

# Reports

This part of the EDPL hosts reports in which our correspondents keep readers abreast of various national data protection developments in Europe, as well as on the most recent questions in different privacy policy areas. The Reports are organised in cooperation with the Institute of European Media Law (EMR) in Saarbrücken ([www.emr-sb.de](http://www.emr-sb.de)) of which the Reports Editor Mark D. Cole is Director for Academic Affairs. If you are interested in contributing or would like to comment, please contact him at [mark.cole@uni.lu](mailto:mark.cole@uni.lu).

## Introduction

### Recent Developments and Overview of the Country and Practitioner's Reports

*Mark D Cole\**

The Von der Leyen-Commission is at full steam. One of the six main objectives it announced in its work programme at the end of January under the motto 'A Europe that strives for more' is to make the area of the European Union fit for the digital age.<sup>1</sup> Two main pillars of this ambition are an action plan for the use of artificial intelligence (AI) and a new data strategy, both of which were published shortly afterwards. While the strategy for data<sup>2</sup> mainly addresses the economic and societal benefits of data, the White Paper on AI<sup>3</sup> also deals with the threats that new digital opportunities bring to individuals, namely their privacy which is protected by fundamental rights. Both pillars should be seen as complementary and should be read as a combination of two approaches. Citizens will only engage in data-driven innovation and trust new applications and solutions – including AI-driven – if their data is effectively protected.

The Data Strategy already envisages some concrete measures, in particular investments and the creation of appropriate infrastructures, to guide Europe towards a leading role in the growing data economy. The White Paper on AI is unfortunately - but maybe more realistically - less concrete than expected when it was announced that within the first hundred days of the new Commission there would be regulatory approaches on the table. Nevertheless, a shift in attention and approach to the issue of data processing and data sharing can already be observed. While the clear focus of the previous Commission was the finalisation of the GDPR and related elements of the data

protection framework – though it fell short of adopting the new e-Privacy Regulation – data is now seen more through the lense of its economic relevance to further the global position of the EU. Therefore, the potential of the 'data economy' shall be lifted as well as ensuring that the EU shall serve as 'role model and a leader' towards a 'society empowered by data'.

In more common terms of the EU this is circumscribed as creating a single market for data – remember the coining of the 'Digital Single Market' strategy of the previous Juncker-Commission – and it will include identifying ways to enhance data sharing eg between public bodies and enterprises, in joint clouds, by creating accessibility rules and keeping data open 'for all'. This increased accessibility to data shall happen with respect of European values and individual rights and ensuring that the ones generat-

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- 1 Commission Work Programme 2020, A Union that strives for more, COM(2020) 37 final <[https://ec.europa.eu/info/publications/2020-commission-work-programme-key-documents\\_en](https://ec.europa.eu/info/publications/2020-commission-work-programme-key-documents_en)>.
- 2 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European strategy for data, COM(2020) 66 final <[https://ec.europa.eu/info/sites/info/files/communication-european-strategy-data-19feb2020\\_en.pdf](https://ec.europa.eu/info/sites/info/files/communication-european-strategy-data-19feb2020_en.pdf)>.
- 3 White Paper On Artificial Intelligence – A European approach to excellence and trust, COM (2020) 65 final <[https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020\\_en.pdf](https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf)>.

ing the data stay in control of it. The Commission has clearly identified the need to create a new (or additional) regulatory framework in order to achieve this. Besides, there are more supportive measures to help create ‘European clouds’ and the adequate infrastructure.

These are no small challenges that lie ahead of the Commission and concerning the data strategy it will be interesting to see what the next steps after conclusion of the currently running public consultation will be. We will certainly continue to monitor and report on the steps being taken in this field, especially when it comes to regulatory proposals.

On a more concrete side of developments, this edition sees the next three country reports in our GDPR Implementation Series. It has been nearly two years since the applicability of the GDPR and still one Member State has not adapted its national law to the new data protection reality. We are therefore happy to be able to include a very up-to-date report on that Member State – Slovenia. The ‘implementation’ report by *Helena U. Vrabec* (‘Slovenia: Introduction to the Most Recent Public Draft of the GDPR Implementing Law’) covers the latest draft proposal for a new law. There will also be a more extensive version of the report – hopefully covering the final and adopted version of the law by the latest ‘implementer’ – in a forthcoming book that will be published by Lexxion. We are aiming to complete our GDPR Implementation Series, as far as the first laws in each Member State are concerned – with the forthcoming edition 2/2020 and soon after that there will be a book joining all reports from the GDPR Implementation Series in updated form including overviews of the practice of implementation since adoption of the new laws (Mark D Cole and Nelly Stratieva (eds), *GDPR Implementation in All EU Member States* (Lexxion 2020 forthcoming)<sup>4</sup>).

In this edition, besides Slovenia we have a GDPR implementation report on ‘Greece: The New Data Pro-

tection Framework’ by *Lilian Mitrou*. Interestingly, she points out that after the adoption of the law, there is still strong criticism of the new framework and the Hellenic Data Protection Authority has indicated it regards numerous provisions as problematic in light of the Greek Constitution and the GDPR and will therefore review on a case-by-case basis which parts can be fully applied. In another report, *Māris Ruķers* informs us about ‘Latvia: The Implementation of the GDPR in a New Legislative Framework’. After we had covered a draft bill in Latvia in an earlier report,<sup>5</sup> this overview covers the law as it was finally adopted. It also highlights remaining areas which will pose difficulties in application and especially points out that the question of a potential dual sanctioning by administrative fines under the GDPR and criminal consequences under national law is not clear currently.

Besides our GDPR Implementation Series, we also have one report in this edition that summarises for our international readers the main findings of a landmark case by the Austrian Constitutional Court: *As Arvid Peix* explains in ‘Austrian Constitutional Court: Number Plate Recognition and ‘Trojan Horse’ Software Are Unconstitutional’ that Court in strong words completely rejected as violation of fundamental rights all measures which had been justified with supposed increased security needs by the previous Austrian Government. Not only in its general direction but also in the detailed findings this judgment should be taken notice of as it could be seen as setting a standard, not last because of the constitutional value of the European Convention on Human Rights (ECHR) in Austria that comes with a strong consideration of the Strasbourg Court’s jurisprudence.

Similar arguments are also put forward in other EU Member States where comparable developments can be observed. In Germany, for example, a provision originally foreseen was deleted from the draft of the new Federal Police Act which would have authorised the Federal Police to use software at ‘security-relevant locations’ with which image recordings could be automatically compared with biometric data.<sup>6</sup> The plans of the French Government to widely<sup>7</sup> roll out facial recognition technology may also prove more difficult than expected: the Administrative Tribunal of Marseille has just annulled the facial recognition system experiment launched in two high schools in the French Provence-Alpes-Côte d’Azur region because the pupils’ biometric data were

4 If you want to pre-order the book or get notified when it becomes available, inform us of your interest on <info@lexxion.eu>.

5 Andis Burkevics, ‘GDPR Implementation Series · Latvia: Draft Personal Data Processing Law’ (2018) 4(1) EDPL 95-96.

6 Cf eg reporting by Daniel Laufer, ‘Neues Bundespolizeigesetz – Innenministerium streicht automatisierte Gesichtserkennung’ (24 January 2020) <https://netzpolitik.org/2020/innenministerium-streicht-automatisierte-gesichtserkennung/>.

7 Cf reporting on these plans eg by Lisa Louis, ‘France embraces facial recognition tech’ (10 November 2019) <https://www.dw.com/en/france-embraces-facial-recognition-tech/a-51106489>.

processed without any legal basis and the court was very critical in its arguments against that project.<sup>8</sup> We already reported on similar cases concerning the use of facial recognition software in the last issue of EDPL<sup>9</sup> and are planning further insights, especially into developments in France and the United Kingdom, in forthcoming issues.

A uniform clarification of this partly differentiated approach of the Member States by the EU, which was expected on the basis of a leaked document, was not included in the data strategy mentioned above. According to that early draft there was discussion of a five year moratorium banning the use of the technology in public spaces until further clarification about the fundamental rights' compliability was reached.<sup>10</sup> This could not be found in the final version. Instead, however, the data protection authorities of the Member States have found a common approach to video surveillance and facial recognition technology and have expressed this approach under the umbrella of the European Data Protection Board (EDPB). *Christina Etteldorf* reports on this in her contribution 'EDPB Publishes Guidelines on Data Processing Through Video Devices' by highlighting that although the EDPB's remarks are of a very general nature, they can nevertheless provide important guidance.

That report on recent guidelines of the EDPB is supplemented by an assessment of an earlier opinion of the EDPB in 2019 that relates to questions of jurisdiction. *Dan Jerker B. Svantesson* gives a critical viewpoint on 'EDPB's Opinion 8/2019 on the Competence of a Supervisory Authority in Case of Establishment Changes'. This report was already prepared soon after the Opinion was published in July 2019, but we delayed the inclusion in our Reports section as we wanted to combine it with a further EDPB report. We will not be able to cover all EDPB activity, but this combination of a report on Guidelines as well as an Opinion shows the diversity of EDPB contributions to the further understanding and application of GDPR provisions. The number of relevant decisions taken at each meeting is high and it is worthwhile for the data protection community to closely follow and observe what is published after each Brussels meeting<sup>11</sup> in addition to having an eye on the EDPB website concerning national developments.<sup>12</sup>

In this context, for readers of the Reports section that are especially interested in current decisions by national DPAs, but also the overview of important

steps on EU level such as outcomes of the EDPB meetings, we would like to draw attention to the EDPL newsletter 'Data Protection Insider', which is edited by *Dara Hallinan* and *Diana Dimitrova* and is published on a bi-weekly basis. If you have not signed up yet, we recommend to do so as a complementary source of information to the authored country and EU reports we offer in the EDPL journal.<sup>13</sup> Additionally, another new place to find recent developments on national level – be it court judgments or DPA decisions – with short English summaries is the wiki and newsletter GDPRhub set up by *Max Schrems'* NGO nyob.eu.<sup>14</sup>

Finally, we have a short report in our Practitioner's Corner. *Laurens Vandercruyse, Caroline Buts and Michaël Dooms* argue in their report 'Beyond Data Controllability: Merits of a Generic DPIA by Hardware and Technology Suppliers' in continuation of their earlier report based on a larger research project<sup>15</sup> that the current setup for Data Protection Impact Assessment (DPIA) procedures is incomplete. In their view it is necessary to include hardware and technology developers as they would have the best insight into some criteria that determine the outcome of the DPIAs. In an interdisciplinary approach they conclude that there would be efficiency benefits coming with such an extension of relevant stakeholders to be included in the process.

We are looking forward to completing the first round of the GDPR Implementation Series with this

8 TA Marseilles, decision of 27 February 2020, N°1901249.

9 See for related reports in the previous issue *Teresa Quintel* 'The First GDPR Fine in the Country of Openness: Is Sweden Moving towards More Privacy?' (2019) 5(4) EDPL 548-553. *Tobias Raab* 'Video Surveillance and Face Recognition: Current Developments in Germany' (2019) 5(4) EDPL 544-547.

10 Cf eg reports in 'Facial recognition: EU considers ban of up to five years' *BBC News* (17 January 2020) <<https://www.bbc.com/news/technology-51148501>>.

11 An overview of meetings (<[https://edpb.europa.eu/our-work-tools/agenda\\_en](https://edpb.europa.eu/our-work-tools/agenda_en)>) and documents (<[https://edpb.europa.eu/our-work-tools/our-documents\\_en](https://edpb.europa.eu/our-work-tools/our-documents_en)>) can always be found on EDPBs' website.

12 <[https://edpb.europa.eu/news/national-news\\_en](https://edpb.europa.eu/news/national-news_en)>.

13 You can sign up for free for the 'Data Protection Insider' newsletter at <<https://www.lexxion.eu/en/newsletter/>>.

14 GDPRhub is a free and open wiki that allows anyone to find and share GDPR insights across Europe. More information at <[https://gdprhub.eu/index.php?title=Welcome\\_to\\_GDPRhub](https://gdprhub.eu/index.php?title=Welcome_to_GDPRhub)>, the accompanying newsletter can be signed up for at <<https://gdprhub.eu/index.php?title=GDPRtoday>>.

15 *Laurens Vandercruyse, Caroline Buts and Michaël Dooms* 'Data Control in Smart City Services: Pitfalls and how to Resolve them' (2019) 5(4) EDPL 554-560.

and the next edition and continue our reporting on national application examples as well as developments on EU level. We hope to have selected an overview of developments for this edition's reports that meet your interest and are useful. The editors,

together with the Institute of European Media Law (EMR), welcome any suggestions for future national and European updates at <mark.cole@uni.lu>. Any comments on our reports can also be sent to this e-mail address.