sciendo

GDPR as a New Consumer Protection "Weapon"?

Verica Trstenjak*

Summary: The General Data Protectio, Regulation (GDPR) has emerged as an important tool for safeguarding consumer rights in the digital age. This legal framework establishes crucial rights for individuals, such as the right to access their personal data, the right to be forgotten, and the right to compensation for data breaches. The Court of Justice of the European Union (CJEU) has played a significant role in interpreting and enforcing the GDPR, issuing rulings that have strengthened consumer protections. These rulings address a wide range of issues, including automated decision-making, data minimisation, and the processing of sensitive personal data.

Key words: Consumer data protection, General Data Protection Regulation, Court of Justice of the European Union, damage, copy, automated decisions, health data

Citation: TRSTENJAK, V. GDPR as a New Consumer Protection "Weapon"? *European Studies – the Review of European law, Economics and Politics*. 2024, vol. 11, no. 2, pp. 15–32, DOI: 10.2478/eustu-2024-0014

1. Introduction[1]

When President J. F. Kennedy first addressed consumer rights in the form of a bill of rights, he outlined four fundamental rights: the right to safety, the right to be informed, the right to choose, and the right to be heard. However, these rights did not address the issue of personal data protection at that time.[2] Today, as consumers engage with new methods of purchasing, accessing services, and investing, they face fresh challenges concerning their rights – especially rights

* Former Advocate General at the European Court of Justice. Contact email: trstenjakverica@gmail.com.

1 Part of this article will be published in a consumer law encyclopedia by Edward Elgar Publishing (Cheltenham) and edited by Hans-Wolfgang Micklitz and Monika Namysłowska.

2 KENNEDY, J. F. *Special Message to the Congress on Protecting the Consumer Interest* [online]. Available at: <https://www.presidency.ucsb.edu/documents/special-message-the-congress-protecting-the-consumer-interest>.

regarding their personal data. Therefore data protection has become a crucial element in defending consumer interests across various sectors. Thus, two important legal areas meet, with which legal theory deals extensively.[3,4]

The essential question is therefore whether data protection affects a better position of consumer protection, or vice versa, consumer protection provisions affect a better level of data protection.[5] The thesis is that legal acts on the protection of personal data affect the status of consumers and affect the higher level of their rights.

In addition, the influence of the Court of Justice of the European Union (CJEU) is essential. With its case law, this court decisively contributes not only to the interpretation of legal acts concerning the protection of personal data, but also indirectly directs the course of development in this area. By analysing the case law of the CJEU, I will show that this court has a decisive influence on the rights of consumers regarding the protection of personal data.

The CJEU has been, as will be explained, pivotal in influencing "consumer data protection rights" – a field that has seen substantial development in recent times with the rise of digitisation and advancements in artificial intelligence. A central role in that field is played by the General Data Protection Regulation (GDPR).[6]

Data protection applies to consumers in various contexts, such as when entering into a sales or other types of contracts, whether online or in-store. It also extends to services that consumers subscribe to or use, such as digital rights as well as other sectors, like passenger rights, as well as other sectors like banking, gambling, and insurance.

As a consequence, we can see that the focus of consumer protection is shifting. New legal areas are also benefiting consumers. While in the past there was a significant amount of case law from both national courts and particularly the

---

3 About consumer law see: MICKLITZ, H.-W. et al. (eds.). *European Consumer Law*. Cambridge: Intersentia, 2014.

4 About data protection see: DE FRANCHESCHI, A. et al. (eds.). *Digital Revolution – New Challenges for Law: Data Protection, Artificial Intelligence, Smart Products, Blockchain Technology and Virtual Currencies*. München: Beck, 2020.

5 About the relation between consumer law and data protection see also: GRAEF, I., CLIFFORD, D., VALCKE, P. Fairness and Enforcement: Bridging Competition, Data Protection and Consumer Law. *International Data Privacy.* 2018, vol. 8, no. 3; TJONG TJIN TAI, E. Data Ownership and Consumer Protection. *Journal of European Consumer and Market Law.* 2018, vol. 7, no. 4; RHOEN, M. Beyond consent: improving data protection through consumer protection law. *Internet Policy Review* [online]. Available at: *https://policyreview.info/articles/analysis/beyond-consent-improving-data-protection-through-consumer-protection-law*

6 Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.

CJEU[7] regarding the Unfair Terms Directive 93/13[8], today there is extensive case law from the CJEU related to data protection and the interpretation of the GDPR. So, is the GDPR a "new unfair terms directive", in the sense that it is a legal act that greatly strengthens consumer rights? For both directive and regulation, it is considered that their role is decisively influenced by the jurisprudence of the CJEU.

2. The EU Data Protection Legal Framework

2.1. EU Charter and other legal acts

In the EU, data protection is governed by several legal acts. Among them, the EU Charter of Fundamental Rights (the Charter) plays a key role in primary law. The Charter addresses fundamental human rights, including social, political, and other basic rights, with personal data protection being of particular interest. Article 8 of the Charter specifically addresses data protection, stating that everyone has the right to the protection of personal data concerning them. It further specifies that such data must be processed fairly, for specified purposes, and based on the consent of the individual or another legitimate legal basis. Additionally, it guarantees the right to access data collected about oneself and the right to have that data rectified.

But data protection is not only enshrined in the Charter. The EU has also adopted several legal acts which build on its primary law. A pivotal legal instrument is the aforementioned GDPR. As outlined in its first article, the GDPR sets forth rules for the protection of natural persons in the processing of personal data. The GDPR safeguards fundamental rights and freedoms, with a particular emphasis on the right to personal data protection.[9] It is highly relevant for consumers, impacting areas such as health, education, employment, private activities, business interactions, and "typical" consumer affairs.

---

7 For example: Judgement of the CJEU (Grand Chamber) in the case *VB Pénzügyi Lízing*, C-137/08, 9 November 2010, ECLI:EU:C:2010:659; Judgement of the Court (Fourth Chamber) in the case *Pannon GSM*, C-243/08, 4 June 2009, ECLI:EU:C:2009:350; Judgement of the Court (First Chamber) in the case *Banco Español de Crédito*, C-618/10, 14 June 2012, ECLI:EU:C:2012:349; Judgement of the Court (First Chamber) in the case *Pereničová and Perenič*, C-453/10, 15 March 2012, ECLI:EU:C:2012:144; Judgement of the Court in the case *Kásler und Káslerné Rábai*, C-26/13, 30 April 2014, ECLI:EU:C:2014:282.

8 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95/29.

9 KUNER, C., BYGRAVE, L. A., DOCKSEY, C. (eds.). *The EU General Data Protection Regulation (GDPR).* Oxford: Oxford University Press, 2020.

In that regard it is also worth mentioning that a so-called „GDPR Enforcement Regulation“[10] is currently in the legislative process.[11] The EU has also adopted other legislative acts like the Digital Services Act (DSA)[12], Digital Markets Act (DMA)[13], and the Artificial Intelligence Act (AI Act)[14], which at least partially regulate data protection.

The aforementioned newer legislative measures, that stand next to the GDPR, further enhance consumer protection in the rapidly evolving digital marketplace. The DSA, for instance, introduces new standards for online intermediaries and platforms such as marketplaces, social networks, and content-sharing services. These platforms often act as key interfaces between businesses and consumers, making it essential that consumer rights are safeguarded. The DSA ensures greater transparency in how digital services operate, including how content is moderated and how personal data is used in targeted advertising. For consumers, this means clearer rights, the ability to report harmful content, and mechanisms for more transparent, accountable interactions with online services.

The DMA addresses another critical aspect of consumer protection by targeting large online platforms, known as “gatekeepers” which control access to significant portions of the digital market. The DMA imposes obligations on these gatekeepers to prevent anti-competitive practices that could harm consumers. For example, it ensures that consumers have more freedom to choose between services, prevents monopolistic behaviours like self-preferencing, and guarantees access to fair pricing and innovation in digital services. This translates into

---

10 Proposal for a Regulation of the European Parliament and of the Council laying down additional procedural rules relating to the enforcement of Regulation (EU) 2016/679 [2023] COM(2023) 348 final.

11 Said regulation already passed the initial reading in the respective Parliament committee in 2024 (See: Amendments adopted by the European Parliament on 10 April 2024 on the proposal for a regulation of the European Parliament and of the Council laying down additional procedural rules relating to the enforcement of Regulation (EU) 2016/679 [2024] (COM(2023)0348 – C9-0231/2023 – 2023/0202(COD))). Furthermore, the Council has also already adopted a common member states‘ position (Proposal for a Regulation of the European Parliament and of the Council laying down additional procedural rules relating to the enforcement of Regulation (EU) 2016/679.

12 Regulation (EU) 2022/2065 of the European Parliament and of the Council on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L 277/1.

13 Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L 265/1.

14 Regulation (EU) 2024/1689 of the European Parliament and of the Council laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) [2024] OJ L.

a more competitive digital environment, benefiting consumers through greater choice, fairer market conditions, and enhanced quality of services.

Similarly, the AI Act is designed to regulate the use of AI technologies, with particular attention to consumer safety, privacy, and fairness. Many AI-driven applications, such as facial recognition, predictive algorithms, and automated decision-making, have a direct impact on consumers, affecting areas such as product recommendations, credit scoring, job applications, and even healthcare. The AI Act ensures that AI systems used in these sectors meet strict safety and transparency standards, so consumers can trust that their rights are protected, and that AI systems are used ethically and responsibly. This is especially important as AI becomes more integrated into everyday consumer experiences, potentially influencing decisions in sensitive areas of life.

2.2. Certain rights under the GDPR, important for consumers

It is important to underscore the critical provisions of the GDPR that protect consumer rights. One such provision is the right of access of Article 15 GDPR, which grants individuals the right to receive confirmation from the data controller about whether their personal data is being processed. If processing is occurring, the individual can access this data and request key information, such as the purposes of processing, the categories of data involved, and the recipients.

Another key right is outlined in Article 17, the right to be forgotten, which applies under specific conditions. The CJEU first acknowledged this right even before the GDPR was adopted in the landmark case C-131/12, *Google Spain*,[15] which involved interpreting Directive 95/46 on personal data protection.[16] Already in its 2014 ruling, the CJEU determined that individuals could request the deletion of personal data or require search engine operators to remove links to third-party websites containing information about them from search results tied to their name.

A notable concern in the context of artificial intelligence is automated decision-making. Article 22 GDPR addresses this, giving individuals the right not to be subject to decisions based solely on automated processing, including profiling, if they have legal or similar significant effects on them.

---

15 Judgement of the CJEU (Grand Chamber) in the case *Google Spain and Google*, C-131/12, 13 May 2014, ECLI:EU:C:2014:317.

16 TRSTENJAK, V. Human Rights in the Digital Era: From Digital Practice to Digital Law and Case Law. In: MILLER, K., WENDT, K. (eds.). *Human Rights in the Digital Era: From Digital Practice to Digital Law and Case Law*. Cham: Springer, 2021.

Additionally, Article 82 GDPR concerns the right to compensation in the event of a data protection breach. It allows anyone who suffers material or non-material damage due to a GDPR violation to claim compensation from the controller or processor responsible. CJEU case law has already started addressing this right.[17]

It is also crucial to note that fundamental rights, in general, are not absolute.[18] Limitations are only allowed under strict conditions, as defined in Article 52 of the Charter. This principle is reflected in the GDPR. According to Recital 4, the right to personal data protection is not absolute. The CJEU has reinforced this point in several rulings, noting that data protection must be balanced against other fundamental rights and considered in relation to its role in society.[19]

3. Case Law of the CJEU and its impact on data protection (and consumers rights)

As noted, the CJEU frequently rules in favour of protecting personal data. In the cases discussed in this contribution, the parties typically involve ordinary citizens, often consumers, on one side, and major global entities like Meta, Google, national data protection authority or postal services on the other. Consumers are often at a disadvantage in these situations. Many of the cases referenced relate to the GDPR or its predecessor, Directive 95/46. In some cases, the CJEU has underscored the importance of data protection as a fundamental right, enshrined in Article 8 of the Charter.

This analysis will focus on the CJEU's 2023 and 2024 rulings and their impact on personal data protection across various sectors, particularly from the consumer's perspective. Specific areas such as consumer data in banking and the right to compensation for personal data breaches will be highlighted.

3.1. Right to compensation

The right to compensation, in addition to general provisions (e. g. in civil code), is often regulated in specific areas (for example, regarding air passenger rights).

---

[17] Judgement of the CJEU (Third Chamber) in the case *Krankenversicherung Nordrhein*, C-667/21, 21 December 2023, ECLI:EU:C:2023:1022.

[18] TRSTENJAK, V. Limitations of Fundamental Rights in EU Law: Are Human Rights Absolute? *European Review*. 2023, vol. 32, no. 2.

[19] See, for example, Judgement of the CJEU (Third Chamber) in the case *Pankki S*, C-579/21, 22 June 2023, ECLI:EU:C:2023:501, para 78; Similarly in Judgement of the CJEU (Grand Chamber) in the case *Facebook Ireland und Schrems*, C-311/18, 16 July 2020, ECLI:EU:C:2020:559, para 172.

The GDPR also contains particular provisions concerning the right to compensation. Article 82 of the Regulation states that: „Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered."

Regarding the right to compensation is of particular interest the Austrian case C-300/21, *Österreichische Post*,[20] which concerns the interpretation of Article 82 GDPR.[21] This case involves a dispute between an Austrian citizen, UI, and the Austrian post (Österreichische Post) regarding compensation for non-material damage that UI claims to have suffered due to the company's processing of data related to the political preferences of individuals living in Austria, including his own, without his consent. The CJEU ruled that a mere infringement of the GDPR does not automatically result in a right to compensation. The Court stressed that the harm suffered must meet a certain threshold of seriousness to justify compensation. This means, that violation *per se* does not necessarily lead to compensation. In this case, the CJEU based its ruling solely on the GDPR, without referencing the Charter.

However, the Court could potentially take a different approach in the future, perhaps allowing for at least minimal compensation in every case of GDPR violation. A parallel for such proposal can be drawn with air passenger rights. Under the Air Passenger Rights Regulation,[22] specifically Article 7 of said Regulation, and CJEU case law, passengers are entitled to 'compensation' (in German: Ausgleichzahlungen) for lost time in the event of flight delays or cancellations, regardless of their status – whether students, athletes, or managers – provided the delay or cancellation meets certain conditions.[23]

Ultimately, national authorities are responsible for making final decisions concerning compensation in relation to GDPR, which can lead to significant differences in outcomes across Member States. This raises the question of whether such discrepancies might encourage forum shopping, specifically the selection of countries where servers and other data processing systems are located, a matter

[20] Judgement of the CJEU (Third Chamber) in the case *Österreichische Post*, C-300/21, 4 May 2023, ECLI:EU:C:2023:370.

[21] LI, S. L Compensation for non-material damage under Article 82 GDPR: A review of Case C-300/21. Maastricht Journal of European and Comparative Law. 2023, vol. 30, no. 3.

[22] Regulation (EC) No 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (Text with EEA relevance) [2004] OJ L 046.

[23] Judgement of the CJEU (Fourth Chamber) in the joined cases *Sturgeon and Others*, C-402/07 and C-432/07, 19 November 2009, ECLI:EU:C:2009:716.

already under discussion.[24] Regardless of the case law of the CJEU, it is important that this right is covered in the GDPR at all.

3.2. Consumers right of access to his/her data

The GDPR also establishes the rights of data subjects regarding access to their data. Article 15 of the GDPR stipulates that data subjects have the right to obtain confirmation from the data controller as to whether or not their personal data is being processed, and, if so, to access this data along with various related information.

The interpretation of this provision was addressed by the CJEU in the Austrian case C-487/21, *Österreichische Datenschutzbehörde*.[25] In this case, the CJEU examined the meaning of the term 'copy' within Article 15 GDPR. The dispute involved three parties: the consumer, F.F., the Austrian Data Protection Authority (Österreichische Datenschutzbehörde), and CRIF GmbH, a business consulting agency that provides information on the creditworthiness of third parties at the request of its clients. Consequently, F.F.'s personal data was also processed for this purpose. However, the Austrian Data Protection Authority declined to require CRIF GmbH to provide F.F. with a copy of the documents and extracts from databases that included his personal data being processed.

It was essential for F.F. to receive some information about what data was being collected, although not all of it. Consequently, the CJEU interpreted the term 'copy' as it appears in Article 15 (3) GDPR. In this interpretation, the CJEU clarified that while the GDPR does not provide a definition for the term 'copy', the usual meaning of the term must be considered. According to the CJEU, this usual meaning refers to a faithful reproduction or transcription of an original document. Therefore, a merely general description of the data being processed or a reference to categories of personal data does not align with this definition.

The CJEU determined that the right to obtain a copy of personal data being processed means that the data subject must receive a faithful and comprehensible reproduction of all such data. The CJEU emphasised: "That right entails the right to obtain copies of extracts from documents or even entire documents or extracts from databases which contain, inter alia, those data, if the provision of such a copy is essential in order to enable the data subject to exercise effectively

24 BEKISZ, H., DWORNICZAK, D. *Towards a data-subject-friendly interpretation of Article 82 GDPR. Verfassungsblog* [online]. Available at: https://verfassungsblog.de/data-subject-friendly/

25 Judgement of the CJEU (First Chamber) in the case *Österreichische Datenschutzbehörde*, C-487/21, 4 May 2023, ECLI:EU:C:2023:369.

the rights conferred on him or her by that regulation, bearing in mind that account must be taken, in that regard, of the rights and freedoms of others.”[26]

This provision is particularly significant for consumers, who may be less aware of the potential risks or misuse of personal data in the private sector. As citizens, we tend to focus on potential breaches of personal data protection by public authorities, such as the police[27] or healthcare institutions[28], while often overlooking the risks posed by major corporations like Meta (e. g. Facebook), as well as private entities such as banks and online retailers.

The CJEU also interpreted Article 15 of the GDPR in a case concerning a consumer’s relationship with a bank. In the case C-579/21, *Pankki S*,[29] the CJEU addressed the consumer’s right to information about his personal data and provided an interpretation of Article 15 GDPR. The dispute originated in Finland, where J.M., an employee and also a client (and thus consumer) of a bank, had his request for certain information regarding consultations carried out on his personal data denied by the bank. Based on its interpretation of Article 15 GDPR, the CJEU ruled that every individual has the right to know the date and reasons for any consultation of their personal data.

3.3. Data protection, unfair commercial practice and processing of special categories of personal data

The European legislator was aware that certain personal data need stricter protection. Therefore, there is a provision in Art 9 GDPR that processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person’s sex life or sexual orientation shall be prohibited. However, in practice it is often not clear which data belong here and how to interpret problems regarding possible interference with personal data in a specific case.

[26] Ibid., para 45.

[27] Especially in combination with Directive (EU) 2016/680 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA [2016] OJ L 119/89.

[28] Judgement of the CJEU (First Chamber) in the case *FT (Copies du dossier médical)*, C-307/22, 26 October 2023, ECLI:EU:C:2023:811.

[29] Judgement of the CJEU (Third Chamber) in the case *Pankki S*, C-579/21, 22 June 2023, ECLI:EU:C:2023:501.

This important issue was addressed in the case concerning the processing of special categories of personal data and the concept of 'data concerning health'. The CJEU made a ruling based on a question from Germany in the case C-21/23, ***Lindenapotheke***,[30] regarding the interpretation of Article 9 of the GDPR, which pertains to the processing of special categories of personal data in connection with health. The question of unfair commercial practices also arose. Although the dispute primarily involved two companies (pharmacies), the case holds significant implications for consumers.

There, the German Federal Court had to resolve a dispute between two German pharmacies. The pharmacist who owns the ***Lindenapotheke*** pharmacy has been marketing pharmacy-only medicinal products on Amazon since 2017. Customers are required to provide certain information when ordering such medicinal products online.

Under German legislation on unfair commercial practices, a competing pharmacist sought an order from the German courts for the owner of *Lindenapotheke* to cease this activity unless it could guarantee that customers would provide their prior consent for the processing of health-related data. The competitor aimed to stop the online marketing of non-prescription medicines by its rival. The alleged act of unfair competition, according to the competitor, was due to the failure to comply with GDPR requirements concerning the processing of 'data concerning health'. The claim was that *Lindenapotheke* had infringed Article 9 of the GDPR by processing the data of customers who ordered non-prescription medicines online without obtaining the explicit consent of those customers to process their data.[31]

The referring court, the German Federal Court of Justice (*Bundesgerichtshof*, *BGH*) as a consequence asked the CJEU two key questions. Firstly, the BGH asked whether competitors can bring legal action against businesses for GDPR violations based on national antitrust laws. This is important because the GDPR primarily assigns enforcement powers to supervisory authorities and affected individuals, and it was unclear for quite some time whether competitors have the right to take legal action in such cases and if so to which degree.

Secondly, the national court seeks clarification on whether the personal information provided by customers when ordering non-prescription but pharmacy-only medicines online – such as their name and address – should be classified as 'health data' under the GDPR. This is especially important as health data receives special protection under the GDPR, especially relevant is Article 9 GDPR, and

[30] Judgement of the CJEU (Grand Chamber) in the case *Lindenapotheke*, C-21/23, 4 October 2024, ECLI:EU:C:2024:846.

[31] Ibid., paras 25–44.

it was unclear whether this personal information qualified as such health data simply due to their connection with pharmaceutical products.[32]

The CJEU concluded that the GDPR does not prevent competitors from filing antitrust claims and clarified that the GDPR does not exclude competitors from bringing legal actions under national laws, such as unfair competition claims, for GDPR violations.

The Court determined that while the GDPR provides remedies for individuals whose data protection rights have been violated, it does not exclude additional remedies available under national law, such as those under unfair competition laws.

Regarding the problem around 'health data', the Court ruled that even though the medicines are not prescription-based, the data collected could still reveal sensitive information about a person's health. As such, it qualifies as 'health data', which requires special protection under the GDPR. In conclusion, it determined that customer data, even in the context of non-prescription medicines, can qualify as 'health data' due to its potential to reveal sensitive health information. As such, this data requires special protection and consent under the GDPR.

It is worth mentioning, that CJEU here diverged from the opinion of the advocate general Spuznar.[33] He argued that data, that could only reveal hypothetical or imprecise conclusions, as would be the case here according to the advocate general, shall not be protected under the special regime for 'health data'.[34] Therefore, the final decision of the Court is more consumer-friendly than the Opinion.

It should be noted that especially modern technologies, including artificial intelligence, enable violations of human rights. The field of healthcare is particularly risky, as modern technologies are used more and more often. Therefore, it is important that there are special provisions in the GDRP regarding this data, as well as that the courts interpret them very strict.

3.4. Automated decision-making and consumers

Within the framework of the GDPR, Article 22 holds particular significance as it addresses automated decision-making. This provision outlines the conditions under which automated decisions may affect individuals. The first paragraph of Article 22 states that "the data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects

[32] Ibid., para 45.

[33] Opinion of the AG Spuznar in the case *Lindenapotheke*, C-21/23, 25 April 2024, ECLI:EU:C:2024:354.

[34] Ibid., paras 44–55.

him or her". This provision is critically important in practice, as it relates to the operations of banks, insurance companies, and similar entities, and it has a considerable impact on consumers. Article 22 GDPR also has to be read in relation to recital 71, which especially clarifies the definition of a ‚decision' in the sense of Article 22 GDPR.

An important case concerning automated decisions related to banking services was decided by the CJEU in December 2023.[35] In the case C-634/21, *SCHUFA*,[36] the CJEU addressed the interpretation of Article 22 GDPR. The dispute revolved around the activities and decisions of the company SCHUFA, which provides its clients with information regarding the creditworthiness of third parties. SCHUFA had supplied a credit institution with a score for the applicant, which formed the basis for refusing the credit application. The applicant argued that SCHUFA's refusal was contrary to data protection regulations.

The CJEU determined that interpreting Article 22 (1) GDPR requires consideration of the automated generation of a probability value by a credit information agency, based on personal data related to an individual's ability to meet future payment obligations. Such an automated process constitutes 'automated individual decision-making' under this provision if the third party significantly relies on this probability value to establish, implement, or terminate a contractual relationship with the individual.[37] In the context of scoring, the CJEU ruled that it should generally be regarded as an automated individual decision, which is prohibited by the GDPR.[38] This prohibition is particularly relevant when entities such as banks, which are clients of credit information agencies like SCHUFA, place substantial importance on the scoring process in their credit approval procedures.

The CJEU concluded that scoring is permissible only under specific conditions, which significantly affect credit calculations and similar scenarios. According to the judgement, probability calculations are acknowledged as automated decisions that have implications for individual rights. Although the judgement refers to a specific case, the interpretation of the CJEU is always valid, for all similar cases in all member states. Therefore, the impact of this ruling can be extremely important, not only for financial institutions, but also in other areas

35 BOARDMAN, R., LÖLFIN, N. Key takeaways from the CJEU's recent automated decision-making rulings. *International Association of Privacy Professionals* [online]. Available at: https://iapp.org/news/a/key-takeaways-from-the-cjeus-recent-automated-decision-making-rulings

36 Judgement of the CJEU (First Chamber) in the case *SCHUFA Holding (Scoring)*, C-634/21, 7 December 2023, ECLI:EU:C:2023:957.

37 General Data Protection Regulation, Recital 71.

38 Judgement of the CJEU (First Chamber) in the case *SCHUFA Holding (Scoring)*, C-634/21, 7 December 2023, ECLI:EU:C:2023:957, para 50.

where similar technology is used. Theory talks in this context about the expansive approach of the aforementioned judgement.[39]

3.5. Online social networks, personalised advertising and processing of special categories of personal data (sexual orientation)

It is also worth mentioning Case C-446/21, *Schrems (III)*,[40] initiated by well known data activist Max Schrems. Schrems has already achieved (indirect) victories in several cases before the CJEU, particularly concerning the transfer of personal data to the US.[41] In said case, the issue of processing special categories of his personal data arose. The request for a preliminary ruling came from the Austrian Supreme Court (*Oberster Gerichtshof*, *OGH*), and the CJEU gave its judgement in October 2024.

The dispute involved Mr Schrems, a Facebook user and data protection activist, and Meta, concerning the allegedly unlawful processing of personal data by the company. Schrems argued that Meta unlawfully processed his personal data, including sensitive data like his sexual orientation, which was inferred through third-party tools such as cookies and social plug-ins. It is especially noteworthy, that Schrems never disclosed his sexual orientation on Facebook. Meta processed this sensitive information based f.e. on his participation in a public panel discussion where he mentioned it. Schrems claimed this processing occurred without valid consent and thus contrary to the GDPR.

The Austrian supreme court sought clarification on whether Facebook's collection and analysis of personal data for personalised advertising could be justified under Article 6 (1) (b) of the GDPR, which concerns the necessity of processing data for the performance of a contract. In particular, the court questioned if this justification was applicable, or whether the legal basis for processing such data should instead fall under Article 6 (1) (a), which requires explicit consent from the user, and must meet the strict requirements of Article 7 of the GDPR. Additionally, and maybe most importantly, the Austrian court asked for

[39] PIERDES, M. et al. EU´s highest Court expands EU GDPR restrictions on automated decision-making, profiling and AI. *Morgan Lewis Lawflash* [online]. Available at: https://www.morganlewis.com/pubs/2024/02/eus-highest-court-expands-eu-gdpr-restrictions-on-automated-decision-making-profiling-and-ai

[40] Judgement of the CJEU (First Chamber) in the case *Schrems (Communication de données au grand public)*, C-446/21, 4 October 2024, ECLI:EU:C:2024:834.

[41] See also: Judgement of the CJEU (Fourth Chamber) in the case *Facebook Ireland and Schrems*, C-311/18, 16 July 2020, ECLI:EU:C:2020:559; Judgement of the CJEU (Grand Chamber) in the case *Schrems*, C-362/14, 6 October 2015, ECLI:EU:C:2015:650.

guidance on whether Article 5 (1) (c) of the GDPR (data minimisation) allows Meta to aggregate and process all personal data, both from on and off-platform activities, without limits on data type or retention time, solely for the purpose of targeted advertising. Another key question posed relates to the interpretation of Article 9 (1) of the GDPR concerning special categories of data, such as political beliefs or sexual orientation, and whether data processing of these sensitive types could be carried out by Meta, even if they do not explicitly distinguish them as such during their data analysis for personalised advertising. The national court also inquired if a public statement by an individual regarding their sexual orientation could be considered as having made such data public, thus allowing for its processing under Article 9 (2) (e).[42]

Thus, the national court asked, in essence, especially if the principle of data minimisation permits the unrestricted processing of personal data in terms of time and data type, and whether an individual's statements about their own sexual orientation, made during a panel discussion, justify the processing of other data related to their sexual orientation for the purpose of personalised advertising.[43]

The CJEU decided that the principle of data minimisation prohibits the unrestricted aggregation, analysis, and processing of personal data collected both on and off a platform for targeted advertising purposes. Meta‘s practice of utilising personal data without limitations on time or data type was deemed disproportionate. The Court reinforced once again that data minimisation requires that only data strictly necessary for the processing purpose should be used and retained only for as long as necessary. Additionally, the CJEU clarified that Mr. Schrems' public statements regarding his sexual orientation during a panel discussion did not grant Meta the right to process other related data. The Court ruled that making such a public statement cannot be interpreted as consent for the processing of additional data concerning a person's private life for personalised advertising.

In conclusion, the CJEU's ruling in Case C-446/21, *Schrems (III)*, reinforces the stringent protections enshrined in the GDPR, particularly regarding data minimisation. Other than that, it also clarified that public statements made by individuals regarding sensitive information, such as sexual orientation, do not equate to consent for the processing of additional related data.[44]

Schrems again succeeded against the giant Meta. The CJEU has again strengthened the protection of personal data with its decision, this time regarding

[42] Judgement of the CJEU (First Chamber) in the case *Schrems (Communication de données au grand public)*, C-446/21, 4 October 2024, ECLI:EU:C:2024:834, paras 11–34.

[43] Opinion of the AG Rantos in the case *Schrems (Communication de données au grand public)*, C-446/21, 4 October 2024, ECLI:EU:C:2024:366, para 2.

[44] Judgement of the CJEU (First Chamber) in the case *Schrems (Communication de données au grand public)*, C-446/21, 4 October 2024, ECLI:EU:C:2024:834, para 82.

the data concerning sexual orientation. Once again, the CJEU gave a GDPR interpretation that enables a higher level of protection of individual data. The judgement of the CJEU is important for data protection in the EU, and it also got an extraordinary response at the global level.[45]

4. Conclusion

The protection of consumers is evolving alongside advancements in information technology, digitalisation, and artificial intelligence. Regardless of the specific field, the GDPR plays a crucial role as a guardian of our personal data and, by extension, our privacy. In addition to the Charter and the GDPR, recent legislative acts such as the DSA, DMA, and AI Act have also been adopted. Legal acts on the protection of personal data affect the status of consumers and affect the higher level of their rights.

However, only time will reveal whether these comprehensive legal frameworks deal with the new and ever evolving problems in an effective manner or if they are maybe excessively extensive. Even the best legal provisions are ineffective if they cannot be properly enforced. This is why legal enforcement plays a crucial role. Therefore, only legal acts are not enough, (website) privacy policies are not enough, but effective judicial protection is also necessary. Courts hold significant power in this regard, particularly at the EU level, where the CJEU plays a pivotal role in shaping and strengthening legal protections for consumers.

We have seen that, in addition to the GDPR and other legal acts, there is extensive case law of the CJEU. Both of these have a positive impact on consumer rights. Regardless of the fact that the consumer is often lost or powerless in the abundance of regulations, the case law of CJEU is precisely what makes his position and the rights stronger. Therefore, if GDPR is a new consumer „weapon", the CJEU is the „guarantor" that this „weapon" is used effectively and fairly.

[45] See, for example: BLOOMBERG. Meta shouldn't use sexuality data for targeted ads, EU top court rules. *Hindustan Times* [online]. Available at: https://www.hindustantimes.com/business/meta-shouldnt-use-sexuality-data-for-targeted-ads-eu-top-court-rules-101728041110482.html; ASSOCIATED PRESS. Austrian Activist Schrems Wins Privacy Case Against Meta Over Personal Data on Sexual Orientation. *U.S. News* [online]. Available at: https://www.usnews.com/news/business/articles/2024-10-04/austrian-activist-schrems-wins-privacy-case-against-meta-over-personal-data-on-sexual-orientation

List of references

Primary Sources

Amendments adopted by the European Parliament on 10 April 2024 on the proposal for a regulation of the European Parliament and of the Council laying down additional procedural rules relating to the enforcement of Regulation (EU) 2016/679 [2024] (COM(2023)0348 – C9-0231/2023 – 2023/0202(COD))).

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95/29.

Directive (EU) 2016/680 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA [2016] OJ L 119/89.

Proposal for a Regulation of the European Parliament and of the Council laying down additional procedural rules relating to the enforcement of Regulation (EU) 2016/679 [2024].

Proposal for a Regulation of the European Parliament and of the Council laying down additional procedural rules relating to the enforcement of Regulation (EU) 2016/679 [2023] COM(2023) 348 final.

Regulation (EC) No 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (Text with EEA relevance) [2004] OJ L 046.

Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.

Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L 265/1.

Regulation (EU) 2022/2065 of the European Parliament and of the Council on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L 277/1.

Regulation (EU) 2024/1689 of the European Parliament and of the Council laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) [2024] OJ L.

Secondary Sources

ASSOCIATED PRESS. Austrian Activist Schrems Wins Privacy Case Against Meta Over Personal Data on Sexual Orientation. *U.S. News* [online]. Available at: https://www.usnews.com/news/business/articles/2024-10-04/austrian-activist-schrems-wins-privacy-case-against-meta-over-personal-data-on-sexual-orientation

BEKISZ, H., DWORNICZAK, D. Towards a data-subject-friendly interpretation of Article 82 GDPR. *Verfassungsblog* [online]. Available at: https://verfassungsblog.de/data-subject-friendly/

BLOOMBERG. Meta shouldn't use sexuality data for targeted ads, EU top court rules. *Hindustan Times* [online]. Available at: https://www.hindustantimes.com/business/meta-shouldnt-use-sexuality-data-for-targeted-ads-eu-top-court-rules-101728041110482.html

BOARDMAN, R., LÖLFIN, N. Key takeaways from the CJEU's recent automated decision-making rulings. *International Association of Privacy Professionals* [online]. Available at: https://iapp.org/news/a/key-takeaways-from-the-cjeus-recent-automated-decision-making-rulings

DE FRANCHESCHI, A. et al. (eds.). *Digital Revolution – New Challenges for Law: Data Protection, Artificial Intelligence, Smart Products, Blockchain Technology and Virtual Currencies*. München: Beck, 2020.

GRAEF, I., CLIFFORD, D., VALCKE, P. Fairness and Enforcement: Bridging Competition, Data Protection and Consumer Law. *International Data Privacy*. 2018, vol. 8, no. 3, pp. 200–223.

KENNEDY, J. F. *Special Message to the Congress on Protecting the Consumer Interest*. [online]. Available at: https://www.presidency.ucsb.edu/documents/special-message-the-congress-protecting-the-consumer-interest

KUNER, C., BYGRAVE, L. A., DOCKSEY, C. (eds.). *The EU General Data Protection Regulation (GDPR).* Oxford: Oxford University Press, 2020.

LI, S. Compensation for non-material damage under Article 82 GDPR: A review of Case C-300/21. *Maastricht Journal of European and Comparative Law*. 2023, vol. 30, no. 3, pp. 335–345.

MICKLITZ, H.-W. et al. (eds.). *European Consumer Law*. Cambridge: Intersentia, 2014.

PIERDES, M. et al. EU´s highest Court expands EU GDPR restrictions on automated decision-making, profiling and AI. *Morgan Lewis Lawflash* [online]. Available at: https://www.morganlewis.com/pubs/2024/02/eus-highest-court-expands-eu-gdpr-restrictions-on-automated-decision-making-profiling-and-ai

RHOEN, M. Beyond consent: improving data protection through consumer protection law. *Internet Policy Review* [online]. Available at: https://policyreview.info/articles/analysis/beyond-consent-improving-data-protection-through-consumer-protection-law

TJONG TJIN TAI, E. Data Ownership and Consumer Protection. *Journal of European Consumer and Market Law*. 2018, vol. 7, no. 4, pp. 136–140.

TRSTENJAK, V. Human Rights in the Digital Era: From Digital Practice to Digital Law and Case Law. In: MILLER, K., WENDT, K. (eds.). *Human Rights in the Digital Era: From Digital Practice to Digital Law and Case Law*. Cham: Springer, 2021, pp. 241–251.

TRSTENJAK, V. Limitations of Fundamental Rights in EU Law: Are Human Rights Absolute? *European Review*. 2023, vol. 32, no. 2, pp. 135–149.

Cases and Opinions of Advocate Generals

Judgement of the Court (First Chamber) in the case *Banco Español de Crédito*, C-618/10, 14 June 2012, ECLI:EU:C:2012:349.

Judgement of the CJEU (Fourth Chamber) in the case *Facebook Ireland and Schrems*, C-311/18, 16 July 2020, ECLI:EU:C:2020:559.

Judgement of the CJEU (First Chamber) in the case *FT (Copies du dossier médical)*, C-307/22, 26 October 2023, ECLI:EU:C:2023:811.

Judgement of the CJEU (Grand Chamber) in the case *Google Spain and Google*, C-131/12, 13 May 2014, ECLI:EU:C:2014:317.

Judgement of the Court in the case *Kásler und Káslerné Rábai*, C-26/13, 30 April 2014, ECLI:EU:C:2014:282.

Judgement of the CJEU (Third Chamber) in the case *Krankenversicherung Nordrhein*, C-667/21, 21 December 2023, ECLI:EU:C:2023:1022.

Judgement of the CJEU (Grand Chamber) in the case *Lindenapotheke*, C-21/23, 4 October 2024, ECLI:EU:C:2024:846.

Judgement of the CJEU (First Chamber) in the case *Österreichische Datenschutzbehörde*, C-487/21, 4 May 2023, ECLI:EU:C:2023:369.

Judgement of the CJEU (Third Chamber) in the case *Österreichische Post*, C-300/21, 4 May 2023, ECLI:EU:C:2023:370.

Judgement of the CJEU (Third Chamber) in the case *Pankki S*, C-579/21, 22 June 2023, ECLI:EU:C:2023:501.

Judgement of the Court (Fourth Chamber) in the case *Pannon GSM*, C-243/08, 4 June 2009, ECLI:EU:C:2009:350.

Judgement of the Court (First Chamber) in the case *Pereničová and Perenič*, C-453/10, 15 March 2012, ECLI:EU:C:2012:144.

Judgement of the CJEU (First Chamber) in the case *SCHUFA Holding (Scoring)*, C-634/21, 7 December 2023, ECLI:EU:C:2023:957.

Judgement of the CJEU (Grand Chamber) in the case *Schrems*, C-362/14, 6 October 2015, ECLI:EU:C:2015:650.

Judgement of the CJEU (First Chamber) in the case *Schrems (Communication de données au grand public)*, C-446/21, 4 October 2024, ECLI:EU:C:2024:834.

Judgement of the CJEU (Grand Chamber) in the case *VB Pénzügyi Lízing*, C-137/08, 9 November 2010, ECLI:EU:C:2010:659.

Judgement of the CJEU (Fourth Chamber) in the joined cases *Sturgeon and Others*, C-402/07 and C-432/07, 19 November 2009, ECLI:EU:C:2009:716.

Opinion of the AG Spuznar in the case *Lindenapotheke*, C-21/23, 25 April 2024, ECLI:EU:C:2024:354.

Opinion of the AG Rantos in the case *Schrems (Communication de données au grand public)*, C-446/21, 4 October 2024, ECLI:EU:C:2024:366.