



Protecting consumers' data in the digital world: advocating fairness by design

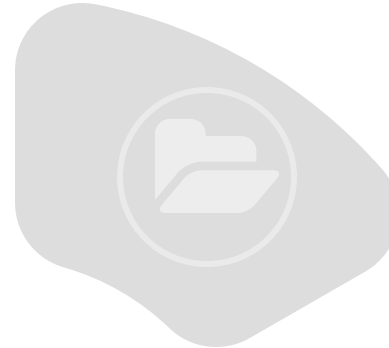
Professor Christine Riefa,
School of Law, University of Reading
[@Cyberchristine](#)

How does the law protect your privacy?

Consumer Law

Consumer Protection from Unfair Trading Regulations 2008 /Consumer Rights Act 2015, Part 2 – unfair terms

UN GUIDELINES for Consumer Protection III.4.(k) legitimate needs; IV.11(e) Good business practice; V.A.(h) consumer privacy and data security in national policies



Data Protection

Data Protection Act 2018 & GDPR (General Data Protection Regulation) guarantees 7 rights of data subjects.
Google Inc. v Judith Vidal-Hall and others [2015] EWCA Civ 311. An individual can claim compensation where personal data processed in contravention with the DPA, including for mere distress (not just for financial loss).

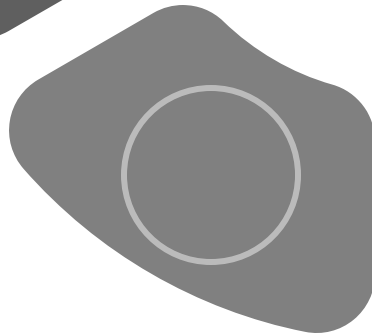
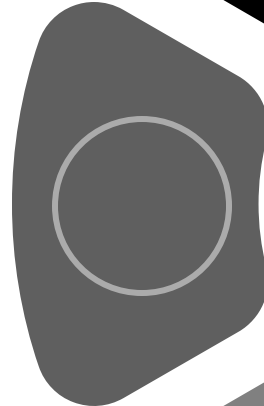
Main use of personal data in a commercial context -

Targeted advertising; Price discrimination; 'Free' websites & apps; risk profiling (e.g. credit & social scoring for banking and insurance)

Human Rights

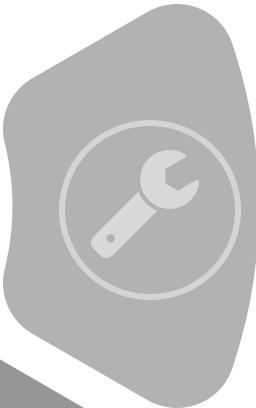
Right to Respect to Privacy (art 8) protected by Human Rights Act 1998, the European Convention of Human Rights and the European Charter of fundamental rights.

Claim for misuse of private information in the UK opened to individuals in the UK.



Public enforcement

e.g. Facebook £500,000 fine from ICO in UK; Abuse of dominant position action from Bundeskartellamt; £8.9m for misleading users over data practices in Italy .



Competition Law

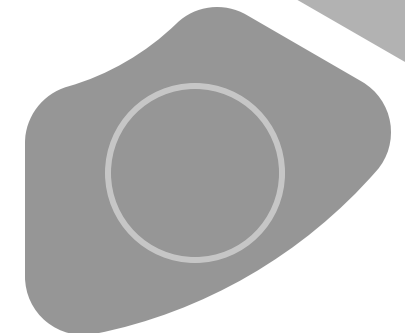
Competition Act 1998, Part II

Abuse of dominant position to combine data collected on different platforms to profile users; use of data to control markets and lock competitors away; is data an essential service?

Private enforcement

Collective action by some consumer associations in the EU (Group Litigation Orders of limited use in the UK)

Actions taken by individuals (but low uptake due to costs and length)



Main Obstacles to the effectiveness of the law

Differences in social norms and values

Legal systems based around different visions of the State and control of business and protection of consumers and citizens.

Governments

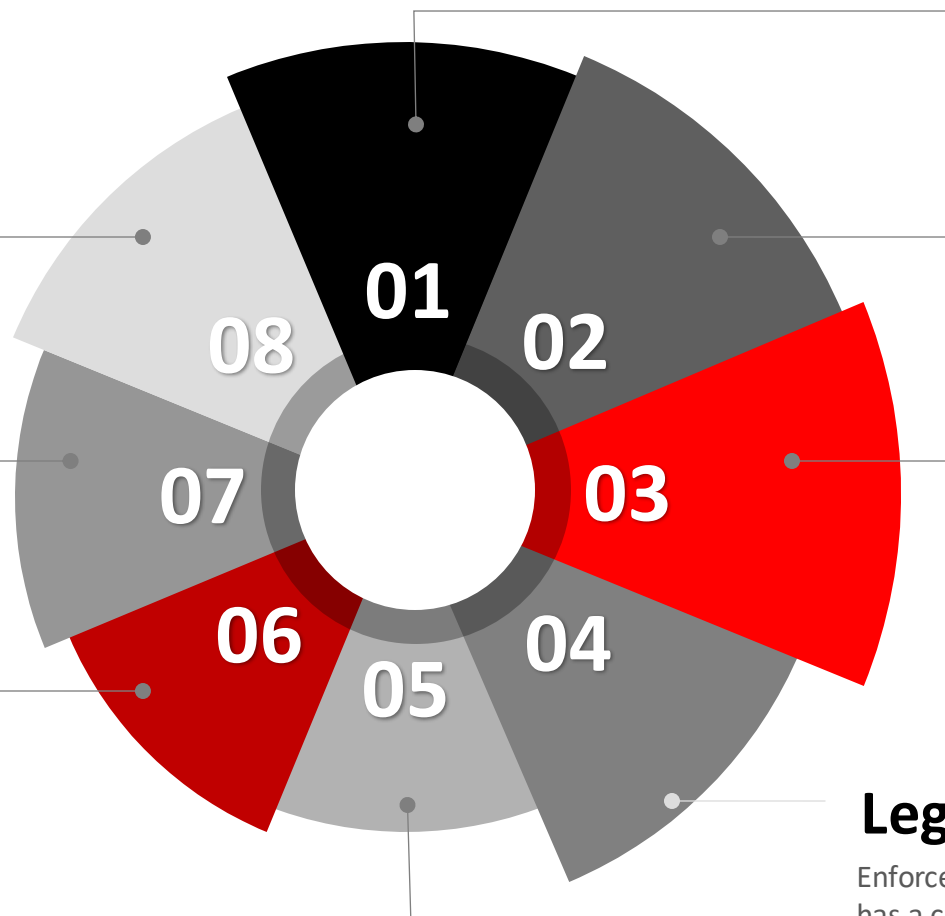
e.g. Third Party Doctrine in the USA; use of Social Media as a way to monitor user activity.

Users

Different groups of users may have different thresholds or level of understanding of what constitute privacy; or what is done with their data

Lack of transparency

On collecting practices and on motivations behind data collection #darkpatterns



Territoriality

Laws still organized along geographical lines and the need for a connection with a State for its laws or courts to have jurisdiction

Digital changes the way data needs protecting

Fast transition from paper record to digital lives creates challenges for regulators – technology = greater scale and speed of collection

Market Structures

Big Businesses build on neo-classical economic models seeking to maximise shareholders' value. Concentration of market powers in a small number of tech giants

Legal systems limitations

Enforcement of rights (private or public) takes time and has a cost not always directly proportional with the illegal use of data
Legal tools not yet adapted to machine learning



How to fix the law?

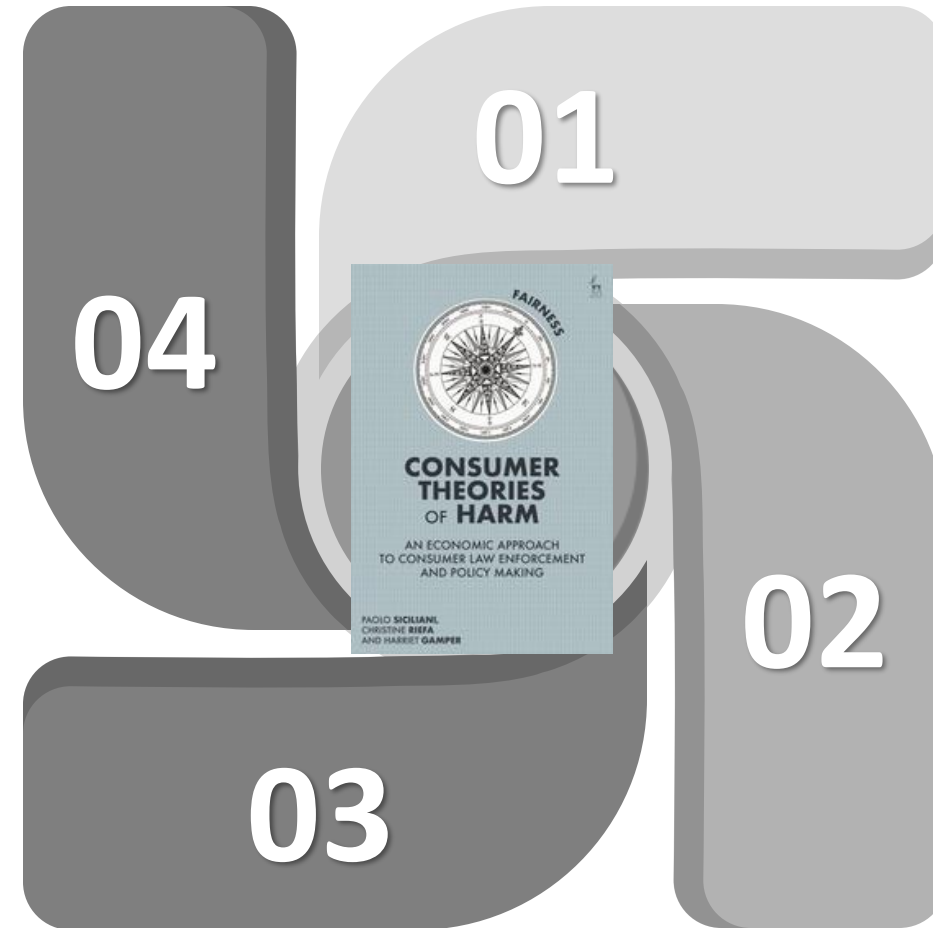
A GENERAL AND POSITIVE OBLIGATION TO TRADE FAIRLY?

Siciliani, Riefa, Gamper, *Consumer Theories of Harm – an economic approach to consumer enforcement and policy making* (Hart Publishing 2019)

An impactful solution is to rely on a more systematic enforcement of consumer rights (through the general clause of the Unfair Trading Regulations 2008) to force changes in market behaviors and structures. It is about using economics to prioritize intervention via one of the available legal regimes. REVERSING EXPECTATIONS. BUSINESS BEHAVE rather than CONSUMER BEWARE

PREPARE FOR THE FUTURE

Anticipate how to control AI
Regulatory framework for PIMS (Personal Information Management Services) – a new business model enabling consumers to monetise their data and/or manage its use.

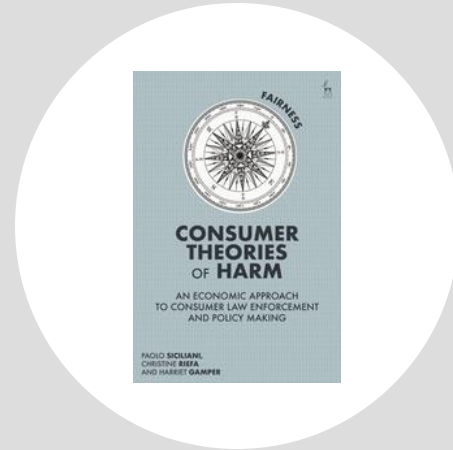


DEVELOP GLOBAL SOLUTIONS

Most data exchanges driven by e-commerce and take place across borders. GDPR transnational reach model?

CHANGES IN MARKET STRUCTURES

Competition Law –
Current market structures favour ‘race to the bottom’, whereby to remain competitive large amounts of data on consumers needs to be collected, used and/ or traded.
*Change to model where the way privacy is treated becomes a commercial argument – open competition on data privacy
#privacybydesign – adopt models where privacy is the default and opt-in to share is the industry standard



Thank you for your attention

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