

Personal (Big) Data Ownership in the behavioural data market

The challenge of “Pricing Privacy”

Gianclaudio Malgieri

PhD Researcher in Law and Technology

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1. Introduction

Finding a common solution for 2 problems:

- Increasing consumers' **awareness** toward *behavioural profiling* and toward "*the myth of free services*" and
- reaffirming data protection rights against IP Rights of businesses: data **ownership**

Informing users about the price of their psychological profile

European Commission in its *Digital Single Market Strategy* in Europe (COM(2015) 192 final) has scheduled the **European Free Flow of Data Initiative** :

"The Commission will address the emerging issues of **ownership**, *interoperability, usability and access to data*"

2. The opaque reality

Data Ownership and Data Pricing are two de facto reality in *our behavioral Internet*:

- The de facto property of Information Multinationals (GAFAM) on our personal data (e.g. considering excludability and rivalrousness) (*Purtova, 2015*)
- Trade Secrets definition can include personal data (*Malgieri, 2016*)
- Discounts if we accept profiling (e.g. insurance policies at better prices) (see *Christl, Spiekermann, “Network of Controls”, 2016*)

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“If something is free you must be the product”

(S. Goodson)

- Trade Secret
- Discounts if we accept profiling (e.g. insurance policies at better prices) (see *Christl, Spiekermann, “Network of Controls”, 2016*)

3. Changing Approach

Changing paradigm: from protecting consumers to empowering prosumers

Considering information asymmetry and the personalized exploitation of biases and vulnerabilities of digital users:

The best way to protect users in the Data Market is to give them power in the marketplace of data

Behavioural Economics applied to Consumer Law and Data Protection Law (see Borgesius, 2014)

4. Legal *tips* for Data Ownership and Data “Price” in the EU

Recital 68, GDPR

the rationale of right to data portability is to “*further strengthen the control* [of the data subject] over ***his or her own*** data”.

(for the first time “his own data” is used, instead of “data relating to”, “referring to”, “concerning”).

Art. 3(1), Proposal for a Directive on certain aspects concerning contracts for the supply of digital content. COM/2015/0634 final

“This Directive shall apply to any contract where the supplier supplies digital content to the consumer or undertakes to do so and, *in exchange, a price is to be paid or the consumer actively provides counter-performance other than money in the form of personal data or any other data*”

User-generated content as payment in Licence Agreements



Art. 1 – On Instagram the user provides Instagram with a non-exclusive licence, **totally paid**, free from royalty, which can be sub-licensed and is valid worldwide, for the use of Content the he or she publishes on Instagram.

5. Ownership and Pricing justification

Theoretical *criticisms* and *counterarguments*

Human Rights Perspective

Art. 8, ECHR
Art. 7 and 8, CFR

Strong link between privacy and property (e.g., *Wilkes v. Wood*, 1736; *Hannah Harendt*, etc.)

Law and Economics Perspective

- No need of incentives
- A **de facto property** on personal data already exists (Max Planck, 2016)

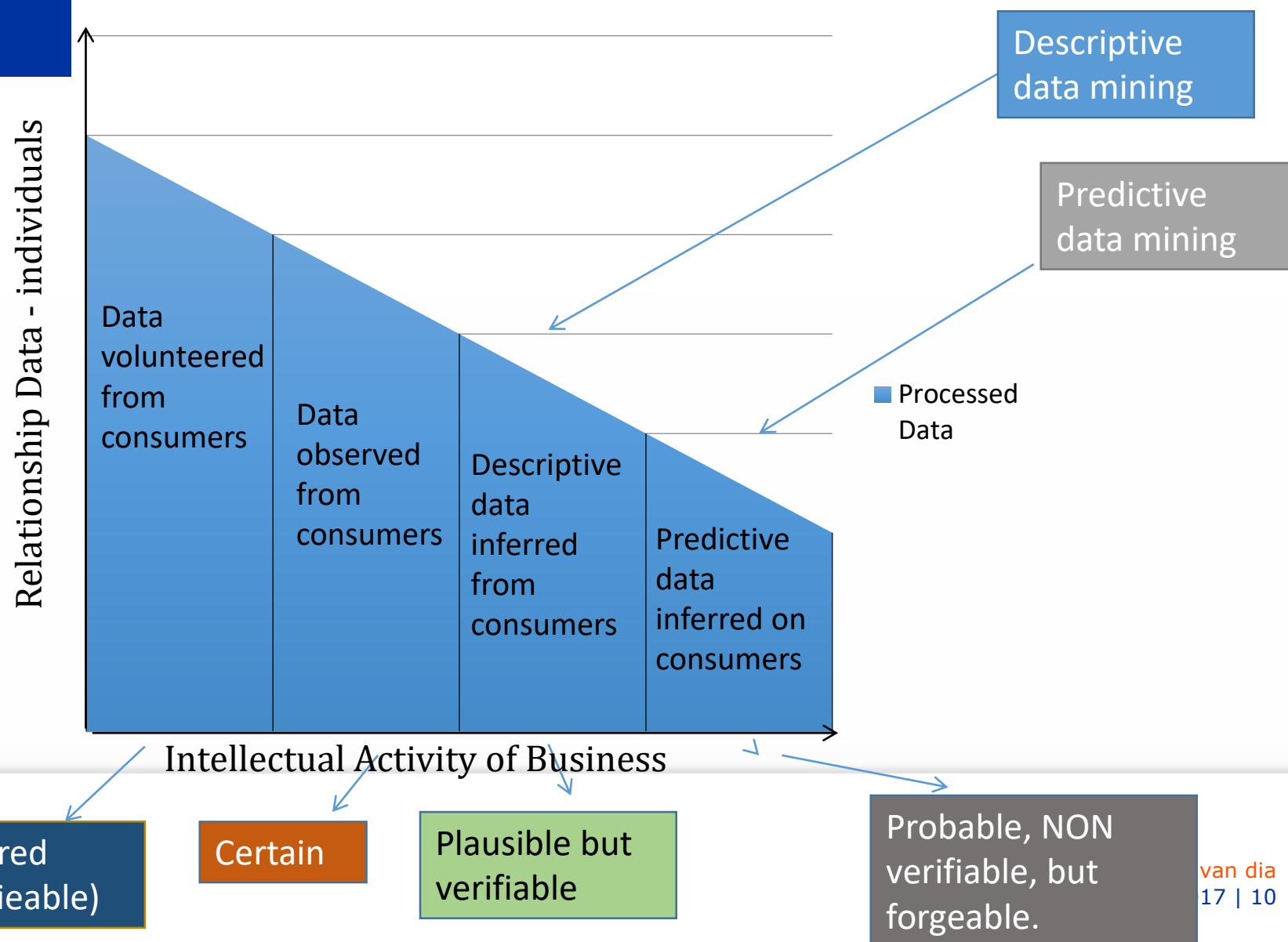
The status quo is a huge asymmetry and a strong complexity in the determination of owners

A new model for ownership borderlines

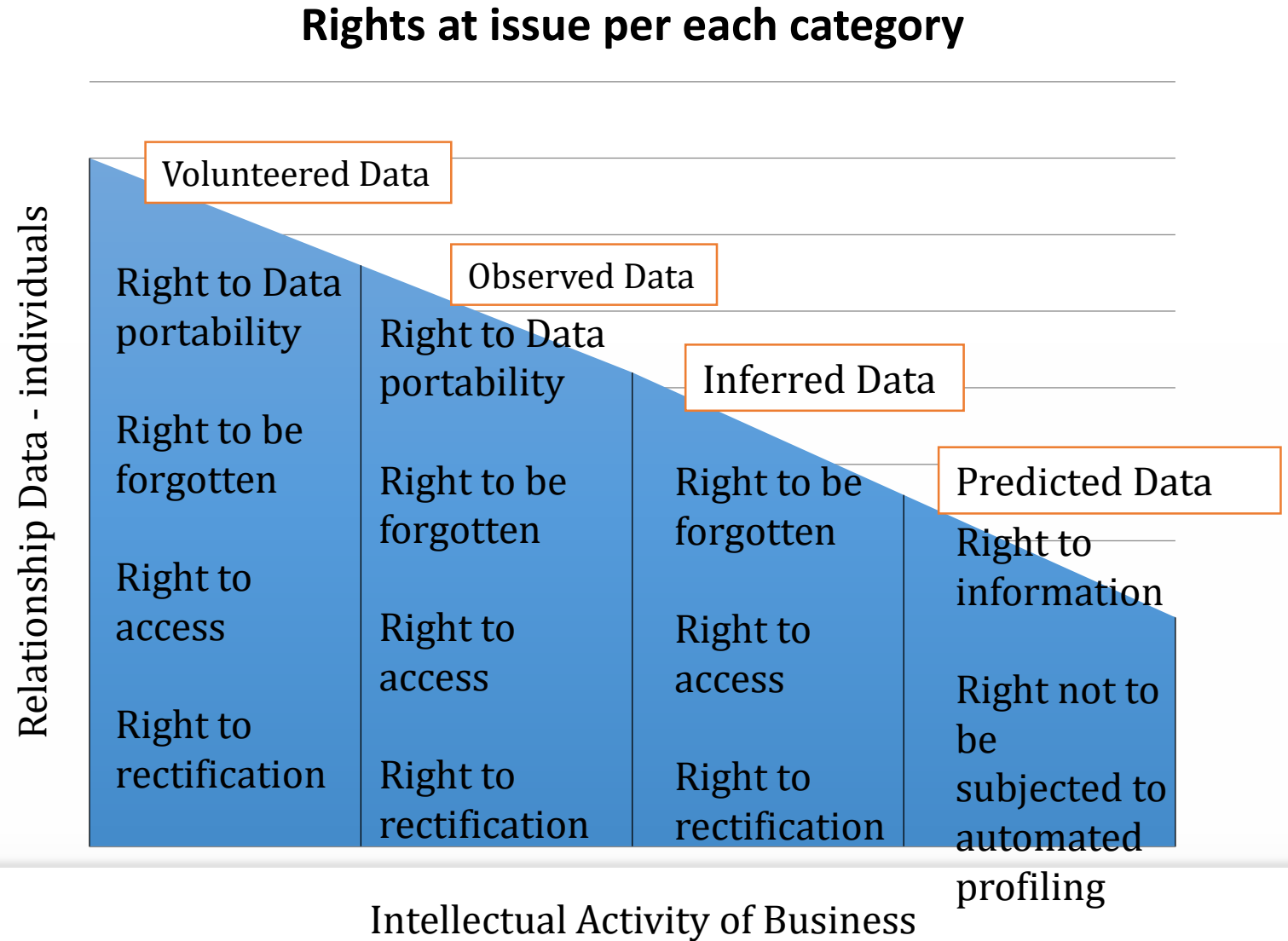
- Different levels of ownership in the conflict between businesses and consumers

(See *Malgieri, 2016*)

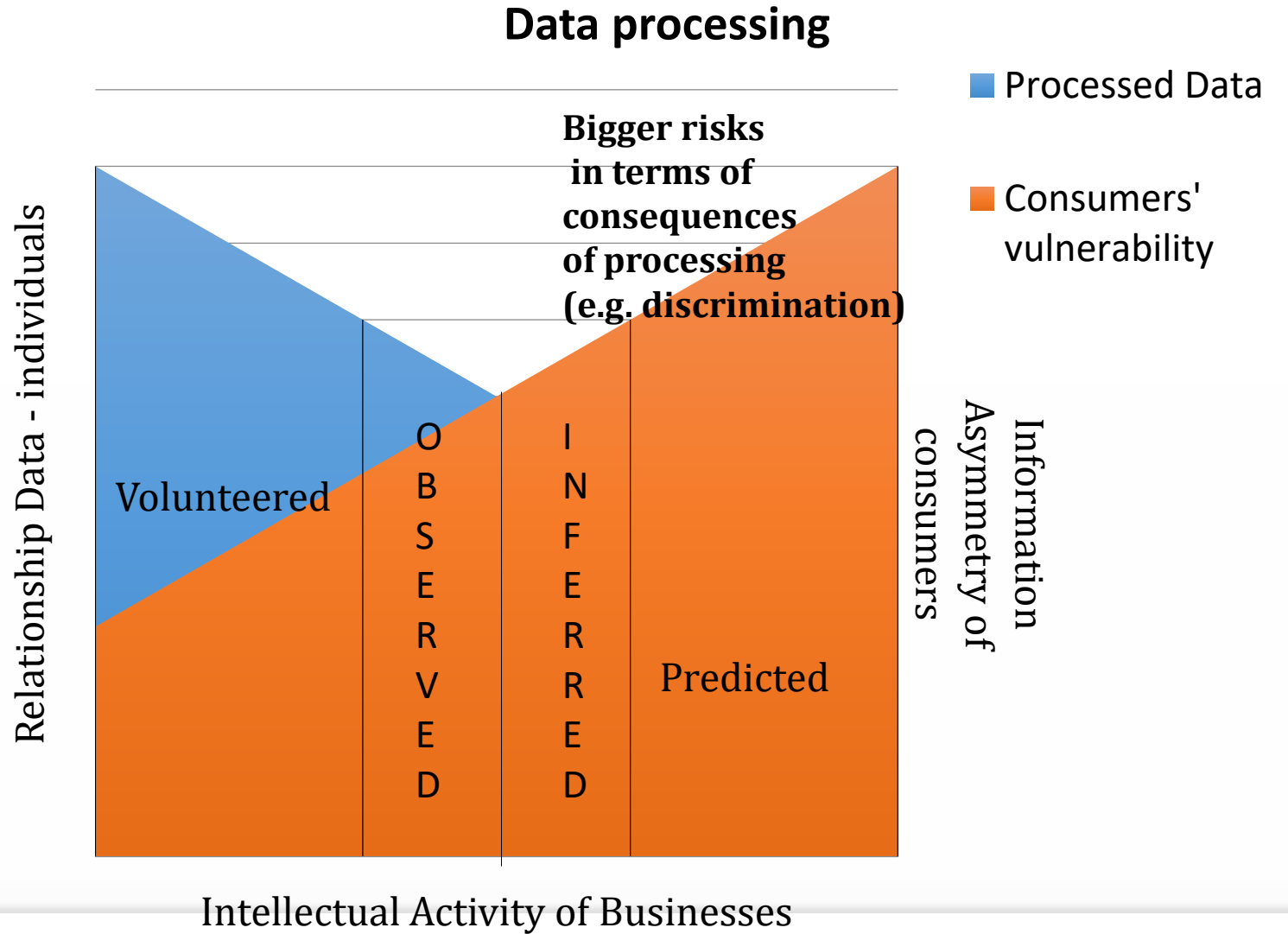
A new taxonomy of Personal Data



Decreasing
control rights for
consumers



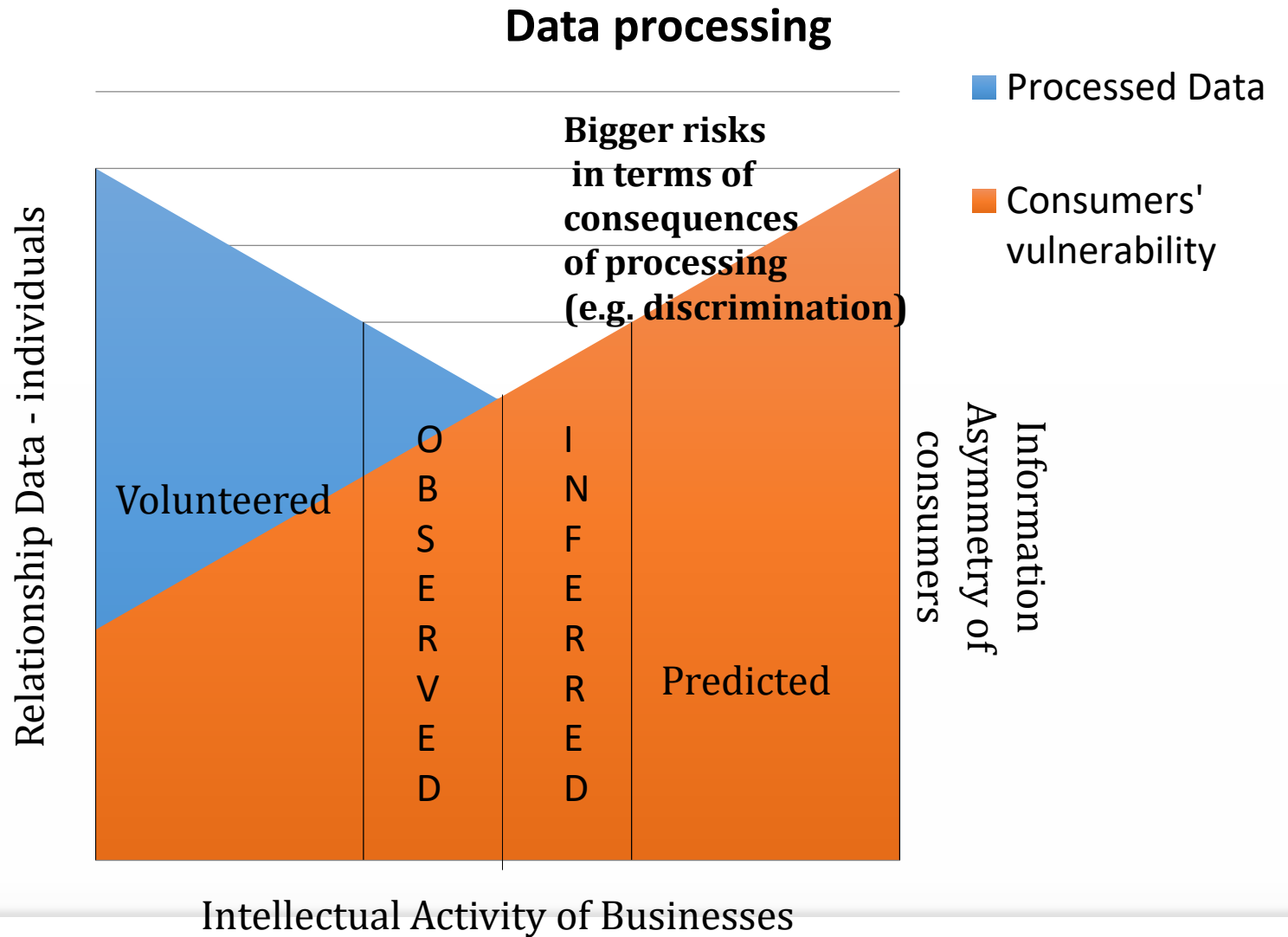
A new variable: Information asymmetry



GDPR seems to set higher ownership on consumers on **Volunteered and Observed data**, while for inferred and predicted the prevailing owners seems to be the business.

But **“value” of data is general**: volunteered and observed data are used to build value of predicted data!

So the value is on the whole profiling not on the single piece of data.



7. Pricing data: objective parameters

Pricing data:

- Impact on awareness (see *Newell, Siikamaki, 2014*)
- Objective parameters :
 - Top-down, **demand of data**: an average between how much businesses earn from online advertising considering the number of pieces of information available (*Financial Times' Calculator; Petkova, Hacker, 2016*)
 - Bottom-up, **supply of data** (loss of privacy as “objective harms” (Calo, 2011): information asymmetry, increasing risk of discrimination, more vulnerability towards behavioural algorithms => being paid to disclose data would be a form of “reverse liability” (see Calabresi, Melamed as read in the Data Protection field by Surblyte, 2014)
- Why pricing personal data can be done only in an “online behaviour” system: not data itself, but “digital identity” is worth

8. Proposals at stake: the active choice

- Proposals already at stake from US (Petkova, Hacker, 2016):

the **active choice** between paying by data or paying by money (e.g. in social network).

| <i>Your Choice!</i> | |
|---|---|
| <i>You may now choose between two different options to sign up for Facebook:</i> | |
| Data Collection Option | Data Free Option |
| For this option, you pay with your data . An average user gives away monthly data worth about \$4. | For this option, you pay with your money instead of your data. The monthly price is \$[x]. |
| The collected data enables the construction of your entire psychological profile . Each time you log on, imagine you start a new session with a company psychiatrist. | This option does not allow for the construction of a psychological profile . |

9. Criticisms

| | |
|-----------------|---|
| Legal | The applicability of the “active choice” model in the GDPR framework (freedom of consent) |
| Ethical | risk of commodification of digital identities and discrimination based on richer data owners. |
| Practice | The effectiveness of control over Data Controllers “pricing” and the feasibility of this system |

9. Criticism: freedom of consent

- The applicability of the “active choice” model in the GDPR:

Article 7(4), GDPR => freedom of Consent

“utmost account shall be taken of whether, inter alia, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract” [also recital 42: “withdraw consent without detriment”]



Customers cannot “pay by data” because they must be free to withdraw the consent to unnecessary data processing without any adverse consequence!

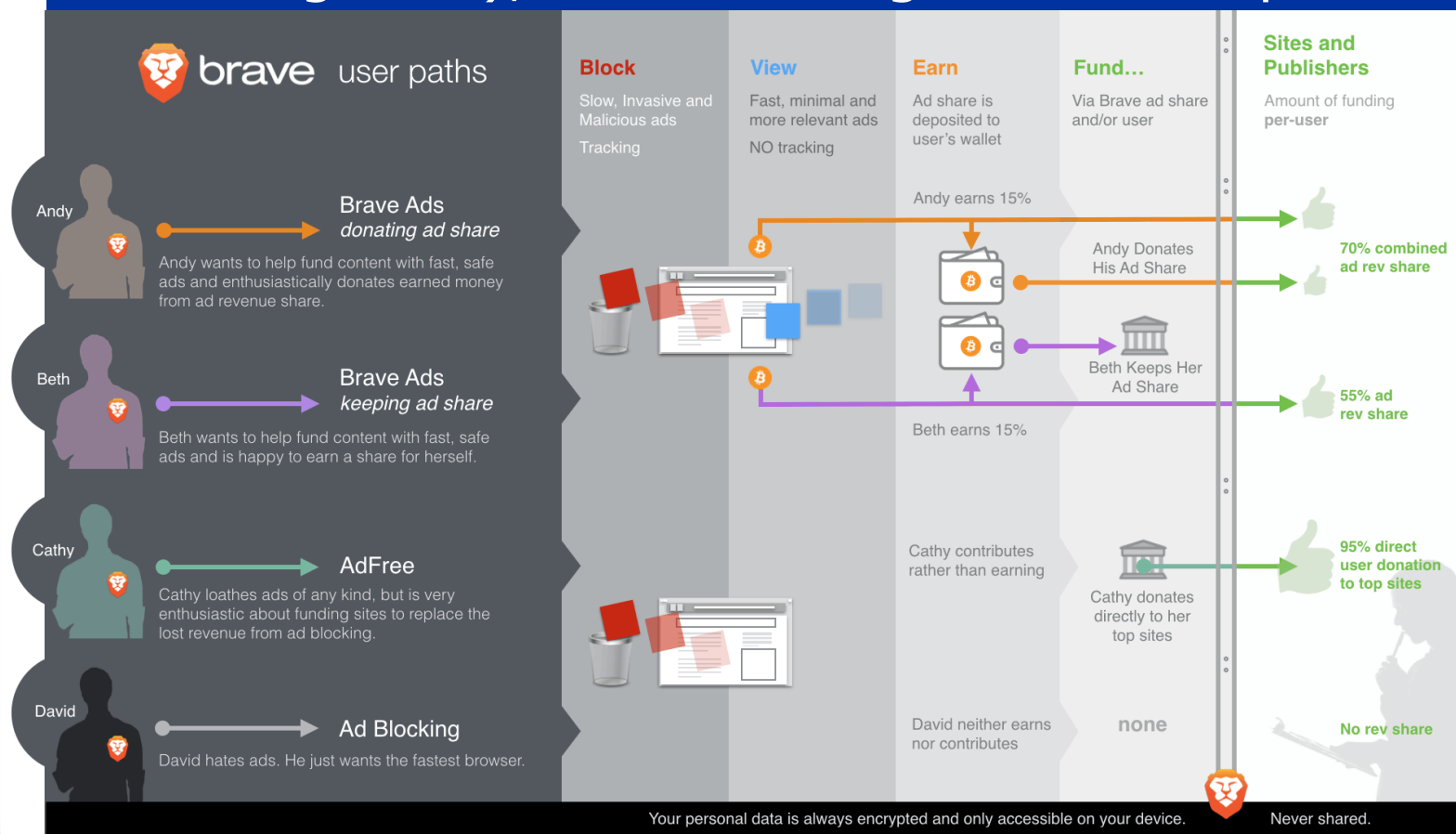
10. A counter-proposal

De lege ferenda:

- **a new right to information under article 13 GDPR about price:** in each data processing where the value of customers' personal data is relevant for the economic transaction, the price of these data (calculated on objective parameters) should be communicated to the consumer.
- The oversight of Data Protection Authorities: as antitrust authorities on data pricing

See G. Malgieri, B. Custers, *Pricing Privacy*, forthcoming, 2017.

A Virtuous examples already at stake: sharing personal data (non blocking data), but receiving “economic power” from it



BRAVE is a new browser where all Ads, cookies and trackers are blocked and replaced with some “trustworthy” partners ads: The income from that profiled advertisement is shared for the 15% with users.

Users can “collect” money from their behavioral profiling and “spend” such money to support websites or advertisers that they like

Thank you!

gianclaudio.malgieri@vub.ac.be