[33] Such mechanisms harness emotional responses to capitalise on positive association[34] with the effectiveness of such techniques linked to their capacity to evoke positive reactions.[35]

**[18]** INTERACTIVE ADVERTISING AND POSITIVE ASSOCIATION – It is well established that emotional state determines how individuals process information and may have an impact on whether they do so superficially or more thoroughly, with those in positive moods (i.e. happy) more likely to be superficial, thus having a clear impact upon the effectiveness of campaigns.[36] As such, the ability of advertising content to evoke emotions (and also not to have a negative impact upon them) is key to the effectiveness of the advertising strategy.[37] Consequently, increasing individuals' attention and awareness of an advertisement but also how positively or negatively these people view it, can have an important impact on the attitudes towards the advertised product and/or service.[38] In recent years, there has been an increasing trend towards the use of 'fun' and 'interactive' advertising formats and the inclusion of gamification techniques in order to illicit the emotional engagement of consumers. However, as will be explored, such developments challenge, (1) the identification-information provision-based approach imbued in EU consumer protections and; (2) the capacity of consumers to make autonomous rational decisions. Building on this analysis, the Chapter will conclude by questioning the positioning of emotions as irrational influences on decision-making in the legal protections in light of the emergence of emotional AI.

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[33] For a discussion see: Valerie Verdoodt, Damian Clifford and Eva Lievens, 'Toying with Children's Emotions, the New Game in Town? The Legality of Advergames in the EU' (2016) 32 Computer Law & Security Review 599; Damian Clifford and Valerie Verdoodt, 'Integrative Advertising: The Marketing "dark Side" or Merely the Emperor's New Clothes?' (2017) 8 European Journal of Law and Technology <http://ejlt.org/article/view/547> accessed 16 March 2017.

[34] A further movement in this direction is the creation of techniques such as augmented reality see: Ryan Calo, 'Digital Market Manipulation' (2014) 82 Geo. Wash. L. Rev. 995.

[35] For example see: Victoria Mallinckrodt and Dick Mizerski, 'The Effects of Playing an Advergame on Young Children's Perceptions, Preferences, and Requests' (2007) 36 Journal of Advertising 87.

[36] Craig R Hullett, 'The Impact of Mood on Persuasion: A Meta-Analysis' (2005) 32 Communication Research 423.

[37] ibid.

[38] For a discussion see: David W Stewart, Jon Morris and Aditi Grover, 'Emotions in Advertising' in Gerard J Tellis and Tim Ambler (eds), *The SAGE Handbook of Advertising* (SAGE Publications Ltd 2007).

## 2.1 IMMERSIVE EMOTIONAL APPEAL AND THE ABILITY TO MAKE AN INFORMED DECISION

**[19]** EMOTION TARGETING AND POSITIVE AND NEGATIVE APPEAL – Advertising and emotion have an established relationship, which is reflected in the very form and delivery of persuasive commercial communications. Irrespective of the fact that some products such as cars for instance may have their own emotional appeal in comparison to everyday consumer products (e.g. washing detergent), the underlying motivator used to sell retains a clear emotional aspect. This reflects the fact that the advertisement itself (i.e. aside from the product/service on offer) can evoke an emotional response and that this in turn can increase the effectiveness of the commercial communication. Humour, sexual desire and a plethora of other means of emotionally engaging the target audience are deployed in practice. As noted by Stewart *et al.*, an advertisement is designed on the basis of (1) informational and (2) emotional dimensions, both of which can have a verbal and non-verbal component. As further clarified by the authors,

> '[t]he informational dimension's verbal component comprises rational and logical arguments; the non-verbal component such as visual imagery, music and language variables, serve to complement, reinforce and clarify the meaning of a verbal message. The emotional or feeling dimension may be verbal but is often nonverbal. The emotional dimension is generally expressed in the form of emotional appeals or messages imbued with content designed to elicit, reinforce and transfer feelings. Adding appropriate emotional content to a purely information-based advertisement is generally believed to enhance attitude change in audience and audience receptivity.'[39]

In this manner, marketers thus aim to evoke a 'positive' or 'negative' appeal to elicit an emotional response.[40] Positive appeals promise positive emotions as a result of the use or purchase of the advertised product and/or service, whereas negative appeals associate negative consequences for those who fail to comply with the marketing message. Negative appeals hence emphasise emotions such as fear, anger, guilt, disgust and sadness and motives building on these to illicit an emotional reaction. For example, the motive of problem avoidance would involve the emotive sequence of a state of fear to one of relaxation being associated with the purchase and use of the product and/or service in question.[41] In contrast, positive appeals such as happiness, joy, humour, pride and warmth may relate to a motive such as social approval with an emotional sequence moving from an apprehensive (or neutral) state to a flattered one. [42]

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[39] ibid 4.
[40] Nadine Henley, Robert J Donovan and Helen Moorhead, 'Appealing to Positive Motivations and Emotions in Social Marketing: Example of a Positive Parenting Campaign' (1998) 4 Social Marketing Quarterly 48.
[41] For a discussion see: Larry Percy and John R Rossiter, 'A Model of Brand Awareness and Brand Attitude Advertising Strategies' (1992) 9 Psychology & Marketing 263.
[42] ibid.

**[20]** EMERGENCE OF EMOTIONAL AI – There is extensive research on the effects of such emotional appeals in advertisements with the capacity to positively influence emotions having an impact on effectiveness and the resulting purchasing behaviour.[43] But what then does all this mean given the rise of emotional AI and hence, the capacity to detect emotions in real-time if such technologies are used to optimise the effectiveness of commercial communications? As noted by McStay, the 'commercial interest in "making-present"' and subjecting intimate life to commodity logic is expressed by the advertising industry's interest in collecting as much data as possible.'[44] In this vein, the author goes on to specify, with reference to interviews with industry representatives, the flaws associated with the traditional self-reporting mechanisms and the draw of emotion detection for the advertising, marketing and retail industries given its reported capacity to overcome self-reporting inaccuracies thereby reflecting the appetite for a move from consumer interaction to observation.[45] To clarify, the advertising and marketing industry has traditionally relied on focus groups and consumer surveys for market insights – the limits of which have been repeatedly illustrated.[46] Hence, the emergence of the ability to bypass such mechanisms and instead rely on automated computerised means of detection arguably removes the risk of consumer self-reporting bias and limitations, thereby leading to more accurate insights.[47] Such advances arguably allow for the development of emotionally evolved consumer-facing exchanges.[48] Developments in technology facilitate the computerised detection of emotional responses in the form of feedback in market and academic research. In short therefore, the technological advances facilitate the development of consumer-facing interactions that are designed and tailored to evoke an emotional response and their influence is potentially widespread given the emergence of a technologically-mediated society. Aside from the above however, it is important to note that the emergence of new advertising formats online also, generally speaking, aim to more effectively exploit the emotional engagement of consumers through subtle persuasive tactics which often involve (1) the integration of the commercial content with the editorial (i.e. 'native' advertising); and the connected point, that (2) such content is often interactive in that it elicits responses and engagement with consumers (e.g. advergames, digital influencers or viral user-generated marketing).[49] Such techniques therefore, represent a divergence from traditional advertising and marketing formats

[43] For instance there is a significant amount of research on this topic in relation to the effectiveness of advergames especially in relation to children: Mallinckrodt and Mizerski (n 35).
[44] McStay, *Emotional AI* (n 4) 115.
[45] ibid 116.
[46] For a discussion see: Poels and Dewitte (n 30).
[47] ibid.
[48] Insights from consumers have long been used to test the impact of developmental products and services. From the screen testing of movies to concept testing for brands, products and logos etc., such feedback mechanisms are utilised in order to tailor to the tastes of the targeted audience.
[49] Valerie Verdoodt, 'Children's Rights and Advertising Literacy in the Digital Era towards an Empowering Regulatory Framework for Commercial Communication' (KU LeuvenFaculteit Rechtsgeleerdheid 2018) 17–29.

even in the online environment especially as their delivery can target specific audiences based on profiling and personalisation.

**[21]** RECOMMENDER SYSTEMS AND PERSONALISATION – Indeed, given the rapid technological growth, one must question *what* an advertisement (or marketing more broadly) actually is and whether commercial nudges such as the use of recommender systems (and other personalisation mechanisms), to enhance commercial interaction more generally, can be classified similarly. More specifically, the use of recommender systems for site content (which would not generally be considered advertising *per se*) actively encourage or arguably manipulate certain behaviours from consumers by mediating the flow of content to the user.[50] Take for example an e-commerce platform that personalises the content shown and thus products and/or services offered to users of its services on the basis of consumer profiling. This allows for the personalisation of content and services beyond the realms of the specifically indicated advertising blocks. The prioritisation of products, services or content based on the preferences of the profiled consumer allows them to more effectively discover items which may be of interest thereby improving the usability of website services.[51] However, such activity can also clearly have a direct impact on spending via an influence on the formation of preferences. Moreover, such systems can also have an anchoring effect with literature showing that peoples' selections can be biased towards products or services with similar attributes to those recommended.[52] This is particularly significant in relation to the offering of media content such as e-books, video and music streaming services[53] and e-commerce platforms and search engines but also when one considers the role of smart assistants such as *Alexa* and *Siri* – thus raising clear ethical and legal questions. Understanding what falls within the meaning of the terms advertising and marketing is thus challenging given the various means which are deployed to nudge consumers towards certain commercial behaviour. To illustrate this problem, further reference can be made to the rather open definition of a 'commercial communication' provided for in EU law.

### 2.1.1 (AUDIOVISUAL) COMMERCIAL COMMUNICATIONS

**[22]** COMMERCIAL COMMUNICATIONS AND THE LEGISLATIVE PATCHWORK – The use of various online platforms to propagate commercial communications results in the application of a patchwork of legal frameworks. More specifically, the form and delivery of a commercial communication may test the scope of application of the relevant Directives. This distinction stems from the more detailed requirements for audiovisual media services

[50] In this regard one should refer to the academic work on the potential effects of such a mediated environment see for example: Eli Pariser, *The Filter Bubble: What The Internet Is Hiding From You* (Penguin 2012); Joseph Turow, *Niche Envy: Marketing Discrimination in the Digital Age* (MIT Press 2006).

[51] See: Sören Köcher and others, 'New Hidden Persuaders: An Investigation of Attribute-Level Anchoring Effects of Product Recommendations' (2019) 95 Journal of Retailing 24.

[52] ibid.

[53] Sylvain Rolland, 'Comment Les Algorithmes Révolutionnent l'industrie Culturelle' <http://www.latribune.fr/technos-medias/comment-les-algorithmes-revolutionnent-l-industrie-culturelle-523168.html> accessed 1 September 2017.

falling within the scope of the *lex specialis* requirements contained in the recently updated Audiovisual Media Services Directive (AVMS Directive) when compared to the *lex generalis* provisions contained in the e-Commerce and UCP Directives. The Unfair Commercial Practices Directive (UCP Directive) protects consumers from unfair business-to-consumer commercial practices[54] including commercial communications such as advertising and marketing by a trader. However, Article 3(4) UCP Directive stipulates that in circumstances where there is a conflict between the requirements in the UCP Directive and other EU rules regulating specific aspects of unfair commercial practices the *lex specialis* rules prevail.[55] Nevertheless, new marketing techniques often stretch (or are simply outside) the scope of application of the definition of an audiovisual media service as provided for in Article 1(1)(a) AVMS Directive (see below). This sub-section will elaborate further on this point with reference to the protections provided for audiovisual commercial communications in the AVMS Directive before the protections for commercial communications in the UCP Directive will then be explored in the next. Before delving into the specifics however, the general provisions contained in the e-Commerce Directive will be first introduced.

**[23]** INFORMATION REQUIREMENTS – The e-Commerce Directive[56] regulates a number of aspects of 'information society services' defined as 'any service normally provided for renumeration, at a distance, by electronic means and at the individual request of a recipient of services.'[57] In particular, Article 2(f) e-Commerce Directive defines a commercial communication as 'any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession.' The information requirements for commercial communications are then specified in Article 6 e-Commerce Directive. This provision requires in a minimum harmonisation manner that, at the national level commercial communications 'which are part of, or constitute, an information society service' must by Member State law, (a) be clearly identifiable as such; (b) make the natural or legal person on whose behalf the commercial communication clearly identifiable; (c)

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[54] Consumers are to be regarded as 'any natural person who is acting for purposes outside of his trade, business or profession'. Article 2 (a) Directive 2005/29/EC of The European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (2005) O.J. L 149/2.

[55] See also Recital 10 UCP Directive.

[56] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ L 178, 1–16.

[57] Article 2(a) e-Commerce Directive refers to Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations OJ L 217 18–26 18–26.This Directive has since been repealed and replaced by Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (Text with EEA relevance) OJ L 241, 1–15. which maintains the same definition in Article 1(b).

render promotional offers, such as discounts, premiums and gifts clearly identifiable as such and ensure that the conditions to qualify for them are presented clearly and unambiguously; and, (d) ensure that promotional competitions or games are clearly identifiable as such, and that the conditions for participation are easily accessible and presented clearly and unambiguously.

**[24]** E-COMMERCE EXCEPTIONS – Importantly however, Article 2(f) e-Commerce Directive goes on to specify two exceptions both of which may be relevant in delineating paid commercial communications from editorial content. The first exception refers to 'information allowing direct access to the activity of the company, organisation or person, in particular a domain name or an electronic-mail address'. This provision thus appears to exclude purely navigational information. Practically speaking however, recommender systems used for content curation purposes will contain more than mere navigational information and will often include promotional messages irrespective of whether the communications fall within the conventional categories of sponsored or organic/editorial content.[58] The second of the exceptions refers to 'communications relating to the goods, services or image of the company, organisation or person compiled in an independent manner, particularly when this is without financial consideration.' This exception presents a more complicated analysis as precisely understanding what is meant by 'an independent manner' and 'without financial consideration' here is challenging in practice.

**[25]** ALGORITHMIC SELECTION AND ORGANISATION – Indeed, although the algorithmic presentation of goods and services has traditionally been viewed as objective and independent, there has been an increasing awareness of the role online platform providers play in the organisation and selection of content. An excellent illustration of this are the competition procedure taken against *Google* as a search engine for giving an illegal advantage to its own comparison shopping services thereby abusing its market dominance[59] and the recent policy initiatives focused on countering the opacity of rankings mechanisms on e-Commerce platforms,[60] and in the consumer law acquis (see below) It should be noted therefore, that the algorithmic selection and organisation of content certainly challenges the traditional separation between editorial and commercial content which forms the basis of the EU regulatory requirements. Aside from such considerations however, put simply where there is an absence of a direct financial relationship, it will be difficult to classify content as commercial given the apparent lack of a commercial intent to market (see discussion below in relation to surreptitious advertising and 'undue prominence' in

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[58] Joris van Hoboken, *Search Engine Freedom. On the Implications of the Right to Freedom of Expression for the Legal Governance of Web Search Engines* (Kluwer Law International 2012) 306.
[59] *Case AT 39740, Google Search (Shopping), 27 June 2017*.
[60] Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services Brussels, COM(2018) 238 final 2018/0112 (COD). Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules COM/2018/0185 final - 2018/090 (COD).

the AVMS Directive). This is despite the fact that the prioritisation of content is directly tied to the user experience and arguably the consumer's likelihood of purchasing (in the context of an e-commerce platform) or continuing to browse and thus being exposed to more traditional forms of marketing (as in the context of social networking sites). In short therefore, information and transparency obligations drive advertising and marketing protections where the communications fit within the commercial non-editorial category.

### *A. AUDIOVISUAL COMMERCIAL COMMUNICATIONS AND THE IDENTIFICATION AND SEPARATION PRINCIPLES*

**[26]** DELINEATING PROTECTIONS AND THE TIERED AVMS DIRECTIVE SAFEGUARDS – The aim of the AVMS Directive is to promote the free movement of audiovisual media services within the EU by providing certain minimum requirements which service providers must respect. As a minimum harmonisation instrument, the Directive leaves scope to the MSs to provide higher levels of protection where they deem fit. The Directive applies to linear and non-linear (on-demand) services which come within the definition of an audiovisual media service in Article 1(a)(i) AVMS Directive as well as video-sharing platform services defined in Article 1(aa) AVMS Directive (see below). The Directive therefore presents a tiered-approach with the general provisions that are applicable to all audiovisual media services provided first with specific rules then stipulated for linear services in particular and others for the distinct video-sharing platform services category. Audiovisual commercial communications are defined in Article 1(1)(h) AVMS Directive. This provision states that audiovisual commercial communications are,

> '[…] images with or without sound which are **designed to promote**, directly or indirectly, the goods, services or image of a natural or legal person pursuing an economic activity; such images accompany, or are included in, **a programme or user-generated video** in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, inter alia, television advertising, sponsorship, teleshopping and product placement'. [Emphasis added]

Before analysing the specifics of this definition in light of the tiered approach in the Directive, the analysis will first introduce the key overarching requirements for audiovisual commercial communications. Indeed, audiovisual commercial communications must be 'readily recognisable' as such (see Article 9 AVMS Directive) and considering the focus of this thesis, a further elucidation of this requirement is an important starting point.

**[27]** THE SEPARATION AND IDENTIFICATION PRINCIPLES AND FAIR ADVERTISING – The obligation to render commercial intent transparent is operationalised through two closely-connected principles namely, the principles of identification and separation. In his commentary on these principles, Schaar observes that they represent the 'heart' of the requirements to render audiovisual commercial communications recognisable and essentially 'codify the

fundamental concept of fairness in advertising'.[61] The identification principle applies to all forms of audiovisual commercial communications and is manifested in the requirements contained in the AVMS Directive. In particular, Article 9 AVMS Directive provides *inter alia* a specific ban on surreptitious advertising (Article 9(1)(a)) and subliminal techniques (Article 9(1)(b)) and stipulates certain requirements regarding the use of sponsorship and product placement methods respectively The requirements for sponsorship and product placement are then further specifited in Articles 10 and 11 respectively. These specify that, (1) the content of the service should in no way be influenced so as to affect the editorial responsibility of the media service provider; (2) no special promotional references should be made to directly encourage the purchase or rental of goods or services; (3) viewers should be clearly informed of the existence of product placement[62] and/or sponsorship and; finally (and specifically in the context of product placement), (4) they should not give undue prominence to the product or service.[63] Surreptitious audiovisual commercial communication is defined in Article 1(1)(j) AVMS Directive as

> '[...] the representation in words or pictures of goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services in programmes when such representation is intended by the media service provider to serve as advertising and might mislead the public as to its nature. Such representation shall, in particular, be considered as intentional if it is done in return for payment or for similar consideration'.

The Court of Justice has interpreted this definition in a broad manner and found that the lack of a payment or other similar consideration does not rule out the potential for such an intention.[64] However, this interpretation renders it difficult to differentiate between surreptitious and lawful communications especially as product placement, if legitimate

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[61] Oliver Schaar, 'Principles for Advertising and Teleshopping' in Kathrin Böttcher and others (eds), *European media law* (Kluwer law international 2008) 497.

[62] Specifically, in relation to product placement Article 11 (d) AVMS Directive goes on to state that: 'Programmes containing product placement shall be appropriately identified at the start and the end of the programme, and when a programme resumes after an advertising break, in order to avoid any confusion on the part of the viewer. By way of exception, Member States may choose to waive the requirements set out in point (d) provided that the programme in question has neither been produced nor commissioned by the media service provider itself or a company affiliated to the media service provider.'

[63] It should also be observed that although in the context of television advertising and teleshopping a clear distinction needs to be made between commercial and non-commercial content Recital 81 notes that '[t]he principle of separation should not prevent the use of new advertising techniques.' This would seem to imply that new advertising formats are not forbidden by default but rather that the commercial and non-commercial content would suggest that new advertising formats need to be easily recognisable. See: Liesbeth Hellemans, Eva Lievens and Peggy Valcke, 'Playing Hide-and-Seek? A Legal Perspective on the Complex Distinction between Commercial and Editorial Content in Hybrid Digital Advertising Formats' (2015) 17 INFO 19.

[64] See: *Case C-52/10, Eleftheri tileorasi AE «ALTER CHANNEL» and Konstantinos Giannikos v Ypourgos Typou kai Meson Mazikis Enimerosis and Ethniko Symvoulio Radiotileorasis, ECLI:EU:C:2011:374* 374.

(i.e. the consumer is adequately informed), is permissible under the Directive. In this vein, Valcke observes that in practice the criterion of 'undue prominence' is often used.[65]

**[28]** NEW ADVERTISING FORMATS AND THE LINEAR-NON-LINEAR DIVISION – Importantly, in contrast the principle of separation applies only to television advertising and teleshopping as two forms of audiovisual commercial communications in the linear-services context and essentially aims to reinforce the identification principle.[66] Indeed, according to Article 19(1) AVMS Directive '[t]elevision advertising and teleshopping shall **be readily recognisable and distinguishable from editorial content**. **Without prejudice to the use of new advertising techniques**, television advertising and teleshopping shall be **kept quite distinct** from other parts of the programme by **optical and/or acoustic and/or spatial means**.' [Emphasis added]. As the focus of this thesis is on the legal limits to the monetisation of *online* emotions, at first sight the application of the separation principle appears to be somewhat limited for the purposes of this analysis. In saying this however, there have been increasing technological developments in relation to the development of 'smart' televisions thereby blurring the online-offline/linear-non-linear divisions.[67] In the context of emotion monetisation, it is interesting here to refer in particular to *Apple's* acquisition of *Emotient* in 2016 and their patents for the development of mood sensitive television advertising.[68] Importantly, the Court of Justice has interpreted the notion of television advertising broadly to include 'advertorials, telepromotions, sponsorship credits and micro-ads' and found that such audiovisual commercial communications count in the calculation of the 20% of commercial content allowed (i.e. in proportion to editorial content).[69] However, according to Article 19(1) AVMS Directive the separation principle does not prevent the use of new advertising techniques. For example, in this manner, the Court of Justice ruled in the *Sanoma* case that the use of a split-screen to separate the editorial and audiovisual commercial communication spatially did not need to be 'combined with, or followed by, other means of separation, in particular acoustic or optical means' – within the meaning of Article 19(1) AVMS Directive.[70] Accordingly, the separation principle does not *de facto* prevent the potential use of audiovisual commercial communications such as overlays as an example of such a hybrid advertising format.[71] That being said, it is important to specified that the Court noted specifically in the *Sanoma* case that the issue related to the separation

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[65] Peggy Valcke, 'The EU Regulatory Framework Applicable to Audiovisual Media Services' in Laurent Garzaniti and others (eds), *Telecommunications, Broadcasting and the Internet* (4th Edition, Sweet & Maxwell 2019) 38.

[66] ibid 43.p. 43

[67] See: Britt van Breda and others, 'Smart TV and Data Protection' (European Audiovisual Observatory 2016) IRIS special.

[68] See: 'Apple Dives Deeper Into Artificial Intelligence By Acquiring Emotient' (*TechCrunch*) <http://social.techcrunch.com/2016/01/07/apple-dives-deeper-into-artificial-intelligence-by-acquiring-emotient/> accessed 24 April 2019. As described in Pamela Pavliscak, *Emotionally Intelligent Design: Rethinking How We Create Products* (O'Reilly Media, Inc 2018).

[69] See Article 23 AVMS Directive

[70] *Case C-314/14, Sanoma Media Finland Oy - Nelonen Media v Viestintävirasto, ECLI:EU:C:2016:89* [38–40].

[71] See: Hellemans, Lievens and Valcke (n 63).

of 'a programme which is ending from the television advertising break that follows it by means of a split screen'.[72] Thus, the fact that the programme was ending in the specific case was significant. Indeed, according to Article 19(2) AVMS Directive isolated television and teleshopping spots remain the exception,[73] and consequently, such audiovisual commercial communications are generally required to be delivered in blocks.[74] There is therefore, a blurring of linear, non-linear and video-sharing platform services which complicates the determination of when the identification and separation principles may apply and, as will now be described, renders the attribution of responsibility of key importance.

### *B. TIERED REQUIREMENTS AND RESPONSIBILITIES*

**[29]** AUDIOVISUAL MEDIA SERVICES – Audiovisual media services are defined as economic services falling within Articles 56 and 57 of the Treaty on the Functioning of the European Union (TFEU).[75] As per Article 1(a)(i) AVMS Directive, to be classified as an audiovisual media service the service in question (or a dissociable section thereof) must be devoted to the provision of programmes which are under the editorial responsibility of a media services provider and be directed towards the general public in order to inform, entertain or educate by means of electronic communications networks. Interestingly, Article 1(a)(ii) AVMS Directive provides that audiovisual commercial communications are included as a form of audiovisual media service. There appears to be a degree of uncertainty here regarding the correct interpretation of Article 1(a) AVMS Directive however, as it could be argued either that audiovisual commercial communications (1) are audiovisual media services in their own right, or instead; (2) that they in fact form an integral part of a linear or non-linear service without amounting to a service in themselves.[76] This is also significant given the apparent separation between audiovisual media services and video-sharing platform services. A video-sharing platform service, as defined in Article 1(aa) AVMS Directive, is delineated from audiovisual media services based on the platform provider's lack of editorial responsibility over 'the programmes, user-generated videos, or both' shared with the general public on the platform. Editorial responsibility is defined in Article 1(1)(c) AVMS Directive as 'the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services.' However, as audiovisual commercial communications seem to be positioned in the Directive as a form of audiovisual media services one must

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[72] *Case C-314/14, Sanoma Media Finland Oy - Nelonen Media v Viestintävirasto, ECLI:EU:C:2016:89* (n 70) paras 38–40.
[73] Aside from in transmission of sports events see Article 19(2) AVMS Directive.
[74] Valcke (n 65) 44.
[75] Consolidated version of the Treaty on the Functioning of the European Union OJ C 326, 47–390.
[76] Verdoodt (n 49) 141. The author goes on to describe the significance of this as determining the applicability of the general requirements such as for instance the prohibition of hate speech as opposed to specific requirements for audiovisual commercial communications hinges on the interpretation of this provision.

therefore wonder how this categorisation impacts video-sharing platform services given their apparent delineation as a distinct category of service.

**[30]** AUDIOVISUAL COMMERCIAL COMMUNICATIONS – Reference here should thus be made to the definition of an audiovisual commercial communication again as stipulated in Article 1(1)(h) AVMS Directive. From this definition there are two cumulative criteria for establishing if a commercial communication of a natural or legal entity pursuing an economic activity fall within the scope of application namely; that they are (1) images that are 'designed to promote' and; (2) they accompany or are included in a 'programme'[77] or a 'user-generated video' (see definition above where the emphasis is added).[78] The first of these elements corresponds to the classification of economic services as evident from the reference to the direct or indirect pursuit of an economic activity, whereas the second clarifies that the promotional intent must be included with some form of editorial content (i.e. be that a user-generated video or a programme). This reference to 'user-generated video' here, as introduced by the 2018 revisions to the 2010 Directive, appears to incorporate important judgments from the Court of Justice.

**[31]** PROGRAMMES – More specifically, in the *New Media Online* case[79] the Court of Justice assessed Recital 28 of the 2010 AVMS Directive which excluded electronic versions of newspapers and magazines from the scope of application in light of Recital 22 AVMS Directive, in order to interpret the meaning of a programme and an audiovisual media service so as to clarify whether newspaper and magazine websites hosting a video section should be subject to the requirements contained in the Directive. Recital 22 stated that audiovisual media services,

> 'should exclude all services the principal purpose of which is not the provision of programmes, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose.'

In brief, the case confirmed that the length of videos is not the key factor and that Recital 28 did not exempt such service providers from the scope of the Directive. Accordingly, the judgement appeared to necessitate the division of such newspaper and magazine websites between the video content and the other principal parts which would not be subject to the Directive thereby highlighting the need to protect consumers due to the potential for abuse.

**[32]** AUDIOVISUAL AND EDITORIAL CONTENT MIXING – As noted by Woods however, problems arise when one attempts to draw the boundaries between such content and these difficulties would be compounded if deliberate structures separating video and editorial content

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[77] A 'programme' is defined in Article 1(1)(b) as '[…] a set of moving images with or without sound constituting an individual item, irrespective of its length, within a schedule or a catalogue established by a media service provider, including feature length films, video clips, sports events, situation comedies, documentaries, children's programmes and original drama'.

[78] According to Article 1 (ba) 'user-generated video' means a set of moving images with or without sound constituting an individual item, irrespective of its length, that is created by a user and uploaded to a video-sharing platform by that user or any other user;

[79] *Case C-347/14, New Media Online GmbH v Bundeskommunikationssenat, ECLI:EU:C:2015:709* 14.

were avoided.[80] Woods' observation highlights the problems associated with the practical interpretation of the scope of the AVMS Directive and the issue of legal certainty regarding the requirements for commercial communications on websites incorporating both audiovisual and editorial content. It appears clear from the *New Media Online* judgement that websites incorporating both content types are required to apply different frameworks for the same techniques depending on the medium in which the commercial communication is delivered. For example, the promotion of a good or service in editorial content (other than videos) will be required to respect the *lex generalis* provisions in the e-Commerce and UCP Directives whereas such a promotion in a video format would require compliance with the requirements provided in the *lex specialis* AVMS Directive.[81] Indeed, it should also be noted that Recital 82 AVMS Directive (see 2010 version) negates the parallel application of the UCP and AVMS Directives. However, the relevance of this exception could be argued given their application overlap (i.e. depending on the services and practices concerned and considering media convergence). [82]

**[33]** ACCOMPANYING A 'PROGRAMME' – It is also interesting to refer to the *Peugeot Deutschland* case in which the meaning of the phrase 'accompanying or being included in a programme' taken from the definition of an audiovisual commercial communication in the 2010 AVMS Directive was analysed. In short, the case related to a *YouTube* video channel operated by *Peugeot Deutschland* which contained promotional videos. In the questions referred, the Court of Justice was asked whether the *YouTube* channel came within the definition of an audiovisual media service as defined in the Directive (see above). The Court decided first that as the video channel was promotional in nature and its principal purpose was not to inform, entertain or educate the general public,[83] it did not come within the definition of an audiovisual media service. Building on this finding the Court then analysed whether one single video on the channel could fall within the definition of an audiovisual commercial communication. The Court concluded that (1) the videos could not be seen as accompanying or being included in a programme as they were 'individual elements independent of one another'[84] and; (2) that 'it would be artificial to assert that only the images at the beginning and the end of the video pursue advertising purposes'[85] as was claimed by *Peugeot Deutschland*, due to the fact that the video was promotional in its entirety. From this judgement it is thus clear that some editorial content is required for a

[80] Lorna Woods, 'EU Law Analysis: Audiovisual Media Services Regulation and The "Newspaper Exception"'" (*EU Law Analysis*, 22 October 2015) <http://eulawanalysis.blogspot.com/2015/10/audiovisual-media-services-regulation.html> accessed 18 March 2019.

[81] As will be shown in Section 2.2 these frameworks in essence both stipulate the same requirements as provided for by the principle of identification.

[82] Francisco Javier Cabrera Blázquez and others, 'Commercial Communications in the AVMSD Revision' (European Audiovisual Observatory 2017) IRIS Plus 2017-2 25; Mark Cole, 'The Current European Legal Framework: The Sets of Rules on Commercial Communication in a Converged World' in Maja Cappello (ed), *New forms of commercial communications in a converged audiovisual sector* (European Audiovisual Observatory 2012).

[83] *Case C-132/17, Peugeot Deutschland GmbH v Deutsche Umwelthilfe eV, ECLI:EU:C:2018:85* [21–24].

[84] ibid 28.

[85] ibid 29–30.

promotional message to come within the definition of an audiovisual commercial communication. However, as stipulated in the 2018 revised definition, this editorial content can be classified as a 'programme' or a 'user-generated' video. Hence, whether the service provider has editorial responsibility of the editorial content appears immaterial. Instead it is the service provider's control of the audiovisual commercial communication that is important. Indeed, although the service provider may not have editorial responsibility for user-generated videos (i.e. as they are by their very nature uploaded by the user), they are in control of the audiovisual commercial communications which accompany or are included within them. Here one can refer to pre-roll advertisements shown prior to the user-generated content.

**[34]** CONTROLLING AUDIOVISUAL COMMERCIAL COMMUNICATIONS – Nevertheless, even though video-sharing platform service providers are directly responsible for much of the audiovisual commercial communications on their websites, they may not be in control of all commercial communications distributed via their services. In this regard reference can be made for instance to social influencers uploading content to video-sharing platforms and application developers uploading advergames to app stores. The lack of awareness or operators' capacity to be aware is reminiscent of the 'hosting' safe-harbour as provided for under Article 14 of the e-Commerce Directive.[86] In brief, this provision stipulates that service providers that merely host information (e.g. cloud storage providers) are exempt from liability if this information is illegal provided (1) the service provider does not have knowledge of the illegality and; (2) that upon obtaining such knowledge 'acts expeditiously to remove or to disable access to the information.' It appears that this exemption may have application in the context of integrative advertising formats such as the use of social influencers and this is reflected in the reference to the applicability of Articles 12-15 e-Commerce Directive in Articles 28a and 28b of the 2018 revisions of the AVMS Directive.[87] However, it is important to note that the application of the safe harbours contained in the e-Commerce Directive are conditional on the fact that the uploading of these commercial communications is not under the control of the platform in question and, further, that these service providers do 'not have actual knowledge of the illegal activity'. This condition appears to more broadly align with the notion of editorial responsibility contained in the AVMS Directive.

**[35]** AUDIOVISUAL COMMERCIAL COMMUNICATIONS AND USER-GENERATED CONTENT – Indeed, although as provided for in Article 28b(2) of the 2018 revisions, video-sharing platform service

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[86] This exemption from application has been used more for the protection of intellectual property rights and the prevention of the distribution of harmful content see generally: Aleksandra Kuczerawy, *Intermediary Liability and Freedom of Expression in the EU: From Concepts to Safeguards* (Intersentia 2018).

[87] Reference here can also be made to the previous case law analysing this exemption in the context of violations of trademarks and Google's responsibility as an advertising network. More specifically, Google was found not to be responsible for trademark violations despite playing an active role in the placement of advertisements (through software it has developed) as it was not involved in the creation of the advertisement text. *Joined Cases C-236/08 to C-238/08, Google France SARL and Google Inc v Louis Vuitton Malletier SA, Google France SARL v Viaticum SA and Luteciel SARL and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others, ECLI:EU:C:2010:159* 08.

providers are responsible for the audiovisual commercial communications that are 'marketed, sold or arranged' by them and thus must comply with the requirements contained in Article 9, these service providers are not required to exercise *ex ante* control over user-generated content in line with Article 15 e-Commerce Directive which stipulates that there is no general obligation to monitor for the services falling with Articles 12-14 e-Commerce Directive (see Article 28b(3) AVMS Directive). As described above, Article 9 AVMS Directive *inter alia* provides a specific ban on surreptitious advertising (Article 9(1)(a)) and subliminal techniques (Article 9(1)(b)) and places certain requirements regarding the use of sponsorship (Article 10) and product placement (Article 11) methods respectively. These requirements are particularly important in the context of certain integrative advertising techniques. For example, the use of digital influencers and advergames could present clear issues in relation to the application of these requirements. This overview of obligations also clearly alludes to the importance of the principle of identification and, in interpreting what is meant by each of these concepts, one can conclude that the method for respecting the ban on surreptitious and subliminal advertising and fulfilling the requirements regarding sponsorship and product placement, is to identify all commercial communications in a clear way so that consumers are informed. In practice, the principle of identification is respected through the use of labelling[88] or 'cues' to make commercial content recognisable. However, the policing of this issue in the context of user-generated videos is clearly problematic from a practical perspective. This is also indicative of the point that mandating intervention on behalf of the intermediary is specifically impermissible under the terms of the e-Commerce Directive except in a reactive sense.[89] In saying this however, service providers are required to take 'practical and proportionate' measures under the AVMS Directive.

**[36]** AUDIOVISUAL COMMERCIAL COMMUNICATIONS AND PROCEDURAL CONTROLS – For instance, Article 28b(3) AVMS Directive refers in particular to *inter alia* the minimum harmonisation requirements to (1) set out the obligation for audiovisual commercial communications contained in Article 9(1) in the terms and conditions of the video-sharing platform service and; (2) have a functionality whereby users can declare that a video they upload contains an audiovisual commercial communication. More generally, such requirements reflect the obligation on service providers in Article 28b(2) to 'clearly inform users where programmes and user-generated videos contain audiovisual commercial communications, provided that such communications are declared […] or the provider has knowledge of that fact.' It is very important to specify however, that although the video-sharing platform services are not directly responsible for the commercial nature of user-generated videos uploaded or shared through its services, this does not exempt

[88] For instance, Facebook uses the term "sponsored" for advertising messages that appear in the newsfeed of Facebook users. A 'Sponsored Story' is a mix between user-generated content and promotional content. A user's action related to a promotional message is shown with a promotional message in 'News Feed', see Brendan Van Alsenoy and others, 'From Social Media Service to Advertising Network: A Critical Analysis of Facebook's Revised Policies and Terms' <https://www.law.kuleuven.be/citip/en/news/item/facebooks-revised-policies-and-terms-v1-2.pdf>.

[89] See here Article 14(1)(a)-(b) e-Commerce Directive.

users who upload or share such content from legal requirements. In this regard, it is interesting to refer to Recital 46 of the 2018 revisions which states that commercial communications on video-sharing platforms are already regulated by the UCP Directive. Therefore, this provision clarifies that one must refer to the general provisions under the UCP Directive for the requirements relating to commercial communications in the context of video-sharing services which do not come within the definition of an audiovisual commercial communication. Practically speaking therefore, the operation of the requirements in the AVMS Directive and the UCP Directive go hand-in-hand and this is largely operationalised through the role of self and co-regulatory instruments in the advertising and marketing sector (see below).

### 2.1.2 COMMERCIAL COMMUNICATIONS AND 'PRACTICE' PROTECTIONS

**[37]** UNFAIR COMMERCIAL PRACTICES – Information requirements are also key to the application of the more general consumer protection requirements contained in the UCP Directive. The UCP Directive defines a commercial practice in Article 2(d) UCP Directive as 'any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers.' Key to the application of UCP Directive is the notion of a 'trader' which is defined in Article 2(b) UCP Directive as 'any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and **anyone acting in the name of or on behalf of a trader**' [Emphasis added]. Although to be classified as a trader the person (legal or natural) must be acting for the specific purposes outlined, it seems reasonable to interpret the words '[…] anyone acting in the name of or on behalf of a trader' to include social influencers acting on behalf of a brand, product or service.

**[38]** COMMERCIAL PRACTICES AND USER-GENERATED CONTENT – However, and in line with the AVMS Directive, it appears that where the UCP Directive overlaps with the e-Commerce Directive in the supply of information society services, traders (i.e. intermediaries)may not be deemed responsible for user-generated content uploaded or shared through their services. Here reference can be made to the Commission's Guidance document on the UCP Directive which indicates that although a trader is responsible for its own commercial practices it may in certain circumstances avail of the hosting safe-harbour as provided for under Article 14 of the e-Commerce Directive (see above).[90] It appears that this exemption may have application in the context of integrative advertising formats such as

[90] This exemption from application has been used more for the protection of intellectual property rights and the prevention of the distribution of harmful content. European Commission, 'Commission Staff Working Document Guidance on the Implementation/Application of Directive 2005/29/EC On Unfair Commercial Practices Accompanying the Document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a Comprehensive Approach to Stimulating Cross-Border e-Commerce for Europe's Citizens and Businesses {COM(2016) 320'.

the use of social influencers.[91] However to reiterate, its application is conditional on the fact that the uploading of these commercial communications is not under the control of the platforms and, further, that these service providers do 'not have actual knowledge of the illegal activity' in line with the general exemption from the obligation to monitor provided in Article 15 e-Commerce Directive.[92]

**[39]** PRODUCTS, CONTRACTS AND THE CRADLE TO GRAVE PROTECTION – Article 2(c) UCP Directive defines the term 'product' as 'any goods or service including immovable property, rights and obligations'. The Directive thus applies to far more than merely advertising, marketing and sales promotions and instead has been described as 'a "cradle to grave" regime, applicable to promotion, negotiation, conclusion, performance, and enforcement' of contracts.[93] However, importantly the UCP Directive is limited in its application to commercial practices that are 'directly connected with the promotion, sale or supply of a product to consumers' (Article 2(d) UCP Directive) which may be deemed unfair only if they are likely to directly and materially harm consumers' economic interests (see Recitals 6-7 UCP Directive). The UCP Directive thus assumes the (at least potential future) creation or existence of a B2C contractual relationship. This is clearly reflected in the notion of unfairness in the UCP Directive which establishes a fully harmonised *lex generalis* assessment of unfairness based on internal market considerations as rooted in market freedoms and competition. As observed by Willet, this interpretation appears to be substantiated by the case law of the Court of Justice[94] and, as a consequence, 'it is unfairness as variously defined in the Directive that determines national regulatory standards—nothing less, but also, nothing more.'[95]

### *A. INTRODUCING THE UNFAIRNESS LEVELS*

**[40]** THE COMMERCIAL PRACTICE UNFAIRNESS LEVELS – The Directive contains a tripartite division of unfair commercial practices as outlined in Article 5 UCP Directive. On the first level is the general clause. According to Article 5(2) of the Directive a commercial practice is unfair if,

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[91] See here: *Joined Cases C-236/08 to C-238/08, Google France SARL and Google Inc. v Louis Vuitton Malletier SA, Google France SARL v Viaticum SA and Luteciel SARL and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others, ECLI:EU:C:2010:159* (n 87) 08.

[92] As noted in the Commission Guidance 'The above provisions of the e-Commerce Directive have a broad scope of application and are relevant in relation to different kinds of illegal information hosted by platforms, including information in breach of consumer law, information infringing copyright rules, hate speech, criminal content (terrorism, child sexual abuse), defamatory statements, etc, as well as information regarding illegal activity.' European Commission, 'Commission Staff Working Document Guidance on the Implementation/Application of Directive 2005/29/EC On Unfair Commercial Practices Accompanying the Document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a Comprehensive Approach to Stimulating Cross-Border e-Commerce for Europe's Citizens and Businesses {COM(2016) 320' (n 90) 124.

[93] Chris Willett, 'Fairness and Consumer Decision Making under the Unfair Commercial Practices Directive' (2010) 33 Journal of Consumer Policy 247, 249.

[94] *Joined cases C-261/07 and C-299/07, VTB-VAB NV v Total Belgium NV and Galatea BVBA v Sanoma Magazines Belgium NV ECLI:EU:C:2009:244* 244.

[95] Willett (n 93) 252.

'(a) it is contrary to the requirements of professional diligence,
and
(b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers'.

Hence, Article 5(2)(b) UCP Directive (as further specified by Recital 18 UCP Directive) provides that if a commercial practice targets a specific grouping then the assessment of the average consumer should be of the average consumer of a member of the group. This is further supplemented in Article 5(3) UCP Directive which stipulates that attention should be given to vulnerable consumers and states that,

'[c]ommercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group […].'

A potentially significant limitation here is the requirement that the trader should be 'reasonably be expected to foresee' the distortion of the vulnerable group.[96] This general clause is then expanded in two small general clauses that specify commercial practices that are deemed particularly unfair on the second level. More specifically, Article 5(4) specifies that in particular commercial practices shall be deemed unfair if (a) they are misleading as set out in Article 6 (Misleading Actions) and Article 7 (Misleading Omissions); or (b) they are aggressive as per Article 8 (Aggressive Commercial Practices) and Article 9 (Use of harassment, coercion and undue influence). Finally, on the third level Article 5(5) refers to Annex I of the Directive which provides a list of misleading or aggressive trading practices which are deemed to be *de facto* unfair. The practices listed in Annex I are binding standards from which the Member States are not permitted to deviate.[97] Consequently, practices that are not enumerated in Annex I can only be prohibited on a case-by-case basis under the general or one of the two small general clauses and this interpretation has been confirmed by the Court of Justice.[98] It is important to note that in contrast with the sequence of the construction in the Directive (i.e. general clause, small general clauses and then blacklist), the practical operation of the Directive

[96] Jan Trzaskowski, 'Behavioural Innovations in Marketing Law' in Hans-W Micklitz, Anne-Lise Sibony and Fabrizio Esposito (eds), *Research Methods in Consumer Law* (Edward Elgar Publishing 2018) 300–301.

[97] See: *Joined cases C-261/07 and C-299/07, VTB-VAB NV v Total Belgium NV and Galatea BVBA v Sanoma Magazines Belgium NV ECLI:EU:C:2009:244* (n 94) 1–02949; *Case C-304/08, Plus Warengesellschaft, ECLI:EU:C:2010:12* [37]; *Case C-540/08, Mediaprint, ECLI:EU:C:2010:660* [18]; *Case C-288/10, Wamo, ECLI:EU:C:2011:443* [31]. This distinction is also reflected in Recital 17 UCP Directive which stipulates that '[i]t is desirable that those commercial practices which are in all circumstances unfair be identified to provide greater legal certainty. Annex I therefore contains the full list of all such practices. These are the only commercial practices which can be deemed to be unfair without a case-by-case assessment against the provisions of Articles 5 to 9. The list may only be modified by revision of the Directive.'

[98] See: *Case C-540/08, Mediaprint, ECLI:EU:C:2010:660* (n 97); *Case C-206/11, Köck, EU:C:2013:14*.

in fact reverses this order.[99] This approach appears to be the intentioned operation of the Directive thus reflecting the positioning of the general clause as a 'safety net'.[100] Indeed, given the inclusion of 'good faith' via the professional diligence component and the positioning of the general clause as a catch-all, it seems unlikely that a commercial practice could been deemed unfair under the specific clauses without also being found unfair under the general clause.[101]

**[41]** THE ELEMENTS OF THE (UN)FAIRNESS TEST – Each of the UCP Directive's unfairness levels focuses on the capacity of the average consumer to make informed autonomous decisions. More specifically, in analysing the general clause there are two elements to the unfairness test contained in Article 5(2) UCP Directive namely; (1) professional diligence and (2) a material distortion of economic behaviour of the average consumer, which must be satisfied cumulatively in order to justify unfairness. These two elements will now be discussed in turn.

### *i. Professional diligence*

**[42]** DEFINING PROFESSIONAL DILIGENCE – Article 2(h) UCP Directive defines professional diligence as 'the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity'.[102] The definition of professional diligence hence provides the clarification that commercial practices combine facts and norms that need to be examined under the test for unfairness.[103] The inclusion of good faith here appears to have been a response to the fear stemming from its omission in the originally proposed definition and which seems to reflect the concern that the original definition may have *inter alia* legitimised dubious practices if these were prevalent in the particular business sector.[104] The professional diligence notion thus incorporates both normative and customary (industry) criteria to ensure that the business community does not determine the minimum standard of protection in

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[99] See generally: European Commission, 'Commission Staff Working Document Guidance on the Implementation/Application of Directive 2005/29/EC On Unfair Commercial Practices Accompanying the Document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a Comprehensive Approach to Stimulating Cross-Border e-Commerce for Europe's Citizens and Businesses {COM(2016) 320' (n 90).

[100] Hans-W Micklitz, 'The General Clause on Unfair Practices' in Geraint G Howells, Hans-W Micklitz and Thomas Wilhelmsson (eds), *European Fair Trading Law: The Unfair Commercial Practices Directive* (Ashgate Pub Company 2006) 84.

[101] This interpretation also appears to have been reflected in the judgements of the Court of Justice. *Case C-435/11, CHS Tour Services, EU:C:2013:634* 634.

[102] Article 2(h) UCP Directive.

[103] Hans-W Micklitz, 'Unfair Commercial Practices and Misleading Advertising' in Norbert Reich and others (eds), *European Consumer Law* (2nd edition, Intersentia 2014) 91.

[104] Mary Donnelly and Fidelma White, *Consumer Law: Rights and Regulation* (Thomson Round Hall 2014) 493.

isolation.[105] In saying this however, an absence of intent, negligence or indeed any evidence of harm suffered by the consumer is irrelevant to the application of the professional diligence element.[106]

**[43]** PROFESSIONAL DILIGENCE AND THE ROLE OF 'SECTORAL' INSIGHTS – The reliance on sectoral insights is reflected in Recital 20 UCP Directive which states that '[i]n sectors where there are specific mandatory requirements regulating the behaviour of traders, it is appropriate that these will also provide evidence as to the requirements of professional diligence in that sector.' It is interesting to refer here again to the Commission Guidance on the UCP Directive which appears to infer obligations similar to those laid out specifically in the AVMS Directive. More specifically, the 2016 Guidance document specifies that,

> '[p]latforms which are considered "traders", should take appropriate measures which – without amounting to a general obligation to monitor or carry out fact-finding (see Article 15(1) e-Commerce Directive) – enable relevant third party traders to comply with EU consumer and marketing law requirements and users to clearly understand with whom they are possibly concluding contracts.'[107]

To further specify these measures the guidance notes that such measures could imply (1) requiring third party traders to indicate that they act as traders in their activity on the platform; (2) making it clear to all platform users that they benefit from the protection of EU consumer and marketing laws, and; providing third parties with the structures necessary to comply with the law and in particular in relation to the information requirements and Article 7(4) UCP Directive in the case of invitations to purchase.[108] This interpretation appears to present similar obligations to those contained explicitly in the AVMS Directive for video-sharing platform service providers. However, in this regard, Micklitz notes that the reference to professional diligence only makes sense where there are European codes of conduct developed with due regard for both professional and consumer interests.[109]

**[44]** CODES OF CONDUCT AND (DIS)INCENTIVES FOR ADHERENCE – Despite the fact that the UCP Directive encourages the use of self-regulatory codes, their adoption is to a certain extent both constrained and stimulated by the provisions of the Directive itself and also how it is implemented and operates in practice in the MSs.[110] Article 6(2)(b) UCP Directive

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[105] Monika Namyslowska, 'The Blacklist of Unfair Commercial Practices: The Black Sheep, Red Herring or White Elephant of the Unfair Commercial Practices Directive?' in Willem van Boom and Amandine Garde (eds), *The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems* (Routledge 2016) 142.

[106] *Case C-388/13, UPC Magyarország, ECLI:EU:C:2015:225* [47–48].

[107] European Commission, 'Commission Staff Working Document Guidance on the Implementation/Application of Directive 2005/29/EC On Unfair Commercial Practices Accompanying the Document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a Comprehensive Approach to Stimulating Cross-Border e-Commerce for Europe's Citizens and Businesses {COM(2016) 320' (n 90) 126.

[108] ibid.

[109] Micklitz, 'Unfair Commercial Practices and Misleading Advertising' (n 103) 91–92.

[110] Namyslowska, (n 105) 138.

stipulates the most significant requirement relating to self-regulation in the Directive. This provision specifies that 'non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound' is considered to be a misleading commercial practice provided, (i) 'the commitment is not aspirational but is firm and is capable of being verified, and (ii) the trader indicates in a commercial practice that he is bound by the code.' Article 6(2)(b) UCP Directive thus aims to strike a balance between the voluntary nature of codes of conduct and the protection of consumers regarding the confidence and trust such codes generate. As observed by Pavillon however, the provision has been largely viewed as a disincentive for voluntary adherence to self-regulatory mechanisms as it has been argued that the provision in fact puts adoptee traders' commercial practices at risk of unintended non-compliance due to a technical requirement in a code which may represent a higher standard of protection than actually mandated by the UCP Directive itself.[111] To clarify, although as stated repeatedly already, the UCP Directive is a maximum harmonisation instrument, codes (as soft law regulation) however, are not subject to the restrictions of full harmonisation and may impose more stringent requirements.

**[45]** PRIVATE REGULATION AND EUROPEAN LEVEL SOFT LAW – Nevertheless, this does not mean that the codes of conduct can act as a safe harbour from the violation of the UCP Directive's requirements and nor does it lead to a presumption of conformity with the legal standard.[112] In any case, due to the openness of the unfairness standard in the general clause it is hard to imagine how precise any such assessment of conformity can be without reference to Court of Justice rulings.[113] That being said, although compliance with a code does not necessarily demonstrate compliance with the UCP Directive, a failure to comply with a code may be strongly considered by Courts or enforcement authorities in an assessment. Private regulation has a strong history in the area of advertising resulting from the fact that 'consumer trust in advertising is an essential prerequisite for making a profit.'[114] However, although the importance of self-regulation is recognised in both the UCP and AVMS Directives and the European Commission clearly has supplementary codes in mind in the operation of both Directives, the absence of European level soft law remains. This is notwithstanding the fact that the e-Commerce Directive (i.e. which was adopted in 2000) explicitly refers to codes of conduct at the EU level as the best means of regulating professional ethics in the context of commercial communications. In particular, Article 8(2) and Article 16 e-Commerce Directive specifically refer to the need for MSs and the Commission '[…] to encourage professional associations and bodies to establish codes of conduct at [EU] level'. Although immediately following the adoption of the e-

[111] ibid 140.
[112] ibid 142.
[113] ibid 144.
[114] Mateja Durovic and Hans W Micklitz, 'International Law on (Un)Fair Commercial Practices', *Internationalization of Consumer Law: A Game Changer* (Springer International Publishing 2017) 34 <https://doi.org/10.1007/978-3-319-45312-5_3>.

Commerce Directive there was some movement in terms of the adoption of national and *supra*-national Codes, this progress stalled.[115]

**[46]** ICC CODE AS A SUBSTITUTE STANDARD – It is significant to note however, that this absence of a European level code has been bridged somewhat by the advertising rules developed by the International Chamber of Commerce (ICC).[116] Importantly the ICC Code applies to both audiovisual commercial communications and commercial communications more generally and is the most significant advertising self-regulatory instrument globally. The Code is designed to protect consumers against fraudulent or misleading advertising but also non-economic harms relating to the taste and decency of the advertising messages. This reflects the Code's first basic principle that '[a]ll marketing communications should be legal, decent, honest and truthful' (see Article 1–Basic principles) with the Code also containing *inter alia* an identification and transparency requirement for digital marketing communication, whatever their form and whatever the medium used including so-called 'native advertising' (Article 7 ICC Code) with Article 11 ICC Code providing that sponsored testimonials should be made transparent. Although the ICC Code targets the harmonisation and coherency of its rules and has seen widespread adoption across the EU MSs, the ICC does not have any power to require national self-regulatory organisations to implement the requirements in a uniform manner. Hence, different legal traditions and market structures have led to major differences between national approaches. Such differences also persist in the EU with clear divergences evident amongst the MSs.

**[47]** EUROPEAN SELF-REGULATION AND THE EASA – Following pressure from the European Commission to overcome the challenges to the internal market posed by various national level codes, the European advertising industry began coordinating the efforts of national self-regulatory organisations in the early nineties, by setting up the European Advertising Standards Alliance (EASA) in 1992. However, unlike the ICC the EASA does not establish substantive standards for advertising practices but instead helps to establish new private systems and improves the operation of existing systems by sharing best practices and providing guidance. In saying this, the EASA has become a member of the Commission on Marketing and Advertising,[117] and thus plays a central role in the adoption and revision of the ICC Codes. The EASA's Best Practice Recommendations for advertising practices can be divided between, (1) operational recommendations, which offer guidance regarding the operation, structure and procedures of self-regulatory organisations, and; (2) blueprint recommendations which provide guidance on the remit and codes of semi-

[115] European Commission, 'First Report on the Application of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce)' (2003) Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee COM(2003) 702final 16–17.

[116] Micklitz, 'Unfair Commercial Practices and Misleading Advertising' (n 103) 91–92.

[117] This is the ICC Committee which convenes twice a year to examine marketing- and advertising- policy issues and revises drafts of codes, rules and opinions and outlines strategies.

regulatory organisations.[118] The EASA has developed a blueprint of recommendations for online behavioural advertising which was agreed upon by the whole advertising eco-system and all self-regulatory organisations at the European level. However, it does not constitute a European Code as it lacks binding force and instead merely offers a guidance for a European implementation strategy with national self-regulatory organisations permitted to go beyond the standards contained therein.[119]

**[48]** FEDMA AND ITS 'RING OF CONFIDENCE' – Aside from the EASA there are two other organisations that issue self-regulatory guidance at the EU level worthy of mention. First, the Federation of European Direct Marketing (FEDMA) which represents direct marketing associations at the EU level that has issued the Code of Conduct for e-commerce and interactive marketing. This Code aims '[…] to contribute to the growth of an e-commerce environment conductive to online direct marketing and at the same time protective of consumer interests'.[120] The Code reflects the requirements contained in the e-Commerce Directive and in particular the information and transparency requirements and aims to set the standard for ethical business conduct for online marketers (1) selling goods or services or; (2) providing information as part of, or following up to a sale.[121] The Code forms part of FEDMA's trustmark system (i.e. the 'Ring of Confidence' for e-commerce) with the companies adhering to the Code allowed to display a Guarantee Seal on their website. And second, the Interactive Advertising Bureau (IAB) which is an EU level industry association that has issued guidance documents on how to comply with EU law. However, again the precise implementation of the FEDMA Code and the IAB Best Practice Guidance documents is left up to the national direct marketing associations and industry players.

### *ii. Material distortions*

**[49]** MATERIAL DISTORTIONS AND ECONOMIC DECISION MAKING – Article 2(e) UCP Directive specifies that to 'materially distort the economic behaviour of consumers' refers to the use of 'a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise'. Significantly therefore, this material distortion does not require an actual economic distortion but rather obliges an examination of the likelihood of such an impact.[122] However, with reference to the principle of proportionality, Recital 6 UCP Directive 'recognises that in some cases the impact on consumers may be negligible' and thus seemingly acknowledges that in certain circumstances such material harm may be

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[118] 'European Advertising Standards Alliance, "Best Practice Recommendation on Online Behavioural Advertising"' 7 <http://www.easa-alliance.org/sites/default/files/EASA%20Best%20Practice%20Recommendation%20on%20Online%20Behavioural%20Advertising_0.pdf>.

[119] For a more elaborate description see: Verdoodt (n 49) 198–200.

[120] 'FEDMA, "Code on E-Commerce & Interactive Marketing"' <http://www.oecd.org/internet/ieconomy/2091875.pdf>.

[121] See: ibid..

[122] Donnelly and White (n 104) 495.

insignificant thereby reflecting the often small and distributed nature of consumer harms. As noted by Micklitz, the importance of the use of the threefold terminology (i.e. referring to 'economic behaviour', 'informed decision' and 'transactional decision') should not be overestimated.[123] The author goes on to note that it appears reasonable to assess these terms together as all three aim to ensure consumer autonomy during the pre-contractual phase.[124] It is not the consumer's behaviour that is of concern but rather their behaviour in the market and hence, in order for there to be an influence over the consumer's behaviour, action is required and for the consumers to act, prior-information is necessary. Therefore, as observed by Stuyck *et al.*, '[i]n this provision the European legislator seems to have based the general fairness test on the equation that "economic behaviour = ability to make an informed decision".'[125] The authors go on to note that the operation of this equation relies on the assumed capacity or ability of the consumer to make informed decisions (i.e. as distinct from how good or bad the decision itself may be) with the consumer still free to make a stupid decision provided their ability to make a decision was not appreciably impaired.[126]

**[50]** TRANSACTIONAL DECISIONS AND THE UNFAIRNESS LEVELS – In essence, therefore the protections provided by the UCP Directive hinge on the effect to the average consumer *vis-à-vis* a transactional decision which inevitably results in or affects a (at least potential) contractual agreement. A 'transactional decision' is defined in Article 2(k) UCP Directive as,

> 'any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting'.

The reference to a 'transactional decision' is also repeated in both small general clauses. The second element of both Articles 6 and 7 UCP Directive relating to misleading practices and omissions specifies that the provisions refer to practices which cause or are likely to cause 'the average consumer to take a transactional decision that he would not have taken otherwise.' Similarly, Article 8 UCP Directive establishes that for an aggressive practice to be established three cumulative requirements need to be satisfied namely, (1) there must be harassment, coercion or undue influence; (2) this must significantly impair the average consumer's choice or conduct; and (similar to the provisions on misleading practices); (3) it must cause the consumer to take a transactional decision they would not have otherwise taken.

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[123] Micklitz, 'Unfair Commercial Practices and Misleading Advertising' (n 103) 92–93.
[124] ibid.
[125] Jules Stuyck, Evelyne Terryn and Tom Van Dyck, 'Confidence through Fairness-The New Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market' (2006) 43 Common Market L. Rev. 107, 125.
[126] ibid.

**[51]** MATERIAL INFORMATION AND COMMERCIAL COMMUNICATIONS – Here it is important to clarify that Article 7(5) UCP Directive states that the information requirements for commercial communications established by EU law and listed in a non-exhaustive manner in Annex II to the Directive are to be regarded as material in that a failure to provide such information would be considered a misleading omission under Article 7 UCP Directive. Importantly, this list includes the information requirements contained in Article 6 e-Commerce Directive outlined above. In addition, Article 7(4) UCP Directive specifies certain information as 'material' in the context of an invitation to purchase. Article 2(i) UCP Directive defines an invitation to purchase as 'a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase'. This leaves an interesting overlap between the notions of a commercial communication and the apparent sub-category of an invitation to purchase. In commenting on this delineation in its 2016 guidance on the application of the UCP Directive the European Commission specifies that,

> '[a] commercial communication or advertisement that includes an exhaustive description of a product or service's nature, characteristics and benefits but not its price cannot be considered an 'invitation to purchase' within the meaning of Article 2(i) of the UCPD. An example of commercial communications which are not invitations to purchase would be advertisements promoting a trader's 'brand' rather than any particular product (i.e. brand advertising).'[127]

Importantly however, as clarified by the Court of Justice in the *Ving Sverige* case, this does not mean that there is actually an opportunity to purchase or for such an opportunity 'to appear in proximity to and at the same time as such an opportunity.'[128] As a result, an invitation to purchase is a narrower category than that of a commercial communication.

**[52]** INVITATIONS TO PURCHASE AND PRE-CONTRACTUAL INFORMATION – Furthermore, an invitation to purchase is a broader category than pre-contractual information. This appears to reflect the reasoning of the Court in the *Ving Sverige* case in that an invitation to purchase does not imply that the next step is to enter a contract with the trader whereas the pre-contractual information refers to the details which must be supplied to a consumer before they enter a contractual relationship. Reference here can be made to the Consumer Rights(CR) Directive[129] which stipulates the information to be given to the consumer at the pre-contractual stage. The CRDirective is based largely on a maximum harmonisation

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[127] European Commission, 'Commission Staff Working Document Guidance on the Implementation/Application of Directive 2005/29/EC On Unfair Commercial Practices Accompanying the Document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a Comprehensive Approach to Stimulating Cross-Border e-Commerce for Europe's Citizens and Businesses {COM(2016) 320' (n 90) 53.

[128] *Case C-122/10, Konsumentombudsmannen v Ving Sverige AB, ECLI:EU:C:2011:299* 32.

[129] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance OJ L 304, 64–88.

approach being designed to close gaps in EU rules on doorstep sales and the common aspects of distance and off-premises contracts.[130] As noted by the European Commission, compliance with the requirements for pre-contractual information stipulated in the CR Directive should normally also satisfy the requirements for an invitation to purchase contained in Article 7(4) UCP Directive and those for the broader category of a commercial communication given that the degree of proximity to the contractual relationship inversely relates to the amount of information to be provided.[131]

### *B. TRANSPARENCY AND PERSONALISATION*

**[53]** TRANSPARENCY AND THE DISTINGUISHING COMMERCIAL COMMUNICATIONS – Transparency therefore plays a key role in that the provision of information and the identification of the commercial communications is deemed material for the consumer to make an informed decision. Consequently, the capacity to integrate a commercial message into non-commercial content raises issues *vis-à-vis* distinguishability and, due to the increased capacity to personalise services, raises doubts in terms of the legitimacy of the subtler forms of user persuasion. It must be acknowledged therefore, that commercialisation extends beyond the conventional understanding of, for example behavioural and programmatic advertising, and incorporates subtle forms of persuasion to consumer purchasing and commercial interactions more generally(see above). Nevertheless, there remains a degree of uncertainty regarding the application of advertising transparency rules to such techniques even though the incorporation of commercial intent into the functionality of services (or service features thereof) may have a strong effect on consumer decision-making. Here it is interesting to refer to the recent updates to the consumer law *acquis* and, more specifically, the Directive on better enforcement and modernisation of EU consumer protection rules (Modernisation Directive) aiming to introduce modifications *inter alia* to the UCP and CR Directives. There are three changes that are of importance to this analysis.

**[54]** PERSONALISATION, UNFAIRNESS AND THE MODIFICATIONS – First, in updating of the UCP Directive the Compromise Modernisation Directive introduces point 11a to Annex I UCP Directive. This new provision blacklists '[p]roviding search results in response to a consumer's online search query without clearly disclosing any paid advertisement or payment specifically for achieving higher ranking of products within the search results.' Second,

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[130] From a minimum harmonisation perspective, the Directive also included for example new rules related to on-premises sales. As noted by Donnelly and White, '[w]hen compared with the earlier Directives, broadly speaking, [the Consumer Rights Directive] requires even more items of information to be communicated to consumers, and not just in the context of doorstep sales (now known as "off-premises" contracts) and distance sales but also in relation to "on-premises" sales.' Donnelly and White (n 104) 285.

[131] European Commission, 'Commission Staff Working Document Guidance on the Implementation/Application of Directive 2005/29/EC On Unfair Commercial Practices Accompanying the Document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a Comprehensive Approach to Stimulating Cross-Border e-Commerce for Europe's Citizens and Businesses {COM(2016) 320' (n 90) 51–52.

the Modernisation Directive introduces 'specific information requirements for contracts concluded on online marketplaces' in the CR Directive. An online marketplace is defined in Article 2(17) CR Directive and Article 2(1)(m) UCP Directive as 'a service which allows consumers to conclude distance contracts with other traders or consumers using software, including a website, part of a website or an application that is operated by or on behalf of the trader'. The inclusion of the words 'part of a website' appears to extend the scope of the definition to online services such as social networking sites which incorporate marketplace like features. As per Article 6a(1)(a) CR Directive, the operators of online marketplaces are required to provide *inter alia*,

> '[…] general information made available in a specific section of the online interface that is directly and easily accessible from the page where the offers are presented on the main parameters determining ranking, as defined in point (m) of Article 2(1) of Directive 2005/29/EC, of offers presented to the consumer as result of the search query and the relative importance of those parameters as opposed to other parameters'.

With the cross-reference to the UCP Directive (i.e. Directive 2005/29/EC) ranking is defined in the new Article 2(1)(m) UCP Directive as 'the relative prominence given to products, as presented, organised or communicated by the trader, irrespective of the technological means used for such presentation, organisation or communication.' In keeping with this information requirement, Article 7(4a) UCP Directive introduces a provision stipulating to that the parameters determining the ranking of products as a result of a search query should be regarded as material information in the determination of whether there has been a misleading omission.[132] And finally, third, Article 6(1)(ea) CR Directive introduces the requirement to inform the consumer 'where applicable, that the price was personalised on the basis of automated decision making'. This final addition is controversial and will be described further in Chapters 5 and 6 in light of the potential negative effects of personalised pricing.

**[55]** PERSONALISATION, UNCERTAINTIES AND CLARIFICATIONS – These modifications aim to reinforce the importance of the identification principle and the information paradigm thereby illustrating a definite move towards rendering the ranking of search results and personalisation, more transparent for consumers. However, in saying that, the provisions do present certain ambiguities which will need to be teased out. More specifically, although the new point 11a to Annex I UCP Directive clearly requires the identification of paid advertising in organic search results and the disclosure of any payment made for achieve a higher ranking, there are uncertainties as to what is meant here by the term

[132] The provision states that '[w]hen providing consumers with the possibility to search for products offered by different traders or by consumers on the basis of a query in the form of a keyword, phrase or other input, irrespective of where transactions may be ultimately concluded, general information made available in a specific section of the online interface that is directly and easily accessible from the page where the query results are presented on the main parameters determining ranking of products presented to the consumer as a result of the search query and the relative importance of those parameters as opposed to other parameters shall be regarded as material. This paragraph does not apply to providers of online search engines as defined in Regulation (EU) 2019/...+'.

'payment'. Recital 20 Modernisation Directive aims to provide more certainty in this regard and states *inter alia* that

> '[w]hen a trader has directly or indirectly paid the provider of the online search functionality for a higher ranking of a product within the search results, the provider of the online search functionality should inform consumers thereof in a concise, easy and intelligible form. Indirect payment could be in the form of the acceptance by a trader of additional obligations towards the provider of the online search functionality of any kind which have higher ranking as its specific effect. The indirect payment could consist of increased commision per transaction as well as different compensation schemes that specifically lead to higher ranking.'

Although this provision certainly opens the potential for indirect means 'of any kind' to be understood as 'additional obligations' resulting in a form of 'indirect payment', it is unclear how far this non-binding provision will stretch. This is significant as search engine optimisation is a big business, and as further stipulated in Recital 20 Modernisation Directive, '[o]nline search functionality can be provided by different types of online traders, including intermediaries, such as online market places, search engines and comparison websites.'

**[56]** TRANSPARENT PERSONALISED COMMODIFICATION – Putting the above ambiguity to one side, the application of this item on the blacklist thus has potentially a wide scope of application. Interestingly, this wide scope contrasts with the narrower focus on online marketplaces in Article 6a(1)(a) CR Directive and the information requirements regarding the parameters determining search results. Moreover, although the contractual information obligations contained in Article 6a(1)(a) CR Directive only apply to the providers of online marketplaces, the inclusion of the obligation to provide the same ranking parameters 'irrespective of where transactions may be ultimately concluded' as material information in Article 7(4a) UCP Directive, effectively results in the applicability of the same transparency requirements to traders generally speaking. However, here it is important to observe that by cross-reference to the Platform to Business (P2B) Regulation, this provision seemingly excludes generalised search engines and refers instead to the requirements for search engines therein.[133] In light of the other provisions discussed above, it would be reasonable to suggest that (1) specialised search engines targeted towards indexing specific products or services are not included within this exemption and that therefore; (2) the more specialised search services (e.g. Google flights) would appear to come with the scope of the provision as such services would appear to be separable from the general search engine (e.g. Google Search). In saying this however, there is a large degree of uncertainty. As will be described in detail in Chapter 5, this uncertainty also relates to what is to be included in this information and thus what amounts to a parameter determining the ranking of offers. The important takeaway here is that information provision requirements are key.

[133] See: Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services Brussels, COM(2018) 238 final 2018/0112 (COD).

## 2.2 AFFECTIVE COMMERCE AND EVOKING EMOTIONAL REACTIONS

**[57]** BOILING DOWN THE REQUIREMENTS AND THE IDENTIFICATION PRINCIPLE – Irrespective of the framework which is deemed applicable in the non-linear and video sharing platform context (i.e. linear meaning television), the identification principle provides the key requirement common across the *lex specialis* and *lex generalis* rules on the protection of consumer. Indeed, despite the complex web formed by the e-Commerce Directive, UCP Directive and the *lex specialis* AVMS Directive, the requirements largely speaking boil down to the requirement for businesses to ensure that their commercial communications (be they audiovisual or not) remain identifiable as such for consumers and provide the mandated information in a transparent and timely manner. But where does the use of emotional appeal fit within the protections provided to consumers in EU law? And could 'excessive' emotional appeal (whatever the threshold might be to establish this) be unfair under the UCP Directive for instance? To answer these questions this section will (1) analyse how the legal protections cater for the integration of commercial and editorial content and how emotional appeal fits within the harmonised protections; before then, (2) exploring how the law has traditionally ignored the role of emotion in decision-making, how recent developments aim to better reflect actual consumer behaviour and then how the emergence of emotional AI may still pose a challenge in light of interdisciplinary insights on the role of emotion in decision-making. In order to position this analysis, the section will first introduce how the emergence of new advertising techniques aiming to engage consumers challenge their capacity to identify such content.

### 2.2.1 EMOTION INTEGRATION, HARMONISATION AND THE IDENTIFICATION PRINCIPLE

**[58]** IMPROVING EXPERIENCE AND RISKING INFORMED DECISION-MAKING – Currently consumers experience difficulties in recognising commercial messages which undermines their ability to process their appeal in a critical manner (i.e. advertising literacy skills).[134] The challenges posed by the further mixing of commercial and non-commercial content and hence, the reliance on more integrated forms of advertising is a key point of contention as such techniques could arguably result in deceptive marketing campaigns with even more persuasive effects on consumers than currently more widely used marketing techniques.[135] Proponents for the adoption of such formats focus heavily on their capacity

[134] The discussion around advertising literacy is particular evident in literature dealing specifically with children see: Verdoodt (n 49); Esther Rozendaal and others, 'Reconsidering Advertising Literacy as a Defense Against Advertising Effects' (2011) 14 Media Psychology 333.

[135] It should be noted that the development of some integrative advertising techniques has coincided with a strong debate on online advertisement blocking. Indeed, in many ways the ad-blocking developments can be seen as part of the same broader argument as these developments are representative of the advertising industry's fear of the potential 'unbundling' of commercial and non-commercial content. To illustrate in November 2015 IAB Europe launched 'six new consumer-friendly formats in response to the rise of ad blocking'. See: Cristina Lezcano, 'Member Blog – Adform – Introducing Six New Consumer-Friendly Formats in Response to the Rise of Ad Blocking' <http://www.iabeurope.eu/blog/blog-introducing-six-new-consumer-friendly-formats-in-response-to-the-rise-of-ad-blocking/>.

to improve the user experience. However, 'improving' experience may come at a risk to the capacity of consumers to make 'informed' decisions. For instance, here one can refer to the example of the use of advergames and digital influencers and the well-documented difficulty of recognising the commercial intent experienced by individuals.

**[59]** GAMIFICATION AND BLURRED BOUNDARIES – The incorporation of gamification techniques and the ability to employ commercial communications and formats which can be tested for their emotional impact arguably raises key concerns and presents fundamental challenges to the rationality of consumers as a legal paradigm of protection. For example, as referred to previously, advergames are a form of advertising which integrate commercial content (the advertising and/or marketing of the brand) into the editorial content of the game. Research on the use of such techniques has shown them to be effective in that, (1) those who play them generally enjoy the gaming experience meaning that they are more receptive to the commercial communication and that; (2) the lines between the commercial and non-commercial editorial content is blurred thereby reducing individuals' capacity to recognise the commercial intent behind the games.[136] The instances in which the lines between commercial and non-commercial content are blurred extends beyond the advergames example however, and instead is merely indicative of the use of fun and interactive formats to stimulate more active consumer engagement. Moreover, in this context one can refer to the plethora of examples in the emotion-aware entertainment media sphere in which emotion is used as an indicator both for the recommending of content and in the context of gaming where companies capitalise on presumed emotional states based on how the consumer is progressing in the game in order to better tailor commercial campaigns.[137] The use of emotion detection for product development and research purposes is evident from the wide variety of companies engaged in the provision of such services.[138]

### *A. INTEGRATIVE COMMERCIALISATION, IDENTIFICATION REQUIREMENTS AND 'AFFECTIVE' OPTIMISATION*

**[60]** INTEGRATIVE ADVERTISING AND NON-COMPETING BRAND COOPERATION – The integration of emotion can feature not only in the development of advertising and marketing campaigns but also in the development of the brands and products themselves. However, it should be acknowledged that 'integrative advertising' is hardly a new phenomenon. As illustrated more extensively elsewhere, *Star Wars* for example has been incorporated into merchandise such as video games and toys for many years and the upsurge in marketing brought about by the new series of films merely kicked added life into themed product sales and additional marketing off-shoots.[139] The marketing for the most recent trilogy of

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[136] For a more elaborate discussion see: Verdoodt, Clifford and Lievens (n 33).
[137] 'Receptiv - Receptiv Is the Leading in-App, Mobile Video Advertising Platform That Is Measurable and Scalable.' <https://www.receptiv.com/> accessed 30 August 2017.
[138] See: 'Useful Links' (*Emotional AI: Ethics, Policy, Culture*) <https://emotionalai.org/useful-links/> accessed 29 August 2017.
[139] Clifford and Verdoodt (n 33).

films and spin-offs has utilised the sentimentality and emotional engagement of fans to increase hype and incorporated active engagement with the online world by employing a social media correspondent to generate further interest through the use of user generated content and also the creation of blogs, tweets and videos.[140] In addition, a number of cross-promotional partnerships were used which allowed for mutual benefits between non-competing brands in order to increase user awareness of the film and the partnered product or service.[141] So what then is new in terms of emotion stimulation and monetisation?

**[61]** EMOTIONAL OPTIMISATION OF CAMPAIGNS – Here it is interesting to again mention the *Star Wars* example and to the deployment of emotion detection technology in-house to assess the emotional valence, engagement and attention of consumers. More specifically, reference can be made to an example offered by McStay of a *Volkswagen* advertisement created by *Lucasfilm* and *Deutsch L.A.* (an advertising agency) which features a child dressed as the *Darth Vader* character who believes that he starts a car with the 'force'.[142] As described by McStay, this advertisement entitled *The Force* (2011) was tested by *Sands Research Inc.* and demonstrated record levels of engagement during the pre-release in-house testing.[143] Accordingly, it should be acknowledged that such a deployment of emotion detection technology adds to the capacity of the advertising and marketing industry to engage with consumers and evoke emotional reactions.[144] Furthermore, although the *Star Wars* example may be seen as a relatively benign use of integrative advertising techniques given the obvious and transparent connections and economic interests, it illustrates the power associated with such campaigns and their capacity to capitalise on content mixing and user engagement commercially. In simple terms, such methods become problematic when used in a less transparent manner and where consumers are less likely to be able to identify the commercial communication and the economic interest behind the delivery of the content.[145]

**[62]** NATIVE ADVERTISING AND THE FRACTURED RESPONSES – Responses to the emergence of more integrative forms of advertising have been somewhat fractured, again illustrating the role of national authorities and their diverging interpretation and application of the harmonised protections provided by the AVMS and UCP Directives. Moreover, given the merely advisory nature of the soft law rules developed at the EU level reference to the national interpretation and enforcement is required. To illustrate this point it is

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[140] See: 'Andi Gutierrez' (*StarWars.com*) <https://www.starwars.com/news/contributor/agutierrez> accessed 18 March 2019.

[141] For example Google created a special themed version of applications and Subway created Star Wars themed advertisements and merchandise.

[142] McStay, *Emotional AI* (n 4) 122–123.

[143] ibid.

[144] See: Clifford and Verdoodt (n 33). This point also harkens back to the well-known flaws associated with self-reporting feedback mechanisms more traditionally used to assess engagement.

[145] This is even worse in the case of those consumers fitting within the 'vulnerable' consumer categories such as children, people with disabilities or older people who might not have the same skills incorporating their advertising literacy.

interesting to refer to the Native Advertising Playbook developed by the IAB which defines core questions advertisers should ask themselves when evaluating native advertising. These include questions regarding the form, function and integration of the commercial communication but also whether the disclosure is clear and prominent.[146] In relation to the latter, the Playbook contains recommended principles, regardless of the specific form of native advertising used. More specifically, the IAB advocates the use of language that conveys that the advertising has been paid for, even if it does not contain traditional promotional advertising messages. In addition, the disclosure needs to 'be large and visible enough for a consumer to notice it in the context of a given page and/or relative to the device that the ad is being viewed on'.[147] In keeping with its mere advisory status, although the Playbook refers to several company practices for the different types of advertisements, it does not contain actual endorsements of any specific language or form and does not offer much practical guidance in relation to setting of minimum qualitative standards.

**[63]** PLATFORM TO PLATFORM VARIATION – As a result, from a practical perspective implementation varies from platform to platform and this lack of continuity arguably presents challenges for the consumer. This again reinforces a key point of this sub-section that although the requirement to identify (audiovisual) commercial communications is certainly harmonised at the EU level, national law and enforcement agencies (be they self-regulatory or not) play the central role in the interpretation and application of the requirements. This argument manifests itself through the heterogeneous responses to integrative forms of marketing such as the use of social influencers with certain MSs illustrating a clear desire to overcome the challenges posed with others remaining strangely silent.[148] Aside from the issues associated with the consistency of application and enforcement of EU law however, a more general critique relates to the ongoing legitimacy of the demarcation line between editorial and commercial content. Precisely delineating sponsored content which clearly falls within the definition of a (audiovisual) commercial communication from 'editorial' content (that can often have a commercial aspect in terms of its organisation and presentation) is increasingly difficult in the online setting.

**[64]** IS TRANSPARENCY ENOUGH? – The fact that technology can now be utilised to optimise the deployment of a marketing campaign means that commercial entities are more aware of the means best fitted to actively engage with their audience.[149] This observation is particularly significant given their effectiveness and the potential for marketing

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[146] 'IAB, "The Native Advertising Playbook" (2013)' <http://www.iab.com/guidelines/native-advertising/>.
[147] ibid.
[148] For a recent analysis of how the law interacts with social influencers see: Christine Riefa and Laura Clausen, 'Towards Fairness in Digital Influencers' Marketing Practices' (2019) 8 Journal of European Consumer and Market Law 64.
[149] Calo, 'Digital Market Manipulation' (n 34).

campaigns to go viral.[150] Indeed, content in the digital world can seemingly take on a life of its own especially if this is nudged by digital influencers.[151] Although there have been several moves at the national level to respond to the challenges associated with the enforcement of the requirements outlined above, this remains difficult from a practical perspective.[152] Despite the fact that the use of marketing techniques such as social influencers to increase the visibility of commercial content has been raised increasingly over the last few years in terms of the transparency of such mechanisms and the consumers ability to recognise the commercial intent behind blogs, videos and posts, the impact of enforcement moves remains uncertain.[153] Even if the patch-work of requirements are complied with however, one must wonder if transparency is enough given that such marketing techniques are proven to be highly effective due to consumers' affective engagement. This is significant as the use of emotional appeal is not limited to the content of commercial communications and research has also shown the potential for a positive emotional impact being associated with advertising formats, branding, product design and indeed virtually all aspects of consumer-facing interactions.[154]

### *B. EMOTIONAL APPEAL AND THE STANDARD OF HARMONISATION*

**[65]** EMOTIONAL APPEAL AND EU LAW – As mentioned above, the emergence of a mediated society, whereby consumers increasingly interact with the market through technology, plays an important role in the increased uptake and importance of the use of emotion for commercial purposes. More specifically, this link relates to the fact that, (1) technology captures and retains vast amounts of information about consumers; (2) commercial entities design all aspects of the consumers' interactions with their services and finally; (3) increasingly these commercial entities can choose when to interact with consumers

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[150] Jan Trzaskowski, 'User-Generated Marketing – Legal Implications When Word-of-Mouth Goes Viral' (2011) 19 International Journal of Law and Information Technology 348.

[151] To illustrate the scale of the potential effects of digital influencers the scandal surrounding the failed *Fyre Festival* provides an evocative example. The *Fyre Festival* was marketed as a luxury music festival that was planned to take place on two occasions in 2017 in the Bahamas as a platform to promote the *Fyre* music booking application and was promoted on *Instagram* by popular social influencers who at first failed to disclose that they had received a payment to promote the event. The event was an unmitigated disaster with the event being cancelled and festival goers left stranded in the Bahamas and out of pocket for the luxury villas and gourmet meals that they had paid for which has left the effect of the influencers at the centre of the storm.

[152] This is largely linked to the enforcement difficulties as influencers may often be micro-influencers with a very specific segmented audience, see: Steven McIntosh, '"A Lot of People Think Influencers Are Obnoxious"' (22 April 2019) <https://www.bbc.com/news/entertainment-arts-47573135> accessed 25 April 2019.

[153] Here one can also refer to a recent pledge by well-known celebrities see: Julia Kollewe, 'Celebrity Social Media Influencers Pledge to Change Way They Post' *The Guardian* (23 January 2019) <https://www.theguardian.com/media/2019/jan/23/celebrity-social-media-influencers-pledge-to-change-way-they-post> accessed 29 January 2019. However, as noted in the previous footnote influencers may often be micro-influencers with a very specific segmented audience, see: McIntosh (n 152).

[154] Blumenthal observes that the use of emotion biases could also extend to the development of manipulative and arguably unconscionable contract terms, see: Jeremy A Blumenthal, 'Emotional Paternalism' (2007) 35 Fla. St. UL Rev. 1, 47–48.

rather than waiting for them to enter the market.[155] The focus on identification, transparency and the counteracting of misrepresentation and deception may therefore fail to protect consumers from the use of emotional appeal. But where does the emotional aspect of advertising and marketing feature within the AVMS and UCP Directives and how does emotional appeal fit within the information paradigm and commercial communication identification principle outlined above?

### *i. Audiovisual commercial communications and non-economic considerations*

**[66]** MINIMUM HARMONISATION AND RESPECT FOR DIGNITY – As stated above, the AVMS Directive is a minimum harmonisation instrument which offers scope to the MSs in their respective implementations to cater for national peculiarities. The effects of this are highlighted in particular for instance when one considers the provisions on hate speech. For the purposes of this thesis it is significant to refer to the requirement for all audiovisual media services (i.e. including audiovisual commercial communications) to respect human dignity and not contain any incitement to violence or hatred on any of the grounds referred to in Article 21 of the Charter of Fundamental Rights of the European Union (Article 6(1)(a) AVMS Directive).[156] This requirement also extends to video-sharing platform service providers. However, in line with the discussion above in Section 2.1.1, the extent of their obligations differs depending on whether the content is contained within an audiovisual commercial communication (i.e. as marketed and sold by the video-sharing platform service provider) or user-generated content.

**[67]** AUDIOVISUAL COMMERCIAL COMMUNICATIONS AND CONTENT PROTECTIONS – To reiterate where the definition of an audiovisual commercial communication is satisfied, the requirements in Article 9 AVMS Directive are applicable. In addition to the separation and identification principles, Article 9(1)(c) AVMS Directive further specifies that audiovisual commercial communications must not, (1) prejudice respect for human dignity; (2) include or promote any discrimination on grounds of sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation; (3) encourage behaviour prejudicial to health or to safety; or (4) encourage behaviour grossly prejudicial to the protection of the environment. In addition, the Directive also lays down specific prohibitions on the promotion of (1) cigarettes and other tobacco products, as well as for electronic cigarettes and refill containers; and, (2) medicinal products and medical treatment available only on prescription. Both these align with the prohibitions provided for in product specific rules with the prohibition of advertising medicinal products and treatments in the AVMS

[155] Calo, 'Digital Market Manipulation' (n 34) 1002–1003. 'As a consequence, firms can generate a fastidious record of their transaction with the consumer and, importantly, personalize every aspect of the interaction. This permits firms to surface the specific ways each individual consumer deviates from rational decisionmaking, however idiosyncratic, and leverage that bias to the firm's advantage. Whereas sellers have always gotten a "feel" for consumers, and although much online advertising today is already automatic, this new combination of interpersonal manipulation with large-scale data presents a novel challenge to consumers and regulators alike.'

[156] Charter of Fundamental Rights of the European Union OJ C 326, 391–407.

Directive repeated in the Directive concerning Medicinal Products for Human Use,[157] and the AVMS Directive filling the gap left by strict restrictions on promoting tobacco etcetera provided for in Tobacco Advertising Directive.[158] Importantly, these specific prohibitions also interact with the UCP Directive and in the business-to-consumer context also manifest direct prohibitions on the promotion of such products/services. Finally, restrictions are placed on (1) the promotion of alcoholic beverages whereby such promotions cannot be aimed specifically at minors and cannot encourage immoderate consumption of such beverages; and, (2) the effects of audiovisual commercial communications on minors whereby promotions may not cause physical, mental or moral detriment to minors. These two restrictions will now be further analysed as both are illustrative of two important underlying points.

**[68]** EMOTION AND THE CONTENT PROTECTIONS – First, that the promotion of certain products or services or behaviour associated with such products/services can be restricted based on public interest grounds and second, the credulity of children renders them susceptible to emotional appeals and that thus, they merit additional protection. Regarding the first of these points, here it should be noted that the protections seem to implicitly target the countering of irrational behaviour due to the particular addictive nature of some of the products specifically mentioned in Article 9(1)(c) AVMS Directive. Indeed, even putting the complete prohibition on the promotion of tobacco products to one side, one can also point specifically to the restriction on the promotion of alcohol and the obligation not to 'encourage immoderate consumption of such beverages'. To clarify, although there is a clear public policy objective underpinning this restriction, implicit here is alcohol addiction and the requirement not to appeal to 'irrational' consumption. Here reference in particular can be made to Article 22 AVMS Directive which provides additional criteria for the promotion of alcoholic beverages through television advertising and teleshopping and by cross-reference audiovisual commercial communications in on-demand audiovisual media services (i.e. excluding sponsorship and product placement) as per Article 9(2) AVMS Directive. More specifically, Article 22 AVMS Directive stipulates that promotions must not, '(a) be aimed specifically at minors or, in particular, depict minors consuming these beverages; (b) link the consumption of alcohol to enhanced physical performance or to driving; (c) create the impression that the consumption of alcohol contributes towards social or sexual success; (d) claim that alcohol has therapeutic qualities or that it is a stimulant, a sedative or a means of resolving personal conflicts; (e) encourage immoderate consumption of alcohol or present abstinence or moderation in a negative light; or (f) place emphasis on high alcoholic content as being a positive quality of the beverages.'

**[69]** EMOTIVE IMPACT – Hence, the use of particularly strong emotional appeals may be restricted due to the nature of the product and this also appears to be illustrated by the fact that hate

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[157] Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use L 311, 67–128.
[158] Article 88(1) MPD

speech in particular can have an impact on human dignity thereby illustrating that the emotive nature of the commercial communication may also have an impact. The second of the underlying points mentioned above, namely that minors merit extra protection *vis-à-vis* their moral and mental development (see also Recital 47 AVMS Directive) is further specified in Article 9(1)(g) AVMS Directive which stipulates in particular that audiovisual commercial communications must not '(a) directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity; (b) directly encourage them to persuade their parents or others to purchase the goods or services being advertised; (c) exploit the special trust minors place in parents, teachers or other persons; or (d) unreasonably show minors in dangerous situations.' For instance, here one can refer to the obligation not to 'unreasonably show minors in dangerous situations' in particular, which seemingly refers explicitly to the requirement not to exploit children's fear for commercial purposes.

**[70]** CULTURALLY AND CONTEXTUALLY DEPENDENT EMOTIONAL APPEAL – Importantly, due to the role of the national legislator reference to national law is therefore required to assess the legitimacy of the emotional appeal contained in the audiovisual commercial communications as such an assessment will often be culturally and contextually dependent. This is further reflected by the fact that the development of national codes of conduct is encouraged in Article 4a of the revised AVMS Directive and that although MSs and the Commission may develop Union level codes, these must be without prejudice to those developed at the national level. In brief, Article 4a states that MSs are obliged to stimulate the development of such codes to the extent permitted in their legal system and that the codes must fulfil four criteria, namely; (1) representativeness (i.e. the main stakeholders should broadly accept them) (Article 4a(1)(a)); (2) the objectives must be clear and unambiguous (Article 4a(1)(b)); (3) regular, transparent and independent monitoring and evaluation of the achievement of the objectives aimed at must be provided for (Article 4a(1)(c)), and; (4) effectiveness (i.e. that the Member States should provide for effective enforcement) (Article 4a(1)(d)). This echoes the need to respect the minimum harmonisation goals of the Directive and the principles of subsidiarity and proportionality which are specifically referred to in the provision. The reasoning in support of the use of such Codes is specified in Recital 7 AVMS Directive which states that,

> '[…] experience has shown that both co-regulatory and self-regulatory instruments, implemented in accordance with the different legal traditions of the Member States, can play an important role in delivering a high level of consumer protection.'

The underlying premise therefore, appears to be grounded in the idea that measures that aim to achieve a public interest objective are more likely to be effective if they are supported by the service providers themselves, but that self-regulation is not a substitute for MS regulation (see Recital 7a of the revised AVMS Directive). Hence, self-regulatory Codes should be in line with the relevant national implementation of the AVMS Directive.

### *ii. COMMERCIAL PRACTICES AND DEMORALISED UNFAIRNESS*

**[71]** MAXIMUM HARMONISATION AND UNIFORM UNFAIRNESS STANDARDS – In contrast to the AVMS Directive the UCP Directive is a maximum harmonisation measure and, in this vein, one must question how this contrast between the frameworks manifests itself in terms of the

room for national approaches. Importantly however, although the UCP Directive contains a substantial amount of specification, the provisions still retain plenty of scope for interpretation.[159] Consequently, the categorisation of what satisfies the unfairness levels in the UCP Directive remains one that is strongly linked to culture and hence, disparity may exist in the determination of whether a practice is unfair in the given circumstances depending on the Member State. With this in mind, it is important to note that despite being a fully harmonised *lex generalis* assessment of unfairness based on internal market considerations as rooted in market freedoms and competition, according to the second half of Recital 7 UCP Directive the instrument,

> '[…] does not address legal requirements related to taste and decency which vary widely among the Member States. Commercial practices such as, for example, commercial solicitation in the streets, may be undesirable in Member States for cultural reasons. Member States should accordingly be able to continue to ban commercial practices in their territory, in conformity with Community law, for reasons of taste and decency even where such practices do not limit consumers' freedom of choice. Full account should be taken of the context of the individual case concerned in applying this Directive, in particular the general clauses thereof.'

As observed by Micklitz, the UCP Directive therefore, aims to 'demoralise' the assessment of fairness and essentially establish a demarcation line between an EU level notion of unfairness and national non-market orientated values which remain outside the scope of the Directive and in the national sphere of competence.[160]

**[72]** AVERAGE CONSUMER TEST – In this vein, it is important to refer to Recital 18 UCP Directive which provides that the average consumer test is not a statistical one and that '[n]ational courts and authorities will have to exercise their own faculty of judgement' in their interpretation with reference to the specific circumstances of the case. In particular, Recital 18 UCP Directive refers to the relationship between the notion of unfairness in the Directive and that of culture by indicating the need to refer to the case law of the Court of Justice.[161] The Recital hence implicitly refers to the formula established in the *Estée*

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[159] Willett (n 93) 250. (i.e. through the above divisions and respective definitions in Article 2)

[160] Micklitz, 'Unfair Commercial Practices and Misleading Advertising' (n 103) 90.

[161] More specifically Recital 18 UCP Directive states that, '[i]t is appropriate to protect all consumers from unfair commercial practices; however the Court of Justice has found it necessary in adjudicating on advertising cases since the enactment of Directive 84/450/EEC to examine the effect on a notional, typical consumer. In line with the principle of proportionality, and to permit the effective application of the protections contained in it, this Directive takes as a benchmark the average consumer, who is reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice, but also contains provisions aimed at preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices. Where a commercial practice is specifically aimed at a particular group of consumers, such as children, it is desirable that the impact of the commercial practice be assessed from the perspective of the average member of that group. It is therefore appropriate to include in the list of practices which are in all circumstances unfair a provision which, without imposing an outright ban on advertising directed at children, protects them from direct exhortations to purchase. The average consumer test is not a statistical test. National courts and authorities will have to exercise their own faculty of judgement, having regard to

*Lauder (Lifting)* case.[162] In short, this case dealt with the legitimacy of German national legislation prohibiting the importation and marketing of a cosmetic product the name of which incorporated the term 'lifting' and hence, if this could mislead consumers and lead them to believe that the product possessed characteristics that it did not. In particular, the Court specified the need to take social, cultural or linguistic factors into account in the assessment of the appropriateness of a measure taken by a Member State to defend national non-market related values.[163]In particular, Recital 18 UCP Directive specifies that the average consumer test is not a statistical one and in keeping with this point it is significant to note that the Court of Justice has repeatedly illustrated how the average consumer is expected to behave in a variety of situations without any specific discussion of psychological, economic, sociological or mathematical points of reference.[164] Such case law emphasises the point that the average consumer test is a normative abstraction as to how consumers should behave as opposed to how they actually behave on the market.[165] Due to this aggregation of actual into expected behaviour the average consumer standard thus aims to set the standard of due care expected from consumers thereby excluding those who fail to act in their own interest. Inevitably therefore, even commercial practices that are 'fair' will lead to some 'collateral damage'.[166]

**[73]** MATERIAL HARM TO ECONOMIC INTERESTS AND NON-ECONOMIC CONSIDERATIONS – Given the above, it is important to re-emphasise that the scope of the UCP Directive is limited to commercial practices that are 'directly connected with the promotion, sale or supply of a product to consumers' (Article 2(d) UCP Directive) which may be deemed unfair only if they directly and materially harm consumers' economic interests (see Recitals 6-7 UCP Directive). Therefore, national measures regulating commercial practices that are not directly related to the influencing of consumer decision-making do not fall under the scope of the harmonised protections. As such, this could potentially imply that protections based on ethical and fundamental rights grounds (i.e. reflecting national taste and decency) fall outside the scope of the Directive.[167] This interpretation of the UCP Directive appears to be reflected somewhat in the European Commission's first guidance document on the Directive which indicated that '[…] national rules on commercial practices, including marketing and advertising, regulating the protection of human dignity, the prevention of sexual, racial and religious discrimination, or the depiction of nudity

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the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case.'

[162] *Case C-220/98, Estée Lauder Cosmetics GmbH & Co OHG v Lancaster Group GmbH, ECLI:EU:C:2000:8* 8.

[163] As noted by Micklitz this will ultimately mean that the Court of Justice will have to decide on the legitimacy of such national measures. Micklitz, 'Unfair Commercial Practices and Misleading Advertising' (n 103) 91.

[164] Trzaskowski, 'Behavioural Innovations in Marketing Law' (n 96) 309.

[165] ibid. With reference Rossella Incardona and Cristina Poncibò, 'The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution' (2007) 30 Journal of Consumer Policy 21.

[166] Jan Trzaskowski, 'Lawful Distortion of Consumers' Economic Behaviour - Collateral Damage Under the Unfair Commercial Practices Directive' (2016) 27 European Business Law Review 25.

[167] Stuyck, Terryn and Van Dyck (n 125) 123.

violence, and anti-social behaviour are not covered by the Directive.'[168] It should be noted however, that the exclusion remains unclear especially in relation to the correlation of such indirect considerations with the notion of professional diligence in the general clause given their potential to also be linked with the influencing of consumer economic decision-making.[169]

**[74]** NATIONAL INTERPRETATIONS AND FULL-HARMONISATION APPROACHES – Consequently, national law still plays an important role in the interpretation and application of the UCP Directive despite being a full-harmonisation measure. Indeed, as noted by Engelbrekt, a serious problem with the full harmonisation approach is that the Directive builds upon a general clause, which by its nature is open and flexible, thereby leaving a large margin of appreciation to the enforcement bodies and courts.[170] The principle-based provisions of the UCP Directive '[…] are meant to guarantee that the legislative framework is flexible enough to cope with new selling methods, products and marketing techniques.'[171] There is therefore, a sense of inevitability about the divergences given that its application is context dependent and tied to the circumstances of each case. To illustrate this potential for interpretative deviations, although the UCP Directive harmonises the average consumer test as the guide to the application of the Directive's provisions in line with the test established by the Court of Justice[172] there may be deviations in the application of this standard as it can be interpreted as being partially bound by culture.[173] This point is reflected in Recital 18 UCP Directive where the need to take 'social, cultural and linguistic factors' into account is specified and where it is stated that National Courts and authorities '[…] will have to exercise their own faculty of judgement, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case.'

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[168] 'Commission Staff Working Document Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices' SEC (2009) 1666, 20.' <http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf> accessed 3 August 2017.

[169] See Jules Stuyck, 'The Court of Justice and the Unfair Commercial Practices Directive' (2015) 52 Common Market Law Review 721.

[170] Antonina Bakardjieva Engelbrekt, 'The Impact of the UCP Directive on National Fair Trading Law and Institutions : Gradual Convergence or Deeper Fragmentation' in Ulf Bernitz and Caroline Heide-Jørgensen (eds), *Marketing and Advertising Law in a Process of Harmonisation* (Hart Publishing Ltd 2017) 124 <http://urn.kb.se/resolve?urn=urn:nbn:se:su:diva-140528> accessed 21 December 2018.

[171] European Commission, 'Commission Staff Working Document Guidance on the Implementation/Application of Directive 2005/29/EC On Unfair Commercial Practices Accompanying the Document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a Comprehensive Approach to Stimulating Cross-Border e-Commerce for Europe's Citizens and Businesses {COM(2016) 320' (n 90) para 1.

[172] i.e. where the average consumer is someone who is 'reasonably well-informed and reasonably observant and circumspect' see: *Case C-210/96, Gut Springenheide GmbH and Tusky v Oberkreisdirektor des Kreises Steinfurt, EU:C:1998:369*.

[173] Thomas Wilhelmsson, 'Harmonizing Unfair Commercial Practices Law: The Cultural and Social Dimensions' (2006) 44 Osgoode Hall LJ 461, 479.

**[75]** TASTE, DECENCY AND BLURRED COMPETENCE LINES – The question thus arises as to how far this need to take national considerations into account can stretch given that citizens of certain MSs have traditionally experienced a higher level of protection than in others. Here reference can be made to countries where there has been a higher consumer standard test applied (i.e. the 'credulous' consumer).[174] In this regard Wilhelmsson notes that,

> '[t]he need to take into account social, cultural, and linguistic factors in the application of the Directive arises in several contexts. One can ask to what extent the information needs of consumers are culturally relative. How is the relation between information, emotional assessments, and legitimate commercial exaggeration connected to national cultural patterns and cultural codes for how communication is understood in different societies? In what way is the impact of information on consumers' likely transactional decisions related to national habits and expectations? Is the question of whether information should be considered ambiguous at least partially related to cultural predispositions?'[175]

Importantly, aside from this more interpretative room from manoeuvre and, as noted above, the UCP Directive seemingly excludes matters of national 'taste and decency' from its scope. More specifically, Recital 7 UCP Directive provides *inter alia* that the Directive, '[…] does not address legal requirements related to taste and decency which vary widely among the Member States.' However, despite this delineation between matters of 'taste and decency' and rules stemming from a desire to protect consumers, the dividing lines may often be blurred.[176] Although certain rules are clearly outside the scope of the UCP Directive,[177] because the Directive has been interpreted in an expansive manner by the Court of Justice,[178] the potential for grey areas arises.[179]

**[76]** DUALIST PURPOSES AND THE HARMONISED STANDARD – To clarify, the Directive also applies to provisions having dualist objectives provided consumer protection is one of these policy goals. As outlined by Stuyck, the Court of Justice has repeatedly emphasised that legislation with a mixed purpose, such as consumer protection and the protection of businesses against unfair commercial practices or consumer protection and the plurality of the press, falls within the harmonised scope of the Directive.[180] This case law is indicative of the difficulties experienced by some MSs in implementing the UCP Directive in their national legal systems.[181] In commenting on these developments, Engelbrekt

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[174] ibid.
[175] ibid.
[176] ibid 480–481.
[177] See for instance: *Case C-483/12, Pelckmans Turnhout, EU:C:2014:304* 304.
[178] See: *Joined cases C-261/07 and C-299/07, VTB-VAB NV v Total Belgium NV and Galatea BVBA v Sanoma Magazines Belgium NV ECLI:EU:C:2009:244* (n 94); *Case C-304/08, Plus Warengesellschaft, ECLI:EU:C:2010:12* (n 97).
[179] Bakardjieva Engelbrekt (n 170) 123.
[180] Stuyck (n 169) 729–732.
[181] Here it should be noted that there we three cases where the Court found a failure to implement namely: *Case C-421/12, European Commission v Kingdom of Belgium, ECLI:EU:C:2014:2064*; *Case C-321/08, Commission v Kingdom of Spain, ECLI:EU:C:2009:265*; *Case C-282/08, Commission v Luxembourg, ECLI:EU:C:2009:55* 00013.

observes that although the European Commission has laboured over the precise wording of the national implementations and their consistency with the UCP Directive, divergences in the interpretation of the terms of the Directive are perhaps the greater threat to the maximum harmonisation goal.[182] In this regard, the author highlights the reference to 'professional diligence' in the general clause in particular in that due to the lack of a uniform standard of professional diligence at the EU level the effect of this provision appears to allow for a national, European or international standard to be used as the benchmark – thereby leading to interpretative divergences.[183] Such a latitude for national variation also appears to be reflected in the case law. Indeed, as noted by Trzaskowski, the CJEU has left the assessment of key interpretative issues such as the application of professional diligence, the requirement for sufficient information to consumers, and the analysis of whether national law pursues consumer protection objectives to the national courts and while becoming clearer in its guidance, the Court still seems reluctant to exclude this role for national judges.[184]

### 2.2.2 EMOTION VERSUS RATIONALITY – PUFFERY AND NON-ECONOMIC VALUES

**[77]** FULLY INFORMED DECISIONS AND 'MERE PUFFING' – The analysis in the previous section has highlighted that the protections provided in EU law focus largely on the identification of the commercial content and hence, the ability of the consumer to make an 'informed decision' based on their preferences or values. This reflects the point that the regulation of advertising and marketing essentially focuses on the availability of truthful information with the role of the law to essentially ensure the consumer's *ability* to make efficient choices thus explaining the focus on identification and the information paradigm (i.e. not that they actually make rational choices in practice thus in line with the consumer's right to self-determination).[185] Advertising however, will always be selective in terms of the information conveyed to the consumer and it is neither practical nor realistic to suggest that *all* information necessary to make a fully informed decision can be supplied in commercial communications. Aside from this point, it is also important to note that this information often may not be entirely accurate. Indeed, commercial operators are not always entirely truthful when they advertise and this reflects the point that advertising and marketing is an industry built on exaggeration both in terms of the claims as to quality and also the positive aspects of a product or service.[186] Such practices can sometimes lead to consumers acting without accurate information and lead to the purchasing of products

[182] Bakardjieva Engelbrekt (n 170) 134–135.
[183] ibid 135.
[184] Trzaskowski, 'Behavioural Innovations in Marketing Law' (n 96) 305.
[185] ibid 298.
[186] James Nehf, 'Misleading and Unfair Advertising' in Geraint Howells, Iain Ramsay and Thomas Wilhelmsson (eds), *Handbook of Research on International Consumer Law, Second Edition* (Edward Elgar Publishing 2018) 90–91.

or services which do not correlate to their preferences thereby resulting in buyer's remorse and inefficient market transactions.[187]

**[78]** PUFFING AND MISLEADING PRACTICE PROTECTIONS – At first glance such practices appear to fly in the face of Article 6(1) UCP Directive on misleading actions referred to above. This provision states *inter alia* that, '[a] commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful […]'. However, as noted by the European Commission in their guidance document, the Directive is based on the notion that prohibiting representations that '[…] might deceive only a very credulous, naïve or cursory consumer (e.g. 'puffery') would be disproportionate and create an unjustified barrier to trade.'[188] The legitimacy of such techniques also appears to align with the reference to professional diligence as such practices are in conformity with custom and usage.[189] Support for this point can be found in Article 5(3) UCP Directive which (as mentioned above) provides that consumers who are particularly vulnerable must be afforded a higher degree of protection. This provision goes on to indicate that the need for higher levels of protection for vulnerable consumers '[…] is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally.' Precisely determining the unfairness of commercial practices is therefore challenging as to put it simply, advertising is designed to be persuasive by its very nature. As will be described in this section, this point reflects the fact that traditionally the law has ignored the role of emotion in decision-making. Indeed, as noted by Maloney the law has traditionally worked from the perspective that these notions 'belong to separate spheres of human existence; the sphere of law admits only of reason; and vigilant policing is required to keep emotion from creeping in where it does not belong.'[190] This section aims to clarify this statement by further elucidating the role of emotion in the protections provided by EU law considering contemporary research which aims to more accurately plot consumer decision-making.

### *A. EMOTIONS, RATIONALITY AND THE AVERAGE CONSUMER*

**[79]** PUFFS AND THE OBJECTIVE AND SUBJECTIVE ELEMENTS – Plotting the point at which a commercial practice becomes manipulative and is likely to distort the market behaviour of consumers and hence, determining standards specific enough to be justiciable but flexible enough to adapt to evolving techniques and technologies, is quite obviously challenging.[191] This is further complicated by the fact that advertising has a clear cultural dimension with strong

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[187] ibid.

[188] European Commission, 'Commission Staff Working Document Guidance on the Implementation/Application of Directive 2005/29/EC On Unfair Commercial Practices Accompanying the Document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a Comprehensive Approach to Stimulating Cross-Border e-Commerce for Europe's Citizens and Businesses {COM(2016) 320' (n 90) 42.

[189] Trzaskowski, 'Behavioural Innovations in Marketing Law' (n 96) 298.

[190] Terry A Maroney, 'Law and Emotion: A Proposed Taxonomy of an Emerging Field' (2006) 30 Law and Human Behavior 119.

[191] Nehf (n 186) 91.

empirical evidence illustrating that consumers from different countries and regions respond differently to the same tactics and have varying levels of trust towards the same commercial communications.[192] As a consequence, delineating mere 'puffery' (i.e. the use of exaggerated statements) from misleading commercial practices has a clear cultural dimension with the acceptability of such persuasive techniques largely tied to national perceptions and attitudes. This reflects the fact that EU consumer protection law is very much tied to the supposed rationality of the consumer and the fact that the assessment of the legitimacy of a specific 'sales puff' may often hang on whether it relates to the objective or subjective elements of the communication. Puffs are not supposed to be taken literally by consumers and exaggeration of the objective material information should be avoided.[193] Factual determinations of the accuracy of objective claims may therefore, govern the legitimacy of the puff which in turn may relate to whether the claim can be categorised as an opinion or a fact – as opinions will often be difficult to challenge.[194]

**[80]** LAWFUL VERSUS UNLAWFUL EXPRESSION AND RATIONALITY – In practice however, it should be acknowledged that representations about the objective or factual qualities of a product or service can also be made implicitly or even by omitting certain details – thereby rendering them more difficult to challenge. Although the UCP Directive for example certainly caters for both misleading actions and omissions, finding implicit representations or representations by omission unfair is certainly more difficult from a practical perspective as omissions may not be deliberate.[195] Hence, a key determination in this regard relates to whether the information in question is material for the consumer to make an informed and undistorted decision. As specified above, under Article 2(e) UCP Directive the distortion of market behaviour more specifically relates to the appreciable impairment of the consumer's economic decision-making ability. The unfairness protections under the UCP Directive hence, seemingly have an objective nature as reflected by the 'rationality' assumption imbued in the framework and the average consumer test more specifically. But what does this mean for emotional appeal and emotion monetisation given the emergence of emotional AI?

**[81]** RATIONAL CHOICE THEORY AND PUFFERY – Simply put, it appears that this subjective-objective/material information-subjective element division inherently assumes the irrationality of 'emotionally' driven decisions and that if provided with the correct objective information consumers will make 'rational' choices. Hence, and as noted by Leiser, rational choice describes both the normative standard and an empirical model of

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[192] See: Marieke de Mooij, *Consumer Behavior and Culture: Consequences for Global Marketing and Advertising* (SAGE 2010). As referred to by Durovic and Micklitz (n 114) 26.

[193] As described by Durovic and Micklitz, '[a]n example would be a baker advertising his product as 'the tastiest pie in the world'. Taste is subjective; therefore it is not possible to prove that such a statement is correct or incorrect. As the consumer is aware of the exaggeration, such advertising should typically be permitted. On the contrary, advertising the same pie as 'the cheapest pie in town' is problematic. Price is an objective category; therefore it can be tested whether the statement is true or not. Such an advertisement might therefore be illegal.' Durovic and Micklitz (n 114) 27.

[194] Nehf (n 186) 92.

[195] ibid 93.

behaviour being essentially founded on the premise that when provided with clear information individuals make optimal decisions.[196] The appeal of rational choice theory is its simplicity in that, by holding that individuals make decisions which maximise their well-being, policy makers should only intervene to counteract a market failure.[197] Within this assumption there are two underlying claims: first, that individuals make decisions accurately for the most part (i.e. taking into account the amount of information they have) by weighing the probability of their own satisfaction or well-being and second, that individuals choose to maximise their own utility and arrange their lives to satisfy these desires to the greatest extent possible.[198] Accordingly, allowing for the classification of certain persuasive representations as puffery reveals an inherent assumption regarding the model of consumption envisaged in the framework. More specifically, implicitly it reveals that the framework assumes that consumers make decisions based on information revealed by the commercial communications. As noted by Hoffman,

> '[t]he "puffery defense" functions to draw a line between lawful and unlawful speech, based on legal authorities' assumptions about the rationality of consumption. To the extent that regulators and courts believe that some speech produced consumption that could not possibly have been "bad" (consumers could not have relied on the speech, or it implied no false facts), the law is more likely to label that speech "puffery" and immunize it. By contrast, if the speech could produce "bad" consumption, then the puffery defense will fail. Thus, the defense is an implicit indication of what legal authorities perceive as the motivation behind economic transactions.'[199]

Although, in his analysis Hoffman is referring to a US law context, the point retains its relevance as there appears to be same objective focus evident in the UCP Directive through the assumption that matters of taste, decency and morality are not supposed to influence decisions[200] (i.e. despite their capacity to evoke strong emotional reactions and be subject to prohibitions). As alluded to above however, despite the full harmonisation effect of the UCP Directive, the principle-based approach evident in the provisions has led to divergences of implementation and application of the Directive at the national level. Such concerns do not emerge in the context of the AVMS Directive given its minimum harmonisation approach and the role of the national legislator in defining the standards of protection.

**[82]** NON-ECONOMIC VALUES AND POSITIONING EMOTION – Hence, evoking emotional responses with violent scenes or images for instance, will have to rely on the cultural acceptance of such methods in the specific MS and therefore, the societal perception from a taste and decency perspective.[201] This potential for deviation through national cultural disparities and the

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[196] Leiser (n 13) 191.
[197] David J Arkush, 'Situating Emotion: A Critical Realist View of Emotion and Nonconscious Cognitive Processes for Law and Legal Theory' [2008] BYU L. Rev. 1275, 1331.
[198] Leiser (n 13) 194.
[199] David A Hoffman, 'The Best Puffery Article Ever' (2005) 91 Iowa L. Rev. 1395, 104.104
[200] Nehf (n 186) 95.
[201] Wilhelmsson (n 173) 480–481.

exclusion of such matters from the scope of the harmonised protections provided by the UCP Directive is also illustrated by the contrast provided through the inclusion of references to the need to protect human dignity in the minimum harmonisation AVMS Directive. To clarify, it is suggested that the references to human dignity in the AVMS Directive are illustrative of a broader objective of setting minimum harmonisation standards for the protection of taste and decency at the *supra*-national level while at the same time allowing for flexibility. A similar point can be made regarding the inclusion of rules in the ICC Code on subjective elements of protection. The most significant of the rules with a non-economic character in the Code is the obligation to respect human dignity and the prohibition against discrimination contained in Article 2 (*Social Responsibility*). However, this provision also states that marketing communications should not, (1) unjustifiably 'play on fear or exploit misfortune or suffering'; (2) 'appear to condone or incite violent, unlawful or anti-social behaviour and; (3) 'play on superstition'. In addition, Article 3 (*Decency*) further provides that '[m]arketing communications should not contain statements or audio or visual treatments which offend standards of decency currently prevailing in the country and culture concerned.' Aside from these provisions of more general application, the Code also specifies certain self-regulatory requirements protecting children from emotional representations. Although a thorough examination of these rules is outside the scope of this thesis,[202] reference here for instance can be made to:

1. Article 18.2(2) (*Inexperience and credulity of children*) – Although the use of fantasy is permissible in marketing towards children '[…] it should not make it difficult for them to distinguish between reality and fantasy'; and,
2. Article 18.4 (*Social values*) – 'Marketing communications should not suggest that possession or use of the promoted product will give a child or teen physical, psychological or social advantages over other children or teens, or that not possessing the product will have the opposite effect.'

As such, these self-regulatory rules further illustrate the potential impact of cultural considerations tied to the emotional appeal of commercial communications. In addition, the contrast between the child specific provisions and the provisions directed towards the protection of consumers at large further illustrate the reliance on individual rationality due to the focus on the '[i]nexperience and credulity of children'. Importantly however, and as mentioned above, the ICC Code does not have any power to require national self-regulatory organisations to implement the requirements in a uniform manner. In fact, the implementation of the ICC Code (and indeed its previous editions) has been influenced by national considerations such as differences in market structures and cultural, legal and commercial traditions.[203] In saying this however, the rules seem to broadly reflect the requirements provided for in the AVMS Directive as described above.

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[202] For a more thorough analysis see: Verdoodt (n 49).

[203] In commenting on these differences Verbruggen suggests that broadly speaking there are three categories of approach namely; (1) systems such as Sweden and Finland which apply the ICC codes; (2) those that apply the ICC standard as a general reference document while at the same time adopting

**[83]** NATIONAL STANDARDS AND THE AVERAGE CONSUMER – It is therefore clear that when it comes to the subjective elements one must refer to the national level to ascertain the unfairness of a commercial communication. The effect of commercial communications on the non-economic values of consumers plays an important role in determining their appropriateness, with certain communications capable of being found perfectly acceptable in one jurisdiction but impermissible in another.[204] In this regard, it is interesting to refer in particular to Wihelmson's taxonomy of possible national variations which takes into account differences between countries with respect to trust, understandings of rationality patterns, decision-making behaviour and values and preferences, all of which may have an impact on how strictly commercial communications should be regulated to cater for social, cultural and/or linguistic factors.[205] For the purposes of this thesis, it is important to emphasise again that such cultural considerations have a clear impact on the acceptability of the subjective emotional commercial message. Indeed, as noted by Wilhelmsson, '[m]ost certainly, the "rational" and the "affective" never appear in pure forms in consumer behaviour, but rather interact with each other. The interaction between them varies according to cultural predispositions.'[206]

**[84]** CULTURAL VARIATION AND THE AVERAGE CONSUMER – Aside from pointing to the cultural variations in how consumers respond to affective communications, thereby justifying the nuancing of the application of the average consumer standard in the national setting, this observation also highlights the continuous interaction between the 'rational' and 'affective'. This reflects the point that relying on the consumer's capacity to act rationally is questionable given the emergence of a wealth of research illustrating the often irrational nature of individual decision-making.[207] Indeed, an ongoing point of contention in EU law is the enduring relevance of the 'reasonable' or 'credulous' citizen-consumer given the systematic nature of revelations in research regarding behaviour, the ability of

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additional rules to cater for specific products (e.g. alcohol) or topics (e.g. food advertising to children) for example France and Belgium; and (3) regimes such as the UK and Ireland (which represent the majority) that have used the ICC Codes either explicitly or implicitly as a guideline but have adopted their own wording and structure and have gone beyond the standard expressed in the ICC Code. Paul Verbruggen, 'Enforcement of Transnational Private Regulation of Advertising Practices: Decentralization, Mechanisms and Procedural Fairness' in Fabrizio Cafaggi (ed), *Enforcement of Transnational Regulation: Ensuring compliance in a global world* (Edward Elgar Publishing 2012) 304..

[204] Durovic and Micklitz (n 114) 26–27.26-27.

[205] See generally: Wilhelmsson (n 173).

[206] ibid 489.

[207] The Nobel Prize winning economists Akerlof and Shiller have analogised irrational actions as monkey-on-our-shoulder inspired human decision making which can be, and is, commercially harnessed or phished. The authors observe in reference to Smith's invisible hand that, '[w]hen there are completely free markets, there is not only freedom to choose; there is also freedom to phish. It will still be true, following Adam Smith, that the equilibrium will be optimal. But it will be an equilibrium that is optimal, not in terms of what we really want; but an equilibrium that is optimal, instead, in terms of our monkey-on-our-shoulder tastes. And that, for ourselves… will lead to manifold problems.' The development of commercial communications has, to a large extent, focused on appealing to these monkeys-on-our-shoulders. See: Akerlof and Shiller (n 10) 5–6. Phished in this context should be interpreted broadly and not within the traditional meaning in terms of the extraction of sensitive information by cyber criminals.

commercial entities to exploit such insights and hence, the capacity (or lack thereof) of consumers to act rationally and in their own best interests.[208] For the purposes of this thesis, it is significant to note therefore that the presumption of rationality and the focus on information in the consumer law *aquis* fail to take account of the fact that (1) emotions are an important influence on decision-making and; (2) practically speaking people have neither the time nor the cognitive capacity to be truly informed about every decision they make daily. Challenges to the rationality-paradigm are far from new however, with Herbert Simon introducing the notion of bounded rationality or that individuals have a limited number of solutions to any one problem and that they then accept the first satisfactory one in 1957.[209] Inspired by Simon's work the field of behavioural economics has emerged as a means of challenging rational choice theory. The next section will briefly summarise this literature as analysis in legal academic literature more readily categorises challenges to the existing rationality-based paradigm based on behavioural economics insights in particular.[210]

### *B. EMOTIONS AND 'AFFECTED' CONSUMER DECISION-MAKING*

**[85]** BEHAVIOURAL ECONOMICS – Behavioural economics scholarship challenges the rationality assumption inherent to rational choice theory and aims instead to explore the consequences of actual rather than hypothetical human behaviour. As such, behavioural economics tests 'the central ideas of utility maximization, stable preferences, rational expectations, and optimal processing of information.'[211] Given the strong link between rationality and the autonomy of individual decision-making, any such deviations from standard rational approaches are significant in terms of the continuing relevance of such protections. In essence therefore, the literature contests the notion of unbounded rationality, will-power and self-interest.[212] The scholarship also opposes two other neo-classical assumptions namely, that (1) individuals learn from their mistakes inevitably resulting in a market learning effect; and (2) only rational actors will survive in the market hence, reducing irrationality.[213] In substantiating their criticism, proponents of behavioural economics have relied on research revealing a number of biases *via* experimental studies which contradict the underlying principles of the standard law and economics approach.[214] Indeed, behavioural economics research characterises deviations

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[208] Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (Hart 2012) 63.
[209] Herbert Simon, *Models of Man: Social and Rational- Mathematical Essays on Rational Human Behavior in a Social Setting* (1st edition, Wiley 1957). as referred to by Leiser (n 13) 195.
[210] Blumenthal (n 154).
[211] Christine Jolls, Cass R Sunstein and Richard H Thaler, 'A Behavioral Approach to Law and Economics' (1998) 50 Stanford Law Review 1471, 1476.
[212] ibid.
[213] Ramsay (n 208) 56.
[214] For example in terms of biases one can refer *inter alia* to the following biases: Fairness and behaviour (Colin Camerer and Richard H Thaler, 'Anomalies: Ultimatums, Dictators and Manners' (1995) 9 Journal of Economic Perspectives 209.); Loss aversion (Daniel Kahneman and Amos Tversky, 'Prospect Theory: An Analysis of Decision under Risk' (1979) 47 Econometrica 263.); Inability to predict experience utility

from rationality as a product of flawed decision-making and a consequence of biases or mental heuristics. Hence, the scholarship challenges the legitimacy of rational maximising behaviour (i.e. rational choice theory) at the root of the economic principles underlying the standard law and economics approach.[215] Importantly, as described by Leiser, it should be noted that there is some degree of division in the literature between those who see heuristics as purely deviations from rationality, and others who view them as potentially both helpful and unhelpful in decision-making.[216] Indeed, due to limitations of time, willpower, rationality heuristics may be positioned as necessary and efficient strategies to ignore certain information (rational ignorance).[217] Those authors who see heuristics as both positive and negative forces, advocate the studying of heuristic strategies to determine whether the outcome as opposed to the procedure was good with regulators needing to take the environment into account in order to determine if individual behaviour is biased or whether an unbiased mind is trying to align with the environment (i.e. so-called 'ecological rationality').[218] Finally, the literature has also proposed libertarian paternalism or 'nudging' to counter-act the mental heuristics and biases which give rise to irrational behaviour. Nudging as a concept owes its origins to a book written by Thaler and Sunstein in 2008.[219] In their analysis the authors offer a broad interpretation of the notion of a nudge and define it as '[…] any aspect of the choice architecture that alters people's behaviour in a predictable way without forbidding any options or significantly changing their economic incentives.'[220]

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(Daniel Kahneman, 'New Challenges to the Rationality Assumption' (1994) 150 Journal of Institutional and Theoretical Economics (JITE) / Zeitschrift für die gesamte Staatswissenschaft 18.) Overoptimism (Neil D Weinstein, 'Unrealistic Optimism about Future Life Events.' (1980) 39 Journal of Personality and Social Psychology 806.); Hindsight bias (Baruch Fischhoff, 'Hindsight Is Not Equal to Foresight: The Effect of Outcome Knowledge on Judgment under Uncertainty.' (1975) 1 Journal of Experimental Psychology: Human Perception and Performance 288.); Availability heuristic (Amos Tversky and Daniel Kahneman, 'Judgment under Uncertainty: Heuristics and Biases' (1974) 185 Science 1124.).

[215] Although less developed, similar concerns have also been raised in law and neuroscience theory more broadly. In short, law and neuroscience theory emerged as another challenge to the existing rational choice theory alongside behavioural law and economics and essentially aims to use the insights from neuroscientific research to gather a more accurate understanding of human reasoning and what it means for the law. In contrast to behavioural economics therefore which, as described above, aims to better understand economic behaviour with psychological explanations, neuroeconomics (i.e. more broadly neuroscience and the law) seeks to explain activity by examining brain activity with legal scholars applying the neuroscientific insights just like behavioural law and economics theorists. In brief, neuroeconomics research relies on the use of fMRI to scan the brains of people while they make economic decisions. Although it remains out of the scope of this thesis to delve further into the genesis and practical mapping of how and what extent these theories are reflected in current legal protections, it is important to note that practically speaking, behavioural law and economics literature in particular has gain a huge amount a popularity in analysing consumer decision-making and has, at least to a certain extent, influenced Court interpretations and EU policy making.

[216] Leiser (n 13) 200–201.

[217] Trzaskowski, 'Behavioural Innovations in Marketing Law' (n 96) 322.

[218] Leiser (n 13) 200–201.

[219] Richard H Thaler and Cass R Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (Yale University Press 2008).

[220] ibid 6.

**[86]** THE LEGITIMACY OF PUFFING – In light of this brief overview, it is interesting to refer to the objective-subjective division and legitimacy of puffing and the contrasting interpretations of rational choice and behavioural economics theorists *vis-à-vis* the rationality of consumers. For instance, in line with the traditional rational choice model, Richard Posner has argued that improvements in the level of education and the capacity of consumers to learn from repeated disappointments allow for the dilution of the significance of sales techniques such as puffing (i.e. the use of exaggerated claims to induce an emotional reaction).[221] In criticising this approach from a behavioural economics approach, Hoffman instead links the effectiveness of puffing to 'overconfidence bias' and optimism theory and notes that both the 'puffer' and the consumer suffer from congenial over-optimism.[222] In essence, Hoffman refers to the fact that the puffer may genuinely believe the puff and that the consumers' retrospective assessment of the product may be influenced in an optimistic light. As Hoffman concludes, this means that a failure to protect consumers against puffery may fail to prevent consumption-distorting behaviour.[223] This approach therefore, links the effectiveness of a puff to underlying cognitive biases. Perhaps a more creative justification of the positioning of puffing with the rational choice model has been offered by Eric Posner who claims that while in an emotional state a person still acts rationally, or rather internally consistently given the circumstances, thus resulting in temporary preferences, abilities and beliefs.[224] The author goes on to note that,

> '[…] agents anticipate their emotion states, and take actions in anticipation of them. This brings us to the matter of character. "Emotional disposition" refers to a person's tendency to feel an emotion, which itself is no doubt connected to genetic, cultural, and educational factors. An irascible person is more likely to become angry; a fearful person is more likely to become scared. People usually know their own emotional dispositions and can take steps to modify them or to avoid conditions that activate them.'[225]

However, Posner's approach appears to be somewhat at odds with empirical research on behaviour which has found that despite being able to predict emotion valence, individuals experience difficulty in accurately anticipating the intensity and duration of future moods (i.e. the *affective forecasting* bias).[226] Additionally, those in a specific emotional state often find it difficult to make accurate predictions about their future actions.[227]

**[87]** CONSUMPTION DISTORTING BEHAVIOUR AND BEHAVIOURAL ECONOMICS – The key take-away here therefore, is that although behavioural economics research recognises that people do not always act rationally, it remains the cornerstone of legal protection. Here reference can

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[221] Richard A Posner, *Regulation of Advertising by the FTC* (American Enterprise Institute for Public Policy Research 1973).
[222] Hoffman (n 199) 136–138.
[223] ibid 136.
[224] Eric A Posner, 'Law and the Emotions' (2001) 89 Georgetown Law Journal 1977.
[225] ibid 1982.
[226] ibid.
[227] Jeremy A Blumenthal, 'Law and the Emotions: The Problems of Affective Forecasting' (2005) 80 Ind. LJ 155, 2004.

be made to the work of Kahneman who differentiates between 'System 1 reasoning' and 'System 2 reasoning'. System 1 reasoning is 'fast, automatic, effortless, associative, and often emotionally charged' whereas System 2 reasoning is 'slower, serial, effortful, and deliberately controlled'.[228] Emotion is seen to pervade forms of heuristic System 1 reasoning with the literature suggesting, not only that this type of reasoning is less accurate than the calculative reasoning, but also that such reasoning can displace reflective thinking resulting in behaviour which deviates from what the individual in question would deem to be the best course of action if they were in a cold deliberative state.[229] To paraphrase, Hoffman therefore, a failure to protect consumers against System 1 style reasoning and thus emotionally driven decision-making may lead to consumption distorting behaviour. The significance of such behavioural insights has not been missed in a consumer law context at the policy making level with the European Parliament suggesting the allocation of funding to research projects with a specific focus on consumer behaviour to help design policies.[230] Moreover, the European Commission has repeatedly recognised the need to take behavioural sciences insights into account.[231] For instance, in its 2016 guidance document on the application of the UCP Directive the Commission emphasises that in the context of misleading commercial practices,

> '[i]nsights from behavioural economics show that not only the content of the information provided, but also the way the information is presented can have a significant impact on how consumers respond to it.
>
> For this reason, Article 6 explicitly covers situations where commercial practices are likely to deceive consumers 'in any way, including overall presentation' even if the information provided is factually correct.'[232]

Despite such moves however, the Court of Justice has not yet (at least explicitly) adopted behavioural sciences in its case law. In saying this, it should be noted that the Court has recognised that traders may aim to exploit psychological effects to persuade consumers

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[228] Daniel Kahneman, 'Maps of Bounded Rationality: Psychology for Behavioral Economics' (2003) 93 The American Economic Review 1449, 1451. as referred to by Dan M Kahan, 'Emotion in Risk Regulation: Competing Theories' in Sabine Roeser (ed), *Emotions and Risky Technologies* (Springer Netherlands 2010) 161–162. As noted by Sunstein, System 2 is therefore more deliberative relative to the more error prone System 1 which is based on heuristic reasoning. Cass Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge University Press 2009) 65. as referred to by Kahan 161–162.

[229] Kahan (n 228) 162.

[230] 'European Parliament Resolution of 15 November 2011 on a New Strategy for Consumer Policy (2011/2149(INI))' para 10 and 41.

[231] 'Commission Staff Working Document Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices' SEC (2009) 1666, 20.' (n 168); European Commission, 'Commission Staff Working Document Guidance on the Implementation/Application of Directive 2005/29/EC On Unfair Commercial Practices Accompanying the Document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a Comprehensive Approach to Stimulating Cross-Border e-Commerce for Europe's Citizens and Businesses {COM(2016) 320' (n 90).

[232] European Commission, 'Commission Staff Working Document Guidance on the Implementation/Application of Directive 2005/29/EC On Unfair Commercial Practices Accompanying the Document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a Comprehensive Approach to Stimulating Cross-Border e-Commerce for Europe's Citizens and Businesses {COM(2016) 320' (n 90) 59.

to make an irrational choice with reference to point 31 in Annex I to the UCP Directive which deals with giving consumers a false impression that they have won, will win or, by doing something, will win a prize.[233]

**[88]** A BEHAVIOURAL TURN? – Furthermore, in the *Teekanne* judgement[234] the Court revisited the average consumer standard and seems to have alleviated the emphasis on the information processing capabilities of consumers and hence the ability of the provision of information to correct false impressions. Although this judgement relates to the obligations under the Labelling Directive,[235] the conclusions have a broader impact on the notion of the average consumer and arguably better reflect the contemporary perspective in both literature and policy-making.[236] In its judgement the Court concluded that for a complete assessment of the effects on the consumer one must consider the 'overall labelling', thus representing a departure from the traditionally normative underpinnings of the notion of the average consumer and potentially catering for the real-world vulnerabilities of consumers.[237] More specifically, the Court emphasised 'the need to consider the words and depictions used as well as the location, size, colour, font, language, syntax and punctuation of the various elements on the […] packaging' and that even accurate information provided in the text of the label *may not* be capable of adequately correcting the misleading impression caused by the other items on the packaging.[238] Arguably, these developments reflect the acknowledgement of the need to protect consumers considering insights brought to the fore by behavioural science.[239]

**[89]** BEHAVIOUR AND TRADEMARKS – However, it is important to specify that it seems to have been the written information provided in the label itself (i.e. the ingredients list was misleading) which triggered the infringement despite the Court's acknowledgment of the

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[233] *Case C-428/11, Purely Creative and Others, ECLI:EU:C:2012:651* 651. as discussed by Trzaskowski, 'Behavioural Innovations in Marketing Law' (n 96) 323.

[234] *Case C-195/14, Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband eV v Teekanne GmbH & Co KG Request for a preliminary ruling from the Bundesgerichtshof, ECLI:EU:C:2015:361* 361.

[235] Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs OJ L 109, 29–42 29–42. Although this Directive has since been repealed by Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004 Text with EEA relevance OJ L 304, 18–63. because of the date of the dispute, the Court interpreted Directive 2000/13. However, in substance this had little effect.

[236] Hanna Schebesta and Kai P Purnhagen, 'The Behaviour of the Average Consumer: A Little Less Normativity and a Little More Reality in the Court's Case Law? Reflections on Teekanne' (2016) 41 European Law Review 590.

[237] ibid.

[238] *Case C-195/14, Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Teekanne GmbH & Co. KG. Request for a preliminary ruling from the Bundesgerichtshof, ECLI:EU:C:2015:361* (n 234) para 43.

[239] Trzaskowski, 'Behavioural Innovations in Marketing Law' (n 96) 323–324.

need to consider the packaging as a whole. The *Proctor & Gamble* case taken from the field of trademark law (i.e. which also relies on the average consumer standard) is another which could arguably illustrate a move towards the inclusion of behavioural insights. In this case the Court of Justice established that the average consumer's attention to goods or services is likely to vary depending on the product in question.[240] Trzaskowski argues that the focus on the average consumer's level of attention could also be relevant in the context of commercial practices as many of the choices consumers make in an advertising and marketing context are more emotional than rational with consumers spending little time actually reading the information provided.[241] Moreover, as per the Commission guidance there is certainly room to include behavioural insights in the interpretation of the UCP Directive's provisions. Despite the above however, and as noted by Trzaskowski, there is no evidence of such an inclusion in the interpretation of the Directive and the two cases described above may only be perceived as two small steps towards the Court recognising the importance of behavioural insights more generally.[242] But what does this all mean considering the emergence of emotional AI? If commercial operators can detect and target emotion what significance do these small behavioural developments have in terms of the legal protections?

**[90]** MARKET MANIPULATION THEORY – The role of emotion in decision-making and the commercial desire to harness emotion fundamentally challenges our capacity as individuals, to act autonomously given that the separation of rational thinking (or reason) from emotion is a core underlying presumption of modern legality. This is significant *vis-à-vis* emotion monetisation as there is little doubt that commercial entities are aware of the importance (and make use of) emotional influences on consumer behaviour[243] and it therefore seems natural that establishing a bias opens up the possibility of manipulation and thus its exploitation for commercial purposes.[244] The development of technology capable of detecting emotions in real-time, the tailoring of individualised affective appeals and hence, the capacity to personalise based on metrics other than relevance, all increase the potential effectiveness and reach of commercial campaigns. The harnessing of biases for commercial purposes has been analysed in the context of behavioural economics and is referred to as market manipulation. Hanson and Kysar introduced the market manipulation theory in three articles published almost twenty years ago.[245] The authors

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[240] *Case T-129/00, Procter & Gamble v OHMI, EU:T:2001:231* 231.
[241] Trzaskowski, 'Behavioural Innovations in Marketing Law' (n 96) 324.
[242] ibid 324–325.
[243] In this context on can refer to Maurits Kaptein, *Persuasion Profiling: How the Internet Knows What Makes You Tick* (Business Contact Publishers 2015).
[244] The economists Akerlof and Shiller analogised irrational actions as monkey-on-our-shoulder inspired human decision making which can be, and is, commercially harnessed or phished. Akerlof and Shiller (n 10) 5–6., Phished in this context should be interpreted broadly and not within the traditional meaning in terms of the extraction of sensitive information by cyber criminals.
[245] Jon D Hanson and Douglas A Kysar, 'Taking Behavioralism Seriously: The Problem of Market Manipulation' (1999) 74 NYUL Rev. 630; Jon D Hanson and Douglas A Kysar, 'Taking Behavioralism Seriously: Some Evidence of Market Manipulation' [1999] Harvard Law Review 1420; Jon D Hanson and

emphasised the key contention that commercial entities will respond to market incentives and manipulate consumer perceptions in the way which maximises profits.[246] This is significant in the context of emotion monetisation as there is little doubt that commercial entities are aware of the importance (and make use of) emotional influences on consumer behaviour,[247] as illustrated by the recent discussion regarding the legitimacy of so-called dark-patterns (see Chapter 6). It therefore seems natural that establishing a bias opens up the possibility of manipulation and thus its exploitation for commercial purposes. It is safe to say that such practices at least potentially pose the substantial risk of distorting the economic behaviour of the average consumer. In this vein, one must wonder for instance whether the requirement to satisfy the professional diligence element in the UCP Directive could be interpreted as to include a requirement for commercial entities not to use commercial practices based on behavioural insights that are known to distort the economic behaviour of consumers and, more generally, an expectation in terms of knowledge as to how consumers are likely to react to certain practices in general.[248]

**[91]** UNFAIR BIAS HARNESSING – In line with the analysis above, this points again to the need to consider national perspectives and, due to the reference to professional diligence, the role of national self-regulatory codes. For example, an interesting point of reference here is a recent decision from the Advertising Standards Association (ASA) in the United Kingdom involving a television advertisement aiming to sell cosmetic surgery as a service.[249] Seventeen complainants, including the Mental Health Foundation, who felt the advertisement exploited young women's insecurities about their bodies, trivialised breast enhancement surgery and portrayed it as aspirational, challenged the advertisement with the ASA finding that the advertisement was irresponsible and harmful.[250] Such a decision points to at least the potential for tactics which aim to exploit known consumer

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Douglas A Kysar, 'Taking Behavioralism Seriously: A Response to Market Manipulation' (2000) 6 Roger Williams UL Rev. 259. See also 'digital' market manipulation: Calo, 'Digital Market Manipulation' (n 34).

[246] Market manipulation theory also renders much of the criticisms positioned against the discovery of bias moot. More specifically, the so-called 'citation bias', where behavioural law and economics scholars have been accused of disproportionately weighing biases relative to the instances in which individuals act in accordance with what is deemed rational, becomes somewhat irrelevant. Instead it is replaced by what Hanson and Kysar refer to as exploitation bias (i.e. the tendency to exploit biases that result 'in increased sales, higher profits and decreased perceptions of risk.'): Hanson and Kysar, 'Taking Behavioralism Seriously' (n 245) 743.

[247] See: Kaptein (n 243).

[248] Trzaskowski, 'Behavioural Innovations in Marketing Law' (n 96) 314.

[249] Advertising Standards Authority | Committee of Advertising Practice, 'MYA Cosmetic Surgery Ltd' <https://www.asa.org.uk/rulings/mya-cosmetic-surgery-ltd-a18-459775.html> accessed 24 March 2019.

[250] ibid. 'considered that the ad went beyond presenting the lifestyle of women who had breast enlargement in a positive light and implied that the women were only able to enjoy the aspirational lifestyle shown, and to be happy with their bodies, because they had undergone that surgery. [The ASA] also considered that the focus on the aspirational lifestyle and the tone of the ad, in combination with the statement "join them and thousands more" – which suggested that it was common to undergo breast enlargement and acted as an explicit call to action – had the effect of trivialising the decision to undergo that surgery.

weaknesses to be found counter to the requirements contained EU law.[251] Outside of such clear examples however, it must be understood that the emotional appeal of an advertisement or marketing campaign is often linked to a particular lifestyle image, with the communication aimed at selling a story which resonates with audiences thereby evoking an emotional connection.[252] This reflects the fact that emotions may not always be negative (irrational) forces but that they also play a more subtle but important role in consumer decision-making.

**[92]** ENTER EMOTIONAL AI – Indeed, in this regard it can be questioned whether the emergence of emotional AI raises the stakes somewhat given that rational choice theory appears to work from the assumption that generally people make decisions in an emotionless state. Indeed, even Eric Posner's more creative approach to justifying the role of emotions in rational choice theory seems to assume the existence of this emotionless state and that it is merely the onset of an emotion which triggers the resulting behaviour. In light of the interdisciplinary work on the role of emotion in decision-making however, this assumption seems to be quite clearly flawed with strong evidence suggesting that emotion plays a key role in all decision-making. Indeed, as noted by Lerner *et al.*, '[s]uch evidence, along with the related lines of work, have contributed to the conclusion that emotion is not epiphenomenal and can influence cognition and behaviour in powerful ways.'[253] Interestingly, it appears that the reverse is also true with research showing that cognitive processes can play a modulating role on emotions. Advancements in understanding the role and importance of emotion have only truly developed from the 1980s onwards and are also a more recent phenomenon. Before this time it was thought that emotions were just a consequence of our thoughts and thus that, '[…] if we understood what we were thinking we understood everything.'[254] However, in psychology researchers such as Zajonc thrust emotion to the forefront by arguing that emotion has primacy over and can work independent of cognition.[255] Furthermore, important work in the field of neuroscience led to the conclusion that emotions are essential for decision-making.[256] Indeed, as noted by Phelps *et al.* this contrasts with the traditional view that the 'limbic system' drives emotion and that, '[t]hus affective neuroscientists and neuroanatomists have suggested that the limbic system concept is no

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[251] The ASA code is developed to respect the UCP Directive in particular see: Advertising Standards Authority | Committee of Advertising Practice, 'Self-Regulation and Co-Regulation' <https://www.asa.org.uk/about-asa-and-cap/about-regulation/self-regulation-and-co-regulation.html> accessed 18 March 2019.

[252] Trzaskowski, 'Behavioural Innovations in Marketing Law' (n 96) 318.

[253] Lerner and others (n 15) 3.

[254] See: Robert Heath and Agnes Nairn, 'Measuring Affective Advertising: Implications of Low Attention Processing on Recall' (2005) 45 Journal of Advertising Research 269.

[255] Robert B Zajonc, 'Feeling and Thinking: Preferences Need No Inferences.' (1980) 35 American Psychologist 151.

[256] Antonio R Damasio, *Descartes' Error: Emotion, Reason and the Human Brain* (18. Druck, Quill 2004); Joseph Le Doux, *The Emotional Brain: The Mysterious Underpinnings of Emotional Life* (Simon & Schuster 1996). Moreover Schacter has shown that this can show that this can an effect even when we are not paying attention and that this can interact with our emotional memory stores, see: Daniel L. Schacter, *Searching For Memory: The Brain, the Mind, and the Past* (Basic Books 1996).

longer useful and should be abandoned to facilitate the development of a more complete and detailed understanding of the representation of emotion in the brain.'[257] Hence, it appears uncontroversial to state that conventional understanding does not view emotion and cognition as separate systems.

**[93]** INTERDISCIPLINARY INSIGHTS ON EMOTION – In reviewing the literature supporting this contention, Arkush observes that '[m]ounting evidence shows that emotions can operate independently of and precede, conscious or reasoned thought and that non-conscious processing is vital to behavior.'[258] Building on this, research has also explored how such non-conscious affective processes influence judgements and decision-making. Indeed, the analysis of the effect of emotion on decision-making has received an increasing amount of attention over the last 20 years in decision-making theory.[259] In their critical analysis of the field, Lerner *et al.* summarise by stating that '[p]ut succinctly, emotion and decision making go hand in hand' with 'many psychological scientists now assum[ing] that emotions are, for better or worse, the dominant driver of most meaningful decisions in life'.[260] Although a more detailed analysis of the relevant research is outside the substantive scope of this thesis, it is important to highlight some key takeaways in order to more accurately understand the effects of emotions on decision-making. As categorised by Lerner *et al.* emotions research has found that emotion effects on decision-making 'can take the form of integral or incidental influences; incidental emotions often produce influences that are unwanted and nonconscious.'[261] Integral emotions here should be understood as emotions arising from the choice at hand whereas incidental emotions refer to emotions that carry over from one situation to the next despite the fact that they should remain separate normatively speaking.[262] In relation to the latter of these two, it has been suggested that mood[263] (as distinct from emotion) or even macro level phenomenon (such as ambient weather[264] or sporting results[265]) can result in an incidental emotional bias for unconnected decisions. It is therefore unsurprising that researchers have categorised a wide variety of mental states as emotional in the literature analysing the effects of emotions on judgements and decision making.[266] Indeed, as summarised by Lerner *et al.* in the supplementary text attached to their review of existing literature, emotion research has included an analysis,

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[257] Elizabeth A Phelps, Karolina M Lempert and Peter Sokol-Hessner, 'Emotion and Decision Making: Multiple Modulatory Neural Circuits' (2014) 37 Annual Review of Neuroscience 263, 265.
[258] Arkush (n 197) 1297.
[259] Jennifer S Lerner and others, 'Emotion and Decision Making' (2015) 66 Annual Review of Psychology 799, 800–801.
[260] ibid 801.
[261] ibid 816.
[262] ibid 802–804.
[263] Phelps, Lempert and Sokol-Hessner (n 257) 271–272.
[264] Norbert Schwarz and Gerald Clore, 'Mood, Misattribution, and Judgments of Well-Being: Informative and Directive Functions of Affective States' (1983) 45 Journal of Personality and Social Psychology 513.
[265] Alex Edmans, Diego Garcia and Øyvind Norli, 'Sports Sentiment and Stock Returns' (2007) 62 The Journal of Finance 1967.
[266] Lerner and others (n 15) 2.

> '[…] from fleeting, momentary reactions […] to protracted, durable moods that last a lifetime […]; from states characterized solely by subjective feelings to those characterized by complex coordination of physiological, hormonal, and expressive activity […]; and from evaluations that involve simple positive and negative associations to those that involve more complex affective relationships [….] '[267]

Putting a pin on what is meant by emotion is thus difficult and accurately understanding and classifying the relationship between the various mental states mentioned above is of key importance in this regard. As noted by Phelps *et al.*, 'the term emotion refers to a discrete reaction to an internal or external event that can yield a range of synchronized responses, including physiological responses (e.g., flight or fight), facial and/or bodily expressions, subjective feelings, and action tendencies, such as approach or avoid.'[268] This classification of emotion creates a clear distinction between emotions and feelings. Indeed, according to the authors an emotion can give rise to subjective feelings rather than them being viewed as synonymous. Hence, this appears to reflect the conventional distinction between emotions and feelings as recognised by researchers such as Damasio who have illustrated that feelings emerge when individuals become aware of their emotions thereby facilitating, but also building upon, conscious attention and reflection on emotions.[269] Emotions must also be clearly delineated from mood which, according to the prevalent opinion in the psychology and neuroscience literature, is characterised by subjective feelings which persists in duration without necessarily being linked to a specific triggering event.[270] As such, it is important to mention that across both the psychology and neuroscience literature the term 'affect' is generally used as the superordinate umbrella term for a collection of component processes which include emotions, moods and subjective feelings.[271]

**[94]** AFFECTIVE IMPACT – Therefore, it is 'affect' that concerns us here (i.e. whether that be emotions, moods and/or subjective feelings) and its impact on the decision-making of consumers even if the word emotion is used herein. The development of technology capable of detecting emotions in real-time, the tailoring of individualised affective appeals and, the capacity to personalise based on metrics other than relevance, therefore all increase the potential effectiveness and reach of commercial campaigns. Indeed, it has also been suggested that emotions shape decisions in two important ways. First, different emotions are associated with different patterns of cognitive appraisals rendering the effect of emotions (for instance of anger or surprise) predictable in terms of the decision-making outcome.[272] Second, emotions influence how individuals process information and

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[267] ibid.
[268] Phelps, Lempert and Sokol-Hessner (n 257) 266.
[269] As described by Mireille Hildebrandt, *Smart Technologies and the End(s) of Law: Novel Entanglements of Law and Technology* (2015) 69–72.
[270] Although differentiating between these categories is interesting it is outside the scope of this particular research and also unnecessary given that our aim here is to study the effect of such mental states on decision making more generally.
[271] See generally: Lerner and others (n 259); Phelps, Lempert and Sokol-Hessner (n 257).
[272] Lerner and others (n 259) 804–806.

affects whether they do so superficially or in detail.[273] This 'affect infusion' bias refers to the fact that in general those in a positive affective state are more easily persuaded than those in a negative one as they tend to rely on heuristics.[274] Even though emotion and emotion detection technologies have been used in market research for some time (thereby informing the development of marketing campaigns and products and services), their expansion out of laboratory conditions to everyday and direct consumer-facing interactions therefore, raises the stakes considerably due to the potential for real-time detection and personalisation. This is compounded by the fact that EU law is weighted towards the protection of the verifiable propositional content of commercial messages whereas interdisciplinary research is increasingly recognising the persuasive effect of the unverifiable content (i.e. images, music)[275] and has long recognised that people interact with computers as social agents and not just tools.[276] These developments could arguably raise key concerns regarding the continuing reliance on the rationality paradigm within the consumer protections and hence, consumer self-determination and individual autonomy as core underlying principles of the legal protections.

## CONCLUSION

**[95]** EMOTIONS AND STANDARD PRACTICE – Emotion and advertising go hand in hand. It is standard commercial practice to rely on emotional appeals to sell with hyperbolic statements linked to the subjective elements that aim to persuade consumers to purchase or facilitate brand penetration. Technological advancements now mean that emotions can be detected with such technology being deployed to optimise campaigns. The emergence of advertising formats which blur the boundaries between editorial and commercial content aim to offer their target audience fun and engaging commercial interactions. Native advertising and the development of campaigns through the use of for example, social influencers, advergames and other commercial communications based on an integrative approach aim to engage with their audience's lived experiences in order to foster an empathic connection. Emotion detection technology or the emergence of what McStay categorises as 'empathic media' further facilitate the gathering of insights regarding consumer emotions. This potentially challenges the reliance on the rationality of consumers and the information-based protections imbued in EU law.

**[96]** TURNING TOWARDS THE UNDERPINNING RIGHTS AND INTERESTS – Overall this Chapter has therefore explored the key requirements contained in the UCP and AVMS Directives in particular and analysed how the use of integrative advertising techniques which have a clear emotional appeal fit within the requirements in EU law. In addition, the chapter

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[273] Hullett (n 36).

[274] See for example: JP Forgas, 'Mood and Judgment: The Affect Infusion Model (AIM)' (1995) 117 Psychological Bulletin 39.

[275] Mandy Hütter and Steven Sweldens, 'Dissociating Controllable and Uncontrollable Effects of Affective Stimuli on Attitudes and Consumption' (2018) 45 Journal of Consumer Research 320, 344.

[276] Min Kyung Lee, 'Understanding Perception of Algorithmic Decisions: Fairness, Trust, and Emotion in Response to Algorithmic Management' (2018) 5 Big Data & Society 1, 2.

explored the role for national law and self-regulation in terms of how this has led to a fractured response to the challenges posed by new forms of advertising. Building on this, the Chapter analysed how emotions are understood in the legal protections, the role of national law and how behavioural insights are used to challenge the existing rational choice model and the increasing significance in behavioural insights in EU law. This analysis was then used to question whether such an approach could cater for the targeting of emotion in real-time. In this vein, the Chapter explored interdisciplinary insights on the role of emotion in decision-making to better conceptualise this challenge and has concluded that such developments have the potential to undermine current protections even further, thereby challenging consumer autonomy. With this point in mind, our analysis now turns to a more in-depth overview of the rights and interests which underpin protections, how these must be 'fairly balanced' to ensure the proportionality of interventions and hence, how such underlying values may be positioned within the EU privacy and data protection framework.

# 3

# BALANCED 'AFFECTIVE' INTEGRATION AND PROTECTING THE INFORMED DATA SUBJECT 'CONSUMER'

## INTRODUCTION

**[97]** EMOTION AND THE RATIONALITY OF CONSUMER DECISIONS – Emotions play a key role in decision-making. As described in the previous Chapter, this does not mean however, that while in a particular emotional state we will make rational or reasonable choices notwithstanding the fact that it is widely accepted that emotions and cognition are intertwined. In this regard the emergence of emotion detection technology raises several fundamental challenges to the existing framework and the rationality-based paradigm imbued in consumer protection law. This chapter aims to plot the key issues through a granular exploration of the expansion of emotion commerce and the proliferation of empathic media and its effect on the autonomous decision-making capacity of consumers. Although emotion measurement is far from a new phenomenon,[277] technological developments are increasing the capacity to monetise emotions.[278] From the analysis of *inter alia* facial

[277] McStay, 'Empathic Media: The Rise of Emotion in AI' (n 16).

[278] Facebook in particular has received a lot of media attention in this regard. From the infamous emotional contagion experiment where users newsfeeds were manipulated to assess changes in emotion, to the introduction of 'feelings' in addition to the 'like' button, the targeting of insecure youths with 'vulnerable' moods (see: Sam Levin, 'Facebook Told Advertisers It Can Identify Teens Feeling "insecure" and "Worthless"' *The Guardian* (1 May 2017) <http://www.theguardian.com/technology/2017/may/01/facebook-advertising-data-insecure-teens> accessed 29 August 2017; Olivia Solon, '"This Oversteps a Boundary": Teenagers Perturbed by Facebook Surveillance' *The Guardian* (2 May 2017) <http://www.theguardian.com/technology/2017/may/02/facebook-surveillance-tech-ethics> accessed 29 August 2017; 'Facebook Research Targeted Insecure Youth, Leaked Documents Show' (*The Independent*, 1 May 2017) <http://www.independent.co.uk/news/media/facebook-leaked-documents-research-targeted-insecure-youth-teenagers-vulnerable-moods-advertising-a7711551.html> accessed 29 August 2017.) and their patents for the detection of emotion in messenger (to add emoticons automatically), via the camera of a smart phone or laptop (for content delivery) and also through image analysis of photos such as selfies (in order to dynamically generate emojis) (see: 'Facebook's Emotion Tech: Patents Show New

expressions,[279] voice/sound patterns[280] *via* smart sensors, to text[281] and data mining,[282] and more generally the ubiquity and use of smart devices to detect emotions,[283] such techniques are becoming increasingly mainstream. Accordingly, technological advancements are now facilitating the more widespread detection of emotions in real-time. Building on the granular insights provided by big data, through machine learning techniques such technological developments allow commercial entities to move beyond the targeting of behaviour in advertisements to the personalisation of services, interfaces and the other consumer-facing interactions, based on personal preferences, biases and emotion insights gleaned from the tracking of online activity and profiling.[284]

AFFECTIVE COMPUTING AND EMOTION DETECTION – The term 'affective computing' was coined by Rosalind Picard in the mid-nineties and defined as 'computing that relates to, arises from, or deliberately influences emotions'.[285] Picard's, and indeed the affective computing sub-discipline's, goal is to enhance the understanding of human emotion and computer functionality in particular *vis-à-vis* 'computer-assisted learning, perceptual information retrieval, arts and entertainment, human health and interaction'.[286] Affective computing is hence characterised not only by the pursuit of emotional intelligence but also the aim of building 'tools that help people boost their own abilities at managing emotions, both in themselves and in others.'[287] Inherent here is the objective of making people care about machines.[288] Since the birth of the affective computing sub-discipline, research in this area has expanded dramatically and in addition to exploring the role of emotions in computing

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Ways For Detecting And Responding To Users' Feelings' (*CB Insights Research*, 1 June 2017) </research/facebook-emotion-patents-analysis/> accessed 29 August 2017.). However, Facebook are clearly not alone and with the rise of many big technology players and also the emergence of smaller dedicated companies, empathic media is now becoming increasingly mainstream. For a growing list of empathic media related projects, companies, people and groups etc. See: 'Useful Links' (n 138).

[279] Andrew G Reece and Christopher M Danforth, 'Instagram Photos Reveal Predictive Markers of Depression' (2017) 6 EPJ Data Science <http://epjdatascience.springeropen.com/articles/10.1140/epjds/s13688-017-0110-z> accessed 29 August 2017.

[280] See for instance companies such as: Bert-Jaap Koops, 'On Decision Transparency, or How to Enhance Data Protection after the Computational Turn' in Mireille Hildebrandt and Katja de Vries (eds), *Privacy, due process and the computational turn: the philosophy of law meets the philosophy of technology* (Routledge 2013) <https://vokaturi.com/> accessed 30 August 2017. Or indeed the project: 'EmoVoice - Real-Time Emotion Recognition from Speech' <https://www.informatik.uni-augsburg.de/lehrstuehle/hcm/projects/tools/emovoice/> accessed 30 August 2017.

[281] Alessandra Potenza, 'Google's US Search Results Will Let People Check If They're Depressed' (*The Verge*, 23 August 2017) <https://www.theverge.com/2017/8/23/16193236/google-depression-questionnaire-mental-health> accessed 29 August 2017.

[282] Martin Hibbeln and others, 'How Is Your User Feeling? Inferring Emotion Through Human-Computer Interaction Devices' (2017) 41 MIS Quarterly 1.

[283] Mingmin Zhao, Fadel Adib and Dina Katabi, 'Emotion Recognition Using Wireless Signals' (ACM Press 2016) <http://dl.acm.org/citation.cfm?doid=2973750.2973762> accessed 30 August 2017.

[284] See: Calo, 'Digital Market Manipulation' (n 34).

[285] Picard (n 6) 1.

[286] ibid.

[287] Rosalind W. Picard (n 6) 19.

[288] McStay, *Emotional AI* (n 4) 18.

this research has also encompassed emotion detection.[289] However, the focus on the role of emotion is not isolated to affective computing but instead has coincided with, and indeed benefited from, an explosion of interest in emotion in a range of diverse areas (e.g. see the discussion of the interdisciplinary insights in the previous Chapter). The emergence of emotion detection technology certainly raises concerns, but how do these concerns map against the underlying rights and interests at play?

**[98]** PLOTTING THE ANALYSIS – Importantly, as described above in Chapter 2, rationality acts as a normative construct in the consumer protection framework with the average consumer acting as a normative abstraction as to how consumers should behave as opposed to how they actually behave on the market.[290] Underlying this observation is the point that the protections provided in EU law are not designed to protection everyone all of the time and that therefore, some collateral damage is inevitable.[291] There is obviously a trade-off here which recognises the commercial entities' interests and the need to take these into account in drawing the lines of 'effective' protection. This raises a number of questions regarding what values and interests underpin such protections and how they influence the regulatory outcome. With these issues in mind, this Chapter will (1) explore how the regulation of emotion monetisation must fairly balance *inter alia* the freedom of (commercial) expression and the freedom to conduct a business in particular with other conflicting rights and interests, before then; (2) analysing the role of the data protection framework and its role in light of the emergence of emotional AI and the capacity to detect and target emotion in real-time.

## 3.1 FAIRLY BALANCED EMOTION MONETISATION – AUTONOMY AND CONFLICTING (CONSUMER) RIGHTS

**[99]** NATIONAL VARIATIONS AND THE MEMBER STATE HARMONISATION OBLIGATION – An important point emerging from the analysis in Chapter 2 is that emotion plays a central role in decision-making and that the separation of rationality from affect in the law fails to take interdisciplinary insights into account. However, as will be illustrated throughout this thesis, this presents a significant challenge both practically and conceptual to solve in a simple manner. Moreover, although the analysis thus far has illustrated that cultural variation is evident in the application of the UCP Directive, one can also refer to the case law of the Court of Justice declaring national protections with dualist objectives (with consumer protection representing one of them) contrary to the harmonisation requirements of the UCP Directive. Although this issue will be explored in more detail in Chapter 6, for our current purposes it suffices to state that somewhat inconsistently the

[289] Sylvie Delacroix and Michael Veale, 'Smart Technologies and Our Sense of Self: Going Beyond Epistemic Counter-Profiling' in Mireille Hildebrandt and Kieron O'Hara (eds), *Life and the Law in the Era of Data-Driven Agency* (Edward Elgar Publishing 2019).
[290] Trzaskowski, 'Behavioural Innovations in Marketing Law' (n 96) 309. With reference to Incardona and Poncibò (n 165).
[291] Trzaskowski, 'Behavioural Innovations in Marketing Law' (n 96) 309. With reference to Incardona and Poncibò (n 165).

'reasonably well-informed and reasonably observant and circumspect' consumer may be a very different person depending on the cultural setting and national interpretation.[292] This point illustrates the key takeaway namely, that the effect of the emotional impact of the subjective elements of an advertising or marketing campaign will largely come within the assessment of the cultural acceptability of such appeals. Differences in protections therefore allow for national variation with respect for national sensitivities. A failure to allow for such differences may arguably further exaggerate the existing concerns regarding the tension that exists between the freedom of expression of commercial entities and strict consumer protections tied to cultural considerations. Such legitimate concerns and the separation between emotions and rationality mean that finding a commercial communication unfair due to the so-called subjective component is often more difficult to substantiate and is very much tied to national cultural perceptions.

**[100]** SHOCK ADVERTISING AND FREEDOM OF COMMERCIAL EXPRESSION – An excellent example here is the *German Benetton* cases[293] and the significant judgement handed down by the *German Federal Constitutional Court* (FCC) regarding the legality of 'shock' advertising campaigns. In short, *Benetton* had used images on provocative issues including a duck covered in oil from an apparent oil spill, child labourers in a third-world factory and a naked buttock branded with the words 'HIV Positive'. The *German Federal Court of Justice* (FCJ) had found in its judgement in 1995 that, although the 'tastelessness' or the 'shock-effect' of an advertisement would not by itself represent a violation of fair competition as the decision could not be made on purely aesthetic grounds given the company's right to express itself, the images aimed exclusively at viewers' emotions without adding to the debate invoked and were thus a violation of fair competition rules. Hence, the FCJ upheld the ban on the campaign and found additionally that the 'H.I.V. Positive' advertisement in fact violated the right to human dignity protected in Article 1(1) of the *German Basic Law* due to *inter alia* its potential to marginalise those suffering from the disease. The referral to the FCC was brought by the publisher of *Stern Magazine* and required the balancing of the fundamental right to freedom of expression with the interest in fair competition protected at the secondary law level. Indeed, the FCC viewed the publishing of the images as constitutionally protected expressions of opinion notwithstanding the fact that the images were deployed for commercial purposes.

**[101]** THE RIGHT TO EXPRESS ONE'S OPINION (COMMERCIALLY) – The Constitutional Court found that the FCJ's ban on the publication of the *Benetton* advertisements violated the constitutional right to express one's opinion as the Court failed to satisfactorily consider the fundamental right to freedom of expression. In short, the FCC found that the FCJ's judgement failed to show the signs that such a fair balancing had in fact occurred thereby

[292] Wilhelmsson (n 173) 490.
[293] *Cases 1 BvR 1762/95 and 1 BvR 1787/95 Benetton I, judgment of 12 December 2000*; *Benetton II, Decision of 11 March 2003 in Case 1 BvR 426/02*.

failing an important constitutional test.[294] Interestingly therefore, the FCC found that the German law on fair competition was constitutional despite its vagueness but that the FCJ had failed to illustrate the evaluation of the competing rights and interests in its ruling. As observed by Zumbansen,

> '[t]his is the subtlety of the FCC's decision. It reinforced the judicial discretion of the FCJ (and the lower courts) while imposing a framework upon the exercise of that discretion, especially when such fundamental rights like the freedom to express one's opinion are at stake. The FCC not only requires the FCJ and the lower courts to sufficiently consider the constitutional interests at stake in a specific case, but the FCJ and lower courts must present that evaluation as part of their judgment. The FCC, for example, accepted the FCJ's rationale that there might be a standard accepted by a wider public that would refute the advertisements for aesthetic and/or ethical reasons. The FCC concluded, however, that the FCJ neither made clear nor followed such a standard in reaching its decision.'[295]

In light of such considerations the FCC rejected the FCJ decision that upheld the bans on the Benetton advertisements as they found the bans to be unconstitutional as they constituted an infringement of the right to freely express one's opinion. The case thus illustrates three significant points for the purposes of this thesis namely, that (1) advertisements can come within the right to freedom of expression; (2) 'shock' advertising that is designed to evoke strong emotional responses can come within this protection and; (3) any limitation of the commercial actors' freedom of commercial expression will have to be fairly balanced against competing rights and interests.

**[102]** INTRODUCING THE CHARTER – In keeping with the German Court's ruling, it is well established in the case law of the Court of Justice of the European Union that commercial expression is protected within the scope of Article 11(1) Charter. This provision stipulates that, '[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.' Even though the formulation of this right differs somewhat from the one contained in Article 10 of the European Convention on Human Rights[296] it should be interpreted in the same manner. This reflects two important points of EU law. First, where the same rights appear in both the ECHR and the Charter, these are to be interpreted as having the same meaning (Article 52(3) Charter). And second, the Charter is prohibited from curtailing the rights guaranteed in the ECHR thereby establishing the ECHR as the minimum standard (Article 53 Charter). As such, the protection of freedom of commercial expression within Article 11 Charter mimics the ECtHR interpretation of Article 10 ECHR. In this regard, it is also important to note the overlaps between the Charter and the ECHR, given that the latter provided inspiration for

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[294] Peer Zumbansen, 'Federal Constitutional Court Rejects Ban on Benetton Shock Ads: Free Expression, Fair Competition and the Opaque Boundaries Between Political Message and Social Moral Standards' (2001) 2 German Law Journal para 5.

[295] ibid 6.

[296] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950.

the development of the former. The importance of the ECHR was first explicitly recognised in the Treaty on European Union (TEU, Maastricht Treaty 1992) in what is now Article 6(2) TEU which required the Union to respect fundamental rights as general principles of EU law and guaranteed by the ECHR.[297] For the most part the general principles of EU law have been fashioned by the Court of Justice and have been used as a means of reading principles such as proportionality, legal certainty, legitimate expectations, equality, the precautionary principle, procedural justice, and importantly for our current purposes, fundamental rights, into the Treaties.[298]

**[103]** CASE LAW DEVELOPMENT – The Court of Justice is hence, commonly placed at the centre of the development of fundamental rights protection as the heroic actor which cajoled the political institutions into accepting fundamental rights as a key feature in the constitutional edifice of the Union.[299] Although authors such as de Búrca question this traditional narrative on the progression of fundamental rights protection as being entirely Court driven at its inception,[300] it is clear that the Court of Justice has played an important role in legitimising Union action with general principles best understood as a 'creature' of judicial law-making.[301] This role reflects the long held concerns regarding potential conflicts between the adoption and implementation of EU law and the rights of individuals or, to put it a different way, the struggle between private autonomy as understood in the constitutional traditions of the MSs and the EU regulatory interventions altering this understanding.[302] These concerns intensified in particular through a string of cases during the 1960's and 1970's in which the Court of Justice found that EU law has direct effect,[303] supremacy over national law[304] and that EU law pre-empts national legislators from adopting law which would undermine EU law.[305] These cases effectively transformed the EU into a 'new legal order' as applying to both individuals and Member States. Such developments required fundamental protection at the *supra*-national level so as to preserve the coherence of the EU. This was emphasised by the fact that the Italian and German Constitutional Courts in particular appeared reluctant to enforce the primacy

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[297] This was the supplemented in the Treaty of Amsterdam *via* the insertion of Article 46(d) EU which provided jurisdiction for the Court of Justice to review actions of the institutions for compatibility with fundamental rights as referred to in Article 6(2) EU. These provisions were then further expanded in the Lisbon Treaty which inserted a requirement for the EU to formally accede to the ECHR in Article 6(2) TEU.
[298] For an overview see Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (6th ed., Oxford University Press 2015) 111.
[299] Gráinne De Búrca, 'The Road Not Take: The European Union as a Global Human Rights Actor' (2011) 105 American Journal of International Law 649.
[300] ibid.
[301] Koen Lenaerts and José Antonio Gutiérrez-Fons, 'The Place of the Charter in the EU Constitutional Edifice' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights : A Commentary* (1st edn, Hart Publishing 2014) 1559.
[302] See: Guido Comparato and Hans-W Micklitz, 'Regulated Autonomy between Market Freedoms and Fundamental Rights in the Case Law of the CJEU' in Ulf Bernitz, Xavier Groussot and Felix Schulyok (eds), *General principles of EU law and European private law* (First, Kluwer Law International 2013).
[303] *Case C-26/62, Van Gend en Loos v Nederlandse Administratie der Belastingen, ECLI:EU:C:1963:1*.
[304] *Case C-6/64, Costa v ENEL, ECLI:EU:C:1964:66*.
[305] *Case C-106/77, Simmenthal, ECLI:EU:C:1978:49*.

of EU law. In response, the Court of Justice found that fundamental rights enjoyed a *de facto* protection as general principles.[306]

**[104]** GENERAL PRINCIPLES AND THE ECHR – The insertion of Article 6(2) TEU was thus inspired by the judicial gap filling on behalf of the Court of Justice, which through the influence of the Italian and German Constitutional Courts recognised fundamental rights as part of the general principles of Community (now EU law). In brief, it is well documented in the literature that general principles play a triple role namely, (1) they allow the Court of Justice to fill normative gaps ensuring the autonomy and coherence of the EU legal order; (2) they act as an aid to interpretation as all matters falling within the scope of EU law must be interpreted in light of the general principles; and finally (3) they may be relied upon as a basis for judicial review.[307] Furthermore, it is also well established that general principles play a role both in the vertical and horizontal allocation of powers. Vertically, general principles may be used to find national legal traditions at odds with the constitutional foundations of the EU thereby circumscribing the powers retained by the MSs, whereas horizontally, general principles may limit the EU legislator's discretion by requiring respect for general principles. Moreover, despite the above it should be clearly emphasised that although (1) there is clear overlap between the Charter and general principles and, (2) that the Charter was inspired by the ECHR, the Charter is distinct and was inspired by more than the ECHR as it also aims to reflect the constitutional traditions of the MSs and other international human rights instruments.

**[105]** ACKNOWLEDGING THE COMPLEXITY – The point which emerges from this brief step into national law and overview of the complexity of the *supra* national *fundamental* rights overlaps is that any limitations of commercial entities freedom of commercial expression must be done in a proportionate manner notwithstanding the potential threats to the autonomous decision-making capacity of the average consumer. With this in mind, this section of the Chapter will (1) analyse fair balancing as the constitutional law theory that has seemingly been adopted by the European Court of Human Rights (ECtHR) and importantly the Court of Justice where rights and interests conflict. Building on this analysis, the section will (2) explore the notion of individual autonomy and its relationship with the right to privacy.

### 3.1.1 BALANCING THEORY AND CATERING FOR CONFLICTING RIGHTS AND INTERESTS

**[106]** FREEDOM OF COMMERCIAL EXPRESSION AND EMOTIONAL AI – Although the original inclusion of commercial expression within the protections provided by the right to freedom of expression was rejected by the ECtHR, since the 1990's there has been no doubt that commercial expression (including advertising) has been within the scope of the

[306] See: *Case C-29-69, Erich Stauder v City of Ulm - Sozialamt, ECLI:EU:C:1969:57*.
[307] For a discussion see: Koen Lenaerts and Jose A Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47 Common Market Law Review 1629.

provision's protection.[308] It is therefore clear that advertising law '[…] must be framed and interpreted with due regard for commercial freedom of expression.'[309] Respect for freedom of expression affords commercial operators the scope to choose how to convey information in the manner which they deem most effective. It is obvious that commercial operators will use this scope to present their information in a manner which they believe will best attract the attention of consumers and places its product/service/brand in the most favourable light. As noted by Nehf, '[a] central underlying premise of most regulatory regimes is that the law should accommodate this practice unless it contravenes basic principles of fairness and accuracy.'[310] However, it is important to emphasise that although advertising and marketing rules may be a restriction on the freedom of expression, from the rulings of the Court of Justice[311] and the ECtHR,[312] such a restriction may be justified with commercial expression afforded a lesser degree of protection as justified *inter alia* by the need to protect consumer decision-making and the public interest.[313] Indeed, as noted by Randall, three factors justify this delineation between commercial and non-commercial expression namely, (1) the regulation of political speech seems more dangerous; (2) regulation in the field of consumer protection is premised on the idea that commercial expression is easier to fact check than political and; (3) political speech is more likely to be chilled than commercial expression.[314] The author also specifies however, that these characteristics do not mean that commercial speech should always be viewed as being of a lower value than political expressions.[315] Importantly, in its jurisprudence the ECtHR draws an additional distinction between commercial and political expression even if the political speech is used in a commercial context.[316] In so doing the ECtHR applies a contextual approach requiring the assessment of each case on its own merits and affords the stricter standard of protection to all communications classified as political with less margin of appreciation for States in such contexts. Therefore, the regulation of emotional conditioning even with the emergence of emotional AI, raises complex concerns from a freedom of commercial expression perspective as any encroachment upon the rights of commercial operators will need to be proportionate in light of the pursued aims. This is further complicated by the

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[308] See: *Casado Coca v Spain A 285 (1994); (1994) 18 EHRR1*. For a more comprehensive analysis see: Krateros Ioannou, 'Ban on Publicity in the Light of the European Convention on Human Rights' in Wassilios Skouris (ed), *Advertising and constitutional rights in Europe: A study in comparative constitutional law* (Nomos 1994) 351. As referred to by Maya Hertig Randall, 'Commercial Speech under the European Convention on Human Rights: Subordinate or Equal?' (2006) 6 Human Rights Law Review 53, 54.

[309] Caroline Heide-Jørgensen, *Advertising Law: Marketing Law and Commercial Freedom of Expression* (Steven Harris tr, DJØF Publishing 2013) 279.

[310] Nehf (n 186) 91.

[311] *Case C-245/01, RTL Television GmbH v Niedersächsische Landesmedienanstalt für privaten Rundfunk, EU:C:2003:580* 580.

[312] *Markt Intern Verlag GmbH and Klaus Beermann v Germany [1989] App no 10572/83, (1990) 12 EHRR 161* 161.

[313] Valcke (n 65) 37.

[314] Randall (n 308).

[315] ibid.

[316] For a more thorough analysis see: ibid.

technological changes and the complex concerns associated with the emergence of a mediated environment filled with user-generated content. For example, in the context of digital influencers or commercial content which goes viral, there may be important concerns with not only the freedom of commercial expression of commercial entities but also the freedom of expression of users sharing that content. As a consequence, there is a need to balance the rights and interests at stake.[317]

**[107]** FAIR BALANCING AND THE EUROPEAN JURISPRUDENCE – Despite the fact that the 'fair balancing' of rights and interests originated as a notion in German constitutional law it has since migrated to the EU and ECHR jurisprudence.[318] Indeed, even though proportionality, or at least the German conception of the principle, consists of three tests, balancing (i.e. strict proportionality) is understood as its essence and the heart of the discourse on legal optimisation.[319] There is a wide body of literature exploring the theoretical foundations of the notion of balancing[320] and although a thorough discussion of this is outside the

[317] For examples of such balancing see *Case C-131/12, Google Spain SL and Google Inc v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, ECLI:EU:C:2014:317*; *Delfi AS v Estonia, [2015] ECHR 586*.

[318] As observed by Bomhoff, the notion of balancing is one of the central features of post-World War II Western legal thought and practice but that despite its pervasiveness it remains a difficult concept to grasp. Indeed, according to the author, this in part stems from this ubiquity of the concept in that there is a widespread assumption that the same or similar terminology means approximately the same thing, with this assumption reinforced by the popular scholarly notions of how constitutional rights justice should be conceptualised. Jacco Bomhoff, *Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse* (Cambridge University Press 2013) 1.

[319] CJ Angelopoulos, 'European Intermediary Liability in Copyright: A Tort-Based Analysis' (PhD Thesis, University of Amsterdam 2016) 73 <http://dare.uva.nl/record/1/527223> accessed 22 April 2016.

[320] Balancing, or strict proportionality, forms part of the broader principle of proportionality which itself consists of three elements namely; (1) suitability, (2) necessity and (3) strict proportionality. The first two of these principles relate to the optimisation of what is factually possible whereas the strict proportionality test refers to optimisation relative to the legal possibilities. As described by Alexy, the legal possibilities are defined by competing principles and that hence, '[c]onstitutional judgements are only correct if they correspond to the outcome of an appropriate balancing of principles.'[320] To clarify this statement it is necessary to specify that Alexy differentiates between rules and principles in his discussion of constitutional norms. As specified by the author, '[i]nterpreting constitutional rights in light of the principle of proportionality is to treat constitutional rights as optimization requirements, that is, as principles, not simply as rules. As optimization requirements, principles are norms requiring that something be realized to the greatest extent possible, given the factual and legal possibilities.' The factual and legal possibilities are the rules of proportionality characterised above as the three elements of the broader principle of proportionality (i.e. (1) suitability, (2) necessity and (3) strict proportionality). Accordingly, rules are norms that are either respected or are not, for instance as per Alexy the strict proportionality principle can be expressed as a rule which states that '[t]he greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other.' The author refers to this rule as the 'Law of Balancing'. See: Robert Alexy, 'Balancing, Constitutional Review, and Representation' (2005) 3 International Journal of Constitutional Law 572, 573. As observed by Sauter, the 'Law of Balancing' thus, 'presupposes that certain individual rights are not attributed trump status, meaning that they cannot be overruled by public policies or submitted to compromise solutions to accommodate such policies–as would be the claim of liberal legal scholars exemplified by Ronald Dworkin.' Wolf Sauter, 'Proportionality in EU Law: A Balancing Act?' (2013) 15 Cambridge Yearbook of European Legal Studies 439, 441. This reflects the fact that if rights are absolute then proportionality cannot play a role. To paraphrase Alexy, balancing by way of contrast demands that the greater the interference with one principle or indeed liberty, requires an increasing weight of reasons providing justification for any such interference.

scope of this thesis, it is worth noting that balancing is controversial amongst certain scholars with this discussion flowing from the debate between the most notable proponents of the respective sides of the argument – Alexy and Habermas.[321] Although the balancing critics certainly raise valid arguments, this thesis will still refer to balancing and adopt it as an approach given that both the ECtHR and, most importantly for this thesis, the Court of Justice have referred to the notion of balancing in resolving conflicts. Indeed, with reference to the Court of Justice, Lenaerts and Gutiérrez-Fons observe that '[g]iven that no principle encapsulating an individual right in the general interest is absolute, the courts must engage in balancing to evaluate whether a legal norm is consistent with a general principle.'[322] Therefore, from a doctrinal perspective it makes little sense to question the choice of the Court of Justice to embrace fair balancing.

**[108]** THE CHARTER AND ITS GENERAL LIMITATION CLAUSE – From the outset, it is important to refer to the fact that fundamental rights are for the most part qualified and not absolute,[323] as illustrated by the proportionality test which was codified in the text of the Charter in Article 52(1) Charter. Article 52(1) Charter acts as a general limitation clause with its wording largely inspired by the prior Court of Justice case law on the protection of fundamental rights as general principles (see above) which was in turn inspired by ECtHR case law.[324] This provision states that,

> '[a]ny limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.'

In their analysis of Article 52(1) Charter, Peers and Prechal identify three types of requirements, namely; (1) a procedural rule in that limitations on rights 'must be provided by law'; (2) a rule relating the justifications for limitations (i.e. 'objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'), and finally; (3) interlinked rules on the balancing test (i.e. the need to 'respect

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[321] Those hostile to the notion of balancing such as Habermas regard it as an irrational and illegitimate interference with rights on the basis of what such scholars deem largely arbitrary judicial discretion which is difficult to align with the ideals of democracy, the rule of law and respect for human rights. Steven Greer, '"Balancing" and the European Court of Human Rights: A Contribution to the Habermas- Alexy Debate' (2004) 63 The Cambridge Law Journal 412, 413. In the words of Habermas, 'there are no rational standards' for balancing which therefore means that it is incapable of consistent application. Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press 1996) 259. According to this view, the idea of balancing runs contrary to the very notion of a right and the Dworkian proposition that in order to retain their normative stretch rights must be considered absolute. Eric Barendt, 'Balancing Freedom of Expression and Privacy: The Jurisprudence of the Strasbourg Court' (2009) 1 Journal of Media Law 49, 51. In contrast, proponents of balancing maintain that 'although the current judicial practice of balancing may be difficult both to describe and to defend, the concept of balancing, when properly understood, is neither irrational nor illegitimate.' Steven Greer 413.

[322] Lenaerts and Gutiérrez-Fons (n 307) 1650.

[323] As illustrated by the very existence of Article 52(1) Charter – See below for more.

[324] Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 European Constitutional Law Review 375, 388.

the essence of' the right(s), proportionality and the necessity requirement).[325] Accordingly, Article 52(1) Charter essentially provides a methodological framework through which conflicts between rights and interests can be resolved.[326] More specifically, when pursuing an 'objective of general interest', the legislator must only limit rights in a proportionate manner with respect for the essence of the rights and only if necessary to achieve the given objective (i.e. it is justified). Therefore, although there are clearly identified 'objectives of general interest' (i.e. as specified in Treaty provisions), the pursuit of these objectives is only justified if it respects the interlinked rules in the balancing test.

**[109]** LAYERS OF PROPORTIONALITY – As mentioned above, in its case law the Court of Justice seems to both implicitly (i.e. by not referring specifically to Article 52(1) Charter) and explicitly adopt such an understanding (see below). In their interpretation of Article 52(1) Charter, Peers and Prechal observe that it appears that the interlinked balancing rules may be more easily infringed when the measures are unlimited.[327] The authors thus specify that if the measure in question is more restrained (i.e. by specifying the impact on rights to specific contexts or a particular aspect of economic activity or by providing safeguards to protect the affected persons' rights or restrain the impact of the measure on the rights) the limitation will satisfy the requirements.[328] It is only where there is complete disregard for the proportionality and necessity elements that the interference with the right in question may be deemed to fail to respect the very essence of this right. In this regard it is interesting to refer to Brkan who compares the essence of a right with the layers of an onion – with the essence at the core and the various layers representing different degrees of interference.[329] More specifically, the author differentiates between five components namely, (1) the outer layer which represents the fundamental right (i.e. without its value being diminished in any way); (2) a justified impairment; (3) an unjustified breach; (4) a

[325] Steve Peers and Sasha Prechal, 'Scope and Interpretation of Rights and Principles' in Steve Peers and others (eds), *The EU charter of fundamental rights: a commentary* (Hart 2014) 1470 <https://www.bloomsburycollections.com/book/the-eu-charter-of-fundamental-rights-a-commentary/>.
[326] It should be noted however that no limitation may be made on the rights contained in Title I of the Charter which contains human dignity (Article 1 Charter), the right to life (Article 2 Charter), the right to the integrity of the person (Article 3 Charter), the prohibition of torture and inhuman or degrading treatment or punishment (Article 4 Charter) and the prohibition of slavery and forced labour (Article 5 Charter). See: Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 European Constitutional Law Review 375, 388.
[327] Peers and Prechal (n 325) 1485–1486.
[328] ibid.
[329] Brkan has written a series of papers on the essence of fundamental rights which build on each other see: Maja Brkan, 'In Search of the Concept of Essence of EU Fundamental Rights Through the Prism of Data Privacy' (Social Science Research Network 2017) SSRN Scholarly Paper ID 2900281 <https://papers.ssrn.com/abstract=2900281> accessed 30 January 2018; Maja Brkan, 'The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to Its Core' (2018) 14 European Constitutional Law Review 332; Maja Brkan, 'The Essence of the Fundamental Rights to Privacy and Data Protection: Finding a Way through the Maze of the CJEU's Constitutional Reasoning', *The Essence of Fundamental Rights in EU Law* (17-18 May, Leuven).

particularly serious breach, and finally; (5) the heart of the onion constituting the core or essence of a fundamental right.[330]

**[110]** PROPORTIONALITY AND THE 'ESSENCE' – Importantly, therefore according to Brkan the essence as an inviolable core is thus only fully disregarded where there are no protections offered. Although there is a much more elaborate debate to be had between the potential separation of the essence of a fundamental from the proportionality test (the 'absolute' theory) or indeed whether proportionality also extends to interferences with the essence (i.e. essence does not stand alone, the 'relative' theory), for our current purposes Brkan's framing of a right's construction provides a good illustrative lens through which to conceptualise interferences more generally.[331] To illustrate the author's point one can refer for example to the contrast between the *Digital Rights Ireland* case,[332] which annulled the Data Retention Directive,[333] and the *Schrems* case,[334] which invalidated the Safe Harbour agreement for data transfers between the EU and the US. In brief, Brkan argues that the Court of Justice did not find a breach of the essence in *Digital Rights Ireland* as 'the Data Retention Directive at stake in this case did not allow any person to acquire knowledge of the content of electronic communication'.[335] Accordingly, despite the fact that the Data Retention Directive was a particularly serious breach of a fundamental right (i.e. thereby resulting in the Court invalidating the Directive), this did not go so far as to violate the essence of the right to privacy. By way of contrast, in *Schrems* the Court found that through the Safe Harbour agreement public authorities had access 'on a generalised basis to the content of electronic communications'[336] which violated the essence thereby illustrating a connection between blanket access to content data and the essence violation.

**[111]** FAIR BALANCING AND CONFLICTING RIGHTS – Although Brkan is critical of the *Schrems* judgement in relation to the Court's finding of a violation of the essence given that *inter*

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[330] Brkan, 'In Search of the Concept of Essence of EU Fundamental Rights Through the Prism of Data Privacy' (n 329) 2–3.

[331] See: Brkan, 'The Concept of Essence of Fundamental Rights in the EU Legal Order' (n 329) 335–338. where the author described the approaches and then goes on to argue for an absolute approach. Despite the fact that it is outside the scope of this thesis to explore this debate more thoroughly, it is suggested here that the practical significance of this debate (outside of constitutional theory) is minimal in the vast majority of cases – i.e. without arguing that is it of no value – as the notion of essence and proportionality go hand in hand.

[332] *Joined Cases C-293/12 and C-594/12 Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others Requests for a preliminary ruling from the High Court (Ireland) and the Verfassungsgerichtshof ECLI:EU:C:2014:238*.

[333] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC O L 105, 54-63.

[334] *Case C-362/14, Maximillian Schrems v Data Protection Commissioner, ECLI:EU:C:2015:650* 14.

[335] Brkan, 'In Search of the Concept of Essence of EU Fundamental Rights Through the Prism of Data Privacy' (n 329) 17.

[336] *Maximillian Schrems v Data Protection Commissioner* [2015] Court of Justice of the EU C-362/14, Curia [94].

*alia* the distinction between content and meta data appears to be questionable, the author also highlights the role played by effective judicial protection and thus the clear lack of protections in the Safe Harbour agreement, as outlined in *Schrems*.[337] As such, the effective removal of the individual's capacity to protect their rights undermined their practical value thus depriving them of the entirety of protection required by the Charter.[338] Moreover, when pursuing the 'objectives of general interest' specified in the treaties, the EU legislator must 'protect the rights and freedoms of others'. This requirement is illustrative of the fact that limitations on rights have both a vertical and horizontal impact. Indeed, as noted by Lenaerts, '[g]iven that all qualified rights stand on an equal footing, conflicts between them must be solved by striking the right balance.'[339] This is also reflected in the role of the EU legislator and the MSs when implementing EU law in striking a fair balance between conflicting rights and interests and it is therefore, clear from the Court's judgements that the notion of fairness and 'fair balance' is strongly linked to the operation of the necessity and proportionality requirements.[340] Hence, fair balancing is not exclusively a judicial methodology in constitutional adjudication but instead rather is also a necessary consideration for the legislator.[341] This understanding of balancing makes sense due to the role of judicial review in analysing the compatibility of legislation with fundamental rights concerns.[342] In the context of emotions and advertising reference here can again be made to the *German Benetton* cases and the fact that, although the FCC did not find the German fair trading law contrary to constitutional values, this was a part of the assessment. In this vein, balancing is part of the structure (or at least the operation) of fundamental rights in which the legislator has limitations on its

[337] Brkan, 'In Search of the Concept of Essence of EU Fundamental Rights Through the Prism of Data Privacy' (n 329) 16–17.

[338] ibid. The author has also highlighted that the Court may have relied on the notion of essence in the case in order to avoid a proportionality assessment of a third country's national security *vis-à-vis* the objectives of EU legislation. See: Brkan, 'The Essence of the Fundamental Rights to Privacy and Data Protection: Finding a Way through the Maze of the CJEU's Constitutional Reasoning' (n 329) 13; Brkan, 'The Concept of Essence of Fundamental Rights in the EU Legal Order' (n 329) 355.

[339] Lenaerts (n 324) 392–393.

[340] As observed by the Court of Justice in *Case C-275/06 Productores de Música de España (Promusicae) v Telefónica de España, ECLI:EU:C:2008:54*. '[…] Member States must, when transposing the directives mentioned above, take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality'. See, to that effect: *Case C-101/01, Bodil Lindqvist, ECLI:EU:C:2003:596* [87]; *Case C-275/06 Productores de Música de España (Promusicae) v Telefónica de España, ECLI:EU:C:2008:54* paras 68–70.

[341] Stephen Gardbaum, 'Limiting Constitutional Rights' (2007) 54 UCLA Law Review 789, 810.

[342] Here we can refer to the annulment of Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC O L 105, 54-63. in *Joined Cases C-293/12 and C-594/12 Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others. Requests for a preliminary ruling from the High Court (Ireland) and the Verfassungsgerichtshof ECLI:EU:C:2014:238* (n 332).

capacity to override such rights and Courts have the capacity to review the balance struck by the legislator.[343]

**[112]** THE LEGISLATIVE BALANCE – Therefore, in the context of secondary law it is the balance struck by the EU legislator (or national legislator when acting within the scope of EU law) between fundamental rights, as interpreted by the Court of Justice, which then applies horizontally. This is manifested in the legislator's obligation to take the notion of balancing into account when adopting legislation and, in line with the horizontality literature, this obligation also extends to secondary legislation regulating private law.[344] The Court of Justice appears to have explicitly confirmed fair balancing as the form the proportionality principle in Article 52(1) Charter takes where there are conflicting rights in the *Sky Österreich* case when in its judgement the Court first refers to the applicability of Article 52(1) Charter[345] and then notes that,

> '[w]here several rights and fundamental freedoms protected by the European Union legal order are at issue, the assessment of the possible disproportionate nature of a provision of European Union law must be carried out with a view to reconciling the requirements of the protection of those different rights and freedoms and a fair balance between them.'[346]

One can refer here to the seminal judgements of the Court of Justice dealing with the balancing of competing fundamental rights due to the fact that as mentioned above Article 52(1) Charter has been identified by the Court of Justice as the codified source of the fair balancing principle. More specifically therefore, in the *Promusicae* case[347] the Court of Justice specifically laid down the obligation to balance competing fundamental rights. The case concerned the interpretation of the e-Commerce Directive,[348] the Copyright

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[343] As noted by Gardbaum,'[v]iewed in this broader context, then, balancing is about constitutionally permissible limits on rights. More specifically, '[…] balancing distinctively concerns external limits on constitutional rights: the limits that the political institutions are empowered to impose under the second stage of rights adjudication.' According to the author the internal limits of a right refers to the interpretative role of the Court in declaring what is meant by a specific right in order to apply that meaning to determine whether it has been infringed in a given context. Through such an interpretation then it is only the external limits and the legislator's respect for fundamental rights which requires balancing in light of the internal limits of the right and hence, its precise scope as interpreted by the Court. Gardbaum (n 341) 811.

[344] Indeed, in the context of the indirect horizontal effect this is in fact a necessity for the development of private law and part of the legislator's positive obligation to provide the necessary safeguards for the protection of fundamental rights. In short, the balancing between fundamental rights happens within the scope of EU secondary law, with the regulatory instrument representing the balance and the Charter merely a supplementing argument in the interpretation of its provisions. Here one can refer to Mak's delineation between 'strong' and 'weak' indirect horizontal effect. Chantal Mak, *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England* (Wolters Kluwer Law & Business 2008) 55–57.

[345] *Case C-283/11, Sky Österreich GmbH v Österreichischer Rundfunk, ECLI:EU:C:2013:28* [21, 47 and 48].

[346] ibid 60.

[347] *Case C-275/06 Productores de Música de España (Promusicae) v Telefónica de España, ECLI:EU:C:2008:54* (n 340).

[348] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ L 178, 1–16.

Directive,[349] the Directive on the enforcement of intellectual property rights,[350] the ePrivacy Directive[351] and by cross-reference the now replaced Data Protection Directive 95/46/EC (GDPR).[352]

**[113]** BALANCING COMPETING RIGHTS IN PRACTICE – In short, the facts of the case related to the possibility for individuals to download free music in breach of copyright restrictions. *Promusicae,* a non-profit organisation representing Spanish music producers, secured a Court order requiring internet service providers (ISPs) to disclose the personal data of individuals alleged to have infringed the copyright protection by using P2P software. When the ISPs resisted, an action was taken and the Spanish Court referred questions to the Court of Justice to determine whether MSs were entitled to limit the duty on ISPs to retain and make available such data in light of the protections provided for by the rights to privacy (Article 7 Charter) and data protection (Article 8 Charter) which the ePrivacy Directive aims to fully respect. The Court was thus asked whether the traffic data collected by the ISP should be provided for criminal investigations or for the purposes of safeguarding public security and national defence, in light of the right to intellectual property (Article 17 Charter) and the right to an effective remedy (Article 47 Charter). The case thus dealt with conflict between the right to property and right to an effective remedy on the one hand and on the other the rights to privacy and data protection. In its conclusion the Court found that,

> '[c]ommunity law requires that, when transposing […] directives, the Member States take care to rely on an interpretation of them which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality.'[353]

The judgement in *Promusicae* therefore established that what is needed is the fair balancing of competing rights. However, the Court provided little guidance as to how such a balance was to be achieved and instead left it to the MSs. Following the adoption of the

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[349] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167/10, 10–19 29.

[350] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157, 16-25 48.

[351] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201, 37–47.

[352] Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data 1995 31, 95.

[353] *Case C-275/06 Productores de Música de España (Promusicae) v Telefónica de España, ECLI:EU:C:2008:54* (n 340) para 70.

Lisbon Treaty[354] several cases have raised similar issues and have followed the *Promusicae* ruling.[355] For instance, in *Scarlet v SABAM*[356] the Court confirmed that the right to intellectual property must be balanced with other fundamental rights with reference to the judgement in *Promusicae*. Significantly, although the Court did not refer to Article 52(1) Charter, it did balance the respective rights itself.[357] Interestingly, in *Scarlet v SABAM* the Court also recognised the applicability of the ISPs freedom to conduct a business. To clarify, in circumstances very similar to *Promusicae,* the Court of Justice found that an injunction requiring an ISP to install an expensive copyright infringing filtering mechanism would infringe its economic freedoms. In this regard, the Court also noted that in assessing such a mechanism the freedom of information also needs to be considered as a filtering mechanism would restrict lawful as well as unlawful communications due to the fact that differentiating between the two is not always easy. In balancing the freedom to conduct a business, the right to data protection and the freedom to receive or impart information with the right to (intellectual) property, the Court found that the three rights outweighed the one.

**[114]** FREEDOM TO CONDUCT A BUSINESS ON BOTH SIDES OF THE SCALES – Hence, as noted by Comparato and Micklitz 'the Court used the freedom to conduct a business to support personal fundamental rights, and in so doing decided in favour of personal data protection over intellectual property.'[358] The authors further observe that in *Scarlet v SABAM* there was an unusual marriage between the right to data protection and the freedom to conduct a business (i.e. as seen again in the subsequent *Netlog* judgement[359]).[360] It should be noted however, that this is not always the case. Indeed, in this regard one can refer for instance to the Court's decision in the *Sky Österreich* case mentioned above which dealt with the compatibility of Article 15 of the Audiovisual Media Services (AVMS) Directive[361] with the freedom to conduct a business and the right to intellectual property. In brief, the facts of the *Sky Österreich* case involved broadcasting rights and *Sky's* freedom to conduct a business versus the freedom of information and the freedom and pluralism of the media due to the Austrian telecommunications authority's decision to require *Sky* to afford another broadcaster the right to make short news reports without remuneration which

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[354] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 OJ C 306, 1–271; Consolidated version of the Treaty on the Functioning of the European Union OJ C 326, 47–390.
[355] See: Peers and Prechal (n 325) 1477.
[356] *Case C-70/10, Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM), ECLI:EU:C:2011:771*.
[357] Peers and Prechal (n 325) 1477.
[358] Comparato and Micklitz (n 302) 146.
[359] *Case C-360/10, Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV, ECLI:EU:C:2012:85*.
[360] Comparato and Micklitz (n 302) 146.
[361] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95, 1–24 as amended by Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 in view of changing market realities OJ L 303, 69–92.

*Sky* contended was a disproportionate interference of its right to intellectual property. Although acknowledging that the application of the AVMS Directive's provisions limited *Sky's* freedom of contract the Court of Justice concluded that,

> '[i]n the light, first, of the importance of safeguarding the fundamental freedom to receive information and the freedom and pluralism of the media guaranteed by Article 11 of the Charter and, second, of the protection of the freedom to conduct a business as guaranteed by Article 16 of the Charter, the European Union legislature was entitled to adopt rules such as those laid down in Article 15 of Directive 2010/13, which limit the freedom to conduct a business, and to give priority, in the necessary balancing of the rights and interests at issue, to public access to information over contractual freedom.'[362]

It is apparent therefore, that both the legislator and the Courts play a key role in striking a fair balance between conflicting rights and interests in practice. Here one can also refer to the European Commission guidance on how the Charter should be promoted and thus incorporated into legislative proposals.[363] In this vein, the Commission's guidance document outlining their strategy for the effective implementation of the Charter specifies that proposals with a specific link to fundamental rights must set this out in the recitals and explain how the proposal complies with the Charter.[364]

**[115]** GIVING SPECIFIC EXPRESSION TO A FUNDAMENTAL RIGHT – However, as noted by Cherednychenko and Reich, despite throwing some light on the references to particular Charter rights and principles, 'the EU legislator has not always been clear and consistent in the use of statements of compatibility' and this lack of clarity is potentially problematic in the field of consumer contract law in particular given the role played by such statements in the *ex post* review of such measures.[365] The authors go on to note that this is particularly challenging in the context of provisions giving specific expression to a fundamental right with reference to the *Test-Achats* case.[366] In short, in the *Test-Achats* case the Court of Justice found Article 5(2) of Directive 2004/113 implementing the principle of equal treatment on the basis of sex in the access to and supply of goods and services[367] incompatible with the Charter despite the fact that the Charter was not binding at the time the Directive was adopted. The provision had allowed for proportionate differences in

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[362] *Case C-283/11, Sky Österreich GmbH v Österreichischer Rundfunk, ECLI:EU:C:2013:28* (n 345) para 66.
[363] European Commission, 'Communication from the Commission, Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union, COM(2010) 573/4.'
[364] More specifically, as clarified in the guidance, '[t]he insertion of recitals is not a mere formality, it reflects the in-depth monitoring of the proposal's compliance with the Charter. The recitals which set out the proposal's conformity with the Charter will be chosen to indicate exactly which fundamental rights the proposal in question will affect. More specific tailor-made recitals concerning certain fundamental rights will be inserted where necessary to explain the scope of a provision or the solutions incorporated in the proposal to ensure that the limitation on a fundamental right is justified under Article 52 of the Charter.' ibid 7.
[365] Olha O Cherednychenko and Norbert Reich, 'The Constitutionalization of European Private Law: Gateways, Constraints, and Challenges' (2015) 5 European Review of Private Law 797, 807.
[366] *Case C-236/09, Test-Achats, ECLI:EU:C:2011:100*.
[367] Directive 2004/113 of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ L 373 373.

insurance premiums and benefits and related financial services based on sex as a risk determining factor. In reaching its decision the Court of Justice noted that as, 'recital 4 to Directive 2004/113 expressly refers to Articles 21 and 23 of the Charter, the validity of Article 5(2) of that directive must be assessed in the light of those provisions.'[368] This led the Court to conclude that due to the fact that Article 5(2) of the Directive enabled MSs to maintain an exemption from the rule on unisex premiums and benefits without temporal limitation it was incompatible with Articles 21 and 23 of the Charter. The *Test-Achats* case thus highlights the role of applying general clauses in consumer protection legislative measures. In this manner therefore, the assessment of the legal limits of emotion monetisation must be viewed as a twofold process incorporating, (1) an examination of the balance struck by the legislator and the requirements provided in secondary law and; (2) the anticipation of the grey areas and the reading into where the Courts may play a role in the determination of the fair balanced application of the relevant requirements and how this balance may be struck in a particular case, which practically speaking includes an indirect role for commercial operators.

**[116]** FUNDAMENTAL RIGHTS AND COMPETENCE – Nevertheless, this raises important questions regarding the precise positioning of fundamental rights in the EU legal order considering the division of competence and thus the boundaries within which the EU legislator may act for their protection. This confusion stems from the fact that broadly speaking there is a lack of any general EU competence to adopt legislation based on the protection of fundamental rights. In this regard reference can be made to Opinion 2/94 in which the Court of Justice found that, '[n]o Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field.'[369] That being said, there is an important distinction between an apparent lack of a general power to legislate and the negative duty not to breach fundamental rights.[370] Indeed, as noted by Kosta,

> '[s]ince respect for fundamental human rights is a condition for the legality of EU acts […] certain institutional duties inevitably flow from this which make it impossible to conclude that there is no fundamental human rights competence whatsoever in the EU.'[371]

In short, such obligations extend not only to when MSs are implementing EU law in their national legal order (i.e. the implementation of a Directive) but also to the EU legislator and Courts (both national and *supra*-national) in the interpretation of law coming within the scope of EU law. This broad scope also reflects the requirement to 'promote the

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[368] *Case C-236/09, Test-Achats, ECLI:EU:C:2011:100* (n 366) para 17.
[369] *Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECLI:EU:C:1996:140* [27].
[370] See for *Case C-11/70 Internationale Handelsgessellschaft, ECLI:EU:C:1970:114* 70; *Case C-4/73 Nold, ECLI:EU:C:1975:114*; ibid. Although these examples are old and were handed down before the adoption of the Lisbon Treaty, and hence the Charter, they still hold up given that this Treaty did not introduce a general positive obligation on the EU to adopt legislation in the field of FRs but actually merely maintained the need to respect FRs (negative obligation).
[371] Vasiliki Kosta, *Fundamental Rights in EU Internal Market Legislation* (Hart Publishing 2015) 17.

application' of the Charter as contained in Article 51(1) Charter but also Article 52(1) Charter. Accordingly, although there is a lack of a general EU competence to adopt legislation based on the protection of fundamental rights, there is a negative obligation on both the EU and national legislators not to disproportionately interfere with fundamental rights in EU law. One must wonder therefore whether this negative obligation not to interfere *de facto* creates a *quasi*-positive obligation to protect fundamental rights in practice. Indeed, both in the adoption and implementation of EU law but also in its interpretation by the Court of Justice and national courts respectively, fundamental rights are integral and transverse all objectives and powers of the EU.

**[117]** MULTI-LAYERED SYSTEM OF PROTECTION – That being said, EU fundamental rights protection is characterised by a multi-layered system with cross-fertilisation across *inter alia,* the respective national constitutional traditions, the EU and the ECHR which all respectively contribute towards the formation of 'a common constitutional space'.[372] This is reflected in Articles 52(3) and 52(4) Charter with the latter stipulating the intention of recognising and interpreting harmoniously, rights resulting from the common constitutional traditions, and the former stipulating that Charter rights that correspond to ECHR rights should be interpreted as the same – albeit not at the exclusion of providing a higher level of protection. Therefore, tracing the overlaps and boundaries of this multi-layered system is complex. The key takeaway from the above is that in horizontal cases the Charter is restricted to more defensive uses provided the situation at hand comes within the scope of EU law as it is invoked through the application of primary of secondary EU law.[373] Through such a conceptualisation however, the Charter can still be understood as a means through which broader social justice considerations can be achieved. This is illustrative of the need for EU law, and also national law coming within the scope of EU law, to respect the Charter.

**[118]** SCOPING EU LAW – In horizontal contexts, this may manifest itself in national Courts having to set aside national law measures coming within the scope of EU law if they do not respect fundamental rights as given expression in an EU legislative measure. The weighing of these fundamental rights will be inherently shaped by the EU legal order and the understanding attributed to (1) the nature of the horizontal effect of fundamental rights provided for in the Charter and as understood in EU law and; (2) how the objectives of the EU legal order (and thus the internal market considerations) shape the development and understanding of the blurred separation between public and private law at the EU level.[374] The former of these relates to the fact that the Charter is triggered

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[372] Lenaerts and Gutiérrez-Fons (n 301).

[373] This reflects the understanding advocated in articles such as Michael Dougan, 'The Impact of the General Principles of Union Law upon Private Relationships' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Hart Publishing Bloomsbury Collections 2013); Dóra Guðmundsdóttir, 'A Renewed Emphasis on the Charter's Distinction between Rights and Principles: Is a Doctrine of Judicial Restraint More Appropriate?' [2015] Common Market Law Review 685.

[374] See generally: Bruno de Witte, 'The Crumbling Public/Private Divide: Horizontality in European Anti-Discrimination Law' (2009) 13 Citizenship Studies 515.

by the scope of EU law, in that it applies when the matter in question comes within the scope of protections provided in secondary EU law or the treaties at the primary level.[375] It seems uncontroversial to suggest therefore, that the standard setting for the protection of fundamental rights is a shared competence due to the fact that as a matter of principle MSs should be able to provide protection in the absence of EU legislation.[376] However, it is important to note that the standard setting in EU law is inherently shaped by the EU legislator's competence and this relates to the second of the two points outlined above. Indeed, as observed by Weatherill,

> '[p]recisely how intrusive the EU rules shall be is determined through the political debate within the legislative process. Appreciation of the substance of the EU's legislative commitment to consumer protection involves inquiry into the extent to which the chosen harmonised standards represent an adequate reflection of the need to protect the consumer from market imperfections and inequities. The allegation that the EU's harmonisation programme carries an emphasis on market-making which subverts protective and distributive aspects carefully inscribed over time into national law has been made with particular force where the EU turns its sights on national (consumer) contract law.'[377]

In this regard it is noteworthy to refer in particular to Micklitz who has questioned whether the evolution of consumer protection law via EU integration and harmonisation has in fact resulted in consumer protection law losing its 'protection' element thereby instead becoming consumer law.[378] More specifically, Micklitz observes that, '[c]onsumer protection law became consumer law, while the protection of the weak became the protection of the ordinary informed and attentive consumer, and the consumer protection law expertise turned into consumer law scholarship.'[379] The author goes on to note however, that from the perspective of the European Commission such an approach is a near perfect combination of efficiency and protection in that, although protection is provided for, it is tailored towards the active internet user who is savvy and diligently surfs the web for the best offers in order to get the best deal regardless of all practical limitations (e.g. linguistic).[380] Therefore, market access has been traditionally positioned as a means of protection as through a diversity of competing products and services market forces are understood as a means of protecting the consumer interests and, as noted by Reich and Micklitz, that through this approach, '[…] consumer welfare and quality of life were to appear quasi-automatically as the results of market freedoms provided certain

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[375] Daniel Sarmiento, 'Who's Afraid of the Chapter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe.(European Union. Court of Justice of the European Communities)' (2013) 50 Common Market Law Review 1279–1280.
[376] Elise Muir, 'The Fundamental Rights Implications of EU Legislation: Some Constitutional Challenges' (2014) 51 Common Market Law Review 219, 239.
[377] Steve Weatherill, 'Consumer Protection' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights : A Commentary* (1st edn, Hart Publishing 2014) 1017.
[378] See: Hans-W Micklitz, 'The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law: A Bittersweet Polemic' (2012) 35 Journal of Consumer Policy 283.
[379] ibid 290.
[380] ibid.

conditions were present (openness of the market under a system of competition and non-discrimination).'[381]

**[119]** CONSUMER PROTECTION AND MARKET INTEGRATION – Here it is important to specify that a diverse consumer protection *acquis* has been established by the EU legislator through the adoption of a wide range of market-integration-based Directives.[382] This is despite the fact that consumer protection has been recognised as a competence since the Maastricht Treaty in 1992 having been developed in response to the *lacuna* left by negative integration.[383] More specifically, Article 169 TFEU specifies two ways to adopt consumer protection legislation, (1) Article 169(2)(a) TFEU which makes a cross-reference to Article 114 TFEU and thus the competence to adopt market harmonising legislation (see below) and, (2) Article 169(2)(b) TFEU which provides the specific consumer protection legislative basis first recognised in the Maastricht Treaty. Article 169(2)(b) TFEU provides that the European policy maker may adopt 'measures which support, supplement and monitor the policy pursued by the Member States.' Hence, it is clear that the EU's competence in relation to measures which do not support the market integration goal is more restricted given that Member States retain the right to introduce and maintain more stringent measures (Article 169(4) TFEU) (see Chapter 6). Perhaps for this reason, Article 169(2)(b) TFEU has been little used in practice and thus, legislative developments in EU consumer protection have been predominantly based on Article 169(2)(a) TFEU and, have thus been a by-product of market harmonisation under Article 114 TFEU.[384]

**[120]** DUALIST OBJECTIVES – Article 114 TFEU is not sector-specific but instead deals with harmonisation and thus the 'establishment and functioning of the internal market' or legislation aimed at 'eliminating distortions of competition.' As described by Weatherill,

> '[…] harmonisation is about setting common standards–but that involves a sensitive choice between a range of possible approaches and techniques. Harmonisation of national consumer laws is an exercise in vertical allocation of regulatory responsibility. It locates at EU level the need for an *EU* understanding of the nature and purpose of consumer law.'[385]

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[381] Norbert Reich and Hans-W Micklitz, 'Economic Law, Consumer Interests, and EU Integration' in Norbert Reich and others (eds), *European consumer law* (2nd edition, Intersentia 2014) 8–9.
[382] Donnelly and White (n 104) 19.
[383] Although the Single European Act which entered into force in 1987 provided an explicit recognition of consumer protection as a specific policy aim within the internal market (Article 100a (now Article 114 TFEU)), this did not affect the competence of the Community *vis-à-vis* law-making. The Treaty of Maastricht in 1992 (the Treaty on European Union (TEU)) aimed to address this issue. This TEU introduced a stronger commitment to consumer policy through the insertion of explicit consumer protection objectives, new citizenship rights and also for the first time formal competence to legislate on consumer issues. As such, to the then Article 100a, the Community could adopt a measure to facilitate market integration *(Article 129(a)(1)(a) EC),* or pursue a 'specific action which supports and supplements the policy pursued by the Member States to protect the health, safety and economic interests of consumers and to provide adequate information' (Article 129(a)(1)(b) EC).
[384] Weatherill (n 377) 1014.
[385] ibid 1015.

Here one can refer to a large number of secondary law sources which are a product of the tension between the EU techniques for protecting consumers *vis-à-vis* the (re-)regulation of the internal market (i.e. following negative integration and the elimination of national protective measures).[386] Accordingly, inherent to the pursuit of consumer protection policy under Article 114 TFEU is the existence of dualist objectives namely, (1) harmonisation and, (2) the consumer protection objective. In relation to the second of these objectives it is significant to highlight Article 38 Charter. Article 38 Charter stipulates that 'Union policies shall ensure a high level of consumer protection.' This provision is based on Article 169(1) TFEU in particular which states that '[i]n order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as protecting their right to information, education and to organise themselves in order to safeguard their interests.'

**[121]** HIGH LEVELS OF PROTECTION – These calls for a high level of consumer protection are further reflected in Article 114(3) TFEU which states that when legislative action is proposed under Article 114 TFEU the Commission is required to '[…] take as a base a high level of protection, taking account in particular of any new development based on scientific facts', an obligation which is also placed on the shoulders of the European Parliament and the Council when they are acting '[w]ithin their respective powers'. Therefore, when adopted under Article 114 TFEU consumer policy by its very nature exemplifies dualist objectives. In this vein, Weatherill points to the EU's legislative output which,

> '[…] faithfully reflects the notion that harmonisation concerns the establishment of common rules designed to promote market integration which also are based on appreciation of the need to determine what shall be the *quality* of the regulated environment–that, in particular, it shall pursue a high level of consumer protection.'[387]

As noted by the author, since the adoption of the Lisbon Treaty this is manifested in the preambular references to Article 38 Charter and also references to specific rights where there is a specific limitation in light of Article 52(1) Charter in the Recitals of the EU's legislative output.[388] The EU consumer law *acquis* is thus arguably shaped by its reliance on Article 114 TFEU as a basis for law-making and hence, the 'purposive' nature of this competence (i.e. internal market).[389] More specifically, here reference can be made to

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[386] ibid.
[387] ibid.
[388] ibid. In this regard reference can be made for example to Directive 2008/48 on consumer credit which in Recital 45 refers to several rights '[t]his Directive respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for the rules on protection of personal data, the right to property, non-discrimination, protection of family and professional life, and consumer protection pursuant to the Charter of Fundamental Rights of the European Union.'
[389] Gareth Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' (2015) 21 European Law Journal 2.

Davies who convincingly argues that EU policy adopted under Article 114 TFEU can have clear consequences for the non-economic objectives as these are peripheral to internal market interests and simply do not exist without this connection and therefore, any legislative development is invariably shaped by this fact.[390] The question thus is one of whether such 'accessory' fundamental rights dimensions (i.e. where the legislation is giving effect to a specific EU policy objective such as consumer protection) could upset the balance between national and EU level fundamental rights protection.[391] Indeed, given that such a basis may be used as an indirect means of addressing fundamental rights matters, this is an important consideration in the context of the monetisation of emotion in light of the emergence of emotional AI. Reference here can be made to the *lex generalis* UCP Directive which through its banning of unfair business-to-consumer practices aims to open up the internal market for 'fair' practices[392] and the *lex specialis* aims of the AVMS Directive of promoting the free movement of audiovisual media services within the EU by providing certain minimum requirements, and essentially, how through the operation of the requirements contained therein respective rights and interests are balanced both by the legislative compromise adopted by the legislator and the Court of Justice and the national courts.

**[122]** REGULATING EMOTION CONDITIONING AND UNFAIR APPEALS – It is obvious but important to note that, in the context of emotion monetisation in advertising and marketing, although commercial speech is included within the protection afforded by the right to freedom of expression, this does not mean that such speech cannot be regulated as is evident from the analysis of the EU consumer protections in Chapter 2. Indeed, the transparency and information provision requirements are clear evidence of this and hence, the question thus becomes one of what affect the emergence of emotional AI may have on such considerations. In this vein, and as noted above, it is important to note that in EU law social justice is regarded as endangered due to the deregulatory effects of free movement and the MSs continued reliance on the formal conception of contractual freedom and equality.[393] Practically speaking however, such an approach is very questionable, and this is potentially heightened given the emergence of emotional AI and technological developments more generally. In 1976 Reed and Coalson published an article which tracked the historical increase of emotional appeals in advertising from the a US law perspective, offered insights into the origins of this gradual adoption and attributed technological development as a key determining factor in its rise.[394] The authors noted that this practice of emotional conditioning was potentially detrimental to society, that the traditional focus in legal protections on misrepresentation and deception fails to

[390] ibid 10.
[391] See: Muir (n 376).
[392] Weatherill (n 377) 1017.
[393] Dorota Leczykiewicz, 'Horizontal Application of the Charter of Fundamental Rights' (2013) 38 European Law Review 479, 495. With reference to Hans-W Micklitz, 'Principles of Social Justice in European Private Law' (1999) 19 Yearbook of European Law; Oxford 167.
[394] Reed Jr and Coalson Jr (n 32).

adequately protect consumers and, as a consequence, the authors called for the regulation of '[…] "emotional" advertising that subconsciously stimulates consumers to purchase generic products which do not vary in their composition or use.'[395] In this manner, the authors concluded that excessive emotional appeals could be deemed 'unfair' and should warrant protective measures in the interest of consumers. Although this article was written over 40 years ago its argumentation has retained, if not increased, in importance due to rapid development of internet technologies in recent years.[396]

**[123]** EMERGENCE OF EMOTIONAL AI MONETISATION AND INDIVIDUAL AUTONOMY – In differentiating the old and current marketing models and efforts to exploit emotions, Sampson highlights two key differences namely, that first, advancements in technology now facilitate the systematic gathering of insights and second, as described in the previous Chapter, there has been a turn towards the recognition of the significant role played by emotions in decision making.[397] These two developments are arguably of major significance and go to the root of the underlying assumptions *vis-à-vis* decision-making capacity and hence, the associated legal protections. Therefore, technological progress and the ability to detect and target emotion in real-time may arguably undermine legal protections and have a negative impact on the autonomous decision-making capacity of the consumer, despite the fact that there is nothing new *per se* in terms of the aim of exploiting the emotional desires of individuals.[398] Certainly, emotional AI may have an impact on the fundamental rights of consumers thereby arguably extenuating the effect of emotion monetisation and necessarily adding additional considerations to the balancing scales. In this manner, although the information provision obligations and the obligations not to mislead consumers contained in EU law may be adequate to protect their interests, one must wonder how the protections stack up considering the technological development. Indeed, even outside the capacity to utilise such technology to increase market penetration through emotion detection and targeting, one must also wonder as to the effect of capitalising on insights into the effectiveness of the available means of delivering commercial messages through market research and product testing (see Chapter 2). Therefore, to reiterate the theme of this thesis, the emergence of emotional AI and the harnessing of emotion insights for commercial purposes arguably raises key concerns regarding individual autonomy. But what is meant here by autonomy and is it a right to be balanced with the rights and interests of commercial operators or rather a more over-arching notion?

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[395] ibid 733.

[396] For a discussion see: Damian Clifford, 'Citizen-Consumers in a Personalised Galaxy: Emotion Influenced Decision-Making, a True Path to the Dark Side?' (Social Science Research Network 2017) SSRN Scholarly Paper ID 3037425 <https://papers.ssrn.com/abstract=3037425> accessed 19 December 2017; Clifford and Verdoodt (n 33); Verdoodt, Clifford and Lievens (n 33).

[397] Tony Sampson, 'Various Joyful Encounters with the Dystopias of Affective Capitalism' 16 ephemera: theory & politics in organization 51, 58.

[398] ibid 57.

### 3.1.2 PRIVACY AND THE NOTION OF AUTONOMY – OUTLINING THE THEORETICAL FOUNDATIONS

**[124]** PRIVACY AS AUTONOMY? – Autonomy is key to liberal theory and inherent to the operation of the democratic values which are protected at the foundational level by fundamental rights and freedoms. Interestingly however, there is no express reference to a right to autonomy or 'self-determination' in either the ECHR or the Charter. Despite not being expressly recognised in a distinct ECHR provision, the ECtHR has repeatedly confirmed that the protection of autonomy comes within the scope of Article 8 ECHR. This provision specifies the right to respect for private and family life. For instance, in *Pretty v. United Kingdom* the ECtHR found that Article 8 ECHR included the ability to refuse medical treatment and that the imposition of treatment on a patient who has not consented '[…] would quite clearly interfere with a person's physical integrity in a manner capable of engaging the rights protected under art 8(1) of the Convention'.[399] The link between the right to privacy and autonomy is thus strong. This connection has been repeatedly illustrated in the ECtHR jurisprudence dealing with individuals' fundamental life choices including *inter alia* in relation to sexual preferences/orientation, and personal and social life (i.e. including a person's inter-personal relationships). Reference to such cases illustrate the role played by the right to privacy in the development of one's personality through self-realisation and autonomy (construed broadly).[400]

#### *A. AUTONOMY, LIBERAL THEORY AND THE RIGHT TO PRIVACY*

**[125]** CONCEPTUALISING THE RIGHT TO PRIVACY – As noted by Ziegler, conceptualising the right to privacy as linked to one's development unites what are often perceived as the two strands of this right, namely; (1) privacy as seclusion or intimacy (i.e. which is often spatially defined or alternatively, in terms of substance *vis-à-vis* what is considered private) and; (2) privacy as freedom of action, self-determination and autonomy – with both strands necessary for the development of one's personality.[401] As noted above, the second of these relates the Article 8 ECHR case law on autonomy, whereas the first refers more explicitly to State led invasions of privacy most aptly characterised recently by the ECtHR's case law on mass surveillance.[402] The operation of privacy is thus context dependent and despite the various attempts to define and/or '*taxonomise*' privacy, it largely remains an elusive

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[399] *Pretty v United Kingdom, (2346/02) [2002] ECHR 423 (29 April 2002)*.

[400] Here it is interesting to refer to the notion of 'intellectual privacy' in US literature as developed by Neil Richards, *Intellectual Privacy: Rethinking Civil Liberties in the Digital Age* (Oxford University Press 2015). and for a similar line of argumentation see: Eric Barendt, 'Privacy and Freedom of Speech' in Andrew T Kenyon and Megan Richardson (eds), *New Dimensions in Privacy Law: International and Comparative Perspectives* (Cambridge University Press 2006) <https://www.cambridge.org/core/books/new-dimensions-in-privacy-law/privacy-and-freedom-of-speech/30E705C4115371DE6F7330A04D4BE704>.

[401] Katja S Ziegler, 'Introduction: Human Rights and Private Law – Privacy as Autonomy' in Katja S Ziegler (ed), *Human Rights and Private Law : Privacy as Autonomy* (1st edn, Hart Publishing 2007) 1.

[402] See: Eleni Kosta, 'Surveilling Masses and Unveiling Human Rights - Uneasy Choices for the Strasbourg Court' [2018] Tilburg Law School Research Paper.

notion.[403] In this vein, it is useful to refer to Feldman who conceptualises privacy as being 'conditioned by the nature of social life' with individuals existing in several different 'social spheres, which interlock, and in each of which they have different responsibilities, and have to work with people in relationships of varying degrees of intimacy.'[404] This approach appears to share a common thread with Nissenbaum's later developed theory of contextual privacy and the conceptualisation of privacy as appropriate (or indeed inappropriate) information flows.[405]

**[126]** PRIVACY AND SOCIAL SPHERES – Feldman notes that there are four dimensions within each of these social spheres which need to be considered namely, space; time; action; and information, with the privacy-related rights being claimed therein dependent on the circumstances and thus, which of the dimensions is at stake.[406] In weighing the circumstances in light of the relevant dimension, the author further observes that there are certain values which will fluctuate in importance depending on the context, such as *inter alia*, secrecy (better conceptualised as selective disclosure), dignity and autonomy.[407] Such an approach aligns well with the ECtHR case law on Article 8 ECHR in that, although there is much discussion of 'secrecy' (i.e. the autonomous control of information), the right to privacy also encompasses a conceptualisation of privacy defined in terms of intimacy or seclusion but importantly, also as freedom of action, self-determination and autonomy (as mentioned above). Therefore, as Feldman convincingly argues, there is a strong link to controlling the boundaries of social spheres within the traditional conception of liberal individualism, and with this, the notion of autonomy.[408] Hence, privacy is not simply synonymous with autonomy.

**[127]** PRIVATE AUTONOMY – Indeed, generally speaking the separation between public and private law is often on the basis of the role of private autonomy or the freedom from State intervention with private autonomy perhaps best characterised as a manifestation of a human freedom guaranteed by fundamental rights frameworks.[409] As noted by Leczykiewicz and Weatherill, in an economic context this private sphere is ruled by market forces and economic power and not, at least conceptually, by a regulatory

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[403] This is said despite the extensive attempts to do so see for example: D Solove, 'A Taxonomy of Privacy' (2006) 154 University of Pennsylvania Law Review 477.

[404] David Feldman, 'Secrecy, Dignity, or Autonomy? Views of Privacy as a Civil Liberty' (1994) 47 Current Legal Problems 41, 51.

[405] Helen Nissenbaum, *Privacy in Context: Technology, Policy, and the Integrity of Social Life* (Stanford University Press 2009); Helen F Nissenbaum, 'Privacy as Contextual Integrity' (2004) 79 Washington Law Review 119.

[406] Feldman (n 404) 52.

[407] ibid 53–59.

[408] ibid.

[409] In this vein, Comparato and Micklitz observe that, '[e]xpressing the individual's autonomy to freely organize their social and economic life, private autonomy – together with the recognition of private property – is the foundation of the free market economy. But this link to certain political and economic ideology is a hint to the fact that behind the generic definition of private autonomy lurks a wide range of understandings, ideologies and designs.' Comparato and Micklitz (n 302) 121–122.

framework.[410] Through such an interpretation, regulatory interventions are utilised to correct market failures and thereby play a role only when private autonomy is endangered.[411] This strict separation and the isolation of private autonomy from regulatory intervention has probably never been strictly respected with States intervening not only to counteract market failures but also for the promotion of social goals.[412] In the scholarly debates, private autonomy in the EU setting is said to be best understood as private (economic) autonomy.[413] This qualification refers to the focus on private autonomy in the sense of an individual economic liberty as opposed to a personal freedom.[414] In this vein, Comparato and Micklitz thus suggest that in the EU legal order private autonomy differs from the understanding attributed to this notion as a constitutional legal principle in national law understandings, in that private autonomy in the EU is shaped by the purpose of achieving policy objectives and, more specifically, the realisation of the internal market (see discussion on fair balancing above).[415]

**[128]** PRIVATE (ECONOMIC) AUTONOMY – In an economic context, the manifestations of private autonomy are multifarious but are perhaps best characterised with reference to the notions of freedom of contract and the absence of coercion.[416] In short, through such an understanding the underlying premise of private autonomy is grounded in the supposition that private parties on an equal footing are themselves best positioned to decide on their legal relationship *inter se*. However, although at first glance the link between private autonomy and private (economic) autonomy does not represent a major conceptual jump, it conceivably further distances itself from its more 'constitutionalised' mother. Indeed, in other words the economic manifestations of private (economic) autonomy may be more difficult to link to basic human rights.[417] In this regard, it is significant to consider the specific role attributed to Article 16 Charter which arguably represents the first time private (economic) autonomy has been recognised at the EU level.[418] This provision stipulates that '[t]he freedom to conduct a business in accordance

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[410] Dorota Leczykiezicz and Stephen Weatherill, 'Private Law Relationships and EU Law' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Involvement of EU Law in Private Law Relationships.* (Hart Publishing Bloomsbury Collections 2013) 4.
[411] ibid 5.
[412] ibid. As described by Colombi Ciacchi examples of such a relationship are (1) legislative reforms aimed at complying with fundamental rights (2) declarations of unconstitutionality and (3) *supra*-national court condemnations of States for non-compliance with fundamental rights. Aurelia Colombi Ciacchi, 'European Fundamental Rights, Private Law, and Judicial Governance' in Hans Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014) 104.
[413] See for example: Rufat Babayev, 'Priate Autonomy at Union Level: On Article 16 CFREU and Free Movement Rights' (2016) 53 Common Market Law Review 979; Comparato and Micklitz (n 302).
[414] Indeed, according to Persmann '[t]he market freedoms guaranteed by the [Treaties] can be understood as the specific manifestations of "freedom of trade" deriving ultimately from an indivisible, basic "right to liberty."' Ernst-Ulrich Petersmann, 'International Trade Law, Human Rights and Theories of Justice' in Debra P Steger, Peter Van den Bossche and Steve Charnovitz (eds), *Law in the Service of Human Dignity: Essays in Honour of Florentino Feliciano* (Cambridge University Press 2005) 49.
[415] Comparato and Micklitz (n 302) 122–123.
[416] Leczykiezicz and Weatherill (n 410) 4.
[417] Comparato and Micklitz (n 302) 121.
[418] Babayev (n 413) 982.

with Union law and national laws and practices is recognised.'[419] Although Article 16 Charter itself does not provide any indication of what is to be included in the freedom to conduct a business, the explanations to the Charter do specify that the provision is to be understood in line with the Court of Justice case law recognising the freedom to exercise an economic or commercial activity, freedom of contract and the principle of free competition (i.e. Article 119(1) and (3) TFEU).[420] In the early days of the Union economic operators viewed the interventions of the European Communities setting aside standards of production and access to the market as an infringement of their freedom to conduct their business, to determine the amount of production and the parties with whom they concluded contracts.[421] It was through the cases dealing with these regulatory interventions that private (economic) autonomy via the freedom to trade was attributed a constitutional status *via* its recognition as a general principle of Community (now EU) law. Indeed, as noted by Advocate General Bobek in his opinion in the *Lidl GmbH & Co. KG v Freistaat Sachsen* case, in its case law pre-dating the entry into force of the Treaty of Lisbon and dealing with the closely connected Articles 15 and 16 Charter, the Court 'used different formulations to refer, in their quality as general principles of law, to the freedom to freely choose and practice one's trade or profession; the freedom to pursue an occupation; the right to carry on one's trade or business; or the freedom to pursue an economic activity.'[422]

**[129]** FREEDOM TO CONDUCT A BUSINESS – Accordingly, seminal Court of Justice case law established that freedom to conduct a business was indeed a general principle of EU law but at the same time that this general principle could be broadly restricted. These first cases therefore essentially weighed the four freedoms against private autonomy in light of the EU's legislative objectives.[423] Indeed, in this regard it is significant to refer to Comparato and Micklitz who after analysing this case law conclude that,

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[419] As noted by Everson and Gonçalves, this right was sourced from the constitutional traditions of the MSs rather than from the international fundamental rights frameworks where it has been extrapolated from the 'constitutionally secured rights to property and to work.' The authors go on to note however, that it is significant that despite its connection with the rights to property and work (as protected in Articles 17 and 15 Charter respectively), the freedom to conduct a business is provided as a separate right in the Charter. Michele Everson and Rui Correia Gonçalves, 'Freedom to Conduct a Business' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights : A Commentary* (1st edn, Hart Publishing 2014) 438.

[420] The explanations to the Charter refer in particular to: *Case C-4/73 Nold, ECLI:EU:C:1975:114* (n 370); *Case C-151/78, Sukkerfabriken Nykøbing, ECLI:EU:C:1979:4*; *Case C-240/97, Spain v Commission, ECLI:EU:C:1999:479*; *Case C-230/78, SpA Eridiana and others, ECLI:EU:C:1979:216*.

[421] Comparato and Micklitz (n 302) 128.

[422] *Opinion of Advocate General Bobek delivered on 16 March 2016 in Case C-134/15 Lidl GmbH & Co KG v Freistaat Sachsen, ECLI:EU:C:2016:169* [20].

[423] For instance, in *Internationale Handelgessellschaft* (also known as Solange I) the German Federal Constitutional Court was asked to set aside an EU measure which related to the forfeiture of an export licence deposit as it was allegedly in violation of the German Constitutional rights to personal freedom (Article 2(1), which is understood as protecting private autonomy) and to property (Article 14). The German Court referred the case to the Court of Justice for a preliminary ruling and, in upholding the EU measure, the Court of Justice held that the restriction on the freedom to trade was not disproportionate vis-à-vis the general interest objective pursued. *Internationale Handelgessellschaft* and subsequent cases thus established that the general principle of freedom to conduct a business is not absolute and may be restricted

> '[i]n light of the various limitations in order to achieve the general objectives of the European communities and of the dichotomy of a legal order which on the one hand limits freedom of contract and on the other hand assumes free trade as a founding principle, it is reasonable to affirm that fundamental freedoms are aimed at opening markets rather than guaranteeing freedom of contract *per se*.'[424]

This separation of the fundamental freedoms (i.e. the free movement rights) and freedom of contract also extends to the other aspects of Article 16 Charter (i.e. the freedom to exercise an economic or commercial activity and the principle of free competition) and thus arguably reflects their differentiation from what is now provided for in this provision. Although the ability to freely engage in an economic or commercial activity or to exercise the freedom to contract, are inherent prerequisites to exercise free movement rights, these free movement rights are not aimed at achieving these elements of the freedom to conduct a business in Article 16 Charter but instead present a specific regulatory expression of the right in light of the establishment of the internal market and the removal of barriers as an objective of the EU legal order. To clarify, the free movement rights do not aim to guarantee private (economic) autonomy as expressed in Article 16 Charter in a general way but rather in a more specific and narrow manner reflecting the desire to confer the freedom to access the market as opposed to the freedom to carry out an economic activity *per se*.[425] As noted by Babayev, '[t]here is, therefore, an element of instrumentality in the nature of free movement rights, which shapes the form of individual autonomy vested in them.'[426] Through such an understanding it is not that Article 16 Charter is unaffected by Union objectives but instead that it is not framed with the sole purpose of achieving and promoting the functioning of the internal market. In this vein, in the operation of the market freedoms different fundamental rights may come into conflict.

**[130]** LIMITING MARKET FREEDOMS – An excellent example of how fundamental rights can be used to limit free movement rights is provided by the judgment in the *Omega Spielhallen* case[427] where the Court of Justice held that national authorities (in this instance the German authorities) could limit the freedom to provide services as justified by the need to protect human dignity as long as this purpose could not be achieved by a less restrictive measure.

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on the basis of proportionate measures which pursue a legitimate objective of the EU legal order. the German Federal Constitutional Court was asked to set aside an EU measure which related to the forfeiture of an export licence deposit as it was allegedly in violation of the German Constitutional rights to personal freedom (Article 2(1), which is understood as protecting private autonomy) and to property (Article 14). The German Court referred the case to the Court of Justice for a preliminary ruling and, in upholding the EU measure, the Court of Justice held that the restriction on the freedom to trade was not disproportionate vis-à-vis the general interest objective pursued. *Internationale Handelgessellschaft* and subsequent cases thus established that the general principle of freedom to conduct a business is not absolute and may be restricted on the basis of proportionate measures which pursue a legitimate objective of the EU legal order. *Case C-11/70 Internationale Handelsgessellschaft, ECLI:EU:C:1970:114* (n 370).

[424] Comparato and Micklitz (n 302) 133.

[425] Babayev (n 413) 981.

[426] ibid 988–989.

[427] *Case C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn, ECLI:EU:C:2004:614*.

The elimination of national barriers also allowed for the constituting of a new source of individual rights. Although the four freedoms were addressed to active market participants, hence relying on a 'productivist concept', they also indirectly supported consumer welfare interests via increased individual freedom of choice.[428] Hence, this approach remained consistent with the goal of increasing the quality of life of citizens in terms of consumer welfare.[429] Indeed, the case law has emphasised the need for a delicate balancing of market integration and the enlargement of consumer choice on one hand and the preservation of the national protective standards on the other.[430] The Court's negative integration role and the striking down of provisions disguised as consumer orientated which actually safeguard national interests in a protectionist manner has, in the words of Ramsay, resulted in the adoption of 'a relatively robust model of the consumer and a standard of deception of "an average consumer who is reasonably well informed and reasonably observant and circumspect"' by the Court.[431] In light of the above, Angelopoulos notes that the developments in the case law of the Court of Justice described above are distinct manifestations of the proportionality principle's jump to the EU level and the aim of reconciling fundamental rights with the supremacy of EU law thereby reflecting its dual use as a means of market integration and as a tool for the protection of fundamental rights (see above).[432]

**[131]** AUTONOMY, EMOTION MONETISATION AND THE VARIOUS RIGHTS IN CONFLICT – In the context of emotion monetisation, a whole range of Charter rights may therefore be at stake. For example, privacy, freedom of thought, conscience and religion and non-discrimination and such rights may need to be balanced against each other or other rights such as freedom of expression, the right to property, freedom to conduct a business, and other societal (i.e. collective interests) all of which have the same liberal foundations with autonomy as an overarching notion evident in the operation of each of these fundamental rights. As such, given that this thesis focuses on the application of several competing rights it is logical to concentrate on how the autonomous decision-making capacity of individuals may be safeguarded. However, given the principle-based approach evident in the UCP Directive and the flexibility that this framework offers, it is unclear whether decisions as to the unfairness of a particular manifestation of the monetisation of emotion can really be made at the legislative level in any concrete manner without

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[428] Reich and Micklitz (n 381) 8–9.

[429] A landmark decision in this regard is the seminal *Case C-120/78, Rewe Zentrale AG v Bundesmonopolverwaltungfiir Branntuiein, ECLI:EU:C:1979:42*. which, in relying on the principle of mutual recognition, aimed to improve market functioning and consumer choice, despite raising concerns over a potential regulatory race to the bottom. Benöhr (n 11) 21. Although the Court of Justice subsequently developed a broader conceptualisation of consumer protection as a justification against national measures restricting free movement, the judgement is indicative of the Court's intention to eliminate barriers to free trade even in situations where these barriers existed to protect the consumer. Donnelly and White (n 104) 18.

[430] Benöhr (n 11) 18–23.

[431] Ramsay (n 208) 33. 33 with reference to: *Case C-210/96, Gut Springenheide GmbH and Tusky v Oberkreisdirektor des Kreises Steinfurt, EU:C:1998:369* (n 172).

[432] Angelopoulos (n 319) 74.

disproportionately impacting rights such as the right to freedom of (commercial) expression. Rather than looking at the application of emotion insights, therefore one must wonder if it is not better to explore the application of legal protections associated with the detection of the emotion in the first instance?

**[132]** EMOTIONAL AI, AUTONOMY AND THE RIGHT TO PRIVACY AS AN AVENUE FOR PROTECTION – As described above, autonomy as a notion has been largely placed within the scope of the right to privacy and this fits well with the emergence of emotional AI given the clear challenges that the capacity to detect emotions in real-time and hence, emotion surveillance, presents for this fundamental right. Hence, although privacy and autonomy are not synonyms, privacy offers a more tangible avenue for the protection of the autonomous decision-making capacity of consumers (indeed as evidenced by the ECHR case law). It appears that these technological developments specifically challenge the two strands of the right simultaneously, namely privacy as seclusion or intimacy through the detection of emotions and privacy as freedom of action, self-determination and autonomy via their monetisation (see above).[433] The precise consequences of the information asymmetries combined with unilateral power to design all aspects of commercial interactions are as of yet unknown.[434]

**[133]** DETECTING EMOTIONS, CONSUMER DECISIONS AND THE ROOM FOR ERROR – Therefore, there may need to be a weighing of rights and interests in the assessment of the unfairness of the use of such developments for advertising and marketing purposes *vis-à-vis* the *ex post* personalisation of commercial communications (see Chapter 4). As such an assessment would appear to require a context dependent assessment to ensure that there is not a disproportionate inference with the freedom of commercial expression. That being said, the mediated society and its effects grow stronger with technological development and the increasing 'datafication' of consumer activity.[435] The precise consequences of the information asymmetries combined with unilateral power to design all aspects of commercial interactions are, as of yet, unknown.[436] Nevertheless, it is uncontroversial to suggest that such developments have contributed towards the increased blurring between editorial and commercial content and thus the progression towards integrative forms of marketing as described above in Chapter 2. This is arguably exacerbated due to the influence of emotions. Indeed, even our attempts to control affective processes are emotionally motivated in the first instance.[437] However, importantly as noted by Arkush, '[t]o say that we often do not control our own actions is not to say that others control

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[433] Ziegler (n 401) 1. This view is shared by Yeung in her discussion of population-wide manipulation, see: Karen Yeung, 'A Study of the Implications of Advanced Digital Technologies (Including AI Systems) for the Concept of Responsibility within a Human Rights Framework (DRAFT)' (Council of Europe) I-AUT2018)05 29.

[434] Calo (n 7) 1002–1003.

[435] See: Viktor Mayer-Schonberger and Kenneth Cukier, *Big Data: A Revolution That Will Transform How We Live, Work and Think* (Houghton Mifflin Harcourt 2013).

[436] Calo, 'Digital Market Manipulation' (n 34) 1002–1003.

[437] Arkush (n 197) 1322.

them'.[438] That being said, the author goes on to specify that we should not underestimate manipulation. It is important to note that Arkush was writing in 2008 and that thus given the technological developments such concerns are far more tangible (i.e. as described above in Chapter 2). As noted by Sampson although it remains unclear *vis-à-vis* whether this 'neurospeculation' is in fact grounded in valid potential, there has undoubtedly been a strong convergence between the neurosciences and the marketing industry.[439] Speculation in this regard has only increased since the *Cambridge Analytica* fallout.[440] Accordingly, it would seem prudent to acknowledge the potential of such technological developments.

**[134]** MANIPULATING EMOTIONS – Personalisation undoubtedly aims to increase the persuasive intent of commercial communications by directly appealing to our profiles**.**[441] The ability to target individuals based on emotional insights and personalise the nature of the appeal to match, arguably adds a layer of manipulation to current programmatic advertising practices. *Facebook* has received a lot of media attention in this regard. From the infamous emotional contagion experiment where users newsfeeds were manipulated to assess changes in emotion, to the introduction of 'feelings' in addition to the 'like' button, the targeting of insecure youths with 'vulnerable' moods,[442] their patents for the detection of emotion in messenger (to add emoticons automatically), *via* the camera of a smart phone or laptop (for content delivery) and also through image analysis of photos such as selfies (in order to dynamically generate emojis)[443] and more recently (and now most infamously) the fallout from the *Cambridge Analytica* scandal.[444] As noted by Stark and Crawford commenting on the fallout from the emotional contagion experiment and prior to the *Cambridge Analytica* debacle, '[…] despite the uproar over *Facebook's* emotional contagion study and concern about the manipulation of user's [*sic*] emotions, it is clear that quantifying, tracking, and manipulating emotions is a growing part of the social media business model.'[445] This point raises a key issue in relation to the blurring lines separating the realms of academic research and commercial market research and thus how seemingly innocuous product/service features such as emoji can be used for commercial benefit. Indeed, in this regard one can again refer to Stark and Crawford who note that '[e]moji offer us more than just a cute way of "humanizing" the platform we inhabit: they also remind us of how informational capital continually seeks to

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[438] ibid 1327.
[439] Sampson (n 397) 59.
[440] See: 'The Cambridge Analytica Files' *The Guardian* <https://www.theguardian.com/news/series/cambridge-analytica-files>.
[441] See: Kaptein (n 243) 176–179.
[442] Levin (n 278); Solon (n 278); 'Facebook Research Targeted Insecure Youth, Leaked Documents Show' (n 278).
[443] 'Facebook's Emotion Tech: Patents Show New Ways For Detecting And Responding To Users' Feelings' (n 278).
[444] Here one can refer in particular to The Guardian's coverage of this story in particular, see: 'The Cambridge Analytica Files' (n 440).
[445] Luke Stark and Kate Crawford, 'The Conservatism of Emoji: Work, Affect, and Communication' (2015) 1 Social Media + Society 1, 8.

instrumentalize, analyse, monetize, and standardize affect' and thus represent merely another means 'to lure consumers to a platform, to extract data from them more efficiently, and to express a normative, consumerist, and predominantly cheery world-view.'[446]

**[135]** TECHNOLOGICALLY MEDIATED SPACES – However, Facebook are clearly not alone and with the rise of many big technology players and also the emergence of smaller dedicated companies, empathic media are now increasingly common place. Indeed, the 'positioning' of products *via* a differentiation based on subjective features is a well-established component in marketing strategies[447] and the ongoing technological developments allow for the personalisation of all aspects of the commercial communication delivery (even the nature of the appeal) to facilitate commercial penetration. Accordingly, one must question the effects of combining such personalisation with consumer-facing interactions that are driven by emotion insights.[448] The proliferation of internet technologies has allowed for the commercialisation of different forms of content which historically were void of a commercial nature and permits the further monetisation of the private sphere, thereby extending technology's reach even further. This is significant as emotionally appealing campaigns can have a direct and immediate impact upon consumers who can act on their desires at the click of a mouse. Such direct access and the elimination of time for reflection potentially permits the commercial exploitation of impulses through emotionally triggered actions.[449] An awareness of emotions provides valuable insights into individual decision-making and behaviour and may thus allow for the optimisation of campaigns based on the profiled differentiation between consumer. One could also argue that given the now infamous *Facebook* 'emotional contagion' experiment, the capacity to manipulate may not stop at the nudging of consumers towards certain behaviours but could conceivably include the manipulation of a consumer's emotional state towards the one which is best suited to a commercial goal.[450]

### *B. EMOTION DETECTION AND PROFILING RISK, NOTHING NEW?*

**[136]** CAPACITY TO COPE? – From the above, the capacity of the current legal framework to cope with such developments is in doubt. The development of emotion detection technology further facilitates the creation of emotion-insight evolved consumer-facing interactions in that such technologies allow for the development of *inter alia* content, formats and

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[446] ibid.
[447] Reed Jr and Coalson Jr (n 32).
[448] For example, the gamification of content (be it commercial or editorial) has been shown to engender positive emotional reactions from consumers thereby rendering such content more attractive and engaging (i.e. gamification techniques applications or advertising techniques such as advergames). See: Verdoodt, Clifford and Lievens (n 33).
[449] Although not specific to the context of emotions one can refer more generally here to Calo, 'Digital Market Manipulation' (n 34).
[450] Adam DI Kramer, Jamie E Guillory and Jeffrey T Hancock, 'Experimental Evidence of Massive-Scale Emotional Contagion through Social Networks' (2014) 111 Proceedings of the National Academy of Sciences 8788.

products or indeed, entire campaigns that are optimised to be tailored by emotion insights. In saying this, the aim here is not to swallow the promises of the capabilities of emotion detection for advertising/marketing purposes whole and thus take a completely dystopian view of the future of this technology. Indeed, as noted by Markwica,

> '[e]ven when emotions produce powerful impulses, people will not necessarily act on them. Humans are neither slaves of the passions nor perfect manipulators of their emotions, but they exert limited and varying degrees of control over them.'[451]

Hence, any potential influence of emotion on decision-making must be approach in a probabilistic manner (as should the accuracy of the detection mechanism used).[452] Instead, the aim therefore is to present the *potential* challenge to the reliance on consumer rationality as a foundation for protection based on the heavy financial investment in this area and its increasing emergence in research and the market. This is significant given that, rationality as a paradigm has been long subject to criticism. As described in Chapter 2, such criticisms are potentially compounded by the fact that the dominant theories applied to consumer decision-making, position emotions as deviations from rationality.

**[137]** EMOTION DETECTION AS A FEATURE – Aside from marketing or advertising however, emotion detection technologies also facilitate the opening of new commercial opportunities in areas such as the health care and/or 'wellness' sectors.[453] In such instances, emotion detection becomes the selling point rather than the means of achieving a sale (i.e. despite the fact that the two will undoubtedly be linked in the marketing campaign). Crawford *et al.* in their exploration of the emergence of self-tracking technologies for example, observe that the rise of wearable devices can be positioned within the historical move towards the pursuit 'of the kind of self-knowledge that will create a fitter happier, more productive person.'[454] In this vein, the authors compare the emergence of wearable technologies designed to track one's well-being with the development of the weight scale and note that,

> '[w]hile self-knowledge may be the rhetoric of wearable device advertising, it is just as much a technology of *being known by others.* With more detailed information, far more individualized and precise interventions can be conducted, with the potential for political and cultural impact well beyond that of the weight scale.'[455]

This sentiment reflects the key role played by providers and hence, the capacity to steer user behaviour based on the insights gleaned from self-tracking devices. Similar concerns are also clearly evident in other smart technologies designed for the future 'smart home' and more generally the development of IoT ('Internet of Things') devices. Although it is

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[451] Robin Markwica, *Emotional Choices: How the Logic of Affect Shapes Coercive Diplomacy* (Oxford University Press 2018) 18.
[452] For an overview of the computer science literature and how it is framed in terms of probabilities see: Burr, Cristianini and Ladyman (n 7); Burr and Cristianini (n 7).
[453] McStay, 'Empathic Media: The Rise of Emotion in AI' (n 16).
[454] Kate Crawford, Jessa Lingel and Tero Karppi, 'Our Metrics, Ourselves: A Hundred Years of Self-Tracking from the Weight Scale to the Wrist Wearable Device' (2015) 18 European Journal of Cultural Studies 479, 480.
[455] ibid 493.

beyond the scope of this Chapter to discuss the intricacies of specific applications in detail, for our current purposes it is significant to note that even though there are common issues, each application also potentially raises its own unique concerns.

**[138]** RISK AND PROFILING FOR EMOTION INSIGHTS – The risks associated with emotion detection therefore, are not limited to the commercial desire to differentiate and/or design based on emotion insights. Profiling by its very nature incorporates risk[456] and, as will now be described, it is questionable whether emotion profiling may in fact aggravate some of the existing risks of personal data processing harm. For instance, although the tangible risk associated with the potential for identity theft/fraud[457] exists irrespective of whether the gathered profile may aim to detect the individual's emotions, whereas the potential negative effects associated with a data breach where the emotion insights reveal an underlying mental health condition may be subjectively worse depending on the individual. Therefore, it is necessary to not only examine the commercial application of emotions in terms of their use for the purposes of creating emotion insight tailored consumer facing interactions or indeed the differentiation between consumer on the basis of emotion, but also the potential risks associated with profiling and thus emotion detection more generally. Indeed, and as will be outlined further in Chapter 4, to distil emotion insights information are collected through a variety of sensors and mechanisms and will therefore often incorporate the processing of large amounts of data.[458] However, given that such large-scale data gathering, and processing is hardly unique to emotion profiling one must question whether emotion detection presents unique challenges. Profiling thus inherently incorporates the risk of both tangible and intangible harm. But what does this mean in a practical sense in the context of emotion detection technology? In order to contextualise the debate, imagine a consumer, John, who suffers from bi-polar disorder purchasing a smart device to track his emotions to improve his well-being.[459] To detect John's emotional state his smart device (a smart watch) captures a number of variables such as movement, heart rate, temperature and galvanic skin response. This information is then transmitted to an application which John has downloaded on his phone that allows him to map his emotional states with reference to his calendar and thus correlate the fluctuations with his scheduled events. Such insights can allow John to map

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[456] See: Recital 71 GDPR - Three particular risks specifically associated with profiling are provided in the GDPR namely; the risk of a data breach, the risk of errors, and finally the risk of discriminatory effects. However, and as will be clear from the analysis infra, the risk of discriminatory effects is the only harm in this list as the risk of data breach and the risk of errors are merely risks of data protection violations that are precursors to potential tangible and intangible harms.

[457] See Orla Lynskey, *The Foundations of EU Data Protection Law* (First, Oxford University Press 2016) 202–208.

[458] Detection mechanisms focus on a range of techniques such as, text analysis technology, speech emotional analytics technology, technology for quantifying emotions via the analysis of facial expressions/eye movement, and content consumption contextual triggers capable of inferring user moods based on usage patterns (i.e. media content provision services such as e-books, music and video streaming) – See Chapter 4.

[459] See for example: 'World's First Emotion Sensor & Mental Health Advisor' <https://www.myfeel.co/> accessed 30 August 2018.

his profile and alter his lifestyle to improve his well-being. But how and where are the data stored? How are they being processed? And for what purposes can John's profile revealing his emotions be used? Although each of these concerns is not specific to emotion detection it is argued in this section that the fact that this illustrative application relates to the detection of emotion aggravates the risk of harm.

### *i. Data breaches, emotion surveillance and the harmful affective impact*

**[139]** SUBJECTIVE AND OBJECTIVE HARM – Although the secure storage of data revealing emotion insights is of paramount importance given that, as per the above example, this may involve the processing of sensitive health data, it does not appear to raise unique difficulties from a security perspective when one considers the multitude of services gathering such sensitive data without a specific emotion tracking component. However, that being said one might question the capacity to reveal particular emotion vulnerabilities therefore potentially aggravating the associated harms. For example, assume that John keeps the fact that he suffers from bi-polar disorder a secret to avoid what he believes would be a reputational harm if his work colleagues were to find out. Although this fear may not be a rational emotion (i.e. a data breach and the disclosure of John's secret may not (in reality) have an effect on his reputation), the fear or anxiety attached to the perception of this potential harm qualifies as a potential intangible harm.[460] In his analysis Calo decouples harm into two categories namely, subjective and objective harms. As described by the author, subjective harms are those that are 'internal to the person harm' or in other words, those harms which 'flow from the perception of unwanted observation'.[461] Objective harms by contrast are those that are external to the person and involve 'the forced or unanticipated use of information about a person against that person.'[462] Positioning data privacy/data protection as having an affect orientated impact appears to be well-established in literature, and therefore, John's fear or anxiety of negative consequences stemming from a potential data breach arguably justify this affect orientated conception and Calo's categorisation of subjective harms. Despite the fact that such subjective harm may be experienced outside the context of emotion detection technologies, it is argued that the data processed to reveal emotional states are particularly sensitive for instance, given the cultural significance of keeping emotions private in certain societies/social groupings. However, although John in the example above, may feel anxious about the collection of his personal data and the security of the insights into his emotional well-being, this may not affect his decision to use the technology as he wishes to gain an accurate way of improving his mental health. But what if the emotion detection was a feature rather than the purpose?

**[140]** CHILLING EFFECTS – Imagine Ruth who lives in a 'smart' home. To detect Ruth's emotions, devices within her home collect large amounts of data using for example voice or facial

[460] See: Daniel Solove, '"I've Got Nothing to Hide" and Other Misunderstandings of Privacy' (2007) 44 The San Diego Law Review 745, 745–746.
[461] Ryan Calo, 'The Boundaries of Privacy Harm' (2011) 86 Indiana Law Journal 1142–1143.
[462] ibid.

emotion recognition technology. Such technology is then utilised to adjust Ruth's living conditions based on her emotions (e.g. lighting or media consumption). If such technology becomes a standard feature in domestic goods, could intangible harms prevent Ruth from acting in particular ways in her own home? This question alludes to the potential impact of surveillance and the resulting chilling effect on behaviour. Significantly as noted by Calo, '[e]ven where we know intellectually that we are interacting with an image or a machine, our brains are hardwired to respond as though a person were actually there.'[463] This observation contrasts strongly with Posner's perspective who argues that harm only occurs when an individual accesses and misuses information resulting in economic or physical harm and that therefore, mere computerised observation is not enough to be categorised as a harm.[464] However, Posner's understanding is strongly disputed here and in other literature. Instead it is argued that an affect orientated conception of privacy/data protection allows for a deeper understanding of moral harm and its effect on actual individual behaviour and this appears to be reflected in findings.[465] Consequently, the mere observation or perception of surveillance can have a chilling effect on behaviour.[466] Moreover, such monitoring can also have an impact on an individual's ability to 'self-present'.[467] This refers to the ability of individuals to present multifaceted version of themselves,[468] and thus behave differently depending on the circumstances.[469]

**[141]** WHAT IS NEW ABOUT EMOTIONS? – As noted by Nissenbaum, informational norms 'circumscribe the type or nature of information about various individuals that, within a given context, is allowable, expected, or even demanded to be revealed.'[470] This reminds us of Feldman's conceptualisation of the right to privacy and his notion of social spheres (see above). Would such technology prevent Ruth from availing of the mask she presents only to close friends and family in the setting of her home? Or even further, could the emotion sensors affect Ruth's capacity to present a mask(s) given the technologies capacity to detect underlying emotions potentially being disguised by deliberately misleading behaviour? Although much of the discussion regarding an individual's capacity to self-present relates to anecdotal evidence in the context of the accessing of

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[463] ibid 1147.
[464] Richard A Posner, 'Privacy, Surveillance, and Law' (2008) 75 University of Chicago Law Review.
[465] See: Calo, 'The Boundaries of Privacy Harm' (n 461).
[466] One should also note surveillance can have a chilling effect even if it is private or public see: Neil M Richards, 'The Dangers of Surveillance' (2013) 126 Harvard Law Review 1934, 1935. 'we must recognize that surveillance transcends the public/private divide. Public and private surveillance are simply related parts of the same problem, rather than wholly discrete. Even if we are ultimately more concerned with government surveillance, any solution must grapple with the complex relationships between government and corporate watchers.'
[467] Lynskey (n 457) 218.
[468] Richard Warner and Robert H Sloan, 'Self, Privacy, and Power: Is It All Over?' (2014) 17 Tul. J. Tech. & Intell. Prop. 8.
[469] James Rachels, 'Why Privacy Is Important' (1975) 4 Philosophy & Public Affairs 323, 323–333., 323-333. The author goes on to discuss how we behave differently depending on who we are talking to and this has been argued as dishonest or a mask by certain authors but the author disagrees saying that these "masks" are in fact a crucial part of the various relationship and are therefore not dishonest.
[470] Nissenbaum, 'Privacy as Contextual Integrity' (n 405) 120–121.

social media profiles by employers, one must acknowledge the potential impact given the controlling effect of being (or feeling like one is being) monitored.[471] Therefore, emotion detection arguably adds a layer of intimacy-invasion via the capacity to not only detect emotions as expressed, but also to detect underlying emotions that are being deliberately disguised. It is important to note that this is of particular significance as it not only limits the capacity to self-present, but potentially erodes this capacity entirely and this could become problematic if such technologies and the outlined technological capacity become common place.[472] For example, behaviour or lifestyle may be masked in certain circumstances (such as the employee-employer relationship) but so too are emotions and thus those emotions that are 'felt' and often not those that are 'displayed' depending on the circumstances.[473] Felt emotions (i.e. the actual emotional state of the individual) may be damaging to that person if expressed.[474] The erosion of the barrier between felt and displayed emotions may present key challenges and significantly this view is given further weight by the potential to also deploy such technology outside the home and thus in so-called 'Smart' environments. Although the above discussion has been somewhat of an abstract exploration of potential issues, it has nevertheless shown how the intimate nature of emotion and the invasive potential of emotion detection technology may exaggerate existing concerns.

### *ii. Profiling errors – Data accuracy and emotion context*

**[142]** BASIC EMOTIONS AND CRITICISMS – Following on from the previous section, it should be noted that although the potential for emotion detection technology to have an impact on an individual's capacity to self-present exists irrespective of the accuracy of such mechanisms (i.e. what is important is that the individual's belief or the mere observation or perception of surveillance can have a chilling effect on behaviour), profiling errors may still present key risks of harm. These issues will be explored in more detail in Chapters 5

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[471] Bentham refers to this is as this as the 'consciousness of visibility' and is the conceptual basis for the effectiveness of Bentham's Panopticon see: Jeremy Bentham, *Panopticon: Or The Inspection-House* (T Payne 1791).

[472] For instance Dr. Paul Ekman who created the Facial Action Coding System catalogue now used by several emotion detection companies has observed that '[t]he… next step in privacy invasion, just around the corner – new computer programs that can link your identity to how you are feeling at the moment. What was your emotional reaction when you read the latest news about … Edward Snowden, Kim Kardashian, or President Obama? How did you feel about the latest packaging of Tide, or Trojans? Which TV ad for which politician got the biggest emotional kick from you? Automated computer recognition of moment-to-moment emotions, even attempts to hide emotions, is nearly here. Crude or incomplete versions are already in use, and better ones will soon be available. I know about all of this having developed the first comprehensive offline tool for measuring facial expressions, and my participation in a company that is developing automated emotion recognition based on my work.' Ekman's comments were published on his blog in May 2014 and his forecast appears to be following through in the technological development. Available at: 'Paul Ekman Group' (*Paul Ekman Group*, 28 May 2014) <https://www.paulekman.com/blog/know-feeling/> accessed 30 August 2018.

[473] See for example: Bella M Depaulo, 'Nonverbal Behavior and Self-Presentation' (1992) 111 Psychological Bulletin 203.

[474] For example, in the workplace context one can imagine how masking your true emotions towards your employer or co-worker could be seen as a necessity in terms of career development.

and 6. However, for our current purposes it is significant to note that emotion detection remains difficult to achieve in practice and that a significant concern in this regard is the debate as to whether emotions are in fact culturally specific. Here reference can be made to the fact that the traditionally dominant approach for detecting emotions namely, the categorical approach and its reliance on research on 'basic emotions' as introduced by Ekman.[475] More specifically, Ekman and his colleagues' research concluded that there are 6 basic emotions which can be recognised universally. These are happiness, sadness, surprise, fear, anger and disgust. However, although Ekman's approach is the most commonly adopted approach in research on the automatic detection of emotion, research has shown that a single label or basic emotion may not accurately reflect the complex nature of an affective state. In this regard it is interesting to refer to the work of Feldman Barret who views the focus on basic emotions as misguided as such categories fail to capture the richness of emotional experiences.[476]

**[143]** ALTERNATIVES TO THE CATEGORICAL APPROACH – That being said, the other major approaches for detecting emotions namely, the dimensional and appraisal-based approach also present challenges of their own. First, according to the dimensional approach affective states are related in a systematic manner with the majority of variability between the various affected states covered by three dimensions; valence, arousal and potency (dominance). However, despite having the advantage of not being restricted to the basic emotions, the dimensional approach also has its critics. For instance, (1) basic emotion theorist criticise the reduction of emotion to three dimensions which they believe results in a loss of information and, (2) although some basic emotions fit into the dimensional theory, some others become indistinguishable from each other (e.g. fear and anger).[477] Second, according to Gunes and Pantic, the appraisal-based approach can be understood as an extension of the dimensional approach and works from the notion,

> '[t]hat emotions are generated through continuous, recursive subjective evaluation of both our own internal state and the state of the outside world. This approach views emotions through changes in all relevant components including cognition, motivation, physiological reactions, motor expressions, and feelings.'[478]

The practical application of this approach is however, challenging and remains an open research question as it requires 'complex, multicomponential and sophisticated measurements of change.'[479] Accordingly, even the choice between approaches remains highly debated and accuracy is still an issue even in research laboratory contexts. But what are the potential consequences of accuracy issues? Take the very practical example of Philip the owner of a smart car that is fitted with emotion detection technology for

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[475] As discussed by: Hatice Gunes and Maja Pantic, 'Automatic, Dimensional and Continuous Emotion Recognition': (2010) 1 International Journal of Synthetic Emotions 68.
[476] Lisa Feldman Barrett, 'Are Emotions Natural Kinds?' (2006) 1 Perspectives on Psychological Science 28. as cited by Markwica (n 451) 72.
[477] Gunes and Pantic (n 475) 71.
[478] ibid.
[479] ibid.

safety purposes.[480] If Philip shows signs of road rage or for instance drowsiness the car reacts. In the future one can imagine vehicles with autonomous driving features simply taking over and safely navigating the vehicle on Philip's behalf, but perhaps less dramatically imagine that Philip receives a warning to either engage or relax his emotional responses (e.g. the playing of music or a warning message).[481] Irrespective of the corrective safety action employed, one must acknowledge that for a system like this to engage at the correct moment it needs to be constantly monitoring the driver (e.g. through the steering wheel and skin conductance, heartbeat etc., voice or facial emotion detection techniques or a combination) and, importantly, be capable of precisely distinguishing between emotions or indeed differences between the same emotion. This potentially raises concerns.

**[144]** ERROR AND DELINEATING EMOTIONS – Imagine Philip has been involved in an incident of some kind and someone is injured, while driving this person to the hospital the emotion detection mechanism in Philip's car needs to be able to distinguish what might be categorised as 'anger' from that anger which signifies road rage (i.e. although Philip may have been angered by the incident but unaffected in terms of his driving ability and may not be thus suffering from road rage). If the safety intervention is invasive, for instance the restricting of access to the vehicle's full power, such technology could create an even greater risk of harm. Although the problems outlined in the hypothetical application described above are a little dramatic in that inaccuracies in devices designed to track well-being relied upon by their users raises the same point and that the described problems can be easily mitigated through practical safeguards,[482] it does show the potential difficulties associated with failing to appreciate context and therefore also points to the multifaceted nature of potential issues in terms of the accuracy of emotion detection mechanisms. Despite the fact that such obvious examples of potential issues are arguably easily eliminated or mitigated, the analysis highlights the potential for inaccuracies and thus the storage of inaccurate profiles. Issues such as the complexity of emotion detection and the cultural differences in the expression of emotions undoubtedly lead to practical difficulties in accurately detecting emotions.[483] Emotion detection is also particularly prone to such inaccuracies as the events which trigger emotional states can often stem from internal reflections. In this context one can refer to the example of John and the tracking of his emotional profile to improve his mental well-being. Although for example the device may connect to John's calendar, not all events triggering emotional reactions occur due to externalities and this may thus lead to inaccuracies. As such, to understand

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[480] See for example: Anne-Muriel Brouet, 'Emotion Detectors Could Make Driving Safer' <https://actu.epfl.ch/news/emotion-detectors-could-make-driving-safer-2/> accessed 30 August 2018.

[481] This example is not far from reality and reference here can be made to recent announcement by Volvo to incorporate camera(s) to enhance safety and take measure where a driver appears to be drowsy or drunk. See: Jolly (n 17).

[482] Also it is worth mentioning that the effects of both types of anger might be the same and thus this might not be an issue.

[483] For a discussion in the context of emotion detection see: McStay, 'Empathic Media and Advertising' (n 25) 3–6.

the reasons behind a particular emotion, context is of key importance. This is aside from the more cynical point that pseudo-health care applications, despite their marketing commercial communications, are not always accurate. Indeed, as noted by Crawford *et al.* in the context of self-tracking fitness devices,

> '[t]he data extraction may be constant, but it is not always accurate. Each brand of wearable device has its own peculiarities in how it works: some will count arm movements as walking, others cannot register cycling as activity, and the sleep tracking functions deploy relatively crude methods when distinguishing between light and deep sleep.'[484]

Although the above example is not specific to emotions it does illustrate that the smart watches and fitness devices often 'sense' inaccurately and present such inaccuracies as fact. As mentioned above, it is arguably that in the context of emotion detection for pseudo-health care or 'well-being' measurement purposes, this potential for inaccuracy could have damaging effects even on the physical and mental well-being of the individual concerned.

**[145]** ACCURACY OF THE DATA – Furthermore, the risks associated with profiling are also strongly related to the fact that the databases being mined for inferences are often 'out-of-context, incomplete or partially polluted' resulting in the risk of false positives and false negatives.[485] This risk remains unaddressed by the individual participation rights approach in the data protection framework as, although the rights of access, correction and erasure may have theoretical significance, the practical operation of these rights requires significant effort and is becoming increasingly difficult.[486] In this vein, Nissenbaum notes that the de-contextualisation of data can also present additional risks of harm and, as mentioned above, thus advocates for contextual integrity or the appropriate flow of information depending on the situation.[487] Hence, one must also be aware of the problems associated with aggregation techniques and thus the combination of profiles revealing emotion insights with data held in other databases that may have inaccurate or outdated information. Such aggregation may lead to incorrect inferences which in turn may cause inconvenience, embarrassment or even material or physical harm.

**[146]** AN ALGORITHMIC PRODUCTION OF REALITY – Indeed, it is important to note that even in relation to deployments of emotion detection technology which (1) appear to be morally above reproach (e.g. for health care purposes) or, (2) at least less obviously questionable ones (e.g. the adjustment of living environments to detected emotions), there are arguably still potential sticking points in terms of autonomy. Indeed, here it is important to refer to what Rouvroy has termed the 'algorithmic production of reality' in questioning the impact of decision-making based on the profiling of individuals' or 'data behaviouralism' and the effects of such techniques on one's capacity for critical thinking. The author notes that

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[484] Crawford, Lingel and Karppi (n 454) 485.
[485] Koops (n 280) 199.
[486] ibid.
[487] See generally: Nissenbaum, *Privacy in Context* (n 405).

despite the pretences of objectivity and responding to individual needs, the computational turn eliminates the capacity for the transversal dimension of 'test', 'trial', 'examination', 'assessment' or '*épreuve*', or even 'experience', which the author deems essential in the scientific, judicial and existential domains.[488] Moreover, building on this point the lines between the seemingly ethical uses of this technology and the more murky commercial exploitation of emotion insights in advertising and marketing may be a fine line. There is arguably only a small step between a service and the future commercial exploitation of the gathered emotion insights for advertising and marketing purposes.[489] As such, despite the fact that there are many applications of such technologies, such as for instance in healthcare or road safety, which appear objectively well-intentioned (at least in terms of their goals as opposed to their implementation and potential effects), their use for advertising and marketing purposes raises clear concerns.[490] Furthermore, although emotion insights are not being currently plugged in to programmatic advertising data sets generally speaking (i.e. there is no market for data sets on emotions),[491] they are used in the plethora of examples in the emotion-aware entertainment media sphere in which emotion is used as an indicator for the recommending of content.[492] Finally, although discrimination, either direct or indirect, on the basis of one of the protected grounds is prohibited in EU law, often decisions on the basis of profiling will not amount to discrimination but will instead be classified as differentiation on the basis of unprotected grounds.[493] Differentiation on the basis of emotion is thus not contrary to EU discrimination law as, first emotions are not a protected ground,[494] and second, it is questionable whether the criterion of a 'comparable situation' is satisfied, given the potential differences in the profiles revealing emotions.

**[147]** THE ROLE OF THE EU PRIVACY AND DATA PROTECTION FRAMEWORK – The risks associated with emotion detection technology discussed above have been inspired by the broader privacy

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[488] Antoinette Rouvroy, 'The End(s) of Critique: Data Behaviourism versus Due Process' in Katja de Vries and Mireille Hildebrandt (eds), *Privacy, Due Process and the Computational Turn* (Routledge 2013) 143–145. For similar points in the context of the impact of adaptive architecture interactions see: Lachlan Urquhart, Holger Schnädelbach and Nils Jäger, 'Adaptive Architecture: Regulating Human Building Interaction' (2019) 33 International Review of Law, Computers & Technology 3, 10–12.

[489] For instance, Google has recently revealed that it will allow users in the US to check if they exhibit signs of depression, however it must be remembered that Google is the largest online advertising company globally. See: Potenza (n 281).

[490] As mentioned in footnote 25, the key concern where emotion detection is a key part of the service provided will be the conformity of the goods being offered. Although this is an important discussion it remains outside the scope of this thesis. It is covered however by: Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC OJ L 136, 28–50.

[491] McStay, 'Empathic Media and Advertising' (n 25).

[492] One should consider in particular services concentrated on the supply of media content and their use of recommender systems see: Rolland (n 53).

[493] i.e. sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation see: Articles 10 and 19 TFEU.

[494] Moreover, it should also be noted that the same result may result in effect indirectly See: S Barocas and AD Selbst, 'Big Data's Disparate Impact' (2016) 104 California Law Review 671.

and data protection literature analysing the risks associated with technological change and 'datafication' more generally. For instance, in the examples highlighted above, could someone suffering from road-rage be subject to higher car insurance premiums? Could a person suffering from bi-polar disorder be subject to higher health insurance[495] premiums? In saying this however, as described above emotion, has always been at the root of advertising and marketing and there is nothing wrong *per se* with evoking the emotions of consumers in order to increase market penetration. There is thus a line to be drawn. Generally speaking, this point reflects two important underlying presumptions inherent to the current legal protections, namely (1) that in line with the analysis in Chapter 2, informed consumers will make rational choices provided the objective elements of the product/service are not misrepresented in the commercial communication and; (2) that any restriction placed on a commercial communication will have to respect the right to freedom of expression contained in Article 10 ECHR and Article 11 Charter. But can the EU privacy and data protection framework (i.e. the General Data Protection Regulation and the *lex specialis* ePrivacy Directive) not be construed as the ready-made *ex ante* answer to the challenges posed by the emergence of emotional AI? If one protects consumers' fundamental rights to privacy and data protection as manifested in specific secondary law would the effects of empathic media and its application for the personalisation of commercial content in an online setting be within the control of individuals thereby safeguarding their autonomy via control over their personal data? To answer these questions, it is necessary to explore the overlaps and intersections between these rights as protected in Articles 7 and 8 Charter respectively.

## 3.2 PRIVACY, DATA PROTECTION, SUBJECTIVE 'RE-PRESENTATIONS' AND EMOTION MONETISATION STANDARDS

**[148]** DATA PROTECTION AS A FUNDAMENTAL RIGHT – The fundamental right to data protection has received increasing amounts of attention since its recognition as a distinct right *via* the allocation of binding force on the Charter through the adoption of the Lisbon Treaty in 2009. Although data protection has been interpreted as part of the right to respect for private and family life (as provided for in Article 8 ECHR by the ECtHR),[496] the Charter delineates data protection and privacy and recognises them as distinct rights. More specifically, Article 7 of the Charter provides the right to respect for private and family life and Article 8 the right to the protection of personal data. This raises confusion in terms of the delineation between the rights and their respective scopes of protection. The precise overlaps between Article 8 ECHR and Articles 7 and 8 Charter are therefore extremely difficult to define. Data protection's underlying rationales of autonomy and informational self-determination pursue the tackling of (informational) power asymmetries

[495] This does not seem too far fetch due to examples where smart watches are being added to promotions being offered by health insurance providers see: 'Apple Watch Deal with Vitality | Apple Watch Offer' (*Vitality*) <https://www.vitality.co.uk/rewards/partners/active-rewards/apple-watch/> accessed 24 March 2019.

[496] See: *S and Marper v United Kingdom [2008] ECHR 1581*.

particularly prevalent today as hastened by technological progress and market forces.[497] The practical application of the fundamental right to data protection recognises the inevitability and benefits of data processing, but at the same time seeks to prevent disproportionate impacts on the individual and society.[498]

**[149]** THE FOUNDATIONS OF THE RIGHT – The underlying rationales of the right to data protection therefore appear to hold a strong resemblance to Feldman's conceptualisation of secrecy as a specific value within the right to privacy. The development of the fundamental right to data protection as a separate right is an interesting historical progression having been preceded by the Data Protection Directive 95/46/EC (i.e. as replaced by the GDPR).[499] Indeed, in the explanations to the Charter it is apparent that Article 8 Charter was adopted on the basis of a series of other instruments, in particular the Data Protection Directive 95/46/EC, the Council of Europe Convention 108[500] and Article 8 ECHR.[501] As a consequence, the boundaries between the rights to privacy and data protection are often blurred reflecting constitutional traditions and the debate surrounding the development of data protection as a distinct right in the EU legal order. Despite the fact that both these rights undoubtedly protect information or data privacy, it has been repeatedly argued that data protection serves objectives beyond the protection of privacy and likewise privacy incorporates aspects that remain out of focus for the protection of personal data.[502] The purposes of this section is to (1) analyse the protection of the rights to privacy

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[497] Antoinette Rouvroy and Yves Poullet, 'The Right to Informational Self-Determination and the Value of Self-Development: Reassessing the Importance of Privacy for Democracy' in Serge Gutwirth and others (eds), *Reinventing Data Protection?* (Springer Netherlands 2009) 68–69 <http://link.springer.com/10.1007/978-1-4020-9498-9> accessed 16 January 2015; Serge Gutwirth, *Privacy and the Information Age* (Raf Casert tr, Rowman & Littlefield Publishers 2002) 86.

[498] See generally: Federico Ferretti, 'Data Protection and the Legitimate Interest of Data Controllers: Much Ado about Nothing or the Winter of Rights?' (2014) 51 Common Market Law Review 843, 849.

[499] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data OJ L 281, 31–50.

[500] The Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (OECD) 1980 and the Convention for the protection of individuals with regard to automatic processing of personal data (Council of Europe) 1981 ('Convention 108'). 108.

[501] Interestingly, the explanations also indicate that Directive 95/46/EC contains 'conditions and limitations for the exercise of the right to the protection of personal data.' As noted by González Fuster, this assertion is somewhat puzzling given the fact that Directive 95/46/EC was 'drafted in the pre-Charter era, when EU personal data protection was typically framed as serving in general the fundamental rights and freedoms of individuals (among which the right to personal data protection had yet to be identified), and in particular their right to privacy with respect to the processing of personal data'. Gloria González Fuster, 'Curtailing a Right in Flux: Restrictions of the Right to Personal Data Protection' in Artemi Rallo Lombarte and Rosario García Mahamut (eds), *Hacia un nuevo derecho europeo de protección de datos = Towards a new european data protection regime* (Tirant lo Blanch 2015) 519.

[502] See for example: Gloria González Fuster and Raphaël Gellert, 'The Fundamental Right of Data Protection in the European Union: In Search of an Uncharted Right' (2012) 26 International Review of Law, Computers & Technology 73; Maria Tzanou, 'Data Protection as a Fundamental Right next to Privacy? "Reconstructing" a Not so New Right' (2013) 3 International Data Privacy Law 88; Juliane Kokott and Christoph Sobotta, 'The Distinction between Privacy and Data Protection in the Jurisprudence of the CJEU and the ECtHR' [2013] International Data Privacy Law; Paul De Hert and Serge Gutwirth, 'Data Protection in the Case Law of

and data protection as provided for in Articles 7 and 8 Charter respectively to determine the capacity of EU privacy and data protection secondary frameworks to fairly balance the competing rights and interests at the core of emotion monetisation. Building on this analysis the Chapter will then (2) explore more specifically how the protection of fundamental rights is shaped by policy objectives, how in the EU legal order the GDPR may be affording higher levels of protection through the specific legislative basis provided for the right to data protection in Article 16 TFEU before then questioning how harmonised protection affects the protection levels afforded in MSs considering the complex constitutional overlaps.

### 3.2.1 PRIVACY AND DATA PROTECTION AS DISTINCT RIGHTS?

**[150]** SCOPING THE RIGHTS – From the outset it should be made clear that the right to privacy encompasses matters extending well beyond that which fall within the right to data protection in that although the right to privacy includes data or information privacy matters in line with the right to data protection, it also encompasses protections which do not hang on the informational component. Indeed, de Hert and Gutwirth observe that 'few direct manifestations of intimacy-oriented conceptions of privacy can be found in the provisions of data protection laws and, conversely, broader privacy concepts are not of a nature to explain data protection principles such as purpose limitation, data quality or security'.[503] In support of the authors' contention one can also refer to Lynskey who notes that the positioning of data protection as a distinct right is appealing in that it explains why privacy law does not cover all aspects of data protection and also that it respect the diverging constitutional traditions of the Member States.[504] It should be noted that the crux of the argument therefore relates to the need for the separation of data protection from data privacy as a component of the right to privacy.

#### *A. INTERPRETING DATA PROTECTION PERMISSIVELY OR PROHIBITIVELY*

**[151]** THE APPROACH BEING ADOPTED – In her analysis of the rights to data protection and privacy, Lynskey delineates the rights on the basis of their substantive scopes of application with reference to ECtHR case law on Article 8 ECHR and CJEU case law on Article 8 Charter respectively.[505] In particular the author highlights that the right to data protection covers a broader range of data and data-related actions. More specifically, Lynskey refers to the fact that, (1) the concept of personal data is not context dependent relative to the notion of 'privacy interference'; (2) that the definition of personal data includes data relating to an unidentified yet 'identifiable' natural person and; (3) data protection offers a broader

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Strasbourg and Luxemburg: Constitutionalisation in Action' in Serge Gutwirth and others (eds), *Reinventing Data Protection?* (Springer Science 2009); Lynskey (n 457) 103–104.

[503] De Hert and Gutwirth (n 502) 8.

[504] Lynskey (n 457) 104.

[505] Orla Lynskey, 'Deconstructing Data Protection: The "Added-Value" of a Right to Data Protection in the EU Legal Order' (2014) 63 International & Comparative Law Quarterly 569.

range of rights to individuals.[506] Hence, despite acknowledging that there is a large degree of overlap between the respective rights, the author argues that the right to data protection is delineated by virtue of the fact that it aims to offer individuals more control over their data relative to the right to privacy and that this separation is driven by, (1) the desire to promote informational self-determination which flows from an individual's right to personality and; (2) the connected point of aiming to alleviate power and information asymmetries between individuals and those which process personal data.[507] Although this approach is adopted in this thesis further clarification is needed.

**[152]** OUTLINING THE CONTENTS OF THE RIGHT – Indeed, it should be acknowledged that this is far from clear-cut. More specifically, authors such as Hijmans have argued that the right to data protection should alternatively be understood as a claim based on fairness checks and balances as opposed to informational self-determination.[508] Indeed, although both sets of authors acknowledge a distinction between the rights to data protection and privacy, Hijmans and similarly minded authors dispute the key positioning of the notion of informational self-determination.[509] These alternative conceptualisations of the right hang on the authors' understanding of the construction of Article 8 Charter as represented below in *Figure 1*.

| **ARTICLE 8 PROTECTION OF PERSONAL DATA** | |
|---|---|
| **ARTICLE 8(1)** | Everyone has the right to the protection of personal data concerning him or her. |
| **ARTICLE 8(2)** | Such data 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. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. |
| **ARTICLE 8(3)** | Compliance with these rules shall be subject to control by an independent authority. |

*Figure 1 The right to the protection of personal data*

Indeed, as explained by Fuster and Gutwirth, the first approach positions the right to data protection as substantially representing a prohibition on the processing of personal data

[506] ibid 581–586.
[507] ibid 587–597.
[508] See: Hielke Hijmans, *The European Union as Guardian of Internet Privacy : The Story of Art 16 TFEU* (Springer 06) 55–61.
[509] Hijmans (n 508); Christopher Docksey, 'Articles 7 and 8 of the EU Charter: two distinct fundamental rights' in Alain Grosjean (ed), *Enjeux européens et mondiaux de la protection des données personnelles: Ouvrage de synthèse* (Primento Digital Publishing 2016); Herke Kranenborg, 'Protection of Personal Data' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights : A Commentary* (1st edn, Hart Publishing 2014) <http://www.bloomsburycollections.com/book///> accessed 5 March 2015; Peter Hustinx, 'EU Data Protection Law: The Review of Directive 95/46 EC and the Proposed General Data Protection Regulation' <https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Speeches/2014/14-09-15_Article_EUI_EN.pdf>.

subject to limitations, whereas the second understands the right permissively as a series of rules applying to the processing of personal data without forbidding processing as such.[510]

**[153]** THE RESPECTIVE INTERPRETATIVE APPROACHES – To illustrate this difference more tangible the authors present the approaches in the form of formulae as reproduced below.

- **APPROACH 1** Article 8 Charter = Art. 8(1) Charter - (Art. 8(2) Charter + Art. 8(3))
- **APPROACH 2** Article 8 Charter = Art. 8(1) Charter + Art. 8(2) Charter + Art. 8(3)

The second approach therefore seemingly echoes De Hert and Gutwirth analysis of the contrast between the rights to privacy and data protection in that the authors suggest that data protection promotes transparency whereas privacy facilitates opacity.[511] Although this separation is perhaps oversimplifying matters somewhat in that privacy has evolved beyond the protection against intrusions into one's seclusion and that data protection also appears to protect individuals from such intrusions as opposed to merely facilitating transparent processing[512] (a point acknowledged by the authors themselves),[513] it does illustrate an inherent distinction.[514] Despite its usefulness however, it seems hard to put too much weight on this point given the post-Lisbon Court of Justice case law in particular but also the construction of the GDPR (e.g. the bolstering of consent in Article 7 GDPR and the specific inclusion of the right to erasure in Article 17 GDPR). But where does this leave us then? And more specifically, is there any real foundation to referring to the right to data protection in line with the second approach? In order to answer these questions, it is necessary to consider the historical evolution of the right to data protection in the EU legal order. As noted in the explanations to the Charter, Article 8 Charter was based on Article 286 of the Treaty establishing the European Community (which was modified and replaced by Article 16 TFEU and Article 39 TEU), the Data Protection Directive (Directive 95/46/EC), the Regulation on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (Regulation 45/2001), the right to privacy as provided for in Article 8 ECHR and the 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108, now updated in the form of Convention 108+).[515] As such, the right to privacy is clearly linked to the conception of the right to data

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[510] Gloria González Fuster and Serge Gutwirth, 'Opening up Personal Data Protection: A Conceptual Controversy' (2013) 29 Computer Law & Security Review 531.
[511] De Hert and Gutwirth (n 502).
[512] Lynskey (n 505) 595–595.
[513] Indeed here it is interesting to refer to Sections 3.2 and 4.3 of their article. De Hert and Gutwirth (n 502). This is a point highlighted in particular by Dalla Corte see: Lorenzo Dalla Corte, 'A Right to a Rule: On the Essence and Rationale of the Fundamental Right to Personal Data Protection' in Rosamunde van Brakel and others (eds), *Data Protection and Democracy* (2020) 12.
[514] Dalla Corte (n 513) 12.
[515] Consultative Committee Of The Convention For The Protection Of Individuals With Regard To Automatic Processing Of Personal Data, 'Final Document on the Modernisation of Convention 108' (Council of Europe 2012) T-PD(2012)04 rev2 en 108 <http://www.coe.int/t/dghl/standardsetting/dataprotection/TPD_documents/T-PD_2012_04_rev2_En.pdf>.

protection and this link is further illustrated when one notes that the EU secondary law frameworks both explicitly refer to the right to privacy. Moreover, Convention 108 clearly aims to protect Article 8 ECHR and essentially requires signatory States to provide the protections specified in the Convention in their national legal systems given that the Convention is a non-self-executing mechanism.[516]

**[154]** THE RIGHT AND THE GENERAL LIMITATION CLAUSE – Accordingly, understanding Article 8 Charter permissively as a series of checks and balances may stem from the fact that the right to data protection as codified in the Charter was inspired by measures intended to fall within the secondary law of the Member States and which essentially aim to cater for any potential limitation of the right to privacy caused by such personal data processing. It is suggested here therefore that this approach perhaps muddies the water somewhat between the role and function of fundamental rights and the role and function of expressions of those rights as protected in secondary law. Indeed, positioning data protection as a negative right instead of a positive one resigns its effectiveness to the fact that personal data processing is unavoidable in our society.[517] To clarify, as a positive right the right to data protection grants the prerogative to the individual even if this right is not absolute and may thus be limited. In such a manner, the concerns regarding data protection's divergence from underlying values such as autonomy and human dignity may be less justified, as it becomes more than just a procedural negative right which, when viewed restrictively, could be satisfied by a compliance orientated approach arguably forgetting the deeper issues traditionally covered by the right to privacy.[518] That being said, the construction of Article 8 Charter is confusing especially in the light of Article 52(1) Charter. As described above, Article 52(1) Charter stipulates the general limitation clause. Accordingly, precisely mapping the relationship between Articles 8(2) and 8(3) Charter and Article 52(1) Charter adds an additional layer of confusion. To clarify, with respect to the first approach, which (to reiterate) is inspired by the notion of informational self-determination, Articles 8(2) and 8(3) represent specific conditions for interferences with the right to data protection with the more generalised limitation clause provided for in Article 52(1) Charter. In contrast, from the perspective of the second approach, as Article 8 Charter is to be viewed as a whole, any limitation of the specific elements contained in Article 8 Charter must be justified with respect for Article 52(1) Charter.

**[155]** SLOW EVOLUTION OF CASE LAW AND SEPARATING THE INSEPARABLE? – Hence, although both approaches engage a number of substantive requirements when personal data are processed, the first approach views these as conditions for lawful limitations whereas the

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[516] Gloria González Fuster, *The Emergence of Personal Data Protection as a Fundamental Right of the EU* (1st edn, Springer 2014) 93.
[517] Dalla Corte (n 513) 18.
[518] This concern is also reflected in the writing of other authors see: Rouvroy and Poullet (n 497); Yves Poullet, 'Data Protection Legislation: What Is at Stake for Our Society and Democracy?' (2009) 25 Computer Law & Security Review 211; Yves Poullet, 'Is the General Data Protection Regulation the Solution?' (2018) 34 Computer Law & Security Review 773.

second sees them as parts of the right itself.[519] Case law interpretation of the right to data protection remains ambiguous with glimmers of the second approach in cases where the requirement for independent data protection authorities were derived from primary law and thus Article 8(3) Charter but a predominant approach leading towards the first. Fuster and Gellert express the opinion that the Court's approach derives from the 'privacy thinking' which envelops the Court's approach to data protection stemming from the original references to privacy in the EU secondary law which has trickled down through its adoption of the Article 8 ECHR proportionality assessment developed by the ECtHR despite what they perceive as the delineated presentation of the right to data protection in the Charter.[520] Indeed, it should be acknowledged that when positioned in line with the first approach, the right to data protection becomes more difficult to separate from the right to privacy given that Article 8 ECHR has been interpreted by the ECtHR to include informational privacy and forms the grounding for Convention 108 (and indeed Convention 108+). Although Lynskey for instance delineates Article 8 Charter from Article 8 ECHR on the basis of the substantive scope of protection/application of the respective rights and indeed the means of protection via the rights afforded to individuals, it is possible to question the merit of such a separation.[521] More specifically, since the time of the publication of Lynskey's analysis, the ECtHR has seemingly acknowledged a (albeit limited) form of information self-determination[522] and the existence of the right to be forgotten as aspects of the right to privacy.[523] More specifically regarding the former, one can refer to the *Satakunnan Markkinapörssi OY and Satamedia OY v. Finland* case in which the ECtHR found that,

> 'Article 8 of the Convention thus provides for the right to a form of informational self-determination, allowing individuals to rely on their right to privacy as regards data which, albeit neutral, are collected, processed and disseminated collectively and in such a form or manner that their Article 8 rights may be engaged.'[524]

It is therefore suggested that delineating on the basis of the rights afforded to individuals by Court of Justice interpretation of the right to data protection may no longer be entirely feasible as such differences may be determined more on the basis of the slow evolution of judicial reasoning as opposed to the substantive foundations of the rights. Moreover, other data subject rights such as the right to data portability could be conceived more as secondary law manifestations of the underlying notion of informational self-determination as manifested on the market and thus as a mechanism designed in secondary law to encourage competition as opposed to being fundamentally grounded in and upon itself. This further points to the potential issues with basing the separation of the rights to data protection and privacy on the fact that 'personal data' is a broader notion

[519] González Fuster and Gutwirth (n 510) 533.
[520] Fuster and Gellert (n 502).
[521] Lynskey (n 505).
[522] *Satakunnan Markkinapörssi OY and Satamedia OY v Finland [2017] ECHR 607*.
[523] *ML and WW v Germany [2018] ECJR 551*.
[524] *Satakunnan Markkinapörssi OY and Satamedia OY v. Finland [2017] ECHR 607* (n 522) para 137.

than private information given that 'personal data' is a notion defined in secondary law (see Chapter 4 for more).

### *B. INFORMATIONAL SELF-DETERMINATION AND 'CONTROL' AT THE EU LEVEL*

**[156]** A RIGHT IN FLUX – The above reflects the historical background of the development of the right to data protection in the EU legal order and, as a right still in flux, it remains unclear as to how exactly the definition of personal data has transitioned from one defined in secondary law to one enveloped within Article 8 Charter.[525] Indeed, although the definition of personal data as information relating to an identified or identifiable natural person features not only the EU data protection framework but also Convention 108 and the update in Convention 108+, these instruments do not sit at the constitutional level but instead manifest the specific expression of the protection of fundamental rights. That is not to say however, that the evolution of data protection has definitively not resulted in the substantive migration of the material scope of protection to the fundamental rights level. The point being made here is rather that this is not particularly clear. It could be that the analysis presented above represents a more pedantic separation between the role of fundamental rights and secondary sources of law than is really necessary. Indeed, it is certainly possible to view the mentioning of personal data in Article 8(1) Charter as a deliberate incorporation of a wider category of data than that protected in Article 7 Charter and Article 8 ECHR even if the definition of this notion is effectively provided in secondary law.

**[157]** PICKING A SIDE – It is argued however, that irrespective of such considerations it is preferable to view data protection in line with the first approach. This choice is based on three justifications namely, (1) positioning the right to data protection as substantially representing a prohibition seemingly offers a stronger protection for individuals even if this can be limited; (2) the Court of Justice and the EU legislator[526] appears to lean more towards this interpretation and; (3) positioning the right to data protection as one based on a series of fairness checks and balances presents an unusual picture from a fundamental rights perspective. To further clarify the third of these, if the right is understood as a permissive right then it can be positioned as the right to fairness checks and balances where personal data are processed. However, this presents the right more as a socio-economic and technical construct as it presents the limitation of the right within its construction and operation rather than in abstract isolation.[527] In more simple terms, the right becomes the right to fairness checks and balances where personal data are *processed* rather than the right to the protection of personal data. Understanding the right as a response to a socio-economic need appears to be a little bit of a jump given that the right was included in the non-binding version of the Charter adopted in 2000 which was

[525] González Fuster, 'Curtailing a Right in Flux: Restrictions of the Right to Personal Data Protection' (n 501).
[526] See Recital 7 GDPR which states *inter alia* that, 'Natural persons should have control of their own personal data.'
[527] This is a point used to reach the opposite conclusion by Dalla Corte see: Dalla Corte (n 513).

prior to the so-called 'datafication of everything'.[528] Therefore, despite the difficulties described above, for the purposes of this thesis the right to data protection will be deemed to be a right driven by the rationale of informational self-determination in line with Lynskey's analysis. Understood as such the right elevates the protection of personal data which is seemingly broader in scope than the information protected under Article 8 ECHR, thereby extending the capacity of natural persons to determine the fate of their data and by extension steer the development of their own personality. Indeed, in the words of Rodotà,

> '[w]e are faced with the true reinvention of data protection – not only because it is expressly considered an autonomous, fundamental right but also because it has turned into an essential tool to freely develop one's personality.'[529]

In this sense therefore, the right to data protection becomes more effective than privacy in the context of matters concerning private information as its material scope is broader and is not restricted by the need for a contextual assessment of the potential privacy interference. Here it interesting to refer again to Feldman's conceptualisation of the right to privacy and his mentioning of the notion of 'secrecy' discussed above.

**[158]** INFORMATIONAL SELF-DETERMINATION – Considering the above analysis, it is perhaps necessary to further spell out the apparent link to informational self-determination. In this regard it is interesting to note that in the draft versions of Charter of Fundamental Rights made specific reference to self-determination and despite its deletion, it is suggested here that the right is still very much driven by this notion and is therefore strongly linked with this concept and the ability to develop one's personality. As described by Ausloos, this link between the notion of informational self-determination and data protection owes its foundations to the *German Federal Constitutional Court* (*Bundesverfassungsgericht*) and the 1983 Population Census case[530] with the author suggesting that this case has been a very influential notion in the development of EU data protection.[531] However, as mentioned above, it should be acknowledged that data protection has been positioned in a variety of ways in the respective constitutional traditions of the MSs.[532] As a consequence, it seems that understanding the right to data

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[528] Mayer-Schonberger and Cukier (n 435).

[529] Stefano Rodotà, 'Data Protection as a Fundamental Right' in Serge Gutwirth and others (eds), *Reinventing Data Protection?* (First, Springer Netherlands 2009) 80 <http://link.springer.com/10.1007/978-1-4020-9498-9> accessed 7 April 2015.

[530] *Volkszaehlungsurteil [1983] BVerfGE BvR 209/83*.

[531] Jef Ausloos, 'The Right to Erasure: Safeguard for Informational Self-Determination If a Digital Society?' (KU LeuvenFaculteit Rechtsgeleerdheid 2018) 52–59.

[532] For example Fuster categorises the approaches into five categories, namely where; (1) The protection of personal data is linked to another right such as the right to data protection (e.g. such as the right to privacy); (2) The protection of personal is connected to a *sui generis* fundamental right in the constitution or as a norm with constitutional status (i.e. by providing a right to data protection); (3) There is a specific mandate to legislate for the protection of personal data; (4) The Constitution does not explicitly address the protection of personal data but the Constitutional court has established a *sui generis* right with a similar content (e.g. informational self-determination in Germany) and; (5) There is no clear linkage between fundamental rights and personal data protection. González Fuster, *The Emergence of Personal Data Protection as a Fundamental Right of the EU* (n 516) 175.

protection as linked to informational self-determination may be controversial as it is not a construct which is familiar to all EU MSs.[533] As noted by Lynskey,

> '[…] the desirability of transplanting a settled notion, such as informational self-determination, from the German legal order into the EU legal order could be questioned. This doctrine has developed in a manner which reflects the specificities of that domestic legal order and the democratic choices of that Member State. Importing these national conceptions of the nature and limits of the right to data protection into the EU legal order would be to impose the values of one Member State onto the Union as a whole.'[534]

This is a valid point and hence, any conceptualisation of individual control at the EU level should be wary of transplanting national idiosyncrasies. Indeed, it should be recognised that the EU is a *sui generis* legal order in itself and that the proper interpreter of the Charter provisions is the Court of Justice, albeit with reference to the national constitutional traditions of the MSs and international fundamental rights mechanisms. Therefore, although it may be incorrect to transplant informational self-determination from the German constitutional tradition, this does not exempt the potential for the Court of Justice to develop its own approach.

**[159]** PRIVACY AND INFORMATIONAL SELF-DETERMINATION – Aside from such considerations (which also have a clear political edge), in this regard it is also unclear what impact the acknowledgement of a form of informational self-determination by the ECtHR jurisprudence may have in the interpretation of the distinct right to data protection provided for under Article 8 Charter (i.e. as opposed to the right to privacy protected in Article 7 Charter and Article 8 ECHR). Here it is interesting to also mention the broader literature exploring informational privacy and the US construction of this notion which as noted by Bennett is broadly analogous to data protection.[535] For instance, in a US context there is a wide body of literature exploring privacy as control over information. The classic definition of information privacy is provided by Westin who described it as '[…] the claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about them is communicated to others.'[536] Viewing data protection as a distinct right covering a broader scope of information, the GDPR can be positioned as a more effective mechanism for informational self-determination and personal development by fostering increased data subject control over their personal data through a variety of checks and balances.[537] Indeed Lynskey opines that individual control or informational self-determination can be understood to play the role of a

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[533] Lynskey (n 457) 178–179.
[534] ibid.
[535] Colin J Bennett, *Regulating Privacy: Data Protection and Public Policy in Europe and the United States* (Cornell University Press 1992) 14.
[536] Alan F Westin, *Privacy and Freedom* (Atheneum 1967) 7. This has been repeatedly linked to the discussion on the 'ownership' of personal data a rhetoric which repeatedly emerges in policy.
[537] See: Damian Clifford and Jef Ausloos, 'Data Protection and the Role of Fairness' [2018] Yearbook of European Law 1.

normative anchor for the interpretation of the data protection framework.[538] This is a view supported in this thesis. Here cross-reference can be made to Feldman's discussion of the notion of secrecy or 'selective disclosure' in his analysis of the right to privacy and thus, data protection's underlying rationales of autonomy and informational self-determination aim to counteract the (informational) power asymmetries as triggered by technological advancement and market forces.[539] Indeed, it is important to emphasise that although the term 'control' has strong connotations in terms of individual autonomous choice/self-determination, its bark is softer than its bite as the right to data protection is not absolute and may therefore be limited.

**[160]** THE RIGHT IN ABSTRACT AND APPLYING THE RIGHT – The triangular structure of Article 8 of the Charter (i.e. requirements for the controllers, data subject rights and the monitoring activities of the data protection authorities) is indicative of this function.[540] Hence, in the context of specific personal data processing operation 'control' should be interpreted broadly[541] to include not only an individual's 'control' over their personal data but also as manifested by a robust architecture of control[542] which aims to actively ensure individual autonomy. 'Control' as understood within the operation of the right to data protection therefore manifests a broader meaning than the rationale of informational self-determination, as it also represents the environmental elements through which control is made effective.[543] However, it is important not to confuse this more collective understanding of control as manifested in the operation of the right and the notion of informational self-determination (i.e. a narrower more individualised notion of control) which is a key rationale of the right to data protection. It is argued here that this

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[538] Lynskey (n 457) 177–196.

[539] Rouvroy and Poullet (n 497) 68–69; Gutwirth (n 497) 86.

[540] Gloria González Fuster, 'Beyond the GDPR, above the GDPR' (*Internet Policy Review*, 30 November 2015) <http://policyreview.info/articles/news/beyond-gdpr-above-gdpr/385> accessed 7 December 2015.

[541] For inter-disciplinary perspectives on the control component of data protection, see notably: Eleni Kosta, *Consent in European Data Protection Law* (1st edn, Martinus Nijhoff 2013); Christophe Lazaro and Daniel Le Métayer, 'Control over Personal Data: True Remedy or Fairy Tale?' (2015) 12 SCRIPTed 3; Paul Bernal, *Internet Privacy Rights: Rights to Protect Autonomy* (First, CUP 2014).

[542] Lynskey (n 457).

[543] There is a huge amount of discussion and confusion regarding the notion of control with criticisms repeatedly levelled against it. For example here one can refer to Woodrow Hartzog, 'Opinions · The Case Against Idealising Control' (2018) 4 European Data Protection Law Review 423. However, it is suggested in this thesis that such opinions fail to account for the differences between assessing a right in abstract isolation and its operation and therefore, the fact that control as manifested in secondary law illustrates ecoysystem-level safeguards but also, that the more individualist aspects of the notion are manifestations of a normative construct (i.e. the rational data subject) which develop from the fundamental rights-based origins of privacy and data protection frameworks and more generally, the liberal democractic origins upon which Western democracies are founded. To remove control (i.e. as manifested through the notion of consent) from protections aimed at safeguarding the rights to data protection and privacy would therefore, undermine individual autonomy in a more paternalistic manner (i.e. a nanny state) – control is a two-way street in that relying on it gives rise to potential exploits but taking it away removes the capacity of the individual to choose. Simply put, the debate is more complex than the critics of 'control' suggest and it is therefore argued here that individually-orientated protections are in fact a necessity in light of the rights-based approach. As will be explored in Chapter 6 however, this does not exclude the potential for bans and the bolstering of the collectively orientated protects (as evidenced in the GDPR for example).

distinction is illustrative of the role and function of Articles 8(2) and 8(3) Charter which aim to ensure the broader notion of control in the operation of right whereas Article 8(1) Charter manifests the narrower aspect of control aligned with notion of informational self-determination and the substance of the right being protected. This reflects the point that although a right may be interfered with this inference may be legitimate given that data protection is not an absolute right. Hence, although precisely understanding what the essence of the right to data is challenging it is suggested here that although 'essence' is an amorphous concept, 'control' or informational self-determination appears to be of key importance in the interpretation of the very substance of the *application* of the right to data protection.

### 3.2.2 EMOTION DETECTION AND THE PROTECTION OF FUNDAMENTAL RIGHTS

**[161]** A SPECIFIC LEGISLATIVE BASIS – From the above, data protection offers a wider material scope of protection in terms of the information protected. However, the right to privacy is also not limited to informational privacy.[544] The rights have different scopes of application in that something which is not a violation of the right to privacy may still violate the right to data protection and *vice versa*. But what does all this mean in the context of the deployment of emotion detection and monetisation technologies? In particular, what does a delineation between the rights to data protection and privacy actually bring us in terms of protection? In this regard, it is significant to note that in addition to the entry into force of the Charter, the Treaty of Lisbon also (perhaps even more importantly) introduced Article 16 TFEU. Article 16(1) TFEU repeats Article 8 Charter and states that '[e]veryone has the right to the protection of personal data concerning them'. Importantly, Article 16(2) TFEU further stipulates that

> '[t]he European Parliament and the Council, acting in accordance with the ordinary legislative procedure, 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. Compliance with these rules shall be subject to the control of independent authorities.'

Therefore, in contrast with fundamental rights more generally it should be understood that data protection (similar to non-discrimination, or to put it more broadly, equal treatment) is in somewhat of a unique position due to the fact that the EU legislator is afforded a specific legislative basis for its protection outside of the market integration role encapsulated by Article 114 TFEU. In short, Article 114 TFEU constitutes the main Treaty provision used to enact harmonisation measures. According to this provision, the Union may adopt '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

[544] Here see: Council of Europe European Court of Human Rights, 'Guide on Article 8 of the European Convention on Human Rights Right to Respect for Private and Family Life, Home and Correspondence' (2018).

and functioning of the internal market'. This provision is thus not sector specific and does not grant the EU legislator any specific competence in relation to adoption of secondary law for the protection of fundamental rights. Although, and as will be described below, this does not entirely restrict the EU legislator in this regard (see the old Data Protection Directive 95/46/EC for example), it is arguably that through the provision of a specific legislative basis for data protection through Article 16 TFEU, the EU legislator has been afforded scope beyond the norm for the protection of fundamental rights where personal data are processed. Accordingly, one must question how this affects the operation of 'control' and more narrowly the protection of information self-determination as a key rationale of the right. The secondary law specific expression of the right to data protection is thus significant.

**[162]** THE GDPR AND THE GENERAL LIMITATION CLAUSE – The GDPR as a secondary framework satisfies the necessity and proportionality tests contained in Article 52(1) Charter through the implementation of similar but distinct sub-fair balancing *ex ante* and *ex post* tests and procedural fairness obligations distributed across the secondary framework which together satisfy the Charter requirements for a secondary law limiting a fundamental right.[545] In this manner the secondary framework acts as a system of fairness checks and balances enabling the protection of the right to data protection in particular and rights and freedoms in general (see Chapter 5).[546] In essence therefore, it is suggested that it is specific expression of the right to data protection contained in secondary law which has fairness checks and balances as its rationale as opposed to the right itself in abstract isolation. The GDPR is shaped by its fundamental rights foundations with this manifesting itself in the operation of the framework most clearly *via* the fairness principle. In saying this, it should be noted that the use of Article 16 TFEU as the basis for the GDPR has not resulted in the removal of references to the importance of market integration.[547] In essence, even if Article 16 TFEU provides a distinct basis for the adoption of legislation with a protective-objective this does not eliminate the fact that the GDPR was adopted as an EU legislative measure and that it must thus reflect the underlying objectives of the EU which are inherently linked to the realisation of the internal market.[548] Indeed, this is also illustrated by the fact that the GDPR protects fundamental rights in general where personal data are processed (i.e. including the freedom to conduct a business protected in Article 16 Charter see above and Article 1(2) GDPR). One must thus question the effects of this development in terms of the level of protection stipulated in EU secondary law

[545] See: Clifford and Ausloos (n 537).
[546] Article 1(2) GDPR.
[547] See for instance Recitals 2, 5, 7, 13, 21, 123 and 133 GDPR.
[548] Indeed, this is specifically reflected in Article 16(2) TFEU which stipulates that, '[t]he European Parliament and the Council, acting in accordance with the ordinary legislative procedure, 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. Compliance with these rules shall be subject to the control of independent authorities.' The rules adopted on the basis of this Article shall be without prejudice to the specific rules laid down in Article 39 of the Treaty on European Union.

providing specific expression to the right to data protection. More specifically, as there is a specific legislative basis for the adoption of secondary law aiming to protect the right to data protection, it is questionable whether a higher level of protection may be provided therein. This question mark points to the discussion above regarding the impact of accessory fundamental rights protection within internal market-making oriented developments more generally and thus the criticism that such legislative objectives undermine the level of protection afforded to consumers. The purpose of this section therefore is to explore what potentially sets the right to data protection apart through the very existence of Article 16 TFEU before then exploring why this is important in terms of standard of protection and the MSs competence to provide protections.

### *A. LEGISLATIVE OBJECTIVES AND FUNDAMENTAL RIGHTS*

**[163]** MARKET INTEGRATION AND LAW-MAKING – It is well-established in the case law that, (1) the choice of legal basis must rest on objective factors to ensure that the measure was amenable to judicial review; (2) that even if a measure pursues more than one aim it should be based on one in line with the 'centre of gravity of test' and; (3) that this 'centre of gravity' rule is subject to the *proviso* that where there are multiple aims which are inextricably linked multiple legal bases can be used (i.e. provided the relevant decision making procedures are compatible).[549] The EU legislator can adopt a measure for fundamental rights protection on the basis of Article 114 TFEU provided this measure also improves the functioning of the internal market. As per Kosta, this conclusion in turn raises two key questions,

1. How must the dualist objectives (i.e. internal market and non-economic (e.g. fundamental rights protection)) relate so that a measure may be pursued? And,
2. When will Article 114 TFEU's necessary condition be satisfied?[550]

The first question at its crux boils down to whether the internal market objective must be the primary aim for it to come under Article 114 TFEU and thus whether there is a hierarchy in line with the centre of gravity test as applied to the dualist objectives. However, the Court of Justice has clarified that EU legislator can rely on Article 114 TFEU even where the non-economic objective is the decisive factor in the legislative choice made.[551] Moreover, given that generally speaking there is no fundamental rights legislative basis provided for in the Treaties, the centre of gravity test will be generally inapplicable if the non-economic objective is the protection of a fundamental right(s) (i.e. other than the rights to data protection and non-discrimination).[552] In responding to the

[549] Kosta, *Fundamental Rights in EU Internal Market Legislation* (n 371) 20–21.
[550] ibid 21–22.
[551] *Case C-380/03 Germany v Parliament and Council (Tobacco Advertising II), ECLI:EU:C:2006:772*.
[552] In this regard it is interesting to refer to the opinion of Advocate General Fennelly in *Tobacco Advertising I*,'[i]n the absence of a distinct Community harmonising competence in respect of health protection, and given the possibility of parallel pursuit of health protection and internal-market aims, the question of whether the Community has acted within its powers cannot be determined by reference to a measure's putative centre of gravity as between these two incommensurable objectives. The issue of competence must instead be resolved by assessing the Directive's compliance with the objective requirements of the internal

second of her questions Kosta refers to two characteristics namely, (1) as noted above, the legislative measure can be weighted in favour of the non-economic objective even if this restricts trade and; (2) that measures adopted under Article 114 TFEU can cover situations that are not linked to free movement.[553] Here, it is illustrative to refer to the now replaced Data Protection Directive 95/46/EC given the focus of this thesis and the fact that the Directive was based on Article 114 TFEU. Indeed, although Directive 95/46/EC is the product of a distinct policy agenda, as illustrated by the fact that it applies whenever personal data are processed (i.e. subject to some exceptions and exemptions) thereby blurring the public-private divide, it does have a clear consumer protection aspect as it aims to ensure a secure personal data processing environment in commercial processing contexts. This is perhaps also illustrative of the positioning of consumer protection as provided for as a principle in Article 38 Charter and thus the consideration of consumer interests across all policy agendas even if the Directive pre-dated the entry into force of the Charter by almost 15 years.

**[164]** THE RESPECTIVE POLICY AGENDAS – Data protection and consumer protection developed in an era of socio-economic change and can both be categorised as part of the complex reforms (and hence the move towards a post-industrial economy) that were taking place during the second half of the 20th Century. Prior to the 1960's consumers, as a distinct legal grouping, were afforded little concern. The need for consumer protection policy was driven by an increase in wealth and availability of goods and services.[554] These socio-economic developments were accelerated due to revelations of major health scandals which highlighted the informational asymmetries and their effects on consumers.[555] The emergence of consumer protection policy in the 1960's was also propelled by the necessity for public regulation to protect consumers from economic loss as although economic losses could be large in total, they were often diffuse in nature meaning that traditional individual actions for redress were uneconomic and therefore ineffective.[556] As observed by Reich and Micklitz, '[c]onsumerism became the slogan in mobilizing countervailing powers against the negative effects of the increased consumption process and in remedying the defects of the legal superstructure.'[557] John F. Kennedy's speech to

market, having regard, in particular, to the concrete internal-market benefits claimed for the measure.' *Opinion of Advocate General Fennelly delivered on 15 June 2000 in Case C-376/98 Germany v Parliament and Council (Tobacco Advertising I), ECLI:EU:C:2000:324* [58].

[553] Kosta, *Fundamental Rights in EU Internal Market Legislation* (n 371) 21–30.

[554] For example, the link between the rise of consumer protection policy and increased wealth is highlighted through an analysis of the historical development of this area in Ireland. As noted by Donnelly and White, Ireland's consumer protection policy agenda was slower to take off in comparison with the other European countries due to the economic difficulties the country was experiencing at the time. See: Mary Donnelly and Fidelma White, 'Irish Consumer Law: Asserting a Domestic Agenda' (2013) 36 Dublin University Law Journal 1.

[555] In this context one can refer specifically to the Thalidomide disaster in the early 60's and also for example the revelations in the tobacco industry and cancer.

[556] Ramsay (n 208) 5.

[557] Hans-W Micklitz and Norbert Reich, *Consumer Legislation in the EC Countries : A Comparative Analysis* (Van Nostrand 1980) 1–2.

the US Congress in 1962 is often cited as the birthplace of consumer policy.[558] Following the US lead, the momentum for change crossed the Atlantic and from the 1970's onwards European countries began adopting consumer protection regulations in earnest[559] and following this consumer protection began to evolve in the EU with a more active legislative agenda emerging in the mid-1980s resulting in the introduction of several consumer protection Directives. These legislative actions were indicative of the political desire in the EU to remove trade barriers with consumer protection being presented as a means of further developing market integration,[560] thereby focusing on ensuring the economic development of the common market with respect to the four freedoms.[561]

**[165]** THE DEVELOPMENT OF DATA PROTECTION – Specifically in relation to data protection, the introduction of computers into daily administration increased public awareness which led to concerns that this technology could alter the citizen-State relationship.[562] In his overview of the emergence of data protection, Van Alsenoy notes that there were a number of key catalysts for this development namely, the development of centralised and computerised population data banks, the closely related introduction or extended use of citizen personal identification numbers, the scheduled population censuses (both in terms of the questions asked and the automation of the process) and finally, the publication of a large volume of 'alarmist' material during the 1960s and 1970s.[563] Although the early progress was concentrated on the public sector, legislative developments soon began to include processing by the private sector.[564] These legislative developments began at the national/regional level[565] before then emerging at the

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[558] See: President John F. Kennedy, Special message to Congress on protecting consumer interest, 15 March 1962. Kennedy highlighted the need for the protection of the weaker consumer party and this political statement later became known as the Consumer Bill of Rights. This extolled four specific rights namely: to safety, to be informed, to choose, and to be heard. These were then later expanded in the United Nations Guidelines for Consumer Protection see: The United Nations Guidelines for Consumer Protection (UNGCP) A/RES/39/248 16 April 1985 (as amended in 1999 and 2015).

[559] At the forefront in this respect was Britain. Many authors reference the 'Molony Report' of the Committee on Consumer Protection, which was published in Britain in 1962, as a landmark starting point in the political move towards consumer protection policy in Europe. For more see Ramsay (n 208) 5.

[560] Benöhr (n 11) 9.

[561] i.e. goods, workers, services and capital.

[562] Frits W Hondius, *Emerging Data Protection in Europe* (Amsterdam North-Holland, 1975 1975) 3–4; Bennett (n 535) ix. as referred to by Brendan Van Alsenoy, 'Regulating Data Protection: The Allocation of Responsibility and Risk among Involved in Personal Data Processing' (PhD Thesis, KU Leuven - Faculty of Law 2016) 106.

[563] Bennett (n 535) 46–53. See also Viktor Mayer-Schönberger, 'Generational Development of Data Protection In Europe' in Philip E Agre and Marc Rotenberg (eds), *Technology and Privacy: The New Landscape* (First, MIT Press 1998) 222–223; Lee A Bygrave, *Data Protection Law : Approaching Its Rationale, Logic and Limits* (The Hague Kluwer law international 2002) 94. as referred to by Van Alsenoy, 'Regulating Data Protection' (n 562) 106–107.

[564] Hondius (n 562) 20. as referred to by Van Alsenoy, 'Regulating Data Protection' (n 562) 107.

[565] The first data protection law was adopted at a regional level, namely by the Hessian Act of 7 October 1970. The first national law was adopted by Sweden in 1973, followed by Germany, France, Denmark, Norway and Austria 1978 and a total of seven European countries had enacted general data protection laws by the end of 1970's. – Van Alsenoy, 'Regulating Data Protection' (n 562) 111.

international level (i.e. the OECD and the Council of Europe).[566] As a consequence of the international developments a raft of further national legislative data protection developments emerged.[567] Due to the disparity created by these national initiatives, by the mid-1980s it was perceived that harmonisation was required and in 1990 the European Commission published its first draft of the harmonising legislation, which would eventually become Directive 95/46/EC. The inclusion of the private sector in data protection legislation reflected the concern regarding increasing business use of data processing but also perhaps the general move towards the acknowledgement of the need for consumer protection during the same period.

**[166]** DUALIST OBJECTIVES – The EU legislator aimed to improve the functioning of the internal market by introducing a harmonised legal environment through the adoption of the Data Protection Directive to eliminate disparities and therefore obstacles to free movement. Lynskey notes however that independent of this internal market objective the Directive also constituted a measure for the protection of fundamental rights as from the early 1970s onwards the European Parliament had expressed its commitment to their protection.[568] Despite this political will, the Court of Justice remained reluctant to acknowledge this objective instead emphasising the market integration goal in its rulings on Directive 95/46/EC.[569] In its earliest case law on the application of the data protection framework the Court of Justice interpreted the Directive in a manner which furthered its market integration objective by refusing to require an *inter*-Member State movement of personal data (i.e. an actual link with free movement) in every situation for the Directive to apply.[570] Indeed as interpreted by the Court, Article 114 TFEU as a legal basis thus does not require a link with free movement in every circumstance. Instead it is the intention of the measures to improve the functioning of the internal market which counts. To find otherwise would potentially undermine their value by requiring a case-by-case analysis of each circumstance.

**[167]** FUNDAMENTAL RIGHTS AND LEGAL BASES – Therefore, in both the *Rundfunk*[571] and *Lindqvist*[572] decisions the Court viewed that such an interpretation would render the application of the Directive uncertain thus detracting from its harmonising objectives. This approach contrasted with Advocate General Tizzano's opinion for both cases, who argued that in the absence of a direct link with the internal market the only possible justification for

[566] The Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (OECD) 1980 and the Convention for the protection of individuals with regard to automatic processing of personal data (Council of Europe) 1981 ('Convention 108').
[567] For an overview see: Bennett (n 535) 57.– As referred to by Van Alsenoy, 'Regulating Data Protection' (n 562) 111.
[568] Lynskey (n 457) 50–51.
[569] This unwillingness on behalf of the Court of Justice is linked to the principle of conferral which restricted the EU's competence in terms of a fundamental rights objective.
[570] Lynskey (n 457) 51.
[571] *Case C-139/01, Österreichischer Rundfunk and Others, ECLI:EU:C:2003:294*.
[572] *Case C-101/01, Bodil Lindqvist, ECLI:EU:C:2003:596* (n 340).

action would be the protection of fundamental rights.[573] Nevertheless, as noted by the Advocate General this reliance on fundamental rights as an independent objective of the Directive separate from the establishment of the internal market objective would be invalid. Lynskey, in analysing the case law observes that,

> '[i]t is suggested that while the Advocate General was incorrect in arguing that an actual link with free movement needed to be demonstrated before the Directive could apply (as this interpretation would in fact detract from the Directive's market harmonization objective), he was correct to note that recognition of an independent fundamental rights objective would invalidate the Directive. If this were the case, then the Directive should have been adopted on dual legal bases, which would have been impossible for the EU legislature.'[574]

Interestingly, the Court chose not to refer to the fundamental rights aspects outlined by the Advocate General's opinions in these cases. This perhaps in part relates to the fact that irrespective of such considerations it found that there was a link to the Directive's market integration basis hence, eliminating a need to analyse the fundamental rights objective argumentation thoroughly.[575] Nevertheless, in any case this omission more fundamentally relates to the lack of a general EU competence to adopt legislation on fundamental rights and thus, reflects the difficult history in terms of fundamental rights protection and the division of competence between the EU and its Member States.[576]

**[168]** DEVELOPING CONFIDENCE AND THE EMERGENCE OF THE CHARTER – The Court's hesitancy and lack of confidence in terms of the fundamental rights at the root of the Directive even brought the market integration objective into question in subsequent judgements. In assessing the balancing of data protection and privacy with other rights in cases such as *Satamedia*[577]and *Promusicae*[578] the Court awarded a large degree of discretion to Member States in the application of this balancing exercise thereby endangering the market integration goal which had been key in the earlier case law.[579] However, there has been a strong signal in the jurisprudence of the Court of Justice that fundamental rights are, and thus data protection more specifically is, being considered in a new light since the adoption of the Lisbon Treaty and the designation of binding status upon the Charter. In

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[573] See *Case C-139/01, Österreichischer Rundfunk and Others, ECLI:EU:C:2003:294* (n 571). *Opinion of Advocate General Tizzano delivered on 14 November 2002 in Case C-139/01 Österreichischer Rundfunk and Others, ECLI:EU:C:2002:662* [53]. and *Case C-101/01, Bodil Lindqvist, ECLI:EU:C:2003:596* (n 340). *Opinion of Advocate General Tizzano delivered on 19 September 2002 in Case C-101/01 Bodil Lindqvist, ECLI:EU:C:2002:513* [42].

[574] Lynskey (n 457) 58–61.

[575] ibid.

[576] Here one can refer to the famous Solange cases concerning the German Constitutional Court. Also in terms of a lack of a positive duty to legislate as opposed to the negative duty not to breach fundamental rights which must be respected by the EU and its Member States when they act within the scope of EU law see above.

[577] *Case C-73/07, Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy, ECLI:EU:C:2008:727*.

[578] *Case C-275/06 Productores de Música de España (Promusicae) v Telefónica de España, ECLI:EU:C:2008:54* (n 340).

[579] For more see: Lynskey (n 457) 55–58.

particular, for instance the *Schecke and Eifert* ruling[580] and the other subsequent judgements[581] contrast strongly with the Court's previous failures to engage with fundamental rights and provide adequate guidance to the national court in relation to the application of the principle of proportionality.[582] Furthermore, the Court's reliance on the Charter as opposed to the ECHR is also noteworthy given that the Charter was not in force at the time of the data processing.[583] This initial willingness to engage with fundamental rights issues has continued and the Court has adopted a similarly robust approach in later judgements.[584]

### *B. THE 'PRIMACY, UNITY AND EFFECTIVENESS' OF EU DATA PROTECTION LAW*

**[169]** THE CHARTER OF FUNDAMENTAL RIGHTS – In essence therefore, fundamental rights are key in the interpretation of and derogation from EU primary and secondary law. However, as mentioned in the introduction to this section, the EU legal order is a complex space in terms of the protection of fundamental rights with somewhat unclear divisions between the role of general principles and that of the Charter. Here, it is significant to note that the entry into force of the Charter as part of the Lisbon Treaty on the 1st of December 2009 thus aimed at securing more popular legitimacy for the Union and a means of gathering support for existing EU activity.[585] At its conception, the process of drafting the Charter was viewed as at least as important as the document which would emerge, in that the well documented intention was not to create anything new substantively.[586] In simple terms the aim was to increase the visibility of something which already existed in EU law and to hence give fundamental rights a more prominent place in the process of European integration. Indeed, for the three decades prior to the initial drafting of the Charter, which was officially adopted in its non-binding form in December 2000, fundamental rights were protected as part of the constitutional fabric of the EU legal order in the form of an unwritten catalogue of rights as part of the general principles of EU law. However, despite the intention to merely raise popular awareness, the number of cases which mention the

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[580] *Joined cases C-92/09 and C-93/09, Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen, ECLI:EU:C:2010:662*.

[581] See for example: *Case C-28/08, Commission v The Bavarian Lager Co Ltd [2010] ECLI:EU:C:2010:378*; *Case C-131/12, Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, ECLI:EU:C:2014:317* (n 317); *Joined Cases C-293/12 and C-594/12 Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others. Requests for a preliminary ruling from the High Court (Ireland) and the Verfassungsgerichtshof ECLI:EU:C:2014:238* (n 332).

[582] Lynskey (n 457) 64.

[583] ibid.

[584] See for example: *Case C-28/08, Commission v The Bavarian Lager Co Ltd [2010] ECLI:EU:C:2010:378* (n 581); *Case C-131/12, Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, ECLI:EU:C:2014:317* (n 317); *Joined Cases C-293/12 and C-594/12 Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others. Requests for a preliminary ruling from the High Court (Ireland) and the Verfassungsgerichtshof ECLI:EU:C:2014:238* (n 332).

[585] Grainne De Búrca, 'The Drafting of the European Union Charter of Fundamental Rights' (2001) 26 European Law Review 1, 3.

[586] See generally: De Búrca (n 585).

Charter has dramatically increased since the adoption of the Lisbon treaty.[587] In hindsight therefore, it is apparent that the attribution of binding force on the Charter has led to a significant change in the EU legal order and that, although initially presented as decorative rather than substantive in nature, in raising the profile of fundamental rights the Charter has forced the Union to take their protection more seriously thereby pushing the Court of Justice in turn.[588] Indeed as noted by Sánchez,

> '[s]ignificantly, the legally binding nature of the Charter is fostering a change in the semantics of rights and in legal argumentation. When dealing with cases already covered by well-developed case law, the Charter provides new coverage and puts into terms of fundamental rights the arguments that were previously latent, but somehow disguised under the more prosaic traditional functional language.'[589]

Consequently, one must question the true effects of the allocation of binding force on the Charter and how it operates in the EU legal order, in particular *vis-à-vis* horizontal business to consumer relationships. The point being made here is that even more generally and outside the references to the fact that Article 16 TFEU may be understood as significant development in relation to the EU competence to act for the protection of the right to data protection (and indeed, the level of protection that can be provided for), there has been an observable constitutionalisation of private law analysis in the Court's reasoning.

**[170]** HIDDEN CONSTITUTIONALISM – Therefore, although one must be aware of the fact that the data protection framework is a bit of a strange animal in EU law and that outside of the insights into the application of Article 114 TFEU more generally, as described by Weatherill, 'the Court has embraced this constitutional linkage between the market-making and the quality of the (re-)regulated environment.'[590] However, it is important to note that in the context of consumer contracts in particular such a constitutional link has often remained somewhat implicit. Indeed, although there have been signs that there is a move beyond the EU's optimised balance between protection and efficiency and thus a re-emerging emphasis on the protection of weaker parties. This is evident, first in the case law of Court of Justice where the Court appears to play an increasingly constitutionalised role in the interpretation of EU law. Comparato and Micklitz refer to this implicit reliance on fundamental rights as '"hidden constitutionalism", in that it avoids explicitly referring to fundamental rights, whilst in practice using them to justify the restriction of private autonomy.'[591] This reflects the point that the role of the Court of Justice in engaging with fundamental rights and completing the fair balancing exercise itself must be tempered somewhat in the context of EU consumer law given the ongoing role played by national

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[587] Steve Peers, 'The Rebirth of the EU's Charter of Fundamental Rights' (2011) 13 Cambridge Yearbook of European Legal Studies 283, 291.
[588] Sarmiento (n 375) 1270.
[589] Sara Iglesias Sánchez, 'The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights' [2012] Common Market Law Review 1565, 1578.
[590] Weatherill (n 377) 1016.
[591] Comparato and Micklitz (n 302) 139–140.

law and courts in private law matters and the misgivings associated with the EU constitutionalisation of private law and hence, the fear that every private law conflict could end up being a constitutional one especially given that the constitutional standard is that developed by the Court of Justice as opposed to the respective national constitutional orders.[592]

**[171]** DRAWING THE CONSTITUTIONALISATION LINES – Indeed, the question is one of whether such a duty to fairly balance fundamental rights should always lead to the interference in private law agreements. In this vein, Leczykiewicz argues that the economic imbalance doctrine could inform the potential application of the Charter to private law relationship where there is an imbalance of power between the parties.[593] However, the author goes on to specify that, '[u]nless the Court of Justice is prepared to claim that the Charter should be used to redistribute entitlements between similarly situated private parties it will not be able to use "fundamental rights" beyond the remit of legislative arrangements, which to a large extent already cover situations of imbalanced power.'[594] Here it is also important to point to the national Courts and their role in balancing competing rights and interests with respect to matters coming within the scope of EU law in their jurisdiction.[595]

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[592] The standard worries associated with constitutionalisation relate to (1) the undermining of the separation between the Court of Justice interpretation of the Directive and national courts application of it; (2) the over-extension of the effectiveness principle at the expense of national regulatory autonomy and; (3) the transformation of the Court of Justice into a 'positive lawmaker' of social policy contrary to the separation of powers. Oliver Gerstenberg, 'Constitutional Reasoning in Private Law: The Role of the CJEU in Adjudicating Unfair Terms in Consumer Contracts: Constitutional Reasoning in Private Law' (2015) 21 European Law Journal 599, 614–615. Here it is also interesting to refer to de Witte's analysis of the crumbling public/private divide in EU non-discrimination law where the author notes that horizontality is potentially limited due to such value conflicts and hence the precise delineation of what falls within this 'public sphere' but also due to the potentially limited effectives of the established European norm. de Witte (n 374) 521.

[593] Leczykiewicz (n 393) 494.

[594] ibid 495.

[595] An excellent point of reference here is The *Case C-415/11, Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa), ECLI:EU:C:2013:164*. which dealt with the application of the Unfair Terms Directive and is perhaps clearest example of Court of Justice intervention into contract law issues. In short, the facts of the case related to Spanish implementation of the Unfair Terms Directive where Mr Aziz had defaulted on his mortgage after he became unemployed resulting in the seizure of his home. Mr Aziz challenged several of the terms before the Spanish Court and one in particular which permitted the bank to seize his property in order to claim the repayment of the total amount of credit where the borrower defaulted on one of this repayments during the term of the contract. As this term was standard and thus not individually negotiated it fell within the scope of the Unfair Terms Directive (see Chapter 4 for more). The Spanish Court referred to the Court of Justice for guidance on how the constituent elements of the concept of 'unfair term' (i.e. in particular that of 'significant imbalance') should be interpreted. Moreover, and more importantly for our current purposes, the Spanish Court also sought guidance on the compatibility of the Spanish procedural system which did not allow for the provision of interim relief including the staying of enforcement proceedings where the fairness of a term was contested. In its conclusion the Court found *inter alia* that the Spanish system did not offer adequate protection for consumers and that this reasoning was strengthened by the fact that the property in question was a family home. In doing so the Court appears for the most part to follow[595] the opinion of Advocate General Kokott who suggested that '[…] the amount of the loan granted, its term and its importance to the existence of the borrower will have to be balanced against the interest of the lender in being able to extricate itself from the loan agreement following the non-payment of just one instalment.' *Opinion of Advocate General Kokott delivered on 8 November 2012 in Case*

Although a further exploration of this issue is outside the scope of this thesis, it is important to specify that the above arguably creates a further delineation between the data protection and consumer protection framework and results in a complex divide given that practically speaking, data protection has a clear consumer protection orientated aspect where personal data are processed for commercial processes.

**[172]** PRIMACY, UNITY AND EFFECTIVENESS OF EU LAW – To reiterate therefore, tracing the overlaps and boundaries of the multi-layered system is complicated. Even though the layer of protection added by the Charter has been widely welcomed, this additional layer adds to the potential for discordance between them.[596] Here, it is important to refer to Article 53 Charter which states that,

> '[n]othing in [the] Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.'

As described by de Witte, Article 53 Charter thus reflects this potential for divergence and hence, the desire to offer stronger fundamental rights protection within the scope of EU law without displacing existing protections.[597] In light of the complex competence divisions between the EU and its MSs it is not surprising that the final few words of this provision have proven to be the most controversial despite the 'in their respective fields' qualification. Indeed, the statement that the Charter does not affect the fundamental rights recognised by the constitutions of MSs raises important questions as to the precise division between the MSs and the EU *vis-à-vis* the potential harmonisation of protections by secondary law. In the *Melloni* case[598] the Court of Justice was asked to clarify the relationship between the national constitutional courts (here the Spanish Constitutional Court) and itself and hence, to interpret Article 53 Charter.[599] In its judgement the Court

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*C-415/11 Mohamed Aziz v Caixa d´Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa) ECLI:EU:C:2012:700* 700. Hence, as observed by Cherednychenko and Reich although similar to the Court the Advocate General does not refer explicitly to fundamental rights, her reasoning is reminiscent of that discussed above in *Promusicae* in that interpreting Article 3(1) UCT Directive required a balancing between the creditors freedom to conduct a business in Article 16 Charter and the consumer's right to privacy (i.e. including a right to a home) in Article 7 Charter. As such, the Unfair Terms Directive, although certainly not the specific expression of the right to privacy, could be used as means of protecting this right in the context of the case Cherednychenko and Reich (n 365) 807.

[596] Bruno de Witte, 'Level of Protection' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights : A Commentary* (1st edn, Hart Publishing 2014) 1524.

[597] ibid.

[598] *Case C-399/11, Melloni, EU:C:2013:107*.

[599] In brief, the facts of the case related to authorisation of the extradition of Mr Melloni by the Spanish judicial authorities in 1996 so that he could be tried in Italy on criminal charges related to bankruptcy fraud. Mr Melloni was convicted *in abstentia* in 1997 and was sentenced to 10 years in prison by an Italian Court and this conviction was confirmed in 2003 by the Appeals Court and in 2004 by the Supreme Court of Cassation. Subsequently, in 2004 a European arrest warrant was issued and the Spanish judicial authority authorised his surrender. However, Mr Melloni then filed a *'recurso de amparo*' before the Spanish Constitutional Court which alleged that his right to a fair trial under the Spanish Constitution had been

of Justice held that Article 53 Charter does not 'allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution.'[600] Accordingly, as long as the EU measure in question is in compliance with the Charter, the national courts are required to set aside measures (including constitutional laws) which are in conflict. Nevertheless, the Court of Justice did find that under Article 53 Charter national courts and authorities are free to apply national standards, 'provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.'[601] The question thus becomes one of what amounts to circumstances compromising 'the primacy, unity and effectiveness of EU law'. It appears from the judgement in *Melloni* that the answer to this question lies in the existence or absence of a measure providing a uniform standard of fundamental rights protection in that where there is a harmonised consensus the national measure is ruled out. As observed by Lenaerts and Gutiérrez-Fons, '[t]his is so because, when adopting such a measure, the EU legislator struck a balance between the general interest the EU pursues and the protection of fundamental rights. Applying higher standards of protection would thus disturb such a balance, thus compromising the "primacy, unity and effectiveness of EU law".'[602]

**[173]** THE IMPORTANCE OF THE LEGISLATIVE STANDARD – Accordingly, the role of the Court of Justice is to review the resulting political compromise for its compliance with the Charter. In essence, the adoption of a harmonised standard of protection is left to the more democratically legitimate political process (i.e. the EU legislator) which has the institutional capacity to balance the respective interests and adopt of piece of legislation which respects the Charter but at the same time achieves the intended legislative goal.[603] Such an approach aligns with the separation of powers thereby limiting the Court of Justice to policing the adopted legislation so as to ensure that it respects the Charter.[604] The Court has therefore adopted a pluralist approach. However, it is important to specify that from *Melloni* it appears that where the EU legislator intervenes the resulting harmonised fundamental rights standards is exclusive and takes primacy over national standards.[605] Indeed, as noted by Muir,

> '[a]lthough EU legislation may assert that the Member States can provide additional protection to a given fundamental right, such a proviso is only relevant for the

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violated as the Spanish Constitution only permits the extradition of a person tried *in abstentia* if that person is given the opportunity for a retrial. However, the relevant provisions of the EU secondary law (Article 4a(1) Directive 2002/584 as amended by Framework Decision 2009/299) limits the grounds under which a judicial authority may refuse to execute a warrant for extradition and on this basis the Spanish Court referred a question to the Court of Justice relating to the compatibility of the provision of the Spanish Constitution with the provision of the Directive.

[600] *Case C-399/11, Melloni, EU:C:2013:107* (n 598) para 58.

[601] ibid 60.

[602] Lenaerts and Gutiérrez-Fons (n 301) 1591.

[603] ibid.

[604] ibid 1592.

[605] Muir (n 376) 238.

mechanisms and procedures giving effect to the said right, but the definition of the right itself is often pre-empted by the Union legal order.'[606]

As such, the role of the EU legislator in defining the *de facto* standard of rights protection (i.e. provided that this standard respects the Charter, broadly speaking) is key and therefore, one must question the precise limits of the EU's competence in this regard. As further noted by Muir, although at first glance the principle of subsidiarity may be of use in defining these boundaries it is inadequate to do so as it is currently defined in EU law.[607] More specifically, subsidiarity specifies that decisions should be made as closely as possible to EU citizens and, according to Article 5(3) TEU, applies in principle whenever the EU legislator acts to establish a fundamental rights standard or mechanism for the protection of fundamental rights.[608]

**[174]** SUBSIDIARITY TO THE RESCUE – However, as summarised by Muir, the practical usefulness of subsidiarity in the context of fundamental rights is debateable for two specific reasons.[609] First, there is a mismatch between the function of fundamental rights protection (i.e. as defined by a policy objective such as consumer protection), which may regulate relationships *within* MSs, and the function of the subsidiarity principle which regulates relationships *among* MSs. Hence, applying the subsidiarity test is conceptually irrelevant to the dynamics of fundamental standard setting in EU legislation. And second, the *nature* of fundamental rights standard setting relates to the weighing of conflicting rights and values whereas, the subsidiarity principle relates to the *effectiveness* of law *vis-à-vis* the pursuit of a specific policy objective and thus is ineffective in the balancing and prioritisation of values in legislation. In short, and as illustrated above, the standard of fundamental rights protection will come down to the balance made by the EU legislator considering the objective pursued as interpreted by the Court of Justice. Although it is outside the scope of this thesis to go even further into this debate, for our current purposes it suffices to say more simply that the Court's approach has been significantly shaped by the objective of market harmonisation where fundamental rights through the general principles are weighed in light of the internal market completion objective. It is with this in mind that one must also appreciate the importance of the harmonising role of EU secondary legislation and thus the 'spillover effects'[610] of such harmonisation on the standard of protection in domestic legal order in light of the underlying EU policy objective and the potential for pluralistic constitutional protection in the common constitutional space.

**[175]** THE IMPORTANCE OF THE PRIVACY AND DATA PROTECTION FRAMEWORK – The key takeaway for the purposes of this thesis therefore is that the fair balance struck by the EU legislator is key. In this vein, any potential difference in the standards of protection provided in the data protection and consumer protection frameworks is a significant consideration. Article 16

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[606] ibid 238–239.
[607] ibid.
[608] ibid 239.
[609] ibid.
[610] ibid 222.

TFEU appears to facilitate a change and the adoption of the GDPR on this basis seemingly has allowed for a higher level of protection. Such a contention will need to be tested and this is significant as it is the emergence of emotional AI and the capacity to detect emotions that is propelling the changes being analysed in this thesis. Indeed, as described by Sampson, 'the history of marketing is strewn with attempts' to harness emotions from the development of St. Elmo Lewis' Attention, Interest, Desire and Action model (AIDA – a template for advertising) which made the link between desire and cognitive beliefs to the marketing propaganda model developed by Bernay who notoriously recognised 'the connection between unconscious desires, attention and the selling of products to the masses'.[611] Hence, appealing to our emotions is not new but their detection and monetisation in real-time and the capacity to tailor our mediated environments to emotional insights is an important development. Therefore, it seems logical then to see how such mechanisms fit with the requirements stipulated in the privacy and data protection framework with the balance struck at the secondary law level of key importance to the assessment of the legal limits to the monetisation of online emotions.

## CONCLUSION

**[176]** THE PRIVACY AND DATA PROTECTION SOLUTION? The EU legislative patchwork presents a complex environment in which to analyse the legal limits to the monetisation of online emotions. Despite the existence of a range of frameworks stipulating relevant requirements, the analysis necessitates an appreciation of the role of national law and the importance of self-regulation for the advertising industry. Moreover, assessing the legitimacy of requirements requires an appreciation of the fundamental foundations and thus, the fact the commercial expression comes within the protections provided in Article 11 Charter. That being said, the emergence of emotional AI and the ability to detect, develop and target products and services on the basis of emotional insights also raises clear concerns for individual autonomy and hence, more specifically the right to privacy. Such conflicting rights and interest must be balanced to ensure the proportionality of any legal intervention. The question thus becomes one of whether the EU privacy and data protection framework could provide effective *ex ante* protection to mitigate the challenge posed by the technological developments. To clarify, as emotion detection would seem to necessitate the processing of personal data, the question is one of whether the privacy and data protection framework is not capable of protecting consumer.

**[177]** A CONCEPTUALLY VIABLE SOLUTION – The final part of this Chapter has illustrated that at least conceptually; the EU privacy and data protection framework could provide the means through which the negative *ex post* effects of emotion monetisation could be mitigated through *ex ante* protection of the information required to detect one's emotions in the first instance. However, this conclusion now requires more detailed analysis. As will be explored in more detail in Chapters 4 and 5, emotion detection and monetisation present several extremely difficult challenges to the scope and application of the EU privacy and

[611] Sampson (n 397) 57.

data protection framework. Before analysing the problems associated with the application of the requirements however, it is first necessary to examine those that crop up in relation to the material scope. As such, the analysis now turns to examination of the GDPR's provisions on the material scope and hence, the definition of personal data and how this is challenged by the emergence of emotional AI.

# 4

# THE EMOTION MONETISATION DEPLOYMENTS AND THE APPLICABILITY OF THE 'INFORMATION' PROTECTIONS

## INTRODUCTION

**[178]** FUNCTION CREEP AND EMOTION INSIGHTS – Technological advancements are now rendering emotions detectable in real-time. It does not take a massive leap then to imagine the value of this development for the advertising industry. Aside from marketing and advertising however, the application of such technology extends to the opening up of new commercial opportunities in *inter alia* human computer/robot interaction, smart home devices (e.g. media consumption or gaming) and the health care or the *pseudo*-healthcare 'wellness' sectors but also in terms of their deployment in a variety of smart space contexts.[612] Although the specificities of these applications are outside the scope of this particular thesis more generally, the emergence of such technologies and emotional AI more generally is significant as such technologies by their very purpose provide insights into individuals emotional status. In a data protection context, it has long been argued that the framework has struggled to deal with what is known as 'function creep',[613] notwithstanding the purpose limitation principle specified in Article 5(1)(b) GDPR (i.e. and before that Article 6(1)(b) Data Protection Directive 95/46/EC). In brief, this principle mandates that personal data must only be collected for specified, explicit and legitimate purposes, and not further processed in a way incompatible with that purpose. Although this is key issue requiring a more detailed examination of the application of the privacy and data protection framework *vis-à-vis* the protection of consumer decision-

[612] i.e. in order to detect potential civil disturbances, encourage socially acceptable behaviour in night life orientated public areas and also to generally improve citizen's wellbeing via civic engagement and the adapting of city surroundings to encourage positive well-being.

[613] Michael Curry, David Phillips and Priscilla Regan, 'Emergency Response Systems and the Creeping Legibility of People and Places' (2004) 20 Information Society 357, 362.: Function creep relates to a situation 'when a system developed for a particular purpose comes to be used for, or to provide the underpinnings for other systems that are used for, different purposes'.

making capacity and autonomy (see Chapter 5), it is first necessary to examine more thoroughly whether emotion detection and monetisation technologies come within the material scope of the GDPR.

**[179]** PURPOSES AND MEANS – In this vein, and as will be examined in further detail in this Chapter, the purposes and means of detection play an important role in determining whether personal or indeed sensitive personal data (which is subject to stricter requirements) are processed. Hence, this analysis is clearly an essential pre-condition for the assessment of the key legislative protections afforded by the Regulation and how they interact with the *lex specialis* provisions in the ePrivacy Directive and the other protections provided for in the EU consumer law *acquis*. But how *does* emotion detection and monetisation fit within the data protection framework? It seems obvious in the context of emotion detection to point towards the GDPR. At first glance, the detection of emotions appears to almost inevitably require the processing of personal data thereby triggering the application of the Regulation. As will become clearer in this Chapter however, this first glance may be deceiving. Indeed, the application of the GDPR to emotion detection and monetisation will depend on the 'identifiability' of the data subject, the specific deployment in question and thus the purpose of the processing. In this vein, this Chapter will explore the application of the GDPR to emotion detection and monetisation technologies and analyse, (1) the personal data category and the notion of 'identifiability' and; (2) the relationship between personal and sensitive personal data in the context of emotion detection and monetisation.

## 4.1 EMOTION DETECTION AND THE MATERIAL SCOPE OF DATA PROTECTION LAW

**[180]** INFORMATION ABOUT EMOTIONS – In their analysis of the literature on emotion detection Gunes and Pantic observe that '[e]motional information is conveyed by a broad range of multimodal cues, including speech and language, gesture and head movement, body movement and posture, vocal intonation and facial expression, and so forth.'[614] In this vein, there are multiple data sources which may be relevant depending on the context, purposes and available means of detection. For instance, outside of the detection of emotions through online browsing behaviour via text and or data mining, examples of methods of detection include the use of the Facial Action Coding System as first developed by Ekman and Friesen in the analysis of facial expressions,[615] the analysis of audio analysis to assess a person's speech through explicit (linguistic) and implicit (paralinguistic) messages, an examination of thermal signals to assess core body temperature and also through technology reliant upon contact with the human body via bio-potential signals.[616] To further specify, these bio-potential signals refer in particular to Galvanic Skin

[614] Gunes and Pantic (n 475) 71.
[615] See for example: Paul Ekman and Wallace V Friesen, 'Measuring Facial Movement' (1976) 1 Environmental psychology and nonverbal behavior 56.
[616] For a more comprehensive description see: Gunes and Pantic (n 475).

Response (skins conductance which increases with arousal or stress); Electromyography (muscle activity or frequency of muscle tension); Blood Volume Pulse (heart rate); Skin temperature (skin surface temperature); Electrocardiogram (measure heart rate variability); and Respiration rate (depth and speed of breathing).[617] As a consequence, depending on whether one is trying to deploy emotion detection technology through a smart device such as a smart watch compared to a smart television or 'online' or through behaviour and text analysis or 'offline' in public or private spaces, the means of detection may vary. Aside from such practical issues however, and as will be described in this section, the particularities of each circumstance will also play a key role in determining (1) the application of the GDPR and; (2) how the Regulation applies in given circumstances. Before delving into the specifics however, the first section will first introduce the GDPR.

### 4.1.1 THE PROCESSING OF PERSONAL DATA AND THE PROTECTION OF THE DATA SUBJECT

**[181]** THE GDPR AND ITS MATERIAL SCOPE – From the outset, it is important to re-iterate that the GDPR specifically targets the protection of the right to data protection in particular but also rights and freedoms more generally (Article 1(2) GDPR) thereby reflecting the enabling fundamental protection functionality of the GDPR (see Chapter 3).[618] To clarify, the GDPR is clearly to be understood as having been adopted with the Charter in mind and not merely the right to data protection in that the Regulation aims to safeguard fundamental rights where personal data are processed. The Regulation aims to counteract power asymmetries between controllers (and processors) and data subjects by offering data subjects tools to bolster their position and rebalance the existing asymmetry where their personal data are processed.[619] Indeed, Article 2(1) GDPR specifies that the Regulation '[…] applies to the processing of personal data wholly or partly by automated means and to the 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.' Effectively therefore, the operation of the material scope comes down whether 'personal data' are 'processed'. Article 4(2) GDPR defines 'processing'

> '[…] any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction'.

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[617] See: ibid; McStay, 'Empathic Media: The Rise of Emotion in AI' (n 16).
[618] See: Clifford and Ausloos (n 537) 20–21. and the discussion of Manon Oostveen and Kristina Irion, 'The Golden Age of Personal Data: How to Regulate an Enabling Fundamental Right?' in Bakhoum and others (eds), *Personal Data in Competition, Consumer Protection and IP Law - Towards a Holistic Approach?* (Springer 2017) <https://papers.ssrn.com/abstract=2885701> accessed 20 January 2017.
[619] Lynskey (n 505).

It is hard to imagine an activity not falling within this definition and given its breadth, the application of the Regulation largely comes down to the notion of personal data. Personal data are defined in Article 4(1) GDPR as,

> '[…] any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.'

This definition has remained largely consistent when compared to the definition in the former Data Protection Directive and therefore, specific reference can be made to the case law interpretations and Article 29 Working Party guidance of this notion.[620] Indeed, although the Article 29 Working Party has been replaced by the European Data Protection Board through the GDPR's entry into force the opinions are still to be understood as persuasive where the provisions of the Regulation and the former Directive 95/46/EC do not deviate. In its interpretation of the definition of personal data contained in Article 4(1) GDPR, the Article 29 Working Party delineates four elements, namely (1) information; (2) relating to; (3) identified or identifiable and; (4) natural person.[621] Before analysing these elements of the definition in detail however, it is first necessary to introduce the key elements of the GDPR.

### *A. PROTECTING PERSONAL DATA – ACTORS, PRINCIPLES AND CONDITIONS*

**[182]** DEFINING THE KEY ACTORS AND PRINCIPLES – The term controller is defined in Article 4(7) GDPR as the natural or legal person 'which, alone or jointly with others, determines the purposes and means of the processing of personal data'. Article 4(8) GDPR defines a processor as any natural or legal person 'which processes personal data on behalf of the controller'. Data subjects are afforded rights and controllers (and processors) are required to satisfy specific requirements to process personal data. The GDPR specifies a precise separation in responsibility and roles, consisting of controllers processing personal data with or without contracting the services of a processor (who holds merely a passive function *vis-à-vis* the determination of purposes), with each entity being clearly distinguishable (at least in theory).[622]

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[620] *Opinion of Advocate General Kokott delivered on 20 July 2017 in Case C-434/16 Peter Nowak v Data Protection Commissioner, ECLI:EU:C:2017:582* [3].

[621] Article 29 Working Party, 'Opinion 4/2007 on the Concept of Personal Data' (Article 29 Working Party 2007) WP 136 29 <http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2007/wp136_en.pdf> accessed 9 December 2012.

[622] Damian Clifford, 'EU Data Protection Law and Targeted Advertising: Consent and the Cookie Monster - Tracking the Crumbs of Online User Behaviour' (2014) 5 JIPITEC <http://www.jipitec.eu/issues/jipitec-5-3-2014/4095>. Practically speaking however this is difficult see: Brendan Van Alsenoy, 'Allocating Responsibility among Controllers, Processors, and "Everything in between": The Definition of Actors and Roles in Directive 95/46/EC' (2012) 28 Computer Law & Security Review 25; Brendan Van Alsenoy, *Data Protection Law in the EU: Roles, Responsibilities and Liability* (First edition, Intersentia 2019).

| THE PRINCIPLES RELATING TO PROCESSING OF PERSONAL DATA | | | |
|---|---|---|---|
| ARTICLE | | PRINCIPLE(S) | RELEVANT EXTRACT FROM PROVISION |
| Article 5(1) | (a) | Lawfulness, fairness and transparency | Personal data shall be: processed lawfully, fairly and in a transparent manner in relation to the data subject |
| | (b) | Purpose limitation | Personal data shall be: collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes… |
| | (c) | Data minimisation | Personal data shall be: adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed |
| | (d) | Accuracy | Personal data shall be: 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 |
| | (e) | Storage limitation | Personal data shall be: kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed… |
| | (f) | Integrity and confidentiality | Personal data shall be: processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures |
| Article 5(2) | | Accountability | The controller shall be responsible for, and be able to demonstrate compliance with, paragraph 1 |

*Figure 2 – The data protection principles.*

The specific requirements that controllers and processors are subject to inherently stem from the principle of accountability (i.e. Article 5(2) GDPR) and indeed the other principles relating to the processing of personal data contained in Article 5 GDPR which are represented above in *Figure 2.* These principles play an overarching role in the application of the framework and essentially guide the interpretation of the rights and obligations contained therein. In addition to the accountability principle in Article 5(2) GDPR, of immediate importance for the purposes of this thesis are Articles 5(1)(a) GDPR ('Lawfulness, fairness and transparency') and Articles 5(1)(b) GDPR ('Purpose limitation').

**[183]** FAIRNESS AND ACCOUNTABILITY – Importantly, the data protection fairness and accountability principles go hand in hand with the controller responsible for the fair balancing of rights and interests when processing personal data. Indeed, fairness manifests itself in the implementation of the environmental variables and the facilitating of the notion of control as an underlying rationale of the data protection framework. This also reflects the fact that fairness has been referred to by the EDPS as a 'core' principle of the framework along with transparency and lawfulness as it appears to be key even in the interpretation of the other principles provided for in Article 5 GDPR.[623] The interpretative overlap between the principles is clearly manifested when one considers how they play a role in the application of the conditions for lawful processing contained in Article 6(1) GDPR (see below) the operation of which are also clearly linked to the lawfulness principle in particular. More specifically, it is important to note that in the GDPR there is a clear emphasis on controller

[623] European Data Protection Supervisor, 'Opinion on Coherent Enforcement of Fundamental Rights in the Age of Big Data' (EDPS 2016) Opinion 8/2016 8 <https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Events/16-09-23_BigData_opinion_EN.pdf> accessed 26 October 2016. – where it is noted that 'fairness of personal data processing is a core principle alongside lawfulness and transparency'

accountability and a flexible decentred regulatory approach framed in terms of 'coordinating, steering, influencing and balancing interactions between actors.'[624] This is illustrative of (1) the focus on risk and responsiveness,[625] and (2) the enhanced focus on accountability and the auditing of performance[626] as two key features which are clearly evident in the GDPR's adopted approach.[627] Indeed, the specific requirements that controllers and processors are subject to inherently relate to the principle of accountability (i.e. Article 5(2) GDPR) and more generally, the other principles relating to the processing of personal data contained in Article 5(1) GDPR with these principles playing an overarching role in the application of the framework and guiding the interpretation of the rights and obligations contained therein. This broadness in terms of scope is also manifested in the application of the data protection fairness principle as described above. Indeed, fairness in data protection extends beyond the assessment of the decision-making capacity of an individual to the fairness of processing operations more generally thereby extending beyond the operation of the transparency principle. The emergence of technology capable of detecting emotions in real-time with everyday consumer devices provides an illustration of why the accountability principle and requirements such as data protection by design and by default (Article 25 GDPR) and data protection impact assessments (Article 35 GDPR) are key to safeguard the rights and interests of data subjects.[628]

**[184]** THE CONDITIONS FOR LAWFUL PROCESSING AND DATA SUBJECT RIGHTS – As mentioned, the processing of personal data requires one of the conditions for lawful processing contained in Article 6(1) GDPR to be satisfied. In the context of emotion detection and monetisation technologies that process personal data for business to consumer purposes, three of these conditions are specifically relevant namely, consent (Article 6(1)(a) GDPR), contract (Article 6(1)(b) GDPR) and legitimate interests (Article 6(1)(f) GDPR) as represented below in *Figure 3*.[629]

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[624] Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54 Current Legal Problems 103.

[625] Julia Black and Robert Baldwin, 'Really Responsive Risk-Based Regulation' (2010) 32 Law & Policy 181, 186–87; Robert Baldwin and Julia Black, 'Really Responsive Regulation' (2008) 71 Modern Law Review 59, 62.

[626] This oversight remains a challenge – See: Colin Scott, 'Evaluating the Performance and Accountability of Regulators Berle V: Capital Markets, the Corporation, and the Asian Century: Governance, Accountability, and the Future of Corporate Law: The Fifth Annual Symposium of the Adolf A. Berle, Jr. Center on Corporations, Law & Society' (2013) 37 Seattle University Law Review 353, 373.

[627] See: Clifford and Ausloos (n 537). Both of these features are indicative of how regulatory mechanisms are framed by the finite nature of resources. In general, it must be understood that 'new' regulation relies on the role of industry and enforcement agencies, and therefore the implementation of self and co-regulatory mechanism, but also individuals in order to hold companies to account.

[628] See: Clifford (n 396).

[629] Importantly in this context commercial activities excludes processing that is necessary for compliance with a legal obligation as laid down in Article 6(1)(c) GDPR.

| LAWFULNESS OF PROCESSING | | |
|---|---|---|
| ARTICLE | CONDITION | RELEVANT EXTRACT FROM PROVISION |
| Article 6(1)(a) | Consent | the data subject has given consent to the processing of his or her personal data for one or more specific purposes; |
| Article 6(1)(b) | Contract | processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; |
| Article 6(1)(f) | Legitimate interest | processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child. |

*Figure 3 – Conditions for lawful processing*

The purpose of the processing, the means used to achieve this purpose and the interests at stake will determine which of these conditions may be applicable. Of the three of these conditions it is important to note that only one is disconnected from the specific will of the data subject. Indeed, consent (Article 6(1)(a) GDPR) and contract (Article 6(1)(b) GDPR) are tied to the data subject's agreement to the processing in question whereas legitimate interest (Article 6(1)(f) GDPR) represents a fair balancing of competing rights and interests by the controller which, in an *ex ante* sense, operates outside the specific control of the data subject. In addition to the general category of personal data there are certain type of personal data that are provided an additional layer of protection with a prohibition on the processing of these sensitive personal data contained in Article 9(1) GDPR. As will be explored in depth in Chapter 3 Article 9(1) includes '[…] personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation shall be prohibited. The exceptions to this prohibition are stipulated in Article 9(2) GDPR which lists ten potential means of side-stepping the general prohibition. However, in the context of emotion monetisation for purely commercial purposes only two of these are potentially applicable, namely (1) where the data subject has given their explicit consent (Article 9(2)(a) GDPR) or; (2) where '[…] the processing relates to personal data which are manifestly made public by the data subject' (Article 9(2)(e) GDPR).[630]

**[185]** (EXPLICIT) CONSENT OR 'MANIFESTLY MADE PUBLIC' – Regarding the second of the potentially available exceptions, although 'manifestly made public by the data subject' is not defined in the GDPR, it must be assumed that a strict interpretation is required given that it applies to the processing of sensitive personal data.[631] This is indicative of the fact that the provision represents an exception as opposed to a condition for lawful processing when

[630] Indeed, although there are specific exceptions dealing with *inter alia* the vital interests of the data subject or another natural person (Article 9(2)(c) GDPR); a substantial public interest (Article 9(2)(g) GDPR) and processing for health care purposes (Article 9(2)(h) GDPR), the processing purposes which could avail of these remain outside the scope of this thesis. To clarify, the focus here is on the monetisation of emotion in business-citizen-consumer contexts and therefore, the detection of emotion for purely medical purposes for instance falls outside of the business-2-citizen-consumer focus herein.

[631] See: European Union Agency for Fundamental Rights (FRA) and Council of Europe, *Handbook on European Non-Discrimination Law* (Luxembourg: Publications Office of the European Union 2011) 162–163.

compared to 'ordinary' personal data and Article 6(1) GDPR.[632] Moreover, here it is also important to reiterate the point that the right to data protection protects against the processing of personal data irrespective of whether this information is public or not and with this in mind, the provision sits a bit oddly in the context of the framework. Perhaps connected to this point, it is also important to note that it is the action of the data subject in particular which counts. Accordingly, it is not a question of whether any other person (natural or legal) makes the sensitive personal data public. Thus, the provision would seemingly require a deliberate act on the data subject's behalf. As one might well imagine this provision presents clear challenges in terms of its application in an online context. For instance, it remains uncertain whether the provision is applicable in situations where a natural person publishes a blog indicating that a person in their circle suffers from a mental health issue. Although it is clear that to publish such information without the explicit consent of the data subject would be unlawful, it is unclear from the wording of Article 9(2)(c) GDPR whether the data subject's explicit consent to someone else publishing this information would then in turn satisfy the 'manifestly made public by the data subject' condition for the application of the exception for any further processing once the information is made available to the public. The simple fact is that even the processing of personal data in the public domain requires the controller to satisfy one of the conditions for lawful processing in Article 6(1) GDPR. Hence, determining the point at which a data subject may be deemed to have 'manifestly made' sensitive personal data public is extremely difficult to determine.

**[186]** INTERPRETING THE WORD 'PUBLIC' – Although explicitly consenting to publishing of sensitive health data on a friend's blog, it must be understood that similar to the conditions for lawful processing, this explicit consent must be linked to a specific purpose(s). Hence, due to the increasingly blurred lines between personal and sensitive personal data the application of this exception is plagued by practical uncertainties. Here one is reminded of the right to privacy in public debate (See Chapter 5 for more) and perhaps one could conceive of the exception contained in Article 9(2)(c) GDPR as being be built with this in mind. Indeed, here one must also wonder what is meant by 'public' for the purposes of Article 9(2)(c) GDPR. Would the publishing of sensitive personal data on a social media pages only accessible to the data subject's connections render it public? What if the data subject only had a very small number of friends or it was shared via an in-application messaging service to only one or a small number of people? Or is this exception built with a public interest balancing in mind and therefore, the processing of the sensitive personal data (e.g. health information) of celebrities? Irrespective of such debates however, it should be noted for instance that in the context of sentiment analysis of publicly available social media postings to ascertain the mental health status of users for private commercial purposes the availability of Article 9(2)(c) GDPR would be very much in doubt. Moreover, it should be emphasised that processing on an individualised level will often fall outside the scope of Article 9(2)(c) GDPR simply by virtue of the fact that it is highly probably that

[632] ibid 162.

the personal data will have to be provided (i.e. either directly by data subject input or a sensor) thus requiring the explicit consent of the data subject (Article 9(2)(a) GDPR). As such, in the context of emotion detection for commercial purposes where sensitive personal data are processed, the explicit consent of the data subject will be almost always required.[633] To trigger the application of the requirements contained in the Regulation however, personal data must be processed and with this in mind, the analysis now turns to an in-depth analysis of the material scope of the GDPR.

### *B. RELATING TO AN IDENTIFIABLE NATURAL PERSON*

**[187]** THE CUMULATIVE ELEMENTS – As mentioned above in the introduction to this section the definition of personal data in Article 4(1) GDPR can be broken down into four cumulative components namely, (1) information; (2) relating to; (3) identified or identifiable and; (4) natural person. Importantly, although these constitutive elements are cumulative and 'are closely intertwined and feed on each other',[634] much of the analysis has focused on the interpretation of 'relating to' and 'identified or identifiable'. This reflects the simple fact that (1) the other elements are easily met and (2) that anonymous data are not considered personal and hence, that the processing of such data does not come within the material scope of the GDPR.[635] As the GDPR imposes important requirements for controllers which can in turn incur significant costs, precisely delineating when the Regulation applies is crucial. Accordingly, determining whether data identifies or renders a data subject identifiable by relating to them becomes the pivotal consideration in the assessment of the Regulation's applicability. In reality however, the boundaries between personal and anonymous data are increasingly blurred with the debate regarding the suitability of the division fuelled by a number of successful re-identifications.[636] As the definition of personal data is construed broadly (i.e. the 'identifiability' and 'relating to' thresholds appear to be easily met in practice), there are question marks as to the ongoing suitability of the anonymous-personal data division as the basis for regulation.[637] But what does this mean for the detection and monetisation of emotion? The purpose of this sub-section therefore is to analyse the definition of personal data and its four cumulative elements considering emotion detection technology to better comprehend, (1) how emotion

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[633] See here: Clifford (n 396).
[634] Article 29 Working Party, 'Opinion on Personal Data' (n 621) 6.
[635] See Recital 26 GDPR
[636] See for example: Latanya Sweeney, 'Simple Demographics Often Identify People Uniquely' [2000] Carnegie Mellon University, Data Privacy Working Paper 34; Latanya Sweeney, Akua Abu and Julia Winn, 'Identifying Participants in the Personal Genome Project by Name' (2013) White paper <http://dataprivacylab.org/projects/pgp/>; Yves-Alexandre de Montjoye and others, 'Unique in the Shopping Mall: On the Reidentifiability of Credit Card Metadata' (2015) 347 Science 536; Arvind Narayanan and Vitaly Shmatikov, 'Robust De-Anonymization of Large Sparse Datasets', *Proceedings of the 2008 IEEE Symposium on Security and Privacy* (IEEE Computer Society 2008) <https://doi.org/10.1109/SP.2008.33> accessed 22 November 2018.
[637] Paul Ohm, 'Broken Promises of Privacy: Responding to the Surprising Failure of Anonoymization' [2010] UCLA Law Review 1701; Ira S Rubinstein and Woodrow Hartzog, 'Anonymization and Risk' 91 Washington Law Review 703.

detection technologies may come within the Regulation's material scope; and (2) how certain deployments may challenge that scope despite the very broad interpretation attributed to the definition of personal data.

### *i. The broad nature of the definition of personal data*

**[188]** DIRECT AND INDIRECT IDENTIFIERS – From the outset, it appears that there are certain emotion detection and monetisation deployments which will undoubtedly process personal data. Indeed, if the very purpose of the technology in question requires the detection of a specific natural person's emotions, it is clear that personal data will be processed. For instance, the use of emotion detection technology in the smart home for interactive gaming in order to personalise user-experience will seemingly require the processing of personal data. Importantly, the definition does not require the knowledge of the person's name and here it is important to specify that the definition of personal data provided for in Article 4(1) GDPR focuses on the capacity to both 'directly' but also 'indirectly' identify the natural person through so-called 'identifiers'. These identifiers can either refer to a specific attribute (or collection of attributes) which directly or indirectly identifies a natural person or renders the natural person identifiable. In this regard, it is interesting to note that Article 4(1) GDPR specifically refers to examples such as 'an online identifier' and factors specific to a natural person (e.g. physical, physiological, mental) but also more broadly, to the fact that under the GDPR pseudonymous data are still considered personal.

**[189]** PSEUDONYMOUS PERSONAL DATA – As a consequence, the processing of pseudonymous personal data must still satisfy the requirements contained in the Regulation even if pseudonymisation reduces the potential risk to data subjects.[638] To clarify, 'pseudonymisation' is defined in Article 4(5) GDPR to mean,

> '[…] the processing of personal data in such a manner that the personal data can no longer be attributed to a specific data subject without the use of additional information, provided that such additional information is kept separately and is subject to technical and organisational measures to ensure that the personal data are not attributed to an identified or identifiable natural person'.

Therefore, the definition of personal data combined with that of pseudonymisation, and the clarifications regarding their interaction provided in Recitals 26 and 28 GDPR, thus indicate that any data capable of 'singling out' an individual should be considered personal.[639] This clarification is significant as a failure to include such data within the scope of the definition of personal data would have undermined the protections provided by the framework. Indeed, the capacity to 'single out' raises the need for protection irrespective of whether one can identify an individual's name.[640] More specifically, Recital 26 GDPR specifies that to determine whether a natural person is identifiable,

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[638] Recital 28 GDPR

[639] See: Frederik J Zuiderveen Borgesius, 'Singling out People without Knowing Their Names – Behavioural Targeting, Pseudonymous Data, and the New Data Protection Regulation' Computer Law & Security Review <http://www.sciencedirect.com/science/article/pii/S0267364915001788> accessed 1 March 2016.

[640] Clifford and Verdoodt (n 33).

> '[…] account should be taken of all the means reasonably likely to be used, such as singling out, either by the controller or by another person to identify the natural person directly or indirectly. To ascertain whether means are reasonably likely to be used to identify the natural person, account should be taken of all objective factors, such as the costs of and the amount of time required for identification, taking into consideration the available technology at the time of the processing and technological developments.'

Accordingly, the 'identifiability' threshold rests on the assessment of all the 'means reasonably likely to be used', and to assess whether something is reasonably likely 'all objective factors' should be explored. Here, it is interesting to refer to the Court of Justice judgement in the *Breyer* case.[641]

**[190]** DYNAMIC IPS AND IDENTIFIABILITY – In brief, the *Breyer* case dealt with the storage of the dynamic IP addresses of visitors to websites operated by the Federal Republic of Germany. Mr Breyer claimed that the Federal Republic should refrain from collecting IP addresses when it was not technically necessary for the functionality of the websites. Following two lower Court rulings, the case ended up before the German Federal Court (the *Bundesgerichtshof*) which referred two questions to the Court of Justice for a preliminary ruling.[642] Importantly, for our current purposes the first of these questions related to whether the prior case law establishing that static IP addresses are personal data[643] also extended to so-called dynamic IP addresses in situations where the website operator storing them does not have the information necessary to link the IP addresses to an individual user and thus identify them.[644] To clarify, in such cases the information which is capable of identifying the natural person when combined with the dynamic IP addresses is instead held by a third party (i.e. an internet service provided) and thus is beyond the reach of the website operator without some form of cooperation/coordination between the parties. In responding to this first question the Court of Justice considered the possibility of combining a dynamic IP address with the additional information necessary to identify held by the internet service provider and thus whether this was reasonably likely given that legal channels exist to obtain such information in Germany.[645] In reaching its conclusion, the Court of Justice followed the opinion of Advocate General Compos Sánchez-Bordona and found that a dynamic IP address would not be considered personal data if the identification of the data subject was prohibited by law or was practically impossible due to it requiring a disproportionate effort in terms of time, cost and man-

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[641] *Case C-582/14, Breyer, ECLI: EU:C:2016:779*.

[642] See here: Frederik J Zuiderveen Borgesius, 'The Breyer Case of the Court of Justice of the European Union: IP Addresses and the Personal Data Definition' (2017) 3 European Data Protection Law Review 130.

[643] *Case C-70/10, Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM), ECLI:EU:C:2011:771* (n 356).

[644] This difference between static and dynamic IP addresses is important as dynamic IP addresses change whereas static IP addresses remain fixed and as such the additional information becomes less important in terms of identifiability.

[645] Importantly the Court actually referred to 'likely reasonably' as this was the phrasing in Recital 26 of Directive 95/46/EC. This has been treated to mean the same in this analysis as the reverse order evident in the GDPR.

power, thereby resulting in an insignificant risk of identification.[646] In doing so, the Court confirmed the broad reading previously adopted by the Article 29 Working Party by finding that not all the information necessary to enable identification '[…] must be in the hands of one person.'[647] As a consequence, due to the fact that internet service providers keep a record of the dynamic IP address(es) assigned, and that a legal means to access this information exists (i.e. even if this is available only to a public authority investigating a crime), dynamic IP addresses are considered personal data.[648] Interestingly however, the fact that the Court followed the Advocate General by finding that actions prohibited by law should not come under what can be considered reasonably likely, deviates from the Article 29 Working Party guidance on the notion of personal data. As noted by Purtova however, the importance of this deviation should not be overestimated as in this respect the Court's ruling was narrow and specific to the circumstances of the case in that it did not aim to answer the broader question of whether dynamic IP addresses should be categorised as personal data as soon as there is a third party capable of using them to identify (a) natural person(s).[649]

**[191]** IDENTIFIABILITY AS A DYNAMIC NOTION – It is suggested here that the Court's ruling illustrates the complex interplay between the requirements in the GDPR and the broader legal landscape. To clarify, for instance personal data that has been 'anonymised' using state of the art techniques should not be considered personal on the basis of the potential for criminal behaviour leading to identification. Importantly however, the 'state of the art' is an ever changing standard and therefore, irrespective of the above, data previously considered to be anonymised may become personal in the future due to the identification of a flaw in the anonymization technique used and/or other advances which render the data personal (technological or otherwise). Identifiability is thus a dynamic notion shifting with the technological developments requiring vigilance from those processing anonymised data.[650] The fact that the identification capabilities are based on the state of the art is evident from the reference to the capabilities held by the controller 'or by another person'. This also presents a more practical challenge in that an entity processing data must take into account the potential for another person to process the '*perceived-to-be-anonymous*' data in combination with other data to render a natural person identifiable. As such, similar to the circumstances in *Breyer*, one should take any legal structures which exists permitting the identification of a natural person in combination with a data set held by a separate entity into consideration. This renders the definition of

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[646] *Opinion of Advocate General Campos Sánchez-Bordona delivered on 12 May 2016 in Case C-582/14, Breyer, ECLI:EU:C:2016:339* 339.
[647] *Case C-582/14, Breyer, ECLI: EU:C:2016:779* (n 641) para 43.
[648] See: *Case C-582/14, Breyer, ECLI: EU:C:2016:779* (n 641); Article 29 Working Party, 'Opinion on Personal Data' (n 621) 29.
[649] Nadezhda Purtova, 'The Law of Everything. Broad Concept of Personal Data and Future of EU Data Protection Law' (2018) 10 Law, Innovation and Technology 40, 65.
[650] W Kuan Hon, Christopher Millard and Ian Walden, 'The Problem of "Personal Data" in Cloud Computing: What Information Is Regulated?—The Cloud of Unknowing' (2011) 1 International Data Privacy Law 211, 214.

personal very broad given that again, it is the possibility to single out the data subject and render them identifiable as opposed to the identification of the name of a natural person which counts. Therefore, in an online context the detection of specific individuals' emotional states through the analysis of browsing behaviour will necessitate the processing of personal data. This is exemplified by the fact that cookies are often used to track users (i.e. as illustrated by their widespread use in the context of online behavioural advertising).[651]

**[192]** 'INFORMATION' VERSUS PERSONAL DATA AND THE *LEX SPECIALIS* SPECIFICATIONS – Although the uses of such tracking technologies will be explored later in terms of their impact on the conditions available to controllers to legitimise such activities, for our current purposes it is important to note that they are also covered by the ePrivacy Directive. The ePrivacy Directive defines the rules protecting electronic communications from unwanted intrusion or interference (Article 3 ePrivacy Directive). Although the ePrivacy Directive applies to telecoms providers there are some provisions which apply more generally that are relevant for this thesis. In particular, the provisions on the confidentiality of communications provided for in Article 5 ePrivacy Directive and the rules on unsolicited communications in Article 13 ePrivacy Directive are more generally applicable. For our current purposes it is important to further specify Article 5 as it is significant in the context of personalisation based on behavioural insights. As amended by Directive 2009/136/EC,[652] Article 5(3) ePrivacy Directive provides that consent is required for the 'storing of information, or the gaining of access to information already stored, in the terminal equipment' of the user for non-functional purposes.[653] Article 5(3) ePrivacy Directive thus refers to 'information' as opposed to the narrower category of personal data as protected in the GDPR. As mentioned above, personal data is defined in Article 4(1) GDPR as 'any information relating to an identified or identifiable natural person ("data subject")'. Hence, it is not a prerequisite that the information is classified as personal to invoke the applicability of the Regulation.[654] This is expressed in Recital 24

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[651] See: Clifford (n 622); Frederik Zuiderveen Borgesius, 'Improving Privacy Protection in the Area of Behavioural Targeting' (PhD Thesis, University of Amsterdam 2014) <http://hdl.handle.net/11245/1.434236>.

[652] Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (Text with EEA relevance), J L 337, 18.12.2009, 11–36.

[653] As described by the Article 29 Working Party, Article 5(3) ePrivacy Directive allows for processing to be exempt from the requirement of consent, if one of the following criteria is satisfied (1) technical storage or access 'for the sole purpose of carrying out the transmission of a communication over an electronic communications network' or (2) technical storage or access which is 'strictly necessary in order for the provider of an information society service explicitly requested by the subscriber or user to provide the service'. See: Article 29 Working Party, 'Opinion 04/2012 on Cookie Consent Exemption' (Article 29 Working Party 2012)' WP 194.

[654] Article 29 Working Party, 'Opinion 02/2010 on Online Behavioural Advertising' (Article 29 Working Party 2010) WP 171 <http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp171_en.pdf> accessed 3 November 2012; Article 29 Working Party, 'Opinion 16/2011 on EASA/IAB Best Practice

ePrivacy Directive which provides that the 'terminal equipment of users […] and any information stored on such equipment are part of the private sphere of these users requiring protection under the European Convention for the Protection of Human Rights and Fundamental Freedoms'. Consequently, it is information considered to be in the 'private sphere of the users' that triggers the application of Article 5(3) ePrivacy Directive and hence, not if the information is classified as personal data. However, it appears to be well-accepted that cookies do fall into the category of personal data and therefore, in relation to behavioural advertising, both Directives appear to have relevance. Indeed, as per the recent European Data Protection Board (i.e. which replaced the Article 29 Working Party through the entry into force of the GDPR) opinion on the relationship between the GDPR and the ePrivacy Directive where it is noted that it is only when the information for the purposes of Article 5(3) ePrivacy in question also constitutes personal data that the GDPR also applies.[655]

**[193]** INFORMATION AND SINGLING OUT – Moreover, as indicated by the Article 29 Working Party, 'cookies'[656] or 'device fingerprinting'[657] have generally been found to also fall within both definitions (i.e. despite some uncertainties)[658] As the very purpose is to 'single out' a data subject,[659] it is clear that such information will also be considered personal data.[660] Consequently, the detection of emotions online for advertising or marketing purposes will clearly fall within the scope of these provisions. The term 'information' across both frameworks is thus to be understood broadly despite remaining undefined. Indeed, as

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Recommendation on Online Behavioural Advertising' (Article 29 Working Party 2011) WP188 <http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2011/wp188_en.pdf>.

[655] 'European Data Protection Board, Opinion 5/2019 on the Interplay between the EPrivacy Directive and the GDPR, in Particular Regarding the Competence, Tasks and Powers of Data Protection Authorities Adopted on 12 March 2019' 13–14.

[656] Article 29 Working Party, 'Working Document 02/2013 Providing Guidance on Obtaining Consent for Cookies' (2013) Working Document <http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2013/wp208_en.pdf> accessed 2 September 2016; Article 29 Working Party, 'Opinion on Online Behavioural Advertising' (n 654).

[657] Article 29 Working Party, 'Opinion 9/2014 on the Application of Directive 2002/58/EC to Device Fingerprinting' (2014) WP 224.

[658] In the proposed ePrivacy Regulation it is significant to note that Article 8(1) of the proposed Regulation refers not 'to the storing of information, or the gaining of access to information already stored, in the terminal equipment' but rather instead prohibits '[t]he use of processing and storage capabilities of terminal equipment and the collection of information from end-users' terminal equipment, including about its software and hardware, other than by the end-user concerned'. This appears to offer a broader definition thereby seemingly aiming to include browser finger-printing techniques more easily within the scope of the provision.

[659] Indeed, the definition of personal data combined with the definition of pseudonymisation (Article 4(5) GDPR) and the clarification regarding the interaction between these two definitions (provided in Recitals 26 and 28), indicate that any data capable of '*singling out*' an individual should be considered as personal. See: Frederik J Zuiderveen Borgesius, 'Singling out People without Knowing Their Names – Behavioural Targeting, Pseudonymous Data, and the New Data Protection Regulation' (2016) 32 Computer Law & Security Review 256.

[660] This is reflected in the addition of 'location data', 'online identifier' and 'genetic' and 'economic' identity as examples within the definition of personal data in Article 4(1) GDPR compared to the equivalent provision in Directive 95/46/EC.

noted by the Court in *Nowak* when interpreting the words 'any information' in the definition of personal data,

> '[…] reflects the aim of the EU legislature to assign a wide scope to [*the definition of personal data*], which is not restricted to information that is sensitive or private, but potentially encompasses all kinds of information, not only objective but also subjective, in the form of opinions and assessments.'[661]

This interpretation mirrors that of the Article 29 Working Party opinion on the notion of personal data which specifies that regarding its nature that the term 'information' '[…] covers "objective" information, such as the presence of a certain substance in one's blood. It also includes "subjective" information, opinions or assessments.'[662] As a result, any information can be personal data but precisely what 'information' itself is remains undefined.

**[194]** INFORMATION AND PSEUDONYMISED DATA – However, given the fact that the *Nowak* case dealt with whether examination answers and corrector's comments constituted personal data, it appears implicitly from the judgement that virtually anything can be either personal data itself or at least contain personal data (i.e. provided the other elements of the definition are met).[663] Such an interpretation mirrors that of the Working Party opinion on the notion of personal data where it is suggested that any information can be personal irrespective of its nature or content and the format or medium in which it is stored. Hence, as noted by the Working Party,

> '[…] the concept of personal data includes information available in whatever form, be it alphabetical, numerical, graphical, photographical or acoustic, for example. It includes information kept on paper, as well as information stored in a computer memory by means of binary code, or on a videotape, for instance. This is a logical consequence of covering automatic processing of personal data within its scope. In particular, sound and image data qualify as personal data from this point of view, insofar as they may represent information on an individual.'[664]

This observation is again illustrative of the use of cookies and cookie-like techniques[665] and their classification as personal data and is hence, also indicative of the fact that pseudonymised data are still considered personal data for the purposes of the GDPR. Moreover, this further highlights the fact that information can 'relate to' a natural person even if the information in question is not strictly *about* them. To clarify, although cookies (or indeed IP addresses) in fact relate to the device in question, they are also understood as 'relating to' a natural person as they can be used to single out an individual.[666] This

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[661] *Case C-434/16, Peter Nowak v Data Protection Commissioner, ECLI:EU:C:2017:994* [34].
[662] Article 29 Working Party, 'Opinion on Personal Data' (n 621) 6.
[663] See: Purtova (n 649).
[664] Article 29 Working Party, 'Opinion on Personal Data' (n 621) 7.
[665] Cookie-like techniques is a reference to the purpose and outcome of the techniques rather than the technical means of deployment *per se*.
[666] Lorenzo Dalla Corte, 'Scoping Personal Data: Towards a Nuanced Interpretation of the Material Scope of EU Data Protecton Law' (2019) 10 European Journal of Law and Technology.

reflects the point that data can relate to a natural person even if the content of the data itself does not.

**[195]** CONTENT, PURPOSE OR RESULT – In this context, it is significant to consider the opinion of the Article 29 Working Party on the notion of personal data where it is noted that, 'in order to consider that the data "relate" to an individual, a "content" element OR a "purpose" element OR a "result" element should be present.'[667] Although non-binding, the Working Party interpretation of the 'relating to' component appears to have been implicitly accepted by the Court of Justice and (at the very least) seems well accepted in the data protection literature.[668] Accordingly, either the content (i.e. the substance in question refers to a natural person), purpose (the purpose is or incorporates the need to identify a natural person) or result (i.e. irrespective of the content and purpose, the consequences are likely to have an impact on the rights and freedoms of a natural person) can mean that personal data are processed.[669] These three elements are considered as alternative conditions (i.e. they are not cumulative). Hence, where one is satisfied there is no need to consider the others. As noted by the Working Party therefore, '[a] corollary of this is that the same piece of information may relate to different individuals at the same time, depending on what element is present with regard to each one.'[670] Moreover, although this personal data does not have to be accurate, as evidenced by the requirement to delete inaccurate personal data in Article 5(1)(d) GDPR (i.e. by the wording it is still personal) and that personal data can relate to a natural person in a multitude of varying ways, this does not exclude the fact that it must also satisfy the other cumulative conditions in the definition of personal data.

### *ii. The 'law of everything' or just the law of a lot of things?*

**[196]** THE 'LAW OF EVERYTHING'? – In light of the above, the 'relating to' and 'identifiability' cumulative elements are broad in nature and seemingly easily met. Such considerations have led several authors to question the usefulness of relying on the definition of personal data as the material scope trigger for the application of the framework given that the expansive scope of the definition arguably undermines the future usefulness of the framework.[671] Indeed, Purtova has warned that the data protection framework is at risk

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[667] Article 29 Working Party, 'Opinion on Personal Data' (n 621) 10.
[668] See here: *Case C-434/16, Peter Nowak v Data Protection Commissioner, ECLI:EU:C:2017:994* (n 661); *Joined Cases C-141/12 and C-372/12, YS v Minister voor Immigratie, Integratie en Asiel, and Minister voor Immigratie, Integratie en Asiel v M, S, ECLI:EU:C:2014:2081*.
[669] See: Corte (n 666).
[670] Article 29 Working Party, 'Opinion on Personal Data' (n 621) 11.
[671] Hon, Millard and Walden (n 650) 24. As noted by the authors '[t]here are degrees of identifiability; identifiability can change with circumstances, who processes information, for what purpose; and as information accumulates about someone, identification becomes easier. On this basis, almost all data is potentially 'personal data', which does not help determine applicability of the DPD to specific processing operations in practice. Similarly, whether particular information constitutes 'sensitive data' is often context-dependent.' And more recently see: Purtova (n 649).

of becoming the 'law of everything' and advocates change.[672] But is Purtova's fear of the 'law of everything' a genuine threat and thus will the GDPR actually cover all deployments of emotion detection technology or does classifying the data protection framework as in danger of becoming a 'law of everything' omit certain nuances within the definition of personal data and indeed in the operation of the GDPR? In answering these questions, it is important to first emphasise that the concerns regarding the expansive material scope of the Regulation certainly have merit even if, as will be argued herein, the GDPR in its construction aims to mitigate the negative effects of an overly broad interpretation of the definition of personal data. To illustrate (1) the safeguards against the inflation of the definition and; (2) the mechanisms imposed by the GDPR to cater for the undoubtedly broad notion of personal data, reference can again be made to the example of Philip the owner of a smart car as described in Chapter 3. To refresh our memory, Philip's car is fitted with emotion detection technology for safety purposes. Let us suppose that Philip's insurer also has access to this information and uses it to help assess Philip's risk of having an accident and thus that this information is a factor in the calculation of his insurance premiums. This information will clearly be personal data as it will both relate to and identify Philip as the insured natural person. Building on this personal data and indeed other personal data collected from Philip (e.g. his age, previous accidents and penalty points on his licence), let us suppose that the insurance company also uses other sources to help calculate client premiums. More specifically, the insurance company assesses data released by the local authority on crime rates and also geospatial data on weather patterns of Philip's local area. The crime rate information is used (intuitively enough) to calculate the risk of theft whereas the weather pattern data is used to calculate precipitation rates compared to other areas in the country as, for the sake of argument, we shall assume that statistically more accidents occur in areas with higher rainfall.

**[197]** NATURAL PERSON VERSUS PEOPLE – But in such a scenario are the weather data and the crime rate data also then personal data as they are used to calculate Philip's premium and thus also relate to him with Philip certainly being identified as in the end he is the one paying the premium linked to his specific circumstances? In presenting her view that the GDPR is at risk of becoming the 'law of everything' Purtova argues that weather data can be considered personal data with reference to a similar example concerning the collection of weather data in a smart city living lab. The author describes that the collection of weather readings (i.e. be they temperature, rainfall etc.) fall under the element of 'information' in the definition of personal data and this is not disputed here.[673] The author goes on to claim that in her described application, '[a]lthough not *about* people' the weather data would likely be used (i.e. in terms of 'purpose') to assess and influence the behaviour of people and that there was also likely to be an impact on people ('result').[674] From an identifiability perspective, Purtova refers to the fact that visitors to the living lab are likely to be considered identifiable,

[672] Purtova (n 649).
[673] ibid 45–59.
[674] ibid 58.

> '[…] if not by the weather information alone, certainly in combination with the data from the WIFI tracking sensors, voice recordings or video footage; if not by a weather station operator, certainly by some other project partners who, being technology companies, possess the tools and expertise to do so.'[675]

However, it is argued here that this is an extreme approach which overlooks a few key points in order to reach the eye-catching 'law of everything' argument. To be clear, there is certainly a valid point to the argument that the definition of personal data is at risk of becoming overly broad. However, in saying this, the current situation is not a stark as Purtova presents it to be in reality. To begin the nuancing of this line of argumentation, it is first necessary to highlight that Purtova's reference to 'people' is misleading and fails to adequately take into account the fact that the definition of personal data in fact refers to 'a natural person'. This points to the key importance of the last element, namely that the information must relate to an identified or identifiable **natural person**. In other words, the definition refers to 'a' person not 'persons' in the plural. When the 'relating to' element is satisfied by the fact that the content of the information relates to an identified or an identifiable natural person the material scope of the Regulation will be easily met keeping in mind the circumstances at hand. For instance, the Article 29 Working Party gives the example of a very common family name in that although it is likely to be enough to single a pupil out in a classroom it would not be enough to single out a natural person regarding the general population.[676] Indeed, although the 'natural person' cumulative element is easy to understand and does not present much of a hurdle, it also cannot be ignored.[677]

**[198]** RELATING TO AND PURPOSES – Furthermore, where the assessment of the 'relating to' cumulative component relies on the purpose or result of the processing there is a clear emphasis on identifiability as information can relate in terms of purpose and result to several people at once. For instance, the data referring to the crime rate and that of the weather of a specific area may be considered 'to relate' in terms of purpose to every individual who is offered a differentiated insurance premium rate on this basis but it is the additional information tying this statistical information to the natural person (i.e. Philip) which renders it personal in the circumstances of the given scenario. Indeed, if Philip could be identified by the crime data or the weather data alone then it would relate to him in terms of its content. Instead it is the processing of this information with the identifying information which transforms its status and hence, it is the inferences drawn from the processing which are personal data. To say that weather data in itself is personal data is thus nonsense. However, if it is applied to an individual to infer things about them these inferences will be personal in that context. This inferred personal data then may contain things like Philip lives in the west of Ireland where it rains a lot so (hypothetically) it can be inferred that he is a person who is more likely to claim compared to those living in a different part of the country. This logic does not render the open weather data personal data but rather it is how it is applied (i.e. the inferences applied to Philip). As

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[675] ibid.
[676] Article 29 Working Party, 'Opinion on Personal Data' (n 621) 13..
[677] Corte (n 666).

such information sets are for the purposes of this example respective statistical representations of an area, they do not identify individuals and thus it is clear that the additional information provided by Philip is in fact the information which forms the 'relating to' link. Hence, regarding the purpose or result, it is the intention to single an individual out or the impact or result on a specific individual which renders the individual identifiable.

**[199]** THE ELEMENTS ARE CUMULATIVE – Without such an impact on a specific natural person or the aim of singling out an individual the information simply remains relatable to a potentially large number of people as opposed to an individual natural person.[678] That being said, as noted by the Article 29 Working Party,

> '[…] it is not necessary that the data "focuses" on someone in order to consider that it relates to him. Resulting from the previous analysis, the question of whether data relate to a certain person is something that has to be answered for each specific data item on its own merits. In a similar way, the fact that information may relate to different persons should be kept in mind in the application of substantive provisions (e.g. on the scope of the right of access).'[679]

On this basis therefore, it is not that the crime and weather data are personal data in themselves but rather that in the circumstances of the case and the fact that given their combination with the additional identifying information that they become personal in their inference form. This reflects the fact that in order to determine whether personal data are in fact processed reference must be made to the entire circumstances of the case and therefore, to simply baldly state that weather information or statistical crime information are personal data is incomplete even in the context of a living lab. To reiterate, the elements in the definition of personal data are cumulative in that there must be information which relates to an identified or identifiable natural person. None of these can be glanced over. Nevertheless, it should be acknowledged that to detect the emotions of a specific individual the processing of personal data is required. For instance, where emotions are detected to personalise some aspect of a service or for example where emotion detection is a key component of the service itself (e.g. wellbeing applications, interactive gaming), the information processed will clearly relate to an identified or identifiable natural person. That being said, 'identifiability' is not always as easy to determine.

### 4.1.2 PROFILING AND AN (UN)IDENTIFIABLE 'NATURAL PERSON'

**[200]** THE PURPOSE AND RESULT OF PROCESSING – The above analysis is of particular importance for the purposes of this thesis as the 'purpose' and 'result' of the processing will be key in the context of emotion detection and monetisation as the 'content' may often relate to several natural persons. For instance, in the hypothetical assessment of Philip's car insurance, it was described how crime data and weather data may be viewed as personal data when

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[678] See: ibid.
[679] Article 29 Working Party, 'Opinion on Personal Data' (n 621) 12.

used to calculate his insurance premium. In essence, it is the combination of this information with other data identifying Philip which renders the inferences made personal data according to the definition of this notion contained in Article 4(1) GDPR. These examples are seemingly commonplace in the insurance industry and are perhaps palatable *vis-à-vis* the calculation of risk. However, the example does point to a broader issue regarding the potential for more collective concerns. Here it is necessary to refer to the literature describing the effects of the use of analytics and the discovery of correlations between consumer with reference to the emergence of the so-called 'Big Data' era and the 'datafication' of everything.[680] Due to the technological developments it is possible to collect huge quantities of data in order to identify and group individuals based on patterns of behaviour. This is referred to as profiling.

### *A. MACHINE LEARNING MODELS AND AGGREGATE PROFILES*

**[201]** PROFILING – According to Hildebrandt profiling is 'the process of "discovering" correlations between data in databases that can be used to identify a human or nonhuman subject (individual or group) and/or the application of profiles (sets of correlated data) to individuate and represent a subject or to identify a subject as a member of a group or category.'[681] For group profiling the subject of the profile is a group or category of persons with any person who is considered as a member subject to the application of the profile with the profile becoming more sophisticated depending on the available data thereby allowing for the more subtle differentiation between members and non-members.[682] As defined by the entity gathering the data, these groups or categories do not (necessarily) fit within the traditional conceptualisation of such a clustering. Instead groups can also be defined in seemingly random ways representing an apparent cross-section of society *vis-à-vis* the more traditionally accepted categories of consumer from a sociological perspective (e.g. the elderly, students or the unemployed).[683] Indeed, here it should be noted that the majority of groups do not have distributive profiles in that not all members of the group in question share all the attributes linked to the group's profile.[684] As observed by Hildebrandt,

> '[i]t is important to realise that treating members of a group that has a non-distributive profile as fitting the entire profile may have interesting effects. For instance, if people fit the profile of a high-income market segment, service providers may decide to offer them certain goods or provide access to certain services, which

[680] See: Mayer-Schonberger and Cukier (n 435).
[681] Mireille Hildebrandt, 'Defining Profiling: A New Type of Knowledge?' in Mireille Hildebrandt and Serge Gutwirth (eds), *Profiling the European Citizen: Cross-Disciplinary Perspectives* (Springer Netherlands 2008) 19.
[682] Wim Schreurs and others, 'Cogitas, Ergo Sum. The Role of Data Protection Law and Non-Discrimination Law in Group Profiling in the Private Sector' in Mireille Hildebrandt and Serge Gutwirth (eds), *Profiling the European Citizen: Cross-Disciplinary Perspectives* (Springer Netherlands 2008) 241–242.
[683] See generally: Lanah Kammourieh and others, 'Group Privacy in the Age of Big Data' in Linnet Taylor, Luciano Floridi and Bart van der Sloot (eds), *Group Privacy: New Challenges of Data Technologies* (Springer International Publishing 2017).
[684] Hildebrandt (n 681) 21.

> may reinforce their fit in the category. If the group profile is non-distributive and they in fact do not share the relevant attributes (e.g., they may live in a certain neighbourhood that is profiled as high-income, while in fact they have a very low income, being an au pair), they may actually be 'normalised' into the behaviour profiled as characteristic for this group.'[685]

Moreover, these groups are thus shaped by the data gatherers with the members often unaware of who the other members are or indeed the consequences of belonging to the group in question.[686] In a business-2-consumer context such techniques are used in a plethora of examples from online behavioural advertising, to insurance and credit scoring but also for instance, in both commercial and editorial content personalisation contexts.[687] Hence, 'profiling' is widely used and does not necessarily rely on traditional categories of consumers.[688] This raises two important issues namely, (1) as mentioned in Chapter 3 such categorisation is not necessarily against the law as it may be based on differentiation as opposed to discrimination *vis-à-vis* the protected categories and; (2) it is also unclear how data protection law applies to such group profiles as they are normally created via aggregate models and through the categorical analytics methodology an individual may not be 'identifiable' as understood in the GDPR.

**[202]** DIFFERENTIATION VERSUS DISCRIMINATION AND CONSUMER PROFILING – The first of these issues refers to the fact that Article 21 Charter prohibits specific types of direct or indirect discrimination namely, '[…] discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.' In EU law direct discrimination refers to when an individual is treated less favourably as compared to another person in a comparable situation on the basis of one of the protected grounds, whereas indirect discrimination refers to when a seemingly neutral action affects a group defined by a protected ground in a significantly more negative way than others in a comparable situation.[689] Discrimination is a clear risk of personal data processing and group profiling (especially in an indirect manner). However, as noted above in Chapter 3 often decisions on the basis

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[685] ibid.

[686] Alessandro Mantelero, 'Personal Data for Decisional Purposes in the Age of Analytics: From an Individual to a Collective Dimension of Data Protection' (2016) 32 Computer Law & Security Review 238, 245.

[687] As will be described below in Chapter 5 in further detail, there are clear questions here regarding the precise delineation between the use of recommender systems for content curation and for commercial communications (i.e. marketing and advertising) as they both allow for the differentiation between citizen-consumers and have an inherent commercial intent. Indeed, in the context of online market places the personalisation of the commercial offerings has a clear impact on what the citizen-consumer views and may in turn affect their commercial decision making and to a certain extent such concerns may also extend to social media sites given their 'attention-economy' business model.

[688] Here it is interesting to refer to *Kammourieh et al.* who outline four category types (1) data analytics which help to discover new things about pre-identified groups; (2) Second, we might come the identification of non-apparent groups through pre-defined parameters; (3) the discovery of groups through analytical approaches without any pre-defined parameters and (4) the potential for another group to remain unidentified even if they may be affected by analytical processes. See: Kammourieh and others (n 683).

[689] European Union Agency for Fundamental Rights (FRA) and Council of Europe (n 631) 29.

of profiling will not amount to discrimination but will instead be classified as differentiation on the basis of unprotected grounds.[690] Differentiation on the basis of emotion is thus not contrary to EU discrimination law as, first emotions are not a protected ground,[691] and second, it is questionable whether the criterion of a 'comparable situation' is satisfied, given the potential differences in the 'emotion insight' profiles. Although the data protection framework aims to mitigate the effects of such profiled differentiation and, as such, the data subject has the right not to be subject to an automated individual decisions and to 'meaningful information about the logic involved' as provided for in Article 22 GDPR, this right is orientated towards an *ex ante* process transparency rather than *ex post* use-based protection and is thus arguably incapable of providing meaningful protection.[692]

**[203]** AUTOMATED DECISIONS AND DATA PROTECTION – Indeed, as noted by Koops there are clear difficulties applying the data protection framework to profiling in that the connection between the processing risk and the notion of personal data is often unclear as data protection is focused on processing risks and not the substantial parts of profiling applications which may also pose a threat to rights and freedoms.[693] Article 22 GDPR states that '[t]he data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her'. There are four points to be made that are important for this thesis. First, the Article 29 Working Party has interpreted the provision as an *ex ante* prohibition of such decisions as opposed to an *ex post* right to contest them.[694] Second, Article 22 GDPR focuses on 'a decision **based solely** on automated processing, including profiling' thereby seemingly categorising profiling as a type of automated processing but also allowing for interpretative difficulties in terms of what will amount to human intervention. Third, these decisions must produce legal effects or effects which similarly affect the data subject. And finally, fourth this prohibition is not absolute and that such decisions may still be taken provided one of the conditions contained in Article 22(2) GDPR is satisfied.

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[690] Lynskey (n 457) 197–200.

[691] Moreover, it should also be noted that the same result may result in effect indirectly See: Barocas and Selbst (n 494).

[692] See GDPR Article 22: Profiling is also particularly challenging as information that cannot be presented in a machine readable format is imperceptible for the users. Francesca Bosco and others, 'Profiling Technologies and Fundamental Rights and Values: Regulatory Challenges and Perspectives from European Data Protection Authorities' in Serge Gutwirth, Ronald Leenes and Paul de Hert (eds), *Reforming European Data Protection Law* (Springer Netherlands 2015) <https://doi.org/10.1007/978-94-017-9385-8_1> accessed 22 November 2018.

[693] Koops (n 280).

[694] Article 29 Working Party, 'Guidelines on Automated Individual Decision-Making and Profiling for the Purposes of Regulation 2016/679' WP259. See also: Michael Veale and Lilian Edwards, 'Clarity, Surprises, and Further Questions in the Article 29 Working Party Draft Guidance on Automated Decision-Making and Profiling' [2018] Computer Law & Security Review.

| AUTOMATED INDIVIDUAL DECISION MAKING INCLUDING PROFILING | | |
|---|---|---|
| ARTICLE | CONDITION | RELEVANT EXTRACT FROM PROVISION |
| Article 22(2)(a) | Contract | is necessary for entering into, or performance of, a contract between the data subject and a data controller; |
| Article 22(2)(b) | Authorised by law | is authorised by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests; or |
| Article 22(2)(c) | Explicit consent | is based on the data subject's explicit consent. |

*Figure 4 Automated individual decision-making including profiling*

It is doubtful therefore, whether transparency as to process will entirely alleviate the problems associated with consumer profiling notwithstanding the data subject's right to contest and express their point of view as per Article 22(3) GDPR as in commercial context the provision will still ultimately hang on the capacity of the data subject to make an informed choice. Hence, although Article 22 GDPR potentially offers an avenue for protection there are some clear limitations to such a claim and these will be explored further in Chapter 5.

**[204]** GROUP PROFILES AGGREGATE MODELS AND THE PROCESSING OF PERSONAL DATA – Regarding the second issue, the key point is that such profiles can be created using a synthetic data set, or (perhaps even more likely), may be built with legitimately processed personal data thereby creating a model through which inferences are then later applied to individuals. Personal data may be used to train the machine learning model requiring that such processing complies with the GDPR. Once generated however, the model will not (necessarily) render any individual 'identifiable' as such thereby excluding it from the material scope of the Regulation. Although Veale *et al*. have questioned the absolutist exclusion of such models from the material scope of the GDPR on the basis of the potential for cybersecurity attacks which cause breaches of confidentiality, the authors note that such possibilities remain abstract and model dependant, with the potential for such attacks in practice still somewhat hypothetical, potentially impossible depending on the model and difficult to prove in practice.[695] More specifically, through their discussion of model inversion and membership inference attacks the authors described the potential of revealing insights relating to the training data used and convincingly illustrate how such techniques result in models being considered personal data even if a narrower understanding of the definition of personal data is used as opposed by Purtova's interpretation outlined above.

**[205]** MACHINE LEARNING MODELS AND ILLEGALITY – That being said, Veale *et al.* remain cautious of over stating the potential for such techniques to render models personal data as, '[…] requiring what is essentially a security vulnerability in order to trigger rights and obligations is disconnected and arbitrary.'[696] Indeed, much of this depends on the

[695] Michael Veale, Reuben Binns and Lilian Edwards, 'Algorithms That Remember: Model Inversion Attacks and Data Protection Law' (2018) 376 Philosophical Transactions of the Royal Society A: Mathematical, Physical and Engineering Sciences 1.
[696] ibid 12.

circumstances. For instance, generally speaking models that are developed using a large personal data set will render re-identification attempts more difficult relative to those developed using smaller samples. Furthermore, it is also interesting to reiterate that the Court of Justice has excluded illegal activity from within the scope of the 'identifiability' cumulative element as per the *Breyer* case.[697] Indeed, to spell this out further the Court of Justice followed the opinion of the Advocate General Campos Sánchez-Bordona[698] and found that the identifiablility of the data subject would not constitute a means likely reasonably to be used '[…] if the identification of the data subject was prohibited by law or practically impossible on account of the fact that it requires a disproportionate effort in terms of time, cost and man-power, so that the risk of identification appears in reality to be insignificant.'[699] This arguably adds an additional limitation but at the very least further illustrates the fact that determining whether data comes within the definition of personal data is a dynamic process dependant on the technological developments.

### *B. DESIGNED FOR (A) PURPOSE(S) – TRACKING, EMOTION DETECTION AND CONSENT*

**[206]** PROFILING AND DEVICE TRACKING – Accordingly, the above analysis illustrates that such models are more commonly dealt with legally through intellectual property and trade secret rules as opposed to data protection given that they apply at an aggregate level.[700] However, aside from the above points, it is important to clarify that for the profile to be applied to an individual, personal data will have to be processed. Indeed, as noted by Schreurs *et al.* this points to two further clarifications which may determine whether the data protection framework applies beyond the use of personal data in the training set, (1) where personal data of an identifiable natural person are used to further train/personalise the model in a dynamic manner and/or query the model to activate the profile; or (2) only non-personal data are processed to query the model.[701] In order to delineate the difference between these two possibilities reference again can be made to the discussion of the four components in the definition of personal data discussed in the previous sub-section and the illustrative example of Philip. To reiterate, it is the combination of data identifying Philip with the crime and weather data which renders the inference personal data. As the purpose of processing the information in question is to calculate the optimum insurance premium to be paid by Philip, the insurance company obviously needs to be able to identify him and the information in question thus must relate to him. A further illustration of the above can be made with reference to the increasing use of technology designed to track a person's driving to calculate insurance premiums. For such deployments the information gathered by the sensor will be run

[697] *Case C-582/14, Breyer, ECLI: EU:C:2016:779* (n 641).
[698] *Opinion of Advocate General Campos Sánchez-Bordona delivered on 12 May 2016 in Case C-582/14, Breyer, ECLI:EU:C:2016:339* (n 646) para 68.
[699] *Case C-582/14, Breyer, ECLI: EU:C:2016:779* (n 641) para 46.
[700] Veale, Binns and Edwards (n 695).
[701] Schreurs and others (n 682) 248–249. 248-249

through a model developed by the insurance company[702] through training data and by running Philip's personal data as gathered by the tracker installed in his car through the model, Philip is offered a quote. Therefore, through the processing of seemingly innocuous personal data Philip can be profiled and categorised as a certain type of driver. Importantly however, it is the additional information identifying Philip which is put through the model and the inferences which emerge rather than the model itself which will be classified as personal data. This example also highlights the importance of the *lex specialis* rules in the ePrivacy Directive. To reiterate, Article 5(3) ePrivacy Directive, as amended, refers to '[…] the storing of information, or the gaining of access to information already stored, in the terminal equipment […]' of a user[703] with the consent of the user required to access or store such information unless the 'functional purposes' exemption applies.

**[207]** FUNCTIONAL PURPOSES – The 'functional purposes' exemption applies if the information (1) is used 'for the sole purpose of carrying out the transmission of a communication over an electronic communications network' or (2) the cookie is 'strictly necessary in order for the provider of an information society service explicitly requested by the subscriber or user to provide the service'. In its opinion on the exemptions, the Article 29 Working Party has noted that these exemptions should be interpreted narrowly and that for instance therefore cookies for *inter alia* user tracking, third party advertising or first party analytics do not come within their scope.[704] Therefore, the consent of the user is required when such technologies are used for commercial tracking purposes (i.e. such as the detection of emotion) and this also appears to be reflected in national Court judgements.[705] Importantly, the ePrivacy Directive still relies on the *lex generalis* provisions in the GDPR where indicated and in this regard, it is important to note that one is required to refer to consent as defined in the GDPR. Although consent as a condition for lawful processing in Article 6(1)(a) GDPR will be explored in detail in Chapter 5, for our current purposes it suffices to say that the implementation of the cookie consent requirement has been the subject of a long and protracted debate on the meaning of consent *vis-à-vis* the implementation of the cookie rules in Article 5(3) ePrivacy Directive.

**[208]** SELF-REGULATORY INTERPRETATIONS – To illustrate the divergences in opinion here reference can be made to the various self-regulatory codes that have emerged in Europe and for example the criticism of the codes developed by the European Advertising Standards

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[702] i.e. or as developed by a third party (who may or may not also be classified by a processor) through an outsourcing contract for the insurance company.

[703] In the proposed reforms of the ePrivacy Directive, the proposed ePrivacy Regulation (largely speaking) retains the general rule in Article 5(3) ePrivacy Directive (see below).

[704] Article 29 Working Party, 'Opinion 04/2012 on Cookie Consent Exemption' (Article 29 Working Party 2012)' (n 653) 9–11. See also: Article 29 Working Party, 'Opinion on Online Behavioural Advertising' (n 654); Article 29 Working Party, 'Opinion 16/2011 on EASA/IAB Best Practice Recommendation on Online Behavioural Advertising' (n 654).

[705] For instance, here one can refer to the recent decision of the French *Conseil d'Etat* which found that when interpreting the French implementation of the ePrivacy Directive that the collection of cookies for advertising purposes could not be considered 'necessary for the provision of the service'.

Alliance (EASA) and the Interactive Advertising Bureau Europe (IAB Europe). More specifically, in 2011 the Article 29 Working Party criticised the Best Practice Recommendation and Framework adopted by the EASA and IAB Europe advertising associations for four reasons considering the requirements of the then in force Data Protection Directive 95/46/EC. First, as the recommendations only offered an opt-out consent and not opt-in. Second, as although the opt-out cookie prevents further personalised advertising it does not prevent the future accessing and storing of information on the user's terminal. Third, the user remains unaware of whether the cookie is retained on their computer and indeed the purposes of this retention. Fourth, due to the fact that the decision to install the opt-in cookie does not offer the possibility to manage previously installed cookies while at the same time it establishes the mistaken assumption that it disables tracking.[706] This debate has far from died down since the publication of the Article 29 Working Party criticisms however, and have in fact intensified through the negotiation of the reforms brought about by the GDPR and also the ongoing discussion regarding the proposed ePrivacy Regulation.[707] Although again this will be discussed in more detail in Chapter 5, in brief, the crux of this discussion is circling around whether requiring users to consent to the collection of cookies to access services is valid (i.e. rendering consent conditional) with polarised interpretations.

**[209]** QUESTIONING THE VALUE OF SELF-REGULATION – History would suggest however, that the potential value of the self-regulatory recommendations is certainly questionable, and in this vein, Hirsch outlines three criticisms. First, when balancing between public and commercial interests, commercial operators will remain loyal to their own profits as a priority. Second, self-regulatory programmes generally lack the capacity to ensure that members comply. And third, voluntary membership results in commercial operators choosing to take advantage of the good-will generated without any specific restriction being imposed by the guidelines themselves.[708] This final point reflects the fact that large corporations use self-regulatory mechanisms as publicity stunts and this arguably is reflected in the membership of these organisations. Indeed, as noted by ENISA '[a]t present most of the largest online advertising and analytics companies participate, and most of the smaller ones do not. Social networks and content providers are almost entirely absent.'[709] The scepticism of the industry's willingness to place public interest first has

[706] ibid

[707] 'European Council Draft Text, Proposal for a Regulation of the European Parliament and of the Council Concerning the Respect for Private Life and the Protection of Personal Data in Electronic Communications and Repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications), Interinstitutional File: 2017/0003 (COD)' (European Council 2017) <http://data.consilium.europa.eu/doc/document/ST-15333-2017-INIT/en/pdf> accessed 20 February 2018.

[708] Dennis D. Hirsch, 'The Law and Policy of Online Privacy: Regulation, Self-Regulation, or Co-Regulation?' (2007 34) Seattle U. L. Rev. 458

[709] ENISA (n.98)

been repeatedly illustrated through scandals.[710] However, it would be premature at this stage of the analysis to suggest that since the adoption of the GDPR these self-regulatory organisations have continued to conflict with the secondary law requirements. This point will require a more detailed analysis as one of the key innovations of the GDPR relates to the bolstering of consent to overcome the long-standing criticisms and the fallacy of consent (see Chapter 5). Therefore, the point here is that at least at a surface level the privacy and data protection framework offers a means of protecting individual autonomy and more specifically, that it is the consent of the data subject that will be required where tracking techniques such as cookies or cookie-like techniques are used to detect a consumer's emotions.

## 4.2 EMOTION MONETISATION, SENSITIVE PERSONAL DATA AND THE 'CATEGORICAL' LIMIT(ATION)S

**[210]** TESTING THE BOUNDARIES AND THE BLURRED DATA CATEGORIES – The analysis above has highlighted that there are clear challenges associated with the application of the data protection framework to emotional AI. However, it must be acknowledged that perhaps some of the difficulties discussed above in terms of the application of the GDPR may be irrelevant considerations depending on the intended application. Indeed, although it is apparent that there may be clear challenges *vis-à-vis* the application of the material scope of the GDPR and in terms of foreseeability and thus the link between the Regulation's requirements and the outcome of the processing, it is arguable that the data protection framework (if properly enforced) may provide the solution where sensitive personal data must be processed to detect emotions. To clarify, although there are deployments which will test the boundaries of the GDPR, depending on the purposes of the processing emotion monetisation deployments may also fall well within the application of the GDPR and the prohibition of sensitive personal data processing. It is with these issues in mind that the analysis now first turns to notion of sensitive personal data and the ban on the processing of such personal data (and indeed the exceptions to this ban) contained in Article 9 GDPR. On this foundation, this section will then further explore the blurred lines between the personal and sensitive personal data categories before then outlining the rules relating to the re-purposing of personal data.

**[211]** PLOTTING THE RE-PURPOSING – Indeed, as should hopefully be clear by now, this thesis aims to assess the legal limits to the monetisation of emotions in commercial communications. Hence, although there may be interesting and important issues dealing with the commercial application of emotion detection for health care or *pseudo*-health care related purposes, these fall outside the scope of this analysis. In saying this, the re-purposing of such insights for marketing or advertising purposes is significant for this thesis which necessitates the consideration of how such purposes are construed in relation to the

[710] Ian Brown and Christopher T. Marsden, *Regulating Code: Good Governance and Better Regulation in the Information Age* (MIT Press 2013) 56.

sensitive personal data category as the processing of such personal data is seemingly prohibited subject to the exceptions as per Article 9 GDPR. Consequently, this section will explore the relevant aspects of such purposes considering their important for this thesis and hence, the assessment of the legal limits to the monetisation of online emotions.

### 4.2.1 TARGETING THE IDENTIFIED DATA SUBJECT – EXPLORING THE NOTIONS OF BIOMETRIC AND HEALTH DATA

**[212]** SENSITIVE PERSONAL DATA – Article 9 GDPR lays down the specific requirements for the processing of sensitive personal data. These categories of data are specified in Article 9(1) GDPR which further stipulates that any such processing is prohibited. To avoid the general prohibition on the processing of sensitive personal data, a controller is required to satisfy one of the exceptions in Article 9(2) GDPR. As a consequence, determining whether sensitive personal data are processed is key in determining the steps that the controller will have to take in order to legitimise the processing in question. As mentioned above, Article 9(1) GDPR specifies certain categories of personal data as sensitive. This provision states that the,

> '[p]rocessing of personal data **revealing** racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, **biometric data for the purpose of uniquely identifying a natural person**, **data concerning health** or data concerning a natural person's sex life or sexual orientation shall be prohibited.' [Emphasis added].

Although through the categorical approach employed in Article 9 GDPR it appears that classifying what comes within the provision's remit is a simple task, the rise of analysis-intensive processing methods has blurred the lines between the personal and sensitive personal data categories.[711] More specifically, in the literature examining this provision (and indeed its predecessor in Article 8 Directive 95/46/EC) there have been question marks surrounding the precise interpretation of what is meant by the word 'revealing'.[712] The difficulties in this regard are particularly significant in the context of emotion detection online. The detection of emotions provides an excellent case study for the interpretation of the sensitive personal data category given that, (1) specific detection mechanisms often use biometrics but such information appears to be distinct from the meaning attributed to biometric data in the GDPR and; (2) the use of emotion detection for health care purposes but more importantly pseudo-health care purposes raises an important question regarding the precise boundaries of the 'data concerning health' which are protected in Article 9(1) GDPR. The purpose of this sub-section is to explore

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[711] Paul De Hert and Vagelis Papakonstantinou, 'The Proposed Data Protection Regulation Replacing Directive 95/46/EC: A Sound System for the Protection of Individuals' (2012) 28 Computer Law & Security Review 130.

[712] See: Lilian Edwards, 'Data Protection: Enter the General Data Protection Regulation' in Lilian Edwards (ed), *Law, Policy and the Internet* (Bloomsbury Publishing Plc 2018); Lilian Edwards, 'Data Protection and E-Privacy: From Spam and Cookies to Big Data, Machine Learning and Profiling' in Lilian Edwards (ed), *Law, Policy and the Internet* (Bloomsbury Publishing Plc 2018); Clifford (n 396).

these two issues. This analysis will then provide an important foundation for the discussion of re-purposing in the subsequent sub-section.

### *A. BIOMETRIC DATA AND THE 'UNIQUE IDENTIFICATION' OF A NATURAL PERSON*

**[213]** DEFINING BIOMETRIC DATA – Biometric data are defined in Article 4(14) GDPR as, '[…] personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data'. There are three elements within this definition which require unpacking namely, (1) 'personal data […] relating to the physical, physiological or behavioural characteristics of a natural person'; (2) 'specific technical processing' and; (3) 'allow or confirm the unique identification of that natural person'. The first of these points seems obvious in that the biometric data covered by the Regulation are required to first satisfy the definition of personal data. As described above in the previous section, due to the wide interpretation attributed to the notion of personal data in the Regulation this does not present a high threshold especially given the nature of the information in question (i.e. aside from the particular difficulties discussed above). However, for clarity it is prudent to reiterate that biometric data are thus, as a first threshold, required to amount to 'information relating to an identified or identifiable natural person' as provided for in Article 4(1) GDPR. The fact that biometric data is a specific category of personal data is then first reflected in the fact that Article 4(14) GDPR specifies that the personal data in question must relate to the identified or identifiable natural person by virtue of the fact that they relate 'to the physical, physiological or behavioural characteristics' of that natural person. As noted by Jasserand, this aspect of the definition serves as an acknowledgement of the fact that a broad range of measurable human characteristics can come within that which is used for biometric recognition.[713] The author goes on to specify however, that the distinction between the terms physical and physiological (i.e. apparent from the fact that both terms are used) is unclear given that in the literature on biometric recognition they are seemingly used interchangeably.[714]

**[214]** UNIQUE IDENTIFICATION – The second element in the definition is a curious clarification which in essence aims to delineate 'personal data […] relating to the physical, physiological or behavioural characteristics of a natural person', which relates to such characteristic but is not capable or is merely potentially capable of being used to extract biometric data (i.e. as opposed to that potential being actually realised), and those biometric data which have been extracted. Importantly, and in line with the discussion above in Section 4.1, such an extraction of biometric data would amount to the 'processing' of personal data given (1) the first element and; (2) the fact that 'processing' amounts to pretty much any activity that can be performed on personal data. However, it is important to highlight that the processing in question must be an example of 'specific

[713] C Jasserand, 'Legal Nature of Biometric Data: From "Generic" Personal Data to Sensitive Data' (2016) 2 European Data Protection Law Review 297, 304.
[714] ibid.

technical processing' which allows or confirms 'the unique identification' of the natural person. This 'specific technical processing' would then appear to require for instance the breaking down of a sample into a mathematical representation of the original and its storage in the form of a template or representation of the extracted biometric data which could then be used for later purposes.[715] Hence, such processing would in itself need to satisfy the requirements in the Regulation – a point to which we will return to below *vis-à-vis* the meaning of the reference to the processing of '[…] biometric data for the **purpose of uniquely identifying** a natural person' contained in Article 9(1) GDPR.

**[215]** EXTRACTING BIOMETRIC DATA – In addition, it should also be noted that there is a distinction to be made between a biometric sample and biometric data. The crux of this point is well highlighted by the Article 29 Working Party opinion on the concept of personal data which notes that,

> '[h]uman tissue samples (like a blood sample) are themselves sources out of which biometric data are extracted, but they are not biometric data themselves (as for instance a pattern for fingerprints is biometric data, but the finger itself is not). Therefore the extraction of information from the samples is collection of personal data, to which the rules of the Directive apply.'[716]

By building on the Working Party's example a further distinction can be made in that although an extracted formatted representation of the fingerprint pattern is considered biometric data, a photograph of the fingerprint in question is not despite it being personal data. Nevertheless, this is not to say that such a photograph could not then later become biometric data as the photograph itself could (given the developments in technology) be used as a sample with a specific technical processing then applied to extract the biometric data. This point is reflected in Recital 51 GDPR which states *inter alia* that,

> '[t]he 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.'

Aside from this point however, it is interesting to emphasise the fact that this differentiation between extracted biometric data and 'personal data […] relating to the physical, physiological or behavioural characteristics of a natural person' also highlights the broadness of the term 'information' in the definition of personal data. More specifically, although a photograph of a fingerprint will be considered personal data as it contains information which relates to an identifiable natural person, in order for it to be considered biometric data the extraction of the data which 'allow or confirm the unique identification of that natural person' is necessary. In her analysis of this issue Kindt notes that this differentiation on the basis of a technical operation in itself presents a risk to fundamental rights as the collection of facial images is not subject to the prohibition in Article 9(1) GDPR given that such personal data have not undergone the process through

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[715] Els J Kindt, *Privacy and Data Protection Issues of Biometric Applications* (Springer Netherlands 2013) 43–47.

[716] Article 29 Working Party, 'Opinion on Personal Data' (n 621) 9.

which they are rendered biometric data as understood in the Regulation.[717] The author therefore laments the legislative choice made in the GDPR given that, in her view, such databases of images are often the pre-condition which allows for biometric identification. With this in mind, the author suggests that an approach built on 'the fitness of the data to be used by automated means for identification or identity verification purposes' should have been taken into account.[718] Although there is certainly merit to this point, it is argued here that such an approach would have been overly broad given the potential effects of such an approach on the online ecosystem. To clarify, if the 'fitness' of the data for identification or identity verification purposes was used as the barometer for regulation, services such as *Google Image Search* or even a small website hosting photographs could seemingly be rendered unlawful given the impossibility of acquiring explicit consent from every data subject and the fact that images are often put online without the data subject's knowledge or input thereby rendering such processing outside the 'manifestly made public' exception contained in Article 9(2) GDPR. Indeed, Kindt explicitly refers to Google and social networking sites to highlight the potential for far-reaching use given the developments in biometric technology with reference to the uploading of photographs.[719]

**[216]** UNIQUE IDENTIFICATION AS A QUALITATIVE REQUIREMENT – However, it is suggested here that more strictly regulating the potential for personal data to become biometric data instead of the data which has undergone the specific technical processing would have been over-inclusive and that the approach in the GDPR arguably better reflects the dynamic nature of personal data. The simple fact remains that the personal data capable of undergoing specific technical processing rendering it biometric data still must satisfy the requirements in the Regulation and when the specific technical processing occurs, it will be considered biometric data provided it allows or confirms 'the unique identification of that natural person'. This final element therefore is effectively the qualitative condition to satisfy the definition of biometric data provided for in Article 4(14) GDPR and hangs on the what is meant by the characteristics '[…] which allow or confirm the unique identification of that natural person'. A perhaps obvious preliminary point is that it is personal data relating to the physical, physiological or behavioural characteristics which undergo the specific technical processing which allows or confirms the unique identification of the data subject that are relevant, as opposed to the characteristics themselves in isolation. As such, it seems that it is the transformation of the personal data which is key for this definition and that as the personal data must uniquely identify the data subject its relational connection to the data subject rests with the 'content' aspect of this cumulative element of the definition of personal data as described above in Section 4.1.1 (A). However, here it is again interesting to refer to the Working Party opinion on the concept of personal data where it is noted that,

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[717] Els J Kindt, 'Having Yes, Using No? About the New Legal Regime for Biometric Data' [2017] Computer Law & Security Review 530.
[718] ibid. 530
[719] Kindt (n 717).

> '[a] particularity of biometric data is that they can be considered both as *content* of the information about a particular individual (Titius has these fingerprints) as well as an element to establish a *link* between one piece of information and the individual (this object has been touched by someone with these fingerprints and these fingerprints correspond to Titius; therefore this object has been touched by Titius). As such, they can work as "identifiers". Indeed, because of their unique link to a specific individual, biometric data may be used to identify the individual. This dual character appears also in the case of DNA data, providing information about the human body and allowing unambiguous and unique identification of a person.'[720]

From this example, it is suggested that although the use of biometric data as an 'identifier' merely renders the data subject 'identifiable' it does so uniquely as the data in question is linked specifically to that individual data subject. In contrast, and as described above in Section 4.1.1, the 'relate to' cumulative element in the definition of personal data is construed broadly by the Court with information capable of relating to multiple natural persons in terms of its content despite the fact that it must relate in terms of either purpose or effect to an identifiable natural person.[721] Of course this construction works from the supposition that such characteristics do in fact uniquely identify natural persons in their content. This point is certainly debateable but is outside the scope of this thesis as a non-legal consideration and therefore, for the purposes of this analysis it is assumed (i.e. as it is so in the GDPR) that biometric data does in fact render a data subject uniquely 'identifiable' by virtue of the fact that in terms of its content such data is uniquely tied to a specific individual.

**[217]** ALLOW OR CONFIRM THE UNIQUE IDENTIFICATION – However, further complexity is added to this debate by the fact that (1) the definition of biometric data provided for in Article 4(14) GDPR refers to personal data which '**allow or confirm** the **unique identification** of that natural person' and; (2) Article 9(1) GDPR, which prohibits the processing of the categories of sensitive personal data, refers specifically to '[…] biometric data for the **purpose of uniquely identifying** a natural person'. Regarding the first of these two connected points, it is important to highlight that there are clear uncertainties regarding the use of the terms 'allow or confirm' in Article 4(14) GDPR and its correlation to the more technical nomenclature used by the biometrics community. More specifically, Jasserand suggests that this uncertainty stems from the fact that identification in data protection law and biometrics have distinct meanings.[722] Indeed, in biometrics identification is attributed a narrow meaning referring to the process of establishing an individual's identity through the comparison of a biometric sample with previously stored biometric template which may be located in one or various databases. This 'one-to-many' identity matching merely requires the singling out of an individual (i.e. you do not have to establish their legal identity), whereas identity verification (sometimes mistakenly referred to as identity authentication) in contrast, operates as a 'one-to-one' matching

[720] Article 29 Working Party, 'Opinion on Personal Data' (n 621) 8–9.
[721] *Case C-434/16, Peter Nowak v Data Protection Commissioner, ECLI:EU:C:2017:994* (n 661).
[722] Jasserand (n 713) 304–305.

process and hence, its purpose is not to identify the individual as such but instead to verify it against stored biometric information (e.g. on a passport or a database).

**[218]** THE IDENTIFYING NATURE OF BIOMETRIC DATA – On this basis Jasserand suggests that identification in the GDPR (i.e. to single out) has a broader meaning compared to biometric identification (to establish someone's identity) and that the provisions should be interpreted in this light.[723] Hence, through the inclusion of the terms 'allow or confirm' in the definition of biometric data the author argues that both biometric identification and identity verification come within the scope of the provision. It is suggested here that although the author is correct in her conclusion that both biometric identification and identity verification come within the scope of Article 4(14) GDPR, her means of getting to this conclusion are somewhat flawed. To clarify, it is proposed that the author confuses the purposes biometric data are used for and the 'identifiability' of the data subject. More specifically, it is suggested that biometric data as a category of personal data are afforded a specific definition by virtue of their highly 'identifying' nature as opposed to the purpose or function for which these data are used. This is exemplified by the reference to 'unique identification'. In short therefore, it is argued here that it is not that identification has a broader meaning in the GDPR but rather that it is better categorised as 'identifiability', with biometric data for the purposes of Article 4(14) GDPR (at a minimum) *allowing* for the 'unique identification' of the data subject. This finding brings us to the second of the two points referred to above and to the specific mentioning of biometric data in Article 9(1) GDPR.

**[219]** PURPOSES AND IDENTIFICATION – To reiterate, Article 9(1) GDPR prohibits the processing of '[…] biometric data for the **purpose of uniquely identifying** a natural person'. As one might expect, and in light of the above analysis, there is clear uncertainty in relation to what is meant by a 'purpose of uniquely identifying' as the apparent trigger for the application of the prohibition contained in the provision. Indeed, one can again question whether this provision is driven by (1) the purpose of a processing operation to uniquely identify in itself or rather; (2) 'purpose' understood within the context of the 'relating to' element of the definition of personal data as a by-product of the means of determining the 'identifiability' of the data subject. To delineate these, one can understand identification 'purpose' (1) to mean the purpose of the processing in Article 5(1)(b) GDPR and in (2) as a required element for some other purpose (e.g. singling out a data subject to personalise content). The issue of course is that certain authors have already seen a reference to purpose through the use of the words 'allow or confirm the unique identification' within the definition of biometric data in Article 4(14) GDPR.[724] Hence, in the GDPR three categories of personal data can be discerned namely, ordinary personal data which can be processed to extract biometric data, biometric data as defined in Article 4(14) GDPR and 'sensitive' biometric data falling under the prohibition contained in Article 9(1) GDPR.

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[723] ibid 305.

[724] i.e. Kindt (n 717); Jasserand (n 713). See also: Catherine A Jasserand, 'Avoiding Terminological Confusion between the Notions of "Biometrics" and "Biometric Data": An Investigation into the Meanings of the Terms from a European Data Protection and a Scientific Perspective' (2015) 6 International Data Privacy Law 63.

Although this categorisation is uncontroversial, for Kindt only biometric identification and not identity verification as understood in the biometric research literature falls within this final category as she reads the reference to purpose as limited in scope to one-to-many identity matching.[725]

**[220]** UNIQUE IDENTIFICATION AS A BY-PRODUCT – In contrast, Jasserand suggests that both biometric identification and identity verification should come under the prohibition in Article 9(1) GDPR as these biometric processing purposes should be interpreted in light of the data protection framework and the meaning attributed to identification therein.[726] This appears to be a strong argument as rather than using these biometric practices as a means of reflecting upon the operation of the legal provisions, the legal provisions should instead be used to determine the legality of the purposes. However similar to Kindt, Jasserand still interprets Article 9(1) GDPR as inherently dictated by the processing purpose of the biometric data with this being the key determining factor in its sensitive personal data categorisation.[727] In contrast, it is argued here that such an approach is flawed as it determines the categorisation on the basis of purpose rather than determining 'identifiability' with reference to the purposes of the processing as is necessary under the interpretation of the definition of personal data adopted by the Court of Justice.[728] As biometric data and sensitive data are also personal data it makes sense to view them through this lens and as subsets of this more general overarching category. Hence, although the three categories will be adopted in this thesis, it is suggested that biometric data falling within the sensitive personal data processing prohibition require the unique identification of the data subject to be a by-product of the purpose rather the purpose itself. This delineates the category from personal data which only come under the definition of biometric data but not the sensitive category. Indeed, although such information may relate to the data subject in both content and purpose, these data only have to render that natural person uniquely 'identifiable' without necessarily identifying them.

**[221]** A BROADER DEFINITION – It is suggested that this subtle distinction in fact makes a significant difference as it effectively broadens the types of biometric data which may come within the prohibition in Article 9(1) GDPR. Recognising that unique identification may be a by-product of a purpose as opposed to being *the* purpose effectively focuses the discussion on the nature of the personal data in question as opposed to that of the processing purposes. This better reflects the construction of the Regulation more generally and arguably also the teleological goals of the GDPR. In breaking down the interpretative ambiguity this extract from Article 9(1) GDPR must be first viewed within the overall provision and here it is important to note that the construction of '[…] biometric data for the **purpose of uniquely identifying** a natural person' is distinguishable in that the other protected categories are unquestionably protected on the basis of their nature without

[725] Kindt (n 717) 535.
[726] Jasserand (n 713) 309–310.
[727] ibid.
[728] *Case C-582/14, Breyer, ECLI: EU:C:2016:779* (n 641).

any specific reference to purpose. Indeed, racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, genetic data, data concerning health, sex life or sexual orientation are all prohibited on the basis of their categorisation as opposed to the particular purpose of the processing. Indeed, despite the fact that there may be some question marks surrounding the 'data concerning health', as will be explored in the next section this also appears to have been interpreted in a purpose-neutral manner.[729] Although it is suggested that the above interpretation is convincing it is acknowledged that there is no certainty in this regard and that the more restrictive interpretation of what comes under the sensitive personal data prohibition may indeed be the correct one. That being said, the interpretation presented above is defended as it reflects one that is internalised within the meaning attributed to the terminology as understood in the Regulation and not as inspired by interdisciplinary insights. Indeed, the Regulation is an omnibus catch-all framework adopted on the basis of a technology neutral approach. But then what are the implications for emotion detection and monetisation? It should be understood that with either approach there appears to be a somewhat narrowed prohibition provided in Article 9(1) GDPR in the context of emotion monetisation which will be linked to the specific commercial applications and indeed implementations. The narrower purpose-orientated understanding of biometric data presented by other authors will clearly limit the prohibition in Article 9(1) GDPR to 'unique identification' purposes thereby seemingly excluding emotion commercialisation purposes.[730]

**[222]** UNIQUE IDENTIFICATION AND THE QUALITATIVE ASSESSMENT – However, even with the understanding adopted in this thesis, it appears that only purposes which uniquely identify the data subject in terms of a qualitative assessment of the personal data in question, will invoke the prohibition in Article 9(1) GDPR. Where the data subject remains merely 'identifiable' it will merely fall within the general provisions for the processing of personal data thereby requiring the application of one of the conditions for lawful processing in Article 6 GDPR. Here one can refer to the singling out of natural persons through profiling for programmatic advertising purposes where the unique identity of the data subject is not known despite the fact the biometric insights (i.e. behavioural insights) gathered may render this natural person *identifiable*. It appears therefore that the processing of biometric data for such purposes will not come within the sensitive personal data category as the data subject will not be uniquely *identified* with respect to the type of personal data processed. In contrast however, the processing of biometric data in smart devices may come within the scope of Article 9(1) GDPR as the very purpose of the processing may be to uniquely identify the emotional state of the individual using their biometric data. Here one can refer to the use of smart watches for instance for *pseudo*-healthcare (wellbeing) purposes or the use of emotion detection in a smart screen/television for example for interactive gaming purposes. Hence, in order to perform such purposes, the natural person must inevitably be identified and given the

[729] *Case C-101/01, Bodil Lindqvist, ECLI:EU:C:2003:596* (n 340).
[730] i.e. Kindt (n 717); Jasserand (n 713). See also: Jasserand (n 724).

nature of personal data processed this will clearly do so in a 'unique' manner. As such, the sub-purpose of uniquely identifying will come within the commercial purpose of processing biometric data for the detection of the data subject's emotions. This in turn raises question marks regarding the use of profiling as through the application of a machine learning model for instance, and the categorisation of individuals into emotion profile groupings, it is questionable whether the processing of the biometric data would actually result in the 'unique identification' of the data subject. However, in this regard it is important to note that (1) information does not have to be accurate in order for it to be considered personal data and; (2) the very purpose is to process biometric data which uniquely identifies the data subject in terms of the content element in the relational nexus for the purpose of offering him/her an insight into their emotional profile. As such, the unique identification of the data subject is a necessary component of the purpose as the data subject will be identified in order to achieve the purpose and the content of the biometric data processed does this identification in a unique manner.

**[223]** NATURE OF THE DATA AND OVERLAPS OF DATA CONCERNING HEALTH – Therefore, purpose does play an important role in delineating the biometric data which come within the Article 9(1) GDPR. However, this role relates to an assessment of the qualitative nature of the data and how the information relates and identifies the natural person in line with the definition of personal data provided for in Article 4(1) GDPR as opposed to the purpose of the processing construed narrowly. It should be noted however, that such insights are potentially of minor significance in the context of emotion detection in smart devices as such processing may also relate to the processing of 'data concerning health' thereby coming within this element in Article 9(1) GDPR. That being said, there are question marks surrounding what is meant by 'data concerning health' and whether it extends to data processed for *quasi* health care purposes.[731] Again in line with the above, and as will be argued below, this uncertainty relates to the nature of data versus the role of processing purposes with the former being presented as the key determining factor and the latter a potentially significant aspect in terms of deciphering the nature of the personal data. Nevertheless, given the importance of this debate for emotion monetisation and the potential of the 'data concerning health' to come within the sensitive personal data processing prohibition, this analysis will be spelled out further in the next sub-section.

### *B. EMOTION DETECTION AND 'DATA CONCERNING HEALTH' – PROCESSING PERSONAL DATA 'REVEALING' SENSITIVE CATEGORIES*

**[224]** DEFINING DATA CONCERNING HEALTH – From the above, the purposes of the processing may play a key role in determining whether sensitive personal data are indeed processed. But how does this play out regarding the use of smart devices (such as smart watches) for health care or *pseudo*-health care/well-being purposes? To clarify, Article 4(15) GDPR

[731] See here: Article 29 Working Party, 'ANNEX - Health Data in Apps and Devices, to the Letter to European Commission, DG CONNECT on MHealth, Brussels, 05 February 2015'; Gianclaudio Malgieri and Giovanni Comandé, 'Sensitive-by-Distance: Quasi-Health Data in the Algorithmic Era' (2017) 26 Information & Communications Technology Law 229.

defines data concerning health (which comes within the prohibition on the processing sensitive personal data as a distinct category) as 'personal data related to the physical or mental health of a natural person, including the provision of health care services, which reveal information about his or her health status'. This provision is further specified in the non-binding Recital 35 GDPR which stipulates *inter alia* that, '[p]ersonal data concerning health should include all data pertaining to the health status of a data subject which reveal information relating to the past, current or future physical or mental health status of the data subject.' But then are emotion insights that are garnered for wellbeing (i.e. the quantified-self movement) purposes or for the purposes of advertising or marketing distinct from mental health data depending on the nature of the data and the potential to link such insights with an underlying mental illness? In essence, the question is what personal data come within this 'data concerning health' category and thus the prohibition contained in Article 9(1) GDPR. In short, and in line with the alternative interpretation of the biometric data category described and disputed above, it is arguable that given that the purpose is not to gain insights into the mental health status of the data subject, the personal data gathered would remain merely personal and not sensitive personal data.

**[225]** AN EXPANSIVE INTERPRETATION? – However, here it is interesting to refer in particular to the *Lindqvist* case in which the Court of Justice found that the publishing of information relating to the fact that a woman had injured her foot came within the meaning of 'data concerning health' under the then Article 8(1) Directive 95/46/EC.[732] In particular, in its judgement the Court found that '[i]n the light of the purpose of the directive, the expression 'data concerning health' used in Article 8(1) thereof must be given a wide interpretation so as to include information concerning all aspects, both physical and mental, of the health of an individual.'[733] In this regard, it is interesting to refer to the 2015 letter sent by the Article 29 Working Party to the European Parliament and the adjoining Annex on the scope of the 'data concerning health' category in the context of wellbeing applications and devices in light of the then in force Directive 95/46/EC.[734] In presenting a wide and dynamic interpretation of health data, the Working Party notes that 'health data (or all data pertaining to the health status of a data subject)' is a much broader term than the term 'medical' and also interestingly for the purposes of this thesis observes that data protection authorities have found that 'data about a person's intellectual and emotional capacity' concern the health of data subjects thus coming within the 'data concerning health' category.[735] Although the GDPR inserted a definition of 'data concerning health' for the first time (i.e. as the old Directive contained no definition), it appears from the broad language contained in Article 4(15) GDPR and Recital 35 GDPR that the expansive interpretation adopted by the Court has been incorporated within the

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[732] *Case C-101/01, Bodil Lindqvist, ECLI:EU:C:2003:596* (n 340).
[733] ibid 50.
[734] Article 29 Working Party, 'ANNEX - Health Data in Apps and Devices, to the Letter to European Commission, DG CONNECT on MHealth, Brussels, 05 February 2015' (n 731).
[735] ibid 2.

Regulation. Such an approach also appears consistent with the line of argumentation adopted above in the previous sub-section in the analysis of the biometric data category (and indeed arguably further reinforces its merits) but in saying this, it does raise a similar difficulty in the determination of the precise boundaries between the personal and sensitive personal data categories.

**[226]** REVEALING DATA CONCERNING HEALTH – Indeed as noted by Malgieri and Comandé, when interpreting Article 4(15) GDPR and Recital 35 GDPR the question becomes one of how far the 'data revealing health' category stretches.[736] More specifically, the authors note that the determination of how to precisely delineate those personal data falling within the Article 9(1) GDPR prohibition and those which do not, thus remaining subject to the conditions for lawful processing in Article 6 GDPR and the GDPR more generally, is the key issue in scoping this prohibition. As one might imagine, there is certain information which will fall clearly and squarely within this category and here one can refer to Recital 35 GDPR in particular for examples.[737] Such personal data may relate to the medical information about an identified individual but may also *inter alia* include information regarding appointment times at a particular medical centre or the membership of a support group for those suffering from a particular illness. What becomes far more difficult to categorise therefore is the seemingly innocuous personal data which although not health data by virtue of its content may be considered as such due to inferences which can be drawn from its processing. It appears well established that in assessing the application of Article 9(1) GDPR one must have regard for both the 'raw' personal data (i.e. that which is collected either directly or indirectly from the data subject) but also the processed personal data and the inferences which may be derived. Indeed, the reference to the 'processing of personal data *revealing*' sensitive personal data in Article 9(1) GDPR results in a blurring of the lines between the categories and the need to refer to inferred processed personal data in interpreting the application of the prohibition.[738] In this regard, it is interesting to again highlight the actions being taken against *Facebook* in particular for allowing the targeting of advertisements on the basis of categories which

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[736] Malgieri and Comandé (n 731) 231–237.

[737] This provisions states that '[p]ersonal data concerning health should include all data pertaining to the health status of a data subject which reveal information relating to the past, current or future physical or mental health status of the data subject. This includes information about the natural person collected in the course of the registration for, or the provision of, health care services as referred to in Directive 2011/24/EU of the European Parliament and of the Council ( 1 ) to that natural person; a number, symbol or particular assigned to a natural person to uniquely identify the natural person for health purposes; information derived from the testing or examination of a body part or bodily substance, including from genetic data and biological samples; and any information on, for example, a disease, disability, disease risk, medical history, clinical treatment or the physiological or biomedical state of the data subject independent of its source, for example from a physician or other health professional, a hospital, a medical device or an in vitro diagnostic test.'

[738] See for example Edwards, 'Data Protection: Enter the General Data Protection Regulation' (n 712); Edwards, 'Data Protection and E-Privacy: From Spam and Cookies to Big Data, Machine Learning and Profiling' (n 712); Clifford (n 396).

appear to correlate strongly with the protected categories.[739] Here it is important to specify that this debate essentially boils down to the interpretation of the word 'revealing' with *Facebook* appearing to argue that for Article 8 GDPR to apply the content of the personal data would have to relate to the data subjects with respect for the indicated categories.[740] This much narrower approach is disputed in this thesis as contrary to both the existing case law and a systematic and teleological interpretation of the Regulation.[741]

**[227]** THE OTHER CATEGORIES OF SENSITIVE PERSONAL DATA – Although the 'data concerning health' are somewhat delineated from the 'racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership' personal data referred to in the beginning of the provision, the reference to personal data which 'reveal information about [the data subject's] health status' in the definition of data concerning health contained in Article 4(15) GDPR, seems to point towards the need for a similar approach. Here it is again interesting to refer to the Annex of the Article 29 Working Party letter to the Parliament where it is noted that personal data are health data where (1) they are inherently medical data; (2) the personal data are raw sensor data that can be used (either by itself or in combination with other data) to draw conclusions about the health status of a natural person or; (3) where such conclusions are drawn about a person's health status irrespective of *inter alia* the accuracy of these conclusions.[742] The first of these points is the easiest to categorise as such data will relate to the data subject's health in terms of its content. The second is arguably the most controversial as raw sensor data can increasingly be used to draw conclusions about an individual's health status given the technological developments. Consequently, understanding the precise nature of the technical step required to transform this personal data into sensitive personal data is essential and thus determining whether such personal data could relate to the health status of an individual will require a context dependent assessment which will hinge in part on the scale of the processing.

**[228]** PURPOSE AND EFFECT OF THE PROCESSING – Furthermore, it is suggested here that reference should also be made to the purpose and effect of the processing in the assessment of how the personal data relate to the data subject. Indeed, although traditionally one would associate the sensitive personal data category with the content element,[743] in an era of

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[739] See: 'Facebook Fined 1.2 Million Euros by Spanish Data Watchdog' *Reuters* (11 September 2017) <https://www.reuters.com/article/us-facebook-spain-fine-idUSKCN1BM1OU> accessed 28 November 2018.

[740] For an introduction to this issue see: Edwards, 'Data Protection: Enter the General Data Protection Regulation' (n 712). and for a more detailed analysis see the author's subsequent chapter: Edwards, 'Data Protection and E-Privacy: From Spam and Cookies to Big Data, Machine Learning and Profiling' (n 712).

[741] For a more technical discussion and application of the Regulation from a computer science perspective to Facebook's advertising and targeting tools see: José González Cabañas, Ángel Cuevas and Rubén Cuevas, 'Unveiling and Quantifying Facebook Exploitation of Sensitive Personal Data for Advertising Purposes', *Proceedings of the 27th USENIX Conference on Security Symposium* (USENIX Association 2018) <http://dl.acm.org/citation.cfm?id=3277203.3277240>.

[742] Article 29 Working Party, 'ANNEX - Health Data in Apps and Devices, to the Letter to European Commission, DG CONNECT on MHealth, Brussels, 05 February 2015' (n 731) 5.

[743] In this regard one can refer to the text of the GDPR itself and the listing of certain categories of data.

'big data' the automated processing of ordinary categories of personal data may often reveal sensitive personal data insights. Hence, the content, purpose and result should be taken into consideration and this is clearly an area where emotion detection technology presents an excellent illustration of this need. Indeed to borrow and further expand upon an example from the Working Party Annex, although it is clear that the posting of 'sad' messages on a social networking site will not amount to the processing of sensitive personal data, the further processing of this information to reveal whether a natural person suffers from depression would be prohibited subject to the exceptions contained in Article 9(2) GDPR.[744] However, to further complicate this example, one can wonder whether the processing of these posts to reveal the emotional state of the individual for advertising purposes without processing to reveal their mental health status would still come under Article 9(1) GDPR. What if the controller only had a snapshot as the person's current emotion or mood in the moment rather than a long-term view? And what if this was part of the design of the processing?

**[229]** BLURRED BOUNDARIES? To emphasise the importance of such considerations one can refer to the fact that Facebook has previously been found to have facilitated the targeting of insecure youths with 'vulnerable' moods.[745] There are no clear answers to these questions as any assessment will be context dependent but it is safe to conclude that much will hang on the scale of the processing and also whether the inference as to the data subject's health status could be (or indeed is) made without the need for an additional technical process. In this regard however, it is important to emphasise the Working Party's third example of when personal data are health data, namely where conclusions are drawn about a person's health status irrespective of *inter alia* the accuracy of these conclusions. This seems to point again towards the purpose and effect of the processing in terms of the triggering of the applicability of Article 9(1) GDPR. However, an additional point of concern may relate to the potential negative impact such inaccuracies may have on the data subject in terms of for instance potential insurance premiums. Indeed, this is particularly significant given that devices such as smart watches are increasingly been used in health insurance for instance.[746]

### 4.2.2 THE 'SENSITIVISATION' OF EVERYTHING AND MONETISING SENSITIVE EMOTION INSIGHTS

**[230]** SENSITIVE PERSONAL DATA AND BEYOND THE DETECTION OF EMOTION – As described above, emotion detection mechanisms focus on a range of techniques such as, text analysis technology, speech emotional analytics technology, technology for quantifying emotions *via* the analysis of facial expressions/eye movement, and content consumption contextual triggers capable of inferring user moods based on usage patterns (i.e. media content

[744] Article 29 Working Party, 'ANNEX - Health Data in Apps and Devices, to the Letter to European Commission, DG CONNECT on MHealth, Brussels, 05 February 2015' (n 731) 3.
[745] (see: Levin (n 278); Solon (n 278); 'Facebook Research Targeted Insecure Youth, Leaked Documents Show' (n 278).
[746] For example see: 'Apple Watch Deal with Vitality | Apple Watch Offer' (n 495).

provision services such as e-books, music and video streaming).[747] Hence, determining whether sensitive personal data are processed may in fact depend on the detection mechanism employed or indeed the purposes of the processing. It should be acknowledged however that simply analysing the detection of emotion in isolation to determine whether this processing comes under Article 9(1) GDPR is perhaps too narrow. This point is perhaps best illustrated through a hypothetical example. For instance, here the example of Philip and Ruth developed in Chapter 3 can be expanded. As a refresher, Philip is the owner of a 'smart car' and Ruth lives in a 'smart home' and for the current purposes it is assumed that their emotions are detected through audio analysis. For this emotion detection technology to work however, the analysis must always be turned on and consequently, the technology is always 'listening in' to conversations being had within its vicinity. Now although there are certainly means of negating potential negative effects associated with such personal data processing, for the purposes of this illustration it suffices to say that irrespective of the means of detection (i.e. analysis of the voice patterns revealing emotions), the content of what is being said may also incorporate the recording of sensitive personal data and thus the use or combination of such information for advertising purposes presents clear challenges in relation to satisfying one of the conditions for lawful processing in Article 6(1) GDPR (especially considering the conditions for consent in Article 7 GDPR, see Chapter 5).

**[231]** EMOTION DETECTION COMPARED TO EMOTION MONETISATION – This exaggerated example provides a simple illustration of the complexity associated with determining the correct application of the GDPR. The purpose of this sub-section is to expand on this point to illustrate the complexities which emerge when one focuses on the fact that Article 9(1) GDPR refers to the 'processing of personal data **revealing'** the indicated sensitive personal data categories. Indeed, although the above example is blunt, it does to the fact that emotion insights may be just part of the overall picture. This section therefore, aims to build upon the above analysis and examine the fact that even outside the detection of emotion the sensitive personal data category may be engaged in order to provide a more complete picture before then examining personal data re-purposing and the compatibility of purposes.

### *A. PROCESSING PERSONAL DATA 'REVEALING' SENSITVE ATTRIBUTES*

**[232]** RETURNING TO THE REVEALING OF SENSITIVE PERSONAL DATA – From the above therefore, although emotion insights may be gathered using only personal data (i.e. without using sensitive personal data) or may be assumed based on market research (i.e. playing games generally leads to positive moods), it is important to note that they may also be combined with the processing of personal data 'revealing' one of the other sensitive categories mentioned in Article 9(1) GDPR. Indeed, the targeting of emotion will inevitably also involve the targeting of other consumer attributes and thus the potential for the

[747] See introduction to this chapter but also – McStay, 'Empathic Media: The Rise of Emotion in AI' (n 16); Gunes and Pantic (n 475).

processing of additional personal data which may in themselves invoke the prohibition in Article 9 GDPR. To reiterate, this provision stipulates that,

> [p]rocessing of personal data **revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership**, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or **data concerning a natural person's sex life or sexual orientation** shall be prohibited.' [**Emphasis added**].

Indeed, following the Court of Justice decision in the *Lindqvist* case[748] there were concerns that the publishing of virtually all personal images could be construed as sensitive personal data processing given that such images often expose information regarding race, skin colour, religion etc.[749] To clarify, as described above the Court in its decision in *Lindqvist* found that the publishing of information on a community church's website relating to the fact that a woman had injured her foot came within the meaning of 'data concerning health'. Hence, it is clear from the judgement that the purpose of the processing does not determine whether or not personal data falls within the scope of the Article 9(1) GDPR processing prohibition and concerns have therefore been raised. However, as referred to above Recital 51 GDPR excludes photographs from systematically being considered as sensitive personal data with reference to the biometric data category and thus appears to implicitly acknowledges that personal images are not in themselves sensitive personal data with reference to the other categories contained in Article 9(1) GDPR. The question thus becomes one of whether (similar to the definition of biometric data) some other technical process is required. Such an interpretation draws a distinction between the simple human viewing of a photograph and the associated observation of characteristics falling within Article 9(1) GDPR with the naked eye and processing wholly or partly by automated means to reveal this sensitive personal data. In short, one must wonder what kind of separation results in information being classified as 'ordinary' personal data when it is only a short step from one of the protected categories in Article 9(1) GDPR. In the context of emotion monetisation and more specifically, the combining of emotion insights with other inferred attributes to target an identifiable natural person, the crux of the matter relates to how closely connected these other inferences are to the protected categories. In this vein, one must wonder whether the ability to target advertising based on interests on *Facebook* results in the processing of sensitive personal data.[750]

**[233]** INFERENCES AND SENSITIVE PERSONAL DATA – Here it is noteworthy to refer to the study conducted by Cabañas *et al.* which demonstrated the capacity to target advertising on Facebook based on interests connected with personal attributes clearly coming within Article 9(1) GDPR. Indeed, from the authors' analysis it is demonstrably possible to target an individual based on their 'interest' (e.g. distilled from the fact they follow certain groups) in for example a particular religion. As a further illustration of this point, one can

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[748] *Case C-101/01, Bodil Lindqvist, ECLI:EU:C:2003:596* (n 340).
[749] Edwards, 'Data Protection: Enter the General Data Protection Regulation' (n 712) 89.
[750] Cabañas, Cuevas and Cuevas (n 741).

refer again to the *Cambridge Analytica* scandal.[751] Despite the fact that this example does not really fit within the business-consumer frame of this thesis given that it dealt with alleged electoral meddling, it does highlight the potential for a psychometric profiles to be used to target an individual for political purposes on the basis of (and tailored towards) that individual's perceived feelings towards a social issue under political debate.[752] Although *Facebook* denies that such activity amounts to the processing of sensitive personal data as the personal data is not sensitive in terms of its content, the validity of such an approach is highly questionable.[753] It seems more realistic to draw a distinction between personal data which could be used to infer attributes relating to the data subject and personal data which has been processed revealing such attributes. Through such an understanding it is the inferred personal data that are sensitive. Hence, as mentioned above, in addition to focusing on the content of the information it is arguable that one is also required to analyse the purpose and result of the processing to ascertain whether the information reveals sensitive personal data. This approach thus seemingly mimics the need to assess the content, purpose and result in the 'relating to' element of the definition of personal data. As described above, either the content (i.e. the substance in question refers to a natural person), purpose (the purpose is or incorporates the need to identify a natural person) or result (i.e. irrespective of the content and purpose, the consequences are likely to have an impact on the rights and freedoms of a natural person) can mean that personal data are processed and it is questionable whether a similar approach may be required in order to determine whether this personal data fall within the prohibition in Article 9(1) GDPR. Such a suggestion however, is extremely controversial.

**[234]** EVERYTHING IS SPECIAL CATEGORY DATA? – To clarify, it appears relatively uncontroversial to suggest that by virtue of its content certain information will come within the scope of the sensitive personal data category and that personal data processing which is aimed at exploiting sensitive characteristics through inference as demonstrated by the purpose of the processing, will also come within Article 9(1) GDPR. In contrast, suggesting that processing which reveals information through which inferences may be made regarding sensitive characteristics irrespective of the purposes or intention of the controller falls within Article 9(1) GDPR is a far more provocative contention as it may further blur the lines between personal and sensitive personal data. As noted by Edwards, '[g]iven the increasing power of [machine learning] algorithms, this might lead us to the inexorable conclusion that not only is 'everything personal data' as per Purtova, but perhaps even, 'everything is special category data'.[754] This might be a strong argument to reconsider the division entirely.' Indeed, although a more thorough analysis of these issues remains outside the scope of this thesis, it is important to note that an approach which extends beyond the categorisation of information as sensitive personal data by the nature of the

[751] See: 'The Cambridge Analytica Files' (n 440).
[752] Bakir and McStay (n 21); Information Commissioner's Office, 'Investigation into the Use of Data Analytics in Political Campaigns' (ICO 2018) <https://ico.org.uk/media/action-weve-taken/2259371/investigation-into-data-analytics-for-political-purposes-update.pdf> accessed 27 November 2018.
[753] Cabañas, Cuevas and Cuevas (n 741).
[754] Edwards, 'Data Protection: Enter the General Data Protection Regulation' (n 712) 90.

content of the information. In brief however, it is suggested that the phrase 'processing of personal data revealing' seemingly requires a more contextual assessment of the processing operation.

**[235]** KEY TAKEAWAYS – The key takeaways for the purposes of this thesis is that emotion monetisation will (1) not be just tied to the emotion insights as the nature of profiling and programmatic advertising is to get a more complete and contextual picture of the targeted data subject; (2) the connected point that targeting may rely on information from disparate sources and; (3) that either the emotion detection part or the processing of other personal data which may reveal sensitive personal data aspect may trigger the application of Article 9 GDPR. To further elaborate on these points, the next sub-section aims to analyse the re-purposing of emotion insights. Indeed, although positioning emotion detection as the selling feature of a product or service for the most part presents challenges for the secure storage of this personal data, its re-purposing raises important questions regarding (1) data subjects' ability to choose the purposes they accept; and (2) the effect of such data sharing choices on their ability to choose (i.e. as consumers *ex post*) if such insights are used to personalise commercial communications.

### *B. LEGITIMISING THE (RE-)PURPOSING OF (SENSITIVE) EMOTION INSIGHTS*

**[236]** EMOTION DETECTION VERSUS EMOTION MONETISATION – As described above in Section 4.1, the processing of personal data for online behavioural advertising purposes requires the consent of the data subject.[755] The need for consent is indicative of two important points. First, profiling for commercial purposes online will incorporate the processing of information (such as cookies) coming within the scope of *lex specialis* requirement for consent in Article 5(3) ePrivacy Directive 2002/58/EC and second, according to Article 22 GDPR, profiling or automated individual decision making for advertising or marketing purposes requires the data subject's explicit consent. Although the application of Article 22 GDPR is certainly very debateable, where emotion detection relies on any form of terminal equipment (smart watch, computer, phone etc.) Article 5(3) ePrivacy Directive will apply. But does this *lex specialis* requirement always rule out the other conditions for lawful processing in Article 6(1) GDPR? Can the detection of emotions relying on cookies or cookie-like technologies (therefore coming within the scope of Article 5(3) ePrivacy Directive) be delineated from the monetisation of emotion for advertising purposes? And finally, how does the GDPR deal with such re-purposing?

**[237]** COOKIE RULES UNDER THE MICROSCOPE – To reiterate, the conventional understanding of Article 5(3) ePrivacy Directive rules out the availability of the other conditions for lawful

[755] See for instance: Article 29 Working Party, 'Opinion 02/2010 on Online Behavioural Advertising' (Article 29 Working Party 2010) WP 171 <http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp171_en.pdf> accessed 2 November 2012; Article 29 Working Party, 'Opinion 16/2011 on EASA/IAB Best Practice Recommendation on Online Behavioural Advertising' (Article 29 Working Party 2011) WP188 <http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2011/wp188_en.pdf>.

processing in Article 6(1) GDPR (i.e. for our current purposes contract (Article 6(1)(b) GDPR) and legitimate interests (Article 6(1)(f) GDPR)) when information is placed or stored on the terminal equipment of a user an opinion recently reconfirmed by the European Data Protection Board as mentioned above.[756] The detection of a person's emotional state that relies on the use of 'cookies' or cookie-like techniques (i.e. accessing information or storing information on the terminal equipment of the user) will therefore, require the consent of the data subject unless this is done for purely functional purposes. Although academic analysis (and indeed Article 29 Working Party opinions[757]) illustrate that through a conventional understanding this means that the tracking of user-terminal equipment for advertising purposes requires the consent of the data subject, there has been a large degree of debate recently as to how far this consent stretches in relation to the availability of legitimate interests as a condition legitimising the processing of such personal data for programmatic advertising purposes. Although the precise justification for the use of Article 6(1)(f) GDPR remains uncertain, one could point towards the fact that Article 5(3) ePrivacy aims to protect the terminal equipment of the user which is in the private sphere of the individual (i.e. the user) as opposed to the 'information' as such.

**[238]** INFORMATION AND THE PRIVATE SPHERE – Here it is important to remember that 'information' in Article 5(3) GDPR is a wider concept than personal data as protected in the GDPR. Therefore, it is at least arguable that although the placing or accessing of information stored on the terminal equipment of the user would require the consent of the user, it is debateable whether subsequence use of this information (which presumably also comes within the definition of personal data contained in Article 4(1) GDPR) when disconnected from the terminal equipment could be legitimised under Article 6(1)(f) GDPR. To spell this out, imagine for example that consent is used to access information stored on the user's terminal equipment and then transferred to the controller's (or a separate controller's) server for separate processing purposes. The question here then is what is being protected in Article 5(3) GDPR. Indeed, in an abstract sense, one must question whether it would make sense to protect this 'information' if it was not deemed to fall within the definition of personal data provided the information was first collected using the consent of the data subject and then later processed in a manner disconnected from the user's terminal equipment. Although such a thought experiment is perhaps undermined by the fact that finding that such information does not fall within the definition of personal data is extremely unlikely, it does usefully highlight the role of the respective frameworks. It is emphasised here therefore that as the ePrivacy Directive focuses on the protection of the equipment as opposed to the information it is at least possible to rely on Article 6(1)(f) GDPR. *Importantly,* the point being made here is **not** that Article 6(1)(f) GDPR can be relied upon for programmatic advertising purposes in

[756] 'European Data Protection Board, Opinion 5/2019 on the Interplay between the EPrivacy Directive and the GDPR, in Particular Regarding the Competence, Tasks and Powers of Data Protection Authorities Adopted on 12 March 2019' (n 655).
[757] Article 29 Working Party, 'Working Document 02/2013 Providing Guidance on Obtaining Consent for Cookies' (n 656).

practice but rather that it is at least theoretically possible and that therefore, a similar conclusion can be reached *vis-à-vis* emotion monetisation.

**[239]** LEGITIMATE INTERESTS AND COMPATIBLE PURPOSES – As will be described in the following Chapter, the application of Article 6(1)(f) GDPR requires (1) an assessment of the legitimacy of the purpose and; (2) the balancing of competing interests and therefore, is not likely to render such processing lawful. Nevertheless, it is at least *possible* for legitimate interests to play a role in the monetisation of emotion for advertising and marketing purposes or the re-purposes for such ends, where relevant. In building on the above, it should be noted that the limits of the notion of consent and the other conditions for lawful processing provided for in Article 6(1) GDPR are also strongly linked to what is meant by 'compatible' purposes *vis-à-vis* the purpose limitation principle contained in Article 5(1)(b) GDPR. Importantly if a latterly defined purpose is deemed 'compatible' no 'new' condition for lawful processing need be satisfied. Indeed, if one assumes that a key underlying aim of the purpose limitation principle is to ensure that the processing of personal data falls in line with the reasonable expectations of the data subject, all latterly defined purposes will be required to pass a compatibility test based on the objective capacity of the data subject to anticipate such purposes on the basis of the original purpose.[758] Moreover, as noted by Bygrave,

> '[t]he requirement that data controllers must take some account of the reasonable expectations of data subjects has direct consequences for the purposes for which data may be processed. It helps to ground rules embracing the purpose specification principle […] and sets limits on the secondary purposes to which personal data may be put. More specifically, it arguably means that when personal data obtained for one purpose are subsequently used for another purpose, which the data subject would not reasonably anticipate, then the data controller may have to obtain the data subject's positive consent to the new use.'[759]

This is also important as according to the Article 29 Working Party's opinion on consent as a condition for lawful processing in the Regulation, a controller cannot rely on back-up conditions and that there are instances where data subject consent will be the only available condition.[760]

**[240]** ASSESSING COMPATIBILITY – This is also evident in the assessment of the compatibility of purposes and Article 6(4) GDPR which outlines the components of the compatibility test when the processing is legitimised via one of the conditions in Article 6(1) GDPR. More specifically, the provision specifies that,

(a) 'any 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;

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[758] Bygrave (n 563) 350.
[759] ibid 335.
[760] Article 29 Working Party, 'Guidelines on Consent under Regulation 2016/679' (2017) WP259 23.

(c) the nature of the personal data, in particular whether special categories of personal data are processed, pursuant to Article 9, or whether personal data related to criminal convictions and offences are processed, pursuant to Article 10;
(d) the possible consequences of the intended further processing for data subjects;
(e) the existence of appropriate safeguards, which may include encryption or pseudonymisation.'

Accordingly, in the operation of consent it will only extend insofar as any such extensions fall within what the data subject may reasonably expect in the specific circumstances of the case and in practice it is hard to determine the precise delineation of legitimate interests and compatible purposes practically speaking as both manifest an *ex ante* fair balancing conducted by the controller. This is an important point in that the further use of models designed to detect emotions which process sensitive personal data will require the explicit consent of the data subject. Indeed, from the analysis in Chapter 4, it can be summarised that in the context of healthcare or *pseudo*-healthcare applications or devices used to monitor a data subject's emotional wellbeing, Article 9(1) GDPR will apply. Not only will such devices or applications process personal 'data concerning health', but also appear to necessitate the processing of the category of biometric data coming within the Article 9(1) GDPR prohibition. What is perhaps even more interesting for this thesis is that the further processing of such information for other commercial purposes (i.e. advertising, marketing or for use by insurance providers) will also require the controller to satisfy one of the exceptions contained in Article 9(2) GDPR.

**[241]** EXPLICIT CONSENT AND CONSENT – Explicit consent, as seemingly the most appropriate exception from the general prohibition, will therefore be key. But what then is the distinction between 'regular' consent (Article 6(1)(a) GDPR) 'explicit' consent (Article 9(2)(a) GDPR)? Indeed, as noted by the Article 29 Working Party in its opinion on consent in the GDPR, '[a]s the 'regular' consent requirement in the GDPR is already raised to a higher standard compared to the consent requirement in Directive 95/46/EC, it needs to be clarified what extra efforts a controller should undertake in order to obtain the explicit consent of a data subject in line with the GDPR.'[761] Although consent as a condition for lawful processing will be explored in more detail in the following Chapter, here it is important to note that in expanding on this point, the Working Party suggests that the use of the term 'explicit' relates to the manner in which consent is expressed by the data subject with the data subject required to give an explicit statement of consent.[762] Accordingly, it appears reasonable to suggest that the requirement for explicit consent leads to an increased burden on the controller to be able to prove the cumulative elements in the definition of consent in Article 4(11) GDPR (i.e. a freely given, specific, informed and unambiguous). In addition, it is important to highlight two important points: (1) the processing of sensitive personal data cannot rely on conditions such as contract (Article 6(1)(b) GDPR) or legitimate interest (Article 6(1)(f) GDPR) which are potential avenues

[761] ibid 18.
[762] ibid.

for commercial personal data processing and; (2) the exception contained in Article 9(2)(a) GDPR is a stricter requirement than the consent available for the processing of personal data contained in Article 6(1)(a) GDPR and in this vein, the term 'explicit' seems to add emphasis to the 'specific', 'informed', 'freely given' and 'unambiguous' components in the definition of consent.[763]

**[242]** EXPLICIT CONSENT AND NECESSARY PROCESSING – Importantly, although explicit consent does not seem to present much of a barrier where such processing is necessary to provide a service requested by a consumer (i.e. through the purchase of a device or application), in order to re-purpose such insights for other commercial purposes the explicit consent of the data subject will be required. This explicit consent will also need to satisfy the conditions for consent contained in the GDPR. That being said, it is important to highlight that where emotion detection is the very selling point, outside of the secure storage of the personal data and the integrity of the devices, the primary challenge for compliance with the Regulation relates to the danger for function creep. Hence, where sensitive personal data are processed, and the only available exception is explicit consent, this is required even if such processing is necessary in order to provide a service requested by the data subject. In other words, there is no equivalent to Article 6(1)(b) GDPR which recognises the legitimacy of processing 'necessary for the performance of a contract' in Article 9(2) GDPR. This distinction is further reflected in Article 22(4) GDPR which specifies that contract as outlined in Article 22(2)(a) GDPR cannot be utilised to legitimise automated individual decision-making including profiling based on the processing of sensitive personal data. Instead, and by cross-reference to Article 9(2)(a) GDPR, explicit consent appears to be the only exception allowing for such processing for such B2C commercial purposes. It is important to note that the classification of emotion insights as personal or sensitive personal data will therefore determine the availability of contract as an exception when Article 22 GDPR is applicable. Consequently, it is clear that there are heightened responsibilities for the controller when the personal data fall within Article 9(1) GDPR. The key takeaway from the above therefore, is that (explicit) consent plays a key role rendering the detection but also the any potential re-purposing of emotion insights lawful.

## CONCLUSION

**[243]** BOILING DOWN TO (EXPLICIT) CONSENT? – The aim of this Chapter was to explore the definition of personal data in the GDPR. As described in Chapter 3, the Regulation arguably offers consumers the necessary tools to safeguard their autonomy through the *ex ante* negation of undesired *ex post* emotion monetisation effects. This Chapter has highlighted however, that the application of the GDPR to emotion monetisation presents complications and uncertainties. Indeed, although the 'law of everything' tag attributed to data protection by

[763] Indeed, to fulfil the requirements, the Working Party gives a series of examples (e.g. such as a two-tier verification mechanisms) which in themselves illustrate the difference between 'regular' and explicit consent and the correlation with the informed and unambiguous components. ibid 19.

Purtova is disputed, this does not remove the value of the underlying premise that the GDPR cannot be the solution to all problems related to the delivery of information society services. Furthermore, even when personal data are clearly processed there are challenges associated with deciphering whether these data fall within the prohibition against the processing of sensitive personal data. Such considerations are key in determining the burden on controllers and hence, the level of protection afforded to the data subject. Practically speaking, this seems to boil down to the difference between consent and explicit consent as the above analysis revealed that to detect emotions the consent or the explicit consent seems to be the only available condition for lawful processing or exception to the prohibition on the processing of sensitive personal data available respectively.

**[244]** PROTECTING CONSENT – Although there are important considerations in terms of the potential separation between the consent required to access or store information on the terminal equipment of a user and the later processing of this information for advertising purposes (i.e. a potential separation between emotion detection and emotion monetisation), it seems that a conventional understanding would mandate the consent of the data subject. Moreover, where sensitive personal data are processed the explicit consent of the data subject will quite clearly be required. But what does this mean in the context of emotion monetisation given the increasing alignment of the consumer protection and data protection policy agendas? Indeed, as will be described in the following Chapter, there has been an increasing trend both in policy-making and enforcement to apply contractual protections to the consumers decision to consent to the processing of personal data. In this vein, one must wonder what the overlaps are between consent and contract in data protection and the contractual protections provided in the consumer law *acquis*.

# 5

# LAWFUL PERSONAL DATA PROCESSING AND 'AFFECTED' CITIZEN-CONSUMER RATIONALITY

## INTRODUCTION

**[245]** CONTROL AND DATA PROTECTION – The analysis in the previous Chapter revealed that the detection and monetisation of emotion may incorporate the processing of personal and/or sensitive personal data. It is arguable that finding whether the information processed to reveal emotion falls into the personal or sensitive personal data category may depend on the detection mechanism used. For instance, the use of biometric data[764] (which for emotion detection could be information such as images or data collected by a smart device e.g. heart rate etc.) may arguably result in the processing of sensitive personal data.[765] In comparison, it is questionable whether text analysis techniques or content consumption analysis deployed for emotion detection purposes would necessarily process sensitive personal data. This further reflects the point that the purposes (and thus the context) of the processing may also play a key role in determining whether sensitive personal data is indeed processed when this information does not fall within the sensitive personal data category by virtue of its very substantive nature (i.e. its 'content').[766] What is clear however, is that the purposes, means and nature of the data

[764] Defined in Article 4(14) as, 'personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data'

[765] It should be noted that there is some degree of uncertainty regarding the interpretation of the definition of biometric data in Article 4(14) GDPR but also the biometric data that are covered by the prohibition in Article 9(1) GDPR. For more see: EJ Kindt, 'Having Yes, Using No? About the New Legal Regime for Biometric Data' [2017] Computer Law & Security Review <http://linkinghub.elsevier.com/retrieve/pii/S0267364917303667> accessed 3 January 2018.

[766] For example, and as analysed above in Chapter 4, Article 4(15) GDPR defines data concerning health (which comes within the definition of sensitive personal data) as 'personal data related to the physical or mental health of a natural person, including the provision of health care services, which reveal information about his or her health status'. Therefore, emotion insights that are garnered for the purposes of advertising

used to detect a data subject's emotions will effectively determine what condition for lawful processing (Article 6(1) GDPR) or indeed, exception from the general prohibition against the processing of sensitive personal data (Article 9(2) GDPR), applies in a given context. The application of a condition or an exception is essential to the legitimisation of the processing which underlies the emotion monetisation purpose. As such, in the context of the use of emotion insights to tailor the affective impact of commercial communications, the specific circumstances are key. The analysis in Chapter 4 has concluded that the consent or in some circumstances, the explicit consent of the data subject, will, in all likelihood, be required to render the detection of emotion lawful. From a theoretical perspective therefore, the data protection and privacy framework offers a means of facilitating data subject–consumer 'control' over their personal data. Practically speaking however, there have been ongoing concerns in relation to the viability of consent to personal data processing for some time. Such concerns have been fed by legitimate concerns and behavioural insights. Indeed, there have been several examples of how privacy policies can be used to disadvantage data subjects with the inclusion of publicity stunt clauses (e.g. the requirement to surrender your first-born child[767] or to clean the city sewers[768]), to the more practical difficulties connected to the complex legalese and lengthy texts used.[769]

**[246]** PRIVACY POLICIES AND THEIR AUDIENCES – Such examples illustrate how privacy policies and data subject consent are an easy target for critics given their apparent futility in their primary function of providing data subjects with information and a choice as to how their personal data are processed. In contrast, others have defended the use of privacy policies by referring to their role in informing, not only data subjects, but also *inter alia* enforcement agencies, civil society and academia[770] and it is important to specify here that privacy policies are designed not only for individual data subjects thus illustrating the point that criticism placed against privacy policies should be nuanced. Due to these challenges to the data subject's capacity to consent there have been important developments in the GDPR and in particular in Article 7 GDPR which outlines the

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or marketing may be deemed distinct from mental health data depending on the nature of the data and the potential to link such insights with an underlying mental illness. In short, it is arguable that given the purpose is not to gain insights into the mental health status of the data subject, the personal data gathered would remain merely personal and not sensitive personal data.

[767] Leyden John, 'Consumers Agree to Give up First-Born Child for Free Wi-Fi – Survey' (30 September 2014) <https://www.theregister.co.uk/2014/09/30/free_wi_fi_survey/> accessed 17 February 2018.

[768] Alex Hern, 'Thousands Sign up to Clean Sewage Because They Didn't Read the Small Print' (*the Guardian*, 14 July 2017) <http://www.theguardian.com/technology/2017/jul/14/wifi-terms-and-conditions-thousands-sign-up-clean-sewage-did-not-read-small-print> accessed 17 February 2018.

[769] For e.g. the Norwegian consumer authority live-streamed the reading of the terms of smartphone applications see: 'Norway Stages 32-Hour App Term Reading' *BBC News* (25 May 2016) <http://www.bbc.co.uk/news/world-europe-36378215> accessed 17 February 2018.

[770] For more see: Mike Hintze, 'In Defense of the Long Privacy Statement' (2016) 76 Md. L. Rev. 1044; Mike Hintze, 'Privacy Statements' in Evan Selinger, Jules Polonetsky and Omer Tene (eds), *The Cambridge Handbook of Consumer Privacy* (Cambridge University Press 2018) <https://www.cambridge.org/core/books/cambridge-handbook-of-consumer-privacy/privacy-statements/8C4EBCD4058E32EC31A6EE87B2BDA282>.

conditions for consent. Outside the realm of data protection law however, there have also been developments in consumer protection which again aim to protect the decision-making capacity of consumers *vis-à-vis* their decision to consent to the processing of personal data. The consumer protection response can generally be categorised as an attempt to ensure the contractual autonomy of the consumer. Nevertheless, as will be described in this Chapter, such developments raise clear interpretative challenges regarding the overlaps between the protections provided in data protection and consumer protection and more specifically, the intersection between consent (Article 6(1)(a) GDPR) and contract (Article 6(1)(b) GDPR) as conditions for lawful processing and the notion of a consumer contract. The purpose of this section is to explore this intersection by (1) examining the positioning of consent and the application of contractual protections to personal data gathering before then; (2) assessing the potential *ex post* application of consumer protection safeguards to the negative effects associated with personalisation and hence, the complex intersection between the frameworks.

## 5.1 EMOTION MONETISATION, CONSENT OR CONTRACT AND THE LAWFUL PROCESSING OF PERSONAL DATA

**[247]** PERSUASIVE INTENT AND PROFILING – Personalisation undoubtedly aims to increase the persuasive intent of commercial communications by directly appealing to our profiles.[771] Although the legitimacy of such an impact has been questioned, there are important concerns regarding the impact of adding emotion. As described in Chapter 2, profiles revealing emotion insights, and indeed the ability to target individuals based on their emotional state and personalise the nature of the appeal to match, arguably adds a layer of manipulation to current advertising practices. In saying this however, it seems reasonable to conclude that GDPR will apply (see Chapter 3 and 4) thereby facilitating data subject 'control' of their personal data, and in turn (at least theoretically), providing a means of effectuating user choice *vis-à-vis* the various commercial applications of emotional AI. Indeed, although in the real world such control may often remain outside our human capacity, the data protection framework seemingly offers us such a means thus rendering the detection mechanisms subject to our individual choices and preferences. As described above, it appears that through a conventional interpretation of the data protection framework, consent (or indeed explicit consent where sensitive personal data are processed) will often be required to detect the emotions of an identified or identifiable natural person. But what does consent mean in the GDPR and how do these protections interact with the consumer protection framework? Indeed, as will be described in this section, there is an increasing overlap between these respective policy agendas in the mitigation of the negative effects associated with technological advances.

### 5.1.1 POSITIONING CONSENT AND APPLYING (PRACTICE) PROTECTIONS

[771] See: Kaptein (n 243) 176–179.

**[248]** DEFINING CONSENT – Consent is defined in Article 4(11) GDPR as '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'. Articles 4(11), 6(1)(a) and 9(2)(a) GDPR are then further specified in the conditions for consent in Article 7 GDPR as represented below in *Figure 5*.[772] Article 7 GDPR is a key innovation of the Regulation.

| ARTICLE 7 GDPR CONDITIONS FOR CONSENT | |
|---|---|
| **ARTICLE 7(1)** | Where processing is based on consent, the controller shall be able to demonstrate that the data subject has consented to processing of his or her personal data. |
| **ARTICLE 7(2)** | If the data subject's consent is given in the context of a written declaration which also concerns other matters, the request for consent shall be presented in a manner which is clearly distinguishable from the other matters, in an intelligible and easily accessible form, using clear and plain language. Any part of such a declaration which constitutes an infringement of this Regulation shall not be binding. |
| **ARTICLE 7(3)** | The data subject shall have the right to withdraw his or her consent at any time. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal. Prior to giving consent, the data subject shall be informed thereof. It shall be as easy to withdraw as to give consent. |
| **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. |

*Figure 5 Conditions for consent*

This provision aims to further specify the need to respect each of conditional elements contained in the definition of consent. Article 7 GDPR appears to establish a burden of care on controllers regarding their responsibility to ensure that data subjects have been informed and that they have understood the provided information. The controller is also required to be able to demonstrate consent (Article 7(1) GDPR) keeping in mind that, in assessing the 'freely given' definitional condition, rendering access to the service conditional on consent may invalidate the reliance on consent (Article 7(4) GDPR). In short, consent is required to be presented in a manner which is clearly distinguishable from other matters if given in the context of a written declaration (Article 7(2) GDPR) and represent a meaningful choice as evidenced by the ability to withdraw consent (see Article 7(3) GDPR).

**[249]** CONSENT AND BEHAVIOURAL ADJUSTMENTS – Consent in the GDPR is thus tailored to incorporate the lessons learned from a behavioural analysis of the application of consent under the old regime (i.e. the Data Protection Directive 95/46/EC) *vis-à-vis* the inadequacies of the past protections and is designed to empower data subjects and counteract the questioning of data subjects' capacity to act in their own best interest.[773]

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[772] For a discussion of each of these see: Article 29 Working Party, 'Guidelines on Consent under Regulation 2016/679' (n 760).

[773] See here: Damian Clifford, Inge Graef and Peggy Valcke, 'Pre-Formulated Declarations of Data Subject Consent – Citizen-Consumer Empowerment and the Alignment of Data, Consumer and Competition Law Protections' [2019] Forthcoming German Law Journal. For an analysis posing a similar question see: I van

These concerns have been repeatedly raised in behavioural science research regarding the bounded rationality and cognitive biases of data subjects and their incapacity to act in their own best interests which call into question the reliance on the rationality of individual decision making.[774] Given the asymmetric data subject-controller relationship the effectiveness of the data protection framework has been repeatedly questioned as asymmetry diminishes the legitimacy of user participation, presents barriers to finding businesses accountable and also clearly impacts the data subject's bargaining power.[775] Due to issues stemming from this asymmetry (such as for example social lock-in effects), Mantelero has noted that 'the self-determination of the single individual is inadequate and insufficient to create an effective and conscious market activity concerning personal data.'[776] This illustrates Koops' point that in a practical sense data subject involvement has limited effect due to their ignorance *vis-à-vis* the extent of data gathering and processing operations.[777]

**[250]** BOUNDED RATIONALITY AND PERSONAL DATA DECISION-MAKING – Indeed, bounded data subject rationality and the biases inherent in individual decision-making undermine the notion of data subject participation and empowerment and have revealed issues such as information overload (i.e. the failure of privacy policies to inform data subjects due to sheer volume of text often presented in complex legalese), the multiplicity of requests for consent and the 'stickiness' of defaults.[778] Privacy policies are the norm due to practical realities. Controllers are required to inform data subjects and the scale of data processing operations necessitates the pre-formulation of detailed information to comply with the transparency requirements mandated in the data protection framework. Given the detailed information to be communicated to the data subject, standard form texts are a necessity. However, as mentioned in the introduction there have been several examples of how such policies can be used to disadvantage data subjects. Interestingly, regarding the operation of consent as a condition for lawful processing in the GDPR, there are specific references to 'pre-formulated declarations of data subject consent'. The precise relationship between such pre-formulated declarations and privacy policies however, remains unclear. That being said, in the context of emotion monetisation, given the significant role of consent as a condition for lawful processing, it is important to consider the protections afforded to pre-formulated declarations and how this may have an impact on the legal limits of emotion monetisation.

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Ooijen and Helena U Vrabec, 'Does the GDPR Enhance Consumers' Control over Personal Data? An Analysis from a Behavioural Perspective' (2019) 42 Journal of Consumer Policy 91.

[774] Cass R Sunstein and Richard H Thaler, 'Libertarian Paternalism Is Not an Oxymoron' [2003] The University of Chicago Law Review 1159; Jolls, Sunstein and Thaler (n 211); Cass R Sunstein, 'Fifty Shades of Manipulation' [2016] J. Marketing Behav. 213 213.

[775] Lynskey (n 505).

[776] Alessandro Mantelero, 'Competitive Value of Data Protection: The Impact of Data Protection Regulation on Online Behaviour' (2013) 3 International Data Privacy Law 229.

[777] Koops (n 280).

[778] Lauren E Willis, 'Why Not Privacy by Default?' (2014) 29 Berkeley Technology Law Journal 61.

### *A. 'UNFAIRNESS' AND PRE-FORMULATED DECLARATIONS OF DATA SUBJECT CONSENT*

**[251]** PRE-FORMULATED DECLARATIONS – In the Regulation's binding provisions, the potential for pre-formulated declarations of consent is not mentioned explicitly. Even though Article 7(2) GDPR refers to the separation of data subject consent 'given in the context of a written declaration' from the 'other matters' which may be included in such a declaration (see *Figure 5* above), this provision remains neutral in terms of its origin and nature. Instead, Article 7(2) GDPR stipulates more generally that such a written declaration must be presented 'in an intelligible and easily accessible form, using clear and plain language'. Such an approach is also reflected in Article 12(1) GDPR which states that,

> '[t]he controller shall take appropriate measures to provide any information referred to in Articles 13 and 14 and any communication under Articles 15 to 22 and 34 relating to processing to the data subject in a **concise, transparent, intelligible and easily accessible form, using clear and plain language**, in particular for any information addressed specifically to a child. **The information shall be provided in writing, or by other means, including, where appropriate, by electronic means.** When requested by the data subject, the information may be provided orally, provided that the identity of the data subject is proven by other means.'[779] [Emphasis added]

Hence, Article 12(1) GDPR also has a wider scope of application than merely pre-formulated declarations, as indicated by the words 'or by other means'. However, such mechanisms are certainly included within its scope. Although the GDPR's binding provisions do not delineate between boilerplate and individually negotiated declarations, Recital 42 GDPR deals with the fairness of pre-formulated declarations with reference to the Unfair Contract Terms Directive (Directive 93/13 hereinafter the UCT Directive),[780] which bans the use of unfair terms in consumer contracts thereby aiming to facilitate a common legal regime fostering the sale of goods and services in the internal market, in the application of informed data subject consent as a condition for lawful processing.

**[252]** UNFAIR TERMS AND CONSENT – As will be described in further detail below, unfairness under the UCT Directive consists of a 'substantive' element (including 'good faith' and 'significant imbalance' components to be assessed at the national level) and a 'formal' (transparency and information provision) as provided for in Articles 3-5 of the Directive.[781] As noted by Donnelly and White, '[a]lthough the first of these mechanisms has inevitably been the more high profile, it is arguable that the primary weighting of Directive 93/13 is toward the latter mechanism.'[782] This observation reflects the strongly

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[779] The information requirements are further specified in Article 13 GDPR ('*Information to be provided where personal data are collected from the data subject*') and Article 14 GDPR ('*Information to be provided where personal data have not been obtained from the data subject*') see Section 5.2.
[780] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 29).
[781] Hans-W Micklitz, 'Unfair Terms in Consumer Contracts' in Norbert Reich and others (eds), *European Consumer Law* (2nd edition, Intersentia 2014) 142.
[782] Donnelly and White (n 104) 239.

held national contract law traditions and also the traditional objections to regulatory inference with the notion of freedom of contract.[783] This provision states that,

> '[w]here 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** 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.'

This cross-reference to the UCT Directive (i.e. Directive 93/13/EEC) therefore, presents an important overlap between the GDPR and the consumer protection policy agenda in the operation of data subject consent. Similar to the GDPR, the UCT Directive works from the assumption that there is an imbalance in bargaining power between 'suppliers' and 'consumers' and in essence, provides that unfair terms shall not be binding for the consumer.[784]

**[253]** COMPARING PROTECTIONS – It is interesting to note that Recital 42 GDPR appears to differentiate between the requirement for pre-formulated declarations to 'be provided in an intelligible and easily accessible form, using clear and plain language' and the obligation that such declarations 'should not contain unfair terms'. The specification in Recital 42 GDPR that pre-formulated declarations should be provided 'in an intelligible and easily accessible form, using clear and plain language' repeats the terminology used in Article 7(2) GDPR and Article 12 GDPR (with some minor differences, see above), thereby reflecting the operation of the transparency principle. Interestingly however, the terminology also appears to reflect the 'formal' unfairness element contained in the UCT Directive with Article 5 UCT Directive providing that '[i]n the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language.' There is therefore a clear overlap in terminology

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[783] ibid. referring to PS Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press 1985) <http://www.oxfordscholarship.com/10.1093/acprof:oso/9780198255277.001.0001/acprof-9780198255277>.

[784] See *Joined cases C-240/98 to C-244/98, Océano Grupo Editorial SA v Roció Murciano Quintero (C-240/98) and Salvat Editores SA v José M Sánchez Alcón Prades (C-241/98), José Luis Copano Badillo (C-242/98), Mohammed Berroane (C-243/98) and Emilio Viñas Feliú (C-244/98), ECLI:EU:C:2000:346* [27]. where the Court noted that 'the system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms.'

here given the repetition of both the 'plain' and 'intelligible' qualifiers. In its assessment of Article 5 UCT Directive in the *Kásler* case,[785] the Court of Justice found that the meaning of 'plain and intelligible' is not limited to grammatical intelligibility but instead should be understood in a broad manner to allow the consumer, 'to evaluate, on the basis of clear, intelligible criteria, the economic consequences for which derive from it'.[786] Plainness hence, appears to relate more to the legal effect of a term, including that the effect of such a term should not put the seller or supplier in an advantageous position, whereas intelligibility seems to incorporate a linguistic element in that the seller or supplier is required to ensure the intelligibility of a term for the consumer acting with reasonable care.[787]

**[254]** FURTHER SPECIFICATIONS AND THE GDPR – Aside from the overlaps in terminology however, there are also some interesting points of contrast with the provisions in the GDPR which should be highlighted. First, in contrast to Recital 42 GDPR and Articles 7(2) and 12 GDPR, Article 5 UCT Directive does not mention the 'easily accessible form' criterion and, although the case law interpretation appears to incorporate the requirement for 'clear criteria', this is inferred from the provision rather than being expressly included, in contrast to the GDPR provisions. Thus, there seems to be a further specification of 'plain and intelligible' in the GDPR. This is further highlighted in the specific provisions relating to the provision of transparent information contained in Article 12 GDPR as referred to above which also inserts 'concise' and 'transparent' as specific requirements, and this is indicative of the key role played by the transparency principle in the GDPR. Moreover, in contrast to the UCT Directive it also shows 'the cradle to the grave' nature of the GDPR as the transparency principle clearly applies in both an *ex ante* (in terms of *inter alia* purpose limitation and informed consent) and *ex post* sense regarding the application of data subject rights. Second, although less obvious than the insertion of additional terms, it is also important to highlight the role played by the accountability principle in the GDPR and thus the burden on controllers to ensure that the data subject is informed. In this regard, one can refer for instance to the requirement in Article 7(1) GDPR which stipulates that controllers must be able to demonstrate that the data subject has consented thereby seemingly creating a burden of proof for controllers *vis-à-vis* the validity of data subject consent.[788]

**[255]** ACCOUNTABILITY AND SIGNIFICANT IMBALANCE – More generally speaking, this is indicative of the importance attached to the accountability principle in the GDPR and also arguably manifests itself in the operation of the fairness principle in terms of a burden of care on controllers to take the interests of data subjects into account, in line with the fair balancing exercises inherent to the operation of the Regulation.[789] The heightened requirements in the GDPR are also manifested by the reference to the potential use of

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[785] *Case C-26/13, Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt, ECLI:EU:C:2014:282*.
[786] ibid. para. 75.
[787] Micklitz, 'Unfair Terms in Consumer Contracts' (n 781) 142–145.
[788] Clifford and Ausloos (n 537).
[789] ibid.

icons in the operation of the information provision requirements (See Article 12(7) GDPR and Recital 60 GDPR) which acts as a further practical illustration of the GDPR's greater specification of the intelligibility criterion contained in the UCT Directive. As mentioned above in the introduction to this sub-section, Recital 42 GDPR also seemingly inserts a specific reference to the substantive unfairness element in the UCT Directive *via* the requirement for pre-formulated declaration to 'not contain unfair terms'. To reiterate, the substantive element contained in Article 3(1) UCT Directive states that 'if, contrary to the requirement of **good faith**, it causes a **significant imbalance** in the parties' rights and obligations arising under the contract, to the detriment of the consumer.' Hence, 'good faith' and 'significant imbalance' are the two key criteria in the assessment of the substantive unfairness of terms. There has been intense academic debate as to the precise meaning of these notions given the potential openness of the tests[790] (i.e. it is hard to imagine a situation where there is no imbalance between a consumer and a seller or supplier) and the fact that the notion of good faith was alien to the common law tradition.[791] In recent years, preliminary reference rulings from the Court of Justice have provided a greater degree of clarity in terms of the meaning of the 'good faith and 'significant imbalance' criteria. For instance, in the *Aziz* case the Court of Justice found that when assessing whether there is a 'significant imbalance' the national court should consider the rules that would apply in the absence of a contractual agreement.[792]

**[256]** GOOD FAITH AND SIGNIFICANT IMBALANCE – In determining when such an imbalance arises contrary to the 'good faith' requirement the Court of Justice found that Recital 16 UCT Directive[793] should be taken into account and therefore, 'whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations' taking the particular circumstances of the case into account.[794] As such, in addition to the requirement for fair and equitable treatment, Recital 16 UCT Directive indicates that the assessment of good faith also obliges the consideration of the following,

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[790] Peter Rott, 'Unfair Contract Terms' in Christian Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar Publishing 2016) 299 <http://www.elgaronline.com/view/9781782547365.xml> accessed 20 December 2017.

[791] Donnelly and White (n 104) 248. Stephen Weatherill, *EU Consumer Law and Policy* (Edward Elgar 2005) 122.

[792] *Case C-415/11, Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa), ECLI:EU:C:2013:164* (n 595).

[793] Recital 16 UCT Directive states that 'Whereas the assessment, according to the general criteria chosen, of the unfair character of terms, in particular in sale or supply activities of a public nature providing collective services which take account of solidarity among users, must be supplemented by a means of making an overall evaluation of the different interests involved; whereas this constitutes the requirement of good faith; whereas, in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account'.

[794] *Case C-415/11, Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa), ECLI:EU:C:2013:164* (n 595) para 69.

- The bargaining power (including specific consumer vulnerabilities[795]);
- Whether the consumer was induced to accept the term; and,
- Whether the good and services were being sold or supplied by the 'special order' of the consumer.

The Court of Justice has also subsequently found that a 'significant imbalance' relates to the 'sufficiently serious impairment of the legal situation in which that consumer, as a party to the contract, is placed, *vis-à-vis* a restriction of rights or a constraint on the exercise of such rights.'[796] In this regard, one can also refer to Article 4(1) UCT Directive which highlights the importance of the individual circumstances of each case and stipulates that,

> '[…] the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent'.

With this in mind, one should note that as the Court of Justice does not normally have access to the full facts of the case[797] (thereby reflecting the division of competence), the national Courts play an important role as the evaluators of the unfairness of a specific term in the given circumstances. In this vein, it is also significant to highlight the role played by the annexed grey-list of clauses that may be unfair contained in Annex 1 UCT Directive in that, although the Court of Justice has found on several occasions that the adoption of the list is dependent on the Member States and that there is no presumption of unfairness unless otherwise provided by Member State law, it remains a key element through which the national court can base its assessment.[798] It is therefore important to specify that one is required to refer to the diverse national frameworks for a true interpretation of the substantive element but also the facts of the particular case as this assessment is context dependent.

**[257]** UNFAIRNESS AND 'PRICE' – Importantly, this potential for disparity is furthered by Article 4(2) UCT Directive which stipulates that an '[a]ssessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies [*sic*] in exchange, on the other, in so far as these terms are in plain intelligible language.' This provision thereby exempts 'core terms' from the application of the substantive fairness element unless otherwise provided by national law (i.e. the UCT Directive is a minimum harmonisation instrument) and therefore importantly excludes the control of the unfairness of the 'price'. As the rules on contract law formation remain within the remit of national the term 'price' here must be undertood broadly in line for

[795] Peter Rott (n 790) 301.
[796] *Case C-226/12, Constructora Principado SA v José Ignacio Menéndez Álvárez, ECLI:EU:C:2014:10*.
[797] Peter Rott (n 790) 300.
[798] *Case C-472/10, Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt, ECLI:EU:C:2012:242*.

instance, with the Common law doctrine of consideration.[799] Aside from divergences in application allowed for by the minimum harmonisation UCT Directive, which would seemingly run contrary to the maximum harmonisation approach espoused in the GDPR, it is important to note that the Article 4(2) UCT Directive effectively restricts the application of the substantive element to the more peripheral contractual aspects provided such terms respect the formal element and are thus provided in 'plain intelligible language'. But what are the effects of this limitation on the scope of the application of the substantive element when the UCT Directive is applied to pre-formulated declarations of data subject consent? And are personal data to be considered the 'price'? These questions will be analysed in the following sub-section.

### *B. 'FREELY GIVEN' CONSENT AND THE MONETISING OF EMOTION INSIGHTS*

**[258]** MEANINGFUL CONSENT – Article 7 GDPR can be positioned as a legislative response to the ongoing concerns and as a means of bolstering consent to render it meaningful. The problems associated with the implementation of consent are well document and in short, the crux of the current debate relates to the 'conditionality' of consent as a condition for lawful processing in Article 6(1)(a) GDPR. More specifically, through the reforms introduced by Article 7 GDPR there is an ongoing debate as to whether access to a service can be made conditional on data subject consent. The discussion hangs on the interpretation of Article 7(4) GDPR. By interpreting Article 7(4) GDPR as delegitimising rendering access to services conditional on consent is clearly controversial as consumers are often confronted with take-it-or-leave-it offers. The Article 29 Working Party in their guidance on consent has adopted a strict interpretation of Article 7(4) GDPR given that in an environment dominated by market effects, user lock-in and market asymmetries, take-it-or-leave-it offers do not facilitate any real choice for individuals but instead require them to accept the terms and conditions and privacy policy (see more below).[800] These changes and the Article 29 Working Party guidance have led to intense debate regarding the availability of contract (Article 6(1)(b) GDPR) and legitimate interest (Article 6(1)(f) GDPR) as conditions for lawful processing. Again, to reiterate, this provision provides a condition legitimising processing 'necessary for the performance of a contract to which the data subject is party or to take steps at the request of the data subject prior to entering into a contract'.

**[259]** NECESSARY PROCESSING – However, the Article 29 Working Party (and the European Data Protection Board since the entry into force of the GDPR) has repeatedly interpreted what is meant by processing necessary for the provision of a service (i.e. performance of a contract in Article 6(1)(b) GDPR or for the legitimate interest pursued by the controller

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[799] i.e. although the doctrine of consideration has been repeatedly criticised in academic literature it remains one of the four key elements of a valid contract in common law contract formation (i.e. offer, acceptance, consideration and intention). The Court of Justice seemingly adopts a broad interpretation of the notion of price see: *Case C-348/14, Maria Bucura v SC Bancpost SA, ECLI:EU:C:2015:447*; *Case C-74/15, Dumitru Tarcău and Ileana Tarcău v Banca Comercială Intesa Sanpaolo România SA and Others, ECLI:EU:C:2015:772*.
[800] Clifford, Graef and Valcke (n 773).

in Article 6(1)(f) GDPR) strictly and stated that large scale personal data processing for commercial purposes (i.e. online behavioural advertising) would not satisfy this necessity test.[801] Such an interpretation aims to delineate consent and contract and limit the availability of legitimate interest as the balancing condition by stating that in some circumstances there will be a clear imbalance.[802] The understanding adopted in this thesis follows this interpretation and hence, the approach taken by the Court of Justice.[803] With this distinction in mind, the activist Max Schrems has launched complaints against *Google, Instagram, WhatsApp* and *Facebook* regarding these companies' 'consent bundling' practices and 'take-it-or-leave-it' requests for consent.[804] There is clearly a lot going on in terms of the industry adjustment to changes brought about by the GDPR. However, the changes and controversy are not restricted to the reactions to the Regulation. In particular, the non-binding Article 29 Working Party guidelines appear to be in contradiction with the very essence of a key component of the ongoing reforms of the consumer protection *acquis* and thus, the recognition of the contractual protections where personal data is provided and digital content and/or services are supplied in the compromise version of the Digital Content Directive adopted by the legislator[805] and the cross-references in the 'new deal for consumers'.[806] As will now be described, these developments, at least at first sight, appear to inherently challenge the requirement in Article 7(4) GDPR that access to a service should not be made conditional upon consent

[801] 'European Data Protection Board, Guidelines 2/2019 on the Processing of Personal Data under Article 6(1)(b) GDPR in the Context of the Provision of Online Services to Data Subjects (Version for Public Consultation) Adopted on 9 April 2019'; Article 29 Working Party, 'Opinion 06/2014 on the Notion of Legitimate Interests of the Data Controller under Article 7 of Directive 95/46/EC' (European Commission 2014) Opinion WP 217 <http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp217_en.pdf> accessed 10 September 2014; Article 29 Working Party, 'Opinion on Online Behavioural Advertising' (n 654).

[802] See here: 'European Data Protection Board, Guidelines 2/2019 on the Processing of Personal Data under Article 6(1)(b) GDPR in the Context of the Provision of Online Services to Data Subjects (Version for Public Consultation) Adopted on 9 April 2019' (n 801).

[803] See: *Huber v Germany* [2008] Court of Justice of the EU C-524/06, Curia [52]. In the *Huber* case the Court found that 'necessity' in Article 6(1) GDPR (then Article 7 Directive 95/46/EC) 'is a concept which has its own independent meaning in Community law and must be interpreted in a manner which fully reflects the objective of that directive'.A point which the EDPS also appears to have made in their opinion on the application of necessity, 'necessity of processing operations in EU secondary law and necessity of the limitations on the exercise of fundamental rights refer to different concepts.' See: European Data Protection Supervisor, 'Developing a "Toolkit" for Assessing the Necessity of Measures That Interfere with Fundamental Rights.' 4 <https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Papers/16-06-16_Necessity_paper_for_consultation_EN.pdf> accessed 5 February 2017.

[804] Rebecca Hill, 'Max Schrems Is Back: Facebook, Google Hit with GDPR Complaint' <https://www.theregister.co.uk/2018/05/25/schrems_is_back_facebook_google_get_served_gdpr_complaint/> accessed 20 June 2018; Derek Scally, 'Max Schrems Files First Cases under GDPR against Facebook and Google' (*The Irish Times*) <https://www.irishtimes.com/business/technology/max-schrems-files-first-cases-under-gdpr-against-facebook-and-google-1.3508177> accessed 20 June 2018.

[805] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services OJ L 136, 1–27.

[806] 'European Commission - Press Release - A New Deal for Consumers: Commission Strengthens EU Consumer Rights and Enforcement Brussels, 11 April 2018' <http://europa.eu/rapid/press-release_IP-18-3041_en.htm> accessed 20 June 2018.

and also raise difficulties in relation to the overlap between consent to personal data processing and if and how such consent can give rise to a consumer contract.[807]

### *i. Putting a 'price' on personal data and 'conditional' access*

**[260]** PERSONAL DATA AND COUNTER-PERFORMANCE – According to Article 1 Digital Content Directive (i.e. compromise adopted by the legislator, hereinafter Digital Content Directive (Compromise)), the instrument aims to 'lay down common rules on certain requirements concerning contracts between traders and consumers for the supply of digital content or a digital service'. More specifically, this provision goes on to note that the Directive aims in particular to establish rules on (1) conformity of digital content/service with the contract; (2) remedies in case of the lack of such conformity or a failure to supply and the modalities for the exercise of those remedies and; (3) modification and termination of such contracts.' Article 3(1) of the Commission draft of the Digital Content Directive stated that the proposal,

> '[…] shall apply to any contract where the supplier supplies digital content to the consumer or undertakes to do so and, **in exchange**, a price is to be paid or the consumer **actively provides counter-performance** other than money in the form of **personal data or any other data**.' [Emphasis added]

Both the Parliament and Council drafts deleted the references to the term counter-performance in the draft binding provisions of their drafts potentially given the kick-back from the privacy and data protection community.[808] In particular, in a critical report on the proposal, the EDPS outlined three specific concerns associated with the use of the term. First, the proposal failed to define counter-performance and the use of one simple catch-all term appears to oversimplify a variety of business models and data usages. Second, linking the active provision of data with the paying of a monetary price is misleading as consumers are often unaware of what they are giving away when it comes to data and this is not helped by the use of 'vague and elastic terms' to describe the use of the collected data. And finally, third data and money are clearly not identical as providing personal data does not deprive an individual of using this same data repeatedly and this complicates matters when it comes to restitution.[809]

**[261]** UNDERTAKING TO PROVIDE – The adopted text deletes all references to the term counter-performance. However, the Directive retains the references to the provision of personal data. Article 3(1) Digital Content Directive (Compromise) provides that,

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[807] This is fundamental question that needs to be answered however it is very challenging and in its recent opinion the EDPB simply side-stepped it by saying that such matters are out of scope. See: 'European Data Protection Board, Guidelines 2/2019 on the Processing of Personal Data under Article 6(1)(b) GDPR in the Context of the Provision of Online Services to Data Subjects (Version for Public Consultation) Adopted on 9 April 2019' (n 801) 4.

[808] See in particular: European Data Protection Supervisor, 'Opinion on the Proposal for a Directive on Certain Aspects Concerning Contracts for the Supply of Digital Content' (EDPS 2017) Opinion 4/2017 <https://edps.europa.eu/sites/edp/files/publication/17-03-14_opinion_digital_content_en_0.pdf> accessed 11 April 2017.

[809] ibid.

'[t]his Directive shall apply to any contract where the trader supplies or undertakes to supply digital content or a digital service to the consumer and the consumer pays or undertakes to pay a price.

This Directive shall also apply where the trader supplies or undertakes to supply digital content or a digital service to the consumer and **the consumer <u>provides</u> or <u>undertakes to provide</u> personal data to the trader**, **<u>except where</u> the personal data** provided by the consumer **is exclusively processed by the trader for supplying the digital content or digital service** in accordance with this Directive **<u>or</u>** for the trader **to comply with legal requirements** to which the trader is subject, **and the trader does not process this data for <u>any other purpose</u>**.' [Emphasis added]

There are some subtle and arguably significant differences between the compromise version and the draft Article 3(1) in the Commission proposal outlined above. As such, the proposed Directive aims *inter alia* to extend the protections provided to consumers by affording concrete consumer rights and remedies where personal data is provided, and access is granted to a digital service or digital content. This is significant as currently at the EU level an infringement of the data protection framework may mean little in terms of consequences for a service contract.[810] However, despite these good intentions the proposal raises several difficulties from a data protection and privacy perspective which can be largely placed within two categories (1) the positioning of personal data as a 'price' (i.e. construed broadly to mean consideration) in a consumer contract and; (2) the delineation of the types of personal data within the Digital Content Directive's scope of protection. These will now be explored.

**[262]** NECESSARY PROCESSING AND THE CONSENT TRIGGER – The adopted Compromise creates a clear delineation between contracts supplied for a price versus those created where the consumer provides personal data. There is some very careful wording here in comparison to the Commission proposal which simply recognised that personal data could be provided 'in exchange' for access to the digital content or service. This modification appears to incorporate the concerns associated with recognising personal data as an economic asset to be bartered and traded. Here reference can also be made to Recital 13 Digital Content Directive (Compromise) which states *inter alia* that,

'[w]hile fully recognising that the protection of personal data is a fundamental right **and therefore personal data cannot be considered as a commodity**, this Directive should ensure that consumers are in the context of such business models entitled to contractual remedies.'

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[810] See: Natali Helberger, Frederik J Zuiderveen Zuiderveen Borgesius and Agustin Reyna, 'The Perfect Match? A Closer Look at the Relationship between EU Consumer Law and Data Protection Law' (2017) 54 Common Market Law Review 1427, 1440.Indeed as noted by Helberger et al., '[a clear] benefit of extending the scope of consumer law to data-related issues lies in giving consumers concrete rights against sellers if information obligations are violated. If a data controller breaches data protection law's information obligations, the processing may become unlawful. That unlawfulness, however, says little about the consequences for a possible contractual relationship between seller and consumer.'

In simple terms, therefore although 'personal data cannot be considered as a commodity', the provision of personal data can still give rise to a contract. Indeed, it is the consent of the 'consumer-data subject' to the processing of personal that will – provided the other requirements contained in the Digital Content Directive (Compromise) are met – give rise to a consumer contract. This is manifested in two ways. First, the use of the phrasing 'the consumer provides or undertakes to provide personal data' which seemingly excludes processing based on Article 6(1)(f) GDPR (legitimate interest) from triggering a contract and second, the apparent exclusion of other 'necessary' processing. More specifically, as alluded to in Article 3(1) Digital Content Directive (Compromise) and Article 3(4) of the Commission proposal, the Directive does not apply where the processing of personal data is exclusively required to supply the digital content or service or to comply with a legal obligation provided 'the trader does not process this data for any other purpose.' This specification therefore, excludes processing based on Article 6(1)(b) GDPR and Article 6(1)(c) GDPR from the scope of protection.

**[263]** FREELY GIVEN CONSENT – Therefore, these provisions paint a complex interlinking with the rules in the GDPR. Arguably, the original concerns remain since the final compromise text *de facto* appears to retain such a commodity-like role for personal data. However, the removal of the implicit references to the recognition of personal data as equivalent to a price and the express inclusion of provisions to the contrary in the final compromise arguably paints a more complex picture. Essentially, this debate circles around the conditionality of consent and the interpretation of Article 7(4) GDPR (as outlined above) as further specified in Recital 43 GDPR (see *Figure 6* below) and its interaction with the Digital Content Directive.

| 'FREELY' GIVEN CONSENT – CONDITIONAL ACCESS | |
|---|---|
| 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. |
| RECITAL 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.** |

*Figure 6 Freely given consent*

As alluded to above, the interpretation of the 'freely given' element in the definition of consent is a matter that is rife with controversy (i.e. the interpretation of Article 7(4) GDPR and Recital 43 GDPR). Interestingly however, in addition to the deletions in the Digital Content Directive (Compromise) as compared to the initial Commission proposal, the Directive alludes specifically to the requirement to defer to the GDPR in the event of interpretative overlaps between the instruments. More specifically, Article 3(8) Digital Content Directive (Compromise) stipulates that, '[i]n particular, this Directive is without prejudice to the provisions of Regulation (EU) 2016/679 and Directive 2002/58/EC. In

case of conflict between the provisions of this Directive and Union law on the protection of personal data, the latter prevails.'[811]

**[264]** ACCESS TO A SERVICE CONDITIONAL UPON CONSENT – As such, there is a clear deference to the rules contained in the GDPR and this arguably alleviates the concerns previously associated with the Commission proposal. In simple terms, if one must refer to consent as defined in the Regulation, then Article 7(4) GDPR and Recital 43 GDPR are to the fore. This is specifically indicated in Recital 22(a) Digital Content Directive (Compromise) which provides *inter alia* that,

> '[t]his Directive should not regulate the conditions for the lawful processing of personal data, as this question is regulated especially by Regulation (EU) 2016/679, in particular its Article 6(1). As a consequence, any processing of personal data in connection with a contract coming within the scope of this Directive is lawful only if it is in conformity with the provisions of Regulation (EU) 2016/679 relating to the legal grounds for the processing of personal data. When processing of personal data is based on consent, in particular point (a) of Article 6(1) of Regulation (EU) 2016/679, the specific provisions of Regulation (EU) 2016/679 including the conditions whether consent is freely given apply. This Directive should not regulate the validity of the consent given.'

Hence, if in line with the Article 29 Working Party guidance and the EDPS opinion, Article 7(4) GDPR is to be interpreted strictly, rendering access to a service conditional upon consent will raise serious concerns in relation to the 'freely given' stipulation in the definition of consent. Such an interpretation however, is debated and here reference can be made to the working paper on consent issued by the IAB GDPR Implementation Working Group. More specifically, with reference to the GDPR and the ePrivacy Directive the IAB guidance argues that the Regulation does not establish a prohibition on rendering access to a service conditional upon consent. In support of this the IAB refers to Recital 25 ePrivacy Directive which states that '[a]ccess to specific website content may still be made conditional on the well-informed acceptance of a cookie or similar device, if it is used for a legitimate purpose.' Aside from this industry interpretation, reference can also be made to Advocate General Szpunar in the Planet 49 case where he notes that '[…] from the terms 'utmost account shall be taken of', the prohibition on bundling is not absolute in nature.'[812]

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[811] See Recital 22 here also which states that, 'The pursuit of activities falling within the scope of this Directive may involve the processing of personal data. Union law provides a comprehensive framework on the protection of personal data. In particular, this Directive is without prejudice to the provisions of Regulation (EU) 2016/6791 and Directive 2002/58/EC2. That framework applies to any personal data processed in connection with the contracts covered by this Directive. Consequently, personal data should only be collected or otherwise processed in accordance with Regulation (EU) 2016/679 and Directive 2002/58/EC. In case of conflict between this Directive and Union law on the protection of personal data, the latter prevails.'

[812] *Opinion of Advocate General Szpunar delivered on 21 March 2019 in Case C-673/17 Planet49 GmbH v Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV, ECLI:EU:C:2019:246* [98].

**[265]** COOKIE WALLS AND CONSENT – There is however, clearly a large degree of uncertainty here as to how the provisions are to be interpreted. This is not helped by the fact that it is a non-binding Recital in the GDPR (i.e. Recital 43 GDPR) which provides the clearest illustration of a prohibition, as Article 7(4) GDPR remains more ambiguous, and that it is also a non-binding Recital in the *lex specialis* ePrivacy Directive which indicates the opposite (Recital 25 ePrivacy Directive). In this regard one can also refer to the ongoing reform of the ePrivacy framework and the discussion regarding the legality of so-called 'cookie walls' (i.e. landing pages giving users a binary option to consent to the use of cookies or to just leave the site without access to the content and or services).[813] Indeed, there are ongoing debates as to whether there should be a ban on cookies walls as these effectively render access to the service conditional upon consent with the EDPS and others criticising the failure to include a specific ban on the use of cookie walls.[814] Following this criticism, the European Parliament draft[815]of the proposed ePrivacy Regulation introduced a ban on the use of cookie walls (see the Parliament draft Article 8(1a) ePrivacy Regulation). However, the Council's consolidated approach, released on the 5th of December 2017, did not follow this example[816] and therefore, it remains largely uncertain how this will be resolved. In this regard, it is important to note that the reform of the ePrivacy Directive (i.e. and the proposed ePrivacy Regulation) as a *lex specialis* framework could essentially decide the conditional consent debate and provide the practical interpretation for the GDPR. To clarify, given that cookies are considered personal data and a key means through which consumers are tracked and profiled, a failure to ban cookie walls or indeed the provision of a partial ban in the *lex specialis* rules would seemingly legitimise the use of such technologies by omission or at least in certain circumstances.[817] Reference here can also

[813] See: Frederik J Zuiderveen Borgesius and others, 'Tracking Walls, Take-It-Or-Leave-It Choices, the GDPR, and the EPrivacy Regulation' (2017) 3 European Data Protection Law Review 353.

[814] European Data Protection Supervisor, 'Preliminary EDPS Opinion on the Review of the EPrivacy Directive (2002/58/EC)' (EDPS 2016) Opinion 5/2016 <https://edps.europa.eu/sites/edp/files/publication/16-07-22_opinion_eprivacy_en.pdf> accessed 11 April 2017; Article 29 Working Party, 'Opinion 01/2017 on the Proposed Regulation for the EPrivacy Regulation (2002/58/EC)' (2017) WP 247.In the proposed reforms of the ePrivacy Directive, the proposed ePrivacy Regulation (largely speaking) retains the general rule in Article 5(3) ePrivacy Directive. Article 8(1)(d) of the proposed Regulation adds an additional ground for processing in comparison to the ePrivacy Directive. More specifically, the activities referenced above in Article 8(1) shall be permitted 'if it is necessary for web audience measuring, provided that such measurement is carried out by the provider of the information society service requested by the end-user.' Accordingly, instead of providing a general consent rule with the two exemptions for 'functional cookies', the proposed Regulation includes this additional ground for 'web audience measurement'.

[815] See: 'Stronger Privacy Rules for Online Communications | News | European Parliament' (19 October 2017) <http://www.europarl.europa.eu/news/en/press-room/20171016IPR86162/stronger-privacy-rules-for-online-communications> accessed 20 February 2018.

[816] 'European Council Draft Text, Proposal for a Regulation of the European Parliament and of the Council Concerning the Respect for Private Life and the Protection of Personal Data in Electronic Communications and Repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications), Interinstitutional File: 2017/0003 (COD)' (n 707).

[817] See: Borgesius and others (n 813).

be made to national level Court decisions[818] and also pending cases before the CJEU which (will) have an important influence on the interpretation of the relevant provisions.[819]

**[266]** SEPARATING SERVICES FROM CONSENT – The above further illustrates the need for a separation between any potential service contract involving the detection of emotion (e.g. for wellbeing purposes) and the sensitive personal data processing necessary to provide that service which will be prohibited except where the data subject explicitly consents. This point adds a degree of complexity to the discussion of the blurred lines between consent and contract as conditions for lawful processing in Articles 6(1)(a) and (b) GDPR respectively in light of Article 7(4) GDPR.[820] Indeed, for the provision of a service whereby the consumer's emotions are detected for wellbeing purposes, it is clear that access to the service in question will be conditional upon the explicit consent of the data subject as it would be simply impossible to provide the service without the sensitive personal data and there is no equivalent to the contract condition provided in Article 6(1)(b) GDPR in Article 9(2) GDPR. However, it is important to clarify here that the lack of an equivalent of Article 6(1)(b) GDPR in Article 9(2) GDPR does negate the potential for the processing in question to be necessary for the provision of the service practically rather than legally speaking. Instead rather it is a matter of what legitimises such processing where sensitive personal data are processed. Indeed, as the processing would still factually be necessary for the provision of the service in question, it is permissible for the explicit consent of the data subject to be conditional in line with Article 7(4) GDPR.[821] With this in mind, it is worth re-emphasising the importance of the purpose limitation principle, as any further processing of such sensitive personal data for additional incompatible purposes (i.e. in this instance those not necessary for the provision of the service) would also require the explicit consent of the data subject.

**[267]** UTMOST ACCOUNT ALLOWS FLEXIBILITY – The difference here however, relates to the fact that if these additional purposes rendered the access to the service conditional upon the explicit consent of the data subject, 'utmost account' would need to be taken of the circumstances of the case in the assessment of the freely given stipulation. Here, one can imagine a scenario where to use an application designed to monitor emotional wellbeing for *pseudo*-healthcare purposes the data subject's access to the service's functionality would be conditional upon their consent to use of the same sensitive personal data for

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[818] For instance, here one can also refer to the recent decision of the French Conseil d'Etat which found that when interpreting the French implementation of the ePrivacy Directive that the collection of cookies for advertising purposes could not be considered 'necessary for the provision of the service'.

[819] *Opinion of Advocate General Szpunar delivered on 21 March 2019 in Case C-673/17 Planet49 GmbH v Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V., ECLI:EU:C:2019:246* (n 812).

[820] For more see: Clifford, Graef and Valcke (n 773).

[821] Interestingly, the recent EDPB guidelines on Article 6(1)(b) GDPR remain silent on the practicalities outlined above and instead merely cross-references the ealier Article 29 Working Party Guidance stating that where there one of the other exceptions in Article 9(2) GDPR does not apply explicit consent will be the only available condition. See: 'European Data Protection Board, Guidelines 2/2019 on the Processing of Personal Data under Article 6(1)(b) GDPR in the Context of the Provision of Online Services to Data Subjects (Version for Public Consultation) Adopted on 9 April 2019' (n 801) 6–7.

advertising and marketing purposes. This example also extends to situations where the original exemption from the prohibition contained in Article 9(1) GDPR utilised is not the explicit consent of the data subject. For example, if an application is installed which links to sensors on the phone but also in a smart bracelet, with the information gathered by healthcare professionals in order to monitor the data subject's mental health, it is clear that (1) this would come under the definition of personal data concerning health and the prohibition in Article 9(1) GDPR and; (2) that such processing may be exempted under Article 9(2)(h) GDPR which allows for the processing of sensitive personal data 'necessary for' medical, diagnostic and healthcare provision purposes.[822] However, in such circumstances the necessity of such processing is the test for any latterly defined purposes. Indeed, as described in Chapter 4, incompatible purposes will require the availability of one of the other exemptions contained in Article 9(2) GDPR and in such circumstances, the explicit consent of the data subject will be the only exception available in the context of commercial personal data processing.

**[268]** CHANGES TO PRIVACY POLICIES – In the context of emotion monetisation there are therefore a few remarks to be made in relation to the requirements for pre-formulated declarations of data subject consent. First, it appears that in line with the above, rendering consent conditional potentially runs afoul of the 'freely given' stipulation in the definition of consent. Second, as the purposes must be both legitimate and specific and consent must be informed, any attempt to attain the 'consent' of the data subject while providing vague or abstract details is likely to be found unfair. And third, any latterly defined purposes legitimised by a change in privacy policy and/or terms and conditions of use will be closely scrutinised.[823] Moreover, in interpreting what is meant by the term unambiguous it is useful to refer to the requirement for controllers to be able to demonstrate that the data subject has in fact consented to the processing of their personal data as mentioned above (i.e. Article 7(1) GDPR). Additionally, and through a combined reading of Articles 7(1) and 7(4) GDPR (and thus in light of the freely given stipulation), an unambiguous indication would also seem to require that any such consent is demonstrably connected to the stated specific purpose and that the data subject is informed prior to the processing and to them giving their consent. Additionally, this prior information is presented in a

[822] In full Article 9(2)(h) GDPR states that, 'processing is necessary for the purposes of preventive or occupational medicine, for the assessment of the working capacity of the employee, medical diagnosis, the provision of health or social care or treatment or the management of health or social care systems and services on the basis of Union or Member State law or pursuant to contract with a health professional and subject to the conditions and safeguards referred to in paragraph 3'.

[823] See: Indeed see press release of the AGCM decision, 'WhatsApp Fined for 3 Million Euro for Having Forced Its Users to Share Their Personal Data with Facebook' <http://en.agcm.it/en/media/detail?id=a6c51399-33ee-45c2-9019-8f4a3ae09aa1> accessed 20 December 2017. For instance in the AGCM's analysis of the WhatsApp change in policy and the validity of consent, the authority refused to accept WhatsApp's claim (with reference to the EDPS opinion) that personal data could not be construed as counter-performance. The AGCM found, with reference to the recent common position on the application of consumer protection in the context of social media, that consumer protection and competition law and indeed, the company itself all recognise the economic value of the data. See: Nicolo Zingales, 'Between a Rock and Two Hard Places: WhatsApp at the Crossroad of Competition, Data Protection and Consumer Law' (2017) 33 Computer Law & Security Review 553.

'distinguishable… intelligible and easily accessible form, using clear and plain language' (see Article 7(2) and Recital 42 GDPR). Here reference can be made to the Article 29 Working Party opinion on consent which clearly suggests that blanket consent which fails to indicate the scope and consequences of the processing clearly would not be considered specific.[824]

**[269]** INTERWOVEN REQUIREMENTS – The above reflects the interwoven nature of the cumulative elements in the definition of consent and is also illustrative of the importance of the transparency principle in the GDPR. In this regard, it is important to note that the substantive aspect of the transparency principle is further supplemented by the more formal requirements for prior information in Articles 13 and 14 GDPR in terms of the information to be provided to the data subject before the processing of personal data. In addition to these *ex ante* requirements one can also refer to the 'Section 1 – Transparency and modalities' (i.e. Article 12 GDPR) in 'Chapter 3 – Rights of the data subject' of the Regulation. Article 12 GDPR relating to 'transparent information, communication and modalities for the exercise of the rights of the data subject', implicitly provides the same two distinct manifestations of the transparency principle.[825] The transparency principle thus manifests both substantive and formal aspects in both an *ex ante* and *ex post* contexts. The purpose limitation principle clearly plays a central role in the operation of the framework. However, one must wonder the extent to which the capacity of consumer to act in their own best interests can be relied upon and thus how the more paternalistic requirements contained in Article 7 GDPR in particular align with the fact that the provision of personal data is often conditional for access to services. The point being made here is that in terms of the monetisation of emotion and the effects on consumer, the clearest and present challenged to their autonomy rests with the use of such insights to target commercial communications towards natural persons. Indeed, although for instance the liability of commercial operators for poorly designed or faulty applications or devices which have emotion detection capabilities as their key selling feature are important considerations, such issues are more related to consumer redress and the implementation of the data protection by design and default requirement contained in Article 25 GDPR as opposed to illustrating a more direct link to the challenges such technologies pose to consumer autonomy.[826] The use of emotion insights to strengthen

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[824] Article 29 Working Party, 'Guidelines on Consent under Regulation 2016/679' (n 760).

[825] More specifically, first, vis-à-vis the information to be provided to the data subject and more specifically the cross-reference to the information requirements in Articles 13 and 14 GDPR and any communication under Articles 15 to 22 and 34 GDPR (Article 12(1) GDPR), any action taken under Articles 15 to 22 GDPR ((Article 12(3) GDPR) or lack thereof (Article 12(4) GDPR). And second, in terms of the means of delivering such information and hence, the requirement 'for concise, transparent, intelligible and easily accessible form, using clear and plain language' (Article 12(1) GDPR), that this should be completed free of charge (except in limited circumstances) (Article 12(5) GDPR) and finally, that standardised icons can be used in order 'in an easily visible, intelligible and clearly legible manner a meaningful overview of the intended processing' (Article 12(7) GDPR).

[826] i.e. aside from the discussion above of what Rouvroy describes as the 'algorithmic production of reality' in questioning the impact of decision-making based on the profiling of individuals' or 'data behaviouralism' and the effects of such techniques on one's capacity for critical thinking. Rouvroy (n 488) 143–145.

the impact of commercial communications is the most direct affront to autonomy and therefore is the key consideration of this thesis.

**[270]** LEGITIMACY OF SURVEILLANCE CAPITALISM – This debate goes to the very essence of the ongoing legitimacy of surveillance capitalism and is therefore key to the application of the data protection and privacy framework to the emergence of emotional AI and the monetisation of emotions in commercial communications. It therefore remains to be seen how the GDPR's consent provisions will be interpreted in practice and thus how far consent will stretch but also how processing that is necessary for the performance of a contract/provision of a service will be delineated from additional activities requiring consent (as provided by Article 7(4) GDPR) and hence, if in practice personal data will be recognised as a *de facto* price (i.e. in the sense of counter-performance/consideration). This debate will also run to the core of the operation of the UCT Directive in the context of pre-formulated declarations of data subject consent. Interestingly for our current purposes, the UCT Directive assumes the payment of some price (i.e. consideration) in the operation of the formation of the consumer contract therefore, contrasting with the adopted compromise version of the Digital Content Directive which as specified above appears to deliberately delineate the payment of a price from the provision of personal data. Accordingly, the inclusion of the reference to the UCT Directive in relation to the unfairness of terms in pre-formulated declarations of data subject consent again raises several questions regarding the precise overlaps between consumer contract and contract and consent as conditions for lawful processing in the GDPR.[827]

**[271]** DATA PROTECTION DOES NOT REQUIRE A CONTRACT – This is an important observation given that, as provided for in the provisions specifying the territorial scope of the Regulation, the GDPR provides in Article 3(2)(a) GDPR that it applies to 'the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union.' Therefore, the GDPR applies irrespective of whether there is a (potential future) contractual relationship and this is significant given that services relying on the processing of personal data as inherent to their business model often position themselves as 'free'. This broadness in terms of scope is also clearly manifested in the application of the data protection fairness principle. Indeed, to reiterate fairness in data protection extends beyond the assessment of the decision-making capacity of an individual to the fairness of processing operations more generally and thus the controller's fair balancing of the rights and interests both *ex ante* and *ex post*.

**[272]** CONTRACT, THE NEED FOR A VALUE EXCHANGE? – As alluded to above, the need for some form of value exchange or 'price' (i.e. consideration) is indicative of the fact that to assess the validity of the contract formation, one is required to refer to the national level which, in

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[827] In her analysis Mak reaches a similar conclusion with the author further highlighting that it is still an open question as whether contracts requiring monetary payment and contracts formed on the basis of personal data provision should be treated the same in terms of the traders liberty to set the terms, see: Vanessa Mak, 'Contract and Consumer Law' in Vanessa Mak and others (eds), *Research Handbook in Data Science and Law* (Edward Elgar Publishing 2018) 30–31.

turn, reflects the failed attempts to harmonise contract formation at the EU level.[828] The Commission draft Digital Content Directive proposal essentially wished to avoid the problems of the past and instead aimed to extend protections to consumers in situations where personal data are effectively used as the means of payment with this aim also manifested in the proposed 'new deal for consumers' announced by the European Commission.[829] The adopted compromise Directive sits a bit oddly at a crossroads in that although, as described above, it explicitly states that personal data cannot be treated as a commodity, it does provide protection where personal data are provided by the consumer. The uncertainty is further compounded here when one considers Article 3(9) Digital Content Directive (Compromise). This provision states *inter alia* that the Directive 'shall not affect the possibility of Member States to regulate general contract law aspects, such as rules on the formation, validity, nullity or effects of contracts […]'. As noted by Mak, an important doctrinal question in this regard therefore, is how this provision of personal data will give rise to a contract in national law.[830] Indeed, the author goes on to specify that this presents important challenges as *inter alia* most national contract laws require a monetary payment for a sales/services contract. For instance, and as mentioned previously, from a common law perspective this derogation to national law presents an interesting challenge considering the common law doctrine of consideration and thus, the need for some form of value exchange for there to be a valid contract.[831] Although Member States with a civil law tradition can recognise the formation of a contract without consideration, this runs counter to the established legal tradition in common law Member States. Therefore, despite the fact that the commercialisation of personal data is a market reality, recognising the existence of a contractual relationship where personal data are provided may require the positioning of personal data as consideration in national law – which can be viewed as sitting a little oddly with data protection and privacy law. Indeed, the changes introduced by the GDPR may be interpreted as prohibiting the formation of

[828] More specifically, the jettisoning of large parts of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance OJ L 304, 64–88. and the failed Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law {SEC(2011) 1165 final} {SEC(2011)1166 final}. (known as the Optional Instrument) are evidence of how controversial the harmonisation of contract formation has been in practice. This is of particular relevance for the current analysis as the proposed Digital Content Directive aims to fill the gap left by the failure of the Optional Instrument *via* a dilution of the Regulation's ambitions (i.e. thus leaving the laws governing contract formation in the hands of Member States) instead aiming to recognise that data (including personal data) can be positioned as a form of payment. See here Article 5(b) of the failed Optional Instrument which aimed to recognise the validity of 'contracts for the supply of digital content whether or not supplied on a tangible medium which can be stored, processed or accessed, and re-used by the user, irrespective of whether the digital content is supplied in exchange for the payment of a price.' See: Clifford, Graef and Valcke (n 773).

[829] 'European Commission - Press Release - A New Deal for Consumers: Commission Strengthens EU Consumer Rights and Enforcement Brussels, 11 April 2018' (n 806).

[830] Mak (n 827) 33–34.

[831] In common law consideration for a contract must be sufficient but it need not be adequate see for instance: *White v Bluett* [1853] Exchequer Chamber 23 LJ Ex 36.

contract obliging the provision of personal data and thus, such contracts may arguably be deemed contrary to public policy or good morals.[832] However, this remains largely up in the air and only time will tell how the EU legislative developments will be manifested in national law and reflected in the national rules governing contract formation. It should be noted however, that the GDPR does not seem to provide an ironclad prohibition on rendering access to a service conditional upon consent to personal data processing. Hence, the moral acceptability of such practices (and surveillance capitalism more generally) remains uncertain, thereby seemingly allowing for personal data to be positioned as consideration. Nevertheless, attributing such an economic value/function to personal data raises concerns. For example, the EDPS in his opinion on the orginal Digital Content Directive proposal stated that '[t]here might well be a market for personal data, just like there is, tragically, a market for live human organs, but that does not mean that we can or should give that market the blessing of legislation.'[833] The strongly evocative nature of this comparison illustrates the divide and hence, that there is an unresolved debate linked to recognising the economic value of personal data in law which still will needs to be addressed (see Section 5.1.2 for more).

#### *ii. Delineating categories of personal data and 'active' versus 'passive' collection*

**[273]** DISTINGUISHING BETWEEN PERSONAL DATA TYPES – What then will be the consideration in the contract for the provision of services which rely on the provision of personal data in Member States such as Ireland? If the personal data are not the consideration could consumer 'attention' to the advertisements and marketing communications on such platforms be deemed 'sufficient'[834] for a valid contract? Even though, in the context of social networking sites, the provision of content by the data subject may constitute consideration, not all information society services necessarily incorporate the use of user generated content. More specifically, although for instance in the context of social networking sites one could argue that the content (i.e. text, photos, videos etc.) provided by the user could be considered the consideration, the argumentation becomes far murkier where the user engages with the services without providing such content either by the design of the service (e.g. a search engine unless search queries would qualify) or a simple lack of activity (opening an account without sharing content such as photos and posts). In this regard it is interesting to refer to Recital 14 Digital Content Directive (Compromise). This provision states *inter alia* that the Directive should,

> '[…] not apply to situations where the trader only collects metadata such as information concerning the consumer's device or the browsing history, except where

[832] This is in contrast to the old Directive 95/46/EC. For a discussion on the same topic through the lens of the then in force Directive see: Carmen Langhanke and Martin Schmidt-Kessel, 'Consumer Data as Consideration' (2015) 4 Journal of European Consumer and Market Law 218.

[833] European Data Protection Supervisor, 'Opinion on the Proposal for a Directive on Certain Aspects Concerning Contracts for the Supply of Digital Content' (n 808) 7.

[834] In common law consideration for a contract must be sufficient but it need not be adequate see for instance: *White v Bluett* (n 831).

this situation is considered a contract under national law. It should also not apply to situations where the consumer, without having concluded a contract with the trader, is exposed to advertisements exclusively in order to gain access to digital content or a digital service. However, Member States should remain free to extend the application of the rules of this Directive to such situations or to otherwise regulate such situations which are excluded from the scope of this Directive.'

This Recital raises two concerns. First, it appears to assume that advertising is separate from any contract formation – albeit while this remains an issue in the competence of the Members States; and second, it draws an odd distinction between different types of personal data. The exclusion of metadata from the scope of protection seemingly aims to exclude the operation of the Directive where there is no specific 'sign-up' process. As such, simply browsing onto a newspaper website that does not require log-in information is deemed distinct from visiting a social networking site where it is only the latter that invokes the operation of the adopted compromise Directive. This delineation of service types was also evident in Commission proposal in Article 3(1) and Recital 14 of the draft which aimed to delineate the 'passive' and 'active' provision of personal data. In particular, from these provisions the intention of the Commission proposal was to exclude personal data such as IP addresses and 'other automatically generated information such as information collected and transmitted by cookies, without the consumer actively supplying it, even if the consumer accepts the cookie' from the scope of application of the Directive.

**[274]** IP ADDRESSES AND COOKIES – However, the approach taken in both the Commission proposal and the final compromise appears to fly in the face of data protection and privacy law given that both IP addresses and cookies (i.e. as 'metadata […] concerning the consumer's device or the browsing history' as per Recital 14 Digital Content Directive Compromise) are both generally construed as personal data and with the processing of such information for online behavioural advertising requiring the consent of the data subject (i.e. as confirmed by the Article 29 Working Party in several opinions – see Chapter 4).[835] Indeed, even excluding the potential for the applicability of other conditions for lawful processing in the B2C information society services context, (1) it is only the consent of the data subject which trigger the contractual protections provided in the adopted compromise Directive and; (2) as described above, as per the requirements in the ePrivacy Directive, consent is required to process information 'concerning the consumer's device' (see Recital 14 Digital Content Directive Compromise). More specifically, although in the context of IP addresses for instance, conditions such as, contract (Article 6(1)(b) GDPR) and legitimate interest (Article 6(1)(f) GDPR) as confirmed in the Breyer case),[836] may be deemed appropriate the *lex specialis* rules in the ePrivacy Directive are clear. It is

[835] See: Article 29 Working Party, 'Opinion on Online Behavioural Advertising' (n 654).

[836] The specific exclusion of IP addresses is also interesting given the CJEU judgement which found dynamic IP addresses to be personal data see: *Case C-582/14, Breyer, ECLI: EU:C:2016:779* (n 641); Borgesius (n 642).

therefore difficult from a data protection and privacy perspective to comprehend the delineation of such metadata from the scope of protection of the Directive.

**[275]** THE ACTIVE-PASSIVE DISTINCTION – In his analysis of the Commission proposal Malgieri suggests that the 'active' - 'passive' distinction is indicative of a deliberate attempt to develop of taxonomy of personal data and a separation between 'received, observed, inferred and predicted data' with only received personal data being considered 'a legitimate non-monetary payment for the supply of digital content'.[837] It has been suggested elsewhere however, that the proposal manifested an ill-informed appreciation of the privacy and data protection legislation and instead reflects the complex history of failed attempts to harmonise contract law formation at the EU level.[838] To clarify, here it is interesting to refer to DG Justice's interpretation of the Consumer Rights (CR) Directive which in Article 2(6) CR Directive defines a service contract as 'any contract other than a sales contract under which the trader supplies or undertakes to supply a service to the consumer and the consumer pays or undertakes to pay the price thereof'. In its interpretation of the Directive's scope DG Justice suggests that such contracts do not require the payment of a *price* (i.e. consideration is a broader notion) by a consumer but that access to services online without the express contractual agreement is excluded from the Directive's scope.[839] In this vein, Helberger *et al.* observe that 'contracts (for the supply of digital content in exchange of data) that are concluded by *tacit* agreement would escape the application of the Consumer Rights Directive.'[840] This need for an 'express contractual agreement' thus appears to draw a similar delineation between passive and active collection in the Commission Digital Content Directive proposal.

**[276]** WHAT ABOUT DATA PROTECTION AND PRIVACY? – Moreover, the simple deletion of the references to 'passive' and 'active' in the adopted compromise does not remove the underlying delineation of types of information processed by commercial actors. Indeed, whatever the justification used, such a delineation belies the fact that the metadata and the data triggering the application of the protections in the Directive both come within the scope of personal data in the GDPR and that it is the same consent that will be used to legitimise the provision of both types of data. Accordingly, it is difficult to imagine how such a delineation could be justified from a privacy and data protection perspective. Indeed, when considering Article 7 GDPR, one must question how the delineation

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[837] Gianclaudio Malgieri, '"User-Provided Personal Content" in the EU: Digital Currency between Data Protection and Intellectual Property' [2018] International Review of Law, Computers & Technology 1, 8–12.

[838] See: Clifford, Graef and Valcke (n 773).There is undoubtedly also an economic and policy lobbying argument here also in terms of the push from certain industries to avoid the scope of the Directive.

[839] European Commission, 'DG Justice Guidance Document Concerning Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council' (European Commission - DG Justice 2014) 64 <https://www.cr-online.de/crd_guidance_en.pdf> accessed 16 February 2018.

[840] Helberger, Zuiderveen Borgesius and Reyna (n 810) 1444.

between metadata and the personal data protected under the adopted compromise version of the Digital Content Directive could be deemed in line with the GDPR and ePrivacy Directive requirements and in particular, for example how cookie banners could not be considered as amounting to an express contractual agreement within the teleological intention and scope of the Digital Content Directive.[841] There is clearly a lot of uncertainty here and it is somewhat unclear why contractual protections should not be afforded to services only collecting metadata especially when one considers that it is this same metadata that is used to profile individuals and track them across the internet. Such an approach seems to miss the fact that it is largely this type of personal data which often poses a problem. Here it is again interesting to refer to the cross-reference to the UCT Directive in Recital 42 GDPR and the fact that it applies to pre-formulated declarations of data subject consent with such consent being required to be kept clearly distinguishable from other matters if it is given in the context of a written declaration which includes other the matters (see Article 7(2) GDPR). Indeed, in assessing these provisions, one must wonder what this separation of consent and 'other matters' (i.e. the details of the contract) means theoretically in relation to the classification of the pre-formulated declaration of consent subject to the contractual protections afforded by the UCT Directive. If consent must be separated from the provision of the service, how can the GDPR rely on the application of the protections against unfair terms in its Recitals? Are the personal data to be viewed as the price for the provision of the service?

**[277]** APPLYING CONTRACTUAL PROTECTIONS – At first glance it seems to be counterintuitive to present consent 'in a manner which is clearly distinguishable from the other matters' as required by Article 7(2) GDPR. This separation hence presents some doubt as to the positioning of consent in relation to the UCT Directive. In other words, can consent to a pre-formulated declaration be understood as a contract in its own right, given its required separation from the provision of a service contract? Can consent in Article 6(1)(a) GDPR in fact be reduced to a form of contract? And can consent to a pre-formulated declaration legitimising personal data processing in effect act as a trigger for the formation of a B2C consumer contract? In answering to these complex questions, it is important to remember that it remains uncertain as to whether the separation of consent and contract in Article 7(4) GDPR is merely indicative of a scenario in which the 'freely given' stipulation may be violated and hence whether it in fact gives rise to a rebuttable presumption and does not entirely delegitimise rendering access to a service conditional upon the provision of personal data – an interpretation advocated by AG Szpunar in his opinion in the Plant 49 case.[842] Despite the Article 29 Working Party's strict interpretation of these provisions therefore, this remains a matter for the Court of Justice to decide and it is arguable that privacy policies in addition to terms of use should be presented as the provisions of the

[841] For a similar discussion of these issues see: Romain Robert and Lara Smit, 'The Proposal for a Directive on Digital Content: A Complex Relationship with Data Protection Law' [2018] ERA Forum <http://link.springer.com/10.1007/s12027-018-0506-7> accessed 6 July 2018.

[842] *Opinion of Advocate General Szpunar delivered on 21 March 2019 in Case C-673/17 Planet49 GmbH v Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V., ECLI:EU:C:2019:246* (n 812).

contract with the declaration of consent being a separate (and indeed revocable) but connected part of the same overarching contractual agreement, despite the presumption and associated burden of proof.[843] In this vein, personal data does not necessarily have to constitute a price but its protection may be encompassed within the contractual agreement as both explicit (i.e. what the controller promises) and implied (legal obligations stemming from the GDPR) terms.[844] Currently interpreting where personal data fits is a matter for national law on contract formation.

**[278]** CONSENT, CONTRACT AND CONSUMER CONTRACT DELINEATED – Importantly, such an interpretation does not render contract and consent synonymous as contract law assumes the autonomous decision-making capacity of individuals whereas consent in data protection aims to bolster the decision-making capacity of the data subject and contract is restricted to what is necessary for the performance of the contract. Hence, although the contract formation may require the voluntary assent of the parties, consent in the GDPR cannot be reduced to a form of contract given that it may not be always 'freely given, specific, informed and unambiguous' for it to be considered a B2C contract. This is indicative of the fact that the UCT Directive focuses on the unfairness of the terms themselves and explicitly excludes the analysis of the contract formation. There are therefore many issues that remain unresolved regarding the recognition (or not) of the economic value of personal data. Although the EDPS and the Article 29 Working Party have both criticised the positioning of personal data as counter-performance (as per the Commission draft of the Digital Content Directive), this is a contentious issue with differences in interpretation amongst policy makers, academics and enforcement agencies.[845] Indeed, the Article 29 Working Party opinion on consent in the GDPR states that in order not be in violation of the 'freely given' stipulation, consent (i.e. not just explicit consent) to personal data processing must be kept separate from the provision of the service.[846] The Working Party further notes that 'the GDPR ensures that the processing of personal data for which consent is sought cannot become directly or

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[843] See: Clifford, Graef and Valcke (n 773).

[844] But what else then could be classified as the price? On the other hand, the viewing of advertisements (whether in addition to the provision of user generated content or not) can be regarded as the price for the purposes of Article 4(2) UCT Directive. From a competition law perspective, reference can be made here to the positioning of attention as a parameter on the basis of which market players compete in multi-sided markets where 'online attention rivals provide products and features to obtain the attention of consumers and sell some of that attention, through other products and services, to merchants, developers, and others who value it'. DS Evans, 'Attention Rivalry among Online Platforms' (2013) 9 Journal of Competition Law and Economics 313, 313.

[845] For instance, in this regard it is important to note that although consumer protection agencies (as illustrated by the common position, and the AGCM and Federation of German Consumer Organisations interpretations) recognise the economic value of personal data the Berlin Regional Court recently found that intangible consideration could not be considered as a cost and accordingly Facebook is not barred from advertising itself as free. See: 'Facebook Verstößt Gegen Deutsches Datenschutzrecht | VZBV' <https://www.vzbv.de/pressemitteilung/facebook-verstoesst-gegen-deutsches-datenschutzrecht> accessed 16 February 2018; *verbraucherzentrale bundesverband (vzbv) e.v v Facebook* [2018] Landgericht Berlin (Berlin Regional Court) Case no. 16 O 341/15.

[846] Article 29 Working Party, 'Guidelines on Consent under Regulation 2016/679' (n 760).

indirectly the counter-performance of a contract.'[847] However, as will be described below this interpretation has not been entirely reflected in consumer protection and competition law and policy.

### 5.1.2 TRANSPARENCY, (UN)FAIRNESS AND THE RESPECTIVE DECISION-MAKING PROTECTIONS

**[279]** ECONOMIC VALUE OF PERSONAL DATA – The uncertainty regarding the recognition of the economic value of personal data described above raises several issues in terms of how the GDPR may be interpreted in practice by the Court of Justice, considering the adoption of the Digital Content Directive and the ongoing debates in the reform of the proposed ePrivacy Regulation. But what does all this effectively mean in practice due to the fallibility of consent? Indeed, given the well-documented failures of consent one must question how these conditions will be interpreted in practice and how effective they will be despite the changes in the GDPR.[848] It therefore remains to be seen how far consent will stretch but also, as noted above, if and how processing that is necessary for the performance of a contract will be delineated from additional activities as required by Article 7 GDPR or if in practice personal data will be recognised as a *de facto* price or counter-performance.[849] From a consumer protection perspective such an assessment (as reflected in the Italian Competition and Consumer Protection Authority (AGCM) rulings, see below) may be less of an analysis of the unfairness of terms under the UCT Directive and instead may invoke comparisons with the application of the UCP Directive *vis-à-vis* the practices through which consent was attained. Reference here can be made to the decisions taken by the AGCM as illustrations as to how the UCP Directive can play a role in assessing the validity of an individual's decision to consent to the provision of personal data. Although the use of instruments other than the GDPR to enhance the protection of consumers online should certainly not be dismissed, one must wonder *why Facebook* was pursued and fined in Italy under the implementation of the UCP Directive as opposed to their national data protection law (then their implementation of the Data Protection Directive 95/46/EC). There are a wide variety of potential influences here including the comparative institutional strength of the relevant national consumer protection and data protection authorities and the fact the Article 29 Working Party was also in discussion with *Facebook,* but such an analysis remains out of scope for this thesis.

**[280]** THE STANDARDS OF PROTECTION – Of more importance for our current purposes however, is to question whether a decision to pursue companies such as *Facebook* under consumer protection law instead of the GDPR has any effect on the protections afforded. In this regard, one is reminded of the analysis of the UCT Directive above in the context of pre-formulated declarations of data subject consent and to the argument that the GDPR

[847] ibid 8.
[848] Kosta, *Consent in European Data Protection Law* (n 541); Bernal (n 541); Lazaro and Métayer (n 541); Lynskey (n 457) 229–253.
[849] Clifford, Graef and Valcke (n 773) 39.

appears to offer more stringent requirements for those processing personal data. Inherent to this discussion is the fact that affording contractual protections may require the positioning of personal data as the 'price'. Indeed, in addition to this discussion of the meaning of the reference to the UCT Directive in the GDPR, one can also refer to the various national level rulings taken against companies under the Directive by consumer protection authorities which all seem to assume that personal data is the value exchanged by the consumer.[850] Such matters are also relevant in the context of the UCP Directive as it is framed in a pre-contractual, contractual and post-contractual manner with all three of the unfairness levels in the UCP Directive referring to economic decision-making capacity and hinging on the (at least potential future) existence of a contractual agreement. The question thus becomes one of how this distinction may have an impact on the application of the UCP Directive to personal data processing operations.

### *A. Economic value of personal data and emotion affected data protection decision-making*

**[281]** AVERAGE CONSUMER STANDARD AND THE CONDITIONS FOR CONSENT – In assessing the information provision and transparency requirements there appear to be clear delineations in practice in terms of focus between the GDPR and UCP Directive, with the GDPR seemingly containing more detailed requirements. As described in Chapter 2, the UCP Directive relies on the notion of the average consumer as is evident from Article 2(e) UCP Directive. This provision makes it clear that the Directive works from the assumption that adequately informed consumers cannot be distorted in their decisions and hence, that only significant impairments are likely to cause a shift in decision-making but also *via* the cross-reference to the 'average consumer' standard developed by the Court of Justice.[851] Therefore, although from the general unfairness clause in Article 5(2) UCP Directive it is irrelevant whether a distortion occurs materially, as the threshold also includes practices that are 'likely to materially distort the economic behaviour' of consumers, there is still strong reliance on consumer decision-making capacity as a barometer for unfairness under the Directive. This seems to contrast with the additional burden of proof *vis-à-vis* the validity of consent evident in the GDPR and more generally the operation of the accountability principle in the operation of the conditions for consent. Indeed, the GDPR (at least in an abstract sense) provides for a high level of protection for data subject consent as a condition for lawful processing in Article 6(1)(a) GDPR.

**[282]** COMPARING THE PROTECTIONS – Considering the above therefore, one must wonder how the GDPR protections compare to the average consumer paradigm relied upon in the UCP

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[850] See for example: 'WhatsApp Fined for 3 Million Euro for Having Forced Its Users to Share Their Personal Data with Facebook' (n 823). and 'Legalis | L'actualité Du Droit Des Nouvelles Technologies | TGI de Paris, Jugement Du 12 Février 2019' <https://www.legalis.net/jurisprudences/tgi-de-paris-jugement-du-12-fevrier-2019/> accessed 25 March 2019.

[851] *Case C-210/96, Gut Springenheide GmbH and Tusky v Oberkreisdirektor des Kreises Steinfurt, EU:C:1998:369* (n 172) para 2. 'an average consumer who is reasonably well informed and reasonably observant and circumspect'.

Directive. Is the data subject the 'average consumer data subject' in the context of the personal data processing for commercial B2C purposes or are the more paternalistic standards in the GDPR evidence of the different underlying notion of the natural person? Indeed, without the added requirements in the GDPR (in particular in the definition of consent and the conditions for valid consent), it is arguable that the protection of decision-making capacity of individuals could be lessened if one was to rely solely on the UCP Directive for protection. More specifically, while the GDPR requires transparent personal data processing and clear information regarding *inter alia*, the nature and purposes of processing, as mentioned above the interpretation of the UCP Directive by consumer protection authorities instead appears to position personal data as a price. This is significant when one takes into account the normal consumer setting where consumers' are not entitled to learn how businesses disposes of their revenue (i.e. the prices they receive for the provision of their goods or services, at least on a micro individual consumer level). Indeed, although a consumer is entitled to transparent information regarding the characteristics of the goods or service with such information being required to be presented in a clear, intelligible and unambiguous manner, this generally extends merely to the rights and obligations in the contractual agreement or transparency *vis-à-vis* the commercial practice(s) employed by the business. Even though the UCP Directive extends its transparency obligations to 'price' (i.e. they are not allowed to position services as 'free' under point 20 Annex 1), these obligations appear to be limited to the disclosure of the commercial nature of the transaction and how much the consumer is expected to 'pay' in exchange for the provision of the service. One must thus question whether there is simply more expected of the average consumer as opposed to the data subject in the GDPR considering the more paternalistic protections afforded by the Regulation.

**[283]** MATERIAL INFORMATION AND THE GDPR – In this regard it is important to consider the potential impact of Article 7(5) UCP Directive which provides that the information requirements established by Community law as included in a non-exhaustive list contained in Annex II that should be considered as 'material information' in the context of misleading omissions as protected against in Article 7(1) UCP Directive and establishes that pre- and post-contractual violations of information obligations are subject to unfair commercial practices law.[852] Thus, this qualification adds considerably to the impact of the Directive given its horizontal application[853] and this perhaps illustrates how the GDPR transparency requirements could be viewed as *lex specialis* rules in the context of personal data processing. Here one can again refer to Article 3(4) UCP Directive which to

[852] As illustrated by the reference to Directive 97/7/EC (as replaced by the Consumer Rights Directive) in Annex II. The Annex lists 13 Directives in chronological order. Importantly this deference to the *lex specialis* rules is restricted to EU instruments and specifically does not extend to Member State legislation. Indeed, according to Article 3(5) all such measures could only be kept in force for a transitional period of 6 years. This seems logical given the full harmonisation approach of the Directive.

[853] Ida Otken Eriksson and Ulf Öberg, 'The Unfair Commercial Practices Directive in Context' in Stephen Weatherill and Ulf Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New rules and new techniques* (Bloomsbury Publishing 2007) 95.

reiterate stipulates that in circumstances where there is a conflict between the requirements in the UCP Directive and other EU rules regulating specific aspects of unfair commercial practices the *lex specialis* rules prevail.[854] Aside from transparency requirements however, the GDPR appears to rely on a broader substantive assessment of fairness in line with its fundamental rights objectives and thus the *ex ante* and *ex post* fair balancing in order to protect fundamental rights and in particular the right to the protection of personal data.

**[284]** RISK OF TANGIBLE (AND INTANGIBLE) HARM – Furthermore, it is interesting to note that there has been some degree of controversy surrounding the interpretation of the term 'misleading' as referred to in the UCP Directive and therefore, whether Community law allows for an abstract risk to be considered sufficient to trigger Articles 6 and 7 UCP Directive or if actual proof of being misled is required.[855] Micklitz observes in relation to this issue that the Directive appears to mirror the current state of the Court of Justice's case law in that there seems to be evidence of task sharing between the Court of Justice and the national courts, with the determination of whether there is concrete evidence of a danger for the consumer a matter to be determined substantively by national courts.[856] This is an important consideration in the analysis of the application of the Directive in the context of personal data processing given the fact that in the operation of the risk-based GDPR,[857] 'risk' is to be construed broadly thereby including societal effects and thus potential in addition to actual tangible and intangible harm.[858] Despite the fact that there are clear question marks surrounding the capacity of the risk-based approach to cater for intangible harms, in no small part due to the absence of a comprehensive taxonomy of risks because of the broad interpretation of risk and thus the reliance on effective enforcement given the role of the organisational safeguards and the application of the principle of accountability, the GDPR clearly demonstrates a more precautionary approach. Indeed, although the UCP Directive applies even if there is merely negligible economic harm there are still concerns in that first, the relationship between a negligible economic harm and a 'risk' is unclear; and second, it is also uncertain if economic harm

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[854] These provisions, as supplemented by Recital 10

[855] Micklitz, 'Unfair Commercial Practices and Misleading Advertising' (n 103) 98.

[856] ibid.

[857] Although the inclusion of risk was not new in the data protection framework, Gellert observes that data protection's risk-regulation origins are distinct from the move towards a risk-based approach (or in other words the regulation through risk) enshrined in the GDPR. More specifically the author notes that a risk-based approach places risk at the centre and therefore 'seems to combine the use of risk management tools with a calibration of the data controllers' obligations according to the level of risk at stake.' See: Raphaël Gellert, 'Data Protection: A Risk Regulation? Between the Risk Management of Everything and the Precautionary Alternative' (2015) 5 International Data Privacy Law 3, 13. See also: Article 29 Working Party, 'Statement on the Role of a Risk-Based Approach in Data Protection Legal Frameworks' (2014) WP 218; Claudia Quelle, 'The "Risk Revolution" in EU Data Protection Law: We Can't Have Our Cake and Eat It, Too' in Ronald Leenes and others (eds), *Data Protection and Privacy : The Age of Intelligent Machines* (1st edn, Hart Publishing 2017).

[858] Article 29 Working Party, 'Statement on the Role of a Risk-Based Approach in Data Protection Legal Frameworks' (n 857) 4.

(even if negligible) can incorporate the intangible harms and risks catered for in the GDPR.

**[285]** COMPLEX CONSUMER LAW OVERLAPS – Moreover, it is also important to note that there are complex overlaps and divisions between the scope of the UCP Directive, the UCT Directive and national contract law. Article 3(2) UCP Directive stipulates that the 'Directive is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract'. This perhaps reflects the fact that in the *Facebook/WhatsApp* investigations the AGCM issued two separate rulings as mentioned above (i.e. one on the unfairness of the terms and the second on the unfairness of the practices employed to attain the acceptance of the consumers). Indeed, to illustrate this complex division between the UCP Directive, the UCT Directive and national contract law further one can refer to Article 7(4) UCP Directive which stipulates the information requirements for an invitation to treat that are to be regarded as material 'if not already apparent from the context'. As referenced in Chapter 2, Article 2(i) UCP Directive defines an invitation to purchase as 'a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase.' As noted by Micklitz this term needs to be interpreted autonomously as the Directive appears to establish a *lex specialis* rule if the requirements of an 'invitation to purchase' are fulfilled by specifying the essential information requirements that are materially necessary in such circumstances.[859] As a consequence, an invitation to purchase is still distinct from a contract in line with the limitation on scope provided in Article 3(2) UCP Directive. However, Micklitz further notes that this does not mean that if the requirements for an invitation to treat are not met that there are no general information requirements in the pre-contractual phase, as to find otherwise would be contrary to the interpretation of Article 7(1) UCP Directive and would exclude certain commercial practices from the scope of application of Article 7 UCP Directive.[860] Separating the UCP and UCT Directives is therefore clearly difficult and this is significant when one considers the consequences of a finding of unfairness. To clarify, in this regard it is significant to highlight the *Pereničová and Perenič* case which concluded that erroneous information provided in contract terms may be deemed 'misleading' within the meaning of the UCP Directive if such information causes, or is likely to cause, the average consumer to take a transactional decision that they would not have otherwise taken.[861]

**[286]** PRACTICES, CONTRACTS AND PROPOSED REFORMS – Nevertheless, as per the *Pereničová and Perenič* judgement, the finding of a practice as 'unfair' does not automatically render a contract invalid under the UCT Directive but instead is merely one factor that may be cited in assessing the unfairness of a particular term and therefore, has no direct effect on the

[859] Micklitz 102-103.
[860] Micklitz 102-103.
[861] Case C-453/10 Judgment of the Court (First Chamber), 15 March 2012 Jana Pereničová and Vladislav Perenič v SOS financ spol. s.r.o.

validity of a contract.[862] This separation is also noted in the European Commission report on the interpretation of the UCP Directive which observed that the clear point of contrast lies in the fact that breaches of the UCT Directive have contractual consequences.[863] As such, even if unfair practices are found in a personal data processing context, it is unclear what impact that would have in practice in terms of the overarching agreement between the parties and indeed, how it would affect the contractual agreement. Consequently, even if the commercial operator fails to adequately inform the consumer by omitting material information and thus falls foul of the protections against misleading omissions in Article 7 UCP Directive, it is unclear what effect this would have on the validity of the contractual agreement and thus the transfer itself. Significant, although a detailed analysis of this issue is outside the scope of this thesis, in the modifications of the consumer law acquis in the 'new deal' for consumers this uncertainty is rectified and thus the Modernisation Directive Compromise).[864] It is therefore, important here to highlight the potential for varying national interpretations reflecting for instance the exclusion of price from the scope of the substantive fairness element in the UCT Directive and hence, the delineation between Member State and EU competence. In this regard, it is significant to reiterate the importance of the adopted Digital Content Directive compromise and the 'new deal' for consumers as they aim to extend consumer safeguards by affording concrete rights and remedies where personal data are provided. Indeed, in simple terms these proposed changes are significant as currently at the EU level an infringement of the data protection framework may mean little in terms of the consequences for the service contract.[865]

**[287]** CONSUMER PROTECTION AND PERSONAL DATA AS A PRICE – From the above, the distinction between the data protection and consumer protection may thus relate to the fact that the consumer protection authorities often considered the provision of personal data as an

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[862] Commission Staff Working Document Guidance on the Implementation/Application Of Directive 2005/29/EC on Unfair Commercial Practices accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions: A comprehensive approach to stimulating cross-border e-Commerce for Europe's citizens and businesses (COM(2016) 320) 21.

[863] Commission Staff Working Document Guidance on the Implementation/Application Of Directive 2005/29/EC on Unfair Commercial Practices accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions: A comprehensive approach to stimulating cross-border e-Commerce for Europe's citizens and businesses (COM(2016) 320) 21.

[864] 'European Commission - Press Release - A New Deal for Consumers: Commission Strengthens EU Consumer Rights and Enforcement Brussels, 11 April 2018' (n 806); Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules COM/2018/0185 final - 2018/090 (COD).

[865] See: Helberger, Zuiderveen Borgesius and Reyna (n 810) 1440.Indeed as noted by Helberger et al., '[a clear] benefit of extending the scope of consumer law to data-related issues lies in giving consumers concrete rights against sellers if information obligations are violated. If a data controller breaches data protection law's information obligations, the processing may become unlawful. That unlawfulness, however, says little about the consequences for a possible contractual relationship between seller and consumer.'

economic asset to be exchange for access to a service. In support of this point it is important to highlight that in its submission to the AGCM *Facebook/WhatsApp* (rather oxymoronically) attempted to escape the Italian implementation of the UCP Directive's scope of application with reference to the EDPS's criticism of the positioning of personal data as counter-performance in the opinion on the proposed Digital Content Directive. In rejecting WhatsApp's line of argumentation and also with reference to the Consumer Protection Collaboration Network common position,[866] the AGCM found in their analysis that consumer protection and competition law and indeed, the company itself all recognise the economic value of the data and thus refused to accept that personal data could not be construed as counter-performance.[867] However it is important to note that the AGCM's decision to apply the UCP Directive in this case is not universally accepted across all the MSs. An interesting point of contrast here is a decision by the Berlin Regional Court.[868] More specifically although the German Courts have accepted that data protection issues do come within the scope of consumer protection, the Berlin Regional Court found that this does not prevent *Facebook* from positioning itself as a 'free' service. The Court thus ruled that the UCP Directive required the payment of a tangible price and thus concluded that by describing itself as 'free', *Facebook* does not fall foul of the requirement to identify commercial practices (see point 20 of Annex 1 UCP Directive) as contracts for such services do not involve the payment of a tangible 'price'. Hence, this ruling seemingly precludes the application of protections as the Court refused to recognise that personal data have an economic value within the meaning of the UCP Directive. This case therefore illustrates an interesting distinction and the important role played by the national courts and indeed, national contract law. Here, it is interesting to refer to common law jurisdictions where consideration or some form of value exchange is necessary for the formation of a valid contract.[869] EU consumer protection is thus clearly linked to contract and contract is strongly linked to national traditions.[870]

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[866] The Consumer Protection Collaboration Network common position regarding the terms of service of social networking sites which clearly focused on more traditional cross-border consumer contract issues such as clauses relating to jurisdiction, the identification of commercial communications, the waiving of liability, the removal of content and unilateral rights to change, determine the scope and terminate agreements. See: EU Consumer Protection Agencies and European Commission (DG Justice), 'Common Position of National Authorities within the CPC Network Concerning the Protection of Consumers on Social Networks' <http://europa.eu/rapid/press-release_IP-17-631_en.htm>.

[867] Zingales (n 823). In essence, WhatsApp had claimed (with reference to the EDPS opinion) that personal data could not be construed as counter-performance. However, the AGCM found, with reference to the recent common position on the application of consumer protection in the context of social media, that consumer protection and competition law and indeed, the company itself all recognise the economic value of the data.

[868] *verbraucherzentrale bundesverband (vzbv) e.v v Facebook* (n 845). See press release by *vzby,* 'Facebook Verstößt Gegen Deutsches Datenschutzrecht | VZBV' (n 845).

[869] In common law consideration for a contract must be sufficient but it need not be adequate see for instance: *White v Bluett* (n 831).

[870] Inge Graef, Damian Clifford and Peggy Valcke, 'Fairness and Enforcement: Bridging Competition, Data Protection, and Consumer Law' (2018) 8 International Data Privacy Law 200, 209.

**[288]** THE ROLE OF INFORMATION – The contrast provided here perhaps illustrates that consumer protection authorities may be far less concerned with the types of personal data and the specific purposes that they are used for (i.e. purposes as understood narrowly under data protection law and in particular the purpose limitation principle in Article 5(1)(b) GDPR). Instead, by positioning personal data as a price (i.e. construed broadly to mean consideration), the above analysis appears to illustrate a focus on transparency *vis-à-vis* the economic value of the personal data, the intended purpose understood more generally and thus informed and unfettered consumer decision-making in this context. This finding appears to correspond with Fuster's analysis who argues that the role of 'information' is appreciably distinct when comparing consumer and data protection law. Indeed, as noted by the author,

> '[...] whereas for [consumer protection] it can facilitate making choices between products and services, for [data protection] it has instead other purposes (namely, contributing to fair and transparent processing, and allowing for consent). It is somehow delicate, thus, to attempt to expand on the conception of the data subject as consumer in order to configure information obligations imposed on data controllers as helping to make choices between different data processing practices.'[871]

This observation is indicative of the fact that 'information' and the fairness and transparency principles also play a key role in the application of data subject rights. In contrast, in commenting on the data protection framework and the protection data subjects in the consumer setting, van Eijk *et al.* propose the use of the UCP Directive as a more 'market-consumer based approach'.[872] The authors argue with reference to the US approach that the positioning of personal data and hence, the economic motivation behind misconduct (i.e. rather than a particular intention to violate fundamental rights) requires a more consumer orientated approach with the authors calling on consumer protection authorities to play a more active role 'whether or not in consultation with data protection authorities based on proper cooperation procedures'.[873] Through such a development the authors suggest that the enforcement of such violations could become more effective. However, it is argued here that the substantive standards of protection provided in the UCP Directive appear to set a lower threshold of protection in line with the analysis above. However, to truly assess the merits of this suggestion it is necessary to further spell out the meaning of the data protection fairness principle. Indeed, although the application of the data protection fairness principle has been referred to throughout this thesis, it is necessary to spell out this notion in further detail to highlight the distinction between what is fair in data protection versus what is unfair in consumer protection in more concrete terms.

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[871] Gloria González Fuster, 'How Uninformed Is the Average Data Subject? A Quest for Benchmarks in EU Personal Data Protection' [2014] IDP. Revista de Internet, Derecho y Política 102 <http://www.redalyc.org/html/788/78835370008/> accessed 2 August 2017.

[872] Nico van Eijk, Chris Jay Hoofnagle and Emilie Kannekens, 'Unfair Commercial Practices: A Complementary Approach to Privacy Protection' (2017) 3 European Data Protection Law Review 325, 336.

[873] ibid.

### *B. EMOTION MONETISATION AND THE DELINEATING FAIRNESS FROM UNFAIRNESS*

**[289]** A CORE PRINCIPLE – The data protection fairness principle is often dealt with in somewhat of a shorthand manner notwithstanding the fact that it is positioned as a core principle.[874] Despite the absence of an extensive body of literature, both an explicit and implicit role for fairness can be distilled.[875] Explicitly fairness has been coupled with the notion of transparency and data collection whereas, implicitly fairness is linked to the protection from controller abuse and the concept of 'fair balancing'. Although explicit fairness and the need for fair and transparent processing seems relatively easy to comprehend, one is required to refer to Court of Justice case law to attain a more accurate understanding of implicit fairness. In brief, implicit fairness relates to the fact that to achieve a 'fair balance' in the application of the requirements contained in the GDPR, personal data must not be processed in a way which unreasonably infringes the fundamental rights and freedoms of data subjects and in particular, their right to the protection of personal data.[876] In other words fair balancing relates to the proportionality and necessity of the processing. Fair balancing here can therefore be understood as a direct response to the asymmetric controller-data subject relationship and thus the acknowledgement that in aiming to achieve their personal data processing aims 'data controllers must take account of the interests and reasonable expectations of data subjects [… and] cannot ride roughshod over the latter.'[877] Hence, fair balancing incorporates the weighing of rights and interests thereby reflecting the GDPR's purpose of protecting fundamental rights and freedoms where personal data are processed (see Chapter 3).

**[290]** EXPLICIT AND IMPLICIT FAIRNESS – Through the application of the explicit and implicit instances of the fairness principle the data protection framework aims to achieve the fair processing of personal data. This reflects the fact that solely aligning fairness and transparency fails to adequately reflect both the explicit and implicit role and the increased importance of the accountability principle evident in the GDPR. Indeed, a broader view incorporating components beyond mere transparency is necessary to determine the operative role of the fairness principle in the Regulation.[878] More specifically, fairness manifests itself *ex ante* and *ex post*. In an *ex ante* sense the conditions for lawful processing in Article 6(1) GDPR are a clear example whereas *ex post* data subject rights such as the right to object (Article 21 GDPR) and the right to erasure (Article

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[874] European Data Protection Supervisor, 'Opinion on Coherent Enforcement of Fundamental Rights in the Age of Big Data' (n 623) 8. – where it is noted that '*fairness of personal data processing is a core principle alongside lawfulness and transparency*'

[875] See: Clifford and Ausloos (n 537).

[876] See for example: *Case C-362/14, Maximillian Schrems v Data Protection Commissioner, ECLI:EU:C:2015:650* (n 334) para 42; *Case C-28/08, Commission v The Bavarian Lager Co Ltd [2010] ECLI:EU:C:2010:378* (n 581) para 115; *Case C-101/01, Bodil Lindqvist, ECLI:EU:C:2003:596* (n 340) para 90; *Case C-73/07, Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy., ECLI:EU:C:2008:727* (n 577) para 56; *Case C-131/12, Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, ECLI:EU:C:2014:317* (n 317) para 81.

[877] Bygrave (n 563).

[878] See: Clifford and Ausloos (n 537).

17 GDPR) are a specific illustration. In this regard, it is important to emphasise that fairness varies in its instances in the GDPR (e.g. when comparing the balancing tests in Article 6(1)(f) GDPR and the right to object in Article 21 GDPR).[879] Accordingly, the fairness assessment extends further than mere data collection. However, looking beyond the fact the fairness in the GDPR is manifested both *ex ante* and *ex post*, one must wonder if there is a distinction to be made from the fact that the UCP and UCT Directives focus on 'unfairness', whereas the GDPR provides for the 'fairness principle'. Indeed, in this regard it is interesting to refer to Hijmans and Raab who see fairness as an element of the accountability principle.[880] Although it is suggested here that such an understanding mistakenly relegates fairness as a mere component of the accountability principle as opposed to a distinct principle with foundations in constitutional theory, there is an important overlap between the principles.

**[291]** ACCOUNTABILITY AND FAIRNESS – The accountability principle is indicative of decentred regulation and the key role played by the controller in the operation of the framework. Indeed, as impartiality is impossible in the practical operation of the GDPR (i.e. as controllers are the ones determining the purpose(s) and means of the processing and may be thus swayed by their own (commercial) interests), through the application of the accountability principle controllers are responsible for their own compliance, have to provide evidence of this compliance and are also left with the substantive burden of proof to justify their actions and their compliance with the fairness principle.[881] Accountability in the GDPR thus constitutes an overarching principle in relation to the practical operation of data protection and thus the effective implementation of the fairness principle (see Article 5(2) GDPR). It is arguably that this controller 'responsibilisation' manifests itself in the Regulation's fairness principle as a burden of care for data subject interests but also for example, their capacities in relation to their ability to provide 'informed' consent. The differences between the GDPR and consumer protection *acquis* may therefore have their foundations in two significant points (1) there are higher standards of protection evident in the GDPR with a clear duty on controllers to positively act to protect the personal data of data subjects (i.e. fairness and not unfairness) and; (2) the data subject's interest in the protection of their personal data is not limited to *ex ante*

[879] Although one may question the validity of separating the procedural fairness and fair balancing elements, it is necessary in order to ascertain an effective understanding of the fairness principle in practice. That being said however, it should be acknowledged that these elements are difficult if not impossible to separate in practice. For example, the conditions for lawful processing inherently have both the fair balancing and procedural fairness elements. Indeed, as discussed elsewhere, even consent as a condition for lawful processing (Article 6(1)(a) GDPR), which clearly manifests the procedural fairness element in terms of the information provision requirements, also appears to incorporate a fair balancing component.

[880] Hielke Hijmans and Charles D Raab, 'Ethical Dimensions of the GDPR' in Mark Cole and Franziska Boehm (eds), *Commentary on the General Data Protection Regulation* ((2018, Forthcoming) Edward Elgar 2018) 11 <https://papers.ssrn.com/abstract=3222677> accessed 3 September 2018.

[881] There are several examples e.g. burden of proof in consent, the refusal to allow access to information in the data subject rights etc.

collection but also extends to *ex post* protections and thus, personal data cannot be simply equated with a 'price'.

**[292]** CRITICISING PERSONAL DATA AS A PRICE – Therefore, criticisms of the positioning of personal data as a *quasi*-price (consideration) should not be disregarded lightly as merely recognising the economic value of personal data does not accurately reflect its intangible value. This point is illustrative of foundational differences between the frameworks and the direct fundamental rights grounding evident in the GDPR as described above in Chapter 3 but also the distinct nature of data when compared to more traditional means of payment. Indeed, these distinctions are well-explored in literature and here it is interesting to refer to the work of Gandy from over 25 years ago in which the author specifies several difficulties associated with valuing or putting a 'price' on personal data. For instance, the author refers *inter alia* to (1) the difficulty in determining the units of information that are to be valued; (2) the peculiar way information is 'produced, re-produced, and consumed' and more specifically the non-rivalrous nature of the consumption of information (i.e. consumption by one commercial entity does not limit the capacity of other to use that same information or indeed the simultaneous retention of the information by actor); and (3) the difficulty associated with the understanding the risks associated with disclosure given the previous points.[882] Although much has changed in 25 years Gandy's criticisms still ring through as evidenced by the fact that they have been reflected for instance, in the EDPS opinion on the proposed Digital Content Directive.[883] Therefore, despite the wide range of literature examining the economic value of personal data and essentially the 'putting of a price' on information, such efforts arguably fail to fully reflect the inherent subjective value attached to such information which may be difficult if not impossible to quantify given the unavoidably subjective nature of such considerations.

**[293]** PERSONAL DATA AND SUBJECTIVE VALUE – In simple terms, the value one attaches to one's personal data may not correspond to the commercial economic valuations derived from a mere *macro*-level market analysis. Commercial valuations of personal data reflect its positioning as an asset and such an approach fails to account for the subjective valuations of data subject to whom the personal data relate. This point is perhaps compounded by the fact that people may only feel the sting of this subjective valuation when they have experienced a harm such as a data breach. Here reference can be made to Stark who interestingly observes that,

> '[…] contemporary digital technologies often seem overly invasive precisely because ephemeral data about ourselves are kept private from us: We do not see its accumulation, we do not feel its impact, and we do not know if it is being used "appropriately" or not. Users do not feel data's use and abuse unless that use and abuse

[882] Oscar H Gandy, *The Panoptic Sort: A Political Economy of Personal Information* (Westview 1993) 72–78.
[883] European Data Protection Supervisor, 'Opinion on the Proposal for a Directive on Certain Aspects Concerning Contracts for the Supply of Digital Content' (n 808). See also: Robert and Smit (n 841).

is amplified or mobilized to interfere with them in a material way, such as embarrassment, arrest or imprisonment.'[884]

It is with such considerations in mind that the GDPR aims to protect against both tangible and intangible risks and harms and establishes both proactive and reactive rights and obligations. That is not to say however, that data protection does not struggle to do so, in part due to difficulties associated with providing a conclusive taxonomy of harms, but rather that irrespective of such difficulties the target of the protective scope of the GDPR is broader by design given its solid fundamental rights foundations. Indeed, there are clear issues in terms of the appropriate approximation of risk as data protection violations do not necessarily lead to material damage (*i.e.* financial loss as a result of the wrongful use of personal data) and this points to the fact that damage from data protection violations may often relate to distress and the associated moral damage caused by the wrongful use.[885] Distress is subjective in nature and is therefore complex to grasp and this point brings us back to emotions. In this regard, one must also wonder how emotions are considered in the assessment of risk? As noted by Gellert, risk can be given two meanings namely, a vernacular one which refers to a possible danger that can only be partially foreseen, and a technical one which is further understood in relation to decision-making in light of potential future events and is comprised of (1) negative/positive forecasting of these events and, (2) the taking of decisions on this basis.[886] For the purposes of this analysis it should be understood that risk can be approached both from the perspective of the commercial entities' assessment of the potential risks associated with a deployment of emotion detection or monetisation technology (or a part of such technology thereof) and the perception of risk associated with engaging with such technologies on behalf of the consumer.

**[294]** FAIRNESS AND TRUST – Trust is inherently associated with both these aspects as a consumer may be hesitant to use a technology if they perceive a risk (i.e. genuine or not) and, to enhance trust, a commercial entity will aim to illustrate how they have mitigated any potential risks through a fair and accountability driven deployment of their technology. This illustrates the clear link between trust and transparency but also opacity *vis-à-vis* the maintaining of ignorance as to the true nature of a commercial entities business practices or parts thereof.[887] Moreover, the above also relates to the fair distribution of the risks and benefits associated with a technology. Indeed, as noted by Roeser,'[a] fair distribution of risks and benefits is morally preferable to an unfair distribution. It is only reasonable

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[884] Stark 22.

[885] 'FRA (2014) Opinion of the European Union Agency for Fundamental Rights on Access to Data Protection Remedies in EU Member States 37-51' 28 <http://fra.europa.eu/sites/default/files/fra-2014-access-data-protection-remedies_en.pdf.>.

[886] Raphaël Gellert, 'Understanding the Notion of Risk in the General Data Protection Regulation' (2018) 34 Computer Law & Security Review 279, 280. with reference to Bertrand Zuindeau, 'O. Godard, C. Henry, P. Lagadec, E. Michel-Kerjan, 2002, Traité des nouveaux risques, éditions Gallimard, collection folio-actuel' [2003] Développement Durable et Territoires (2003); Peter L Bernstein, *Against the Gods: The Remarkable Story of Risk* (Wiley 1996).

[887] Luke Stark, 'The Emotional Context of Information Privacy' (2016) 32 The Information Society 14, 22.

that somebody feels outrage if she is to undergo the risks of a certain technology without being able to benefit from it, whereas somebody else may get all the benefits without undergoing the risks.'[888] Aside from these issues it is also important to note that emotions can have a misleading effect on our judgements about risks and moral judgements more broadly. Although it remains largely outside the scope of this thesis, here it is important to note that much of the existing literature on risk and emotions unsurprisingly maintains the existing separation between rationality and emotions (positioned as irrational) seemingly in line with Kahneman's separation between System 1 and 2 reasoning described in the previous section.[889] However, as described above emotions pervade decision-making and cannot be neatly separated into systems and thus in order to assess the morality of a particular decision and its associated risk emotions are a necessary component. That being said, emotions and indeed moods in particular can have a clear impact on the perception of risk and the outcome of decision making. Consequently, precisely plotting where emotions fit in all this is difficult and, in this regard the interpretation of what is meant by fair in a legal sense is imperative to appropriately map the overarching relationships between the notions of fairness, trust and risk. In essence, the ability of commercial entities to incorporate fairness in the operation of the framework and thus in the assessment of risk plays a key role in the enhancement of individual autonomy.

**[295]** THE SUSTAINABILITY OF THE DIFFERENCES – The differences between consumer and data protection have been manifested in the interpretation of the frameworks. Indeed, as described above, this is reflected in the reforms of consent in the GDPR and the Article 29 Working Party restrictive interpretation of 7(4) GDPR and their opinion that personal data cannot be positioned as a counter-performance for the provision of a service.[890] However, one must wonder whether such an interpretation is truly sustainable. To clarify, this comment is not just with reference to the current advertising-based ecosystem online but also to the current reforms of the consumer protection framework and the approach of many consumer protection authorities. More practically speaking, if rendering access to a service conditional upon consent violates the 'freely given' stipulation this may lead to the separation between a 'free' personalised (requiring consent) and non-personalised pay-for-access version of the same service thereby putting a price on privacy by the backdoor. In any case, and irrespective of the above, although there are uncertainties regarding the application of the UCP Directive in the context of so-called 'free services' and thus the current (and potential future) reliance on national interpretations, national consumer protection authorities are increasingly recognising an economic value in the exchange of personal data notwithstanding the apparent inconsistencies with data protection law. Nevertheless, for now it suffices to say that the validity of a data subject's consent and the (un)fairness of the pre-formulated declaration of consent are two

[888] Sabine Roeser, 'The Role of Emotions in Judging the Moral Acceptability of Risks' (2006) 44 Safety Science 689, 696.
[889] Kahneman (n 228) 1451.
[890] Article 29 Working Party, 'Guidelines on Consent under Regulation 2016/679' (n 760).

connected but distinct issues. That being said, this higher threshold for consent in data protection does not exclude the potential that the data subject's consent may result in a B2C contract. This hinges on whether the provision of personal data can be conditional for the provision of the service in national contract law or indeed, on whether national contract law otherwise recognises the existence of a B2C contract. The Article 29 Working Party opinion on consent should thus be taken with a grain of salt as this is an issue which is far from resolved even from a policy-making perspective. As such, much hinges on the Digital Content Directive and the interpretation of Article 7 GDPR by the Court of Justice but also, and significantly, the reform of the ePrivacy Directive and the proposed ePrivacy Regulation.

**[296]** UNFAIRNESS IS NARROWER IN TERMS OF PROTECTION THAN FAIRNESS – It is argued here therefore that unfairness in the UCP Directive is too narrow to encompass the broader fundamental rights considerations in the same manner as the GDPR and this is perhaps indicative of the divergences in the level of safeguards evident between the frameworks as manifested in respective transparency and information provision requirements evident in the GDPR and the UCP Directive. It is therefore questionable whether van Eijk *et al.* are correct in their conclusion that '[t]hrough applying rules on unfair commercial practices, the enforcement of privacy issues could become more effective.'[891] Instead, it is argued here that dealing with personal data processing under the UCP Directive instead lowers the level of protection. That is not to say however, that practically speaking there would not oxymoronically be better levels of compliance depending on the positioning of the two authorities in the specific MS. Although it is outside of the scope of this thesis there is a clear argument for allowing for the application of the consumer protection *acquis* in parallel to the GDPR as consumer protection enforcement agencies may in fact be better placed (i.e. financially and politically) to act for consumers.

## 5.2 THE LONG HAND OF DATA SUBJECT CONSENT, LEGITIMATE INTERESTS AND EMOTION MONETISATION

**[297]** UNCERTAIN CONTOURS – The precise contours of the relationship between the GDPR and the consumer protection framework are uncertain. First, the GDPR is an omnibus regime whereas the UCT Directive refers specifically to B2C contractual agreements only whereas consent in the GDPR applies to much more than just B2C contexts and the UCP Directive pre-dominantly applies to the ability of the consumer to make an informed choice (i.e. at least in this context) compared to the GDPR which offers protections both *ex ante* and *ex post* and is applies even when the data subject plays no active role in the determination of whether personal data are processed (e.g. legitimate interest as a condition for lawful processing Article 6(1)(f) GDPR). And second, the connected point that the consumer protection represents a far more economic assessment as opposed to the fundamental rights approach evidenced in the GDPR. Despite these differences however, consumer

[891] van Eijk, Hoofnagle and Kannekens (n 872) 336.

interests are furthered by the application of the GDPR. This is an obvious but important point and, in this regard, Benöhr for instance contends more generally speaking that the consumer protection agenda may be furthered by a broad range of Charter rights, including for instance the rights to data protection and dignity.[892] In this regard it is important to reiterate that in contrast to the fundamental right to data protection, consumer protection is recognised as principle in Article 38 Charter. This provision states that 'Union policies shall ensure a high level of consumer protection'.[893] The need to align data and consumer protection to further empower the data subject is being increasingly recognised.[894] This reflects the desire for more holistic responses to the challenges posed by the emergence of new technologies as individual autonomy in the mediated environment is affected both in terms of the data protection and consumer protection safeguards.

**[298]** *EX AN* AND *EX POST* ALIGNMENT? – In addition to the bolstering the decision-making capacity of individuals to consent with respect to personal data processing, there is an increasing amount of discussion surrounding whether consumer protection can mitigate potentially harmful commercial practices that rely on personalisation and which may have an impact on autonomy and consumer choice. However, there are major issues which need to be ironed out. To frame this problem one must question, how it is possible to ensure the ongoing viability of the average consumer standard? And how can we adjust protections to enable the continuance of fair market conditions? With these questions in mind, it could be suggested that the use of emotion detection technology may fall foul of the requirements in the UCP Directive in terms of the effect of personalisation on the decision-making capacity of individuals.[895] Indeed, the above arguably strengthens the call for a more holistic approach towards the protection of consumer and thus the alignment of the GDPR and UCP Directive to mitigate the negative *ex post* effects of the substantial parts of profiling applications.

### 5.2.1 SEPARATED FROM THE TERMINAL EQUIPMENT AND THE PROTECTION OF THE PRIVATE SPHERE

[892] Benöhr (n 11) 59–60.
[893] However, it is important to note that there is a clear distinction between rights and principles. Indeed, as per Article 52(5) Charter, principles 'may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union Law'. In addition, Article 52(5) Charter further specifies that principles are only 'judicially cognisable' in the interpretation of these acts. In simple terms therefore, rights and principles seem to be weighted differently in terms of their significance.
[894] European Data Protection Supervisor, 'Privacy and Competitiveness in the Age of Big Data: The Interplay between Data Protection, Competition Law and Consumer Protection in the Digital Economy' (European Data Protection Supervisor 2014) Preliminary Opinion of the European Data Protection Supervisor' <https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2014/14-03-26_competitition_law_big_data_EN.pdf> accessed 27 April 2019.
[895] Unfair Commercial Practices Directive.

**[299]** A MULTITUDE OF (POTENTIAL) CONTRACTS – Although there are certainly debates regarding the availability of the UCP Directive protections in the context of 'free' service and consent to the processing of personal data, this does not prevent the application of the Directive to specific elements of such services. More specifically, as described above in Chapter 2, the assessment of personalised and integrative commercial communications will come within the scope of the Directive's protections. To illustrate, imagine the sign-up process to an e-commerce service as a consumer. Although this sign-up and the data subject's consent to the processing of personal data may result in the applicability of the UCP Directive, the commercial communications which form part of the service will come within the Directive's scope of protection. Although the use of emotion detection technology for advertising and marketing purposes is not *de facto* unfair and thus does not appear on the blacklist in Annex I, it is arguable that depending on the circumstances such technology may fit within the small general clauses or the general clause more broadly.

**[300]** AGGRESSIVE COMMERCIAL PRACTICES – With this in mind, one could arguably refer to the protection against aggressive commercial practices in the assessment of the use of emotion detection technologies. Indeed, commercial practices are classified as aggressive if they 'by harassment, coercion or undue influence significantly impair the freedom of choice or conduct of the average consumer'.[896] Even though it is unlikely that harassment and coercion (including the use of physical force) would be applicable, undue influence may arguably be applicable given the asymmetric power relationships.[897] Article 2(j) UCP Directive defines undue influence as '[…] 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'. In addition, Article 9 UCP Directive establishes five factors that need to be taken into account in order to establish if harassment, coercion or undue influence has occurred, namely: '(a) its timing, location, nature or persistence; (b) the use of threatening or abusive language or behaviour; (c) the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which the trader is aware, to influence the consumer's decision with regard to the product; (d) any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader; (e) any threat to take any action that cannot legally be taken.' As such, with reference to point (c) here, there are at least some circumstances in which the exploitation of a known consumer weaknesses will result in an undue influence and thus an unfair commercial practice.[898] Indeed, here it is interesting to refer to Trzaskowski, who notes that in line with the discussion of market manipulation theory above in Chapter 2, as traders will be aware of

[896] Article 8 Unfair Commercial Practices Directive.
[897] Undue influence means that the company holds a position of power in relation to the consumer and exploits this to exert pressure, in order to significantly restrict the consumer's ability to make an informed decision. Article 2 (j) Unfair Commercial Practices Directive.
[898] Trzaskowski, 'Behavioural Innovations in Marketing Law' (n 96) 317.

the consumer's biases, their exploitation of them could trigger the application of Articles 8 and 9 UCP Directive.[899]

**[301]** CHICKEN OR EGG AND LOCALISING THE PROBLEM – Importantly however, the potential here is perhaps undermined by two 'chicken-or-egg' like difficulties in trying to localise the root of the problem. First, one must wonder whether data subject consent to the personal data processing resulting in the personalisation mitigates the potential *ex post* application of the UCP Directive. And second, even if legitimate interests as a condition for lawful processing in Article 6(1)(f) GDPR is potentially available (i.e. thereby disconnecting the personal data processing and personalisation in an *ex ante* sense from the specific will of the data subject), one must wonder whether any negative *ex post* effects triggering the application of the UCP Directive would illustrate that the reliance on Article 6(1)(f) GDPR as opposed to consent was not valid in the first place in light of the controller's obligation to fairly balance the competing interests at stake. Both these points will be further elaborated upon below to supplement the discussion on the potential availability of legitimate interests as a condition for lawful processing in the context of emotion monetisation discussed previously in Chapter 4.

### *A. CONSENT, INFORMATION AND THE TERMINAL EQUIPMENT – EMOTION MONETISATION AND LEGITIMATE INTERESTS*

**[302]** HIGH THRESHOLD OF PROTECTION – As consent in data protection (at least in abstract terms) represents a high threshold of protection, one must wonder whether any negative *ex post* effects would have in fact necessarily also resulted in an *ex ante* violation of data protection as, due to the individualist model of protection, valid consent *ex ante* would represent an awareness of the *ex post* personalisation effects. Such a contention is furthered by the fact that the conditions for consent evident in the GDPR represent a more protective standard compared to those that would be applied *ex post* in the UCP Directive. Therefore, if consent is relied upon to legitimise the personalisation based on *inter alia* emotion insights and this leads to *ex* post effects, the natural point of inquiry is the data subject's original consent. More specifically, the two possibilities in a legal sense appear to be that either that, (1) the individual opted for this personalisation as a data subject and gave informed, unambiguous, freely given and specific consent thereby meeting the average consumer standard *ex post* or; (2) valid data subject consent was not given resulting in an *ex ante* violation of data protection law thereby pre-empting the *ex post* unfairness assessment of the personalisation. In simple terms, it is hard to imagine the use of emotion insights to personalise violating the UCP Directive without also first violating the GDPR. Unless one is to declare a certain practice *de facto* unfair in consumer protection the choice should be made by the consumer and in the case of personalisation this is a choice that is in fact made by the consumer data subject. However, it is significant to note that, as described in Chapter 3, consent is only one of six conditions for lawful processing with consent, contract and legitimate interests all of potential importance in

[899] ibid 316.

B2C personal data processing for commercial purposes. Thus, in the context of emotion monetisation one must wonder what role the legitimate interest balancing condition in Article 6(1)(f) GDPR could play in particular.

**[303]** AVAILABILITY OF LEGITIMATE INTEREST – Here reference can be made to the analysis in Chapter 4 regarding the availability of legitimate interests as a condition for lawful processing in the context of the online advertising ecosystem. In this vein however, it is important to note that there are also potential applications of emotion detection and monetisation which may not necessarily fall within the *lex specialis* requirements in the ePrivacy Directive in a less controversial manner – thereby opening up the other conditions in Article 6(1) GDPR from the outset. To illustrate this point, we can refer again to the example of Ruth who lives in a smart home provided in Chapter 3. Imagine that one of the device tracking Ruth in her home is a smart monitor that detects her emotions through a camera in a localised manner (i.e. everything happens on the device) for gaming but also advertising and marketing purposes – thereby seemingly ruling out the application of contract as a condition in Article 6(1)(b) GDPR. For the purposes of the example suppose that all processing occurs on the device (e.g. storage, running of the raw data through the machine learning model and the emotion insights output) and that therefore, there is no processing of personal data on the cloud thereby ruling out the application of the ePrivacy Directive in relation to the monitor as the terminal equipment used to track as everything happens locally and there is no accessing or placing of information on the monitor.[900] Although there would certainly be personal data processed to detect Ruth's emotional state, the ePrivacy Directive would not apply *vis-à-vis* the detection of emotion as a natural person cannot be considered as 'terminal equipment'. In other words, the information being processed will be collected from the capturing of Ruth's facial expressions and not from the use of cookies or cookie-like technology. But could such processing purposes be deemed lawful under Article 6(1)(f) GDPR? The answer here is somewhat uncertain given that as mentioned above Article 6(1)(f) GDPR manifests an *ex ante* balancing act.

### *B. LEGITIMATE INTERESTS EX ANTE BALANCING AND EX POST EFFECTS*

**[304]** THE ELEMENTS OF LEGITIMATE INTERESTS – Article 6(1)(f) GDPR differentiates between three distinct entities: the controller, the data subject and third parties with the interests of each relevant in the operation of the provision. A multitude of elements may need to be considered and these factors are often difficult to identify and quantify.[901] This reflects

[900] Importantly, even in such an example Article 5(3) ePrivacy may still apply in terms of the optimisation of the model as this information would need to be accessed on the device and then information would have to be placed on the device to update the model.

[901] Indeed, as noted by the A29 Working Party, 'The nature of the interest may vary. Some interests may be compelling and beneficial to society at large, such as the interest of the press to publish information about government corruption or the interest in carrying out scientific research (subject to appropriate safeguards). Other interests may be less pressing for society as a whole, or at any rate, the impact of their pursuit on society may be more mixed or controversial. This may, for example, apply to the economic interest of a company to learn as much as possible about its potential customers so that it can better target

the point that Article 6(1)(f) GDPR acts as a context depending fair balancing mechanism that is deliberately constructed in an open-ended manner.[902] In saying this however, as noted by Ausloos,

> '[...] the provision groups together the legitimate interests of the controller and third parties on one side of the scale, against the interests or fundamental rights and freedoms of the data subject on the other. As the balancing act will *a priori* exclusively be performed by the controller (exceptionally in dialogue with the data subject), in practice third party interests will generally only enter the equation to the extent they correspond with (or relate to) the controller's interests.'[903]

Importantly, the use of the term 'third party' has a distinct meaning under the GDPR which is important to specify. In particular, the definition of a 'third party' in Article 4(10) GDPR provides that a '"third party" means a natural or legal person, public authority, agency or body other than the data subject, controller, processor and persons who, under the direct authority of the controller or processor, **are authorised to process** personal data' [**Emphasis added**]. A third party can thus be classified as a natural or legal persons who is not part of the 'inner circle' of a particular data processing activity and which is therefore, not part of the controller or processor (including their employees) and thus party to a relevant data processing agreement.[904] Accordingly, the grouping of the interests of the controller and that of third parties appears to be indicative of the fact that they are authorised to process personal data through the direct authority of the controller or processor.[905]

**[305]** NECESSARY PROCESSING – In specifying the meaning of the term 'legitimate interests', the Article 29 Working Party notes that the significance of the words 'pursued by' and argues that this demands the presence of '[…] a real and present interest, something that corresponds with current activities or benefits that are expected in the very near future. In other words, interests that are too vague or speculative will not be sufficient.'[906] Building on this it is important to emphasise that, in addition to specificity, the personal data processing must also be 'necessary for the purposes' of pursuing the controller's or

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advertisement about its products or services.' Article 29 Working Party, 'Opinion 06/2014 on the Notion of Legitimate Interests of the Data Controller under Article 7 of Directive 95/46/EC' (n 801) 20.

[902] *Case C-582/14, Breyer, ECLI: EU:C:2016:779* (n 641).

[903] Ausloos (n 531) 259..

[904] Van Alsenoy, 'Regulating Data Protection' (n 562) 86–87; Article 29 Working Party, 'Opinion 1/2010 on the Concepts of "Controller" and "Processor"' (Article 29 Working Party 2010) WP 169 31 <http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp169_en.pdf> accessed 19 April 2015.

[905] As noted by Van Alsenoy, given that third parties are external to a particular data processing operation they do not a priori benefit from any legitimacy or authorisation for the processing of personal data (i.e. outside of that necessitated by the disclosure (e.g. receiving the disclosed personal data) which is legitimised by the lawfulness of the data controller processing). As such, following disclosure third parties must be considered as controllers in their own right and thereby separately responsible for ensuring compliance with the data protection framework. Van Alsenoy, 'Regulating Data Protection' (n 562); Article 29 Working Party, 'Opinion 1/2010 on the Concepts of "Controller" and "Processor"' (n 904).

[906] Article 29 Working Party, 'Opinion 06/2014 on the Notion of Legitimate Interests of the Data Controller under Article 7 of Directive 95/46/EC' (n 801) 24.

a third party's interests. The use of the term 'necessary' here refers to need for the processing in question to represent the least restrictive measure to achieve the purpose(s) at hand with respect for the data subject's interests. Evaluating the necessity of a given processing operation in a commercial B2C context will therefore inevitably require an analysis of whether the processing is in fact 'necessary' from a practical perspective. More specifically, the Article 29 Working Party has observed that the reference to this term mandates a direct and objective link between the processing and the purposes of the processing and has also indicated that the test requires an examination of whether 'less invasive means are available to serve the same end.'[907] This narrow understanding of 'necessity' also appears to have been adopted by the Court of Justice and therefore, it appears that in order to satisfy this element the processing in question must be required in order to effectively achieve the specified purpose.[908] Therefore, simply put if there is an alternative way of achieving the purpose(s) of the legitimate interests pursued by the controller or by a third party which is less of an interference with the data subject's right to data protection then the processing fails to meet the necessity test in Article 6(1)(f) GDPR.[909]

**[306]** BALANCING COMPETING INTERESTS – Even if the controller's or third party's interest is legitimate and necessary to achieve a specified purpose however, it may still be outweighed in the balancing with the 'interests or fundamental rights and freedoms of the data subject'. In the example provided it is at this point that the application of the legitimate interest condition may arguably become problematic. Although it remains outside the scope here to provide a list of the potential interests that would need to be weighed, it is important to note that factors such as the types and scale of the personal data processed, and the measures implemented to mitigate any potential negative effects are matters which will be considered. For instance, the Article 29 Working Party has observed that where large amounts of personal data are collected in a commercial setting, consent will often be the only appropriate condition.[910] That being said, the applicability of the legitimate interest condition to the example given is certainly possible especially because the processing in the hypothetical occurs locally. Even though it is certainly arguable that the greater the likelihood of there being an impact on Ruth's individual autonomy the greater the likelihood that the consent of the data subject will be required, precisely drawing a line here is extremely challenging. To return to the discussion of programmatic advertising therefore, there are serious questions as to whether enough is done to mitigate the risk to data subjects to render any reliance on Article 6(1)(f) GDPR

[907] ibid 55.
[908] *Huber v Germany* (n 803) para 62.
[909] Irene in her chapter with Paul p. 14.
[910] See for example: Article 29 Working Party, 'Opinion 06/2014 on the Notion of Legitimate Interests of the Data Controller under Article 7 of Directive 95/46/EC' (n 801); Article 29 Working Party, 'Opinion on Online Behavioural Advertising' (n 654) 29.

valid and reference here can be made to the security of the processing and Article 5(1)(f) GDPR in particular.[911]

**[307]** THE POTENTIAL AVAILABILITY OF LEGITIMATE INTERESTS – Although this is certainly debateable it is indicative of two important points. First, commercial interests are legitimate and may be part of the balancing in Article 6(1)(f) GDPR which thus swings on the invasiveness and scale of the personal data processing. And second, the more proactive the controller is in terms of their obligations stemming from the accountability principle in Article 5(2) GDPR the more likely that balancing will fall in its favour. In relation to the use of emotion insights to personalise therefore, if there is an effect on the decision-making capacity of the average consumer thereby triggering the application of the protections provided in the UCP Directive when legitimate interests was the condition used, it seems unlikely that this balance would have been struck correctly by the controller and therefore, that Article 6(1)(f) GDPR would in fact be available to render such processing lawful in light of the significant interest of the data subject. In simple terms it is hard to imagine that this would lead to a fair balance *ex ante* given the negative *ex post* effects. This is far from certain however, as the application of Article 6(1)(f) GDPR is context dependant. This uncertainty is not helped by the fact that there is debate as to how machine learning fits within the GDPR and thus challenges the boundaries of protection.

### 5.2.2 EMOTION MONETISATION, LEGITIMATE INTERESTS AND *EX POST* PROTECTIONS

**[308]** A CONTEXT DEPENDANT ASSESSMENT – As analysed in Chapter 4, the provisions defining the material scope of the GDPR illustrate that a context dependent assessment is necessary to determine whether personal data (or indeed sensitive personal data) are processed.[912] Significantly, there are clear question marks surrounding the application of the Regulation to machine learning models and in this vein, much will depend on the nature of the data used to query the models in question. Such confusion is not helped by the fact that the protections hinge on the processing of personal data as opposed to the effect on the individual with all risk seemingly eliminated if the information is anonymous. For instance, the need for the consent of the data subject is not inextricably linked to the machine learning models themselves but rather the personal data processing with the surroundings and context key regarding the identifiability of the natural person. This has led authors such as Schreurs *et al.* to suggest that it may be important to resist anonymization or indeed the use of one's personal data for the construction of profiles.[913] To clarify, the processing of an individual's personal data may have a relatively minor effect in comparison to the use of a model and thus a profile. Indeed, given that group

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[911] See: 'Europe's GDPR Offers Privacy Groups New Ways to Challenge Adtech' [2019] *The Economist* <https://www.economist.com/briefing/2019/03/23/europes-gdpr-offers-privacy-groups-new-ways-to-challenge-adtech> accessed 25 March 2019.

[912] Paul M Schwartz and Daniel J Solove, 'Reconciling Personal Information in the United States and European Union' [2013] SSRN Electronic Journal 886 <http://www.ssrn.com/abstract=2271442> accessed 14 September 2018.

[913] Schreurs and others (n 682) 249.

profiling allows for the taking of decisions affecting a multiplicity of natural persons in that the target of such data processing are clusters of people as opposed to individual data subjects, interests take on a more collective aspect.[914]

### *A. THE RIGHT TO PRIVACY, 'INDIVIDUALISED' IMPACT AND THE DATA SUBJECT'S RIGHT TO OBJECT*

**[309]** CHALLENGING THE DEFINITION OF PERSONAL DATA – From the above therefore, the use of emotion detection in a smart home like Ruth's and for example the deployment of similar sensors in a smart advertising panel in a public place are not comparable situations in every respect albeit despite the fact that, both would seemingly be excluded from the scope of Article 5(3) ePrivacy Directive given that (as mentioned above), a person cannot be considered terminal equipment. Taking this public display advertising example as a starting point one must then wonder how to interpret the application of the GDPR if it is questionable whether personal data are in fact processed. In other words, what if the specific application of the emotion detection technology does not aim to single out a natural person by design? A *potential* example of where emotion detection technology is used but personal data are not processed is illustrated by the testing of the emotion sensitive public advertising in 2015 developed by *M & C Saatchi*.[915] This test deployment took the form of a panel advertisement designed to be located in public areas such bus stops with a camera installed to detect *inter alia* the emotions of passers-by via a *Facial Action Coding System*. As described by McStay, the first test deployment of this technology allowed for the evolution of the advertising content over time (i.e. depending on the emotions of those viewing it in order to make itself gradually more effective) without the storage of any data or indeed the targeting of an identified or identifiable natural person.[916] Storage is arguably key to 'identifiablity' as the longer data are stored the more likely identification becomes and this relates to the point raised in Chapter 4 that data must be assessed on a continuum and viewed as dynamic with the storage period a key factor. Indeed, put simply the longer the time the data are kept the longer there is an opportunity for them to satisfy the cumulative criteria contained in the definition of personal data.[917]

**[310]** AGGREGATE ANALYSIS – By relying on aggregate improvement, this application of the emotion detection technology highlights how in public places such technologies may interact with society *arguably* without necessarily 'singling out' individuals and hence, thereby *potentially* remaining outside the scope of the GDPR. More specifically, as claimed by the companies behind the pilot, the test technology simply reacted to facial expressions

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[914] Mantelero (n 686) 248–249.

[915] John Still, 'Is Artificial Intelligence the next Step in Advertising?' *The Guardian* (27 July 2015) <https://www.theguardian.com/media-network/2015/jul/27/artificial-intelligence-future-advertising-saatchi-clearchannel> accessed 26 November 2018.

[916] McStay, 'Empathic Media and Advertising' (n 25) 6–8.

[917] Hon, Millard and Walden (n 650) 213–214.

of up to 12 people at a time and did not store any information.[918] Although 'processing' is an extremely broad concept in itself and hence, the mere detection of an individual's emotions in real-time may necessitate the processing of personal data (i.e. without any storage), given that the changes adopted by the test advertising deployment were also incremental and thus not person specific, it is uncertain how one could find that an individual could be singled out practically speaking. Indeed, although one could conclude that if the advertisement did change on an individual basis then the purpose would be to single out and the emotion detected would relate to an identifiable individual, this was not (at least according to the company's statements) was deliberately not part of the deployments design. However, even if the deployment was done on an individual basis, without the storage of the information the individual would only be potentially identifiable insofar as the specific instance in which this specific natural person was presented with the advertising campaign tailored to them. This then may relate to the specificity of the targeting and the granularity (i.e. in terms of how it relates to an identifiable natural person) of the processed information.

**[311]** FOCUS ON RESULT? – Indeed, if the categorical breakdown in such circumstances is based on age range, gender and emotional status (i.e. happy, sad) etc., it is unclear whether such general information is enough to truly render an individual identifiable in the traditional sense given that the targeting would remain at an aggregate level. The question may thus relate to the effectiveness of the campaign and more broadly its impact on the natural person and thus the 'result' of the processing to determine whether it related to an 'identified' natural person (i.e. as identified through the selection of the appropriately tailored advertisement). Therefore, the more effective the campaign or indeed, the more such deployments have an impact on the decision making of individuals, the more likely that the information in question will relate to an individual by virtue of the 'result' and hence, the impact on the natural person. Indeed, to further spell out this point reference can be made to the use of billboard sized smart advertising panels operated by *Clear Channel* installed on buildings overlooking Piccadilly Circus in London which incorporate emotion detection technology.[919] Although these panels are installed on private property they overlook and 'sense' a public space thereby reacting to pedestrians and vehicles passing through the area. Similar to the *M & C Saatchi* example described above this raises clear challenges from a data protection perspective regarding the 'identifiability' of the data subject. Indeed, although the GDPR lists biometric data within the prohibition against the processing of sensitive personal data in Article 9(1) GDRP, for it to be classified as such, it must (as a preliminary step) first come within the scope of the definition of personal data. In a manner of speaking therefore, attempts to avoid the application of the GDPR will weigh in the controller's favour in terms of the applicability of the legitimate interest balancing condition contained in Article 6(1)(f) GDPR.

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[918] Still (n 915).

[919] See: Thuy Ong, 'Huge New Screen in London's Piccadilly Circus Will Display Ads Based on Nearby Cars and People' (*The Verge*, 16 October 2017) <https://www.theverge.com/2017/10/16/16468452/screen-london-picadilly-circus-cars-targeted-ads-landsec> accessed 26 November 2018.

### *i. Emotion monetisation in public versus private spaces*

**[312]** THE RIGHT TO PRIVACY IN FOCUS – Leaving the above debates to one side, one must wonder what the consequences for the right to privacy specifically as opposed to the right to data protection as specifically expressed in the GDPR are regarding the deployment of such technologies in public or private commercial spaces (i.e. such as shopping centres) frequented by large numbers of the public. Indeed, as described above in Chapter 3, the rights to data protection and privacy are distinct in EU law and with this in mind, one must wonder whether the deployment of emotion detection in public display advertisement could escape the scope of the right to data protection but still fall within the scope of protection provided by the right to privacy and if such a deployment would amount to an interference with the right? As a preliminary point, it should be acknowledged that this problem is perhaps uniquely associated with the deployment of such technologies in public or private commercial spaces. Indeed, as described above, where emotion detection technology is designed to be deployed within the home, online or via a smart device (such as a smart watch) for seemingly individualised purposes the identification or at least the 'identifiablity' of the individual will not normally be in question. However, in contrast in public spaces or private spaces open to the public, 'identifiability' becomes a more pertinent issue.[920] The separation between data protection and privacy as described above in Chapter 3 may therefore, be of key importance in the regulation of emotion monetisation technologies. Reference here can be made to Gellert and Gutwirth's examination of the overlaps and distinctions between these respective rights in their discussion of body scanners where the authors note that even if personal data are deemed not to be processed, the fundamental right to privacy applies undiminished.[921]

**[313]** PUBLIC SPACES AND PRIVACY – Such considerations may hence be of key importance in assessing the legality of the deployment of emotion detection technology in public or 'privately owned but otherwise public spaces like shopping centres' which may involve complex considerations in relation to the reasonable expectations to privacy *vis-à-vis* the deployment of emotion detection technology.[922] Here it is prudent to note the traditional conceptual difficulties associated with defining when the right to privacy applies in public as such a claim seems almost paradoxical at first site.[923] This difficulty, which is evident in privacy theory, is also manifested in the discussion of the right to privacy in practice in

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[920] See above Section 4.1

[921] Raphaël Gellert and Serge Gutwirth, 'The Legal Construction of Privacy and Data Protection' (2013) 29 Computer Law & Security Review 522, 527.

[922] Elaine Sedenberg and John Chuang, 'Smile for the Camera: Privacy and Policy Implications of Emotion AI', *TPRC45 2017* (2017) 9.

[923] Indeed, as observed by Nissenbaum, '[t]o many, the idea that privacy may be violated in public has an oddly paradoxical ring. One likely source of this response is the way the terms "public" and "private" have been used in political and legal theory. Although their respective meanings may vary from one context to another (and I take it this assertion is relatively uncontroversial among scholars in these areas), the terms are almost always used as a way to demarcate a strict dichotomy of realms.'Helen Nissenbaum, 'Protecting Privacy in an Information Age: The Problem of Privacy in Public' (1998) 17 Law and Philosophy 559, 567.

the case law of the ECtHR on Article 8 ECHR.[924] Indeed, the ECtHR decisions have dealt with the dissemination of publicly available information and thus an infringement of privacy by publication as opposed to the initial collection of the information.[925] Although reference can be made to the *dictum* from *Rotaru v Romania* that 'public information can fall within the scope of private life where it is systematically collected and stored' any form of clarity is further muddied by the fact that in the described deployment there is no storage of the information gathered (i.e. outside of any brief functional requirements).[926]

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[924] The leading case here is *Von Hannover v Germany - 59320/00 [2004] ECHR 294 (24 June 2004)*. which deals with the interpretation of Article 8 ECHR by the ECtHR. In brief, this case related to photographs taken of Princess Caroline of Monaco and her attempts to prevent them being published. In its judgement the ECtHR found that the Princess did have a legitimate expectation of privacy despite being photographed in a public space and thus that the key question was whether this incursion of her right to privacy could be justified with respect for freedom of expression. The key factor here was the fact that the photographs did not contribute to public debate but instead were aimed to satisfy the curiosity of the readership of the Princess' private life. The balancing in the judgement between the right to privacy and the freedom of expression of the publisher was shaped by the celebrity status of the applicant. Indeed, even though the applicant was successful there was significant weight given to the public interest. This is important as intuitively enough, the public interest as a counter-weight for the most part disappears in the context of non-celebrities. Here reference can be made to *Peck v the United Kingdom - 44647/98 [2003] ECHR 44 (28 January 2003)*. where the applicant successfully brought an action against the UK for a violation of his right to privacy when it failed to prevent the transmission of his failed suicide attempt on television. This decision is of clear significance for of the deployment of emotion detection technologies in public or private commercial spaces as these will function *vis-à-vis* the public at large and thus interact predominantly with non-celebrities. In this regard it is also interesting to refer again to the more recent decision in *Satakunnan Markkinapörssi OY and Satamedia OY v. Finland [2017] ECHR 607* (n 522). which dealt with the publication of legally obtained personal tax data. Although it is legal to obtain such information in Finland, the case dealt with whether the journalistic exception and the right of dissemination of personal data acquired through access to such public documents applied in the circumstances, when this information was published in a Finnish newspaper and was also accessible by text message with the help of a mobile phone operator. The ECtHR found that the decision by the national court to limit the freedom of expression of the companies publishing the information on the grounds of an interference with the right to privacy was justified in the circumstances of the case.

[925] Therefore, as noted by Edwards and Urquhart, '[w]hat remains less clear is if (or when) Article 8 interprets as an infringement recording, processing and storage of private material disclosed in public, rather than its actual dissemination.' Although the authors make this observation in the context of the application of Article 8 ECHR to the use of publicly available social media communications by law enforcement agencies, the point remains extremely relevant for our current purposes as the deployment of the emotion detection technology will not involve the further dissemination of the gathered information. Lilian Edwards and Lachlan Urquhart, 'Privacy in Public Spaces: What Expectations of Privacy Do We Have in Social Media Intelligence?' (2016) 24 International Journal of Law and Information Technology 279, 300. That being said, one point of clarification is needed in that any such processing of publicly available online social media information for commercial purposes would undoubtedly come within the scope of EU law and thus the right to data protection in line with the definition of personal date (see above). To explain, although law enforcement agency use of publicly available information for national security purposes falls within the national competence (thereby in turn becoming an Article 8 ECHR issue), commercial data processing will clearly fall within the scope of EU law and thus the Charter and the GDPR. Hence, for instance if an emotion detection technology is used to do a sentiment analysis of publicly available social media postings in order to assess the public perception of a specific product or service, these postings are still likely to contain personal data thereby bringing it within the material scope of the GDPR irrespective of the fact that they are publicly available. To clarify, (at least some of) this information will have been personal data even before the sentiment analysis processing.

[926] *Rotaru v Romania - 28341/95 [2000] ECHR 192 (4 May 2000)* [43].

It is important to note therefore that (1) non-systematic collection of information may not actually infringe the right to privacy and; (2) in the example at hand, as there is no storage of the information, there are clear question marks surrounding the application of Article 8 ECHR and by extension Article 7 Charter. Indeed, the aggregate detection of emotion for public display advertising requires the analysis of individuals and thus the translation of biometric indicators into information but without this, (1) being at an individualised level and; (2) involving any actual storage. As a result, there are question marks as to whether the processing ever actually involves personal data[927] but also whether such a deployment would have an effect on the right to privacy as a distinct right.

**[314]** CHILLING EFFECTS AND PRIVACY – That being said, one must wonder how the right to privacy would be taken into account if such technologies result in a portion of the population acting in a different manner when near such devices or if, when deployed *en masse*, they alienate the citizenry from such public or private commercial spaces? Would such a reality not then illustrate an interfere with the right to privacy especially *vis-à-vis* the development of one's personality? These are difficult questions and are perhaps impossible to answer through a strictly legal analysis as they involve the examination of the public's perception of such commercialisations of emotion detection.[928] That being said, even from its early jurisprudence the ECtHR has stressed the importance of the fact that the right to privacy includes 'the right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfilment of one's own personality.'[929] Indeed, as noted by McStay, '[i]nformation about emotions feels personal because emotional life is core to personhood and while data may not be identifiable, it certainly connects with a fundamental dimension of human experience. This gives it special value.'[930] As a result, there appears to be a valid argument here regarding the protection of privacy outside of data privacy where technological deployments would have an impact on the behaviour of individuals. Indeed, in this regard there is also a potentially important link with the freedom of expression in terms of the impact such technology could have on the willingness of individuals to express their emotions in public or in a more dystopian light the ability not to express their emotions depending on the (at least perceived) accuracy of such mechanisms.[931]

### *ii. Protection, individual impact, the right to object and collective interests*

**[315]** POSSIBLE IN THEORY – There are therefore clear question marks regarding the potential application of the right to data protection as at least arguably there is no personal data processing. This is significant as data processing risks stem far beyond the specific threats

[927] Indeed, although the GDPR lists biometric data within the prohibition against the processing of sensitive personal data in Article 9(1) GDRP, for it to be classified as such, it must (as a preliminary step) first come within the scope of the definition of personal data.
[928] See: McStay, 'Empathic Media and Advertising' (n 25).
[929] *X v Iceland - 6825/74 [1976] ECHR 7 (18 May 1976)*.
[930] McStay, 'Empathic Media and Advertising' (n 25) 8.
[931] See: Richards (n 400); Barendt (n 400).

associated with confidentiality or the protection of private information but encompass broader societal concerns associated with freedom of action, self-determination and autonomy. That being said, one must question how likely this is to occur in the context of the technological development of emotion detection and monetisation technologies. At first glance, although this is at least theoretically possible it seems unlikely due to the simple fact that the greater the probability of there being an interference with the right to privacy the greater the chance the processed information would also be considered personal data. In other words, if it was found that the deployment in question had the effect of altering the behaviour of citizens thereby affecting the free development of their personality rights and also their freedom of expression,[932] it is hard to imagine how this would not be also deemed to relate to an individual on the basis of the deployment's impact. In saying this however, the impact in question must relate to an identifiable natural person and this leaves clear question marks when the impact is distributed over a group or even society at large.

**[316]** LEGITIMATE INTERESTS AND NET EFFECT – One must wonder whether a deployment of emotion detection technology having an impact on a group of individuals would in fact satisfy the cumulative criteria in the definition of personal data as it would not *per se* single out individuals but rather delineate and target them based on broad categories defined based on, for example, age, gender, height and emotional state. Indeed, in this regard it is interesting to refer to the Article 29 Working Party opinion on the use of facial recognition in online and mobile services where it is noted that,

> '[a] template or set of distinctive features used only in a categorisation system would not, in general, contain sufficient information to identify an individual. It should only contain sufficient information to perform the categorisation (e.g. male or female). In this case it would not be personal data provided the template (or the result) is not associated with an individual's record, profile or the original image (which will still be considered personal data).'[933]

As a result, it appears that the application of the right to data protection is certainly questionable in the context of the described deployment of emotion detection technology in public spaces. Furthermore, even if one concludes that personal data are processed, the efforts to avoid the application of the GDPR will play a considerable role in determining the potential to apply Article 6(1)(f) GDPR in line with the discussion above. Indeed, if personal data are processed, legitimate interest is of significant importance in the context of public display advertising as from a practical perspective consent and contract will often be impossible to apply in such circumstances (i.e. it is not justifiable to suggest that a person consents or enters a contractual agreement simply by leaving their house and walking passed an advertising panel). This leaves controllers wishing to deploy such mechanisms falling within the scope of the GDPR with legitimate interest as the solely available condition for lawfulness. But because this legitimate interest balancing is in the

[932] See: Richards (n 400).
[933] Article 29 Working Party, 'Opinion 02/2012 on Facial Recognition in Online and Mobile Services' WP 192 4.

hands of the controller one must wonder what the negative net effect is for the controller if there are personal data processed and the GDPR applies. Indeed, given that the processing occurs in a manner disconnected from the specific will of the data subject in an *ex ante* sense is it not then six of one and half a dozen of the other?

**[317]** THE RIGHT TO OBJECT AND *EX POST* FAIR BALANCING – To answer this question reference must be made again to the fact that fair balancing in the GDPR is manifested in both *ex ante* and *ex post* micro fair balancing mechanisms. More specifically, a close examination of the exercising of data subject rights seems to indicate that a personal data processing operation may be 'lawful' under the conditions for lawful processing in Article 6(1) GDPR but may not be fair *ex post* in the particular circumstances of the case in that although the fairness principle may have been satisfied *ex ante* in the application of Article 6(1)(f) GDPR for instance, and thus data subjects in general, the data subject rights offer a more individualised *ex post* application of fairness. To clarify the above it is interesting to refer to the example of the right to object contained in Article 21 GDPR which offers a broader basis through which data subjects can oppose a specific processing operation initially deemed lawful under Article 6(1)(e) GDPR (necessary for the public interest) or Article 6(1)(f) GDPR (legitimate interest as mentioned above). Article 21(1) GDPR provides that,

> '[t]he data subject shall have the right to object, on grounds relating to his or her particular situation, at any time to processing of personal data concerning him or her which is based on point (e) or (f) of Article 6(1), including profiling based on those provisions. The controller shall no longer process the personal data unless the controller demonstrates compelling legitimate grounds for the processing which override the interests, rights and freedoms of the data subject or for the establishment, exercise or defence of legal claims.'

In brief the right to object is an *ex post* empowerment measure and therefore, a more context aware manifestation of the fairness principle. In this vein, the right to object (as with other data subject rights such as the right to erasure in Article 17 GDPR) can be understood as a stress test of the *ex ante* balancing conducted in Article 6(1) GDPR *vis-à-vis* the conditions for lawful processing.[934] Hence, *ex post* fair balancing explicitly places a re-balancing exercise for an existing personal data processing operation in the hands of data subjects (or rather 'a' or 'the' data subject). In this vein, data subject rights and in particular the rights to erasure and object complement Articles 6(1)(e) and (f) GDPR by offering the tools to question the balance originally defined by the controller.[935] Importantly, therefore *ex post* manifestations of fairness directly implicate the enjoyment

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[934] Indeed, although all fair balancing incorporates necessary and proportionate personal data processing, this element is manifested in slightly different forms throughout the framework thereby illustrating the context dependent nature of the omnibus framework.

[935] From a practical perspective, most controllers will construct their balancing under Article 6(1)(f) GDPR *a priori* on the basis of the median context and average data subject. In contrast, *ex post* empowerment tools such as the rights to erasure and object target the enabling of data subjects to allow them to question this initial balancing act in light of their particular circumstances. See in this line also: *Case C-131/12, Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, ECLI:EU:C:2014:317* (n 317) para 82.

of the right to data protection as this stress test will directly reflect the data subject's wishes whereas the personal data processing may have been found lawful on the basis of legitimate interests as a lawful condition. The specific value of *ex post* fair balancing is that it more accurately responds to the context of the specific situation by offering a more individualised empowerment measure (i.e. as opposed to pre-formulated privacy policies and consent or for example, legitimate interests as a condition for processing). Hence, *ex post* fair balancing is designed with the evolution of rights and interests over time in mind and hence, the enabling of 'control' throughout the lifecycle of the personal data processing. This is significant as *ex ante* fairness mechanisms in themselves are inadequate to protect the data subject.

**[318]** EXTENDING THE HAND OF FAIRNESS – Therefore, in the context of emotion monetisation such an approach affords the opportunity of mitigating the *ex post* consequences of personal data processing revealing emotion by more visibly extending the hand of fairness. Accordingly, fairness is thus a broader principle than that of lawfulness and this is further illustrated by the fact that even if the right to object is successfully invoked, this does not affect the lawfulness of the processing established *ex ante* but rather renders any further/future processing unlawful. To illustrate this point further, one can refer to Article 21(3) GDPR in particular. This provision stipulates that, '[w]here the data subject objects to processing for direct marketing purposes, the personal data shall no longer be processed for such purposes.' Hence, even if the deployment of emotion detection technology in public display advertising is found to process personal data and such processing is based on legitimate interests as a condition for lawful processing, the data subject has the right to object to such processing. Interestingly, this right to object appears to be absolute in that by its construction controllers will no longer be able to process the data subject's personal data for such purposes. Although a complete analysis of these issues is outside the scope of this thesis due to the fact that they are not unique to the monetisation of emotions or in fact central the very purposes of the analysis herein, it is important to note here that there are important practical difficulties applying key data subject rights such as the right to object in the context of the deployment of emotion detection technologies in public display advertising.[936]

**[319]** MOTIVATED TO AVOID THE GDPR – For our current purposes however, it is important to note that this point illustrates a very valid motivation for trying to avoid the application of the GDPR. In saying this, given the focus of this thesis it is important to specify that outside such perhaps unique applications there will (1) normally be no difficulty in finding that the GDPR applies and; (2) that the processing of the personal data to detect and monetise the emotions will require the (explicit) consent of the data subject. This finding does not negate the impact of more collective concerns associated with personal data process and the application of profiling and technologically mediated decision-making more generally.

[936] Here refer to Article 11 GDPR and its potential applicability. On the challenges associated with enforcing data subject rights in relation to privacy by design see: Michael Veale, Reuben Binns and Jef Ausloos, 'When Data Protection by Design and Data Subject Rights Clash' (2018) 8 International Data Privacy Law 105.

In this vein, Mantelero observes that these interests can be either aggregate or non-aggregate in that at a non-aggregate level the collective interest may be represented through a fundamental value of society.[937] The author goes on to note that,

> '[t]he notion of collective non-aggregative interests seems to be the best way to describe the collective dimension of data protection […]. Although individuals may have different opinions about the balance between the conflicting interests, there are some collective priorities concerning privacy and data-protection that are of relevance to the general interest. Here the rationale for collective data protection is mainly focussed on the potential harm to groups caused by extensive and invasive data processing.'[938]

There is an increasing body of literature exploring the role of such group or collective privacy concerns and thus the move from considering 'their' privacy (i.e. as in the individuals that make up a group) to its privacy (i.e. the group itself).[939] Accordingly, as referred to here, group privacy represents a notion which is outside that which is currently protected within the existing understandings of the rights to data protection and privacy.[940] In their analysis, Taylor *et al.* acknowledge that practically speaking from a legal perspective it will be difficult for group privacy to gain any traction despite the fact that the harms associated with data processing go beyond that which is covered by individual privacy harms.[941] This points seemingly reflects the point referred to above in Chapter 4 by Koops that the difficulties associated with the application of the data protection framework is that it focuses on processing risk and not the substantial parts of the profiling applications.[942] But what role could the UCP Directive play here?

### *B. EMOTION MONETISATION AND PRACTICE PROTECTIONS*

**[320]** UNFAIR PERSONALISATION – In positioning the UCP Directive against this backdrop it is important to note that although the Directive (given its distinct aims relative to the GDPR) cannot be equated to the GDPR, it has been argued that the application of the Directive could be informed by the effects of personalisation. Indeed, although the discussion regarding the alignment of the data protection and consumer protection policy agendas has been largely focused on data provision there is an important discussion to be had

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[937] Mantelero (n 686) 248–249.
[938] ibid.
[939] Linnet Taylor, Luciano Floridi and Bart van der Sloot, 'Introduction: A New Perspective on Privacy' in Linnet Taylor, Luciano Floridi and Bart van der Sloot (eds), *Group Privacy: New Challenges of Data Technologies* (Springer International Publishing 2017) 10.
[940] Significantly, this conceptualisation of group privacy differs from the use of the same notion by Bloustein who refers to relational or family privacy (i.e. privacy in the sense of the interest of individuals belonging to a group, forming a group or their identity as part of a group identity) as opposed to the protection of a group interest. Edward J Bloustein, *Individual and Group Privacy* (Transaction Publishers 1978). as referred to by Taylor, Floridi and van der Sloot (n 939).
[941] Linnet Taylor, Bart van der Sloot and Luciano Floridi, 'Conclusion: What Do We Know About Group Privacy?' in Linnet Taylor, Luciano Floridi and Bart van der Sloot (eds), *Group Privacy: New Challenges of Data Technologies* (Springer International Publishing 2017) 233.
[942] Koops (n 280).

regarding the application of the UCP Directive protections against the negative effects of personalisation. However, in this regard one could argue that due to the economic focus of such B2C personalisation, the UCP Directive is better focused to tackle the effects of targeted commercial communications. There is thus a potential role to be played by the UCP Directive. From the outset however, it should be acknowledged that despite the fact that the data protection and consumer protection policy agendas have been gradually aligning, this has mainly focused on the bolstering of data subject control over their personal data (as illustrated in Chapter 6).[943] Here if is important to mention, the European Commission in the guidance document on the interpretation of UCP Directive stated that in certain circumstances 'personalised pricing/marketing could be could be combined with unfair commercial practices in breach of the UCPD' (i.e. Articles 8 and 9 UCP Directive), there is no real clarity in this regard.[944] In particular, despite the arguments in academic research[945] it remains unclear whether personalisation in itself could ever be in violation of the UCP Directive or whether this must necessarily to be combined with some additional element which breaches the UCP Directive. This is significant as following the logical interpretation of the changes provided for by the Modernisation Directive, provided the consumer is 'informed' the commercial practice should be, generally speaking, deemed fair.[946]

**[321]** ORGANIC VERSUS SPONSORED CONTENT – As a cross-reference, here it is interesting to refer to van Hoboken's analysis of the demarcation between organic and sponsored search results and his criticism of the separation as being 'too simplistic to capture what is really going on'. The author goes on to suggest that users,

> '[…] should be, or be made, aware of the many ways in which organic search results are, in fact, shaped by different forms of outside pressure, including not only pressure from advertisers but also from other special interests. Search engines should complement the existing practice of labeling with additional internal policies and strategies to prevent the crowding out of objectively valuable, non-commercial references in their index. They should also make themselves publicly accountable for adhering to these policies. In the absence of such additional safeguards, search engine users may be better off, not having any expectation of impartiality, objectivity of any type of search result. In that case, they will have to simply rely on their own judgment about the value of the references that are provided to them.'[947]

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[943] See *infra* the discussion of the Unfair Terms Directive but also the Unfair Commercial Practices Directive and in this regard the recent common position on consumer protection and social networks see: EU Consumer Protection Agencies and European Commission (DG Justice) (n 866).

[944] 'Commission Staff Working Document Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices' SEC (2009) 1666, 20.' (n 168).

[945] See generally: Clifford and Verdoodt (n 33); Verdoodt, Clifford and Lievens (n 33); Clifford, Graef and Valcke (n 773).

[946] Indeed, as described above in Chapter 2 the updates to the CR and UCP Directive include information requirements regarding the ranking parameters used when rendering the result to a search query (see Article 6a(1)(a) CR Directive and Article 7(4a) UCP Directive).

[947] van Hoboken (n 58) 310.

Although van Hoboken's points are with a specific reference to search engines they can be referred to in a more general context given the use of a plethora of recommender systems in the mediated environment. Moreover, although transparency requirements are certainly important, it could still be questioned whether identification-based protections sufficiently respond the manipulative effect of such integrative techniques in light of their emotive impact. Indeed, it is also important to note that such recommender systems may act as a means of 'locking' the consumer into long term service provision contracts and not just one-off purchases.[948] It is therefore uncertain whether EU consumer protection in its current form is in fact capable of protecting consumer.[949] This uncertainty also relates to what is to be included in this information and thus what amounts to a parameter determining the ranking of offers which must be communicated to the consumer under the recent reforms of the consumer *acquis*.

**[322]** INFORMATION OR 'MEANINGFUL INFORMATION' – Here specific reference can be made to Recitals 22 and 23 Modernisation Directive. Recital 22 clarifies that parameters determining the ranking refers to 'any general criteria, processes, specific signals incorporated into algorithms or other adjustment or demotion mechanisms used in connection with the ranking.' The potentially far reaching consequences of this provision however, are then mitigated by Recital 23 which states that the information requirements are without prejudice to trade secrets as protected in Directive 2016/943 and thus that '[t]raders should not be required to disclose the detailed functioning of their ranking mechanisms, including algorithms.' Instead Recital 23 clarifies that '[t]raders should provide a general description of the main ranking parameters that explains the main default parameters used by the trader and their relative importance as opposed to other parameters, however it does not have to be presented in a customized manner for each individual search query.' The potential for such general information to aid consumers may therefore be limited. Furthermore, there is also a degree of ambiguity here in terms of the overlaps with the GDPR as search queries may also be personalised. As a consequence, there is a potential overlap with Article 22 GDPR in relation to the operation of the transparency principle in the context of automated individual decisions and thus, one must wonder how the general description of the ranking parameters may relate. To clarify, although Recital 23 Modernisation Directive states that the trader does not have to present customised information for each individual search query, this does not exclude the potential that a data subject is entitled to 'meaningful information about the logic involved' in automated decisions through the requirements in the GDPR (see Articles 13(2)(f), 14(2)(g), and

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[948] See for example a discussion on the influence of AI on emotions: D. Zeng, 'A Letter from the Editor AI Ethics: Science Fiction Meets Technological Reality' IEEE Computer Society may/june 2015 ieeexplore.ieee.org/stamp/stamp.jsp?arnumber=7111869

[949] Such conceptual problems are also manifested in the potential *ex post* application of the UCT Directive to mitigate the 'negative' effects of personalisation. Indeed, although such matters more readily fall within the UCP Directive, it could be suggested that if certain terms were personalised the unfairness of them could also be assessed under the UCT Directive.

15(1)(h) GDPR).[950] Interestingly, in contrast with the omission of a reference to the potential cross-application of Article 22 GDPR regarding search queries and results, Recital 45 Modernisation Directive refers specifically to Article 22 GDPR in relation to price personalisation. Indeed, the Recital stipulates that the information requirement contained in the updates to the CR Directive is without prejudice to the GDPR while at the same time only requiring traders to informed consumers that a price is personalised (i.e. as opposed to how) in the requirements in the CR Directive. Although the decision to seemingly legitimise personalised pricing will be criticised in particular in Chapter 6, for our current purposes it is sufficient to highlight that the protections introduced by the Modernisation Directive remain rooted in the traditional separation between commercial and editorial content (identification principle) and the ability of the consumer to choose based on information. But is this enough in the mediated environment where services are designed to personalise the user-experience?

**[323]** KEEPING THE IDENTIFICATION-BASED FOCUS – Indeed, it is questionable whether simply requiring adherence to the identification principle is adequate or if, for effective protection, more coordination is in fact needed. Although the industry response to this requirement more generally has been to create labels or cues that indicate the commercial nature of advertisements to enhance transparency. However, the effectiveness of these has been repeatedly questioned. Indeed, for these tools to be effective it is crucial that during their development elements such as *inter alia* cross-media use (i.e. uniform labels

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[950] There has been a lot of scholarship focused on Article 22 GDPR which as noted above in Chapter 4 provides that, '[t]he data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her.' The debate began with Bryce Goodman and Seth Flaxman, 'European Union Regulations on Algorithmic Decision-Making and a "Right to Explanation"' [2016] arXiv:1606.08813 [cs, stat] <http://arxiv.org/abs/1606.08813> accessed 23 May 2017. There was then a reply presenting a critical view of the so-called right to explanation namely; Sandra Wachter, Brent Mittelstadt and Luciano Floridi, 'Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation' (2017) 7 International Data Privacy Law 76. The Wachter et al. article was followed by a number of pieces notably; Andrew D Selbst and Julia Powles, 'Meaningful Information and the Right to Explanation' (2017) 7 International Data Privacy Law 233; Lilian Edwards and Michael Veale, 'Slave to the Algorithm? Why a "Right to an Explanation" Is Probably Not the Remedy You Are Looking For' 16 Duke Law & Technology Review 18. The Selbst and Powles article is extremely critical of the Wachter et al. piece and raises some excellent points presenting a more convincing analysis. In general, their criticisms are also reflected in other legal scholarship which in general avoids the term "right to explanation" and sticks to the interpretation of principles in the GDPR. See: Dimitra Kamarinou, Christopher Millard and Jatinder Singh, 'Machine Learning with Personal Data' in Ronald Leenes and others (eds), *Data Protection and Privacy : The Age of Intelligent Machines* (1st edn, Hart Publishing 2017) <http://www.bloomsburycollections.com/book/data-protection-and-privacy-the-age-of-intelligent-machines/ch4-machine-learning-with-personal-data-this-paper-has-been-produced-by-members-of-the-microsoft-cloud-computing-research-centre-a-collaboration-betwe/> accessed 26 February 2018; Isak Mendoza and Lee A Bygrave, 'The Right Not to Be Subject to Automated Decisions Based on Profiling' in Tatiana-Eleni Synodinou, Philippe Jougleux and Thalia Prastitou (eds), *EU Internet Law: Regulation and Enforcement* (Springer International Publishing 2017). In addition to academic scholarship it is important to note that the Article 29 Working Party has also issued guidance in the interpretation of Article 22 GDPR see: Article 29 Working Party, 'Guidelines on Automated Individual Decision-Making and Profiling for the Purposes of Regulation 2016/679' (n 694).

across different techniques), adoption processes by users or viewers, specific cognitive characteristics and levels of advertising literacy of specific user groups (such as minors) and regular monitoring of efficiency.[951] This observation thus suggests building on interdisciplinary work to provide more meaningful implementations that are practically capable of informing consumers to provide a more structured and standardised approach to this issue.[952] Notwithstanding this suggestion however, from a cynical perspective it is hard to imagine such a development occurring as simply put, it is not in the interest of commercial operators.

**[324]** OUTLINING THE BROADER ISSUES – It is important to emphasise that commercial operators design their services to maximise profits, but as the *Cambridge Analytica* scandal has illustrated but also the wave of public consciousness dedicated to the '*Fake News*' phenomenon, the pursuit of profit and the public interest do not necessarily align. Here reference can be made to the academic analysis of the effects of the mediated environment on individuals and the effects of what Pariser has referred to as the 'filter bubble' or the how the effects of personalisation can expose the individual only to content which is deemed of 'interest' to them thereby limiting their exposure to other content.[953] In this context one can refer to the plethora of examples in the emotion-aware entertainment media sphere in which emotion is used as an indicator both for the recommending of content.[954] But are these issues consumer protection law issues? Certainly, exposing or inhibiting individuals access to a diverse 'media diet' has important consequences for freedom of expression and information and, as such personalisation requires the processing of personal data, the rights to data protection and privacy are also relevant. However, one must question how to effectively frame the regulation of this problem. Indeed, there is still some uncertainty regarding the capacity of the Directive to cater for more intangible harms related to the protection of fundamental rights and freedoms. Clarity in this regard would provide a more certain delineation of the regulatory responsibility of enforcement authorities thereby facilitating more coordinated action. Aside from such considerations and as indicated above however, it is important to note

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[951] See: Clifford and Verdoodt (n 33).

[952] Indeed, studies have shed some light on the effectiveness of the current standard of implementation of the identification requirement. In particular, Wojdynski and Evans discovered significant effects of disclosure characteristics on visual attention and visual attention on advertising recognition. The authors' study discovered that the use of the words 'sponsored' or 'advertising' led to greater advertising recognition in comparison with vague disclosure language. B.W. Wojdynski and N.J. Evans, 'Going Native: Effects of Disclosure Position and Language on the Recognition and Evaluation of Online Native Advertising' (2015) Journal of advertising 157-168 Moreover, a second study completed by the authors found that top-placed disclosure (a technique which is most often used by the industry) was seen as relatively ineffective in garnering visual attention by the consumer and that, as a result, a middle-positioned disclosure or a disclosure within the content could be a more effective means of increasing consumer awareness. Bartosz W Wojdynski and Nathaniel J Evans, 'Going Native: Effects of Disclosure Position and Language on the Recognition and Evaluation of Online Native Advertising' (2016) 45 Journal of Advertising 157.

[953] Pariser (n 50).

[954] see: Rolland (n 53).

that even in the context of personalised pricing where there could be direct economic harm it appears unlikely that the UCP Directive would be able to cater for the more intangible harms protected against in the GDPR. Data protection law, and the GDPR as a legislative mechanism, certainly presents a means of framing and responding to this problem as the Regulation focuses on risks which extend beyond the likelihood of economic harm. However, this does not preclude the concurrent application of the UCP Directive and thus the mitigation of interferences with consumer autonomous decision-making capacity *via* the effects of personalisation.

**[325]** MARKET MANIPULATION AND EMOTIONAL AI – Such a debate necessarily also requires an appreciation of market manipulation theory as described above in Chapter 2. To reiterate, in their analysis of market manipulation Hanson and Kyser emphasised the key contention that commercial entities will respond to market incentives and hence, manipulate consumer perceptions in the way which maximises profits while providing supporting evidence of the possibility of market manipulation and arguing that a liability regime provides the best regulatory response.[955] In this vein, one must question the significance of the emergence of emotional AI and the increasing capacity to personalise services on the basis of (*inter alia*) such insights. In simple terms, if individuals are emotionally manipulated how then in their subjective state can we return them to a point of objectivity within which they would have the capacity to exercise their consumer rights effectively? The problem is that simply relying on information provision and the identification principle may be insufficient.[956] The harm would have already been effectuated, the purchase made, and emotional connection exploited. Of course, this may also raise specific concerns regarding the potential harm to society as opposed to the economic harm felt by an individual.[957] Could this further increase the complaints focused against consumerism and the emergence of a culture of excess? Are these really harms that can be simply linked here and also do the economic benefits for businesses outweigh these concerns at a more *macro* socio-economic level? These are difficult questions requiring interdisciplinary research and it is certainly arguable that a more precautionary

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[955] Market manipulation theory also renders much of the criticisms positioned against the discovery of bias moot. More specifically, the so-called 'citation bias', where behavioural law and economics scholars have been accused of disproportionately weighing biases relative to the instances in which individuals act in accordance with what is deemed rational, becomes somewhat irrelevant. Instead it is replaced by what Hanson and Kysar refer to as exploitation bias (i.e. the tendency to exploit biases that *result* 'in increased sales, higher profits and decreased perceptions of risk.'): Hanson and Kysar, 'Taking Behavioralism Seriously' (n 245) 743.

[956] The principle of identification provides the key requirement vis-à-vis the protection of consumer from commercial communications. Indeed, despite the complex web formed by the e-Commerce Directive, and the *lex specialis* AVMS Directive, the requirements essentially boil down to the requirement for businesses to ensure that their commercial communications (be they audiovisual or not) remain identifiable as such for consumers. For a discussion see: Clifford and Verdoodt (n 33). In practice, this principle is implemented through the use of labelling or 'cues' to make commercial content recognisable. For a discussion see: Natali Helberger, 'Form Matters: Informing Consumers Effectively' (University of Amsterdamn) 2013–10 <http://papers.ssrn.com/abstract=2354988> accessed 4 August 2016.

[957] In this content we can refer to emotional conditioning as discussed by Reed and Coalson see: Reed Jr and Coalson Jr (n 32).

approach is required but it should be noted that as early as 1935 it was suggested that consumers essentially rationalise their own behaviour in that they find reasons or meaning to justify it and that practically everything that people want is driven by some unconscious (emotional) reason.[958]

**[326]** HYPERBOLIC OVERESTIMATING – However, for our current purposes it is important to emphasise that the dangers here (and thus the promise of the emotional AI industry) should not be over-estimated. As described in Chapter 4, emotion detection is not an exact science and there are those who remain very critical of the underlying methodologies employed by certain companies (especially in the context of facial action coding).[959] In addition, and as described in Chapter 3, although emotion pervades decision-making this does not render individuals helpless in terms of the manipulation of the consumption decisions. In saying this however, these technological developments should not be ignored and are of clear significance. Indeed, as noted by Arkush,

> '[j]ust as meteorologists can predict probabilities of precipitation given a set of environmental variables, we can predict probabilities of human action given a set of human circumstances. And the more variables we can control, the better the predictions. Likewise, in human behavior, the more aspects of the situation we can control, the more behavior can be predicted and controlled.'[960]

The true impact of these techniques on economic decision-making is unknown but this does not render the underlying premise of this thesis redundant as (1) there is strong evidence for instance within the computer science literature to support cause for concern[961] and; (2) their impact needs to assessed not only from the perspective of individuals but also in terms of the macro-level societal effects. This points to the fact that advertising and marketing does not suppose an impact in every case but rather a proportionate percentage improvement in engagement for the segment of the population targeted. Aside from these points it is also important to re-iterate the point that emotion detection poses risks to consumers extending beyond the application of such technology for marketing, advertising and sales personalisation purposes. Indeed, as noted by Hesselink in his analysis of the consumer law *acquis* '[t]here is more to a human being than her or his inclination to consume.'[962] In this regard therefore, even outside the potential application of legitimate interests as a condition, due to the difficulties

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[958] In 1935 it was suggested that practically everything that people want is wanted for some unconscious (emotional) reason that the average person does not understand, and that apparent reasons are merely excuses ('rationalization')57 – the idea being that we find meaning in and
arguments for what we do rather than doing things because we find them to be meaningful or rational in an economic sense. Donald A. Laird, *What Makes People Buy* (McGraw-Hill 1935), 22 f. – Trzaskowski p. 309.

[959] See: Oscar Schwartz, 'Don't Look Now: Why You Should Be Worried about Machines Reading Your Emotions' *The Guardian* (6 March 2019) <https://www.theguardian.com/technology/2019/mar/06/facial-recognition-software-emotional-science> accessed 25 March 2019.

[960] Arkush (n 197) 1327.

[961] Burr, Cristianini and Ladyman (n 7); Burr and Cristianini (n 7).

[962] Martijn W Hesselink, 'European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?' (2007) 15 European Review of Private Law 323, 332.

associated with consent, one can question whether consent can truly be regarded as a condition legitimising all forms personalisation *ex post* due to problems associated with reliance on this condition.

## CONCLUSION

**[327]** ALIGNMENT UNCERTAINTIES – The alignment of the data protection and consumer protection policy agendas is complicated, and this has an important impact on the assessment of the legal limits to the monetisation of online emotions. As illustrated by the analysis in this Chapter, despite the ongoing policy developments precisely plotting the overlaps and conflicts is an ongoing process. This leads to uncertainties as to how the future 'aligned' protections will play out in the future. This uncertainty manifests itself in the application of both *ex ante* and *ex post* protections of consumer (term used loosely to include data subject) decision-making. In an *ex ante* sense, the application of both data protection and consumer protection seems unnecessary on paper but also potentially detrimental to the consumer interests if the requirements in the GDPR somehow fall out of enforcement favour.[963] As argued above, the GDPR provides more paternalistic protection of the data subject as compared to the requirements contained in the UCP and UCT Directives. This has not stopped the trend towards relying on consumer protection instruments in relation to personal data gathering practices however, and although there is certainly an argument for increased protection this does not appear to have a substantive standard of protection grounding to justify the use of the consumer law *acquis*. Indeed, as analysed above it appears to raise a number of concerns and in some sense disregards long-held and significant data protection and privacy debates. In an *ex post* sense, the alignment of the protections presents an interesting chicken-and-egg problem in trying to localise the protection problem with the relevant frameworks. To clarify, it is the data subject's decision to consent to personal data processing for personalisation purposes which leads to negative *ex post* effects. It is uncertain therefore, whether protection can be provided *ex post* without declaring the initial processing first invalid thereby suggesting that the best place to focus any potential solution is *ex ante*.

**[328]** BEYOND MERE REQUIREMENTS – Aside from the above more positivist analysis the Chapter also question whether, in a world where emotions are detectable and can be monetised in real-time, the discord described above raises questions in terms of the suitability of the ongoing protections to safeguard consumer self-determination and individual autonomy more fundamentally. Indeed, although the data protection and consumer protection frameworks certainly provide protections, it is uncertain whether these adequately respond to such developments. But what does this mean in terms of the ongoing protection of consumers? Is a focus on the rationality of the individual decision-maker in fact necessary for protection or can we construct legal protections based on some other

[963] In this regard it should be noted that there have been clear challenges associated with enforcement in the past, see: Damian Clifford and Yung Shin Van Der Sype, 'Online Dispute Resolution: Settling Data Protection Disputes in a Digital World of Customers' (2016) 32 Computer Law & Security Review 272.

paradigm for protection? And in answering these questions what does this mean in terms of the legal protections that can be provided and how do these fit within the existing frameworks? The following Chapter aims to answer these questions.

# 6

# THE LIMITATIONS OF LEGAL PROTECTIONS AND MITIGATING THE RISKS OF EMOTION MONETISATION

## INTRODUCTION

**[329]** THE LEGAL LIMITS EXPOSED – There are limits to the monetisation of emotion but there are also limits to how current legal requirements can cater for the emergence of emotional AI and the monetisation of emotion more specifically. The previous Chapters have explored (1) the limits imposed by EU law on advertising and marketing; (2) assessed the underlying fundamental rights and their role in determining the 'limits' of protection and, in this manner, presented the EU data protection and privacy frameworks as the filter through which the potential problems associated with emotion monetisation could be weeded out; (3) examined the applicability of the EU data protection and privacy framework; and finally (4) explored the limits imposed by the GDPR and the capacity of the framework to nullify the autonomy risks which go to the core underlying premise of this thesis. Through this analysis several challenges have been exposed. Broadly speaking, these problems can be categorised as (1) difficulties stemming from an internal assessment of a specific policy agenda and; (2) problems associated with the increasing alignment of the respective data and consumer protection policy agendas. Regarding the first of these, the challenges to the information paradigm, the level of protection provided by EU consumer (protection) law (i.e. and the influence of underlying policy objectives), the difficulties associated with 'fitting' emotion detection into the GDPR and the uncertain grey areas which pervade its interpretation are all examples of such issues. In relation to the second, the '*propertisation'* of personal data, the application of contractual protections to so-called 'free' services and the challenges associated with applying *ex post* protection to personalisation when the challenge may be better localised within *ex ante* protections which seem ill-equipped to mitigate the negative effects of profiling applications, are all clear examples.

**[330]** BEYOND THE LIMITS – But where does this list of limits and problems associated with these limits leave us? A continuous undercurrent in this thesis has been the analysis of how power and information asymmetries as well as the cognitive limitations of users undermine the reliance on rationality as a normative anchor in both the data and

consumer protection frameworks and that emotions and rationality appear to be kept firmly separate in legal protections. Emotions however, are key to advertising and go to the core of why a consumer makes a specific transactional decision – a point which is arguably not fully reflected in legal protections. Emotions thus play a key role in determining our choices and this also extends to our decisions to provide personal data or not which is of course crucial for the deployment of emotional AI. The emergence of emotion detection technology raises several fundamental challenges to the existing framework and in particular, the rationality-based paradigm imbued in the legal safeguards analysed in the previous Chapters. Framed as such, this problem gives rise to questions namely, is rationality needed as a normative anchor? And how can we create an environment in which individuals can make a rational choice? The aim of this Chapter therefore is to explore these questions. To reach this aim the Chapter will (1) examine the role of rationality and in this vein, assess the part played by emotions and more specifically the philosophical writings on the role of emotion to better position the current legal protections and how theories of decision-making in law are conceptualised. Building on this foundation, the Chapter will then; (2) assess how a fairer emotion monetisation ecosystem could be designed by exploring the avenues for more tailored protection in the current legal frameworks and hence, analysing the limits imposed by the EU regulatory environment as a complex constitutional space.

## 6.1 EMOTIONS, 'RATIONALITY' AND THE LEGAL LIMITS TO MONETISATION

**[331]** UNDERMINING RATIONALITY – By undermining the rationality of individuals to act in their own best interests, (however they define them) commercial operators challenge consumer self-determination and, as described in Chapter 3, individual autonomy as an overarching notion or value in fundamental rights. The relationship between consumer protection and fundamental rights is complicated due to the traditional separation between public and private law. Therefore, the interaction between consumer rights and fundamental rights is an important underlying consideration. Indeed, due to the asymmetric business-consumer relationship certain scholars have called for a re-evaluation of consumer rights and their potential positioning as fundamental human rights at the international level.[964] For instance, Deutch in arguing for such a repositioning has shown that consumer rights are comprised of many of the characteristics of second generation human rights[965] observing *inter alia* that they are both characterised by the need for State intervention rather than abstention and confer rights on individuals indiscriminately within the population at large (i.e. at one point or another all individuals

[964] See: Benöhr (n 11). Sinai Deutch, 'Are Consumer Rights Human Rights? (Includes Discussion of 1985 United Nations Guidelines for Consumer Protection)' (1994) 32 Osgoode Hall Law Journal.

[965] i.e. those which were economic, social and cultural in nature and were acknowledged in the Universal Declaration of Human Rights 1948 and in the International Covenant on Economic, Social and Cultural Rights of the UN 1966.

are consumers).[966] This link between consumer protection and fundamental rights is increasingly significant given the recent technological advancements. The development of emotion detection and monetisation technologies possibly adds further credence to the argument that the connection between consumer and human rights needs to be re-evaluated given the increasing power asymmetries online. However, such a step may be considered sensationalist and indeed a dilution of the very nature of a fundamental right.[967] That being said, one must acknowledge that in a consumerist environment incorporating persuasive or even manipulative techniques, the protection of the individual consumer and their autonomy is inextricably linked with the protection of fundamental rights[968] and that, as described above, may more accurately be configured as an indirect manifestation of fundamental rights in private law. The purpose of this first section therefore, is to analyse what is meant by individual autonomy in philosophical literature as the fundamental root of these protections and hence, how philosophical understandings conceptualise autonomy, emotions and rationality.

### 6.1.1 AUTONOMY AND THE AFFECTIVE PHILOSOPHICAL FOUNDATIONS

**[332]** AUTONOMY, RATIONALITY AND EMOTION – Precisely plotting the meaning of autonomy is challenging given that, as noted by Harbinja, autonomy 'takes various meanings and conceptions, based on different philosophical, ethical, legal and other theories.'[969] Indeed, in providing an introductory overview of philosophical accounts of individual autonomy Christman observes that '[i]deas and theories that make crucial use of the notion of autonomy, or what amounts to close variations on that theme, are ubiquitous in the history of Western moral and political philosophy.'[970] Autonomy is often introduced with reference to its etymological roots which are comprised of 'auto' meaning self and 'nomos' meaning law thereby illustrating the clear link between autonomy and the notion of self-government or self-legislation.[971] Despite the apparent hodgepodge of autonomy scholarship, specific reference can be made to Kant's deontological ethics and the utilitarian liberalism of John Stuart Mill.[972]

#### *A. AUTONOMY, RATIONALITY AND EMOTION*

**[333]** INTERPRETING AUTONOMY – Autonomy is the centrepiece of Kant's moral theory which offers a rationalist account of moral autonomy. Interestingly however, and as summarised by

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[966] Benöhr (n 11) 47.
[967] For a general criticism of the creation of new human rights see: Philip Alston, 'Conjuring up New Human Rights: A Proposal for Quality Control' (1984) 78 The American Journal of International Law 607.
[968] Deutch (n 964) 552–553.
[969] Edina Harbinja, 'Post-Mortem Privacy 2.0: Theory, Law, and Technology' (2017) 31 International Review of Law, Computers & Technology 26, 29.
[970] John Christman (ed), *The Inner Citadel: Essays on Individual Autonomy* (Oxford University Press 1989) 4.
[971] Marijn Sax, Natali Helberger and Nadine Bol, 'Health as a Means Towards Profitable Ends: MHealth Apps, User Autonomy, and Unfair Commercial Practices' [2018] Journal of Consumer Policy <http://link.springer.com/10.1007/s10603-018-9374-3> accessed 5 June 2018.
[972] Christman (n 970) 4.

Donnelly, although several authors link autonomy to Kant's Categorical Imperative (i.e. his fundamental principle of morality) and view it as an essential component in Kantian ethics, several scholars dispute this connection.[973] For instance, O'Neill clarifies that the Categorical Imperative is illustrative of Kant's focus on principles which '*could* be chosen by all, that is to say which principles are univerali*sable*, or *fit to be universal laws*.'[974] Accordingly, this illustrates the underlying premise of Kantian moral autonomy that it is only those who act morally and hence, in line with the Categorical Imperative, who act rationally and autonomously. On this basis O'Neill refers to individual and principled autonomy in order to differentiate between these two meanings and notes that the emphasis Kant 'places on the term *self-legislation* is on the notion of *legislation*: the advocates of individual autonomy by contrast stress the notion *self* and have little to say about any conception of (moral) legislation.'[975] As noted by Donnelly therefore, the Kantian conception of autonomy 'is not about free choice but about the drive to appropriate or moral action'[976] In contrast to Kant, according to Mill, 'the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others' and that the person's 'own good, either physical or moral, is not a sufficient warrant'.[977] Accordingly, under the Millian conceptualisation of autonomy an individual is sovereign over their own mind and body and the only limit to this freedom 'for which he is amenable to society, is that which concerns others.'[978] As noted by Donnelly, it is important to highlight therefore that Mill 'defended the principle of individual liberty on the utilitarian basis that it is through liberty that human individuality can develop.'[979]

**[334]** MODERN INTERPRETATIONS – Modern liberal theorists continue to build upon Mill's classical libertarian account and important positioning of the principle of individual autonomy albeit with (sometimes significant) alterations. This illustrates a seemingly clear link between autonomy and the independent self-determination of individuals or, as Christman phrases it, 'the authentic and independent self'.[980] In analysing Christman's authenticity and independence criteria Sax *et al.* note that independence here should be understood as a person's control over how their values, desires and goals inform their decision-making and choices whereas authenticity refers to a person's relationship with their values, desires and goals in that authenticity requires 'managerial control' over how these inform an individual's decisions, actions and lifestyle and hence, those who are

[973] Mary Donnelly, *Healthcare Decision-Making and the Law: Autonomy, Capacity and the Limits of Liberalism* (Cambridge University Press 2010) 17–19.
[974] Onora O'Neill, *Autonomy and Trust in Bioethics* (1st ed., reprinted, Cambridge University press 2002) 84. As referred to by Donnelly (n 973) 17–19.
[975] O'Neill (n 974) 85–86.
[976] Donnelly (n 973) 19.
[977] John Stuart Mill, *On Liberty and Other Essays* (John Gray ed, 1 edition, Oxford Paperbacks 2008) 14. as discussed in Donnelly (n 973) 19.
[978] Mill (n 977) 75–76. as discussed in Donnelly (n 973) 19.
[979] Donnelly (n 973) 18.
[980] Christman (n 970) 3.

manipulated towards certain desires would not be understood as autonomous.[981] Building on this, and with reference to the work of legal philosopher Joseph Raz, the authors then go on to suggest that 'options' should be included as a third element as although the authenticity and independence elements may be satisfied, an individual's autonomy can still be restricted by a lack of 'an adequate range of options'.[982]

**[335]** AUTONOMY AND EMOTION – Although the above will be described in more detail below with particular reference to the work of Raz, it can be briefly stated here that the conceptualisation of individual autonomy espoused in this thesis (and more generally within recent legal work exploring technological advancements) could arguably be better understood within contemporary philosophical discussion which owe their foundations to Millian rather than Kantian discussions of autonomy.[983] Although this certainly presents an interesting point of contention, a full exploration of this proposition remains outside the scope of this particular analysis. What is of particular significance however, is the shared rationalist presumptions at the root of both Kant and Mill's conceptualisations of autonomy which reflects the traditional emotion-rationality dichotomy and the categorisation of the experience of emotions as subjective in nature. Indeed, even outside the autonomy discourse, Roeser observes that in the traditional philosophical discussions of moral thought there are two major traditions deriving from the work of Kant and David Hume, both of which position emotions as subjective.[984] More specifically, according to Hume ethics are based on emotions and as a result, there cannot be objective moral truths whereas Kant, as a rationalist, instead positions ethics as objective and thus bans emotions from objective thought. As noted by Roeser therefore, '[m]ost moral philosophers think that we have to choose between the two horns of the Hume-Kant-dilemma: either take emotions seriously but forfeit claims to objectivity, or reject emotions as being a threat to objectivity.'[985] However, the author goes on to observe that 'based on modern theories of emotions, we can reject this dichotomy as a false dilemma.'[986] In order to understand Roeser's proposition fully however, it is necessary to first explore the philosophical debates surrounding the understanding of the role of emotion which draw inspiration from interdisciplinary insights described above in Chapter 2.

### *i. Rationality, cognition and (non)conscious thought*

**[336]** PLOTTING THE PHILOSOPHICAL DEVELOPMENT – As noted by Kahan and Nussbaum, '[p]hilosophical accounts of emotion have their roots in ordinary ways of talking and

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[981] Sax, Helberger and Bol (n 971).
[982] ibid. referring to Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) 372.
[983] O'Neill (n 974) 30. In this vein and writing in a bioethics contexts O'Neill, quips that, 'Contemporary admiration for individual or personal autonomy still owes, I believe, far more to Mill than to Kant: although many of its admirers crave and claim Kantian credentials, they mostly seek an account of individual autonomy that fits within a naturalistic account of human action.'
[984] Roeser (n 888) 694–695.
[985] ibid 695.
[986] ibid.

thinking about the emotions.'[987] Emotions however are difficult to define. As noted by Strasser, although '[m]any philosophers, scientists and psychologists have laboured from pre-Socratic times onwards to find the right way to define the term emotion […] no consensual definition has ever been found.'[988] Nevertheless, the lack of a definition has not had a detrimental effect on the analysis of emotion and the expanding body of literature examining its role and nature.[989] Moreover, there has been long standing agreement that certain experiences can be grouped together as emotions and that these are distinct from 'from bodily appetites such as hunger and thirst, and also from objectless moods, such as irritation or endogenous depression.'[990] Although a full examination of the development of the modern philosophical understanding of emotions is outside the scope of this chapter, a few key points emerge from the existing literature analysing the developments in this area *vis-à-vis* the positioning of law and emotions in terms of rationality as a legal notion.[991]

**[337]** THOUGHTS VERSUS DISTINCT PHENOMENA – More specifically, there has been a long-standing philosophical debate regarding the interaction between cognition and emotion. Broadly speaking two opposing views have emerged namely, those which position emotion as thoughts incorporating beliefs and appraisals or evaluations (the evaluative view) and those which classify emotions as a distinct phenomenon that act independent of cognitive function (the mechanistic view).[992] The mechanistic view holds a certain appeal given that it responds well to certain features associated with emotions. For instance, the way in which emotions can feel like they sweep over one's consciousness without the capacity to control their effects, the sense that emotion appears to reside external to the self and finally, the urgency of the experience of emotion.[993] In contrast, at first glance it appears conceptually difficult to align emotion with thought given that thoughts are often conceived of as conscious evaluations.[994] However, despite the traditionally strong

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[987] Dan M Kahan and Martha C Nussbaum, 'Two Conceptions of Emotion in Criminal Law' (1996) 96 Columbia Law Review 269, 277.
[988] F Strasser, *Emotions, Experiences in Existential Psychotherapy & Life Duckworth,* (Duckworth 1999) 23. As cited by Eimear Spain, *The Role of Emotions in Criminal Law Defences: Duress, Necessity and Lesser Evils* (Cambridge University Press 2011) 74.
[989] Spain (n 988) 74. See also: Susan Bandes, *The Passions of Law* (New York University Press 2001).
[990] Kahan and Nussbaum (n 987) 276.
[991] Spain (n 988); Maroney (n 190).
[992] As defined by the authors, '…the mechanistic view holds that emotions are forces more or less devoid of thought or perception-that they are impulses or surges that lead the person to action without embodying beliefs, or any way of seeing the world that can be assessed as correct or incorrect, appropriate or inappropriate. The evaluative view holds, by contrast, that emotions do embody beliefs and ways of seeing, which include appraisals or evaluations of the importance or significance of objects and events. These appraisals can, in turn, be evaluated for their appropriateness or inappropriateness.' Kahan and Nussbaum (n 987) 278.
[993] ibid.
[994] As observed by Kahan and Nussbaum, 'Conceptions that define emotions as embodying a kind of thought about an object would appear to have difficulty meeting this challenge, for thoughts are usually seen as things we actively make or do, not things we suffer; they are usually conceived of as central to the core of our selfhood; and they are usually imagined as calm and cool. Thinking of emotions as thoughts may make

positioning of the mechanistic view, more recent research in cognitive psychology and neuroscience have provided strong evidence of a cognitive element.[995] As will be described below, this 'cognitive element' is to be understood broadly as including both conscious and non-conscious appraisals. In short, the evaluative view (i.e. encompassing cognitive appraisal theories) is founded on the premise that 'individuals make assessments about the personal relevance of a given situation in light of their beliefs, values and capabilities, and it is this assessment which results in the experience of emotion.'[996] Hence, as noted by de Sousa '[e]ven when emotions involve physical manifestations, it is their mental causation that defines them as emotion and grounds our evaluations of them.' [997] In essence, it is not that cognitive appraisal theories ignore physiological manifestations of emotions but rather that these are consequential to the experience of emotion rather than constituting or causing them. Thus, although emotions are accompanied by bodily arousal, judgements are both necessary and, in themselves, sufficient constituent elements.[998]

**[338]** EMOTION AND THE COGNITIVE ELEMENT – Cognitive elements are therefore essential to an emotion's identity. However, even if one accepts the cognitive element to emotion, there is no consensus on the precise nature of their interaction and thus the exact role of cognition.[999] As observed by Clore, '[a]sserting that emotions are mental states in no way implies that emotions are not also bodily states and legacies of our evolutionary past […]. It requires only that emotion be seen as part of a larger information processing system.'[1000] Indeed, although cognitive appraisal theories are the dominant approach, such theories hang on the interpretation of what is meant by cognition and have been criticised for positioning emotions as thoughts rather than mere brain functions. In response to such criticisms, Lazarus has observed that a thought must actually 'refer to something – it does not operate in a vacuum – and the cognition of the emotions involves goals, plans and beliefs and is about the stakes (active goals) and (coping) options a person has for managing the person-environment relationship.'[1001] Hence, from this perspective emotions are more than mere thoughts as the person's goals, beliefs, values, morals and capabilities are applied to these thoughts, thereby resulting in an emotion which reflects the relevance of the particular situation for an individual.

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it difficult to see why they should be so difficult to manage and should cause the upheaval in human life that they frequently do.' ibid 280.

[995] See: Joseph E Le Doux and Richard Brown, 'A Higher-Order Theory of Emotional Consciousness' [2017] Proceedings of the National Academy of Sciences 201619316.

[996] Spain (n 988) 77.

[997] Ronald De Sousa, *The Rationality of Emotion* (MIT Press 1987) 6.

[998] Martha C Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (Cambridge University Press 2003) 64.

[999] Robert C Solomon, *Not Passion's Slave: Emotions and Choice* (Oxford University Press 2007) 86.

[1000] Paul Ekman and Richard J Davidson (eds), 'Why Emotions Are Felt', *The Nature of Emotion: Fundamental Questions* (Oxford University Press 1994) 181. As referred to by Spain (n 988) 80.

[1001] Richard S Lazarus, *Emotion and Adaptation* (Oxford University Press 1994) 13.

**[339]** EMOTIONS AS INTENSE FORCES – Nevertheless, for some authors the fact that thoughts still retain such a key role fails to reflect emotions as intense forces over which we exert no control. For instance, Le Doux in proposing the emotion appraisal theory as an alternative to cognitive appraisal theories, suggests that cognitive theories 'have turned emotions into cold, lifeless states of mind.'[1002] The author instead suggests that emotions should be considered as brain functions rather than psychological states which emerge from a more primitive emotion appraisal system. In this vein, Damasio refers to the non-conscious and thus non-deliberative responses which occur in the 'evolutionary old brain structure'.[1003] However, this delineation of emotion brain function and the cognitive or conscious part of the brain appears to be formed more on the basis of intuition rather than scientific results.[1004] Indeed, in refining her evaluative view of emotions as cognitive appraisals, Nussbaum notes that emotions have urgency and heat not due to primitive mechanistic reason but 'because they concern our most important goals and projects, the most urgent transactions we have with our world'.[1005] As such, the cognitive appraisal triggers the experience and the 'heat' of emotion is dependent on individual's assessment of the circumstances.

**[340]** CONSCIOUS AND NON-CONSCIOUS THOUGHT – The validity of cognitive appraisal theories therefore seems to rest somewhat on their willingness to include both conscious and non-conscious appraisals within their scope. Nussbaum, in her inclusion of conscious and non-conscious appraisals, proposes a wide definition of cognition as being nothing more than 'concerned with receiving and processing information' without the need for 'elaborate calculation, of computation, or even of reflexive self-awareness.'[1006] To clarify, the author positions non-conscious appraisals in the ordinary sense of the word to mean the way 'in which many of our most common beliefs are nonconscious, although they guide our actions in many ways: beliefs about cause and effect, beliefs about numbering, beliefs about where things are, beliefs about what is healthy and harmful, and so forth.'[1007] As such, the adoption of such a wide interpretation of cognition, and the recognition that emotions are more than merely thoughts, results in the assumption that emotions result from an individual's appraisal of a given situation bearing in mind their goals, beliefs, values, morals and capabilities at both the conscious and non-conscious level. However, although as discussed above, emotions appear to be cognitive appraisals this does not mean that they are 'rational'. The question thus becomes what is meant here by the term rational? With this in mind, the analysis now turns to an examination of what is meant by

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[1002] Le Doux (n 256) 42.
[1003] Damasio (n 256).
[1004] See for example: Le Doux and Brown (n 995).
[1005] Martha Craven Nussbaum, *Hiding from Humanity: Disgust, Shame, and the Law* (Princeton University Press 2004) 77.
[1006] Nussbaum, *Upheavals of Thought* (n 998) 23.
[1007] ibid 70–71. Nussbaum goes on to clarify that '[i]n the case of emotion-beliefs, there may at times be special reasons for not confronting them consciously, for they may be very painful to confront. This means that it may take much longer to get someone to recognize grief or fear or anger in herself than to admit to spatial or numerical beliefs. There is a resistance to the acknowledgment of one' s own vulnerability that must be overcome.'

rationality in the philosophical literature on emotions and how this aligns with the notion of rationality in consumer protections.

### *ii. Dysfunctional rationality and rational and irrational emotions*

**[341]** RATIONALITY AND ITS DIFFERENT MEANINGS – As noted by Spain, '[t]wo distinct meanings can be attributed to the concept of rationality and both must be borne in mind in any discussion of the rationality of emotions. The term rational may refer to the process through which an emotion is experienced, following a trail of reason, or it may refer to the normative acceptability of the emotion.'[1008] The former of these is aligned with the discussion of thought above *vis-à-vis* the cognitive nature of emotion. The conception of emotion as primitive rather than as mental states has resulted in them being classified as irrational reflecting the historical weight to the mechanistic view of emotions.[1009] However, and as discussed above, under the cognitive appraisal theories emotions are capable of rationality in the sense that there is a clear link to reasoning. This is reflected by the fact that emotions change with our opinions and thus significantly are at least rational in this more literal sense.[1010] Building on this, De Sousa has suggested that emotions make an important contribution in the decision making process and that '[w]hat remains of the old opposition between reason and emotion is only this: emotions are no reducible to beliefs or wants.'[1011]

**[342]** EMOTION AND RATIONALITY – It has therefore been suggested that emotions are in fact indispensable to rationality in that they point us in the right direction and allow us to best exercise 'the instruments of logic'.[1012] However, that is not to say that all emotional experiences are rational in terms of their normative acceptability. Indeed, as noted by Nussbaum, in this sense one must acknowledge emotions like beliefs 'can be true or false, and (an independent point) justified or unjustified, reasonable or unreasonable. The fact of having an emotion depends on what the person's beliefs are, not whether they are true or false'.[1013] As observed by Damasio however, acknowledging that emotions are 'an integral component of the machinery of reason […] is not to deny that emotions and feelings can cause havoc in the processes of reasoning under certain circumstances.'[1014] Indeed, with this in mind one can refer to Nussbaum's positioning of irrationality which she defines in terms of thought and thus from the perspective of normative irrationalities

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[1008] Spain (n 988) 98.
[1009] Nussbaum suggests that, 'their urgency and heat; their tendency to take over the personality and to move it to action with overwhelming force; their connection with important attachments, in terms of which a person defines her life; the person's sense of passivity before them; their apparently adversarial relation to "rationality" in the sense of cool calculation or cost-benefit analysis; their close connections with one another, as hope alternates uneasily with fear, as a single event transforms hope into grief, as grief, looking about for a cause, expresses itself as anger, as all of these can be the vehicles of an underlying love.'
[1010] Solomon (n 999) 5.
[1011] De Sousa (n 997) xv.
[1012] ibid xii.
[1013] Nussbaum, *Upheavals of Thought* (n 998) 46.
[1014] Damasio (n 256) xii.

based on false information or values.[1015] Rationality here has thus been distinguished from a broader understanding of rationality *vis-à-vis* the objective merits of the choice made by an individual. Indeed, it has been suggested that '[e]ven though emotions have their own rationality, this rationality is of a different order than that of deliberate reflective judgments'.[1016] Irrational emotions will result from an incorrect assessment of a situation or when the person's underlying value system is somehow flawed.[1017]

### *B. Emotions and rationality as a 'functional fiction' – Perfectionist libertarian autonomy*

**[343]** EXTRACTING THE TAKEAWAYS – What have we learned from the above brief exploration of the philosophical understandings of autonomy and emotions? It appears that emotions are understood as cognitive appraisals, keeping in mind that 'cognitive' here refers to both conscious and non-conscious appraisals. This is in keeping with the work of Nussbaum in particular who, as described above, argues that emotions are value judgements thus building on Stoic philosophy. The wide interpretation given to cognition thus appears to contrast somewhat with the interdisciplinary discussion which delineates emotions, feelings and moods (i.e. *vis-à-vis* the overarching classifier of affect). By including both conscious and non-conscious appraisals within the understanding of cognition, emotions as understood in the neuroscience and psychology literature, comes within the philosophical understanding of rationality. Furthermore, although cognition and rationality seem to be used interchangeably in the philosophical literature on emotions (i.e. cognition-rationality), it appears that rationality also has a second meaning *vis-à-vis* the 'normative acceptability' of an emotion (i.e. rational-acceptability). This must be further delineated from the objective merits or rationality of a given choice (i.e. rational-reasonableness) given that, as described above, individuals are neither the slaves to nor the perfect manipulators of their emotions, but instead control them to varying degrees.[1018] Indeed, in essence therefore emotion can still undermine the rationality of a decision even if it is necessary to rationality in the first place. Aside from such nuancing between the tripartite understanding of rationality adopted in this thesis, the simpler

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[1015] Nussbaum, *Hiding from Humanity* (n 1005) 11–12. As noted by the author, 'in terms of thought that is bad thought in some normative sense. Thus, the person who says that two plus two is five, even after repeated teaching, is irrational, because he thinks badly. So, too, in a different way, we typically hold that racism is irrational, based on belief that are false or ungrounded […]. Of course many particular instances of anger or fear may indeed be irrational in the normative sense. They may be based on false information…. [or] false values, as would be the case if someone reacted with overwhelming anger to a minor insult. (Aristotle's example of this is anger at people who forget one's name).'

[1016] Samuel H Pillsbury, 'Emotional Justice: Moralizing the Passions of Criminal Punishment' (1988) 74 Cornell L. Rev. 655, 679.

[1017] In contrast irrationality in terms of behavioural economics refers more to flawed decision-making, mental heuristics and bounded rationality. Irrationality here should be construed as referring to a decision that an individual would not have made if they were informed and had alternative choices (i.e. if informed afterwards they would wish to change their choice). Cass R Sunstein, 'Nudging: A Very Short Guide' (2014) 37 Journal of Consumer Policy 583; Sunstein, 'Fifty Shades of Manipulation' (n 774); Jolls, Sunstein and Thaler (n 211).

[1018] Markwica (n 451) 18.

conclusion from the above is that contrary to the philosophical understandings of Kant and Hume, both of whom separated emotion from cognition-rationality (albeit to different ends), emotions and cognition-rationality are intertwined, as emotions are best understood as cognitive appraisals from a philosophical perspective.

**[344]** RATIONALITY AS A FUNCTIONAL FICTION – Indeed, although Hume proffered that reason is and should be understood as the slave of the passions, he inherently recognised a separation between emotion and rationality. Understanding emotions as cognitive appraisals aligns emotions as part of the inherent capacity for reason at the root of conceptualisation of autonomy constructed above. However, considering the ubiquity of attempts to manipulate emotions, one could wonder how an individual could be seen as autonomous if the conceptualisation of cognition-rationality thereby affecting the rational-reasonableness of a choice is viewed as containing emotions (i.e. as both conscious and non-conscious thought). Indeed, although philosophically one may question the causal link at the root of such a bypassing of reason, the key point at this stage in the analysis is that such mechanisms appear to work and therefore, undermine the legitimacy of rationality-based protections even if cognition-rationality is understood to include emotions as cognitive appraisals.[1019] Such criticisms of cognition-rationality as a conceptual basis are rife in philosophical writings but also in behavioural economics *vis-à-vis* the decision-making capacity of individuals as described above in Chapter 2. However, in her analysis of rationality (i.e. or cognition-rationality in line with the above division) as the fundamental unit of liberalism, Rouvroy observes that '[t]he rational, liberal, individual subject, or the autonomous legal subject have never been anything other than useful or even necessary functional fictions without empirical, phenomenal correlates, despite their merits and the fact that, in a series of domains, they need to be presupposed. However, the legal subject must be presupposed by the law, even though this subject is in no way an empirical entity.'[1020] This appears to be well-reasoned as to simply abandon the cognition-rationality-based assumption would undercut the very foundations of liberalism potentially requiring a far more paternalistic form of governance. But what then for the theory of law and emotions? As described in the introduction to this thesis, law and emotions theory emerged as a distinct body of work from behavioural economics and the law and neuroscience, criticising the reliance on rationality. In contrast with these however, law and emotions theory arguably challenges

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[1019] In this context it is significant to take into account Avner Offer's observations that sales puffs 'are effective even when known to be untrue. What else could account for their widespread use? Hence the legal attitude is misconceived: it applies the test of reason to claims that are designed to bypass the filter of reason.' The author goes on to note that: 'Decisive evidence for the effectiveness of puffs is how ubiquitous they are. Whether effective or not, advertisers cannot afford not to use them, for fear of losing ground to the competition. If truthfulness is a public good, then puffs are an example of the 'tragedy of the commons', which no competitor feels they can avoid, for fear of losing out.' See: Avner Offer, *The Challenge of Affluence: Self-Control and Well-Being in the United States and Britain since 1950* (Oxford University Press 2007) 109.

[1020] Rouvroy (n 488) 157–158.: In reaching this conclusion the author relies on the work of several authors including Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"' (1990) 11 Cardozo Law Review.

the traditional theoretical foundations more directly by not clinging to rationality as traditionally understood in legal theory.

**[345]** COGNITION, EMOTION AND AFFECTED DECISION-MAKING – Blumenthal has suggested that the focus on cognition and rationality in legal research perhaps relates to the fact that the discussion often relies on the work of authors such as Nussbaum and the conceptual starting point that emotions are typically based on a belief or judgement.[1021] In critiquing Nussbaum's approach Blumenthal suggests that such an account fails to adequately consider how emotions affect decision making due to the focus on emotions as cognitions.[1022] However, Blumenthal's criticism arguably fails to appropriately nuance the fact that Nussbaum's evaluative view does not disregard the potential for a loss of control while under the influence of emotion. Instead, and as described above, Nussbaum theorises that emotion stems from an individual's conscious or *non-conscious* assessment of how a situation affects them. In essence, this relates to the differentiation between the rationality or cognitive nature of emotions and rationality *vis-à-vis* the objective assessment of the logical nature of a person's actions and the resulting outcome. In short, it is argued here that although a fiction, rationality is a functional fiction in the liberal conceptualisation of autonomy which forms the bedrock of Western society.

**[346]** PERFECTIONIST LIBERAL CONCEPTUALISATION OF AUTONOMY – Indeed, a number of legal scholars have focused on the impact of technology have turned towards Razian legal philosophy.[1023] In some respects, given that much of this literature is fundamental rights and freedoms focused (as is the present thesis), a Razian interpretation may seem to be an odd choice as it does not offer a rights-based view of autonomy but instead positions autonomy as 'a kind of achievement' or, in other words, the value central to one's well-being. To clarify, Raz views other rights as derivative of autonomy and that these derivate rights 'defend and promote limited aspects of personal autonomy.'[1024] Importantly, and in contrast with the traditional liberal approach, Raz's perfectionist liberal conceptualisation of autonomy requires more than simple non-interference and with the central placing of autonomy Raz thus argues that autonomy 'transcends' the individual concerns. Therefore, Raz does not conceptualise autonomy as individualist but instead proposes that '[t]he ruling idea behind the ideal of personal autonomy is that people should make their own lives. The autonomous person is a **(part)** author of his own life. The ideal of personal autonomy is the vision of people controlling, **to some degree**, their own destiny, fashioning it through successive decisions throughout their lives' [emphasis added].[1025]

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[1021] Blumenthal (n 154) 18–23. The author also refers to the work of Jon Elster in his critique see: Jon Elster, *Alchemies of the Mind: Rationality and the Emotions* (Digital printing, Cambridge University press 2003).
[1022] Blumenthal (n 154) 20.
[1023] See for example: Bernal (n 541); Angela Daly, *Private Power, Online Information Flows and EU Law: Mind the Gap* (Hart Publishing 2016).
[1024] Raz (n 982) 247.
[1025] ibid 369. In doing so the Chapter follows Bernal's analysis in his reliance on the work of Joseph Raz and Raz's positioning of autonomy as the key notion at the root of privacy and data protection. Bernal (n 541).

**[347]** ENSURING THE CONDITIONS FOR AUTONOMY – Moreover, in contrast with the more rationality-focussed interpretation of autonomy, as analysed by Bernal Raz's broad conceptualisation is understood to include a 'freedom to be irrational'.[1026] Hence, Raz's conception of autonomy does not preclude the potential for positive regulatory intervention to protect individuals and enhance their freedom. In fact, such positive action is at the core of Raz's conception of autonomy as a correct interpretation must allow effective choice in reality, thus at times requiring regulatory intervention.[1027] Importantly therefore, Raz posits that liberalism requires the elimination of autonomy-demeaning options and that while coercion should only be utilised for the 'morally repugnant' ones, regulatory interventions which support certain activities and discourages those which are undesirable are required 'to provide the conditions of autonomy.'[1028] In line with the discussion of the Sax *et al.* analysis above, according to Raz these 'conditions' relate to the capacity for autonomy in a very wide sense, 'are complex and consist of three distinct components: appropriate mental abilities, an adequate range of options, and independence.'[1029] Raz therefore, affords the State a pivotal task[1030] but importantly, this is the *State's* role and thus clearly not the role of private actors. Indeed, according to Raz '[a]utonomy is opposed to a life of coerced choices. It contrasts with a life of no choices, or of drifting through life without ever exercising one's capacity to choose. Evidently the autonomous life calls for a certain degree of selfawareness. To choose one must be aware of one's options.'[1031] The manipulation of choice can inherently interfere with autonomy ultimately resulting in alienation and as a result one can conclude that through this lens excessive persuasion also runs afoul of autonomy.[1032] The Razian philosophical conceptualisation of autonomy is therefore beneficial as the more traditional rationality-focused conception of autonomy concentrates on the effects to individual choice. In contrast however, Raz's broader notion of autonomy more readily adapts to the fact that the mediated society has an effect both on the individual and society and further that manipulation often stems from this social component. Indeed, as noted by Bernal in his analysis of Raz's conception of autonomy, there are few people who would wish to live their lives separate from society and maintain purely rational thoughts.[1033] Accordingly, for the purposes of this thesis a Razian interpretation of autonomy will be adopted as, although not fully responding to the potential undermining of rationality, this interpretation more readily reflects the realities of human interaction and recognises the need to facilitate an environment in which individuals can act autonomously.

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[1026] Bernal (n 541) 26–27. with specific reference to Raz (n 982) 382..
[1027] Bernal (n 541) 25.
[1028] Raz (n 982) 420.
[1029] ibid 372.
[1030] Indeed in this regard it is interesting to refer to the Marcelo Thompson's critique of Benkler's understanding of Raz's work, see: Marcelo Thompson, 'In Search of Alterity: On Google, Neutrality and Otherness' in Aurelio Lopez-Tarruella (ed), *Google and the Law: Empirical Approaches to Legal Aspects of Knowledge-Economy Business Models* (Springer Science & Business Media 2012) 13.
[1031] Raz (n 982) 371.
[1032] Bernal (n 541) 26.
[1033] ibid 28.

**[348]** THE LINE BETWEEN PROTECTION AND EMPOWERMENT – Indeed as noted by Donnelly, Raz's 'account of autonomy does not purport to provide answers to all of the concerns […] but it does show the value of continuing engagement with the concept.'[1034] As such, and as mentioned above, the question thus becomes one of how to ensure that rationality does not digress to the point of dysfunctionality where this fiction no longer achieves its aims. In this vein, the means through which regulatory interventions may provide such protection must be considered and must therefore, carefully toe the line between paternalism and the protection of a life free from commercial manipulation. In short, the manipulation of choice can inherently interfere with autonomy and, as a result, one can conclude that through this lens excessive persuasion also runs afoul of autonomy.[1035] Framing this problem gives rise to questions namely *inter alia*, how it is possible to ensure the ongoing viability of the cognition-rationality-based paradigm? How can we create an environment in which individuals can make a rational choice or, more specifically, know when they are deviating from rationality but do so in the pursuit of their own goals (i.e. autonomous irrationality)? And how can we adjust protections to enable the continuance of fair market conditions? It is with these questions in mind that our analysis now turns the discussion of emotion in legal theory as to provide answers it is necessary to explore how emotion has been placed within existing legal theories.

### 6.1.2 PRIVACY AND DATA PROTECTION DECISIONS – THE RATIONALITY OF EMOTION AND RATIONALITY IN PROTECTIONS

**[349]** THE RATIONALITY ANCHOR – The long and the short of the above amounts to the relatively simple proposition in this thesis that despite its flaws *legal theory needs to hold onto rationality*. Although there is certainly merit to an in-depth exploration of the philosophical foundations upon which an alternative to rationality could be conceived of, this thesis is not the place. Instead, the idea here is to assume that the foundations of liberal autonomy are not going to change and to instead look towards how the law has catered for irrationalities and hence, justified the effect of emotions on decision-making and judgements. Indeed, despite the fact that we have determined that emotion can be rational or irrational in the normative sense, it must also be acknowledged that emotion does affect decision-making. Hence, the focus becomes one of whether the commercial use of emotion can result in irrational decision-making or, more specifically, decision-making which can result in an alternative outcome if the individual targeted by the campaign had been experiencing a different or neutral emotion or mood beyond their capacity to manage. If protections are to be grounded in the rationality paradigm, the protections are still left with the problem that the issue is best localised *ex ante* in a framework which struggles to mitigate the negative *ex post* effects of profiling.

#### *A. THE (IR)RATIONALITY OF THE RATIONALITY PARADIGM*

[1034] Donnelly (n 973) 41.
[1035] Bernal (n 541) 26.

**[350]** RATIONALITY AND CONTROL – In their examination of the notion of control in data protection, Lazaro and Le Métayer observe that this concept 'is strongly associated with the conventional figure of the "rational and autonomous agent", capable of deliberating about personal goals, controlling the course of the events and acting under the direction of such deliberation.'[1036] The authors further note that this notion is both 'individualist' given the emphasis on individual sovereignty and also 'active' in that control implies effective participation of the data subject and the liberty to alienate their personal data provided that such alienation is informed and voluntary.[1037] Nevertheless, although consent in the GDPR suffers from the same difficulties as highlighted by behavioural economics, the higher burden on controllers to ensure that data subjects comprehend the nature and purposes of the processing (at a minimum) illustrates an attempt to learn from the findings in behavioural economics thereby increasing the likelihood of informed data subject consent. This must be understood as a significant and substantively relevant difference when compared to the average consumer standard.

**[351]** EMOTIONS AND LEGAL THEORY – This illustrates the continuing reliance on rationality in legal theory. Indeed, although behavioural economics emerged as a theory challenging the rationality assumption in rational choice theory thereby aiming to explore the consequences of actual rather than hypothetical behaviour, as described in Chapter 2, it appears to maintain the assumption inherent to rational choice theory that emotions act as values to be weighed by individuals in their pursuit of welfare maximisation or, alternatively, that emotion is predominantly an irrational force which interferes with decision making albeit accepting that this occurs frequently.[1038] This separation however, contradicts the contemporary understanding of the role of emotion and developments in this literature have provided a normative foundation for the assessment of the role and impact of emotions on decision-making and judgements. Indeed, as summarised by Markwica, '[a]fter two decades of research, neuroscientists and psychologists have shattered the orthodox view that "passions" stand in opposition to rationality. Their work suggests that the capacity to feel is a prerequisite for reasoned judgment and rational behaviour.'[1039] In this vein, Arkush notes that behavioural economics divides decision-making into cognitive and emotional types without an empirical basis for the 'rational,

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[1036] Lazaro and Métayer (n 541).

[1037] ibid.

[1038] Such a delineation also seems inherent to much of the neuroeconomics literature in that there also appears to be a separation between emotions (positioned as irrational) and rationality. See for example: Terrence Chorvat, Kevin McCabe and Vernon Smith, 'Law and Neuroeconomics' (2005) 13 Supreme Court Economic Review 35; Kevin McCabe and Laura Inglis, 'Using Neuroeconomics Experiments to Study Tort Reform' [2007] Mercatus Policy Series George Mason University 25. Indeed, as noted by Pardo and Patterson the idea of competing rational and irrational (i.e. emotional) parts of the brain does not appear to make much sense and that therefore, '[t]he current neuroeconomic explanation of decision making misguidedly ascribes psychological attributes to the brain (e.g., deciding, reasoning, adjudicating) that only make sense when attributed to the person. This confusion undermines attempts to draw conclusions for law.' Michael S Pardo and Dennis Patterson, *Minds, Brains, and Law: The Conceptual Foundations of Law and Neuroscience* (Oxford University Press 2013) 70.

[1039] Markwica (n 451) 7.

non-emotional decision making that [behavioural economics] prioritizes.'[1040] Positioning emotion against this backdrop results in the understanding of emotion as in conflict with rationality running into at least three conceptual difficulties namely, (1) just because a specific emotional reaction may have occurred this does not mean that this causes the person to act a specific way; (2) even if emotional reactions cause individuals to act a certain way, these emotions could be based on prior judgements rather than the specific stimulus being attributed the causal role, and (3) it is questionable whether emotional judgements should *de facto* be deemed irrational.[1041] Indeed, emotions play a key role in determining all our choices and this also extends to our decisions to provide personal data or not, which is crucial for the deployment of emotional AI.

**[352]** EMOTIONS AND THE RATIONAL-IRRATIONAL DISTINCTION – The emergence of emotion detection technology therefore, raises a number of fundamental challenges to the existing framework and in particular, the rationality-based paradigm imbued in consumer protection but also data protection law. In his analysis of the emotional context of informational privacy, Stark convincingly argues that literature fails to take account of the 'lived nuances and messy complexities of how ordinary people engage with their own feelings about informational privacy' due to the behavioural economics approach.[1042] The author further notes that, although this literature has made a series of valuable contributions through the highlighting of concepts such as bounded rationality and information asymmetry, it 'has difficulty transcending its own frame of reference to offer broader insights on the subjective experience of online life, and why people act in the "irrational" ways that they do.'[1043] Undoubtedly, an overarching understanding of decision-making requires an appreciation of the role of emotion and this is a point that is simply hard to dispute. Indeed, Herbert Simon, who, as mentioned in Chapter 2, introduced the notion of bounded rationality and thus the need to include cognitive and situational constraints thereby revolutionising decision theory, recognised that 'in order to have anything like a complete theory of human rationality, we have to understand what role emotion plays in it.'[1044]

**[353]** EMOTION AND THE PRIVACY PARADOX – Accordingly, emotion is key to interpreting the so-called privacy paradox whereby people express concern regarding their informational privacy without this concern having any effect practically speaking. For instance, in this regard one can point to the fact that individuals often become attached emotionally to their devices and the connectivity and interactivity enabled by them in addition to the personal history they may represent.[1045] This point is perhaps compounded by the fact

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[1040] Arkush (n 197) 1335.
[1041] These three points are taken from Pardo and Patterson's critique of neuroeconomics literature but as this (and indeed the neuroscience and the law literature more generally) largely appears to position emotions as irrational forces in keeping with the behavioural economics literature it is suggested here that insights are equally valid Pardo and Patterson (n 1038) 75–77.
[1042] Stark (n 887) 16.
[1043] ibid.
[1044] Herbert Simon, *Reason in Human Affairs* (Stanford University Press 1990) 29.
[1045] Stark (n 887) 19.

that we may be less attached to the contents of the objects themselves and thus the data that is produced.[1046] Indeed, although individuals may take steps to protect the privacy of their hardware they appear less concerned by the intangible information being processed. The simple fact is that different types of data can evoke different emotional responses. This is arguably reflected in the separation of certain types of personal data (categorised as sensitive or special) for specific enhanced protections in Article 9 GDPR. As explored in detail in Chapter 3, Article 9(1) GDPR protects against the processing of personal data,

> 'revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation shall be prohibited.'

Aside from the specific elements analysed previously, what is interesting about this provision is that one can imagine each of these types of personal data evoking strong emotional reaction if illegitimately processed with such a reaction stemming not from any potential economic loss but rather from the nature of the information itself in terms of its intimate nature. Indeed, in this regard the absence of a category such as financial information is not surprising as it is less tied to the individual's personality (albeit potentially revealing aspects of it).

**[354]** BLURRED PERSONAL-SENSITIVE PERSONAL DATA DIVISION – However, as described in detail in Chapter 4, the lines between the personal data-sensitive personal data categories are becoming increasingly blurred due to the emergence of data intensive processing which can reveal sensitive emotion insights without necessarily having access to sensitive personal data in terms of content. It is somewhat counterintuitive therefore, for people to be less emotionally engaged with 'metadata' and thus, the European legislator's failure to extend the protections in the Digital Content Directive to personal data generally is arguably surprisingly in this light. As described by Stark,

> '[t]he heterogeneous emotional responses prompted by different categories of personal information can give rise to what one might term "data myopia": the inability to see the "big picture" forest of comprehensive data profiling through the trees of our own particular, partial experiences of sharing personal information in a limited way. Because individual experience does not always feel unsafe, users are viscerally disengaged from the seemingly abstract dangers of data collection and aggregation, even if they know such risks exist. Our lack of felt connection to the aggregation of our everyday data, and our resulting myopia, influence our broader attitudes toward information privacy and the appropriate flows of our personal information at a societal level.'[1047]

Emotions are therefore key to decisions regarding privacy and data protection and this presents a difficulty given that; (1) as outlined above policy discussions on privacy and data protection have traditionally tended to focus on the role of notice and consent and; (2) in the context of the use of emotion insights for the personalisation of commercial

[1046] ibid 20.
[1047] ibid 21.

communications, the legitimacy of the purposes may be often determined by the data subject's decision to consent (or not). The framework therefore relies on the capacity of individuals to act as active market participants in the protection of their personal data. However, although flawed rationality serves the purpose of a functional fiction that is necessary to the operation of protections provided by law due to the liberal foundations of these safeguards. But how do we solve this problem?

### *B. PIECEMEAL PROGRESS, NUDGING AND THE RATIONALITY ANCHOR*

**[355]** ALTERNATIVES IN LEGAL THEORY – From the above it is necessary to consider alternative means of conceptualising emotions in legal theory. Although the need for a rationality paradigm as a normative construct is defended in this thesis there are those who suggest abandoning it. The purpose here therefore is to further illustrate (1) why such theories are not adopted; and (2) what this means for the pursuit of fairness in the context of emotion monetisation. From the outset, it should be noted that the legal discussion often relies on Martha Nussbaum's philosophical work on emotion and hence, the conceptual starting point that emotions are typically based on a belief or judgement.[1048] Indeed, as noted above in Section 6.1.1(A), in this vein Roeser observes that the moral philosophical dilemma between emotion and rationality should be abandoned considering the interdisciplinary insights into emotion and that thus emotion should be included in the conceptualisation of rationality.[1049] Such an approach also aligns with the proponents of cultural evaluator theory and in particular the work of Kahan. In defining the model of the cultural evaluator theory Kahan observes that,

> '[t]his model rests on a view of rational agency that sees individuals as concerned not merely with maximizing their welfare in some narrow consequentialist sense, but also with adopting stances towards states of affairs that appropriately *express* the values that define their identities. Often when an individual is assessing what position to take on a putatively dangerous activity, she is, on this account, not weighing (rationally or irrationally) her expected utility but rather the *social meaning* of that activity.'[1050]

Importantly, the rational individual understood here incorporates the inclusion of 'emotions as constituents of reason'.[1051] This appears to reflect the philosophical accounts of emotion and hence, the cognitive appraisal theory. Although there are clear issues with adopting the broad interpretation of cognition-rationality (i.e. to include both conscious and non-conscious cognitions), it is argued that the best (and the most realistic) approach is to maintain the conventional conceptualisation of autonomy and rationality as a functional fiction. This does not mitigate the weaknesses of relying on rationality, even

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[1048] See for example: Nussbaum, *Upheavals of Thought* (n 998); Elster (n 1021); Martha C Nussbaum, '"Secret Sewers of Vice": Disgust, Bodies, and the Law.' in Susan Bandes (ed), *The Passions of Law.* (New York University Press 2001); Kahan and Nussbaum (n 987).
[1049] Roeser (n 888) 695.
[1050] Dan M Kahan, 'Two Conceptions of Emotion in Risk Regulation' (2008) 156 University of Pennsylvania Law Review 108–109.
[1051] ibid 109.

one which incorporates emotions within its scope. Indeed, for Arkush holding on to rationality and the associated weakness runs deep with the author suggesting that the discussion of libertarian paternalism in behavioural economics literature are inherently flawed as proponents of the theory retain welfare despite destabilising the decision-making capacity of individuals to effectively pursue their preferences and well-being.[1052]

**[356]** AUTONOMY AND PATERNALISM – Arkush's criticism reflects the tight-rope walking between autonomy and paternalisms evident in the behavioural economics and (nudging literature). Indeed, because behavioural economics retains welfare but simultaneously undercuts the legitimacy of the capacity of individuals to pursue their preferences, libertarian paternalism can only offer piecemeal progress. Nudging policies can only be adopted in areas that are intuitively problematic for autonomy without the development of an overarching understanding of what 'welfare' means and thus, what version of it should be pursued. In simple terms, if individuals cannot be trusted to act in their own best interest but we cannot decide what 'best interest' means and thus only intervene in clearly problematic areas, the improvements to the *status quo* may be limited. As these criticisms refer more to the rationality-paradigm, if we are to adopt an understanding of rationality which incorporates the role of emotion and reflects the interdisciplinary insights, the criticisms persist but are arguably also accentuated given that cognitive appraisal theories include both conscious and non-conscious thoughts. Indeed, in commenting on this Arkush notes that despite making valuable contributions cultural evaluator theory,

> '[…] is oddly mistaken about the precise role of emotion in decision making. In particular, the claim that emotions reflect reasoned judgements no doubt captures an important aspect of emotion–that emotions are sometimes products of thoughts and even effort–but it is incomplete. To the extent that [cultural evaluator theory] holds that one cannot have emotions without cognitive judgements, or that emotions are always products of reasoned choice, these views are out of step with mainstream social psychology.'[1053]

Although there is certainly merit to Arkush's points, it is argued here that they are flawed. Indeed, in proposing his alternative, 'emotion realism', the author claims that we should eschew the emotion *versus* reason dichotomy and instead move towards studying how to 'promote some influences and mute others.'[1054] Although such an approach seems justified (i.e. as to view emotions purely through the lens of rationality belies the realities therefore potentially weakening proposals for protections which fail to take such considerations into account),[1055] the philosophical foundations of a liberal democracy require rationality as a starting point.

**[357]** DECIDING FOR ONESELF – Without rationality as a normative anchor the law would have to assume that consumers are not able to choose for themselves and thus simply make all

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[1052] Arkush (n 197) 1343.
[1053] ibid 1346.
[1054] ibid 1356.
[1055] See: Blumenthal (n 154).

choices for them. Although Arkush suggests that this is a matter of moving away from the '[…] circular definitions of welfare and preferences employed by rational choice theory and [behavioural economics] and instead examin[ing] the real causes of human happiness',[1056] such an approach flies in the face of the conceptualisation of liberal autonomy. Indeed, it must be emphasised that any move from a rationality-based approach in legal protection would be far more epistemologically challenging than other alternatives to the rational choice model[1057] and would seemingly change the role of regulation as it is currently conceived. In simple terms, the use of rationality as a functional fiction rests on the conceptual starting point that individuals are best placed to decide on their preferences. Although this is certainly a fiction, doing away with the rationality paradigm would undermine the very roots of liberal autonomy and effectively lead to a far more paternalistic form of governance whereby the State would decide how individuals' welfare and preferences should be formulated. One must really question whether such an approach would be at all desirable especially in light of the fact that emotions affect the decision making of all individuals including the legislator, a point recognised by the cultural evaluator theory. Instead therefore, it is suggested that minor and incremental modifications of existing theories are necessary. Rationality is necessary and should not be tossed aside. Nevertheless, although the rationality standard may be a necessary construct for the continuance of a liberal rights-based approach, this does not exclude the possibility of ensuring the existence of an environment which renders this standard more effective and realistic given the potential for biases to undermine the capacity of an individual to act autonomously and in their own best interests. This need is arguably exaggerated by the emergence of a technologically mediated society (as described throughout this thesis).

**[358]** A SHORT BUT NOT SO SIMPLE SOLUTION – So, it is simple then? Well no, and this is a consequence of the fact that both conscious and non-conscious thoughts will have to be understood as coming within the meaning of rationality. In this regard it is hard to argue with Arkush when the author states that 'because so much human behaviour is nonconscious, automatic, and not readily amendable to inspection, we should reevaluate areas of law that depend on proving states of mind.'[1058] The author goes on to suggest a re-evaluation of advertising law and an evaluation of practices which may be deemed unfair. This appears to echo the proposition made by Reed and Coalson as discussed in Chapter 3 and is also an opinion which is shared in this thesis, albeit subject to the caveat that any paternalistic intervention should be cautious, target the facilitation of market conditions primed to safeguard autonomy (i.e. as opposed to the legislator taking the welfare decision entirely). In essence therefore, rationality should not be abandoned but instead interventions should aim to ensure fairness and the ongoing viability of autonomy in light

[1056] Arkush (n 197) 1357.
[1057] Kathryn Abrams and Hila Keren, 'Who's Afraid of Law and the Emotions' (2009) 94 Minn. L. Rev. 1997, 1999.
[1058] Arkush (n 197) 1356.

of the influence of emotions on decision making. But what is fair in this context? And how do we achieve fairness in practice?

**[359]** DATA PROTECTION FAIRNESS AND APPRECIATING THE CHALLENGE – The data protection fairness principle has been dealt with in detail in Chapter 5 in particular. Despite this specification however, a precise understanding of its operation and hence, an interpretation of balancing exercises remains somewhat abstract. This sentiment reflects the criticisms levelled against fair balancing in constitutional theory and in this vein, one can also point to similar academic debates in the data protection literature.[1059] Precisely determining what should be fair is therefore difficult. In saying this however, it seems safe to say that undermining the decision-making capacity of consumers to the point where they can be manipulated would be unfair. Although precisely determining what is meant by manipulation is something requiring a more in-depth analysis that is outside the scope of this thesis,[1060] for the purposes of this analysis manipulation is defined as disabling the capacity of individuals to choose even when they are endeavouring to make whatever they deem to be the 'correct' decision and hence, the authenticity, independence and options elementsreferred to above in Section 6.1.1. The chances of this happening in such an extreme way however, seems unlikely. Indeed, even if one could predict a consumer's emotional state with complete accuracy (a point which is very much disputed in literature in terms of the current capacities), even then this does not mean that consumers are entirely malleable to commercial desires. Context is key to an emotional state and in brief, the reason why someone is feeling the way they are is just as important (if not more) as the emotional state itself. Although online tracking is pervasive with consumers tracked across the web and detailed profiles created, this is not a complete access point into our lives and not an absolute intrusion into our psyche.

**[360]** AN APPRECIABLE IMPACT – Importantly however, and this is the key point, if adopted at a broad scale such techniques will conceivably have an appreciable, and potentially significant, impact at a societal level – an argument seemingly well supported in a review of more technical literature.[1061] Impact in an advertising and marketing context is, and always has been, hard to measure. On top of this the very existence of the GDPR, the various data protection and privacy scandals and the other moves to address the perceived and well-defined negative aspects of intense personal data processing are a reminder of the broader role that fairness and indeed, the GDPR more specifically play in the protection of fundamental rights and freedoms where personal data are processed. Moreover, the effect on consumer autonomy does not have to go to the very manipulation of thought or thought processes to have an impact on society at large. This relates to what Tene and Polonetsky refer to as 'a fleeting intuition as to what is right or wrong' in their analysis of how social norms are challenged by technology with such developments being

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[1059] See for example: Bart van der Sloot, 'Editorial' (2017) 3 European Data Protection Law Review 1.; and the reply: Raphael Gellert, 'On Risk, Balancing, and Data Protection: A Response to van Der Sloot Discussion' (2017) 3 European Data Protection Law Review (EDPL) 180.

[1060] For more see: Kosta, *Consent in European Data Protection Law* (n 541) 173–175.

[1061] See: Burr, Cristianini and Ladyman (n 7); Burr and Cristianini (n 7).

labelled as 'creepy'.[1062] Here, reference can again be made to Calo's decoupling of harm into subjective and objective components, with subjective harm flowing from unwanted observation and the risks associated with personal data processing and profiling, as discussed in more depth in Chapter 3.[1063] Harm therefore, goes beyond economic loss and the unbridled manipulation of choice and regulation responds to perceived threats to societal norms *vis-à-vis* how people enjoy life, develop and express their personality rights. In saying this however, and in light of the key point made above in terms of the appreciable and potentially significant impact of such technologies across society at large (i.e. rather than in terms a of micro analysis of each decision and individual specifically), such technologies pose a problem.

**[361]** THE DANGERS OF OVER/UNDERESTIMATING – The point being made is that the impact of this technology should not be over-estimated on the one hand nor under-estimated on the other. Indeed, in this regard the potential for an intelligent system to update its model *vis-à-vis* the probability of affecting consumer decision-making in the form of a feedback loop is another important consideration.[1064] Here it is interesting to refer to the recent declaration on the manipulative capabilities of algorithmic processes by the Council of Ministers of the Council of Europe calling for frameworks beyond current notions of personal data protection and privacy to address the targeted use of data.[1065] More specifically, the declaration observes that,

> '[c]ontemporary machine learning tools have the growing capacity not only to predict choices but also to influence emotions and thoughts and alter an anticipated course of action, sometimes subliminally. The dangers for democratic societies that emanate from the possibility to employ such capacity to manipulate and control not only economic choices but also social and political behaviours, have only recently become apparent. In this context, particular attention should be paid to the significant power that technological advancement confers to those – be they public entities or private actors – who may use such algorithmic tools without adequate democratic oversight or control.'[1066]

If the emergence of emotional AI truly has the capacity to influence emotions and thought thereby altering choice, one might question whether such practices could bring the fundamental right to the freedom of thought as protected in Article 9 ECHR and Article 10 Charter more readily into focus.[1067] In his analysis of the freedom of thought in the context of neuroscientific research, Bublitz calls for the law to redefine this right in terms of its theoretical significance in light of technological developments capable of altering

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[1062] Omer Tene and Jules Polonetsky, 'A Theory of Creepy: Technology, Privacy and Shifting Social Norms' [2013] Yale Journal of Law & Technology 1 <http://ssrn.com/abstract=2326830> accessed 4 April 2015.
[1063] Calo, 'The Boundaries of Privacy Harm' (n 461) 1142–1143.
[1064] Burr and Cristianini (n 7) s 4.1.3.
[1065] 'Declaration by the Committee of Ministers on the Manipulative Capabilities of Algorithmic Processes (Adopted by the Committee of Ministers on 13 February 2019 at the 1337th Meeting of the Ministers' Deputies) Decl(13/02/2019)1' para 9.
[1066] ibid 8.
[1067] See: Oostveen and Irion (n 618); Christoph Bublitz, 'Freedom of Thought in the Age of Neuroscience' (2014) 100 Archives for Philosophy of Law and Social Philosophy 1.

thoughts.[1068] The author concludes that such technological developments require the setting of normative boundaries 'to secure the freedom of the *forum internum*.'[1069] But how does the freedom of thought interact with the rights to privacy and data protection and where are the precise boundaries here? Although it is clear that the GDPR protects fundamental rights and freedoms in general when personal data are processed, thereby acting as an enabling secondary law mechanism where fundamental rights and freedoms can (at least at a theoretical level) be balanced in a fair manner, there are still areas of conceptual uncertainty. It is beyond the scope of the current analysis to delved further into this debate. However, it is suggested that there is a real need to conceptualise the overlaps and delineations between the fundamental rights through which the problems discussed in this thesis could be conceptualised and this is particularly the case in light of the tendency for commentators to propose 'new' rights to categorise the problems associated with a society mediated by technology.

**[362]** DILUTING THE SIGNIFICANCE OF RIGHTS – Indeed, here one can refer again to Bublitz who has called for the right to cognitive liberty (or phrased alternatively a right to mental self-determination) due to the fact that the right to freedom of thought has been insignificant in practice despite its theoretical importance.[1070] In addition, reference can also be made to the Rathenau Institute's report analysing human rights in the robot age in which two novel human rights are proposed namely, the right to not be measured, analysed or coached and the right to meaningful human contact – with the report calling for the Council of Europe to clarify how these proposed rights could be included within the right to privacy and the right to family life respectively.[1071] It is suggested here however, that in line with the literature criticising the positioning of consumer rights as fundamental rights, that such moves potentially dilute what is meant by a fundamental right. More specifically, one must wonder why the Rathenau report suggests two novel human rights and then calls for their relationship with Article 8 ECHR (Article 7 Charter) to be clarified and if Bublitz's suggestion merely distracts from the potential reframing of what already exists in Article 9 ECHR (Article 10 Charter).

**[363]** DELINEATING PRIMARY AND SECONDARY LAW – The point being pushed here is that (1) we should exercise restraint and consider what already exists but also (2) there is need to delineate between rights and the specific manifestation of these rights in their operation and/or in secondary law protections (i.e. derived sub-rights). Examples here such as key data subject rights like the right to erasure, object, access and portability are all manifestations of the aim of respecting the right to data protection as balanced with other

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[1068] Bublitz (n 1067).
[1069] ibid 25.
[1070] See: Jan-Christoph Bublitz, 'My Mind Is Mine!? Cognitive Liberty as a Legal Concept' in Elisabeth Hildt and Andreas G Franke (eds), *Cognitive Enhancement: An Interdisciplinary Perspective* (Springer Netherlands 2013) <https://doi.org/10.1007/978-94-007-6253-4_19> accessed 9 April 2019.
[1071] Rinnie Van Est and Joost BA Gerritsen, 'Human Rights in the Robot Age: Challenges Arising from the Use of Robotics, Artificial Intelligence, and Virtual and Augmented Reality' (Rathenau Instituut 2017) Expert report written for the Committee on Culture, Science, Education and Media of the Parliamentary Assembly of the Council of Europe 43–45.

rights and interests with a specific dualist objective (i.e. protection and economic integration) in mind.[1072] Secondary law is the vehicle for such issues and, in the context of this thesis dealing with B2C applications of emotional AI for advertising and marketing purposes, it is the consumer protection framework which should act as the vehicle for the protection of fundamental rights as expressed through a legislative balance. The question thus becomes one of whether the principle-based approach in the UCP Directive in particular is capable of providing such protection and protecting the 'sub-rights' mentioned above through judicial interpretation of the existing unfairness levels in the UCP Directive as a complementary mechanism to the protections provided in the GDPR. As described in the previous Chapter, there are clear challenges associated with this alignment. Nevertheless, there is a need to (1) further bolster *ex ante* protection of consumer decision-making relating to personal data and; (2) to fill the gaps in *ex post* negative profiling effects protection. The challenge therefore, is conceiving of a way of achieving these goals within the scope of the current framework.

## 6.2 FAIRNESS, DESIGNING FOR EMOTION AND THE PATERNALISTIC PROTECTION OF COLLECTIVE INTERESTS

**[364]** THE CONDITIONS FOR CONTROL – Although the data protection framework seemingly offers us the means to 'control' our personal data thus rendering the detection mechanisms subject to our individual choices and preferences, in the real world such 'control' may arguably remain outside our human capacity. In this vein, it is interesting to highlight the decentred risk-based regulatory approach evident in the GDPR, the connected emphasis on the principle of accountability and thus the focus on the role of the controller (i.e. the natural or legal person who '[…] determines the purposes and means of the processing of personal data' in the fair balancing of rights and interests – Article 4(7) GDPR). Given the role of controllers in the assessment of risk, the question marks surrounding the capacity of the risk-based approach to cater for intangible harms and also the extent to which the risk-based approach applies and has an impact across the framework (i.e. in particular in relation to data subject rights),[1073] the reliance on the effective operation of the accountability principle is questionable.[1074] The absence of a comprehensive taxonomy of risks is justified by the fact that 'risk' is to be understood broadly to include societal effects

[1072] See discussion of private (economic) autonomy in Chapter 2 and: Comparato and Micklitz (n 302).
[1073] Quelle (n 857).
[1074] Importantly, a risk-based approach needs to be distinguished from risk as a threshold for application. See: Hustinx (n 509) 20; 38. See also the WP29's observation that, 'It is important to note that – even with the adoption of a risk-based approach – there is no question of the rights of individuals being weakened in respect of their personal data. Those rights must be just as strong even if the processing in question is relatively 'low risk'. Rather, the scalability of legal obligations based on risk addresses compliance mechanisms. This means that a data controller whose processing is relatively low risk may not have to do as much to comply with its legal obligations as a data controller whose processing is high-risk.' Article 29 Working Party, 'Statement on the Role of a Risk-Based Approach in Data Protection Legal Frameworks' (n 857) 2.

and potential as well as actual harms.[1075] However, this highlights the key role of enforcement and the effective monitoring of controllers. To clarify the above, it is significant to reiterate the importance of Article 5(2) GDPR which provides that controllers are obliged to be able to demonstrate compliance with the principles relating to processing of personal data laid down in Article 5(1) GDPR. Hence, the framework mobilises protections or 'environmental variables' incorporating technological and organisational safeguards to ensure a secure personal data processing environment.[1076]

### 6.2.1 'ETHICAL' EMOTION COMMERCE AND AUTONOMOUS DECISION-MAKING

**[365]** MOBILISING PROTECTIONS – The operational mobilisation of protections and the risk-based approach enshrined in the GDPR are indicative of more a collective view of safeguarding the right to data protection in that they aim to ensure the protection of data subjects collectively to provide a secure personal data processing environment.[1077] Such an approach therefore aims to position data subjects as the key actors empowered to determine the fate of their personal data.[1078] However, this rests on the willingness, or at least capacity of controllers, to effectively cater for risks (and therefore effective enforcement in the absence of the necessary safeguards) but also the assumption that individuals are capable of 'controlling' their personal data and thus playing the role of the active market participant. However, although positioning data subjects as the key actors affords protections in theory, the practical realities belie the liberal assumption regarding their capacity and rationality. At the root of this statement is a reference to the acknowledgement within the data protection framework of objectives that extend beyond mere data protection and thus the intention to provide protections from harms stemming from personal data processing through control orientated protections. Consequently, there is an inherent reliance on commercial entities to take fairness considerations into account. This practical reality maps the role for 'trust' (construed broadly) in that the consumer will need to 'trust' such entities to utilise machine learning techniques for emotion detection and monetisation fairly. Of course, the law clearly plays a role here in establishing the environment and conditions through which consumers can 'trust' the emotion monetisation ecosystem. Reference can again be made to the focus on the accountability principle (Article 5(2) GDPR) but also the requirement to adopt a data protection by default and by design approach (Article 25 GDPR), the requirement to conduct data protection impact assessments (Article 35 GDPR), and more generally, the related focus on risk in the GDPR as examples. The formalisation of fairness is an important step towards the development of more accountable systems and the

[1075] Article 29 Working Party, 'Statement on the Role of a Risk-Based Approach in Data Protection Legal Frameworks' (n 857) 4.
[1076] Lazaro and Métayer (n 541).
[1077] ibid.
[1078] Christophe Lazaro and Daniel Le Métayer, 'Control over Personal Data: True Remedy or Fairytale?' (2015) 12 SCRIPTed <http://script-ed.org/?p=1927> accessed 6 November 2015.

accountability of the actors developing these systems is of clear significance *vis-à-vis* their proper mitigation of potential risks and the fostering of consumer trust.

### *A. BOLSTERING 'CONTROL' AND AFFECTIVELY DESIGNED CONSENT*

**[366]** TRUST RISK-TAKING AND THE EMOTIONAL MANAGEMENT OF BREACHES OF TRUST – Trust implies a degree of risk-taking.[1079] Therefore, it can be distilled that trust cannot co-exist with guarantees[1080] and that the absence of such guarantees creates risks.[1081] It should be further noted that trust is inevitably imperfect in that there is always some degree of risk as to whether trust is misdirected.[1082] However, trust is clearly a subjective notion that can only be defined in context, through the definer's own particular perspective.[1083] Indeed, in her analysis of this notion, O'Neill clarifies the fickle nature of trust with reference to two sides to the same problem, or in the author's words, 'misplaced trust' and 'misplace mistrust'.[1084] Consumer trust therefore goes to the core as to why we feel comfortable shopping online but also browsing the internet thereby being exposed to data analysis and tracking. As noted by Stark however, interestingly, the concern of large companies '[…] seems not to be about the security of the data per se, but for the management of public feelings about information privacy, and by extension the possible pressure for regulatory and legal remedy, that are often divorced from technical reality.'[1085] In this vein, one is reminded of the fallout from the *Cambridge Analytica* scandal and *Facebook's* public relations management efforts to mitigate the impact of the breach.[1086] Indeed, it is also interesting to point out *Facebook's* initial response to the scandal and its insistence that it was not caused by a data breach as its users had in fact 'consented' to *Cambridge Analytica's* processing of their personal data. However, users still felt a violation of trust which resulted in a very noticeable *Facebook* marketing campaign via mainstream media and public display advertising. This reflects Stark's point that such companies have a clear incentive to suppress negative emotional reactions to such incidences and that therefore, trust has an important emotional element that can be

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[1079] In analysing the notion of trust, Vandezande extracts interdisciplinary insights from philosophy, psychology, sociology, economics, computer science and law and concludes that, '[w]hile there are certainly clear divergences between how the different scientific disciplines […] view the concept of trust, there are also a number of common elements to be distinguished. Overall, the abstract notion of trust can be characterised as an attribute to interpersonal relationships that serves as a bet for future possibilities and that constitute a degree of risk-taking.' In saying this the author goes on to note that although trust is evident in law, it manifests itself in diffuse and divergent forms. Niels Vandezande, *Virtual Currencies A Legal Framework* (Intersentia 2018) 109–110.

[1080] Helen Nissenbaum, 'Can Trust Be Secured Online? A Theoretical' [1999] Etica e Politica 15.

[1081] See: Josh Boyd, 'The Rhetorical Construction of Trust Online' (2003) 13 Communication Theory 392.

[1082] O'Neill (n 974) 141.

[1083] See: Boyd (n 1081).

[1084] O'Neill (n 974) 141.

[1085] Stark (n 887) 22.

[1086] See: 'The Cambridge Analytica Files' (n 440).

fostered by companies by deliberate strategies which may promise practices quite different from the ongoing reality.[1087]

**[367]** CONSENT IS NOT A LICENCE TO DO ANYTHING – Here it is interesting to refer again to the work of O'Neill who describes how consent is only an aspect of what should be deemed ethically acceptable behaviour and that reliance on consent alone is in fact misleadingly incomplete given that often broader ethical justifications will be required to justify certain actions and thus maintain trust.[1088] This debate is also shaped by the legal notion of capacity and in essence, the ability of the individual in question to consent in the given circumstances. As described in the previous Chapter, consent in the GDPR appears to have been designed with such considerations in mind. The conditions for consent contained in Article 7 GDPR but also the more generally 'environmental variables'[1089] described above, aim to provide the conditions through which consent may operate as intended. Here reference can also be made to purpose limitation as a key data protection principle and the prohibition on the processing of certain special categories of personal data in particular as legislative mechanisms designed to constrain processing.[1090] Nevertheless, the practical application of these provisions remains challenging. Indeed, in her criticism Cohen suggests that, [p]roponents of those tools, however, tend to engage in considerable over-claiming. To begin with, information businesses have little incentive to respect such restrictions and tend to use broad consent provisions systematically as a way of circumventing them […].'[1091]

**[368]** AN ENFORCEMENT PROBLEM? – From a data protection purist's perspective however, such a criticism reflects more the failure to adequately enforce the GDPR as opposed to illustrating an underlying problem with the framework itself. Indeed, although it remains well outside the scope of this thesis to go too much further down the rabbit hole to understand the notion of trust, given the focus of this thesis on business-2-consumer transactions, it is important to note the inherent link between trust and access to justice and therefore, the availability, suitability and efficacy of redress mechanisms.[1092] It is suggested here however, that the truth perhaps lies somewhere in between and that positioning the data protection framework as *the* solution fails to consider the clear difficulties associated with the effective operation of the data protection framework. Indeed, although technological developments have accelerated the need for change, the core of the GDPR has remained consistent with the old Data Protection Directive which it replaced (i.e. Directive 95/46/EC).[1093] Indeed, it should be noted that it has been repeatedly argued that the principles contained in Article 5(1) GDPR are under strain

[1087] Stark (n 887) 22.
[1088] O'Neill (n 974) 147.
[1089] Lazaro and Métayer (n 541).
[1090] Julie E Cohen, 'Turning Privacy Inside Out' 20 Theoretical Inquiries in Law 32, 8.p. 8.
[1091] ibid 8–9.
[1092] Clifford and Van Der Sype (n 963).
[1093] De Hert and Papakonstantinou (n 711).

given the proliferation of technology and 'datafication'.[1094] More specifically, data security is becoming gradually more difficult due to the increasing number of attacks and high profile data breaches, despite legislative developments.[1095] In addition, data gathering in the big data environment appears almost inherently in contradiction with the data minimisation and purpose limitation principles given that personal data are often gathered in an unrestricted manner for unspecified purposes and then mined for useful commercial applications.[1096] These failings highlight the potential for function creep[1097] and therefore the repurposing of personal data (see Chapter 4). Aside from these principle-based challenges however, as explored in Chapter 4 there are clear difficulties interpreting Article 9(1) GDPR considering the machine learning techniques where although deployments may respect the prohibition on the processing of the special categories of data directly, this may effectively occur by the backdoor via inference.

**[369]** LET'S NOT JUMP THE GUN – It is important to note however, that such claims also pre-date the entry into force of the GDPR as these 'problems' have been carried over from Directive 95/46/EC.[1098] Therefore, although it remains out of scope here, it is arguable that for instance the increased fines may foster a move towards compliance. In saying this however, there are clear challenges in this regard and therefore, despite the fact that the dual approach to control is well established in the data protection framework,[1099] the ongoing legitimacy of this approach is increasingly under strain in the data driven world.[1100] Indeed, a clear difficulty in the application of the data protection framework to profiling is that the connection between the data processing risk and the notion of personal data is unclear due to the fact that data protection focuses on the risks associated with processing and not on the substantial parts of profiling applications (which may also present a threat).[1101] Instead, as described in Chapter 4, Article 22 GDPR merely provides that a data subject has the right not to be subject to an automated individual decision and, as such, does not specifically regulate the subject matter of such decisions. Indeed, although one could argue that meaningful information about the logic involved and the personal data processed could stimulate informed data subject consent, there are a number of limitations to such a claim.[1102] First, it is uncertain whether it is in fact possible

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[1094] See generally: Tal Z Zarsky, 'Incompatible: The GDPR in the Age of Big Data' (2017) 47 Seton Hall Law Review 2; Koops (n 280); Bert-Jaap Koops, 'The Trouble with European Data Protection Law' (2014) 4 International Data Privacy Law 250; De Hert and Papakonstantinou (n 711).

[1095] In this context on can refer to the GDPR and also Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union OJ L 194.

[1096] Verdoodt, Clifford and Lievens (n 33).

[1097] Koops (n 280) 198.

[1098] Paul De Hert and Vagelis Papakonstantinou, 'The Proposed Data Protection Regulation Replacing Directive 95/46/EC: A Sound System for the Protection of Individuals' (2012) 28 Computer Law & Security Review 130; Koops (n 280); Koops (n 1094).

[1099] Lynskey (n 457) 258–262.

[1100] For a recent discussion here see: Zarsky (n 1094). But also for instance Koops (n 1094).

[1101] Koops (n 280).

[1102] See Cohen (n 1090).

to explain certain types of machine learning processes.[1103] Second, it is debateable whether such transparency requirements actually remedy the problems associated with such developments which are pre-dominantly connected to the unfair treatment of consumers.[1104] Third, for such a remedy to have any impact there needs to be scepticism towards the trade secrecy claims of commercial operators,[1105] which is a very controversial issue.[1106] And fourth, consent needs to be meaningful (i.e. the conditions for consent must be respected) and thus that consent to the processing of personal data is not conditional for access to the service in question in a wholesale manner, a point which goes to the core of the debate presented in Chapter 5.

**[370]** MORE INFORMATION THE ANSWER? – Building on these points Cohen observes more generally, that it is unclear how individuals would benefit from this added layer of complexity in terms of information. As noted by the author, '[...] when disclosure is in aid of a regulatory regime predicated on consent, the cure may be worse than the disease.'[1107] This is an important point which clearly links to the criticisms of consent outlined in the previous Chapter but also the effectiveness of the information-provision orientated protections evident in the consumer law *acquis*. The lack of clear guidance as to how such transparency mechanisms should be formulated is an important weakness.[1108] But what role does emotion play here and given the clear importance of emotion in decision-making how could existing mechanisms be bolstered to foster more meaningful consent? Indeed, as emotion plays a key role in decision-making a natural question is one of how emotion may be harnessed to safeguard autonomous decision-making capacity. In this vein, attention needs to be given to the emotional context of information privacy. Although a bit of stretch, such developments could in a broad manner be deemed a necessary part of the notion of data protection by default and by designed as espoused in the GDPR. Stark refers to this process as '"data visceralization" – making the tie between our feelings and our data visible, tangible, and emotionally appreciable.'[1109] Underlying this approach is the fact that emotions play a key role in the appreciation of risk and in this manner there is a need to explore how insights into emotions could be harness to bolster risk perceptions.[1110] Embedding a cognitive theory of emotion could help individuals focus on salient aspects.[1111] In this manner, one can point to the potential role for human-computer

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[1103] See: Frank Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* (Harvard University Press 2014).
[1104] See: Edwards and Veale (n 950).Lilian and Michael's slave to the algorithm paper.
[1105] Cohen (n 1090) 8.
[1106] See: Gianclaudio Malgieri, 'Trade Secrets v Personal Data: A Possible Solution for Balancing Rights' (2016) 6 International Data Privacy Law 102.
[1107] Cohen (n 1090) 8.
[1108] See: O Seizov, AJ Wulf and J Luzak, 'The Transparent Trap: A Multidisciplinary Perspective on the Design of Transparent Online Disclosures in the EU' (2019) 42 Journal of Consumer Policy 149.
[1109] Stark (n 887) 23. For a similar proposal in relation to privacy policies see: Ryan Calo, 'Against Notice Skepticism in Privacy (and Elsewhere)' (2012) 87 Notre Dame Law Review 1027.
[1110] See: Kahan (n 228).
[1111] Sabine Roeser, 'Emotional Reflections About Risks' in Sabine Roeser (ed), *Emotions and Risky Technologies*, vol 5 (Springer Netherlands 2010) 238.

interaction and user interface (UI) and user experience (UI) designers[1112] to reflect the needs of users into technology design to respond to the regulatory challenges in a more contextually aware manner.[1113] Indeed, it is well established in technology law that design plays an important role in the regulation (i.e. construed broadly) of human behaviour.[1114] There is therefore, room for further analysis exploring how such an aim could be practically realised and this also points to the need for further interdisciplinary research to embed such insights in human-computer interactions.[1115] Here reference for instance can be made to the recent report issued by the Institute of Electrical and Electronic Engineers (IEEE) on ethically aligned design which will play an important role in determining the high level principles for the IEEE community.[1116] Such developments reflect the point that designers are increasingly required to take ethical decisions beyond what is strictly provided for within legal frameworks and that thus design decisions are not neutral. More collaborative research between human-computer interaction designers, philosophers and legal scholars is hence, needed to translate such abstract debates into practical outcomes and to prevent any potential 'moral overload' in relation to the difficult decisions requiring complicated trade-offs and reflection.[1117]

**[371]** MOVING BEYOND THE ABSTRACT – Although such research is necessary in order to map the potential in this area, from a legal perspective it remains too abstract and future-looking to be of any real benefit practically (at least for now). Indeed, even though broad requirements such as data protection by default and by design could be construed as fostering the need for commercial actors to explore such means of harnessing data subject engagement to empower individuals, it is suggested here that this is wishful thinking – at least until design practices are incorporated into the corpus of IT regulation strategies.[1118] This opinion is based on the fact that commercial interests run counter to these developments with certain commercial operators in fact having been shown to deploy so-called 'dark-patterns' to manipulate consumers. It is suggested that a more pragmatic regulatory approach would be to focus instead on what is clearly unfair at least until such

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[1112] To clarify '[t]he fact of telling the user what they can and cannot do falls within the user interface design (or UI) which strives to build a coherent visual language. It is built through the design of interactions or IxD, i.e. how the interface interacts between the system and the user, to enable it to achieve its objectives. The concept of user experience (or UX) has recently emerged; it includes an expanded version of the design of interaction focusing on the user journey as a whole, focusing on the emotional quality of experience and the commitment between a service and its users.' Chatellier and others (n 29) 8.

[1113] Lachlan Urquhart, 'Ethical Dimensions of User Centric Regulation' (2018) 47 SIGCAS Comput. Soc. 81, 84.

[1114] See for example: Lawrence Lessig, 'The Law of the Horse: What Cyber Law Might Teach' (1999) 113 Harvard Law Review 501; Lawrence Lessig, *Code: And Other Laws of Cyberspace* (Basic Books 1999); Lawrence Lessig, *Code: Version 2.0* (Basic Books 2006).

[1115] See: Lachlan Urquhart and Tom Rodden, 'New Directions in Information Technology Law: Learning from Human–Computer Interaction' (2017) 31 International Review of Law, Computers & Technology 150.

[1116] 'Ethically Aligned Design: A Vision for Prioritising Human Well-Being with Autonomous and Intelligent Systems' (n 2).

[1117] Urquhart (n 1113) 89.

[1118] ibid 84. See Chatellier and others (n 29). calling for further research in this area.

time as the law more actively embraces the regulation of design practices.[1119] Such practices are gaining increasing attention in academic research (albeit seemingly fitting within the pre-existing market manipulation theory described in Chapter 6),[1120] and importantly the enforcement level with the recent report issued by the Norwegian Consumer Council noting that,

> '[w]hen digital services employ dark patterns to nudge users toward sharing more personal data, the financial incentive has taken precedence over respecting users' right to choose. The practice of misleading consumers into making certain choices, which may put their privacy at risk, is unethical and exploitative.'[1121]

The report analysed the updates and prompts as a result of the entry into force of the GDPR by *Facebook*, *Google* and *Microsoft* and focused the analysis on the use of techniques that clearly benefited the companies under the headings default settings, ease, framing, rewards and punishments, and forced action illustrating several examples of exploitative nudges for each company.[1122] Such developments are important as they clarify the role of the data protection by design and default principle but also the acceptable limits in the Regulation. The analysis in Chapter 5 revealed distinctions between the protections afforded to the data subject and those provided to the average consumer and that therefore, any alignment of the respective policy agendas raises complications in terms of the standard of protection afforded. Indeed, in commenting on the then ongoing reforms of the former Data Protection Directive through the proposed GDPR, Fuster observes that configuring the data subject as a consumer has important conceptual drawbacks. More specifically, the author argues that by pushing the data protection framework towards consumer protection to enhance protection may lead to the paradoxical situation of them being treated as informed, observant and circumspect consumers by default thereby reducing the level of protection afforded in practice.[1123] This observation is supported here and reflects the comparative analysis made above in Chapter 5. But the conclusion of the analysis provided therein is not that the GDPR provides the ultimate solution to the problems outlined and there are a number of basic points of interpretation which remain vague and ill-defined within data protection law. Here an interesting illustration of uncertainty relates to the apparent lack of a benchmark of the data subject through which to assess the fairness of processing.[1124] Although the standards of protection in the GDPR are more paternalistic, it remains unclear as the level of misinformation which triggers unlawfulness in the Regulation.[1125] A clear difficulty in establishing such a standard is the

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[1119] This does not undermine the need for such research.
[1120] Bösch and others (n 29); Gray and others (n 29).
[1121] 'Deceived by Design: How Tech Companies Use Dark Patterns to Discourage Us from Exercising Our Rights to Privacy' (n 29) 5.
[1122] ibid 12.
[1123] González Fuster, 'How Uninformed Is the Average Data Subject?' (n 871) 101.
[1124] ibid.
[1125] As noted by Fuster '[m]ore importantly, defining a standard notion of data subject in terms of information and capability to make choices appears as a necessary prerequisite to define which online practices are unlawfully misleading. It is striking that despite the significance of the data subject's right to know and of information obligations imposed on data controllers for European personal data protection,

omnibus nature of the framework and therefore, the fact that it applies to a variety of controller-data subject relationships which may complicate the application of any such standard but this does not remove the importance of conceptualising who exactly is protected in the framework in terms of the normative benchmark of protection that will be provided by the Courts.

**[372]** A MOVE TO PATERNALISTIC PROHIBITIONS? – Indeed, in this regard several authors have also proposed the adoption of the 'vulnerable consumer' notion in the data protection context.[1126] There are therefore certainly aspects of the GDPR which could learn from the consumer law *acquis* to bolster data subject decision-making rationality in practice. However, for the purposes of this analysis it is important to note more simply that despite the differences, individual 'rationality' still underpins both the data and consumer protection framework and that therefore, the literature on market manipulation theory is of clear relevance. In this regard, it could be argued that the role for law may be more to determine which techniques should be prohibited. This does not exclude the potential for the continued application of the principle-based rules already provided by the GDPR (or the UCP Directive depending on national interpretations). However, in this regard one must acknowledge the greyness and the ethical debates which dominate the development of new technology. In this vein, it is significant to note that the application of ethical analyses is becoming inherent to the operation of data protection and that this is indicative of the requirement to fairly balance moral values as expressed through competing fundamental rights in the determination of what is perceived as being 'good' or 'bad' for society. However, as will be described in the following section, there is a blurring between legal requirements and ethical debates and thus the relationship between the law (in particular the GDPR) and broader issues associated with the effects and deployment of technology.

### *B. EMBEDDING FAIRNESS, ETHICAL EMOTION MONETISATION AND AFFECTIVE MODEL DESIGN*

**[373]** THE ETHICAL TURN – The ethics of AI or 'data' ethics is a hot topic in the policy-making sphere. This reflects the reality that these technological developments pose important questions for society. That being said, these debates have led to confusion as to the precise role of the law. In commenting on the deluge of ethical analyses of AI, Nemitz illustrates his degree of cynicism regarding such developments by observing that,

> '[i]n a move of genius, the corporations interested have started to finance multiple initiatives to work on ethics of AI, thus, while pretending best intentions, effectively delaying the debate and work on law for AI. There is no doubt that ethics is a good

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there is no clear benchmark in EU law as to the level of misinformation of data subjects to be regarded as unlawful.' ibid 102.

[1126] Milda Mačėnaitė, 'Protecting Children Online: Combining the Rationale and Rules of Personal Data Protection Law and Consumer Protection Law: Towards a Holistic Approach?' in Mor Bakhoum and others (eds), *Personal Data in Competition, Consumer Protection and Intellectual Property Law: Towards a Holistic Approach?* (Springer 2018); González Fuster, 'How Uninformed Is the Average Data Subject?' (n 871).

thing, in particular intra-company ethics for the leadership and employees which go beyond what the law requires.'[1127]

The requirements provided by law (even if based on ethical foundations) must thus be delineated from the debates on the ethics of AI. Nemitz offers the GDPR as an example of AI regulation and it seems reasonable to conclude that legal requirements expressed in the GDPR should be delineated from broader ethical concerns which remain unexpressed or ambiguous in terms of the obligations and safeguards laid down therein in an abstract sense.[1128] To clarify, here reference can be made to Floridi's distinction between 'hard' and 'soft' ethics with the notion of hard ethics referring to 'what makes or shapes the law' and soft ethics to post-compliance ethics and what should be done 'over and above the existing regulation, not against it, or despite its scope, or to change it, or to by-pass it (e.g. in terms of self-regulation).'[1129] That being said, the precise relationship between the data protection fairness principle and the role of ethics in determining the appropriate uses of personal data remains blurred due to the broad context dependant nature of this principle. Indeed, as noted by Hijmans and Raab, '[…] it is often unclear what this ethical 'turn' amounts to, how it relates to legal requirements, and what practices it enjoins on (or forbids to) whom; moreover, what its proponents mean by 'ethics' is often not explained.'[1130] Due to the broad role of fairness in the GDPR, one must therefore wonder how the separation of ethics and this principle *via* the EDPS's positioning of the latter as a purely legal notion adds up.[1131] Importantly, this observation is not intended to take away from the fact that within the operation of the Regulation there are clear rights and obligations which must be respected irrespective of broader ethical debates (i.e. soft ethics) in line with Nemitz's argument. Instead therefore, the point being made here is that the grey areas that are left in the operation of the GDPR and more specifically, the fair balancing of rights and interests provide a role for soft ethical debates within the operation of the fairness principle in a particular context to determine the legality of a specific processing operation. In simple terms, fairness becomes the avenue through which such debates could be filtered into the Regulation.

**[374]** FAIRNESS AND ETHICS – Through such an understanding the principle would oblige the adoption of ethical data practices and standardisation mechanisms which effectively

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[1127] Nemitz (n 2) 7.
[1128] Nemitz (n 2).
[1129] Luciano Floridi, 'Soft Ethics and the Governance of the Digital' (2018) 31 Philosophy & Technology 1, 4. See also: Luciano Floridi, 'Soft Ethics: Its Application to the General Data Protection Regulation and Its Dual Advantage' (2018) 31 Philosophy & Technology 163.
[1130] Hijmans and Raab (n 880) 3.
[1131] In this regard, one can refer to the European Data Protection Supervisor (EDPS) opinion calling for a move towards new digital ethics which notes that, '[d]ata protection principles have proven capable of safeguarding individuals and their privacy from the risks of irresponsible data processing. But today's trends may require a completely fresh approach. So we are opening a new debate to what extent the application of the principles such as fairness and legitimacy is sufficient'. European Data Protection Supervisor, 'Towards a New Digital Ethics - Data, Dignity and Technology' (EDPS 2015) Opinion 4/2015 14 <https://edps.europa.eu/sites/edp/files/publication/15-09-11_data_ethics_en.pdf> accessed 28 March 2017.

incorporate broader socio-ethical based considerations in their operation. The various initiatives currently being taken at the EU and national level could be then made effective in the application of the GDPR or at least, in further specifying the greyness in the Regulation's provisions. Indeed, in this regard reference can be made to the guidelines produced by the High-Level Expert Group on Artificial Intelligence set up by the European Commission which appears to follow Floridi's soft-hard ethics model and in essence, recognises the role of ethics as requiring debates that go beyond current legal requirements.[1132] This suggestion does not help however, in the determination of what is 'fair' or ethical in a given circumstance and thus any attempts to decipher what such notions may mean in the application of the framework requires an understanding of how the term ethics is being conceived of in the policy debates. In this regard, it is interesting to note that human dignity was the key driver for the EDPS's engagement with ethics when Giovani Buttarelli proposed the insertion of an ethical claim into the data protection ecosystem,[1133] and this engagement with human dignity as an essential value seems to pervade the discussion on ethics.[1134] In the previous Chapters of this thesis, human dignity has been sporadically mentioned and it appears to be dropped into Court rulings, Advocate General opinions and legislation as a cross-reference to the need to protect fundamental rights and interests. Here we can think of the references to dignity in the AVMS and UCP Directives and key judgements such as *Omega Spielhallen* but also Recital 88 GDPR. Indeed, in her analysis of the rights to data protection and privacy, Lynskey observes that one of the potential models for conceptualising the rights to data protection and privacy is by viewing them as complementary tools inherently linked to the 'ultimate aim of ensuring respect for human dignity'[1135] with such an understanding appearing to have inspired much of the data ethics movement.[1136] But what is human dignity and what value does it add as an underpinning ideal or aspiration for the development of ethical technology? And what role does it play in law? To provide some initial answers to these questions, it is necessary to refer to a much wider body of literature examining the precise (1) role and (2) nature of human dignity in international human rights law.

**[375]** THE ROLE OF HUMAN DIGNITY – Regarding the first of these, the crux of the debate centres on the foundational role of human dignity in grounding rights and shaping 'the societal matrix in which they are to be realised'.[1137] More specifically, on this basis one can question whether human dignity can in fact be understood as an independent right or an

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[1132] 'Ethics Guidelines for Trustworthy AI High-Level Expert Group on Artificial Intelligence' (European Commission 2019) 6.
[1133] Hijmans and Raab (n 880) 2.
[1134] 'Ethics Guidelines for Trustworthy AI High-Level Expert Group on Artificial Intelligence' (n 1132) 10.
[1135] Lynskey (n 457) 94.
[1136] See for example: Luciano Floridi, 'On Human Dignity as a Foundation for the Right to Privacy' (2016) 29 Philosophy & Technology 307; European Data Protection Supervisor, 'Towards a New Digital Ethics - Data, Dignity and Technology' (n 1131).
[1137] This construction reflects the equivalent provision in the German Basic Law and illustrates filtering down and percolating up of influences between national and international legal orders protecting fundamental rights. See: Tarlach McGonagle, 'Safeguarding Human Dignity in the European Audiovisual Sector' [2007] IRIS plus 2, 3.

overarching value in human rights law. As an overarching value for instance, one can refer here again to the case of *Pretty v United Kingdom* where the ECtHR held that 'very essence of the Convention is respect for human dignity and human freedom'.[1138] This is despite the fact that the ECHR does not explicitly refer to human dignity as one of its propelling objectives. As noted by McGonagle, such an approach appears to reflect other international human rights instruments and the fact that the ECHR's preamble refers to the Universal Declaration of Human Rights (UDHR) and its key values and objectives.[1139] Indeed, Article 1 UDHR stipulates that '[a]ll human beings are born free and equal in dignity and rights […]'. It should be noted however, that the inclusion of human dignity in Article 1 UDHR is quite unusual (which gives it an added significance), given that references to human dignity in international human rights instruments are generally made in the preamble rather than the corpus of the text.[1140] In outlining the approach taken by various international human rights instruments towards human dignity, McGonagle observes that the pre-dominantly preambular positioning of references to human dignity and the construction of Article 1 UDHR suggests that dignity is positioned as an underlying value or quality rather than as a specific individual right.[1141] Indeed, as noted by Feldman '[i]n view of the wide-ranging significance of human dignity as a justification for conferring and protecting human rights, there is arguably no human right which is unconnected to human dignity. Nevertheless, some rights seem to have a particularly prominent role in upholding human dignity.'[1142] In this regard, one can point in particular to *inter alia* the rights to privacy and data protection, non-discrimination and freedom of thought. Hence, from the UDHR and the preambular references in other international human rights instruments, it appears that human dignity can be understood as an overarching value. However, reference to national constitutional traditions,[1143] but also importantly, the EU Charter, arguably muddies this discussion.

**[376]** HUMAN DIGNITY AND EU LAW – Indeed, Article 1 Charter states that '[h]uman dignity is inviolable. It must be respected and protected.' In this regard, it is significant to note that, although the German Constitution inspired the recognition of a right to dignity,[1144] it is in fact more common amongst the national constitutional traditions of the Member States that human dignity is not recognised as a right.[1145] However, in addition to Article 1

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[1138] *Pretty v. United Kingdom, (2346/02) [2002] ECHR 423 (29 April 2002)* (n 399) para 65.
[1139] McGonagle (n 1137) 3.
[1140] ibid.
[1141] ibid.
[1142] David Feldman, 'Human Dignity as a Legal Value: Part 1' [1999] Public Law 682, 690. With a similar argument developed more thoroughly see: Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge University Press 2015).
[1143] For an analysis of some national approaches see: Conor O'Mahony, 'There Is No Such Thing as a Right to Dignity' (2012) 10 International Journal of Constitutional Law 551.
[1144] McGonagle (n 1137) 6.
[1145] Here one can refer to the opinion of Advocate General Stix-Hackl in the *Omega Spielhallen* case who noted that '[...] human dignity seems to appear in the national legal systems of the Member States primarily as a general article of faith or—often in the case-law—as a fundamental, evaluation or constitutional principle, rather than as an independent justiciable rule of law.' *Opinion of Advocate General Stix-Hackl*

Charter there are there are also preambular references to human dignity in the Charter. Consequently, human dignity in the EU legal order is provided for as a right but due to such references in the Charter's preamble, it can also be understood as an indivisible universal value upon which the EU is founded along with freedom, equality and solidarity and the principles of democracy and the rule of law. Human dignity therefore, appears to play a dual role as both a right and an overarching value and basis for other rights. Interestingly, the inclusion of a right to dignity in the Charter was based on the apparent desire to ensure that its status could not be weakened. However, recognising human dignity as a right runs contrary to much academic literature. Indeed, one could argue that as a right to human dignity is in fact more susceptible to limitation than when it is characterised as a value. Indeed, in this regard it is significant to refer to O'Mahony's deconstruction of human dignity as a right with the author arguing that,

> '[…] such a notion is essentially inconsistent with the invocation of dignity as the foundational principle underlying and justifying the legal protection of human rights. It paradoxically suggests that an inherent characteristic can be taken away and that the enjoyment of rights leads to people attaining dignity rather than that people's inherent dignity is the reason that they should be afforded rights.'[1146]

Hence, relying on dignity as inherent or attached to the human condition and the foundation for rights is different from regarding it as a right which could be taken away and violated, as even if a right is violated to its core one remains human. Feldman proposes a similar view of the idea of a specific right to human dignity by stating that although it is superficially appealing it remains ultimately unconvincing due to the fact that '[w]e are conceived and born, and most of us live and die, in circumstances of significant indignity.'[1147] Where human dignity is a value it can viewed as a desirable state or an aspiration and becomes the catalyst or an umbrella for other rights which act as the subordinate forms of dignity and together protect this general value. Feldman refers to such protective rights as '"rights to dignity" in so far as they have the object of upholding dignity indirectly.'[1148] Through such an understanding, human dignity as a value becomes something for individuals and society to aspire to and, through such a understanding, interests are weighed and rights may therefore be limited without necessitating the destruction of their very substance.[1149] Therefore, any limitation on a specific right must be justified with respect to the overarching value of human dignity and such an approach sets dignity as the objective in the balancing of rights and interests. Through such a conceptualisation, legislative measures could be understood as the manifest pursuits of human dignity. Nevertheless, notwithstanding the above it should also be noted that in

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*delivered on 18 March 2004 in Case C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn, ECLI:EU:C:2004:162* [84].

[1146] O'Mahony (n 1143) 564–565.

[1147] Feldman (n 1142) 682.

[1148] ibid 5.

[1149] In this vein reference can be made to Feldman's discussion regarding the weighing of key values such as secrecy (or selective disclosure), autonomy and dignity in the context of the right to privacy in order to assess whether there has been a violation *vis-à-vis* what he refers to as controlling the boundaries of social spheres. Feldman (n 404).

purely practical terms the arguments presented may have little real impact and further, that it remains a debated issue in terms of its significance in the EU legal order.

**[377]** AUTONOMY-AS-DIGNITY PROBLEMS – In relation to the second of the two points referred to above (i.e. the nature of human dignity), it is important to note that this discussion effectively shapes the operation of dignity in its designated role. Despite being referred to repeatedly in international and regional human rights instruments, human dignity 'is culturally dependent and eminently malleable.'[1150] As observed by O'Mahony, the fluidity of dignity is perhaps indicative of its function or indeed, the function of international human rights instruments more generally, and hence the margin of appreciation designated to national interpretations.[1151] The author goes on to describe that generally speaking two dominant aspects of the nature of dignity can be distilled namely; (1) the 'equal treatment and respect aspect' of dignity and (2) 'autonomy-as-dignity'. O'Mahony suggests a narrowing of the discussion of the notion to the first of these aspects as in his view, the 'autonomy-as-dignity' aspects inevitably results in scenarios that are almost impossible to resolve in light of the fact that there may be 'competing dignities'.[1152] More specifically, conflicts arise, for instance between two individuals and the autonomy of the individual and either the perceived dignity of that individual or another and/or society as a whole.[1153] In short, the human rights of different people will inevitably come into conflict and therefore, any human rights framework which is built on the notion of equality will struggle to offer a theoretical framework providing a uniform method for resolving such conflicts. O'Mahony proposes that such problems result in divergences and could be overcome in the international human rights discourse if autonomy was understood as a secondary right flowing from human dignity rather than an aspect of dignity itself. This approach thus equates human dignity with the first aspect namely, 'equal treatment and respect'. In this manner, the author suggests that a more universal understanding of human dignity could be reached to lend more consistency to this key tenet of international human rights instruments. Interestingly, this narrower approach seems to be reflected (albeit seemingly coincidentally) in machine learning fairness literature.[1154]

**[378]** MACHINE LEARNING FAIRNESS – As described in the introduction to this thesis, the use of machine learning techniques is widespread, and they essentially underpin much of the technology discussed in this thesis. From recommender systems to emotion detection itself, machine learning plays and will play a key role in the monetisation of emotion. It is therefore apparent that machine learning affects individuals and that it is being

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[1150] Feldman (n 1142) 698.
[1151] O'Mahony (n 1143) 557.
[1152] O'Mahony (n 1143).
[1153] O'Mahony references 'hard' cases familiar to his background as an Irish Constitutional law academic such as the former conflict between the right to life of the unborn child and rights of the mother *vis-à-vis* abortion brought about by the Irish constitution at the time and the rights of a terminally ill individual and the legality of euthanasia in Irish law. See: ibid.
[1154] For an overview see: Ben Hutchinson and Margaret Mitchell, '50 Years of Test (Un)Fairness: Lessons for Machine Learning' [2019] Proceedings of the Conference on Fairness, Accountability, and Transparency - FAT* '19 49.

increasingly deployed in ways which have an impact on the distribution of benefits, burdens and opportunities in society.[1155] Given the widespread deployment however, there is a clear risk of unfair outcomes. As noted by Binns, cognisance of this problem has resulted in the growth of 'discrimination-aware data mining' or 'fair machine learning' research which aims to counteract the negative impact of machine learning.[1156] Such research aims to embed fairness into the very design of machine learning techniques to reduce the occurrence of unfair outcomes. In other words, the 'learning processes' are designed so that the outcome matches what has been pre-defined as 'fair'. As summarised by Gajane and Pechenizkiy in the machine learning literature fairness has been formalised based on two questions, namely; 'parity or preference?' And, 'treatment or impact?' In brief, parity here refers to equality and therefore, by ensuring equality in the 'treatment' or 'impact' of a particular system the outcome is deemed 'fair'.[1157] Although it remains outside of the scope of this thesis to delve into these issues in depth, a simple example here relates to the avoidance of the use of/or impact on the protected legal grounds in non-discrimination law in particular.[1158] In contrast, 'preference' refers to 'envy-freeness' and in applications like prediction and decision-making it can also be expressed as the notion of *Pareto efficiency.* To reiterate, *Pareto-efficiency or Pareto optimality* refers to specific situation in resource allocation where it is no longer possible to reallocate so as to make one party better off without making another person worse off.[1159]

**[379]** FAIRNESS AND NON-DISCRIMINATION – Following a 'preference' based approach a fair outcome will be achieved if a group of individuals would collectively prefer its outcome(s) as compared to other groups if given a choice between various sets of outcomes. In contrast, in terms of treatment a 'preference' based approach to fair machine learning should aim to ensure that the group in question prefers their set of decisions compared to the set of decisions they would have received if they had presented themselves as members of a different sensitive group. Irrespective of the above delineations however, Naudts convincingly argues that both these techniques essentially seek to achieve a very similar outcome *vis-à-vis* the protection of 'sensitive attributes' which normally correspond to the protected grounds in non-discrimination legislation. The author goes on to note that fair machine learning research thus targets 'the known fear that machine learning techniques can reinforce prejudices that persist in society'.[1160] In Naudts' view this equates fairness with a substantively limited version of 'equality' and in building on this, the author suggests that to ensure that machine learning truly becomes fair, a broader notion of

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[1155] Laurens Naudts, 'Towards Accountability: The Articulation and Formalization of Fairness in Machine Learning' [2018] Working Paper 1.
[1156] Binns (n 18) 1.
[1157] Pratik Gajane and Mykola Pechenizkiy, 'On Formalizing Fairness in Prediction with Machine Learning' [2017] arXiv:1710.03184 [cs, stat] <http://arxiv.org/abs/1710.03184> accessed 5 September 2018.
[1158] See: Naudts (n 1155).
[1159] Akerlof and Shiller (n 10) 5.
[1160] Naudts (n 1155) 5.

fairness should be pursued or at least a better conceptualisation of the existing conceptualisations of fairness is required.[1161]

**[380]** DIGNITY AND ITS MALLEABILITY – For the purposes of this thesis, here it is interesting to question whether a conceptualisation of fairness beyond equality is required. Indeed, if it is only egalitarian principles that are viewed through the lens of fairness as understood in machine learning literature, others such as autonomy may be neglected.[1162] This reflects the point that a similar critique is made here of O'Mahony's suggestion to narrow the meaning of human dignity to the equal treatment and respect aspect of this notion in international human rights law. Although Feldman for example suggests that dignity (i.e. incorporating autonomy) should be treated with caution due to the fact that, (1) it could arguably undermine the legitimacy of judicial action due to its malleability and; (2) it can be used just as easily to restrict as well as uphold autonomy thereby becoming the vehicle for paternalism or moralism, he also recognises its inherent collective as well as individual value.[1163] Such an approach therefore lends itself to results which are more collectivist than individualist and also seemingly aligns well with the Razian conceptualisation of autonomy outlined above. To reiterate, taken as a value human dignity can therefore represent collective interests as defined by the legislator and although this point may still be open to the criticism that it does not cater for dignity's malleable nature, this may arguably be aligned with the role of the democratic process and hence, the margin of appreciation attributed to the legislator in the adoption of secondary legislation and the role of the judiciary in the constitutional review of the legislation adopted. Such a conclusion is significant given that as described above, the monetisation of emotions will inherently require the limiting of fundamental rights as has been explored in the previous Chapters. It is suggested here therefore, that an understanding of dignity as limited to mean equality as an approach loses the inherent benefit and purpose of human dignity as a value in international human rights instruments and its key role in the exercising of all rights and hence, its indivisible connection with the liberal values underlying international human rights instruments. In this regard, one can refer to the role for autonomy in several rights as described above in Chapter 3. In short, the societal function of dignity should not be underestimated. In saying this however, positioning dignity as such gives it a malleability which could potentially undermine protection. Therefore, it is again necessary to specify that there needs to be a distinction made between dignity as aspired to through a regulatory mechanism aiming to protect fundamental rights and interests and the balancing of those that are conflicting (hard ethics), and broader conceptualisations of what is ethical and

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[1161] ibid 7–8.

[1162] ibid.

[1163] '[p]ublic authorities can give substance to the notion of an affront to human dignity, feeding into it their own values, subject to review by administrative tribunals in the light of the tribunals' own conception of what constitutes the dignity of the human person [...]. This paternalistic approach is allied to (although not the same as) a form of legal moralism which treats autonomy as an aspect of human dignity but one which can be overridden by reference to the need to maintain respect for the dignity of whole human societies and the human race.'Feldman (n 1142) 702.

what ethics are more generally (soft ethics). In saying this however, the need to specify what is ethical in the context of machine learning and the emergence of emotional AI more specifically remains an issue as in the words of Floridi, 'the space of soft ethics is both practically bounded, and yet unlimited.'[1164] Hence here, there are certainly debates to be had as to whether there is a need for more paternalistic consumer protection mechanisms to define what is unfair in specific circumstances to protect the autonomy of individuals in the context of emotional AI and the monetisation of emotion insights. This point is of clear importance considering the broad meaning attributed to the notion of fairness as a legal principle in the GDPR (i.e. understood here as a vehicle for ethics) but also in light of the criticisms levelled against the AI ethics movements at the EU level in terms of the claims that such developments are merely ethics washing exercises and industry led attempts to delay the discussion of regulatory interventions. Indeed, the failure of the High-Level Expert Group on Artificial Intelligence set up by the European Commission to provide any specific non-negotiable red-lines of unethical practices attracted significant attention and is a notable example in this regard.[1165]

**[381]** OPERATIONALISATION AND AUTONOMY-BASED INTERPRETATION – For instance, in the emotion monetisation context where emotion insights may be used to manipulate consumers towards certain actions an autonomy-based interpretation of fairness may be more apt. But how would this manifest itself practically speaking? As the deployment of emotional AI in the context of advertising and marketing specifically targets the persuasion (or arguably the manipulation) of the consumer, one must wonder how a conceptualisation of fairness based on both equality and autonomy might actually work. It is suggested here that in this regard, a key point of analysis relates to whether it is 'fair' in any circumstances to use emotion detection mechanisms to manipulate an individual given that this could arguably undermine their autonomy. This observation goes to the very core of the ongoing legitimacy of surveillance capitalism and, as described above in Chapter 5, this debate has largely been categorised within the legitimacy of rendering consent conditional in view of Article 7(4) GDPR and the 'freely given' stipulation in the definition of consent in particular. The interpretation of such provisions ultimately rests with the Court of Justice and here another important consideration arises regarding the level of fairness protection provided for in the GDPR and the potential for deviating MS interpretations in light of the vague drafting, previously well-documented disparities and differences in national legal, political and socio-economic priorities.

**[382]** THE PRIMACY, UNITY AND EFFECTIVENESS OF EU LAW – Indeed, as described in Chapter 3, to ensure the effectiveness of EU law the standard of protection provided for the right to data protection (or rather fundamental rights where personal data are processed) in the GDPR will be seen as uniform to ensure 'the primacy, unity and effectiveness of EU

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[1164] Floridi, 'Soft Ethics and the Governance of the Digital' (n 1129) 5.

[1165] See the strong criticisms levelled against the report by one of the lead authors: Thomas Metzinger, 'Ethics washing made in Europe' *Tagesspiegel* (4 August 2019) <https://www.tagesspiegel.de/politik/eu-guidelines-ethics-washing-made-in-europe/24195496.html> accessed 11 April 2019.

law'.[1166] As this was the balance struck by the EU legislator, allowing MSs to apply a different (i.e. lower but also importantly higher) standard of protection would upset the objectives of harmonisation. Indeed, legislation designed to give specific expression to a fundamental right is balanced based on prioritising one fundamental right over other fundamental rights and objectives.[1167] But how then may the balance in MSs deviate? How would EU law cope with a divergence caused by differences in the ethical perspectives on the legitimacy of surveillance capitalism as a business models? And what does this mean for national ethics initiatives? Are such enterprises in fact futile? It is suggested here no, but intuitively enough only no if the Court of Justice has remained silent on the 'ethical' issue at hand. Clearly, the very purpose of the GDPR (even by its very adoption as a Regulation) was to harmonise the fragmented implementations of the Data Protection Directive 95/46/EC and in this regard fragmented enforcement was an area which received particular attention.[1168] Although it seems clear that as the GDPR represents a harmonised standard for the protection of personal data, if it was to allow for national divergences, 'the primacy, unity and effectiveness of EU law' would arguably be threatened. However, as described above, what is fair or ethical will be a context dependent assessment and thus even if the Court of Justice delivers a ruling on a particular provision, its interpretation may be inseparably linked to the facts of that particular case and other factually similar contexts. Moreover, the GDPR represents a political compromise and was thus concluded despite the polarised debates surrounding the trilogue phase. In this regard, one can point to the protracted negotiations which preceded the adoption of the Regulation but also the apparent migration of the stickier issues from the binding provisions into the non-binding Recitals. The future to a large extent therefore, rests with the interpretation of the GDPR by the Court of Justice. As such, the pursuit of fairness is a challenge in part due to the fact that what is fair is a malleable notion dependant on the context at hand thereby mirroring the critique of dignity above, but also due to the regulatory environment and the theoretical allocation of responsibilities in the secondary law frameworks.

**[383]** INTERPRETING THE GDPR – The GDPR thus provides the standard and here two illustrative warning shots are perhaps warranted in a more overarching sense to demonstrate potential issues associated with its significance. First, the GDPR is increasingly looking like the golden-haired child of the EU legal order or a hammer where every information society service problem is seen as a nail. In this regard, one can refer to expanding interpretations of the definitions of personal data as an example (see Chapters 4) but also the definition of a controller.[1169] In this manner, it is interesting to consider how the expansionist interpretation of the GDPR could arguably invalidate or at least influence other legislative proposals. Here, reference can be made to the apparent contradictions between the interpretation of the GDPR given by the Article 29 Working Party (and

[1166] See *Case C-399/11, Melloni, EU:C:2013:107* (n 598). and Chapter 3.
[1167] Muir (n 376) 241.
[1168] See: Clifford and Van Der Sype (n 963).
[1169] For more see: Van Alsenoy, *Data Protection Law in the EU* (n 622).

latterly the EDPB) and the reform of the consumer protection *acquis* as described in Chapter 5. Indeed, one must wonder whether we are not forever tied to the compromise reached in the GDPR and hence, to an ever increasing standard of protection with respect to the specific expression of a right in a secondary framework as opposed to a standard which would fall in line with Article 52(1) Charter. This may be linked to the uncertain contours of the right to data protection as outlined in Chapter 3 and the fact that discussions of this right's specific nature often refer to peculiarities which are sometimes grounded in the secondary law expressions of the right (i.e. the GDPR and the old Data Protection Directive 95/46/EC) as opposed to detailed analysis of the right itself.

**[384]** GOING TOO FAR? – Perhaps this is an argument fuelled by a *reductio ad absurdum* inspired logic and undoubtedly is a matter that requires further examination and debate. However, as made clear above there are concerns as to whether there are different standards of protection evident between the role of the fairness principle in the GDPR[1170] and the unfairness standards legislated for in consumer protection frameworks. This provides food for thought, especially given the apparent alignment of the respective consumer protection and data protection policy agendas. Despite the foregoing analysis of the areas which may be clarified by the Court of Justice in the future which are of particular interest *vis-à-vis* the monetisation of emotion, it is important to reiterate the point that even if the Court provides an interpretation of a specific provision this interpretation may be inseparably attached to the specific facts of the case. This reflects the point made above that what is ethical is a broader consideration than what is strictly legal and, in this regard, it also evident from the analysis of the GDPR that the fairness principle plays a broader role than that of the lawfulness principle.[1171] Here one can refer to Hijmans and Raab who note that,

> '[t]he role of ethics could become reinforced if the general public perceives that something is 'not right', rather than 'not legal', in evaluating the data-driven processes to which they are increasingly involved. There are indications that, more vocally than before, customers and citizens may press for ethically better treatment rather than acquiescing in how they are dealt with by data controllers.'[1172]

The question thus becomes how far 'not right' may be from 'not legal' given the role of the fairness principle in the GDPR. This points to the flexibility associated with fair balancing exercises and therefore, the point that although ethics and fairness are concepts that are difficult to delineate, the degree to which such considerations need to be considered may vary from what is necessary to be deemed legal. A clear uncertainty therefore is left in determining the degree to which controllers will be accountable and morally responsible

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[1170] See: Clifford and Ausloos (n 537).

[1171] In this context one can refer to the separation between the fairness and lawfulness principles provided for in Article 5(1)(a) GDPR and accordingly, the operation of fairness as comprised of both *ex ante* and *ex post* manifestations provides grounding for the point that what is fair and ethical does not necessarily align with the assessment of 'legality' *stricto sensu* (see Chapter 5). Therefore, in the context of emotion monetisation such an approach affords the opportunity of mitigating the *ex post* consequences of personal data processing revealing emotion by more visibly extending the hand of fairness.

[1172] Hijmans and Raab (n 880) 4.

for taking ethical considerations into account[1173] and this debate is not helped by the fact that 'ethical' discussions at the policy level have sometimes confusingly presented legal requirements (which albeit are ethically grounded) as ethical considerations in the development of technology. In this vein, the points which emerge are that (1) the requirements in the GDPR (hard ethics) should be separated from broader ethical debates (soft ethics); (2) ethical interpretations (i.e. soft ethics) can inform the application of the fairness principle in the GDPR in the specific context of a defined processing purpose; (3) due to vagueness of the GDPR provisions and the room for fair balancing throughout the Regulation, there is arguably a need to further specify the legality of emotional AI through a further alignment with consumer protections rather than leaving such matters merely to (soft) ethical debates;[1174] and finally, (4) considering the specific application discussed in this thesis, the use of consumer protection mechanisms to ban certain purposes *ex ante* in a paternalistic manner may be necessary to protect individual autonomy. The third and fourth points listed above will be further expanded upon in the next section in order to better understand how they could be positioned within the existing framework and the EU legal framework more generally.

### 6.2.2 PATERNALISM AND (UN)FAIRNESS PROTECTIONS IN DATA PROTECTION

**[385]** ENSURING THAT RATIONALITY REMAINS FUNCTIONAL – Although the rationality standard may be a necessary construct for the continuance of a liberal rights-based approach, this does not exclude the possibility of ensuring the existence of an environment in which this standard is rendered more effective and realistic given the potential for such developments to undermine the capacity of an individual to act autonomously and hence, in their own best interests. This need is arguably exaggerated due to the emergence of the mediated society. As such, the question thus becomes one of how to ensure that rationality does not digress to the point of dysfunctionality where this fiction no longer achieves its aims. In this vein, the means through which regulatory interventions may provide such protection must be considered and therefore, carefully toe the line between paternalism and the protection of a life free from commercial manipulation.

#### *A. THE LEGITIMACY OF PURPOSES AND LAWFULNESS AS DISTINCT FROM THE LAW*

**[386]** THE LAWFULNESS PRINCIPLE – From a systematic analysis of the GDPR the 'lawfulness' principle can be traced directly to Article 6 GDPR.[1175] This seems to indicate that compliance with the lawfulness principle (provided for in Article 5(1)(a) GDPR along with the fairness and transparency principles respectively), is largely dependent on the application of one of the conditions in Article 6(1) GDPR (or indeed a failure thereof).[1176] As described above in Chapter 5, through in its construction, and more specifically the

[1173] ibid 12.
[1174] Nemitz (n 2) 8.
[1175] See: Clifford and Ausloos (n 537).
[1176] See generally: ibid. For instance one can refer to Recitals 49, 83, 116, and Articles 4(12), 5(1)(f), 17, 18, 23(2)(d), 32(2),

assignment of a particular meaning to the term 'lawfulness' and the explicit inclusion of transparency, the GDPR appears to in fact have given fairness an overarching and distinct role.[1177] Consequently, processing which is lawful under the conditions for lawful processing as outlined in Article 6(1) GDPR may still violate the broader notion of fairness in the GDPR (see the discussion on the right to object in Chapter 5).[1178] Importantly, the lawfulness principle is also distinct from the purpose limitation principle and thus, determining the legitimacy of purpose must be delineated from the lawfulness to process personal data for a legitimate purpose. Article 5(1)(b) GDPR specifies the purpose limitation principle and states that personal data must be 'collected for specified, explicit and **legitimate purposes** and not further processed in a manner that is incompatible with those purposes […]' [Emphasis added]. Purposes must first be legitimate to be assessed in terms of their lawfulness in the circumstances of the case. For example therefore, processing *purposes* that are illegal under criminal law will be illegitimate without requiring an assessment in the GDPR to determine 'lawfulness'.[1179] Accordingly, there is a distinction between the lawfulness principle as provided for in the GDPR and the broader conceptualisation of 'the law'.[1180] Such a possibility can be delineated from attempts to restrict specific aspects of the GDPR and instead represents the intersection between the Regulation and other areas of the law.

**[387]** INTERESTS AND ILLEGAL PURPOSES – To illustrate this point reference can be made to the Court of Justice decision in the *Breyer* case where the Court found that the German law requiring consent and ruling out the application of the balancing test in Article 6(1)(f) GDPR (then Article 7(1)(f) Directive 95/46/EC) to be an incorrect transposition of its requirements under EU law.[1181] The availability of the balancing in Article 6(1)(f) GDPR therefore, cannot be determined by the legislator. Importantly however, the construction of the provision assumes that it is only the legitimate interests of controllers and third parties which may be part of the balancing act contained in the provision.[1182] In contrast, in

[1177] See: ibid.

[1178] To clarify, although the fairness principle in the application of the relevant condition for lawful processing may have been satisfied, data subject rights offer an *ex post* fair balancing exercise on a more individualised basis thereby incorporating a more contextual assessment of the fair balance in the given circumstances. Although this does not render any prior processing unlawful retrospectively, if successfully invoked it renders any future processing contrary to the fairness principle and therefore, unlawful.

[1179] For instance, a person who hacks a company's computer system will be prosecuted under criminal law if caught bypassing the application of the GDPR whereas the company that was hacked may be assessed under *inter alia* the GDPR to determine whether their security was in line with the requirements to protect personal data.

[1180] Clifford and Ausloos (n 537).

[1181] The Court found that Article 6(1)(f) GDPR, 'precludes Member States from excluding, categorically and in general, the possibility of processing certain categories of personal data without allowing the opposing rights and interests at issue to be balanced against each other in a particular case. Thus, Member States cannot definitively prescribe, for certain categories of personal data, the result of the balancing of the opposing rights and interests, without allowing a different result by virtue of the particular circumstances of an individual case.'*Patrick Breyer v Bundesrepublik Deutschland* [2016] Court of Justice of the EU C-582/14 [62]. For more see: Borgesius (n 642).

[1182] A29WP 'If the data controller's interest is illegitimate, the balancing test will not come into play as the initial threshold for the use of Article 7(f) will not have been reached.'

commenting on the scope of the data subject's 'interests' in the operation of the same condition, the Article 29 Working Party suggests that the exclusion of the word 'legitimate' in Article 6(1)(f) GDPR illustrates the legislator's intention to also include illegitimate interests in that even the rights and interests of those involved in illegal activities for instance should not be subject to disproportionate interference.[1183] Kamara and de Hert argue however, that the Working Party's example of illegal activities does not correspond to the inclusion of both legitimate and illegitimate interests as the right to data protection does not disappear if you commit a crime.[1184] To nuance the Working Party's point therefore, it is suggested here that it is whether the motivation behind the data subject's interests is legitimate or illegitimate that does not matter given that the data subject's interest in their right to data protection remains constant.

**[388]** INTERESTS VERSUS PURPOSES – In contrast, the legitimacy of the controller's interests is key as these may inherently relate to the (il)legitimacy of the purposes. This points to the confusion associated with the separation between legitimate interests and legitimate purposes[1185] and here reference can be made to the Article 29 Working Party opinion which classifies purposes as the reasons for the processing and the interests as the stake or benefit derived from it.[1186] In the context of emotion detection therefore, one can imagine how that, although an application designed to monitor the mental health of people may be a common purpose for both a private company but also a governmental health care department, the interests of these respective parties would vary considerably.[1187] Practically speaking however, purposes and interests are extremely difficult to separate thereby reflecting the point that parties with an interest in the processing outcome will often be involved in deciding on the purposes.[1188] Therefore, the point being made is pretty simple – purposes that are illegal or banned (i.e. and that incur civil or criminal penalties) do not require the GDPR to determine the legitimacy and lawfulness of the processing as such purposes are pre-determined as illegitimate by law (i.e. either by legislative measure or some form of ruling). Hence, the assessment of the

[1183] Article 29 Working Party, 'Opinion 06/2014 on the Notion of Legitimate Interests of the Data Controller under Article 7 of Directive 95/46/EC' (n 801) 30.
[1184] Irene Kamara and Paul De Hert, 'Understanding the Balancing Act behind the Legitimate Interest of the Controller Ground' in Evan Selinger, Jules Polonetsky and Omer Tene (eds), *The Cambridge Handbook of Consumer Privacy* (Cambridge University Press 2018) 330 <https://www.cambridge.org/core/books/cambridge-handbook-of-consumer-privacy/understanding-the-balancing-act-behind-the-legitimate-interest-of-the-controller-ground/E981CBD42283BF46FA5CC0F9BAB2714E>.
[1185] What is provided here is a short overview for more see: Clifford and Ausloos (n 537).
[1186] Article 29 Working Party, 'Opinion 06/2014 on the Notion of Legitimate Interests of the Data Controller under Article 7 of Directive 95/46/EC' (n 801) 24.
[1187] This example has been developed from a similar example provided by Moerel and Prins in the following: Lokke Moerel and Corien Prins, 'Privacy for the Homo Digitalis: Proposal for a New Regulatory Framework for Data Protection in the Light of Big Data and the Internet of Things' <http://papers.ssrn.com/abstract=2784123> accessed 13 July 2016.
[1188] Van Alsenoy, 'Regulating Data Protection' (n 562) 471.

legitimacy of a purpose can be determined by areas of law outside the operation of the GDPR.

**[389]** A SPECIFYING ROLE FOR CONSUMER PROTECTION – The point being pushed here is that consumer protection law could play a role in specifying certain purposes that are illegitimate in the consumer protection law vertical's intersection with the omnibus application of the GDPR. In simple terms, certain products or services could be banned and this, at least to a certain degree, appears to reflect current practice. Here it is interesting to refer to the decision taken by the German telecom regulator to ban the internet connected doll *Cayla* and its subsequent decision to ban smart watches designed for children that allowed parents to listen in on their children in its jurisdiction. The regulator found that the toys had breached a national law banning clandestine recording under the Telecommunications Act. Interestingly however, it is still possible to buy the toys in several other Member States. This dispartiy reflects three underlying points namely; (1) although there is a rich history on the role of negative integration in removing the barriers to the free movement of goods and services this does not prevent Member States from imposing bans in their own jurisdictions in certain circumstances without affecting other national laws; (2) there is a complex overlap between harmonised EU data protection and privacy law (i.e. the GDPR and ePrivacy Directive) which makes it confusing as to why the German regulator had to resort to national legislation when the toys in question would also seemingly fall foul of key data protection principles and; (3) it is also interesting that it was the product and not the underlying commercial practice that was banned thereby illustrating a reactive limitation to the approach taken.

**[390]** PROTECTION ORIENTATED MEASURES – In relation to the first of these, reference here for example can be made to the reasoning in the *Omega Spielhallen* case[1189] where as mentioned above in Chapter 3, the Court of Justice held that national authorities (in this instance the German authorities) could limit the freedom to provide services as justified by the need to protect human dignity as long as this purpose could not be achieved by a less restrictive measure. Such case law emphasises the need for a delicate balancing of market integration and the enlargement of consumer choice on one hand and the preservation of the national protective standards on the other.[1190] The Court of Justice's role is to ensure that only measures which are truly protection focused are in force. More specifically, in aiming to prevent discriminatory behaviour and interference with the four freedoms, the Court of Justice has acted to eliminate measures which were deemed to be primarily designed to protect national rather than consumer interests.[1191] In practice this role requires the striking down of provisions disguised as consumer orientated which safeguard national interests in a protectionist manner.[1192] As such, there is nothing

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[1189] *Case C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn, ECLI:EU:C:2004:614* (n 427).
[1190] Benöhr (n 11) 18–23.
[1191] Ramsay (n 208) 33.
[1192] Fundamental EU case law such as *Joined cases C-267/91 and C-268/91, Criminal proceedings against Bernard Keck and Daniel Mithouard, ECLI:EU:C:1993:905*; *Case C-315/92, Verband Sozialer Wettbewerb eV v*

preventing the German authorities from banning such toys on the grounds that they interfere with the right to privacy, but in saying this, such a ban does raise an interesting point as Member States are not permitted to act beyond the limits imposed by harmonised EU law. This relates to the second of the underlying points above.

**[391]** HARMONISED PROTECTIONS – Although a more detailed analysis is outside the scope of this thesis, this point refers to the fact that the GDPR (i.e. and its predecessor Directive 95/46/EC) and the ePrivacy Directive establish harmonised rules on the protection of the rights to data protection and privacy at the secondary law level. It is debateable therefore, whether the assessment of lawfulness should first have been completed under the data protection framework (then the German implementation of the Data Protection Directive 95/46/EC) as the very purpose of this framework is to ensure (1) the protection of the right to data protection and other rights where personal data are processed and importantly; (2) the free flow of information (and presumably goods and services respecting the framework) within the EU. This is perhaps a bit of a moot point as the toys in question would also appear to breach the key principles of the GDPR but the point being made is that there is a complex division here between the role of EU and national law. This raises several questions regarding why action is pursued under one framework and not another and the consequences of such decisions but also the complexities in delineating the boundaries between Member State and EU competences. Indeed, although the Lisbon Treaty aimed to clarify the competence issues in relation to the conferral of powers by setting out three categories of competences: exclusive, shared and supporting,[1193] the application of the principle of subsidiarity and hence, the lack of certainty in terms of the margin of competence means that precisely delineating these boundaries is difficult.[1194]

**[392]** PRODUCTS VERSUS PRACTICES – The third of the underlying points (i.e. that it is interesting that it was the product and not the underlying commercial practice that was banned) further builds on these complicated divisions between EU and Member State law. From a

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*Clinique Laboratoires SNC and Estée Lauder Cosmetics GmbH, ECLI:EU:C:1994:34*. refined the *Cassis de Dijon* judgement and, in restricted circumstances, awarded Member States a greater degree of autonomy and discretionary legislative power. See also the contrast between *Case C-362/88, GB-INNO-BM SA v CCL, ECLI:EU:C:1990:102*; *Case C-382/87, Buet v Ministere Public, ECLI:EU:C:1989:198*. It should also be noted that although this case law was initially developed to cover the free movement of goods, it has subsequently been applied *ceteris paribus* to the free movement of services and establishment.

[1193] Article 4(2) TFEU Consumer protection and data protection are similarly areas of shared competence. Consequently, both the EU and its Member States can adopt legislation in these areas. However, according to Article 2(2) TFEU Member States may only exercise their competences only to the extent that the EU has not exercised its competence.

[1194] This lack of certainty is also visible in terms of the margin of competence and hence in relation to the application of the principle of subsidiarity which was introduced by the Maastricht Treaty in Article 3(b)(2) EC. However, although compliance with subsidiarity is in principle of vital importance in practice however the Court seems very unlikely to interfere. This is highlighted in the *R v. Secretary of State ex parte BAT and Imperial Tobacco* judgement. The Court found that harmonising measures with the objective of eliminating barriers between State laws could only be achieved at the Community level as the variety of approaches is the cause of the problem. Indeed, as summarised by Weatherill, '[i]t appears that the Court has neatly sustained subsidiarity as a legal principle on paper while conceding much in practice to legislative discretion.' Weatherill (n 791) 22–23.

practical perspective it would be obviously more effective to ban certain practices (i.e. such as failing to comply with state of the art cybersecurity standards). In this vein Fuster contends that there has been a failure to specify what is to be regarded as unfair and in-transparent in all circumstances in the GDPR and that in this manner the drafters of the Regulation could have learned from the UCP Directive.[1195] This is a valid point as by failing to specify certain practices that are *de facto* unfair in all circumstances the GDPR essentially leaves the fairness assessment to each particular context and the determination of what is fair in the hands of the controller (at least until the data subject challenges this and/or an enforcement action is taken). However, in this regard one must wonder whether, aside from learning from the UCP Directive from a legislative drafting perspective, legal certainty could also be attained through the careful alignment of the Regulation and the UCP Directive and thus, the reliance on the Directive to declare certain personalisation practices unfair. Importantly however, as described above in Chapter 2, the Directive applies to provisions having dualist objectives provided consumer protection is one of these policy goals[1196] and thus legislation with mixed purposes comes within the harmonised scope of protection provided one of these is purposes is consumer protection (see Section 2.1.2(A)).[1197] Therefore, although the national applications of the UCP Directive cater for cultural variation, national legislation aiming to more paternalistically protect consumers would fall foul of the maximum harmonisation goals of the Directive and would therefore, be seemingly contrary to EU law. This is also reflected in the case law on the role of the blacklist provided in Annex 1 of the Directive.

**[393]** A ROLE FOR THE BLACKLIST? – To clarify, according to Article 5(5) UCP Directive the blacklist provided in the Directive stipulates practices that are to be viewed as unfair 'in all circumstances' and according to the case law the implementation of the blacklist is a mandatory requirement for the correct implementation of the Directive. Hence, in contrast to the other two levels of unfairness there is seemingly at least on the face of it no room for deviation *vis-à-vis* 'taste and decency'. If 'taste and decency' are interpreted to include protections on ethical and fundamental rights grounds as has been suggested in this thesis, the blacklist would seemingly include them automatically given the mandatory nature of the protections contained therein. Hence, as the blacklist can only be updated by the EU legislator it will have no impact unless one of the existing blacklisted practices applies.[1198] However, it is also important to note that the average consumer standard applies across the framework. Despite the fact that Article 5(5) UCP Directive specifies that the commercial practices contained in the blacklist in Annex I UCP Directive

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[1195] González Fuster, 'How Uninformed Is the Average Data Subject?' (n 871) 102.

[1196] See: *Joined cases C-261/07 and C-299/07, VTB-VAB NV v Total Belgium NV and Galatea BVBA v Sanoma Magazines Belgium NV ECLI:EU:C:2009:244* (n 94); *Case C-304/08, Plus Warengesellschaft, ECLI:EU:C:2010:12* (n 97).

[1197] Stuyck (n 169) 729–732.

[1198] Indeed, as analysed in more detail in the previous Chapter, it appears that in the context of personal data processing and personalisation related practices reference is only made to the failure to identify the commercial nature of the product and thus '[d]escribing a product as 'gratis', 'free', 'without charge' or similar...' in line with number 20 on Annex I UCP Directive and as illustrated by the judgement of the Berlin Court and the decisions of the AGCM (see Chapter 5).

will 'in all circumstances be regarded as unfair', Stuyck suggests that in contradiction with this provision the Court of Justice does in fact need to take the circumstances of the case into account and that this has been reflected in the judgements of the Court of Justice.[1199] In this vein, Namyslowska observes that in essence the Court has afforded some room for interpretation by moving the unfairness assessment to an appraisal of the circumstances of the case.[1200] Therefore, although the material distortion test is not applicable, one is still required to refer to the average consumer standard to determine if a blacklisted practice has occurred.[1201] Such an interpretation appears to be proportionate as otherwise the blacklist would have protected every consumer category rather than the average consumer benchmark as was intended in the Directive.[1202]

**[394]** THE AVERAGE CONSUMER STANDARD – Accordingly, even if the blacklist was updated to include certain personal data processing commercial practices as 'in all circumstances' unfair, such mechanisms would already be regarded as *de facto* contrary to the data protection framework where the (relatively speaking) lower average consumer standard does not apply and thus where there are higher standards of accountability and thus fairness. At least hypothetically this could result in a situation where a blacklisted practice would be found not to have occurred in practice while at the same time this practice would seemingly breach the more stringent requirements in the GDPR. The challenge therefore would be to set out very specific practices that would be deemed unfair in all circumstances. However, experience would suggest that establishing well-defined and clear prohibitions has proven to be challenging.[1203] Managing to do this practically speaking however is extremely difficult as there will always be a factual determination as to whether the circumstances fit within the blacklisted practice. Here one could imagine however, the blacklisting of the use of cookies capable of respawning after deletion in the consumer setting and the use of surreptitious personal data collection mechanisms (such as some forms of device fingerprinting) to single out the user to target them with personalised commercial communications. However, the real benefit of such a ban would really be disputable as (1) such mechanisms are already *de facto* unfair under a combined reading of the ePrivacy Directive and the GDPR and; (2) the application of the UCP Directive to personal data collection arguably provides a lower level of protection given the dependence on the average consumer standard.

**[395]** UPDATING THE BLACKLIST – The nuance being proposed here therefore is that the blacklist could be updated to specifically ban certain practices or applications of emotion detection technology in B2C situations to provide some legal certainty and thereby, specify some processing purposes as illegitimate without requiring a lawfulness assessment in the GDPR. Indeed, it is a key premise of this thesis that the difficulties associated with

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[1199] Stuyck (n 169) 741–742. with reference to *Case C-428/11, Purely Creative and Others, ECLI:EU:C:2012:651* (n 233). and *Case C-515/12, '4Finance' UAB, EU:C:2014:211*.
[1200] Namyslowska, (n 105) 71.
[1201] ibid.
[1202] ibid 68.
[1203] See Chapter 2 and . Stuyck, Terryn and Van Dyck (n 125) 131.131.

individualised protections and the focus on data subject rationality further aggravates the limitations associated with the reliance on rationality-based conceptions in consumer protection safeguards due to the increased capacity to personalise (which in turn in a circular fashion can also then have an impact on future personal data gathering). The integration of such insights was explored in detail in the previous Chapter 2 in relation to the separation of commercial and non-commercial content and the potential effects on consumer autonomy. However, for our current purposes it is sufficient to reiterate the point made above that given the potential for manipulation, it is noteworthy that individual autonomy may be linked with the protection of the fundamental rights to human dignity, mental integrity and freedom of thought in such circumstances.[1204] This further reflects the link between the role of consumer protection and the protection of fundamental rights which is increasingly significant given the recent technological developments. The development of emotional AI arguably adds further credence to the argument that in a consumerist environment incorporating persuasive or even manipulative techniques, the protection of the individual consumer and their autonomy is inextricably linked with the protection of fundamental rights.[1205]

**[396]** RISKS TO FUNDAMENTAL RIGHTS AND STANDARDS OF PROTECTION – However, the monetisation of emotion incorporates certain risks to fundamental rights as protected in the Charter but, in saying that, the application of fundamental rights in private law settings is an issue which itself raises complex issues. These complexities cannot be simply ignored in the analysis of the emergence of emotion detection and monetisation. Although the protection of fundamental rights is a shared competence, precisely delineating where the EU or the MSs should act is far from easy. It is clear that, outside the scope of EU law, the Charter will not apply. This does not mean that there is a fundamental rights void but rather that reference must instead be made to the respective national constitutional traditions, the international fundamental rights instruments and in particular the ECHR. However, for matters falling within the scope of EU law it is an important observation that due to the fact that EU legislation is required to respect fundamental rights even where their protection is not the primary objective of the legislator, it is uncertain how the harmonisation of fundamental rights standards fits within the division of competence thus raising clear concerns regarding the *constitutionalisation* of private law as described above in Chapter 3. Indeed, the question thus becomes one of whether such 'accessory' fundamental rights dimensions (i.e. where the legislation is giving effect to a specific EU policy objective such as consumer protection) could upset the balance between national and EU level fundamental rights protection. As such a basis may be used as an indirect means of addressing fundamental rights matters it could arguably circumvent the division of competence. In addition, Muir also notes that,

> '[t]he level of fundamental rights protection set in EU legislation may also be controversial insofar as it has not necessarily been processed through a fully-fledged

[1204] See: European Data Protection Supervisor, 'Opinion 3/2018 EDPS Opinion on Online Manipulation and Personal Data' (EDPS 2018) Opinion 3/2018.
[1205] Deutch (n 964) 552–553.

political debate on fundamental rights protection; also, it may be argued that the fundamental right at hand has been regulated through the prism of another policy objective that is given prevalence over the fundamental right.'[1206]

Accordingly, these issues remain serious considerations and here it is interesting to refer to the fact that, as described above in Chapter 3, the EU legislator has been afforded a particular legislative mandate thus seemingly extending beyond the functioning of the internal market. More specifically, the previous Chapters have illustrated the legislative significance of the GDPR in terms of its grounding in the Treaties and the Charter but also by way of contrast to the consumer protection policy agenda. Indeed, although internal market considerations remain of significant importance to the Regulation, it is arguable that data protection incorporates a protective element which may be lacking in the consumer law *acquis*.

**[397]** FULL HARMONISATION AND STANDARDS OF PROTECTION – The differences in the levels of protections evidenced in the GDPR and the UCP Directive are therefore significant due to the fact that the willingness for protections in terms of social rights orientated safeguards appears to be somewhat at odds with the traditional market centred approach to consumer law. Building on these insights, it is also important to emphasise that this failure to provide a more protection-orientated approach is worsened by the move towards maximum harmonisation in EU consumer policy-making. Indeed, the shift from minimum to maximum harmonisation represented a major change as minimum harmonisation by its very nature (i.e. as it set the minimum level of protection to be provided by the MSs) was capable of representing both 'protectionist' private law concerned with the protection of the weaker party (i.e. from the perspective of MSs and outside of national measures deemed to be protectionist) and an EU market orientated rationality, which was focused around the market-aware active consumer.[1207] In short by providing for minimum standards MSs could provide higher levels of protection if they so desired. Nevertheless, the shift to maximum harmonisation eliminated this possibility for higher protection thereby raising questions in terms of the continued protection of weaker consumers as opposed to the 'normative optimized, omnipotent consumer' envisaged by the EU Market.[1208] In the words of Howells under a maximum harmonisation approach EU law 'becomes the guardian of trade interests. Business only has to be concerned to lobby hard for favourable European laws and national legislators are unable to react to any remaining consumer concerns.'[1209] Hence, the shift to full harmonisation[1210] resulted in the transfer

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[1206] Muir (n 376) 233.

[1207] Marija Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political' 21 European Law Journal 572, 589.

[1208] Micklitz, 'The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law' (n 378) 289.

[1209] G Howells, 'The Rise of European Consumer Law - Wither National Consumer Law?' [2006] Sydney Law Review 63, 64.

[1210] Indeed, as a cross-reference here it is also interesting to note here that the Commission used the *Tobacco Advertising I* judgement as a further justification for the move towards maximum-harmonisation. This was a departure from the minimum-harmonisation approach which was institutionalised in the Maastricht Treaty. See: European Commission, 'Communication from the Commission to the European Parliament, the

of power from Member States to the EU, as it constrains the operation of the indigenous legal systems, this has proven to be a highly contentious issue.[1211] Diversity in terms of national consumer law protections was deemed a problem of fragmentation contrary to the goals of the internal market with the solution being full harmonisation and the full transfer of powers (i.e. and thus rationalities) to the EU legislator.[1212] Thus the Commission based this policy shift on the premise that minimum harmonisation of consumer protection safeguards gives rise to diversity in standards of protections and therefore has an impact on the free circulation of goods and services within the market. However, this interpretation is questionable as consumer protection does not have a direct influence on free movement but instead regulates the marketing of goods and services within the internal market thereby potentially creating additional costs and risks due to differing standards and thus, even with full harmonisation, uniformity remains elusive due to the prior existing disparities in law and regulation.[1213] Aside from the perceived need to address the national diversities, the full-harmonisation push was also an acknowledgement of the need to address other flaws which had made themselves clear despite the continuing strength of the market integration underpinnings of consumer policy.[1214] Nevertheless, in the context of marketing and advertising law Wilhelmson notes that '[…] empirical examples provide a good foundation for a criticism of culturally blind harmonization and transplantation attempts.'[1215] Notwithstanding such criticism however the full-harmonisation approach has continued and there are therefore, serious questions regarding the capacity or indeed willingness of the EU legislator to consider alternatives[1216] despite having a clear legislative basis to pursue a more broadly-based consumer protection agenda through Article 169(2)(b) TFEU as mentioned in Chapter 3. As a reminder, Article 169(2)(b) TFEU provides that the European policy maker may

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Council, the Economic and Social Committee and the Committee of the Regions Consumer Policy Strategy 2002-2006 COM (2002) 208' 208.

[1211] Benöhr (n 11) 34–37.

[1212] Bartl (n 1207) 589.

[1213] Hans Micklitz, Norbert Reich and Stephen Weatherill, 'EU Treaty Revision and Consumer Protection' (2004) 27 Journal of Consumer Policy 367, 385.

[1214] More specifically, first the fragmented nature of measures resulted in gaps in the framework and second, as the EU acquis was a compromise between common and civil law traditions this rendered effective implementation patchy depending on the pre-existing position. The full-harmonisation policy objective was initiated through the Consumer Policy Strategy 2002-2006 and resulted in several measures including the Unfair Commercial Practices Directive in 2005. Aside from the legislative moves towards full-harmonisation, the Court of Justice also played a role. . – See: Donnelly and White (n 104) 20–26. 20-26. For instance, in several cases the Court of Justice has concluded that higher levels of protection provided at the national level protecting product liability were inconsistent with the terms of the EU Product Liability Directive See for example: *Case C-183/00, Maria Victoria Gonzalez Sanchez v Medicina Austuriana, ECLI:EU:C:2002:255* 1–3901., other relevant cases are *Case C- 52/00, Commission v France, ECLI:EU:C:2002:252* 1–3856. and *Case C-154/00, Commission v Greece, ECLI:EU:C:2002:254* 1–3879.

[1215] Wilhelmsson (n 173) 496.

[1216] These issues came to the fore particularly during the debate surrounding the proposal for a Consumer Rights Directive. Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance OJ L 304, 64–88.

adopt 'measures which support, supplement and monitor the policy pursued by the Member States.' Although, it is clear that the EU's competence in relation to measures which do not support the market integration goal is more restricted given that Member States retain the right to introduce and maintain more stringent measures (Article 169(4) TFEU), the capacity to pursue a more broadly-based consumer protection agenda is possible. This possibility is significant and for more holistic protection the role of Article 169(2)(b) may need to be re-evaluated in light of the above concerns.

**[398]** NEED FOR COORDINATED RESPONSES – Irrespective of the above however, it is argued more generally that a more holistic response via the coordination of the data protection and consumer protection policy agendas is necessary to respond to these developments. As described throughout this analysis, the wholesale adoption of mediated consumer-facing interactions that are emotionally tailored in their design and delivery, presents key overarching questions. The effects of emotional conditioning and the impact of such a computational turn on autonomy raises the need for an interdisciplinary analysis of the true consequences of such developments.[1217] Although such interdisciplinary research remains outside the scope of this thesis, it adds emphasis to the need for the more holistic consideration of the effects of such commercial practices on regulatory protections. Despite the fact that it is clear that emotion monetisation presents unique concerns challenging the existing paradigms of protection more extensively than a simple finding of a need for use-based protections solely satisfies, it is necessary to align the protections in order to truly understand the potential gaps, instil a secure environment and adequately cater for architectural societal risks. Indeed, in this regard it is interesting to refer to Koops who notes that 'data protection can no longer reside in the exclusive realm of informational privacy and self-determination; rather, it must be approached from the angle of due process and fair treatment in the database age. A focus on decision transparency has good potential to achieve just that.'[1218] The author proposes a dual strategy whereby upwards transparency (or data collection) is diminished through the shielding and obfuscating of data and downwards transparency (or data use) is increased via a combination of legal and technical measures. The view proffered in this thesis is that (despite the difficulties) data protection is a response to legitimate tangible and intangible harms and has a continuing role in the protection of data subjects, but that this could be supplemented by consumer protection

### *B. ABILITY TO CHOOSE AND THE AVAILABILITY OF CHOICE*

**[399]** THE CONSUMER PROTECTION TOOLBOX – It is therefore proposed that consumer protection policy can act as a toolbox for the mobilisation of the protection of consumers in order to facilitate more holistic protection and hence as a means to move beyond 'the exclusive realm of informational privacy and self-determination'.[1219] Such an approach may also

[1217] In this regard one can refer to the academic work on other potential effects of such a mediated environment see for example: Pariser (n 50); Turow (n 50).
[1218] Koops (n 280) 216.
[1219] ibid.

cater for the difficulties associated with trying to operationalise group privacy as instead of focusing on a reconceptualization of how a group may fit within a fundamental rights framework, secondary law may be adopted on the basis of collective concerns in the pursuit of human dignity, individual autonomy and personality in order to mitigate the negative effects of such developments. The potential for more holistic protection through the alignment of the EU consumer and data protection policy agendas is hardly a controversial claim given that (1) there have been legislative proposals in this direction; (2) there is growing body of literature on this issue and; (3) institutions such as the EDPS have repeatedly called for such a development.[1220] Emotion detection technology is an example of a development requiring a more holistic and coordinated regulatory approach. But what practice could be *de facto* unfair and how can unfairness in the context of emotional AI be determined? Indeed, it should be noted that deciphering what steps too far into the realms of manipulation (thereby justifying intervention) is a major challenge. This is difficult from an autonomy perspective as the monetisation of emotions is already within the murky area of advertising and marketing (i.e. which is inherently persuasive by design). Hence, the bright-line between what would be permissible and what would not, is difficult to distinguish. However, here reference can perhaps be made to the fact that there are strict rules relating to the marketing of medicinal products requiring a prescription with a specific ban on such promotions evident in the AVMS Directive (see above Chapter 2). Accordingly, one must wonder whether it is fair to be able to target emotional states (especially when the profiling reveals an underlying medical condition) given that the promoting of medicinal products used to treat such conditions is restricted. More specifically, should *Facebook* be permitted to target vulnerable teens for instance? Should so-called 'super cookies' as a type of browser cookie designed to last permanently be permitted for commercial business-to-consumer purposes? And should commercial entities be allowed to use dark-patterns to manipulate consumer choices? It is suggested here that the answer to all three of these questions should be no but without specific bans, the permissibility is left to interpretation (even if this obviously leads to the same conclusion). As emotional AI develops, regulatory steps will need to be taken and it is suggested that to have any traction they will need to move beyond ethical deliberations and provide more concrete guidance in terms of what amounts to manipulation.[1221]

**[400]** WHAT IS UNFAIR? – In a more abstract sense, in this regard one could arguably refer to the emergence of libertarian paternalism and thus the analysis of 'nudging' to improve decision-making capacity in a range of policy areas. Although these discussions on nudging often focus on the use of such techniques from a policy perspective *vis-à-vis* the legitimacy of such interventions from an autonomy perspective, they may provide inspiration in terms of classifying where paternalistic intervention and protection is in fact justified and stays within the realms of what is proportionate. For instance, in analysing the use of nudging or libertarian paternalistic means of regulation to improve

[1220] European Data Protection Supervisor, 'Opinion on Coherent Enforcement of Fundamental Rights in the Age of Big Data' (n 623).
[1221] For a discussion see: Kosta, *Consent in European Data Protection Law* (n 541) 173–175.

consumer choices, Baldwin convincingly argues that for conceptual clarity one must differentiate between different types of nudging, as distinct ethical and practical issues are raised depending on the methods used.[1222] Baldwin proposes three different nudge classifications. First, those which aim to enhance rational thinking, hence respecting autonomy and individual decision making. Second, those which build upon an existing behavioural or volitional limitation to bias a decision in a desired direction. Finally, third, those which incorporate behavioural manipulation the result of which renders reflection futile as it only further enhances the pursuit of a 'shaped preference'.[1223] Baldwin observes that the use of emotional appeal and the classification of the nudge will stem from the degree of associated emotional power. In differentiating between the second and third categories the author notes that the distinguishing feature relates to the fact that the third category of nudge will result in a complete blocking of reflection.[1224] Hence, this separation may in fact be one of degree rather than of method. It is significant to note that such mechanisms (or at least those fitting within the first and second categories) are becoming increasingly prevalent. However, the use of such techniques is not restricted to the legislator and, as described in this thesis, nudging for commercial gain (i.e. market manipulation) raises clear concerns in terms of autonomy and the need for regulatory intervention. Therefore, and as suggested previously, Baldwin's distinction between the three categories of nudge also provides food for thought in terms of the appropriateness of such a distinction in a commercial setting and hence, the establishment of a bright-line in terms of the acceptability of appeals.

**[401]** THE NEED FOR INTERDISCIPLINARY INSIGHTS – Determining what amounts to manipulation is not solely a legal question and requires collaboration between *inter alia* philosophers, legal academics and social scientists research to determine the boundaries and grey areas of regulation. As such, what is suggested here is more of a schema in terms of how to position such a debate in a legal and regulatory setting. In saying this however, more research is required to determine how precisely one could regulate for emotional AI but as the purpose of this thesis is to focus on how emotion monetisation tests the legal limits, this analysis is left for future research. To frame this future analysis the key point of departure is that although the future regulation of emotional AI should aim to provide the legal certainty that is currently lacking and left to the interpretation of the cracks in the applicable frameworks and indeed, between the respective policy agenda silos (despite the continued alignment of data protection and consumer protection), any moves will need to be proportionate to the aim pursued. Undoubtedly, the ability to commercialise the capacity to detect emotions in real-time brings with it a series of concerns from a privacy and data protection perspective in particular. However, in saying this and as described in detail in Chapter 3, competing rights such as freedom of (commercial) expression, the right to conduct a business and the right to intellectual property for

[1222] Robert Baldwin, 'From Regulation to Behaviour Change: Giving Nudge the Third Degree' (2014) 77 The Modern Law Review 831.
[1223] ibid.
[1224] ibid.

instance, may be in conflict. A key concern which emerges for the deployment of EU policy aimed at catering for the challenges posed by emotion detection and monetisation technological developments relates to the standard of protection provided for in EU secondary law. This relates to the persisting underlying premise in EU policy-making that the opening of the internal market automatically provides a degree of protection to the consumer through the availability of choice.

**[402]** PRICE PERSONALISATION AND PRICE DISCRIMINATION – However, the information-provision paradigm seems ill-equipped to deal with all challenges and, in this regard, the EU legislator's decision to specify that price personalisation is permissible,[1225] provided that the consumer is informed, is perplexing as it seemingly contradicts research in relation to consumer attitudes towards such practices.[1226] This is particularly the case as according to Recital 45 Modernisation Directive, the information requirement does not 'apply to techniques such as "dynamic" or "real-time" pricing that involves changing the price in a highly flexible and quick manner in response to market demands when it does not involve personalisation based on automated decision making.' Interestingly therefore, this provision seems to exclude practices such as 'surge-pricing' employed by companies like *Uber* to dynamically change prices based on factors external to the individual consumer (e.g. weather or demand)[1227] from having to comply with the information-provision requirement. Hence, the Recital singles out what has been referred to as first order price discrimination, whereby each individual consumer is charged the maximum they are willing to pay,[1228] on the basis of personalisation and automated decision making, for additional (albeit transparency-based) protection – thereby also legitimising such controversial practices by default. This also creates confusion from a data protection and privacy perspective as the processing of personal data will be necessary not only for first order price discrimination but also dynamic pricing and thus, the information requirements in the GDPR will apply to both.

**[403]** PRICE PERSONALISATION AND UNFAIRNESS – Importantly, it is not suggested here that all forms of discriminatory pricing should be *de facto* unfair, on the contrary some forms of price differentiation are proven to be beneficial from a welfare effects perspective.[1229] Indeed, as suggested by Steppe, the question appears to be not *if* price discrimination should be allowed but rather *how*, or in what form it is permissible.[1230] Pricing based on the profiling of consumers into opaque categories defined automatically by a machine learning model

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[1225] See modification to the CR Directive introduced by the Modernisation Directive – Chapter 2.
[1226] See Chapters 2 and 5 for a discussion of the provisions.
[1227] 'A Deeper Look at Uber's Dynamic Pricing Model | Uber Newsroom US' (*Uber Newsroom*, 12 March 2014) <https://www.uber.com/newsroom/guest-post-a-deeper-look-at-ubers-dynamic-pricing-model/> accessed 25 April 2019.
[1228] Frederik J Zuiderveen Borgesius and Joost Poort, 'Online Price Discrimination and EU Data Privacy Law' (2017) 40 Journal of Consumer Policy 347, 352; Richard Steppe, 'Online Price Discrimination and Personal Data: A General Data Protection Regulation Perspective' (2017) 33 Computer Law & Security Review 768, 769–770.
[1229] For more see: Borgesius and Poort (n 1228) 353–355.
[1230] Steppe (n 1228) 785.

seems distinct from the more traditional ways in which certain categories of consumers (e.g. students or pensioners) or those buying in bulk quantities, are offered discounts.[1231] One could argue perhaps that the insertion of the provision on price personalisation in Article 6(1)(ea) CR Directive relates to the difficulty described in Chapter 5 and the *ex post* consequences of consenting to purposes *ex ante* in terms of the legislative protections available to the legislator (i.e. the chicken-or-egg analysis above). This is perhaps further fuelled by the fact that the GDPR provides more stringent transparency requirements for profiling by requiring information as to *how* an automated decision was made in comparison to the requirement to merely acknowledge that the price was personalised in the CR Directive. However, in line with the delineation between legitimate and illegitimate purposes outlined in the previous sub-section, this would not have excluded the potential to add protections against the negative effects of price personalisation in the reform of the UCP Directive as opposed to the CR Directive and there is a strong argument that such practices (at least in some form) should have been added to the blacklist in the UCP Directive.[1232] Indeed, in its legitimisation of such practices in the reforms of the CR Directive, the EU legislator seems to have ignored the profound impact personalisation may have on society. An interesting point of reference here is Yeung who, in her report for the Council of Europe's Committee of experts on human rights dimensions of automated data processing and different forms of artificial intelligence, observes that,

> '[w]hile this kind of intentional discrimination might not be unlawful, in so far as it might not directly or indirectly discriminate individuals on the basis of protected grounds under contemporary equality law, nevertheless the effect is a serious departure from the pricing practices that prevailed in a pre-digital, pre-data driven age in ways that, if they become widespread and ubiquitous, may seriously undermine social solidarity and cohesion.'[1233]

Indeed, in this regard one must truly wonder whether the economic and non-economic motivations underlying price personalisation can be fully separated.[1234] It is thus argued that this legislative decision to specifically legitimise such practices subject to informing the consumer was fuelled by internal market ideology as opposed to a specific desire to protect consumer interests. The point being made therefore, is even if price personalisation was not to be added to the blacklist in the UCP Directive, the decision to legitimise it as a practice subject to an information-provision obligation, arguably results

[1231] For a description of different types of price discrimination see: Borgesius and Poort (n 1228) 352; Steppe (n 1228) 769–770.

[1232] It is asknowledge that even if this was the policy choice taken it would have resulted in complex debates as to what in fact amounts to price personalisation and the difficulties of application common to the other items listed on the blacklist in Annex I to the UCP Directive.

[1233] Yeung (n 433) 28–29.

[1234] Przemyslaw Palka and others, 'Before Machines Consume the Consumers: High-Level Takeaways from the ARTSY Project' (European University Institute 2018) EUI Working Papers LAW 2018/12 4 <https://papers.ssrn.com/abstract=3228085> accessed 3 April 2019.

in legal certainty working in favour of industry as opposed to consumers, or more cynically, disguises this legislative decision as consumer protection policy.[1235]

**[404]** THE OTHER PIECE IN THE JIGSAW – Irrespective of the price personalisation/discrimination nuancing however, the more general point being pushed here is that the idea that opening the internal market provides a degree of protection seems ill-equipped to deal with large market operators. Such a conceptualisation is predicated on the availability of choice, however this choice is arguably curtailed in the online environment and modern platform economy. The GDPR aims to address power asymmetries and empower the data subject. The conditions for consent provided in Article 7 GDPR are a clear example of this aim. However, despite these provisions one must wonder whether the legislator intended to ban the programmatic advertising ecosystem as it currently exists and the associated business models of the players (both big and small) therein in doing so? In any case such controversial issues remain outside the scope of this particular Chapter and require a more in-depth analysis and teleological interpretation of the GDPR. However, it would seem mad to the point of incompetence based on institutional fragmentation if this was the intention of the Commission given that its version of the proposed Digital Content Directive, which was being drafted while the GDPR was being negotiated and was released after the GDPR was finalised and published in the official journal, flies in the face of such an interpretation. As described above these concerns are of clear importance to emotion detection and monetisation technologies as deployed by companies as in essence, the debate essentially circles around the continuing legitimacy of data-driven business models in general. In addition, however it should be noted that outside the focus of this thesis lies the third policy agenda in the alignment of protections namely, competition law which in very simple terms effectively aims to provide choice through its application and the addressing of market failures and the abuse of market position.[1236] Indeed, although the data protection and consumer protection frameworks as described in this thesis aim to bolster the ability for individuals to choose, competition law is necessary to ensure the availability of a choice. Although there are certainly overlaps and synergies (e.g. the right to data portability in Article 20 GDPR), there is another important piece of the jigsaw

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[1235] Here it is interesting to refer to the Commission Guidance document on the UCP Directive issued prior to the Modernisation Directive where it is specified that '[p]ersonalised pricing/marketing could be combined with unfair commercial practices in breach of the UCPD.' European Commission, 'Commission Staff Working Document Guidance on the Implementation/Application of Directive 2005/29/EC On Unfair Commercial Practices Accompanying the Document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a Comprehensive Approach to Stimulating Cross-Border e-Commerce for Europe's Citizens and Businesses {COM(2016) 320' (n 90) 135. Although elsewhere it has been argued that this was an extremely ambiguous construction (See: Clifford (n 396). as there has been criticisms of price personalisation from a data protection perspective at the policy level (see footnote 9 of 'European Data Protection Supervisor, Opinion 7/2015 Meeting the Challenges of Big Data A Call for Transparency, User Control, Data Protection by Design and Accountability' (2015) <https://edps.europa.eu/sites/edp/files/publication/15-11-19_big_data_en.pdf> accessed 25 April 2019., the more recent consumer law legislative developments have clarified that the consumer policy position has always been that such practices are legitimate.

[1236] Graef, Clifford and Valcke (n 870); Inge Graef, 'Market Definition and Market Power in Data: The Case of Online Platforms' (2015) 38 World Competition 473.

missing in this analysis with significant enforcement teeth.[1237] The point is that more research is needed to further link the three areas and this particularly significant in terms of enforcement especially considering the Digital Clearing House initiative launched by the EDPS.

## CONCLUSION

**[405]** THE LEGISLATIVE LIMITS – Having assessed the limits imposed on the monetisation of online emotions, the purpose of this Chapter was to examine the limitations of these protections and how the risks could be mitigated through the application of EU law. The analysis has again emphasised the complexity of this task and there remain many open debates. Despite these uncertainties the Chapter has aimed to chart some ways of addressing the concerns which go to the very essence of intense debates at the policy level on the ethics of AI. This analysis has attempted to map some of the key inconsistencies, uncertainties and suggest what is argued here a more reasoned path to understanding the role of the requirements provided in the GDPR in particular and the role for broader debates and the manner in which gaps should be addressed. It has been suggested that in the context of emotional AI and the use of such technology for advertising and marketing purposes, it may be necessary to prohibit certain applications. Deciding precisely on what should be banned and why is a matter left for interdisciplinary research and instead this Chapter has aimed to provide an indication of how such purposes could be found illegal and thus illegitimate *ex ante* in data protection thus providing for more paternalistic protection. Although the potential for such a possibility is defended here, the competence divisions and legislative approach and objectives of the EU policy-maker potentially undermine the manner in which effective legislative action could be taken. Hence, although the consumer protection *acquis* and policy agenda are proposed as an avenue for such protection, challenges remain in effectively addressing the emerging challenges associated with emotional AI.

[1237] Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International BV 2016); Graef, Clifford and Valcke (n 870); Francisco Costa-Cabral and Orla Lynskey, 'Family Ties: The Intersection between Data Protection and Competition in EU Law' (2017) 54 Common Market Law Review 11.

# 7

# CONCLUSION – THE FUTURE OF EMOTION MONETISATION AND THE BOUNDARIES OF LEGALITY

## INTRODUCTION

**[406]** THE PURPOSE AND CONCLUSIONS OF THE THESIS – The purpose of this thesis was to examine the legal limits to the monetisation of online emotions. This analysis has revealed a number of grey areas in the law, thereby rendering these limits hard to define in practice. In saying this however, three key conclusions can be drawn. First, assessing the legal limits to the monetisation of emotions requires a transversal analysis and the application of data protection or consumer protection alone seems inadequate to tackle the challenges which emerge regarding the rationality paradigm within the law. Second, aligning the data protection and consumer protection policy agendas bring with it significant questions regarding the underlying aims of the distinct right to data protection which may play a significant role in determining the legitimacy of certain commercial applications of emotional AI. And third, the regulation of emotional AI is, or indeed any future regulatory developments are, shaped by the EU legal order and this has a clear impact of the levels of protection that can be provided by MSs. To conclude the thesis, these three conclusions will now be briefly considered.

## 7.1 THE LEGAL *AND* REGULATORY LIMITS TO THE MONETISATION OF ONLINE EMOTIONS

**[407]** RATIONALITY AS THE ANCHOR – The reliance on rationality as a normative anchor was assessed in detail in this thesis. The aim, in short, was to (1) illustrate the difficulties posed by the rise of emotional AI and emotion monetisation more specifically for this anchor; (2) to assess its role and significance and building on this, (3) analyse the ways of counter-acting the challenges to its ongoing significance to ensure that it does not become a dysfunctional fiction in the operation of the consumer (including data) protections. This analyse has revealed a number of difficulties culminating in the three conclusions outlined above.

### 7.1.1 KEY TAKEAWAYS FROM THE AFFECTIVE ANALYSIS

**[408]** EMOTIONS AND ADVERTISING – Chapter 2 examined the regulation of advertising and marketing in the EU legal order through an analysis of the UCP and AVMS Directive. The analysis explored the reliance on the information paradigm and the identification principle as a means of informing the consumer and allowing them to make informed transactional decisions. Indeed, although the *lex specialis* requirements in the AVMS Directive provide more detailed provision, generally speaking the obligations common across all frameworks at the EU level boil down to the requirement to identify commercial communications and inform the consumer. These requirements were then assessed to explore the role of emotional appeals, both in terms of the delivery of advertising content *vis-à-vis* the blurring of the boundaries between commercial and editorial content (i.e. in light of the emergence of new advertising formats) and the use of exaggeration of 'puffing' as a sales technique. Puffing in particular was explored through the lens of rational choice theory and the criticisms posed by behavioural economics theorists so as to illustrate the potential concerns with the traditional juxtaposition of emotion and reason in legal protections. The above is seemingly in contradiction with the long-standing emphasis on emotion in advertising and marketing literature and the way in which emotional cues are used to trigger commercial decisions. In building on these insights, the analysis revealed the potential threat posed by emotional AI in the context of emotion monetisation by exploring interdisciplinary insights on the role of emotions.

**[409]** THE REFORMS TO BOLSTER DECISION-MAKING CAPACITY – The Chapter therefore revealed how the consumer protection requirements analysed struggle to deal with the technological developments. In building on this opening, Chapter 3, following an exploration of the key rights and interests at stake, the need for a fair balance and thus the role for the rights to privacy and data protection, proposed the data protection framework (and more specifically, the GDPR) as a potential solution to the challenge posed by the technology at the root of this thesis. However, the analysis provided in the subsequent Chapters has revealed how the framework in isolation struggles to deal with such developments. This is already reflected in the various moves to (1) reform the consumer protection *acquis* to cater for the challenges posed by the digital economy and (2) align the respective data protection and consumer protection policy agendas. Indeed, the need to align data and consumer protection is being increasingly recognised in order to further empower the data subject. However, the precise overlaps and subtle distinctions between these respective policy agendas are far from clear. In addition, as per the above, the technological developments combined with the emergence of the mediated environment render protections reliant on individual rationality increasingly out-of-sync with reality.

**[410]** THE MANIFESTATIONS OF THE ALIGNMENT – With this in mind, there is an increasing amount of discussion surrounding whether consumer protection can play two roles regarding its alignment with the data protection framework, namely, (1) as a supplement to data protection in order to protect data subjects in the context of data gathering practices; and (2) regarding the protection of consumers from potentially harmful commercial practices that rely on personalisation and hence, its role as a toolbox to mobilise the protection of fundamental rights. This reflects the desire for more holistic responses to the challenges posed by the emergence of new technologies as individual autonomy in the mediated environment is affected both in terms of the data protection and consumer protection

safeguards. As explored in Chapter 5 in particular, such a desire can be illustrated by the perceived need to better cater for both the *ex ante* and *ex post* needs of consumers. Furthermore, in Chapter 6 the analysis revealed that the need to further specify the application of the data protection framework can be illustrated by the increasing fascination with 'ethics' at the policy level and it was suggested that consumer protection could be used to provide more concrete legal protections rather than leaving the assessment to ethical analyses conducted by businesses. In essence, the consumer protection framework could be aligned with data protection to provide more specifically what should be prohibited. It seems easy to conclude therefore, that there is a need to align the protections and provide a more transversal protection of consumers.

**[411]** THE LIMITS TO REGULATORY COMPETENCE – The suggestion is simple therefore, but the means of achieving this are difficult. The challenges presented in Chapter 5 illustrate the hurdles which will need to be overcome in order to navigate this alignment effectively. However, as explored therein, the EU legislator seems to have ploughed ahead with the reform of the consumer law *acquis* without truly catering for some underlying ongoing debates dealing with the commodification of personal data. In addition to these issues, the analysis in Chapters 3 and 6 explored the competence restraints imposed on the EU legislator, how the objectives of the Union can affect the harmonising secondary law and how this renders the specific competence attributed to the legislator for the right to data protection in Article 16 TFEU unusual. Indeed, as argued above, the GDPR is a clear manifestation of a secondary framework built on checks and balances in order to respect the essence of the right to data protection.

**[412]** THE NEED FOR A TRANSVERSAL APPROACH AND PROHIBITIONS – Hence, it is the provisions provided in the GDPR which are required to be in line with the strict test provided in Article 52(1) Charter and the viability of this approach is strengthened by the graduated nature of the balancing expressed in the GDPR (i.e. the role of both *ex ante* and *ex post* fairness). With this in mind, it is unclear whether consumer policy, especially considering the full harmonisation approach employed by the Commission, is truly capable of providing a similar level of protection as provided for in the GDPR. These are all issues which need clarification. In saying this however, data protection alone through an isolated application fails to account for the full effects of the monetisation of online emotions and, as described, this need for a more transversal approach is also evident from the uncertain application of the GDPR in particular circumstances (Chapter 4). The above therefore illustrates the third of the key conclusion mentioned above and, in this regard, it is important to question the future regulation of such technologies in the EU legal order. In Chapter 6 it was proposed that to maintain the autonomous decision-making capacity of consumers there may be a need to ban certain applications of emotion monetisation. The Chapter explored the recent policy developments and the apparent legitimisation of price personalisation as a commercial practice provided consumers are informed and suggested that as a 'consumer protection' development, this is a difficult one to grasp.

**[413]** PROHIBITIONS AND INTERDISCIPLINARY INSIGHTS – Precisely determining which practices should be banned is a matter to be unravelled by more interdisciplinary research to determine,

interpret and enforce fairness standards,[1238] and lessons may be learned from comparative a law approach (see for instance the recent legislative proposals in the US in relation to the legitimacy of dark patterns).[1239] However, as explored in this thesis, legally speaking the structures in which this could be provided for are complicated by the EU legal order. It is suggested therefore, that a more detailed discussion needs to be had on the role of different frameworks in terms of when and how they should be used and what this means regarding protection standards in the EU legal order. It is important to specify that the GDPR is not the 'law of everything' as claimed by Purtova (see Chapter 4) but in saying this, it seems that the intersections with consumer protection need to be elaborated. The analysis in Chapter 6 revealed that a more paternalistic approach via the *ex ante* declaring of certain applications or purposes of emotion detection technology for advertising or marketing purposes can fit within the operation of the framework. The GDPR presumes the legitimacy of purposes and it is suggested here that declaring certain purposes through the blacklist in the UCP Directive for instance as being contrary to consumer protection law would render them illegitimate *ex ante*. The potential for this needs to be explored in greater detail.

### 7.1.2 AFFECTIVE APPLICATIONS AND THE OPEN DEBATES

**[414]** INTRODUCING THE DEBATES – The thesis has provided insight into the debate regarding the ongoing viability of the rationality anchor in consumer and data protection and in so doing, has analysed several fundamental connected debates with a practical relevance for the development of Emotional AI and the monetisation of emotion through advertising and marketing more specifically. In saying however, there are a number of issues which have remained outside the scope and in this regard, there are a few which present particularly interesting points of analysis which need to be assessed in future research. These can be broadly categorised in two groups (1) those which specifically relate to emotional AI and; (2) those which fit within the broader literature exploring the legal consequences associated with emerging technologies. Regarding the former of these it is important to note that, as explored in particular in Chapter 5, the deployment of emotion detection technology in public or private but publicly accessible places (e.g. shopping centres) potentially challenges the application of the right to data protection and thus the availability of the protections provided in secondary law in the GDPR. Although the material scope of the Regulation is broad, it is unclear whether it truly caters for applications which merely detect emotions on the basis of several natural people without requiring the storage of this information. As this monitoring of such spaces may have consequences for the public at large there is a further need to explore the definition of

[1238] Peggy Valcke, Inge Graef and Damian Clifford, 'IFairness – Constructing Fairness in IT (and Other Areas of) Law through Intra- and Interdisciplinarity' (2018) 34 Computer Law & Security Review 707.
[1239] See: Kayla Tausche Wellons Mary Catherine, 'New Senate Bill Would Ban a "deceptive" Practice Used by Facebook to Get Users' Contact Data' (9 April 2019) <https://www.cnbc.com/2019/04/09/new-senate-bill-would-ban-a-deceptive-practice-used-by-facebook-to-get-users-contact-data.html> accessed 29 April 2019.

personal data (and hence, the material scope of the GDPR) considering such developments with specific access to the details on how these devices work in practice. Aside from the potential impact of such technology on the public at large it must be understood that such devices seemingly collect information indiscriminately.

**[415]** CHILDREN'S RIGHTS AND PUBLIC DISPLAY EMOTION DETECTION – Building on this, one must also question for instance how such technology could have an effect on children's rights as protected in the United Nations Convention on the Rights of the Child (UNCRC).[1240] In this regard one must wonder whether such considerations regarding the effects of such deployments should be specifically addressed in any assessment of the legality and impact of such technologies. Indeed, although it was outside of the scope of this particular thesis, in the context of the protection of children against new exploitative or manipulative forms of advertising, Verdoodt suggests that an approach built around the precautionary principle should be adopted.[1241] In this vein, one must wonder how such considerations could feature in the context of emotion monetisation in the form of public display advertising. Indeed, here one must wonder whether *Clear Channel* factored in the potential impact on children's rights when they were designing the smart advertising panels in Piccadilly Circus and if not, how such an impact assessment could be conducted and hence, the impact it would have on the legitimacy of the deployment. It is suggested here that given their potential for wide scale deployment, any data protection impact assessment would need to consider *inter alia* the potential effects on the rights of all members of society including children.

**[416]** STATE RESPONSIBILITY AND SECURITY PURPOSES – The questions to be asked here relate to the responsibility of the State in terms of the protection of public spaces and thus the vertical as opposed to (or in addition to) horizontal rights protection which such deployments could require. More specifically, in this regard one must wonder whether the assessment of the framework in smart space deployments differs depending on vertical-horizontal nature of the circumstances and hence, whether the controller is a private (e.g. a shopping centre), public authority (public spaces) or indeed semi-public (e.g. a private entity created by a public one for the development of a smart city or living lab). Here it is important to note that public entities are generally excluded from applying Article 6(1)(f) GDPR in the pursuit of their assigned public activities. But where would these public-private hybrids fit in this narrative? And given that public space deployments of emotion monetisation technology cannot rely on the consent of consumers, under what condition for processing could such purposes be based? This is particularly significant when one considers that processing purposes extend beyond the commercial. Indeed, here it is

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[1240] United Nations General Assembly, Convention on the Rights of the Child 1989. Of particular, importance here are four underlying principles contained in the Convention namely, (1) Article 6 UNCRC which protects the Child's right to have their lives protected from the moment of birth, as well as their right to be able to survive, grow and develop appropriately; (2) Article 2 UNCRC which protects children against all forms of discrimination; (3) Article 3 UNCRC which stipulates that the best interests of the child must be a primary consideration in all actions, and finally, (4) Article 12 UNCRC, the right to be heard.

[1241] See: Verdoodt (n 49).

important to point to the significant issues which emerge when one considers the use of emotion detection technology for policing purposes. This is most definitely an area requiring more detailed research but it also, in a way, points to another more in keeping with the theme of this thesis.

**[417]** MODELS VERSUS DATA – As described in Chapter 4, machine learning models are difficult to categorise within the definition of personal data and more readily fall within the realms of intellectual property and trade secrecy law. In this regard therefore, it is interesting to refer to the increasing trend towards the trading or renting of models either through the licensing of APIs through platforms or as packaged models. As noted by the Veale *et al.*,

> '[t]hese issues are of increasing importance given how data controllers increasingly refrain from trading data, as the ability to do this freely is heavily limited by data protection law, and instead are looking to trade or rent out models trained on it, as a way to pass on the value with fewer privacy and regulatory concerns. Many large firms already offer trained models for tasks including face recognition, emotion classification, nudity detection and offensive text identification.'[1242]

Although, as further noted by the authors, there are clear benefits here from a data protection and privacy perspective, the emergence of such business models also puts the technological capacity to detect emotions into the hands of anyone who can access the API for instance.[1243] This may present clear challenges when models designed for specific purposes and then redeployed for different ones and in this vein there are clear difficulties *vis-à-vis* the allocation of responsibility, the attribution of liability (where necessary) and indeed, the effective operation of the accountability principle.[1244] Such developments raise important questions surrounding the development of emotion detection models, their deployment and future research directions as to how such challenges should be approached in the law. This example of an area for further research perhaps straddles into the more general category of topics referred to above but in this regard one can also refer to the enforcement challenges and the emergence of B2B fairness considerations. The significance of competition law analyses is of clear importance. Indeed, as mentioned in Chapter 6, data protection, consumer protection and competition law need to be viewed in tandem and in this regard the ongoing development of the Digital Clearing House established by the EDPS to foster cross-discipline enforcement collaboration is important. However, there is a need for further *inter-disciplinary* discussion and this fittingly also extends to enforcement where the automated detection of unfair commercial behaviour could be facilitated by the incorporation of algorithmic techniques to render the law on

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[1242] Veale, Binns and Edwards (n 695) 3.
[1243] ibid 3–4.
[1244] See: Jatinder Singh, Jennifer Cobbe and Chris Norval, 'Decision Provenance: Capturing Data Flow for Accountable Systems' [2018] arXiv:1804.05741 [cs] <http://arxiv.org/abs/1804.05741> accessed 24 November 2018.

the books more effective and thus empower civil society and consumers to undertake civil control.[1245] Therefore, there are plenty avenues for further research

## 7.2 BEYOND THE 'LIMITS' OF THE EU LAW ASSESSMENT OF EMOTION MONETISATION

**[418]** THE LIMITS OF AN EU FOCUS – Perhaps a limitation of this thesis is that it has assessed the emergence of emotional AI and the monetisation of emotion more specifically only through the lens of EU law. However, emotional AI is a transboundary issue, and in this regard, there are arguably potential limitations associated with a constitutionalised response to regulating AI given the often-collective nature of potential risks and diverging national law traditions and interpretations. Indeed, there are clear challenges linked to the conflict between the fundamental rights orientated approach to data protection in the EU for instance and the more market driven approach in other jurisdictions such as the US and Australia. This is further exacerbated by the fact that conceptualisations of the cultural significance of the right to privacy (as the more globally accepted right compared to the right to data protection) and its value in terms of other rights and interests in particular vary considerably depending on the jurisdiction and reference here can be made to the conflicting understandings of the importance of privacy when comparing the US and EU approaches.[1246]

**[419]** DATA PROTECTION COLONIALISM – Importantly however, in the context of the emergence of emotional AI much of the technological development will in fact occur outside the EU and US therefore presenting similar but distinct challenges which are not nearly as well explored in the literature. Such considerations need further development as they are of key significance given the transboundary influence of such developments and the jurisdictional reach of sources such as the GDPR and the Council of Europe Convention 108+ on third countries. Effective regulation in a globalised digital economy presents important practical questions. However, the cross-jurisdictional push of legislative standards presents an interesting debate regarding the regulatory autonomy of States that wish to trade with the EU. There is a clear need to explore these issues especially considering the recent trade deals/negotiations with jurisdictions such as Australia and Japan,[1247] the US (given the recent State Privacy Acts in Washington and California) and the post-Brexit UK. The relationship between such countries and the EU will be extremely significant in terms of the regulation of Emotional AI.

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[1245] Palka and others (n 1234) 2. For some examples of such research see: Hans-W Micklitz, Przemysław Pałka and Yannis Panagis, 'The Empire Strikes Back: Digital Control of Unfair Terms of Online Services' (2017) 40 Journal of Consumer Policy 367; Giuseppe Contissa and others, 'CLAUDETTE Meets GDPR: Automating the Evaluation of Privacy Policies Using Artificial Intelligence' (2019) Study Report, Funded by The European Consumer Organisation (BEUC).

[1246] For example see: Franz-Stefan Gady, 'EU/U.S. Approaches to Data Privacy and the "Brussels Effect": A Comparative Analysis' [2014] Georgetown Journal of International Affairs; Washington 12.

[1247] As an illustrative example see: Graham Greenleaf, 'Asia-Pacific Free Trade Deals Clash with GDPR and Convention 108' [2018] Privacy Laws & Business International Report 22.

## CONCLUSION

**[420]** OPENING THE REGULATORY TOOLBOX – The analysis in this thesis aimed to explore the legal limits to the monetisation of online emotions and has ended with references to the challenges associated with regulating for Emotional AI and the monetisation of emotion to overcome the challenges identified. This must clearly be the next step. The analysis provided has provided an in-depth analysis of the key legislative frameworks, the intersections, gaps and areas of real uncertainty so as to provide a clear mapping of where the legislative changes should focus. Before any such movements however, there needs to be an increased appreciation of the existing challenges associated with aligning the data protection and consumer protection (and indeed, competition law) policy agendas. The thesis has plotted these overlaps and has suggested areas of potential synergy through the lens of the monetisation of emotions. Such developments must be understood as necessary to safeguard the continuing relevance and reliance on the rationality of individuals. However, it is important to note that differentiating between what is persuasive and permissible from what is manipulative and an affront to individual autonomy, is a clear challenge requiring detailed interdisciplinary research. Given the inherent aim of the adoption of such technologies for advertising and marketing practices, it is further debateable whether a more paternalistic approach is necessary through the blacklisting of certain uses of emotion insights. In conclusion, therefore, such questions need to be brought into the mainstream discussions on the future of legislative protections designed for a world of Emotional AI and technologically mediated choices.

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