

How far can Law on its own
create an environment of trust and
confidence especially for people
who feel vulnerable?

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- Perspective on the issue
- Duty of Care; Equity and the Fiduciary Duty
- Perspectives from the GDPR 2016/679
- Solutions?

- Power imbalance
 - Opportunities for surveillance, positive and negative - offering protection to vulnerable workers
 - Union membership decline
 - not full employment
 - overtly bad employers
 - But, freedom of contract
 - where might protections lie?

- Power imbalance - duty of care
 - is the duty established?
 - what is the standard?
 - what is to be expected of the average employer?

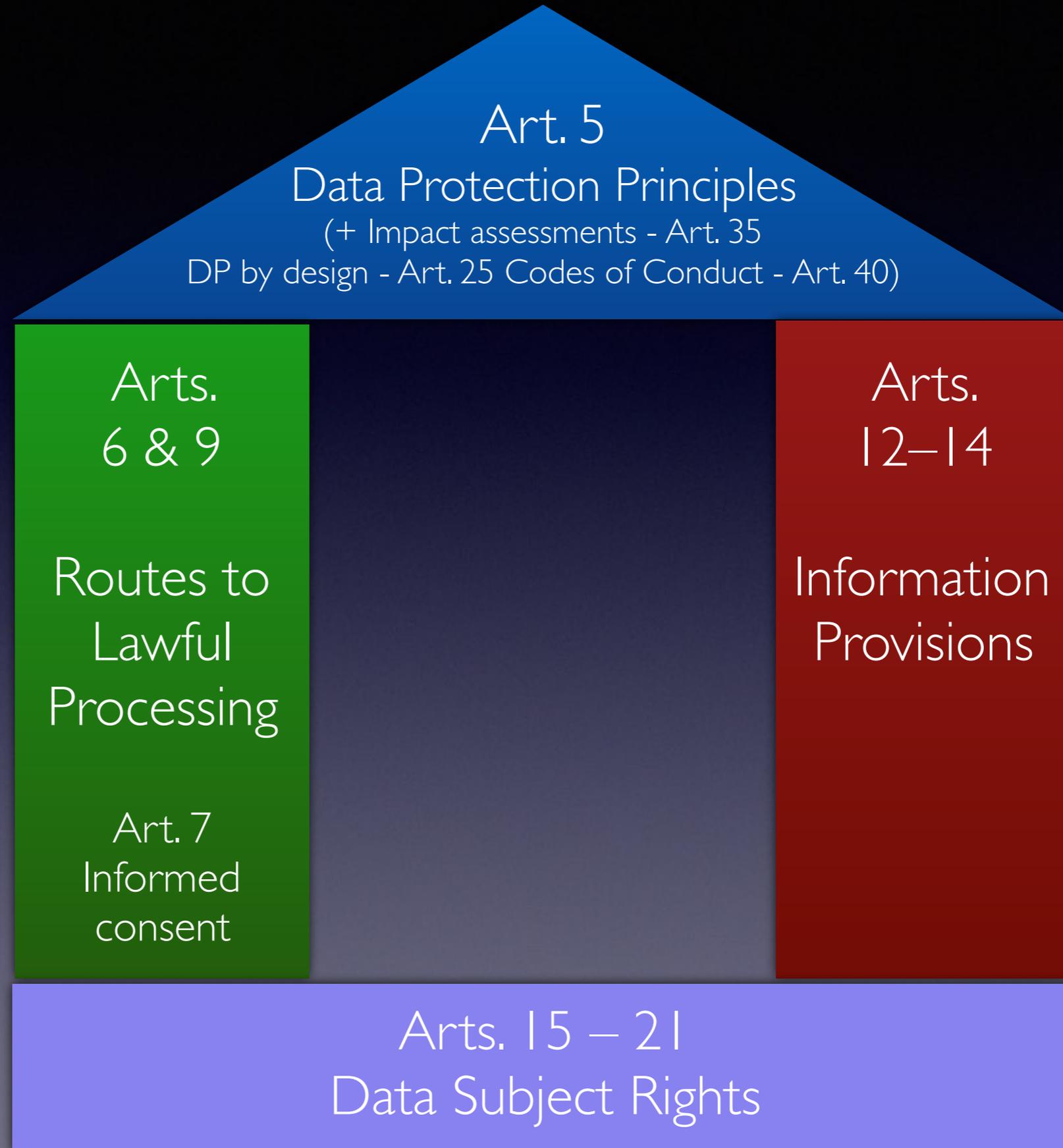
- Power imbalance - fiduciary duty
 - Equity - (unlimited?) discretion flowing from residual duty of the monarch to do justice - mitigate the rigours of the Law
 - Basic Principle - e.g. *Boardman v. Phipps*
 - Best interests of the beneficiary paramount
 - Much higher standard - range of remedies
 - Is the employer/employee relationship the sort of relationship where fiduciary duties have been imposed?

- Power imbalance - fiduciary duty
 - Why doubtful?
 - outside the traditional relationship of professional to beneficiary
 - judge-made; lost enthusiasm?
 - too many legitimate competing interests?
 - best interests of company not best interests of workers
 - who would owe the duty? Reach of FD?

- General Data Protection Regulation 2016/679

Article 88(1) Member States may, by law or by collective agreements, provide for more specific rules to ensure the protection of the rights and freedoms in respect of the processing of employees' personal data in the employment context, in particular for the purposes of the recruitment, the performance of the contract of employment, including discharge of obligations laid down by law or by collective agreements, management, planning and organisation of work, equality and diversity in the workplace, health and safety at work, protection of employer's or customer's property and for the purposes of the exercise and enjoyment, on an individual or collective basis, of rights and benefits related to employment, and for the purpose of the termination of the employment relationship.

(2) Those rules shall include suitable and specific measures to safeguard the data subject's human dignity, legitimate interests and fundamental rights, with particular regard to the transparency of processing, the transfer of personal data within a group of undertakings, or a group of enterprises engaged in a joint economic activity and monitoring systems at the work place.



- General Data Protection Regulation 2016/679

- Route to lawful processing
 - Consent? - Article 7

1. Where processing is based on consent, the controller shall be able to demonstrate that the data subject has consented to processing of his or her personal data.

(2. clearly separated from other consent elements?)

4. When assessing whether consent is **freely given**, utmost account shall be taken of whether, *inter alia*, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not *necessary for the performance of that contract*.

- General Data Protection Regulation 2016/679
 - Consent? - Recital 43

In order to ensure that consent is freely given, consent should not provide a valid legal ground for the processing of personal data in a specific case where there is a **clear imbalance between the data subject and the controller**, in particular where the controller is a public authority and it is therefore unlikely that consent was freely given in all the circumstances of that specific situation.

Consent is presumed not to be freely given if it does not allow separate consent to be given to different personal data processing operations despite it being appropriate in the individual case, or if the performance of a contract, including the provision of a service, is dependent on the consent despite such consent not being necessary for such performance.

- General Data Protection Regulation 2016/679
 - Consent? - Recital 155

Member State law or collective agreements, including ‘works agreements’, may provide for specific rules on the processing of employees' personal data in the employment context, in particular for the conditions under which personal data in the employment context may be processed on the basis of the consent of the employee, the purposes of the recruitment, the performance of the contract of employment, including discharge of obligations laid down by law or by collective agreements, management, planning and organisation of work, equality and diversity in the workplace, health and safety at work, and for the purposes of the exercise and enjoyment, on an individual or collective basis, of rights and benefits related to employment, and for the purpose of the termination of the employment relationship.

- General Data Protection Regulation 2016/679
 - Other routes to lawful processing?

Art. 6(1)(d) processing is necessary in order to protect the vital interests of the data subject or of another natural person

Art. 6(1)(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data

Art. 9(2)(h) processing is necessary for the purposes of preventive or occupational medicine, for the assessment of the working capacity of the employee(...)

- General Data Protection Regulation 2016/679
- Solutions?
 - Transparency in processing
 - Risk assessment - monitoring by supervisory authority
 - Data Protection by design
 - Code of Conduct
 - Sanctions