

## Data Privacy: An Evolving Global Landscape

I am pleased to present the articles published in this issue of the Global Privacy Law Review (GPLR).

Under the *Report* section, Waewpen Piemwichai of Tilleke & Gibbins analyses Vietnam's first-ever personal data protection law.<sup>1</sup>

On 17 April 2023, Vietnam adopted its long-awaited data privacy law, Decree No. 13/2023/ND on the Protection of Personal Data (Decree 13/2023).<sup>2</sup> Decree 13/2023 took effect on 1 July 2023, without any transition period.

Similar to the European Union's General Data Protection Regulation (GDPR), Decree 13/2023 is centred around eight principles for personal data processing:

- (1) lawfulness;
- (2) transparency;
- (3) purpose limitation;
- (4) data minimization;
- (5) accuracy;
- (6) integrity, confidentiality, and security;
- (7) storage limitation; and
- (8) accountability.

Also, Decree 13/2023 sets out broad data subject rights as well as requirements for organizations to report personal data breaches, obtain data subjects' consent for advertising and marketing, and conduct impact assessments, including for transferring personal data overseas from Vietnam. Piemwichai examines these rights and obligations in great detail.

All companies that are located in Vietnam or that carry out data processing activities in Vietnam are required to comply with Decree 13/2023. It will undoubtedly have significant implications on companies that have business operations in Vietnam.

In the *Case Notes* section, we will examine the two recent landmark cases of the Court of Justice of the European Union (CJEU).

Prof. Dr Boris Paal of the University of Leipzig analyses the CJEU's first case on automated decision-making.<sup>3</sup>

Credit scores are crucial in determining an individual's creditworthiness. This is mainly because credit institutions use such scores to decide whether and at what interest rate and terms a loan will be granted to a person.

In the case at hand, Schufa Holding AG (Schufa), a German private credit bureau, provided a credit institution with a score for an applicant. The score served as the basis for its refusal to grant the credit to the applicant. The applicant subsequently asked Schufa to give her access to the data used to calculate her credit score and erase it.

However, Schufa only informed the data subject of her credit score and the principles underlying the calculation method, without providing information on the specific data included in the calculation. Schufa argued that the calculation method is a trade secret.

The data subject filed a complaint with *Hessischer Beauftragter für Datenschutz und Informationsfreiheit* (HBDI) in Germany asking it to order Schufa to provide information about the logic involved, as well as the significance and consequences of the processing.<sup>4</sup> The HBDI considered that the scoring by Schufa was in accordance with the requirements of German *Bundesdatenschutzgesetz* (BDSG) and refused to take action against Schufa.<sup>5</sup> The data subject appealed the decision before the Administrative Court of Wiesbaden. The court requested a preliminary ruling from the CJEU.<sup>6</sup>

These preliminary ruling proceedings primarily deal with the question of whether the creation of a score by a credit bureau falls within the scope of Article 22(1) of the

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<sup>1</sup> Waewpen Piemwichai, *Vietnam's First-Ever Personal Data Protection Decree*, in this issue at 121.

<sup>2</sup> Thư Viện Pháp Luật (Law Library), *Decree* (17 Apr. 2023), [thuvienphapluat.vn/van-ban/Cong-nghe-thong-tin/Nghi-dinh-13-2023-ND-CP-bao-ve-du-lieu-ca-nhan-465185.aspx](http://thuvienphapluat.vn/van-ban/Cong-nghe-thong-tin/Nghi-dinh-13-2023-ND-CP-bao-ve-du-lieu-ca-nhan-465185.aspx) (accessed 8 Jul. 2023).

<sup>3</sup> Boris Paal, *Article 22 GDPR: Credit Scoring Before the CJEU*, in this issue at 127.

<sup>4</sup> The Hessen data protection authority, [datenschutz.hessen.de](http://datenschutz.hessen.de) (accessed 8 Jul. 2023).

<sup>5</sup> German Federal Data Protection Act, s. 31.

<sup>6</sup> Case C-634/21, Request for a preliminary ruling from the Verwaltungsgericht Wiesbaden (Germany) lodged on 15 Oct. 2021, *OQ v. Land Esse, Schufa Holding AG* (joined party).

GDPR.<sup>7</sup> The CJEU will thus decide on the scope of data subjects' right to obtain meaningful information when their personal data is processed through profiling systems.

On 16 March 2023, Advocate General (AG) Priit Pikamäe delivered his opinion in Cases C-26/22, C-64/22, and C-634/21 involving Schufa.<sup>8</sup> In his note, Paal focuses on the third case, where the AG strikes a balance between trade secrets and the data subject's right not to be subject to a decision based solely on automated processing, including profiling, under Article 22(1) GDPR.

In his opinion, the AG found that the conditions for that right are satisfied as<sup>9</sup>:

- (1) the scoring procedure constitutes 'profiling';
- (2) the decision produces legal effects concerning the person concerned or similarly significantly affects him or her; and
- (3) the decision is based solely on automated processing.

The AG therefore concluded that Article 22(1) GDPR should be interpreted as meaning that<sup>10</sup>:

the automated establishment of a probability value concerning the ability of the person concerned to service a loan in the future already constitutes a decision based solely on automated processing, including profiling.

In contrast, Paal argues that such an automated determining of a probability value or score 'does not in itself constitute a decision based solely on automated processing' under Article 22(1) of the GDPR, regardless of whether a third party 'uses this score significantly or exclusively as a basis for its decision on the establishment' of a contractual relationship with the individual.<sup>11</sup>

The AG further stated that the obligation to provide 'meaningful information on the logic used' should be

interpreted as requiring sufficiently detailed explanations of the method used to calculate the score.<sup>12</sup>

There has been much academic debate on the existence and the limits of a 'right to explanation' under the GDPR. The CJEU now has the opportunity to clarify the extent of such a right in case of profiling.

The AG's Opinion is not binding on the CJEU, and it remains to be seen whether the court will follow the AG's approach. Clearly, the ruling will be of huge interest to any organization that makes decisions based on automated processing.

Next, Patrick Van Eecke & Bartholomäus Regenhardt of Cooley LLP analyse the CJEU's ruling on the role of a data protection officer (DPO) in Cases C-453/21 and C-560/21.<sup>13</sup>

The CJEU ruled that a DPO may perform other duties or tasks as long as there is no conflict of interest.<sup>14</sup>

Further, the CJEU found that the GDPR does not preclude Member State legislation which provides that a controller or a processor may dismiss a DPO where there is 'just cause', in so far as such legislation does not undermine achieving of the objectives of the GDPR.<sup>15</sup>

Van Eecke & Regenhardt note that these findings are not surprising, as the CJEU has reached similar conclusions in earlier decisions.<sup>16</sup>

The authors also note that the designation and position of DPOs is an increasingly important topic for data protection authorities.<sup>17</sup> The rulings came just ahead of the European Data Protection Board's (EDPB's) coordinated enforcement actions focusing on the designation and position of DPOs.<sup>18</sup>

Again, these rulings of the CJEU are of particular importance for many organizations, as they shed additional light on the role of DPOs under the GDPR.

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<sup>7</sup> *Ibid.*, Question 1. Question 2 is as follows: 'If Question 1 is answered in the negative, are Articles 6(1) and 22 of Regulation (EU) 2016/679 to be interpreted as precluding national legislation under which the use of a probability value – in casu, in relation to a natural person's ability and willingness to pay, in the case where information about claims against that person is taken into account – regarding specific future behaviour of a natural person for the purpose of deciding on the establishment, implementation or termination of a contractual relationship with that person (scoring) is permissible only if certain further conditions, which are set out in more detail in the grounds of the request for a preliminary ruling, are met'.

<sup>8</sup> Opinion of Advocate General Priit Pikamäe (16 Mar. 2023), in Case C-634/21, *supra* n. 6, ECLI:EU:C:2023:220.

<sup>9</sup> CJEU, Press Release No. 49/23 – Advocate General's Opinion in Case C-634/21 – *Schufa Holding and Others (Scoring) and in Joint Cases C-26/22 and C-64/22 Schufa Holding and Others (Discharge from remaining debts)* (16 Mar. 2023), [curia.europa.eu/jcms/upload/docs/application/pdf/2023-03/cp230049en.pdf](https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-03/cp230049en.pdf) (accessed 8 Jul. 2023).

<sup>10</sup> Pikamäe, *supra* n. 8, para. 95.

<sup>11</sup> Paal, *supra* n. 3, at 137.

<sup>12</sup> Pikamäe, *supra* n. 8, para. 58.

<sup>13</sup> Patrick Van Eecke & Bartholomäus Regenhardt, *CJEU Clarifies Whether Data Protection Officers Can Perform Other Roles or Be Dismissed*, in this issue at 138. CJEU Cases C-453/21, *X-FAB Dresden GmbH & Co. KG v. FC (Sixth Chamber)* (9 Feb. 2023), ECLI:EU:C:2023:79, and C-560/21, *ZS v. Zweckverband 'Kommunale Informationsverarbeitung Sachsen' KISA, Körperschaft des öffentlichen Rechts* (Sixth Chamber) (9 Feb. 2023), ECLI:EU:C:2023:81.

<sup>14</sup> Cases C-453/21 and C-560/21, *ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> Van Eecke & Regenhardt, *supra* n. 13, at 140.

<sup>17</sup> *Ibid.*, at 140. See e.g., Ceyhun Necati Pehlivan, Eduardo Novella & Elena Valín, *Spanish Data Regulator Issues Guidance On Data Protection Officers*, Linklaters Tech Insights (5 Jun. 2023), [techinsights.linklaters.com/post/102ig8m/spanish-data-regulator-issues-guidance-on-data-protection-officers](https://techinsights.linklaters.com/post/102ig8m/spanish-data-regulator-issues-guidance-on-data-protection-officers) (accessed 8 Jul. 2023).

<sup>18</sup> EDPB, *Launch of Coordinated Enforcement on Role of Data Protection Officers* (15 Mar. 2023), [edpb.europa.eu/news/news/2023/launch-coordinated-enforcement-role-data-protection-officers\\_en](https://edpb.europa.eu/news/news/2023/launch-coordinated-enforcement-role-data-protection-officers_en) (accessed 8 Jul. 2023).

In the *Book Reviews* section, we have three brilliant reviews from the Department of Innovation and Digitalization in Law at the University of Vienna.

Klaudia Kwiatkowska reviews Nita A. Farahany's *The Battle for Your Brain: Defending the Right to Think Freely in the Age of Neurotechnology*.<sup>19</sup>

In her book, Farahany, a professor of law and philosophy at Duke University who studies the ethical, legal and social ramifications of emerging technologies, considers 'the promises and perils of the coming dawn of brain access and alteration'.<sup>20</sup>

Neurotechnologies are rapidly developing for use in several sectors, including healthcare, wellness, sports, and marketing.<sup>21</sup> For example, Elon Musk's Neuralink is developing brain-machine interfaces that can read thoughts directly.<sup>22</sup>

The Information Commissioner's Office (ICO) in the United Kingdom also recently stated that<sup>23</sup>:

the use of technology to monitor neurodata, the information coming directly from the brain and nervous system, will become widespread over the next decade.

Farahany is sounding the alarm. She argues that such technologies may be used for 'neural surveillance' purposes by authoritarian governments, including as an interrogation tool, or by companies to hire or monitor their employees.<sup>24</sup>

This is not science fiction. There are some chilling examples<sup>25</sup>: Employees' brain waves are reportedly being monitored in state-owned enterprises and the military across China.<sup>26</sup> The US Department of Defence is developing technology that could be used to recall memories and wirelessly transmit that information to a computer

worn externally.<sup>27</sup> Researchers also predict which criminals are more likely to reoffend based on brain scans.<sup>28</sup>

In her book, Farahany asks important questions and inquires whether our existing laws actually protect our cognitive freedom<sup>29</sup>:

I worry about our laws' ability to keep up with technological change. Take the First Amendment of the US Constitution, which protects freedom of speech. Does it also protect freedom of thought? Does it give us the freedom to alter our thoughts whenever and however we choose, or can the government or society put limitations on what we do with our own brains? What about the Fifth Amendment? What does it mean to be protected from self-incrimination when the government can hook you up to a machine and find out what's in your mind, whether you want to share it or not? Can companies that we share our brain data with through their applications sell it to third parties? Right now, no laws prevent them from doing so.

As Kwiatkowska notes in her review, 'Farahany makes a strong case for the need to recognize an international human right to cognitive liberty', which would come to supplement other existing fundamental rights to privacy, data protection, freedom of thought and self-determination.<sup>30</sup>

In the same vein, in her new book *Data Driven: Truckers, Technology, and the New Workplace Surveillance* Prof. Karen Levy of Cornell University discusses how intrusive surveillance technologies have 'upended life and work' for truckers and raises crucial questions about the expansion of workplace surveillance.<sup>31</sup> Clara Saillant reviews the book and provides us with a detailed analysis.<sup>32</sup>

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<sup>19</sup> Nita A. Farahany, *The Battle for Your Brain: Defending the Right to Think Freely in the Age of Neurotechnology* 288 (reviewed by Klaudia Kwiatkowska, St. Martin's Press, New York 2023) USD 29.99. ISBN: 978-1-250-27295-9, in this issue at 142.

<sup>20</sup> *Ibid.*

<sup>21</sup> In healthcare, see e.g., Pallab Ghosh, *Brain Implants Help Paralyzed Man To Walk Again*, BBC (24 May 2023), [www.bbc.com/news/science-environment-65689580](http://www.bbc.com/news/science-environment-65689580) (accessed 8 Jul. 2023); and in sports, see e.g., Mateo Pitkin, *Neurotech in Sports: 'The Head Should Always Be in the Game'*, Medium (27 Mar. 2020), [medium.com/neurotech-davis/neurotech-in-sports-the-head-should-always-be-in-the-game-9fb27bb43c36](https://medium.com/neurotech-davis/neurotech-in-sports-the-head-should-always-be-in-the-game-9fb27bb43c36) (accessed 8 Jul. 2023).

<sup>22</sup> Fiona Jackson, *Neuralink Is Approved For Human Trials, How Long Until We're All Walking Around With Elon Musk's Brain Chip?*, Dailymail (26 May 2023), [www.dailymail.co.uk/sciencetech/article-11494731/How-does-Elon-Musks-Neuralink-brain-chip-actually-work.html](https://www.dailymail.co.uk/sciencetech/article-11494731/How-does-Elon-Musks-Neuralink-brain-chip-actually-work.html) (accessed 8 Jul. 2023).

<sup>23</sup> ICO, *ICO Warns of 'Real Danger' of Discrimination in New Technologies That Monitor The Brain*, ICO (8 Jun. 2023), [ico.org.uk/about-the-ico/media-centre/news-and-blogs/2023/06/ico-warns-of-real-danger-of-discrimination-in-new-technologies-that-monitor-the-brain](https://ico.org.uk/about-the-ico/media-centre/news-and-blogs/2023/06/ico-warns-of-real-danger-of-discrimination-in-new-technologies-that-monitor-the-brain) (accessed 8 Jul. 2023).

<sup>24</sup> Farahany, *supra* n. 19.

<sup>25</sup> Melissa Heikkilä, *Machines Can Read Your Brain. There's Little That Can Stop Them.*, Politico (31 Aug. 2021), [www.politico.eu/article/machines-brain-neurotechnology-neuroscience-privacy-neurorights-protection](https://www.politico.eu/article/machines-brain-neurotechnology-neuroscience-privacy-neurorights-protection) (accessed 8 Jul. 2023).

<sup>26</sup> Tara Francis Chan, *China is Monitoring Employees' Brain Waves and Emotions*, Business Insider (1 May 2018), [www.businessinsider.com/china-emotional-surveillance-technology-2018-4](https://www.businessinsider.com/china-emotional-surveillance-technology-2018-4) (accessed 8 Jul. 2023).

<sup>27</sup> Meg Tirrell & Brad Quick, *Defence Department Developing a 'Prosthetic Memory'*, CNBC (25 May 2016), [www.cnn.com/2016/05/24/defense-department-developing-a-prosthetic-memory.html](https://www.cnn.com/2016/05/24/defense-department-developing-a-prosthetic-memory.html) (accessed 8 Jul. 2023).

<sup>28</sup> Regina Nuzzo, *Brain Scans Predict Which Criminals Are More Likely to Reoffend*, Nature (2013), doi.org/10.1038/nature.2013.12672 (accessed 8 Jul. 2023).

<sup>29</sup> Farahany, *supra* n. 19, at 10.

<sup>30</sup> Kwiatkowska, *supra* n. 19, at 143.

<sup>31</sup> Karen Levy, *Data Driven: Truckers, Technology, and the New Workplace Surveillance* (Princeton University Press, New Jersey 2023).

<sup>32</sup> *Ibid.* reviewed by Clara Saillant, in this issue at 145.

Levy notes that federal regulations in the US require truckers to install digital monitors which, hardwired to their engines, log data about how long a truck has been driven and its location.<sup>33</sup> She also states that such devices expand employers' surveillance capabilities and enable them to monitor how fast the driver is going, how hard he is braking, and fuel consumption. The data are then used to create competition between drivers and predict future performance.<sup>34</sup>

These surveillance technologies are designed to 'address the pervasive problem of trucker fatigue by regulating the number of hours driven each day'.<sup>35</sup> Levy nevertheless notes that they have also eroded the 'long valued day-to-day independence' and 'tradition of autonomy'.<sup>36</sup> She also argues that such surveillance measures have paradoxically made the roads less safe.<sup>37</sup>

As noted by Saillant, Levy concludes her book by 'opening the question of technology, enforcement and apparent order outside of the trucking world'.<sup>38</sup> The reviewer further writes<sup>39</sup>:

In [Levy's] view, technology becomes a means for decision-makers to solve economic and social problems instead of focusing on the real issues represented by work conditions – in the case of truckers, this would mean increasing wages and acknowledging overtime. Technologies, instead of being the only solution to socio-economic and institutional problems, should be integrated and put at the service of social order, workers' protection and human dignity.

Finally, Saskia Kaltenbrunner reviews Danielle Keats Citron's *The Fight for Privacy: Protecting Dignity, Identity and Love in the Digital Age*.<sup>40</sup>

In her book, Citron argues that the barrier that once protected our intimate and private lives from outside

interests no longer exists.<sup>41</sup> She notes that we have 'embraced a vast array of technology that enables constant access and surveillance of the most private aspects of our lives'.<sup>42</sup> As a result, we are more vulnerable than ever: e.g., non-consensual pornography, emergence of deep fakes, inferences of intimate details from non-revealing information.<sup>43</sup>

The author also convincingly notes that such intimate privacy violations particularly affect women and minorities.<sup>44</sup>

As a solution, Citron proposes to take a human rights approach and recognize intimate privacy as a civil right.<sup>45</sup> She argues that 'collectively, citizens, lawmakers, and corporations have the power to create a new reality where privacy is valued and people are protected as they embrace what technology offers'.<sup>46</sup>

Kaltenbrunner notes that this 'goes beyond merely suggesting to strengthen privacy' and suggests a paradigm shift<sup>47</sup>:

it requires a shift in how we think about the relationship between data, dignity, and equality. The author successfully pre-empts criticism from those who perceive, for instance, increased online content moderation as a problematic restriction of freedom of speech. These two rights do not have to stand in opposition to each other, and in fact failure to protect privacy pushes those whose privacy has been violated out of the spheres in which they are able to participate in public discourse.

While Citron recognizes 'law's failure to protect intimate privacy in the [US] and in other countries', she remains optimistic and invites the readers to 'fight for intimate privacy'.<sup>48</sup>

In the *News* column, Diego Fernández of Marval O'Farrell Mairal in Argentina put together and edited

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<sup>33</sup> Zoë Corbyn, *Prof Karen Levy: 'Monitored Workers Are Less Likely To Think Outside The Box'*, *The Guardian* (22 Jan. 2023), [www.theguardian.com/world/2023/jan/22/karen-levy-the-more-workers-are-monitored-the-less-likely-they-are-to-think-outside-the-box](https://www.theguardian.com/world/2023/jan/22/karen-levy-the-more-workers-are-monitored-the-less-likely-they-are-to-think-outside-the-box) (accessed 8 Jul. 2023).

<sup>34</sup> *Ibid.*

<sup>35</sup> Levy, *supra* n. 31.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> Saillant, *supra* n. 32, at 145.

<sup>39</sup> *Ibid.*

<sup>40</sup> Danielle Keats Citron, *The Fight for Privacy: Protecting Dignity, Identity and Love in the Digital Age*, 304 (reviewed by Saskia Kaltenbrunner, W.W. Norton, New York 2022) USD 30.00. ISBN: 978-0-393-88231-5, in this issue at 147.

<sup>41</sup> Citron, *ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*, at xviii.

<sup>46</sup> *Ibid.*

<sup>47</sup> Kaltenbrunner, *supra* n. 40, at 147.

<sup>48</sup> Citron, *supra* n. 40, at xix.

LATAM Privacy News.<sup>49</sup> This piece tracks significant developments in some of the key Latin American countries in the area of privacy, data protection, and cybersecurity.<sup>50</sup>

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*I hope you enjoy reading this new edition of the GPLR!*

Ceyhan Necati Peblivan  
Editor-in-Chief

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<sup>49</sup> Diego Fernández (ed.), *LATAM Privacy News*, in this issue at 149.

<sup>50</sup> *Ibid.*