

## **ONLINE COUNTER-NUDGING IN EU PRIVACY LAW : THE EXAMPLE OF TARGETED-ADVERTISING & COOKIES**

Anne Brunon-Ernst  
Université Panthéon-Assas

The present talk looks into the strategies developed by private players to transgress the effectiveness of the norm set by public bodies. Indeed, private companies manipulate user expectations to have them take decisions they would not have taken otherwise.

To delineate manipulation strategies, the study is based on the concept of ‘frames’. A frame is the psychological construct which is shaped by a person’s knowledge of the world and which influences his/her understanding (Kahneman 1981; Wendland 2010: 28). It involves the context in which decisions are made and the expectations it gives rise to. The use of framing as an analytical category stands at the crossroads of both culture (Goffman 1974: 24) and the language used to express this culture. Thus it is based on and goes beyond the linguistic analysis of statements to include both statistical data (Custers and alii, 2013) about practice, and behavioural insights on how framing manipulates expectations.

To carry out this study, I will focus on the field of EU Privacy Law. I will determine why certain norms are set by the Commission and the means by which they are implemented (technical standards, use of default options, mandatory disclosure and framing options). I will then turn to the strategies used by online companies to manipulate user expectations by framing user consent to data collection, storage, transfer and processing. Indeed, research carried out on the ‘I agree’ clicking option show that web-users are more likely to consent to a statement which corresponds to their web experience (Böhme and Köpsell 2010: 2406).

I thus hope to highlight the complex ways in which legal norms are set, implemented and transgressed by players at the EU level. Framing is not absent from discussions on public policy-making in the EU (Sousa Lourenco et alii 2016: 16), however it is overlooked by the Commission’s implementation policies (see the shift from Annex I to the proposal for a General Data Protection Regulation to Regulation 2016/679). I will seek to demonstrate that framing is key to ensuring effective compliance to legal norms in EU Privacy Law.

**Anne Brunon-Ernst** is Professor in Legal English at Panthéon-Assas University (Paris, France) and researcher at the Cersa (Panthéon-Assas) and at the Centre Bentham (ScPo, Paris). She is co-founder of the FrenchNudgeProject (ScPo, Paris) and of the Law&Humanities research group (Panthéon-Assas). Her interests focus on utilitarianism, and law and language. She is the author of *Le Panoptique des pauvres* (PSN, 2007) and *Utilitarian Biopolitics* (Pickering & Chatto, 2012), and she co-edited *Beyond Foucault* (Ashgate, 2012), *Bentham’s Theory Today* (spec. issue of *The Tocqueville Review*, 2011), *Nudges: Better Choices?* (spec. issue of *The Tocqueville Review*, 2016) and *Indirect Legislation: Jeremy Bentham’s Regulatory Revolution* (spec. issue of *History of European Ideas*, 2016). She is now working on framing strategies in EU law.