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## Substantive fairness in the GDPR: Fairness Elements for Article 5.1a GDPR

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### ABSTRACT

According to the fairness principle in Article 5.1a of the EU General Data Protection Regulation (GDPR), data controllers must process personal data fairly. However, the GDPR fails to explain what is fairness and how it should be achieved. In fact, the GDPR focuses mostly on procedural fairness: if personal data are processed in compliance with the GDPR, for instance, by ensuring lawfulness and transparency, such processing is assumed to be fair. Because some forms of data processing can still be unfair, even if all the GDPR's procedural rules are complied with, we argue that substantive fairness is also an essential part of the GDPR's fairness principle and necessary to achieve the GDPR's goal of offering effective protection to data subjects. Substantive fairness is not mentioned in the GDPR and no guidance on substantive fairness is provided. In this paper, we provide elements of substantive fairness derived from EU consumer law, competition law, non-discrimination law, and data protection law that can help interpret the substantive part of the GDPR's fairness principle. Three elements derived from consumer protection law are good faith, no detrimental effects, and autonomy (e.g., no misleading or aggressive practices). We derive the element of abuse of dominant position (and power inequalities) from competition law. From other areas of law, we derive non-discrimination, vulnerabilities, and accuracy as elements relevant to interpreting substantive fairness. Although this may not be a complete list, cumulatively these elements may help interpret Article 5.1a GDPR and help achieve fairness in data protection law.

### 1. Introduction

In 2018, the much-touted EU General Data Protection Regulation (GDPR) came into force. Since then, many flaws of this legal instrument have been revealed.<sup>1</sup> In the light of new technologies such as artificial intelligence (AI)<sup>2</sup> it seems questionable whether the protection the GDPR intends to offer, is in fact realized. The fairness principle

enshrined in Article 5.1a GDPR could play an important role in addressing these concerns, contributing to effective protection as envisaged by the GDPR.<sup>3</sup>

The GDPR implements the principles for the processing of personal data.<sup>4</sup> However, these principles focus primarily on procedural, i.e., formal or process-oriented requirements.<sup>5</sup> If personal data are collected and processed according to the rules (for instance, rules regarding

Fairness Elements for Article 5.1a GDPR.

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<sup>1</sup> See, for instance, Peter J van de Waerdt, 'Information asymmetries: recognizing the limits of the GDPR on the data-driven market' (2020) *Computer Law & Security Review*, 38, 105436. Many of these issues carry on from prior data protection legislation, see, for instance, Tal Zarsky, 'Incompatible: the GDPR in the age of big data' (2016) *Seton Hall Law Review* 47 (2016): 995; Bert Jaap Koops, 'The trouble with European data protection law' (2014) Vol 4 Iss 4 *International Data Privacy Law* 250-261; Elisabetta Biasin, 'Why accuracy needs further exploration in data protection' Proceedings of the 1st International Conference on AI for People: Towards Sustainable AI, pp. 1 – 7; Daniela Dimitrova, 'The rise of the personal data quality principle: Is it legal and does it have an impact on the right to rectification' (2021) *European Journal of Law and Technology* Vol. 12 No. 3

<sup>2</sup> Jan de Bruyne, Cedric Vanleenhove, *Artificial Intelligence and the Law* (Intersentia 2021); Woodrow Barfield, Ugo Pagallo, *Advanced Introduction to law and artificial intelligence* (Edgar Elgar 2020); Bart Custers, Eduard Fosch Villaronga, *Law and Artificial Intelligence: Regulating AI and Applying AI in Legal Practice* (Springer 2022) 569.

<sup>3</sup> Recital 11 GDPR. Case C-645/19 [2021] Facebook Ireland ECR I-483 para 45; Case C-319/20, Meta Platforms Ireland Limited [2022] ECR I-322 para 73.

<sup>4</sup> These principles were drafted by the OECD in 1980 and then incorporated in the Strasbourg Treaty, Council of Europe, Convention no. 108, January 28<sup>th</sup> 1981.

<sup>5</sup> Inge Graef, Damien Clifford, Peggy Valcke, 'Fairness and enforcement: bridging competition, data protection, and consumer law' (2018) Vol 8 No 3 *International Data Privacy Law* 200, 203.

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informed consent and transparency), then such processing is assumed to be ok.

However, the implicit assumption that complying with these procedural rules guarantees fairness may be flawed. Although according to Recital 39 and Article 5.1a GDPR, personal data shall be processed fairly (the fairness principle), the GDPR fails to explain what fairness is and how it could or should be achieved. Nonetheless, the literature on fairness suggests that fairness consists of two elements: procedural fairness and substantive fairness.<sup>6</sup> In fact, neither is the essential element of substantive fairness mentioned in the GDPR nor is any guidance on substantive fairness provided therein or elsewhere. Therefore, even if all procedural rules of the GDPR are complied with, data processing can still be unfair from a substantive perspective.

Typical examples of personal data processing that people consider unfair (even though allowed under the GDPR) concern personalized pricing. For instance, consumers are not very supportive of increased prices for umbrellas when it is raining or paying more for a can of Coca-cola when it is very warm.<sup>7</sup> Food deliveries that are up to 50 % more expensive for consumers in wealthy neighbourhoods are even more complicated.<sup>8</sup> Another daunting example is a practice adopted by Uber that allegedly charges consumers more if their phone battery is low.<sup>9</sup> Moreover, some technologies group people into completely novel categories, such as dog owners, sad teens, video gamers, single parents, or gamblers, but none of these characteristics are covered in the GDPR or anti-discrimination laws.<sup>10</sup> Likewise, predictions generated by machine learning and other types of AI may unfairly impact data subjects. This especially applies when predictions are considered as facts, although such predictions are probabilistic and relate to future conduct that has not yet happened or may never happen at all. Also, reasoning deficiencies currently present in AI systems<sup>11</sup> may lead to unfair decisions. However, all these types of decision-making based on personal data are usually allowed if they comply with the GDPR's procedural rules. This is not always the case, as AI systems can violate procedural fairness, for instance, when it is impossible to follow the steps these systems take to generate their output (i.e., the black box problem).<sup>12</sup>

<sup>6</sup> Daniel Schaefer, Procedural versus substantive justice: Rawls and Nozick (2007) *Social Philosophy and Policy* 24(1), 164-186; Gianclaudio Malgieri, 'The concept of Fairness in the GDPR' (FAT\* '20: Conference on Fairness, Accountability, and Transparency, Barcelona, January 2020) 2, 3 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3517264](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3517264)> accessed 1 June 2023. See also the conceptualization of justice as fairness by Rawls, see John Rawls, *A theory of justice: Revised edition* (Harvard University Press 2020); John Rawls, *Justice as fairness: A restatement*. (Harvard University Press 2001)

<sup>7</sup> Frederik Zuiderveen Borgesius, Joost Poort, Online Price Discrimination and EU Data Privacy Law (2017) Vol 40(3) *Journal of Consumer Policy* 347-366.

<sup>8</sup> Sarah Maxwell, Ellen Garbarino, The identification of social norms of price discrimination on the internet (2010) Vol 19(3) *Journal of Product & Brand Management* 218-224.

<sup>9</sup> Vice News, Uber Accused of Charging People More If Their Phone Battery Is Low, <<https://www.vice.com/en/article/m7beq8/uber-surge-pricing-phone-battery>> accessed 17 November 2023; Marion Dakers, Uber knows customers with dying batteries are more likely to accept surge pricing, *The Telegraph*, 30 October 2017.

<sup>10</sup> Sandra Wachter, The theory of artificial immutability: Protecting algorithmic groups under anti-discrimination law. (2022) *arXiv preprint arXiv:2205.01166*.

<sup>11</sup> Brian Bergstein, 'What AI still can't do' MIT Technology Review (Cambridge 31 January 2020) <<https://www.technologyreview.com/2020/01/31/304844/ai-common-sense-reads-human-language-ai2/>> accessed 1 June 2023; Brandon Bennet, Anthony G Cohn, 'Automated Common-sense Spatial Reasoning: Still a Hughe Challenge' in Stephen Muggleton, Nicholas Chater (eds) *Human-Like Machine Intelligence* (Oxford University Press 2021) 405;

<sup>12</sup> Amitai Etzioni, Oren Etzioni, 'Keeping AI Legal' (2016) 19 Vand. J. Ent. & Tech. L. 133, 137; Danielle Keats Citron, Frank Pasquale, 'The scored society: Due process for automated predictions' (2014) Vol. 89 Iss. 1 *Washington Law Review*, 1, 6.

The elusiveness of the GDPR's fairness principle was already unveiled by Clifford and Ausloos in their landmark paper in 2017.<sup>13</sup> They point out that even though the GDPR's fairness principle is often referred to as a critical tenet of data protection law, a precise understanding of its role is unclear. They delineate fairness from the other data protection principles and clarify its overarching role and importance in the GDPR. Graef, Clifford and Valcke signal that the notion of fairness underpins the regimes of data protection law, consumer protection law, and competition law.<sup>14</sup>

Using these works as a starting point, in this paper, we provide elements of substantive fairness derived from other areas of law. It is postulated that EU consumer protection law, competition law, non-discrimination law and (to a limited extent) data protection law itself can help interpret the substantive part of the GDPR's fairness principle. The three elements derived from consumer protection law are good faith, no presence of detrimental effects, and no undue influence on autonomy, e.g., through misleading or aggressive practices. From the domain of competition law, non-exploitation of dominant positions<sup>15</sup> (and power inequalities) is derived. Competition and consumer protection laws aim to re-balance power dynamics between different stakeholders. In our view, considering the elements derived from these areas of law may, as such, lead to fairer outcomes of data processing. In addition, data protection law needs some form of re-calibration due to power inequalities between data controllers and data subjects. From other areas of law, we derive the elements of non-discrimination, vulnerabilities, and accuracy for interpreting substantive fairness. Although this may not be an exhaustive list, these elements may cumulatively help interpret Article 5.1a GDPR and help achieve a higher degree of fairness in data protection law-related cases and enforcement actions.

Focussing on substantive fairness may contribute to increased fairness in data protection law for two reasons. First, merely focusing on procedural fairness elements does not per se guarantee fair outcomes. Hence, considering both procedural and substantive fairness offers a better, more complete approach to fairness. This ties in with a second reason: the current focus on procedural fairness tends to lean towards black letter law approaches, i.e., legalism focusing on grammatical interpretations rather than teleological interpretations. In practice, data controllers often see the provisions in the GDPR as a checklist to comply with but hardly consider fairness by taking the broader picture into account.<sup>16</sup> Substantive fairness fits with teleological interpretations of EU law, which demand that the CJEU gives concrete expressions to unclear or too general notions.<sup>17</sup>

This paper is structured as follows. Section 2 provides further background on fairness in the GDPR. Section 3 examines EU consumer

<sup>13</sup> Damien Clifford, Jeff D Ausloos, 'Data Protection and the Role of Fairness' (2018) Vol. 37 No. 1 *Yearbook of European Law* 130, 187.

<sup>14</sup> Inge Graef, Damien Clifford, Peggy Valcke, 'Fairness and enforcement: bridging competition, data protection, and consumer law' (2018) Vol 8 No 3 *International Data Privacy Law* 200, 203.

<sup>15</sup> Stemming from the prohibition on the abuse of dominant positions in EU competition law.

<sup>16</sup> Custers, B.H.M., Sears, A.M., Dechesne, F., Georgieva, I.N., Tani, T., and Van der Hof, S. (2019) *EU Personal Data Protection in Policy and Practice*, Heidelberg: Asser/Springer. Note the differences between countries: in the context of the data protection law, countries like France and Italy focus more on grammatical interpretations, whereas countries like Germany focus more on teleological interpretations.

<sup>17</sup> Pierre Pescatore, 'Les objectifs de la Communauté européenne comme principes d'interprétation dans la jurisprudence de la Cour de justice' (1972) vol 2 *Miscellanea W.J. Ganshof van der Meersch* 328; Koen Lenaerts, José A Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' (2013) *European University Institute Working Paper AEL 2013/9* at 6 <[https://cadmus.eui.eu/bitstream/handle/1814/28339/AEL\\_2013\\_09\\_DL.pdf?sequence=1&isAllowed=y](https://cadmus.eui.eu/bitstream/handle/1814/28339/AEL_2013_09_DL.pdf?sequence=1&isAllowed=y)> accessed 30 June 2023.

protection law and derives elements of substantive fairness from this field. Section 4 conducts the same exercise from the EU competition law point of view. Section 5 discusses other elements that are potentially relevant when interpreting substantive fairness. Section 6 provides conclusions and discusses how these substantive fairness elements can further be used to interpret the fairness principle in Article 5.1a GDPR.

## 2. Fairness in the GDPR

Fairness is usually categorised into two types, i.e. procedural and substantive fairness.<sup>18</sup> In this section, we discuss both these sub-types of fairness and argue that currently, the focus in data protection law is on procedural fairness whereas substantive fairness should receive more attention. These two types of fairness are complementary.<sup>19</sup> Substantive fairness focusses on the *outcome* of a process<sup>20</sup> and procedural fairness examines the fairness of the procedure by which that outcome was reached.<sup>21</sup> For instance, if a fair outcome (i.e., an outcome everyone considers fair) is achieved without involving all stakeholders, procedural fairness may still be lacking. Conversely, if all procedural fairness elements (e.g., transparency, legal requirements, etc.) are observed, outcomes may still be unfair, as was illustrated above with the examples on personalized pricing.

### 2.1. Procedural fairness

*Procedural fairness* concerns formal or process-oriented requirements.<sup>22</sup> It examines the fairness of the procedure by which an outcome was reached.<sup>23</sup> In data protection law, procedural fairness focuses on whether data has been obtained or otherwise processed through unfair means, for instance, by deception or without the knowledge of the individual concerned.<sup>24</sup> Procedural fairness in the GDPR concentrates on rules for the processing of personal data, for instance, transparency (Article 5.1a GDPR), security safeguards (Article 5.1f GDPR), and ensuring data subject rights (Articles 12–22 GDPR). These procedural elements of fairness date back to the 1980s, as they were already incorporated in the Council of Europe Convention 108 (the Strasbourg Treaty).<sup>25</sup> Back then, the focus on these elements was deemed sufficient. This is because there was limited internet access and no existence of interconnected databases or sophisticated data analytics tools and large-scale automated processing. In light of the current technological developments, including in AI, the mere focus on procedural fairness is no longer sufficient. This is also evidenced by the

Commission's fitness check on digital fairness launched in May 2022.<sup>26</sup> Against the backdrop of the digital transformation, the European Commission is currently investigating whether additional action is needed to ensure an equal level of fairness online and offline with regard to EU consumer protection law.<sup>27</sup>

Some authors, such as Eskens and Wachter & Mittelstadt interpret fairness as a mere proxy for transparency that essentially falls under procedural fairness as it simply focuses on formal transparency requirements.<sup>28</sup> According to their views, fairness does not merit an independent meaning because it solely relates to transparency; it is not defined in the GDPR and it only appears in the context of lawfulness or transparency.<sup>29</sup> Additionally, Eskens's interpretation of fairness as mere transparency is backed by the argument that 'fair processing' is never mentioned in the GDPR.<sup>30</sup> However, the claim that 'fair processing' is never mentioned in the GDPR is simply wrong. Article 5.1a GDPR literally states that "personal data shall be processed [...], *fairly*", which is another linguistic form for expressing 'fair processing'.

We think an interpretation of fairness as merely procedural fairness is not convincing for at least three reasons. The first reason is that it provides an incomplete conceptualization. In essence, focusing merely on procedural fairness can yield unfair results. This is particularly the case when fairness is interpreted as mere transparency. A data controller can be completely transparent about using a discriminatory decision-making system, but that does not ensure fair outcomes. In other words, procedural fairness requirements can be fully complied with, but from a substantive perspective, the results can still be unfair. Online price discrimination is a typical example. Basically, the assumption that merely following all the procedural rules yields fair outcomes is flawed.

Second, lawfulness, fairness, and transparency are clearly used as distinct concepts in the GDPR.

None of these terms are defined as such in Article 4 of the GDPR, but some of these principles are further substantiated in the GDPR. Article 6 of the GDPR, for instance, implements the lawfulness principle by mandating six legal grounds for processing. Articles 12–14 of the GDPR substantiate the transparency principle by imposing specific information obligations on data controllers. Other principles, such as the accuracy principle and the data minimisation principle are not further substantiated in the GDPR. The fact that fairness is not further elaborated not only enables interpreting fairness as compliance with the GDPR rules but also allows interpreting fairness as a broader concept, i.e. so as to include substantive fairness. Only because Article 5.1a GDPR mentions

<sup>18</sup> Giulia Gentile, 'Two Strings to One Bow? Article 47 of the EU Charter of Fundamental Rights in the EU Competition Case Law: Between Procedural and Substantive Fairness' (2020) Vol 4 No 2 *Market and Competition Law Review* 169-204; Stephen A Smith, 'In Defence of Substantive Fairness' (1996) Vol 112 Iss 1 *Law Quarterly Review* 138-158; Pinar Akman, *The concept of abuse in EU competition law* (Hart Publishing Ltd 2012) 166.

<sup>19</sup> Giulia Gentile, 'Two Strings to One Bow? Article 47 of the EU Charter of Fundamental Rights in the EU Competition Case Law: Between Procedural and Substantive Fairness' (2020) Vol 4 No 2 *Market and Competition Law Review* 169, 173-174.

<sup>20</sup> Stephen A Smith, 'In Defence of Substantive Fairness' (1996) Vol 112 Iss 1 *Law Quarterly Review* 138-158.

<sup>21</sup> Pinar Akman, *The Concept of Abuse in EU Competition Law* (Hart Publishing Ltd 2012) 166.

<sup>22</sup> Inge Graef, Damien Clifford, Peggy Valcke, 'Fairness and enforcement: bridging competition, data protection, and consumer law' (2018) Vol 8 No 3 *International Data Privacy Law* 200, 203.

<sup>23</sup> Pinar Akman, *The Concept of Abuse in EU Competition Law* (Hart Publishing Ltd 2012) 166.

<sup>24</sup> Cecile de Terwangne, Commentary of Article 5 in Christopher Kuner, Lee A. Bygrave, Christopher Docksey (eds), *The EU General Data Protection Regulation: A Commentary* (OUP 2020) 314.

<sup>25</sup> Council of Europe (1981) Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, No. 108, 28.01.1981.

<sup>26</sup> See < [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13413-Digital-fairness-fitness-check-on-EU-consumer-law\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13413-Digital-fairness-fitness-check-on-EU-consumer-law_en) > accessed 10 November 2023.

<sup>27</sup> See also 'New Consumer Agenda' COM (2020) 696 final at 10 < <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0696&from=EN> > accessed 10 November 2023.

<sup>28</sup> Sarah Johanna Eskens, 'Profiling the European Citizen in the Internet of Things: How Will the General Data Protection Regulation Apply to this Form of Personal Data Processing, and How Should It?' (2016) Master thesis, University of Amsterdam 27 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2752010](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2752010)> accessed 7 October 2022; Sandra Wachter, Brent Mittelstadt 'A Right to Reasonable Inferences: Re-Thinking Data Protection Law in the Age of Big Data and AI' (2019) No 2 *Columbia Business Law Review* 494, 581-582.

<sup>29</sup> Sarah Johanna Eskens, 'Profiling the European Citizen in the Internet of Things: How Will the General Data Protection Regulation Apply to this Form of Personal Data Processing, and How Should It?' (2016) Master thesis, University of Amsterdam 27 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2752010](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2752010)> accessed 7 October 2022; Sandra Wachter, Brent Mittelstadt 'A Right to Reasonable Inferences: Re-Thinking Data Protection Law in the Age of Big Data and AI' (2019) No 2 *Columbia Business Law Review* 494, 582.

<sup>30</sup> Sarah Johanna Eskens, 'Profiling the European Citizen in the Internet of Things: How Will the General Data Protection Regulation Apply to this Form of Personal Data Processing, and How Should It?' (2016) Master thesis, University of Amsterdam 27 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2752010](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2752010)> accessed 7 October 2022.



fairness together with lawfulness and transparency does not imply that these notions mean the same. Otherwise, the legislator would not have introduced these three distinct notions and mentioned in recital 39 GDPR that “any processing shall be lawful *and* fair” [italics added]. Of course, recitals do not have an independent legal value in EU law, but they help to determine the nature of a provision and expand an ambiguous provision’s scope.<sup>31</sup>

Third, regulatory enforcement at the EU level confirms that the fairness principle has an independent meaning.<sup>32</sup> Additionally, the CJEU uses fairness as an interpretative tool in order to balance the different interests at stake.<sup>33</sup> According to the CJEU, a fair balance requires specific consideration of the substantial circumstances and interests at issue<sup>34</sup> with particular consideration of the interests of the data subject: “That balance may, however, depend, in specific cases, on the nature of the information in question and its sensitivity for the data subject’s private life”.<sup>35</sup> This goes beyond transparency requirements or merely focusing on how the data are collected and processed. It allows for considering the substantive effects of the data processing. Some authors, like Clifford and Ausloos<sup>36</sup> and Graef et al.<sup>37</sup> focus on the substantive fairness element of the GDPR’s fairness principle. Malgieri goes even further. He states that fairness is effect-based and, therefore, it is not the formal procedures that are relevant but the substantial mitigation of unfair imbalances that create situations of vulnerability.<sup>38</sup> Regulatory guidance also points to substantive fairness by mentioning *reasonable expectations* of the data subjects, possible *adverse consequences* of processing, and effects of *power imbalance* as some of the key elements of the fairness principle.<sup>39</sup>

Altogether, the interpretation of fairness in data protection law as merely procedural fairness is not convincing. Principles are open norms that allow judges to adjust the law to changing circumstances in order to address contemporary problems. As open norms, principles are well suited to recalibrate data protection legislation to changing technological circumstances for achieving the goals set out by the fundamental right to data protection, including legislative goals pursued by the GDPR. The goals of the GDPR, in particular, include achieving a

consistent and high level of protection for personal data (recitals 6 and 10), a strong and coherent data protection framework (recital 7) and effective protection (recital 11). The fairness principle’s broad scope and open texture<sup>40</sup> make it a particularly suitable candidate to host normative parameters beyond transparency.<sup>41</sup>

## 2.2. Substantive fairness

*Substantive fairness* focuses on the *outcome* or *consequences* of a process<sup>42</sup> as opposed to procedural fairness, which examines the fairness of the procedure by which that outcome was reached.<sup>43</sup> When applied to data protection law, procedural fairness concentrates on how personal data is collected and processed, whereas substantive fairness focuses on the *outcomes* of such processing and how it affects data subjects. These outcomes and effects can relate to the expectations of data subjects, adverse impacts on them, and the actual interests of the parties involved.

Although the GDPR is much less explicit about substantive fairness than it is about procedural fairness, it still hints at the former. Substantive fairness, i.e., the *outcome* or *consequence* of a specific processing activity, neatly fits with certain provisions contained in the GDPR. For instance, when a data controller intends to further process personal data for purposes other than for which the personal data have been initially collected, the possible consequences of such further processing must be considered.<sup>44</sup> Articles 13.2f and 14.2 g GDPR<sup>45</sup> require data controllers to inform data subjects about the envisaged consequences of automated decision-making and profiling. Article 35.1 GDPR requires data controllers to assess “the *impact* of the envisaged processing operations on the protection of personal data” where such processing operations are “likely to *result* in a high risk to the rights and freedoms of natural persons” [italics added]. Recital 150 GDPR requires Supervisory Authorities to take the consequences of a GDPR infringement into consideration when determining the administrative fine to be imposed on the data controller.

Substantive fairness is also concerned with actual fairness between the parties involved.<sup>46</sup> It recalibrates imbalanced situations and is used in other areas of law (e.g., employment law).<sup>47</sup> In data protection law, substantive fairness thus concerns fairness between the data controller and the data subject. This aspect of substantive fairness, which is based on a more transactional view of data protection law, is in line with other provisions in the GDPR. The relationship between a data controller and a data subject is mentioned in Article 6.4b and Recital 50 GDPR. According to these provisions, the data controller needs to take the relationship with the data subject into consideration when intending to further process personal data for purposes other than that for which they were initially collected. As such, it involves an aspect of societal fairness.

<sup>31</sup> Tadas Klimas, Jfrate Vaitiukait, ‘The Law of Recitals in European Community Legislation’ (2008) Vol 15 No 1 ILSA Journal of International & Comparative Law 61, 63.

<sup>32</sup> Binding Decision 2/2023 on the dispute submitted by the Irish SA regarding TikTok Technology Limited (Art. 65) adopted 2 August 2023 para 100; Binding Decision 3/2022 on the dispute submitted by the Irish SA on Meta Platforms Ireland Limited and its Facebook service (Art. 65 GDPR), adopted on 5 December 2022 paras 22, 477; Binding Decision 4/2022 on the dispute submitted by the Irish SA on Meta Platforms Ireland Limited and its Instagram service (Art. 65 GDPR), adopted on 5 December 2022 para 226, 444; Binding Decision 5/2022 on the dispute submitted by the Irish SA on Meta Platforms Ireland Limited and its WhatsApp service (Art. 65 GDPR), adopted on 5 December 2022.

<sup>33</sup> Case C-275/06 *Promusicae* [2008] ECR I-00271 paras 68,70; Joined Cases C-92/09 and C-93/09, *Schecke* [2010] ECR I-662 para 88.

<sup>34</sup> Gianclaudio Malgieri, ‘The concept of Fairness in the GDPR’ (FAT\* ’20: Conference on Fairness, Accountability, and Transparency, Barcelona, January 2020) 6 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3517264](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3517264)> accessed 29 April 2022.

<sup>35</sup> Case C-131/12, *Google Spain* [2014] ECR I-317 para 81.

<sup>36</sup> Damien Clifford, Jeff D Ausloos, ‘Data Protection and the Role of Fairness’ (2018) *Yearbook of European Law*, Vol. 37, No. 1, 130, 187.

<sup>37</sup> Inge Graef, Damien Clifford, Peggy Valcke, ‘Fairness and enforcement: bridging competition, data protection, and consumer law’ (2018) Vol 8 No 3 *International Data Privacy Law* 200, 203.

<sup>38</sup> Gianclaudio Malgieri, ‘The concept of Fairness in the GDPR’ (FAT\* ’20: Conference on Fairness, Accountability, and Transparency, Barcelona, January 2020) 2, 3 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3517264](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3517264)> accessed 29 April 2022.

<sup>39</sup> European Data Protection Board, ‘Guidelines on Article 6(1)(b) GDPR’ (Guidelines 2/2019, 8 October 2019), at 6.

<sup>40</sup> Lee A Bygrave, ‘Minding the machine v2.0: The EU General Data Protection Regulation and Automated Decision Making’ in Karen Yeung and Martin Lodge (eds) *Algorithmic Regulation* (OUP 2019) 260.

<sup>41</sup> Lee A Bygrave, ‘Machine Learning, Cognitive Sovereignty and Data Protection Rights with Respect to Automated Decisions’ (2021) University of Oslo Faculty of Law Legal Studies Research Paper Series No. 202-35 at 22, 23 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3721118](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3721118)> accessed 9 April 2022.

<sup>42</sup> Stephen A Smith, ‘In Defence of Substantive Fairness’ (1996) Vol 112 Iss 1 *Law Quarterly Review* 138-158.

<sup>43</sup> Pinar Akman, *The concept of abuse in EU competition law* (Hart Publishing Ltd 2012) 166.

<sup>44</sup> Article 6 (4) lit d and recital 50 GDPR.

<sup>45</sup> See also recital 60 GDPR.

<sup>46</sup> Stephen A Smith, ‘In Defence of Substantive Fairness’ (1996) Vol 112 Iss 1 *Law Quarterly Review* 138-158.

<sup>47</sup> Giulia Gentile, ‘Two Strings to One Bow? Article 47 of the EU Charter of Fundamental Rights in the EU Competition Case Law: Between Procedural and Substantive Fairness’ (2020) Vol 4 No 2 *Market and Competition Law Review* 169, 173.

In this context, legitimate interest assessments (LIAs) are relevant. Although technically relating to the lawfulness principle, the performance of a LIA might also contribute to substantive fairness. It requires the data controller to carry out a balancing exercise by considering its own legitimate interest and the interest or fundamental rights of the data subject concerned. When doing so, data controllers need to pay particular attention to the reasonable expectations of the data subjects, the scale of processing and the impact on the data subjects.<sup>48</sup> Precisely due to these considerations, the CJEU held that Meta cannot rely on its legitimate interest for targeted ads on Facebook.<sup>49</sup> The CJEU's focus on the impact on the concerned data subjects contributes to substantive fairness. However, the performance of a LIA relates to the lawfulness principle. In this paper, we focus on the fairness principle, which is distinct from the lawfulness principle and thus has an independent meaning.<sup>50</sup>

Including substantive fairness in the interpretation of the GDPR's fairness principle can contribute to addressing fairness issues concerning the processing of personal data by new technologies, such as AI systems. It aims to prevent adverse effects in concrete circumstances, particularly when conflicting interests need to be balanced.<sup>51</sup> EU primary sources also seem to refer to a substantive conceptualisation of fairness.<sup>52</sup> Interpreting fairness as including substantial fairness furthermore complies with the CJEU's approach to favour that interpretation of a provision which is the most effective. According to case law, if a provision in EU law is open to several interpretations, preference must be given to the interpretation that ensures and maintains the effectiveness of that provision.<sup>53</sup> Both regulatory guidance<sup>54</sup> and regulatory enforcement at the EU level<sup>55</sup> point to substantive fairness by mentioning *reasonable expectations* of the data subjects, possible *adverse consequences* of processing, and effects of *power imbalance* as relevant factors of the fairness principle.

Altogether, there are sufficient reasons to interpret fairness in a way that includes both procedural and substantive fairness. The current focus on procedural fairness leads to a compliance-based approach, whereas the focus on both substantive and procedural fairness could lead to a risk-based approach. Just to avoid any misunderstanding, we do not suggest replacing interpretations of procedural fairness with interpretations of substantive fairness. Rather, we suggest considering both types when interpreting fairness so they complement each other.

If the GDPR's fairness principle includes both procedural and substantive fairness, the next question concerns how to interpret both types. Since the GDPR contains several procedural fairness provisions, which are also further interpreted in case law and literature, we will not focus on this. Instead, we will focus on substantive fairness, on which the GDPR is much less clear and much less case law and literature is available. We turn to notions of fairness in two other fields of EU law, namely consumer protection (Section 3) and competition law (Section 4). These two areas of law are particularly relevant because they deal with notions of fairness, which might provide helpful insights to further substantiate the same under data protection law.<sup>56</sup> It is often easier to determine whether a particular outcome is *unfair* than to agree on whether a particular outcome is fair.<sup>57</sup> This is also reflected in the title of the two major directives in EU consumer protection law, which both use the term "unfair". Likewise, EU competition law explicitly prohibits certain unfair behaviors, such as abuse of a dominant position (Article 102 TFEU). Therefore, we suggest focusing on elements of fairness that may lead to unfair processing of personal data rather than focusing on fair processing. In addition to the elements derived from consumer and competition law, we also refer to other potentially relevant elements when interpreting substantive fairness (Section 5).

### 3. Elements from EU consumer protection law

In consumer protection law, fairness focuses on the decisional capacity of consumers. Fairness acts as the substantive standard against which the legality of contractual terms and commercial practices are tested.<sup>58</sup> Under the Unfair Terms Directive (UTD),<sup>59</sup> 'good faith' and 'significant imbalance' are elements of fairness that must be examined together. The principle of good faith has its roots in Roman Law<sup>60</sup> under the term 'bona fides'. Applying this principle in the context of consumer law requires the contracting parties to take each other's interests into account in order to achieve a fair balance.<sup>61</sup> A contractual term is unfair when, contrary to the requirement of good faith, it causes a significant imbalance to the detriment of the consumer.<sup>62</sup> In order to pass the fairness test under the UTD, a contractual term that has not been individually negotiated should not cause a significant imbalance in the contracting parties' rights and obligations to the detriment of the

<sup>48</sup> Recital 47 GDPR.

<sup>49</sup> Case C-252/21, *Meta Platforms* [2023] ECR I-537 paras 116-118.

<sup>50</sup> Binding Decision 2/2023 on the dispute submitted by the Irish SA regarding TikTok Technology Limited (Art. 65) adopted 2 August 2023 para 100; Binding Decision 3/2022 on the dispute submitted by the Irish SA on Meta Platforms Ireland Limited and its Facebook service (Art. 65 GDPR), adopted on 5 December 2022 paras 22, 477; Binding Decision 4/2022 on the dispute submitted by the Irish SA on Meta Platforms Ireland Limited and its Instagram service (Art. 65 GDPR), adopted on 5 December 2022 para 226, 444; Binding Decision 5/2022 on the dispute submitted by the Irish SA on Meta Platforms Ireland Limited and its WhatsApp service (Art. 65 GDPR), adopted on 5 December 2022.

<sup>51</sup> Gianclaudio Malgieri, 'The concept of Fairness in the GDPR' (FAT\* '20: Conference on Fairness, Accountability, and Transparency, Barcelona, January 2020) 2, 3 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3517264](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3517264)> accessed 29 April 2022.

<sup>52</sup> Giulia Gentile, 'Two Strings to One Bow? Article 47 of the EU Charter of Fundamental Rights in the EU Competition Case Law: Between Procedural and Substantive Fairness' (2020) Vol 4 No 2 *Market and Competition Law Review* 169, 177.

<sup>53</sup> Case C-31/17 *Cristal Union* [2018] ECR I-168 para 41; Case C-517/07 *Afton Chemical* [2008] ECR I-751 para 43; Case C-152/13 *Holger Forstmann Transporte* [2014] ECR I-2184 para 26.

<sup>54</sup> European Data Protection Board, 'Guidelines on Article 6(1)(b) GDPR' (Guidelines 2/2019, 8 October 2019), at 6.

<sup>55</sup> Binding Decision 2/2023 on the dispute submitted by the Irish SA regarding TikTok Technology Limited (Art. 65) adopted 2 August 2023 para 103; Binding Decision 3/2022 on the dispute submitted by the Irish SA on Meta Platforms Ireland Limited and its Facebook service (Art. 65 GDPR), adopted on 5 December 2022 paras 219-220; Binding Decision 4/2022 on the dispute submitted by the Irish SA on Meta Platforms Ireland Limited and its Instagram service (Art. 65 GDPR), adopted on 5 December 2022 paras 223-224; Binding Decision 5/2022 on the dispute submitted by the Irish SA on Meta Platforms Ireland Limited and its WhatsApp service (Art. 65 GDPR), adopted on 5 December 2022.

<sup>56</sup> Milda Mačėnaitė, 'Protecting Children Online: Combining the Rationale and Rules of Personal Data Protection Law and Consumer Protection Law' in Mor Bakhroum et al (eds) *Personal Data in Competition, Consumer Protection and Intellectual Property Law* (Springer Nature 2018) 361.

<sup>57</sup> Francis Herbert Buckley, 'Three Theories of Substantive Fairness' (1990) Vol 19 *Hofstra Law Review* 33, 56.

<sup>58</sup> Inge Graef, Damien Clifford, Peggy Valcke, 'Fairness and enforcement: bridging competition, data protection, and consumer law' (2018) Vol 8 No 3 *International Data Privacy Law* 200, 204.

<sup>59</sup> Articles 3-5 of the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ 01993L0013 further on UTD.

<sup>60</sup> Hugh Collins, 'Good Faith in European Contract Law' (1994) Vol 14 No 2 *Oxford Journal of Legal Studies* 229, 250.

<sup>61</sup> Mahmoud Fayyad, 'Measures of the Principle of Good Faith in European Consumer Protection and Islamic Law, a Comparative Analysis' (2014) Vol 28 *Arab Law Quarterly* 205, 208; Martin Schermaier, 'Bona Fides in Roman Contract Law' in Reinhard Zimmermann, Simon Whittaker (eds) *Good Faith in European Contract Law* (Cambridge University Press 2000) 65.

<sup>62</sup> Article 3 (1) UTD.

consumer. When assessing good faith, particular regard should be given to the strength of the bargaining positions of the parties.<sup>63</sup> From the UTD, we derive two elements of fairness, namely, (i) *good faith* or acting in sincere and honest ways, including preventing imbalances between the interests of the seller and consumer, and (ii) *detrimental effects* on the consumer.

In the Unfair Commercial Practices Directive (UCPD),<sup>64</sup> fairness focuses on the average consumer's capacity to make informed autonomous decisions.<sup>65</sup> A commercial practice is unfair if it is contrary to professional diligence and distorts or is likely to distort the consumer's economic behavior,<sup>66</sup> causing the consumer to act transactionally in a way he would have otherwise not done.<sup>67</sup> The UCPD offers protection from misleading and aggressive commercial practices (Article 5 UCPD) and contains a blacklist of practices that are deemed de facto unfair.<sup>68</sup> Aggressive practices, including harassment, coercion and undue influence, are prohibited.<sup>69</sup> The prohibition of misleading practices protects consumers from making transactional decisions that they would not have taken in the absence of false or untruthful information provided by the trader.<sup>70</sup> Thus, from the UCPD we derive no undue *interference* with a consumer's *autonomy* as an element of fairness.

The above-mentioned three elements derived from consumer law are discussed in more detail in the following sections.

### 3.1. Good faith

Acting in good faith essentially means sincere intentions to be fair, open, and honest. Traditional conceptualisations of *good faith* have their roots in virtue ethics as well as Roman Law and essentially refer to the idea of acting in good conscience or not unconscionably, which would prevent taking advantage of another's trust.<sup>71</sup> Ethical principles that form the basis of the classical notion of *bona fides* are enjoyed a renaissance today and help modern lawyers solve current issues.<sup>72</sup> This applies particularly to virtue ethics. For example, it has been suggested that a virtue ethics approach to privacy regulation be adopted.<sup>73</sup> Virtue ethics focuses on the notion of a good or virtuous person.<sup>74</sup> Aristotle is seen as the classical influence on the conceptual profile of virtue,<sup>75</sup> who

<sup>63</sup> Pinar Akman, *The concept of abuse in EU competition law* (Hart Publishing Ltd 2012) 177.

<sup>64</sup> 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 OJ L 149/22 further on 'UCPD'.

<sup>65</sup> Inge Graef, Damien Clifford, Peggy Valcke, 'Fairness and enforcement: bridging competition, data protection, and consumer law' (2018) Vol 8 No 3 International Data Privacy Law 200, 204.

<sup>66</sup> Pinar Akman, *The concept of abuse in EU competition law* (Hart Publishing Ltd 2012) 180.

<sup>67</sup> Sarah Brown, 'European regulation of consumer credit: enhancing consumer confidence and protection from a UK perspective?' in James Devenney et al (eds) *Consumer credit, debt and investment in Europe* (Cambridge University Press 2012) 74.

<sup>68</sup> Inge Graef, Damien Clifford, Peggy Valcke, 'Fairness and enforcement: bridging competition, data protection, and consumer law' (2018) Vol 8 No 3 International Data Privacy Law 200, 204.

<sup>69</sup> Article 8 UCPD.

<sup>70</sup> Article 6 UCPD.

<sup>71</sup> Hugh Collins, 'Good Faith in European Contract Law' (1994) Vol 14 No 2 Oxford Journal of Legal Studies 229, 250.

<sup>72</sup> Martin Schermaier, 'Bona Fides in Roman Contract Law' in Reinhard Zimmermann, Simon Whittaker (eds) *Good Faith in European Contract Law* (Cambridge University Press 2000) 89.

<sup>73</sup> Bart van der Sloot, *Privacy as Virtue* (Cambridge University Press 2017) 107-143.

<sup>74</sup> Nathan R Kollar, 'Virtue Ethics' in John K Roth (ed) *Ethics* (Salem Press Inc 2005) 562.

<sup>75</sup> Shannon Vallor, *Technology and the Virtues: A Philosophical Guide to a Future Worth Wanting* (OUP 2016) 18.

understood virtues as character traits<sup>76</sup> such as honesty, courage and patience that promote the performance of right or excellent actions.<sup>77</sup> Particularly, the virtues of honesty and trust<sup>78</sup> seem to relate to the concept of good faith. Good faith is well suited to prevent data controllers from taking advantage of their stronger position and should, therefore, be considered when assessing the fairness of processing. Mačėnaitė made the same suggestion regarding the protection of children in an online context.<sup>79</sup>

When applying the notion of good faith to data protection law, data controllers should assess whether their data processing violates the concept of good faith. Good faith is typically an element of substantive fairness that concerns fairness between parties. The element of good faith has some overlap with the prohibition of the abuse of dominant position as discussed in Section 4.1.

### 3.2. No detrimental effects

*Detrimental effects* are an essential element for assessing substantive fairness because they directly refer to the *outcome* or *consequences* of a process.<sup>80</sup> For instance, output generated by AI systems may have detrimental effects on data subjects in many ways. Predictions facilitated by machine learning and other types of AI, such as negative score values, may prevent data subjects from obtaining a loan for buying a house, a mobile phone subscription, or health insurance coverage. The emotional state of a job applicant detected during an automated video assessment may play a role when the hiring manager is deciding whether the applicant is to be invited for a second round of interviews. Such detrimental effects generated by AI are generally problematic in terms of substantive fairness. They become even more problematic when the output generated by AI systems is *inaccurate or unverifiable* (see Section 5.2).

Putting someone at risk may have a detrimental effect on a data subject, even if that risk never materialises.<sup>81</sup> Harms relating to the processing of inaccurate personal data are highly contextual and depend on how such data is subsequently utilised. Adverse effects and actual harm depend on various factors, such as which data controller is processing the personal data, and whether the data is shared with other data controllers. In any case, inaccurate personal data inherently causes the risk of possible detrimental effects, irrespective of whether this risk materialises.

When applying detrimental effects as an element of substantive fairness in data protection law, data controllers should question whether the data processing leads to detrimental effects for the data subject, e.g., due to the nature of the personal data processed. Detrimental effects are not always prohibited and may sometimes be unavoidable, but data controllers should always consider how they account for detrimental effects. Detrimental effects are typically an element of substantive fairness that concerns the fairness of the outcome.

<sup>76</sup> Bart van der Sloot, *Privacy as Virtue* (Cambridge University Press 2017) 109.

<sup>77</sup> Shannon Vallor, *Technology and the Virtues: A Philosophical Guide to a Future Worth Wanting* (OUP 2016) 18.

<sup>78</sup> The virtues honesty and trust are related, see Shannon Vallor, *Technology and the Virtues: A Philosophical Guide to a Future Worth Wanting* (OUP 2016) 121. See also Aimee van Wynsberghe, 'Artificial intelligence: from ethics to policy' (2020) study prepared for European Parliament, 12.

<sup>79</sup> Milda Mačėnaitė, 'Protecting Children Online: Combining the Rationale and Rules of Personal Data Protection Law and Consumer Protection Law' in Mor Bakhom et al (eds) *Personal Data in Competition, Consumer Protection and Intellectual Property Law* (Springer Nature 2018) 368.

<sup>80</sup> Stephen A Smith, 'In Defence of Substantive Fairness' (1996) Vol 112 Iss 1 Law Quarterly Review 138-158.

<sup>81</sup> Danielle Keats Citron, Daniel J Solove, 'Privacy Harms' (2022) Vol 102 Iss 3 Boston University Law Review 793, 817-818.



### 3.3. Autonomy

The general idea of personal autonomy is “that people rule their own lives”,<sup>82</sup> which means freely facing both existential and everyday choices.<sup>83</sup> Thus, persons are considered to be autonomous when their decisions and actions are their own and thus self-determined.<sup>84</sup> This is in line with the idea that a person acts but is not acted upon.<sup>85</sup> Personal autonomy is closely related to privacy, partly because privacy seems to be a precondition for autonomy. From this perspective, privacy is an enabler of personal autonomy because it helps to sustain a person’s borders with the social environment.<sup>86</sup> Autonomy has become one of the core pillars of the fundamental right to privacy as per the case law of the European Court of Human Rights.<sup>87</sup>

External influences, such as manipulation, constitute threats to personal autonomy.<sup>88</sup> The concept of decisional privacy is well suited to address concerns about manipulation.<sup>89</sup> Decisional privacy entails being free to make personal decisions and choices.<sup>90</sup> This can be violated when manipulation invades internal thought processes, affects free will, or interferes with an individual’s self-interest.<sup>91</sup> Manipulation aims to influence people’s choices in ways that circumvent or counter rational decision-making.<sup>92</sup> It refers to exercising influence on an individual’s beliefs, desires, or emotions to the detriment of the individual’s self-interest<sup>93</sup> and may involve altering the actual choices available to a

<sup>82</sup> Joseph Raz, *The Morality of Freedom* (Oxford University Press 1986) 369; see also Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press 1988) 12, 18.

<sup>83</sup> Daniel Susser, Beate Roessler, Helen Nissenbaum ‘Technology, autonomy, and manipulation’ (2019) Vol 8 Iss 2 Internet Policy Review 1, 8.

<sup>84</sup> Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press 1988) 13.

<sup>85</sup> See Berlin, which explains the concept of autonomy under the heading positive liberty: ‘Isaiah Berlin, *Liberty* (Hendry Hardy ed Oxford University Press 1969) 185; Marijn Sax, *Between Empowerment and Manipulation* (Kluwer Law International B.V. 2021) 131.

<sup>86</sup> Hildebrandt Mireille, Koops Bert-Jaap, ‘The challenges of Ambient Law and Legal Protection in the Profiling Era’ (2010) Vol. 73 (3) *The Modern Law Review* 428, 435-436.

<sup>87</sup> Bart van der Sloot, ‘Decisional privacy 2.0: the procedural requirements implicit in Article 8 ECHR and its potential impact on profiling’ Vol 7 No 3 *International Data Privacy Law* 190, 192, *Munjaz v the United Kingdom* App no 2913/06 (17 July 2012) para 80; *NB v Slovakia* App no 29518/10 (12 June 2012); *IG and others v Slovakia* App no 15966/04 (13 November 2012); *VC v Slovakia* App no 18968/07 (8 November 2011).

<sup>88</sup> Lawrence Haworth, ‘Dworkin on Autonomy’ (1991) Vol 102 *Ethics* 129, 136.

<sup>89</sup> Marjolein Lanzig, ‘Strongly Recommended: Revisiting Decisional Privacy to Judge Hypernudging in Self-Tracking Technologies’ (2019) Vol 32 *Philosophy & Technology* 549-568.

<sup>90</sup> Bart van der Sloot, ‘Decisional privacy 2.0: the procedural requirements implicit in Article 8 ECHR and its potential impact on profiling’ Vol 7 No 3 *International Data Privacy Law* 190, 192.

<sup>91</sup> Francisco Lupiáñez-Villanueva et al, ‘Behavioural study on unfair commercial practices in the digital environment: dark patterns and manipulative personalisation’ (2022) Final Report produced by European Innovation Council and SMEs Executive Agency on behalf of the European Commission 92 < <http://op.europa.eu/en/publication-detail/-/publication/606365bc-d58b-11ec-a95f-01aa75ed71a1/language-en/format-PDF/source-257599418> > accessed 21 October 2022.

<sup>92</sup> Allen W Wood, ‘Coercion, Manipulation, Exploitation’ in Christian Coons, Michael Weber (eds) *Manipulation* (Oxford University Press 2014) 35.

<sup>93</sup> Anne Barnhill, ‘What is Manipulation?’ in Christian Coons, Michael Weber (eds) *Manipulation* (Oxford University Press 2014) 52.

person or changing a person’s perception of those choices.<sup>94</sup>

Note that good faith and refraining from manipulation and other forms of undue influence on autonomy are, to some extent, overlapping elements. If a data controller deliberately uses manipulative practices, this is not acting in good faith. However, acting in good faith may not ensure that all manipulative practices are avoided, as some forms of manipulation can be unintentional, for instance, because they are embedded in the design of technology.<sup>95</sup>

When applying autonomy as an element of substantive fairness in data protection law, data controllers should question whether it is likely that the data processing will negatively affect the data subject’s autonomy, particularly her decisional privacy. A data controller should thoroughly check whether there are any misleading or aggressive practices. Autonomy is typically an element of substantive fairness that concerns the fairness of the outcome.

### 4. Elements from EU competition law

The precise meaning of fairness in EU competition law is controversial<sup>96</sup> and what constitutes ‘fair’ or ‘unfair’ behavior is not exactly clear.<sup>97</sup> Among other reasons, this is partly due to the fact that fairness depends on the context since the legality of practices under competition law is evaluated on the basis of their anticompetitive nature or effects in the specific circumstances of a case.<sup>98</sup> Anticompetitive effects are considered as unfair if they ultimately deprive consumers of the power to arbitrate the marketplace, which underlines the social rationale of EU competition policy.<sup>99</sup>

In EU competition law, Article 102 of the Treaty on the Functioning of the EU (TFEU) prohibits certain unfair behavior as an abuse of a dominant position.<sup>100</sup> Both practices that are presumptively abusive (irrespective of their impact) and those that have, or are likely to have, anticompetitive effects fall under the prohibition.<sup>101</sup> Such abuse, for instance, consists of imposing unfair purchase or selling prices as well as other unfair trading conditions and limiting production, markets or

<sup>94</sup> Ruth Faden, Tom Beachamp, Nancy King, *A History and Theory of Informed Consent* (Oxford University Press 1986) 354. Custers, B., Dechesne, F., Pieters, W., Schermer, B., and Hof, S. van der (2018) *Consent and Privacy*, in: Andreas Müller and Peter Schaber (eds.) *Handbook of the Ethics of Consent*, London: Routledge, p. 247-258.

<sup>95</sup> Technology is usually not neutral and its design may include biases and prejudices of its designers. Melvin Kranzberg, ‘Technology and History: “Kranzberg’s Laws”’ (1995) Vol 15 Iss 1 *Bulletin of Science, Technology & Society* 5-13.

<sup>96</sup> Giulia Gentile, ‘Two Strings to One Bow? Article 47 of the EU Charter of Fundamental Rights in the EU Competition Case Law: Between Procedural and Substantive Fairness’ (2020) Vol 4 No 2 *Market and Competition Law Review* 169, 170.

<sup>97</sup> Pinar Akman, *The concept of abuse in EU competition law* (Hart Publishing Ltd 2012) 146; Barak Orbach, ‘Mandated neutrality, platforms, and ecosystems’ in Pinar Akman, Or Brook, Konstantinos Stylianou (eds) *Research Handbook on Abuse of Dominance and Monopolization* (Elgar Publishing 2023) 359.

<sup>98</sup> Inge Graef, Damien Clifford, Peggy Valcke, ‘Fairness and enforcement: bridging competition, data protection, and consumer law’ (2018) Vol 8 No 3 *International Data Privacy Law* 200, 204.

<sup>99</sup> Damien Gerard, ‘Fairness in EU Competition Policy: Significance and Implications’ (2018) Vol 9 No 4 *Journal of European Competition Law & Practice* 211-212.

<sup>100</sup> Pinar Akman, *The concept of abuse in EU competition law* (Hart Publishing Ltd 2012) 146.

<sup>101</sup> Pablo Ibáñez Colomo, ‘What is an abuse of a dominant position?’ in Pinar Akman, Or Brook, Konstantinos Stylianou (eds) *Research Handbook on Abuse of Dominance and Monopolization* (Elgar Publishing 2023) 85.



technical development to the prejudice of consumers.<sup>102</sup> A dominant company may discriminate against its customers with selective price cuts and targeted discounts.<sup>103</sup> Ultimately, Article 102 TFEU aims to prohibit the abuse of market power and it has been argued that unfairness in the context of competition law simply means exploitation.<sup>104</sup> In competition law, fairness is pivotal for a pluralistic market in which companies shall not exploit dominant positions, and consumers can efficiently use their financial resources.<sup>105</sup> Exploitation presupposes power inequalities between the parties concerned. In this context, power is the ability of private parties to influence one another towards their respective preferred outcomes.<sup>106</sup> In the case of power inequalities, one party can use its stronger position vis-à-vis the weaker party to obtain outcomes that it could not have achieved without that disparity in power.<sup>107</sup>

In 2022, the EU Digital Markets Act (DMA) came into force. The concept of fairness in the DMA aims to make the digital economy fairer and ensure a higher degree of competition. Corresponding research is needed to explore what fairness means under the DMA.<sup>108</sup> Fairness in the DMA is at some points connected to non-discrimination (e.g., Article 6.1d, 6.1i, and 6.1k DMA). Since non-discrimination is dealt with more extensively in non-discrimination law, this will be discussed in the next section. Thus, from EU competition law, we derive the prohibition on the abuse of a dominant position as an element of fairness.<sup>109</sup>

#### 4.1. Abuse of dominant positions

At first sight, it might be surprising that the element ‘power inequalities/dominant positions’<sup>110</sup> should be assessed in the context of fairness under data protection law.<sup>111</sup> Nevertheless, power inequalities often exist between data controllers and data subjects. This is pretty obvious: it is the data controller that determines the purpose of processing, the legal basis for processing, how long data will be stored,

<sup>102</sup> Article 102 TFEU.

<sup>103</sup> Marco Botta, ‘Exploitative abuses: recent trends and comparative perspectives’ in Pinar Akman, Or Brook, Konstantinos Stylianou (eds) *Research Handbook on Abuse of Dominance and Monopolization* (Elgar Publishing 2023) 115.

<sup>104</sup> Pinar Akman, *The concept of abuse in EU competition law* (Hart Publishing Ltd 2012) 184.

<sup>105</sup> Giulia Gentile, ‘Two Strings to One Bow? Article 47 of the EU Charter of Fundamental Rights in the EU Competition Case Law: Between Procedural and Substantive Fairness’ (2020) Vol 4 No 2 Market and Competition Law Review 169, 177.

<sup>106</sup> Daniel D Barnhizer, ‘Inequality of bargaining power’ (2005) Vol 76 Iss 1 University of Colorado Law Review 139,159.

<sup>107</sup> Pinar Akman, *The concept of abuse in EU competition law* (Hart Publishing Ltd 2012) 173.

<sup>108</sup> Jacques Crémer et al, ‘Fairness and Contestability in the Digital Markets Act’ (2023) Vol 40 Yale Journal on Regulation 973, 978.

<sup>109</sup> The GDPR also mentions possible discriminatory effects of processing in the context of profiling (recital 71), security (recital 75) and personal data breaches (recital 85).

<sup>110</sup> Note: under EU competition law, it must first be established that there is a dominant position in an identified market. Also, the concept of relative dominance as applied in certain member states should be considered.

<sup>111</sup> Because these concepts originate from EU consumer and competition law, which have different legislative aims

whether personal data is accurate, with whom data will be shared, and for which purposes personal data will be further processed after collection. Data subjects have enforceable rights but cannot influence most of the decisions the data controller makes regarding these aspects. Hence, there is a clear power inequality between data subjects and data controllers. This power inequality should be considered when assessing fairness in data protection law.

Regarding *abusing dominant positions*, a concept from EU competition law, competition authorities start to consider non-compliance with data protection law when assessing whether an undertaking abuses its dominant position or engages in other anti-competitive practices. Germany’s Competition Authority, the Bundeskartellamt, initiated proceedings against Google for its data processing terms, which allegedly amount to prohibited anti-competitive practices.<sup>112</sup> Advocate General (AG) Rantos of the Court of Justice of the EU (CJEU) argued that competition authorities may take compliance with the rules enshrined in the GDPR into consideration when examining an undertaking’s conduct under EU competition law.<sup>113</sup> The CJEU followed the AG’s opinion, provided that the competition authority fulfilled its duty of ‘loyal cooperation’ and consulted the competent data protection supervisory authority.<sup>114</sup> Also, the circumstances in which a controller holds a dominant market position are a relevant factor when assessing whether consent according to Article 4 (11) GDPR is freely given because a dominant market position affects the freedom of choice of the data subject.<sup>115</sup> Thus, the CJEU confirms that data protection law should be considered when examining an undertaking’s conduct under EU competition law. For this reason, it must also be possible to consider concepts from EU competition law, such as a controller’s dominant market position and power inequalities, when examining fairness under data protection law.

When applying the non-abuse of dominant position as an element of substantive fairness in data protection law, data controllers should assess whether they are exploiting any power inequalities or a dominant market position. Not abusing a dominant position is typically an element of substantive fairness that concerns fairness between parties.

## 5. Other elements of fairness

Apart from the elements of substantive fairness that can be found specifically in consumer law and competition law, there are also elements that can be found across several areas of law or (to some extent) in data protection law itself. Here, we discuss three further elements, i.e., non-discrimination, vulnerability, and accuracy. Non-discrimination obviously can be found in non-discrimination law, but also in competition law (see Section 4) and in data protection law.<sup>116</sup> Vulnerability is a term that is mentioned in the GDPR but not in consumer law or competition law. Nevertheless, vulnerability seems to be an underlying

<sup>112</sup> [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/11\\_01\\_2023\\_Google\\_Data\\_Processing\\_Terms.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/11_01_2023_Google_Data_Processing_Terms.html) accessed 15 January 2023.

<sup>113</sup> Case C-252/21 *Meta Platforms Inc.* [2022] ECR I-704, Opinion of AG Rantos paras 23-33.

<sup>114</sup> Case C-252/21 *Meta Platforms Inc.* [2023] ECR I-537 paras 56-63.

<sup>115</sup> *Ibid* paras 148-149, 154.

<sup>116</sup> The GDPR mentions possible discriminatory effects of processing in the context of profiling (recital 71), security (recital 75) and personal data breaches (recital 85).

concept in all these areas of law, in which a weaker party is protected against a stronger party.<sup>117</sup> Accuracy is an element that is explicitly mentioned in data protection law. These three elements (i.e. non-discrimination, vulnerability, and accuracy) are discussed below in more detail.

### 5.1. Non-discrimination

That the notion of *non-discrimination* must be considered in the context of substantive fairness is fairly obvious. This is anchored in Article 21 of the Charter of Fundamental Rights of the EU (CFEU).<sup>118</sup> Other areas of law also refer to non-discrimination, such as the DMA (e.g., Article 6.1d, 6.1i, and 6.1k DMA) and the GDPR in data protection law (e.g., Recitals 71 and 75, and Article 9 on the processing of special categories of personal data, i.e., sensitive data that could easily lead to discrimination).

There are many examples of the how processing of personal data may lead to discriminatory outcomes. For instance, due to deficiencies in reasoning capabilities, AI systems may generate output that is discriminatory. Google's photo app automatically classified images of black people as gorillas.<sup>119</sup> In New Zealand, a man of Asian descent had his passport application rejected because the software that approves photos claimed his eyes were closed.<sup>120</sup> AI may reflect the conscious and unconscious biases of the people who assemble it and thus produce biased outcomes.<sup>121</sup> This is called encoded bias, in which the designer's values

<sup>117</sup> Gianclaudio Malgieri, Jędrzej Niklas, 'Vulnerable data subjects' (2020) Vol 37 Computer Law & Security Review 2-16.

<sup>118</sup> Underlying this provision in primary legislation, a plethora of secondary legislation has been developed. For instance, Directive 2000/43/EC addresses discrimination on grounds of race and ethnic origin, Directive 2000/78/EC addresses discrimination at work on grounds of religion or belief, disability, age or sexual orientation, Directive 2006/54/EC regulates equal treatment for men and women in matters of employment and occupation, and Directive 2004/113/EC regulates equal treatment for men and women in the access to and supply of goods and services. These are just a few examples of regulation in this area – more specific regulation exists for protection of persons with disabilities, children, the elderly, etc. For more details, see for instance, FRA (2018) *Handbook on European non-discrimination law*, European Union Agency for Fundamental Rights, Vienna, Austria; See also Ellis, E., Watson, Ph. (2012) *EU anti-discrimination law*, Oxford: Oxford University Press.

<sup>119</sup> Crawford Kate, 'Artificial Intelligence's White Guy Problem' *The New York Times* (New York, 25 June 2016) <<https://www.nytimes.com/2016/06/26/opinion/sunday/artificial-intelligences-white-guy-problem.html>> accessed 05 October 2018.

<sup>120</sup> Titcomb James, 'Robot passport checker reject Asian man's photo for having his eyes closed' *The Telegraph* (London, 7 December 2016) <<https://www.telegraph.co.uk/technology/2016/12/07/robot-passport-checker-rejects-asian-mans-photo-having-eyes/>> accessed 10 March 2019.

<sup>121</sup> Brent Daniel Mittelstadt et al, 'The ethics of algorithms: Mapping the debate' (2016) Vol 3 Iss 2 Big Data & Society 1, 7.

are "frozen into the code, effectively institutionalising those values".<sup>122</sup> The interests, needs and life experiences of technology developers will be reflected in the particular AI that they develop,<sup>123</sup> potentially including stereotyped thinking in terms of traditional gender roles<sup>124</sup> or racial/ethnic prejudices.

When applying non-discrimination as an element of substantive fairness in data protection law, data controllers should assess whether their personal data processing is likely to be discriminatory. Non-discrimination is typically an element of substantive fairness that concerns the fairness of the outcome.

### 5.2. Taking vulnerabilities into account

*Vulnerability* is mentioned in recital 75 GDPR in the context of security of processing. The recital states that children must particularly be considered as "vulnerable natural persons". However, not only children are potentially vulnerable data subjects. In our view, data subjects are also vulnerable when special categories of personal data relating to them are being processed. Due to the sensitivity of such data, its processing is particularly likely to create harm.<sup>125</sup> Vulnerability also plays an important role in the processing of emotion data. In fact, revealing emotions makes an individual potentially more vulnerable.<sup>126</sup> Whereas not specifically enshrined in specific provisions, data protection law arguably manifests the idea that data subjects are vulnerable<sup>127</sup> simply by regulating the processing of personal data. It seems reasonable to assess the vulnerability<sup>128</sup> of data subjects in the context of the fairness principle and not only in the context of other provisions in the GDPR.<sup>129</sup>

Note, however, that vulnerability overlaps to some extent with other elements of substantive fairness already discussed, such as power inequalities, detrimental effects, and discrimination. When applying vulnerability as an element of substantive fairness in data protection law, data controllers should assess whether the data subject is vulnerable. If so, data controllers should take this vulnerability into account. Vulnerability is typically an element of substantive fairness that concerns fairness between parties.

<sup>122</sup> Kevin Macnish, 'Unblinking the eyes: the ethics of automating surveillance' (2012) Vol 14 Ethics and Information Technology 151, 158.

<sup>123</sup> Alex Campolo et al, 'AI Now Report' (2017) 15 <<https://ainowinstitute.org/publication/ai-now-2017-report-2>> accessed 05 October 2018.

<sup>124</sup> Janneke Gerards, Raphaële Xenidis, 'Algorithmic discrimination in Europe: Challenges and Opportunities for gender equality and non-discrimination law' (2021) at 51 study prepared for the European Commission <<https://op.europa.eu/en/publication-detail/-/publication/082f1dbc-821d-11eb-9ac9-01aa75ed71a1>> accessed 05 May 2021.

<sup>125</sup> Art 29 Working Party, 'Advice paper on special categories of data ("sensitive data")' (20 April 2011) at 4.

<sup>126</sup> Aaron Ben-Ze'Ev, *The Subtlety of Emotions* (MIT Press 2000) 183.

<sup>127</sup> Ryan Calo, 'Privacy, Vulnerability, and Affordance' (2017) Vol 66 Iss 2 *DePaul Law Review* 591, 592-593; Gianclaudio Malgieri, Jędrzej Niklas, 'Vulnerable data subjects' (2020) Vol 37 Computer Law & Security Review 2-16.

<sup>128</sup> For an extensive analysis of vulnerable data subjects, see Gianclaudio Malgieri, *Vulnerable People and Data Protection Law* (Oxford University Press 2022).

<sup>129</sup> Such as consent, data protection impact assessments, and automated decision-making as argued elsewhere see Gianclaudio Malgieri, Jędrzej Niklas, 'Vulnerable data subjects' (2020) Vol 37 Computer Law & Security Review 2-16.

### 5.3. Accuracy

Article 5.1d GDPR states that data should be accurate and, where necessary, kept up to date. Although accuracy can be considered an element of procedural fairness (i.e., the way in which data are collected and processed should be accurate), it also can be an element of substantive fairness. Accuracy is important in this context. If people are assessed based on inaccurate data, the outcome of such processing is likely to be unfair.

Inaccurate personal data may pose significant risks, for instance, in the form of economic or reputational harm.<sup>130</sup> Predictive profiling powered by machine learning and other types of AI may be used to predict an individual's behavior, character, or risk (e.g., score values) and to treat someone accordingly.<sup>131</sup> Predictions usually are not absolutely certain, as they are probabilistic and have error margins. If predictions are essentially considered as *facts*, despite their probabilistic nature, this will have a real impact on humans, for instance, when applying for a loan or insurance. Also, predictions are often difficult to verify (e.g., a prediction that someone will buy a house in two years may be disproved after two years) and sometimes impossible to verify (e.g., an individual is a 'high credit risk').<sup>132</sup> The accuracy of some data can be checked by data subjects (e.g., their date of birth, address, or hobbies and preferences), but for other data, this is impossible (e.g., whether they will attract some form of cancer within ten years). Emotion data generated by affective computing systems represent factually uncertain information about the emotional states of individuals. When emotion data are considered as facts, despite their questionable accuracy, it might unduly impact people's lives and access to opportunities.<sup>133</sup>

When applying accuracy as an element of substantive fairness in data protection law, data controllers should assess whether the processed personal data is potentially inaccurate. Most data have some level of inaccuracy, so data controllers should also determine the level of inaccuracy of their data and, subsequently, of the conclusions and decisions they infer from their datasets. Accuracy is typically an element of substantive fairness that concerns the fairness of the outcome.

<sup>130</sup> Danielle Keats Citron, Daniel J Solove, 'Privacy Harms' (2022) Vol 102 Iss 3 Boston University Law Review 793, 817; Custers, B.H.M. (2003) *Effects of Unreliable Group Profiling by Means of Data Mining*. In: G. Grieser, Y. Tanaka and A. Yamamoto (eds.) *Lecture Notes in Artificial Intelligence, Proceedings of the 6th International Conference on Discovery Science (DS 2003)* Sapporo, Japan. Berlin, Heidelberg, New York: Springer-Verlag, Vol. 2843, p. 290-295.

<sup>131</sup> Helena U Vrabec, 'Uncontrollable: Data Subject Rights and the Data-driven Economy' (Dissertation, Leiden University 2019) 220; Hans Lammerant, Paul de Hert, 'Predictive profiling and its legal limits: Effectiveness gone forever' In Bart van der Sloot et al (eds) *Exploring the boundaries of big data* (2016 Amsterdam University Press/WRR) 145-173. Custers, B.H.M., and Bachlechner, D. (2018) Advancing the EU Data Economy; Conditions for Realizing the Full Potential of Data Reuse, *Information Polity*, Vol. 22, No. 4, p. 291-309. DOI 10.3233/IP-170419

<sup>132</sup> Sandra Wachter, Brent Mittelstadt, 'A Right to Reasonable Inferences: Re-Thinking Data Protection Law in the Age of Big Data and AI' (2019) Issue 2 Columbia Business Law Review 494, 510.

<sup>133</sup> Kate Crawford et al, 'AI Now Report' (2019) AI Now Institute 6 <[https://ainowinstitute.org/AI\\_Now\\_2019\\_Report.pdf](https://ainowinstitute.org/AI_Now_2019_Report.pdf)> accessed 6 July 2020.

**Table 1**

Elements of substantive fairness according to EU consumer law, competition law or other areas of law.

Elements of substantive fairness	Area of EU law
Good faith	Consumer law
No detrimental effects	Consumer law
Autonomy (no misleading/aggressive practices)	Consumer law
No abuse of dominant positions (and power inequalities)	Competition law
Non-discrimination	Non-discrimination law, Competition law, Data protection law
Taking vulnerabilities into account	Consumer law, Competition law, Data protection law
Accuracy	Data protection law

## 6. Conclusion

In this paper, we argued that substantive fairness is an essential part of the GDPR's fairness principle and necessary to achieve the GDPR's goal of offering effective protection to data subjects.<sup>134</sup> The primary argument is that some forms of data processing can still be unfair, even if all the GDPR's procedural rules are complied with. As substantive fairness is never mentioned in the GDPR and no further guidance on substantive fairness is provided, we distilled elements of substantive fairness from other areas of law, such as EU consumer law, competition law, non-discrimination law, and (to some extent) from data protection law itself. We derived a total of seven elements. Table 1 shows an overview of these elements of substantive fairness.

For all of the elements listed in Table 1, it can be argued they are essential for substantive fairness in the GDPR. Any processing of personal data potentially has fairness issues if it does not take place in good faith, has detrimental effects, exercises undue influence over a data subject's autonomy, abuses a dominant position, leads to discrimination, does not take into account vulnerabilities, or has limited accuracy. Neglecting these elements is likely to render the data processing unfair. Note, however, that disregarding these elements does not presently constitute a violation of the GDPR<sup>135</sup> due to the focus on procedural fairness. We argue that a violation of substantive fairness, even though not specified in the GDPR, should also constitute a violation of Article 5.1a GDPR.

We argue that the GDPR's fairness principle should be interpreted as including substantive fairness next to the procedural fairness that already is given ample attention in the GDPR. This offers a more comprehensive approach towards fairness, whereas the current approach, focusing mostly or solely on elements of procedural fairness, does not guarantee fair outcomes. The one-sided focus on procedural fairness allows data controllers to focus on grammatical (i.e., black letter law) interpretations of the GDPR provisions rather than on teleological interpretations (i.e., protections the GDPR intends to offer).

The GDPR fails to explain what substantive fairness is and how it could or should be achieved. Table 2 provides an overview of how the

<sup>134</sup> Obviously, this is a teleological interpretation of Article 5.1a GDPR. Cf. Pescatore, P. (2972) *Les objectifs de la Communauté européenne comme principes d'interprétation dans la jurisprudence de la Cour de justice*, Vol. 2, Miscellanea W.J. Ganshof van der Meersch 328; Koen Lenaerts, José A Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' (2013) European University Institute Working Paper AEL 2013/9 at 6 <[https://cadmus.eui.eu/bitstream/handle/1814/28339/AEL\\_2013\\_09\\_DL.pdf?sequence=1&isAllowed=y](https://cadmus.eui.eu/bitstream/handle/1814/28339/AEL_2013_09_DL.pdf?sequence=1&isAllowed=y)> accessed 21 October 2022.

<sup>135</sup> Except for non-discrimination because Recital 71 GDPR mentions discriminatory effects explicitly in the context of fair processing.

identified elements of substantive fairness can be taken into account by data controllers.

To further implement these elements of substantive fairness in actual practice, the European Data Protection Board (EDPB) could adopt extensive guidelines on the fairness principle and include these seven elements of substantive fairness therein. The considerations in Table 2 could provide a basis for this exercise. Dedicated regulatory guidance on the fairness principle does not yet exist, although some EDPB regulatory guidance<sup>136</sup> and regulatory enforcement at the EU level<sup>137</sup> already point to several of these elements<sup>138</sup> of substantive fairness. Implementing the proposed elements of substantive fairness is also in line with the CJEU's case law, which gives preference to the method of interpretation that ensures and maintains the effectiveness of the provision.<sup>139</sup>

The list of elements of substantive fairness provided in this paper may not be exhaustive. We already pointed out in Sections 3 through 5 that some elements may partially overlap. We think further research in this area may reveal other elements that may need to be added.

A more general observation is that the GDPR is full of balancing exercises (e.g., balancing the interests of data subjects and data controllers), but never draws any red lines. There are hardly any forms of collecting and processing personal data that are absolutely off-limits. Even the use of special categories of personal data (i.e., sensitive data like gender, ethnicity, religion) is allowed under specific conditions. This allows data controllers to stretch proportionally considerations to their advantage (like the legitimate interests in Article 6.1f GDPR). The GDPR's focus on procedural fairness leads to a compliance-based approach rather than a risk-based approach. This may not result in the level of protection of personal data that the GDPR intends to offer.<sup>140</sup> Our suggested elements of substantive fairness could be used to draw red lines: not considering them would result in a violation of the GDPR's fairness principle.

<sup>136</sup> European Data Protection Board, 'Guidelines on Article 6(1)(b) GDPR' (Guidelines 2/2019, 8 October 2019), at 6.

<sup>137</sup> Binding Decision 2/2023 on the dispute submitted by the Irish SA regarding TikTok Technology Limited (Art. 65) adopted 2 August 2023 para 103; Binding Decision 3/2022 on the dispute submitted by the Irish SA on Meta Platforms Ireland Limited and its Facebook service (Art. 65 GDPR), adopted on 5 December 2022 paras 219-220, 222-223; Binding Decision 4/2022 on the dispute submitted by the Irish SA on Meta Platforms Ireland Limited and its Instagram service (Art. 65 GDPR), adopted on 5 December 2022 paras 223-224, 226-227; Binding Decision 5/2022 on the dispute submitted by the Irish SA on Meta Platforms Ireland Limited and its WhatsApp service (Art. 65 GDPR), adopted on 5 December 2022.

<sup>138</sup> These are possible (i) adverse consequences of processing which is the same as our suggested element *no detrimental effects*, (ii) the data subject's autonomy and (iii) effects of power imbalance which essentially relate to our suggested element of *non-exploitation of dominant positions/no power inequalities*.

<sup>139</sup> Case C-31/17 *Cristal Union* [2018] ECR I-168 para 41; Case C-517/07 *Afton Chemical* [2008] ECR I-751 para 43; Case C-152/13 *Holger Forstmann Transporte* [2014] ECR I-2184 para 26.

<sup>140</sup> Particularly vulnerable groups, such as children would benefit from strong protection against this, see Simone van der Hof, Eva Lievens, The Importance of Privacy by Design and Data Protection Impact Assessments in Strengthening Protection of Children's Personal Data Under the GDPR (2018) Vol 23(1) *Communications Law* 33-43; Simone van der Hof, I Agree... Or Do I? A Rights-Based Analysis of the Law on Children's Consent in the Digital World (2017) 34(2) *Wisconsin International Law Journal* 409-445. Karoni La Fors-Owczynik, Profiling 'Anomalies' and the Anomalies of Profiling: Digitalized Risk Assessments of Dutch Youth and the New European Data Protection Regime. In: Adams S., Purtova N., Leenes R. (Eds.) *Under Observation: The Interplay Between eHealth and Surveillance*. Law, governance and technology series no. 35 (Springer 2017) 107-138.

**Table 2**

Elements of substantive fairness to be considered under the GDPR's fairness principle.

Elements concerning the fairness between the parties	
<i>Good faith</i>	Does the balancing of interests violate the concept of good faith?
<i>No abuse of dominant positions (and power inequalities)</i>	Is the data controller abusing power inequalities and/or dominant market positions?
<i>Taking vulnerabilities into account</i>	Is the data subject vulnerable? Is vulnerability taken into account?
Elements concerning the fairness of the outcome	
<i>No detrimental effects</i>	Does the processing likely lead to detrimental effects for the data subject, e.g., due to the nature of the personal data processed? If so, how is this taken into consideration?
<i>Autonomy (no misleading/aggressive practices)</i>	Is it likely that the processing will negatively affect the data subject's autonomy, particularly decisional privacy? Are there any misleading or aggressive practices?
<i>Non-Discrimination</i>	Is the outcome of the processing likely to be discriminatory?
<i>Accuracy</i>	Is the processed personal data likely to be inaccurate? What is the level of inaccuracy of the data and, subsequently, of the conclusions and decisions inferred from the datasets?

This is in strong contrast with the EU's AI Act proposal,<sup>141</sup> in which some types of AI are explicitly prohibited. Typical examples are the prohibition of AI systems that deploy subliminal and purposefully manipulative or deceptive techniques, exploit vulnerabilities of people, social scoring systems, and remote real-time biometric identification by law enforcement (Article 5 AI Act). The AI Act takes a risk-based approach and states that some technologies pose such high risks that they are not allowed under any circumstances.<sup>142</sup> Other AI systems listed in Annex III of the AI Act are considered high risk, for instance, emotion recognition systems and certain AI systems intended to be used in an employment context (Article 6 AI Act). A further focus in the GDPR on substantive fairness could help shift the focus from the current compliance-based approach relating to procedural fairness requirements towards a teleological interpretation of EU law,<sup>143</sup> ensuring fairness through offering effective protection for data subjects. One way to do this could be a more risk-based approach. Under this approach, if the risks of processing are low, data controllers can turn their focus on procedural requirements. However, if risks are high, data controllers have a responsibility to look beyond the GDPR's procedural requirements and should also assess the substantive elements of fairness.

The GDPR does not a priori rule out any forms of data processing. Having clearer guidance on what (substantive) fairness entails will

<sup>141</sup> See the leak of the 'final version' under column 'draft agreement' available here: <https://drive.google.com/file/d/1xfN5T8VChK8fSh3wUiytrVOKii9oICAF/view> accessed 23 January 2024.

<sup>142</sup> Bart Custers, Eduard Fosch Villaronga, *Law and Artificial Intelligence: Regulating AI and Applying AI in Legal Practice* (Springer 2022) 569.

<sup>143</sup> Substantive fairness fits with teleological interpretation in EU law, which demands the CJEU to give concrete expressions to notions that are unclear or too general see Pierre Pescatore, 'Les objectifs de la Communauté européenne comme principes d'interprétation dans la jurisprudence de la Cour de justice' (1972) vol 2 *Miscellanea W.J. Ganshof van der Meersch* 328; Koen Lenaerts, José A Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' (2013) European University Institute Working Paper AEL 2013/9 at 6 <[https://cadmus.eui.eu/bitstream/handle/1814/28339/AEL\\_2013\\_09\\_DL.pdf?sequence=1&isAllowed=y](https://cadmus.eui.eu/bitstream/handle/1814/28339/AEL_2013_09_DL.pdf?sequence=1&isAllowed=y)> accessed 30 June 2023.



contribute to the effective and strong protection of personal data that the GDPR aims<sup>144</sup> to achieve.

#### **Declaration of competing interest**

Authors declare to have no competing interests.

#### **Data availability**

No data was used for the research described in the article.

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<sup>144</sup> Recitals 7, 11 and 17 GDPR. Case C-645/19 [2021] Facebook Ireland ECR I-483 para 45; Case C-319/20, Meta Platforms Ireland Limited [2022] ECR I-322 para 73