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) 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.

Recent Developments and Overview of the Country Reports

Mark D Cole and Christina Etteldorf*

Another exciting and rich year in data protection law is coming to an end and several open ends are coming to a close, too.

We opened our first issue in 2023 with a look at the two opinions of the Advocates General in the pending CJEU proceedings on credit scoring agencies due to the potential impact of the final judgments on a business practice with impact on the lives of most residents in Germany on a very regular basis. The joined cases C-26/22 and C-64/22 as well as case C-635/21 deal with the practices of the German SCH-UFA, a credit scoring agency, and their compatibility with the GDPR, in particular Article 22 GDPR and the right not to subjected to purely automated-decision making. The joined cases mainly concern storage periods of data retrieved from publicly available registers (in this case: the insolvency database) and the limits to which credit scoring agencies can use them, especially whether a credit score may still be based on such data even if it has in the meanwhile been deleted from the public register itself. The other case is about the determination of the score value and the question of whether this constitutes an (unlawful) automated decision-making under Article 22(1) GDPR. In view of both Advocate General's Opinions finding clear words to the detriment of the agencies' practices, landmark decisions were expected from the CJEU. And very rightly so, as we now know since 7 December 2023. In joined cases C-26/22 and C-64 the Court ruled that Article 78(1) GDPR must be interpreted as meaning that a decision on a complaint adopted by a supervisory authority is subject to full judicial review – in the case at hand, the practices of

SCHUFA had been approved by the competent data protection authority of Hessen. Furthermore, credit scoring agencies which process data from public registers are bound to the storage periods of those registers, which makes processing after their public deletion unlawful. Correspondingly, they have to delete such data as soon as possible and have to grant the users rights to erasure without undue delay.[1] The 'one-liner' ruled in C-634/21 is much shorter but no less significant:

> Article 22(1) GDPR must be interpreted as meaning that the automated establishment, by a credit information agency, of a probability value based on personal data relating to a person and concerning his or her ability to meet payment commitments in the future constitutes 'automated individual decision-making', where a third party, to which that probability value is transmitted, *draws strongly on that probability value* to establish, implement or terminate a contractual relationship with that person [emphasis added].[2]

With this, the CJEU dismisses the main argument of SCHUFA and many other national credit agencies.

* Mark D Cole, Professor at the University of Luxembourg, Director for Academic Affairs, EMR, and EDPL Associate Editor. For correspondence: <mark.cole@uni.lu>. Christina Etteldorf, Senior Research Scientist at the EMR and lecturer at the University of Saarland. For correspondence: <c.etteldorf@emr-sb.de>.

1 Joined Cases *UF* (C-26/22) and *AB* (C-64/22) *v Land Hessen* [2023] ECLI:EU:C:2023:958.

2 Case C-634/21 *OQ v Land Hessen* [2023] ECLI:EU:C:2023:957.

They had always argued that the credit score does not actually fulfil the requirements of Article 22 because it does not involve an automated decision – after all, a human decision would still be required from the person requesting the score (eg landlord, credit institution, etc). With both judgments, the Court strengthens the rights of individuals who have previously found it difficult to defend themselves against the rating of their creditworthiness, which is so important in many areas of life. In the future, credit scoring agencies will therefore have to obtain consent (which is unlikely) or cut back on automation, in particular involving human decisions themselves or ensuring they are made by their customers. These CJEU cases will certainly have a significant impact in Germany.

Further future 'landmark decisions' on this year's topics of the Reports Section, which could possibly eventually end up at the CJEU, are already on the horizon. For example, the EDPB has now published its binding urgency decision in the matter of Meta's personalised advertising on 7 December.[3] It had become necessary, as there was a request from the Norwegian Data Protection Authority (Datatylsinet) based on an own decision which we covered in an extensive report in the last issue.[4] We will certainly take a closer look at that decision, which is lengthy

considering it was issued in urgent proceedings. Meta's alternative solution of a 'pay or okay' model will likely be subject to a data protection assessment soon as well, as noyb has filed a complaint with the Austrian supervisory authority concerning this way of offering its services.[5] It is doubtful whether the authority will apply the same standards to the intermediary Meta as it does to journalistic content providing websites,[6] but the outcome of the proceedings should be eagerly awaited in view of its relevance for the sector altogether. Another landmark not only for this technology, but also with relevance for data protection law,[7] is the agreement on the EU AI Act that was reached by the European Parliament and the Council on 8 December 2023 in the trilogue proceedings.[8]

Mentioning this globally observed next 'leap' in digital technology regulation in the realm of the EU with a potential next 'Brussels effect' emanating from it, readers of EDPL may have already spotted important news in this regard: soon, EDPL will have a 'sister journal' covering the topic of artificial intelligence and law in the broadest sense and some of us EDPL editors have the honour to be involved in this new adventure, too. The *Journal of AI Law and Regulation (AIRe)*[9], Lexxion's newest addition to its journal portfolio, is set to launch in the first quarter of 2024!

In our current edition of EDPL we cover several long pending EU- and GDPR-related matters that seemingly are coming close to a – interim – conclusion.

Thilo Gottschalk deals with what may, but likely will not, be the last word in a long story – third chapter currently – about finding the adequate legal framework allowing for data transfers from the EU to the US. Needless to point out the fundamental relevance of this for today's digital landscape which is still largely shaped by US companies. It is coincidental that we also closed last year's reports section with pointing to the importance of coming to legal certainty in light of the (second) fall of the privacy shield by the corresponding CJEU decision and that this topic accompanied us through the whole year of 2023. Now, as a kind of conclusion, the report '*The EU-US Data Privacy Framework (DPF) – A Blueprint for International Data Transfers?*' sheds light on the background of the agreement, the different processing activities covered by the DPF, as well as its complexity due to the various elements on the US side. The author concludes that, the EU-US DPF might not nec-

3   EDPB, 'Urgent Binding Decision 01/2023 requested by the Norwegian SA for the ordering of final measures regarding Meta Platforms Ireland Ltd (Art. 66(2) GDPR)' (27 October 2023) <https://edpb.europa.eu/system/files/2023-12/edpb _urgentbindingdecision_202301_no_metaplatformsireland_en_0 .pdf>.

4   Mark Cole and Katharina Kollmann, 'Norwegian DPA Blocks Personalised Advertising on Facebook and Instagram in Urgency Procedure: Another Step towards a Departure from Meta's Business Model?' (2023) 9(3) EDPL 363 – 370.

5   See 'noyb files GDPR complaint against Meta over "Pay or Okay"' (*noyb*, 28 November 2023) <https://noyb.eu/en/noyb-files-gdpr -complaint-against-meta-over-pay-or-okay>.

6   Katharina Kollmann, 'Reconciling 'Pay or Okay' Models with the GDPR: The Austrian DPA Decision and other Recent Approaches in Europe' (2023) 9(2) EDPL 200 – 206.

7   See on this the brief report produced by the Technology and Privacy Unit of the European Data Protection Supervisor, TechDispatch #2/2023 - Explainable Artificial Intelligence (16 November 2023) <https://edps.europa.eu/data-protection/our-work/ publications/techdispatch/2023-11-16-techdispatch-22023 -explainable-artificial-intelligence_en>.

8   European Parliament, 'Artificial Intelligence Act: deal on comprehensive rules for trustworthy AI' (9 December 2023) <https://www .europarl.europa.eu/news/en/press-room/20231206IPR15699/ artificial-intelligence-act-deal-on-comprehensive-rules-for -trustworthy-ai>.

9   For more information on writing for AIRe or subscribing to it, see <https://www.lexxion.eu/en/journals/aire/>.

essarily be a blueprint for Adequacy Decisions in other contexts, but the continuous development, discussion and litigation certainly will help to identify and tackle existing risks and shortcomings in international data transfers.

Another recurring and important fundamental topic is the enforcement of the GDPR. In particular, the effectiveness of cross-border enforcement has been subject to much criticism since the GDPR's entry into force. This can also be found in the Council's recently published position and findings on the application of the GDPR, in which it calls for a comprehensive evaluation of the Regulation in view of the experience with its application in practice.[10] *Lisette Mustert* gives us an overview of how the EU wants to change some of these practical shortcomings in the future by presenting the recent Commission Proposal for a Regulation laying down additional procedural rules relating to the enforcement of Regulation (EU) 2016/679. In her report *'The Commission Proposal for a New GDPR Procedural Regulation: Effective and Protected Enforcement Ensured?'* she highlights the most significant key mechanisms of the proposal: duties to handle and investigate complaints, increased cooperation among authorities, the dispute resolution mechanism introduced, and the procedural rights granted to addressees. However, as *Mustert* states with regret, there are no specific rights given to complaining data subjects, for example in case an authority does not continue with investigations on behalf of a complaint but switches in the same matter to an own-volition investigation. In her opinion, the proposal is an important step towards (more) effective enforcement of data protection law but has room for improvements. So, here again: it will be interesting to observe in 2024 what the positioning of the legislative bodies will be and the shape the final compromise will take.

Eva Lievens and *Valerie Verdoodt* turn their attention to a decision of the Data Protection Commission (DPC) that originated in Ireland but is significant for the whole of Europe – as with so many of the DPC's decision since they consider the main online services for the majority of people in the EU. The social network TikTok, which is particularly popular among the underage population, has around 125 million monthly active users in the EU.[11] However, Chinese provider Bytedance in the view of the DPC did not adequately protect users' personal data which is why it imposed a large fine, primarily for violations relat-

ing to the data of minors. The report *'A €345 Million Fine for TikTok for Violations of GDPR Obligations on the Processing of Children's Personal Data'* gives us a comprehensive overview of the decision, the procedure it went through on supranational level and the key aspects for the calculation of the fine. The authors also reflect on what this decision means in a broader context for the protection of minors online and why technical developments in the digital environment in this area must be observed closely.

Lastly, *Katharina Kollmann* deals with a fundamental issue, too, that is taking place in parallel in many Member States and to which the CJEU has already, and will further, contribute. She takes the perspective of the approach of the matter in Germany. Her contribution *'Recent Decisions from German Courts in Facebook Scraping Cases: Compensation of Non-Material Damages or Not?'* deals with these two issues of supranational relevance: the data scraping incident of 2018/19 on the social media platform Facebook which resulted in the violation of the data protection rights of millions of users worldwide, and the scope of the compensation obligation with regard to non-material damages. The latter, in particular, has become the focus of discussion with the CJEU's decision in the *Österreichische Post*[12] case and will most likely become even more so in light of many other pending proceedings. By presenting decisions from different courts in Germany, *Kollmann* shows that the outcome of these proceedings, in particular whether non-material damages were awarded, can differ even within a single Member State. One can anticipate what this means for the consistency of decisions on the Facebook scraping cases pending throughout Europe.

This overview of our reports once again demonstrates the diversity of topics and developments that we can cover thanks to our country experts. We, the editors together with the Institute of European Media Law (EMR), hope to have made a worthwhile selection in sharing with you these reports and are sure that they will prove useful to you. We invite you to

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10 Council position and findings on the application of the GDPR – Presidency proposal (4 October 2023), 13538/23 <https://data.consilium.europa.eu/doc/document/ST-13538-2023-INIT/en/pdf>.

11 TikTok, 'Information about TikTok's Monthly Active Recipients number for the European Union' <https://www.tiktok.com/transparency/en/eu-mau/>.

12 Case C-300/21 *Österreichische Post* [2023] ECLI:EU:C:2023:370.

continue to suggest reports on future national and European developments to us. To submit a report or to share a comment please reach out to us at <mark .cole@uni.lu> or <c.etteldorf@emr-sb.de>. Finally, we would like to wish all our readers a safe and healthy end of year and extend our best wishes to a happy new year 2024 which will certainly continue to bring relevant developments in data protection law and hopefully keep us connected through EDPL and the reports section.