



Below the Click: A Quiet Question for European Digital Rights

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Abstract

Consumer neurotechnology is quietly entering European workplaces and homes. EEG headbands, neural wearables, and brain-computer interfaces can detect activity the user cannot perceive; activity that, in a sense, lies below the click of consent. Drawing on the German philosopher Hans Jonas, who argued that ethics must keep pace with actions whose effects we cannot fully foresee, this short article examines what such devices ask of European digital rights law. It traces the question through the GDPR, the EU AI Act and its harmonised standards, and the Council of Europe's HUDERIA Methodology, presented not as a critique but as an invitation to careful thought.

Keywords: neurotechnology, neural data, consent, EU digital rights, EU AI Act

Introduction

Consider a hypothetical scenario involving a software engineer at a company in the European Union (hereafter EU)¹. They sign a consent form. Their employer has launched a wellness programme that includes a small electroencephalography (hereafter EEG) headband worn at work. The form lists what the device collects, including brainwave activity, attention, and stress signals. They have read forms like this before, so they agree.

What they have agreed to, however, they cannot quite see. Their attention drifts and returns dozens of times an hour without them noticing. Their reactions register in the brain a fraction of a second before they feel them. The device picks it all up. The form was written for the part of them that thinks. Yet the data also includes the part that does not.

This scenario is not science fiction. EEG headbands, neural wearables, and brain-computer interfaces are already on sale in the EU². The engineer's story is not atypical. It is the future of the European workplace, and probably the present too. This short article asks one question, gently. *When a device examines parts of us we cannot see in ourselves, what is the conscious self really agreeing to?*

A. The Tools We Brought With Us

Half a century ago, Hans Jonas reflected on how modern technology had outpaced the ethical tools we had inherited. Until modern times, he wrote, human action was small-scale. We could see what we were doing and imagine the consequences. Modern technology had quietly shattered that picture. We were now capable of acts whose effects we could not fully foresee, sometimes in ways we could not even perceive in ourselves³. He argued that ethics needed to be revisited in light of that condition.

Interestingly, Jonas was writing about ecology and biotech, but his observations travel well. Neurotech sits squarely within the kind of action he had in mind.

¹ This vignette is illustrative. It does not describe any specific employer, employee, or product.

² A. MOCHAN / B. PARKIN et al., *Emerging Applications of Neurotechnology and Their Implications for EU Governance*,

European Commission JRC, 2025,
<https://data.europa.eu/doi/10.2760/8383402>.

³ H. JONAS, *The Imperative of Responsibility: In Search of an Ethics for the Technological Age*, Chicago, 1984.



It produces effects in the very layer of ourselves we cannot see. The challenge of *building responsibility* for actions whose effects are partly hidden even to the actor is probably one that European law has been quietly grappling with in various forms for years; the Council of Europe's HUDERIA Methodology, with its life cycle approach to risk and impact, is one expression of that effort⁴. Neurotech is one more setting where the challenge surfaces, and perhaps the one that brings it closest to the person.

B. The Ground Consent Stands On

EU privacy law has long treated consent as a cornerstone. The General Data Protection Regulation (hereafter GDPR) is the primary legal basis for processing health and biometric data⁵. The European Data Protection Board (hereafter EDPB) has carefully examined the requirements for valid consent: free, specific, informed, and unambiguous⁶. This careful work has been a significant achievement in European law and has likewise shaped the global conversation on data protection.

Even then, consent has had its limits, and the EU has long acknowledged them. Solove identified it as the privacy self-management problem more than a decade ago⁷. The familiar response has been to improve consent, i.e., clearer interfaces, stricter

rules, and prohibitions on the worst design tricks. That work continues, and rightly so.

The European Union Artificial Intelligence Act (hereafter EU AI Act) has already begun to address related questions. Article 5(1)(f) prohibits emotion recognition systems in workplaces and in education, with carve-outs for medical and safety reasons⁸. The provision is close to the territory this article explores.

The Act's practical reach will also be shaped by the harmonised European standards being developed under Article 40, in response to the Commission's Standardisation Request M/593. The work is carried out by CEN-CENELEC Joint Technical Committee 21 (hereafter JTC 21), with delivery now targeted for late 2026⁹. These standards translate the Act's requirements into testable technical terms and quietly shape how it is applied on the ground. In a related development, the Commission's 2025 Digital Omnibus on AI, on which the co-legislators reached a provisional political agreement on 7 May 2026, would tie the Act's high-risk obligations to the readiness of those standards¹⁰, closely linking the Act's practical effect to the technical work underway.

The Council of Europe, a separate body, offers a complementary tool: the HUDERIA Methodology, a structured approach for public and private bodies to

⁴ Council of Europe Committee on Artificial Intelligence, *HUDERIA Methodology*, adopted 28 November 2024 (approved by the Committee of Ministers on 26 February 2025); HUDERIA Model (COBRA), approved 25 February 2026, <https://www.coe.int/en/web/artificial-intelligence/huderia-risk-and-impact-assessment-of-ai-systems>.

⁵ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (General Data Protection Regulation, hereafter GDPR), Art. 9.

⁶ European Data Protection Board (hereafter EDPB), *Guidelines 05/2020 on Consent under Regulation 2016/679*, v1.1, 4 May 2020, https://www.edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-052020-consent-under-regulation-2016679_en.

⁷ D. J. SOLOVE, Introduction: Privacy Self-Management and the Consent Dilemma, in: *Harvard Law Review*, 126 (2013), pp. 1880–1903.

⁸ Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 (Artificial Intelligence Act, hereafter AI Act), Art. 5(1)(f).

⁹ European Commission, Standardisation Request M/593 of 22 May 2023, as amended by M/613; see CEN-CENELEC, *Update on the Decision to Accelerate the Development of Standards for Artificial Intelligence*, 23 October 2025, <https://www.cenelec.eu/news-events/news/2025/brief-news/2025-10-23-ai-standardization/>.

¹⁰ European Commission, *Proposal for a Regulation amending Regulations (EU) 2024/1689 and (EU) 2018/1139 (Digital Omnibus on AI)*, COM(2025) 836, 19 November 2025, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52025PC0836>. The European Parliament and the Council reached a provisional political agreement on the proposal on 7 May 2026; formal adoption is anticipated before 2 August 2026, with standards related to high-risk AI systems deferred to 2027 and 2028.



assess an AI system's risks to human rights, democracy, and the rule of law throughout its life cycle.¹¹ The approach is socio-technical: it weighs the technology alongside its interactions with people and institutions, and calls for a mitigation plan and reassessment over time.

Neurotech raises a slightly different question. *Even with a perfect form, can the person reading it really know what they are agreeing to when the device examines parts of them they cannot see in themselves?*

C. Where the Reader Cannot See

For consent to mean something, it relies on a self capable of deliberation. The person agreeing must, in some sense, know what they are agreeing to. This works for most data. Take, as an example, the fact that we have a workable grasp of what is in our emails or where we have been. The conscious self has access to the information being shared.

Conversely, neural data is not like that. The brain signals that capture attention, emotion, and pre-conscious reactions are not available to introspection. Recent research has reconstructed semantic content and inner-speech fragments from non-invasive brain recordings¹². That work shows something general about neurotech: *it can extract information from the brain that the person whose brain it is cannot access on their own*. As Ienca and Andorno noted a decade ago, neurotech does not merely produce more data of the familiar kind; it makes legible parts of the person that most legal frameworks were not built to consider¹³.

This is the sort of thing Jonas warned about. When the effects of an action cannot be reliably foreseen,

he argued, agreeing to it can only do so much¹⁴. Neural data is exactly such a case: if the person cannot perceive what the device records, their consent cannot fully extend to it. That is not a criticism of consent. It is a recognition that consent has a natural reach, and that reach has edges.

To be clear: *the point is not that consent fails in the neurotech context. The point is that consent does what it has always done, i.e., it works best when the person consenting has a meaningful sense of what is in front of them*. Where the device operates beneath that sense, the work consent can do becomes more modest. It is a thought worth holding alongside the existing framework, not in place of it.

D. Threads Worth Pulling

None of this means the existing frameworks have failed. The GDPR, the EU AI Act, and the EU Charter of Fundamental Rights are doing serious work and remain the foundation of any sensible response. The more interesting question is whether neurotech raises issues that sit just at the edge of what those frameworks were originally designed to address, and what the wider legal community might say about them.

A few questions seem worth considering together. How can shared neural data, particularly data drawn from below the user's conscious awareness, be characterised within existing categories? Where consent is structurally fragile, as in employment and education, what additional context might support its meaning? Which neurotech applications fit comfortably within current high-risk classifications, and which sit at the margins?

¹¹ HUDERIA Methodology (n. 4).

¹² J. TANG et al., Semantic Reconstruction of Continuous Language from Non-invasive Brain Recordings, in: *Nature Neuroscience*, 26 (2023), pp. 858–866, <https://www.nature.com/articles/s41593-023-01304-9>.

¹³ M. IENCA / R. ANDORNO, Towards New Human Rights in the Age of Neuroscience and Neurotechnology, in: *Life Sciences, Society and Policy*, 13 (2017), 5, <https://doi.org/10.1186/s40504-017-0050-1>.

¹⁴ JONAS (n. 3) 27–30, on the precautionary heuristic where consequences cannot be reliably foreseen.



Of course, these are not questions any single article can resolve. They are the kinds of questions a community of scholars, practitioners, and regulators is well placed to take up over time. Raising them here is meant as an invitation, not an argument.

The Commission has also begun clarifying how the high-risk categories should be applied in practice. Its draft guidelines on classification under Article 6, open for consultation until 23 June 2026, work through where particular systems fall, an exercise whose outcome will matter for how neurotechnology is treated¹⁵.

Notably, two recent international developments make these questions even more timely. The United Nations Educational, Scientific and Cultural Organization (hereafter UNESCO) adopted a *Recommendation on the Ethics of Neurotechnology* on 12 November 2025, the first global instrument of its kind¹⁶. The Council of Europe's Framework Convention on Artificial Intelligence offers a complementary international vehicle, working alongside the HUDERIA tools mentioned earlier¹⁷. These instruments are now on the table. How they relate to EU instruments and the conversations they invite are for the wider legal community to explore.

Conclusion

Drawing the threads together, a familiar pattern emerges, one Jonas would recognise. A new kind of action arrives. The familiar tools stretch to meet it. Sometimes that stretch is enough. At other times, the action sits where the tools were not built to reach, and

the most useful first step is simply to notice that fact honestly. Noticing is not the same as alarm. It is the beginning of careful thought.

Neurotech is not a crisis. In fact, the European framework is, by some distance, in better shape than those of most jurisdictions. But it is fair to say that the engineer at the desk introduced at the beginning of this article poses a question we have not fully answered. What does it mean to agree to share something we cannot see in ourselves? The answer need not be alarming (or at least not yet). It just has to be thought through, slowly and seriously, in a kind of conversation that European legal scholarship is well placed to host.

As a tentative recommendation, three threads merit further exploration. First, sustained scholarly attention to how neural data fits within existing data categories would help clarify the practical scope of current roles. Second, careful study of contexts in which consent is structurally fragile and in which neurotech is most likely to be developed may reveal where existing safeguards can do more. Third, attentive engagement with the UNESCO Recommendation, the Council of Europe Framework Convention, and the HUDERIA Methodology may offer useful international reference points without disturbing the balance that EU law has carefully built.

None of this needs to settle the question. For now, it is enough to invite it onto the page.

¹⁵ European Commission, *Draft Commission Guidelines on the Classification of High-Risk AI Systems under Article 6 of Regulation (EU) 2024/1689 (AI Act)*, issued for stakeholder consultation (consultation open until 23 June 2026), <https://digital-strategy.ec.europa.eu/en/library/draft-commission-guidelines-classification-high-risk-ai-systems>. The guidelines are in draft form and may be revised.

¹⁶ United Nations Educational, Scientific and Cultural Organization (hereafter UNESCO), *Recommendation on the*

Ethics of Neurotechnology, adopted 12 November 2025, <https://www.unesco.org/en/articles/ethics-neurotechnology-unesco-adopts-first-global-standard-cutting-edge-technology>.

¹⁷ Council of Europe, *Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law*, CETS No. 225, opened for signature 5 September 2024, <https://www.coe.int/en/web/artificial-intelligence/the-framework-convention-on-artificial-intelligence>.