



Bird & Bird & Digital Innovation & Legal challenges in a data-driven environment

DISCOVERY Transatlantic ICT Forum



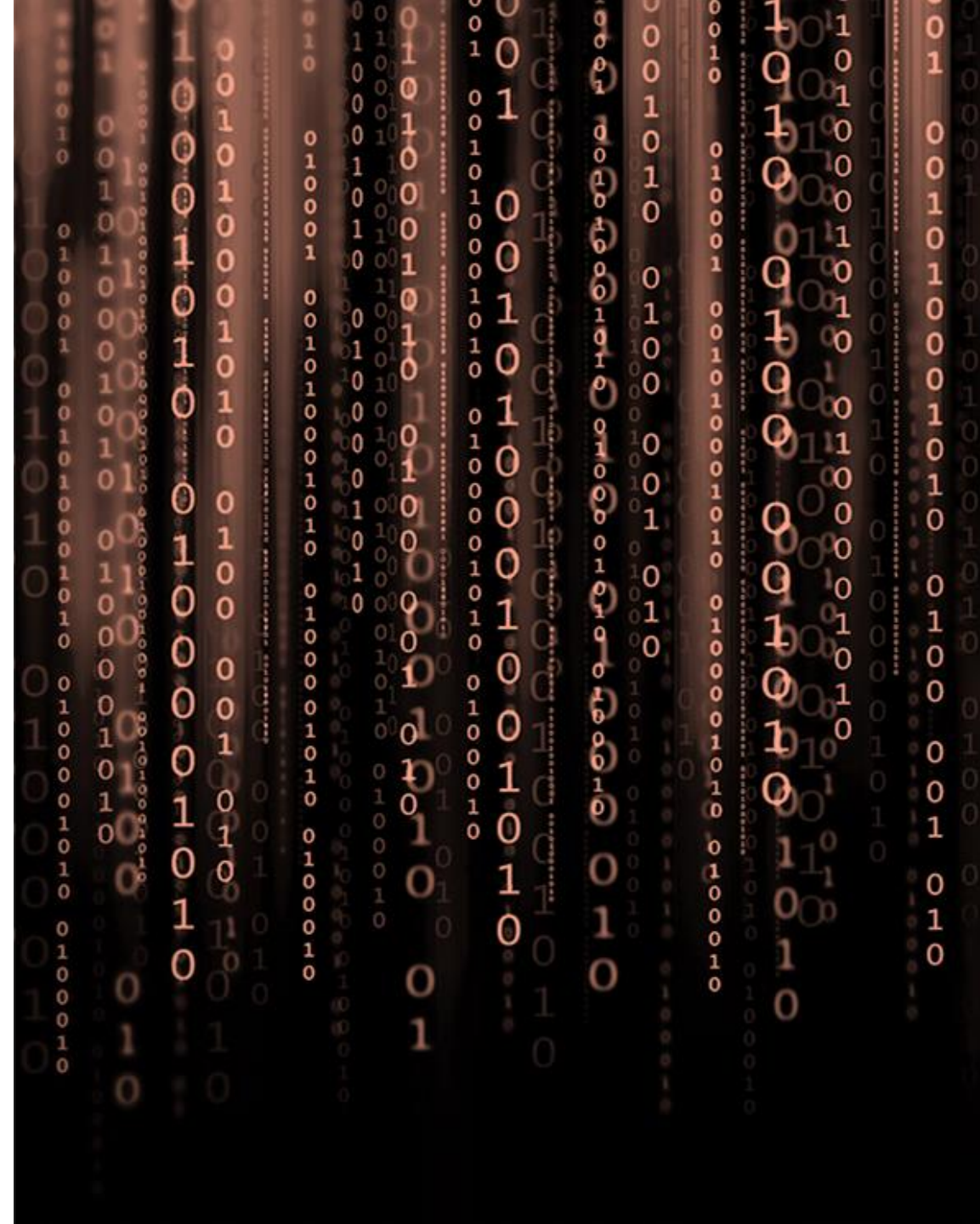
Benoit Van Asbroeck
benoit.van.asbroeck@twobirds.com
Partner, Brussels office
16 November 2016



This work was partly supported by the EU-funded project TOREADOR
(contract n. H2020-688797)

“Data is [...] a catalyst for economic growth, innovation and digitisation across all economic sectors, particularly for SMEs and for society as a whole.”

- EU Commission, Digital Single Market Strategy



Key selected issues

- 1 The EU data-driven strategy
- 2 GDPR: Challenges when confronted to data
- 3 Security & Cyber-security (NIS Directive)
- 4 Anonymisation & pseudonymisation
- 5 Ownership of data

The EU data-driven strategy

July 2014: Communication – "Towards a thriving data-driven economy" (EU Commission)

- The Big Data market was expected to grow worldwide to USD 16.9 billion in 2015
- The EU had been slow in embracing this revolution
- The EU must *"make sure that the relevant legal framework and the policies, such as on interoperability, data protection, security and IPR are data-friendly, leading to more regulatory certainty for business and creating consumer trust in data technologies."*
- Highlights issues related to data protection, consumer protection, data mining and security

May 2015: Digital Single Market Strategy (EU Commission)

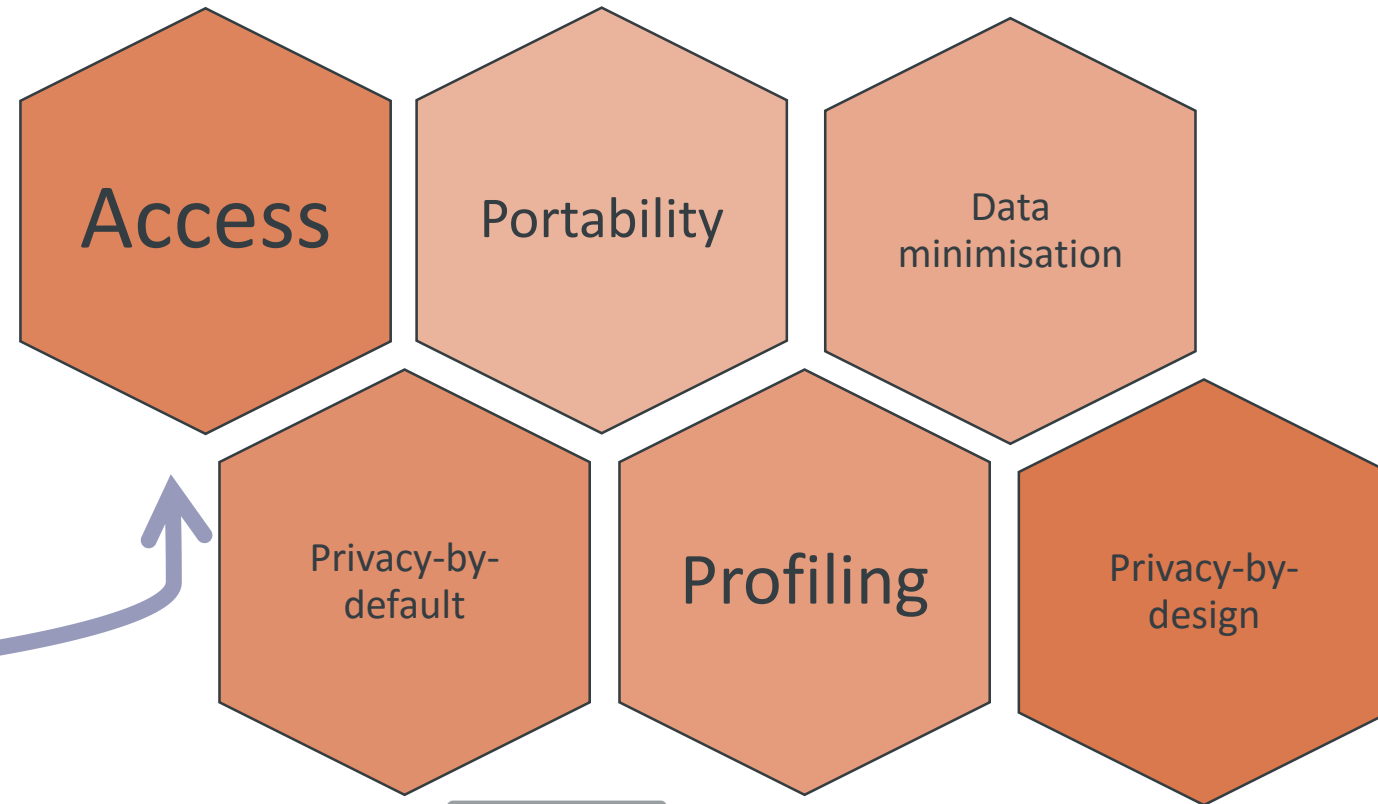
- Highlights issues related to data ownership, treatment of personal and industrial data, availability, access and re-use, contractual terms and conditions, data security, quality of data, authentication of users, cybercrime, etc.
- 'Free flow of data' initiative



The GDPR & Challenges when confronted to data

The General Data Protection Regulation

- Enters into application on 25 May 2018
- Equivalent level of protection of personal data throughout the EU
- Leeway for Member States to maintain or enact national provisions in implementation of GDPR
- Efforts to regulate personal data in a digital age
- New and existing data protection rights and principles that are difficult to reconcile with a data-driven environment



Security & Cyber-security (NIS Directive)

Network and Information Security (NIS) Directive

- Apart from security of personal data regulated by the GDPR
- Transposition into national law by May 2018
- Security obligations for providers of essential services and digital service providers
- Security of non-personal, commercially sensitive data in critical sectors
- Some of the new NIS requirements are difficult to reconcile with the GDPR requirements, especially in a big data context
 - *E.g.* personal data breach notification vs. security incident notification

Notification	GDPR	NIS
Of what?	A breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed	Incidents having a significant impact on the continuity or provision of the services concerned
To whom?	<ul style="list-style-type: none"> • Processor to controller; • Controller to supervisory authority; and/or • Controller to data subjects 	<ul style="list-style-type: none"> • National competent authorities; or • Computer Security Incident Response Teams
When?	<ul style="list-style-type: none"> • Without undue delay • Controller to supervisory authority: not later than 72 hours 	Without undue delay



Anonymisation & pseudonymisation

Anonymisation	Pseudonymisation
A technique of processing personal data to reduce the likelihood of identifiability of individuals.	A technique of processing personal data in such a way that it can no longer be attributed to a specific individual without the use of additional information.

- Heightened importance under the GDPR
- Issue of diverging **legal** and technical definitions
- *All the means likely reasonably to be used*
- Absolute /objective approach vs. subjective/relative approach
- Evolution towards risk-based approach?

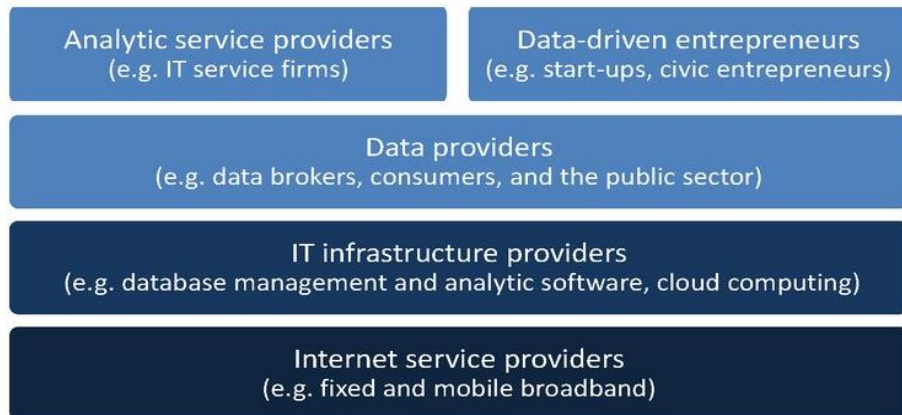
CJEU: C-582/14 – Breyer (§46)

Data is not/no longer personal "if the identification of the data subject was prohibited by law or practically impossible on account of the fact that it requires a disproportionate effort in terms of time, cost and manpower, so that the **risk of identification** appears in reality to be insignificant."



Ownership of data

- Multitude of actors involved in the data value cycle



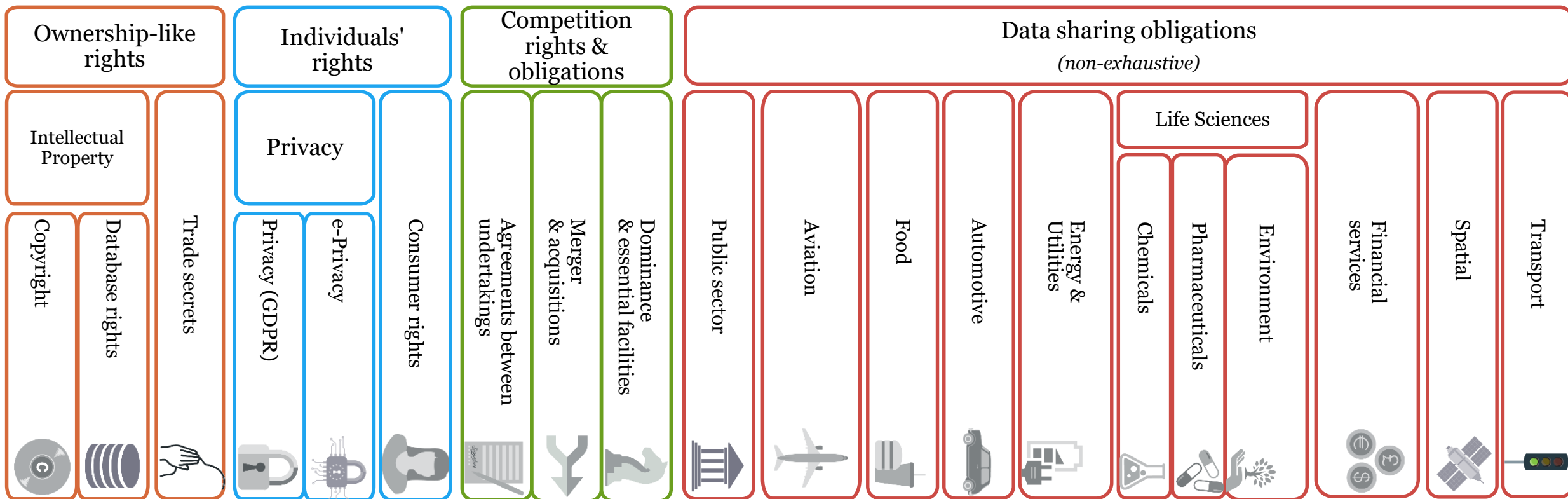
- Need to protect companies' assets engaged in the data economy?
- To what extent can or will organisations claim proprietary rights in data?

- No civil law ownership over intangible assets such as data
- Complex EU legal framework not fit for purpose
- Solution: contractual arrangements
 - **But:** not sufficient due to complexity of data flows



Ownership of data


Complex EU Legal Framework



Thank You!



Benoit Van Asbroeck
benoit.van.asbroeck@twobirds.com
Partner, Brussels office
16 November 2016

 This work was partly supported by the EU-funded project TOREADOR
(contract n. H2020-688797)

[twobirds.com](https://www.twobirds.com)

