

Background and Legal Assessment on the CJEU SCHUFA case (C-634/21)

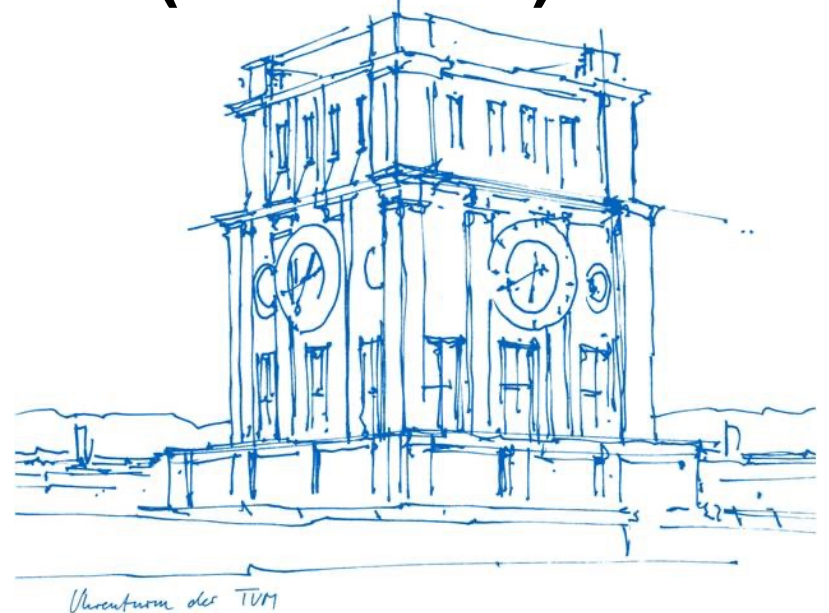
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In a nutshell

Core question: Can assigning a **score / probability value** to someone constitute a **decision** according to **Art. 22(1) GDPR**?

It was the first time the CJEU had the opportunity to decide on Art. 22 GDPR **prohibiting decisions „based solely on automated processing“**

The CJEU rules that the answer is „**YES**“ if a credit agency engages in automated individual decision-making and where lenders **draw strongly** on that probability value to establish, implement, or terminate a contractual relationship

Facts of the case

- German consumer was refused the granting of a loan from her bank, having been the subject to negative financial SCHUFA information transmitted to the bank
- Consumer made a GDPR access and erase request to SCHUFA about her data
- SCHUFA informed the consumer about her score and general information regarding the methodology; but refused to say more, claiming business confidentiality
- Preliminary ruling: Is the SCHUFA score system an automated decision under Art. 22(1) GPDR? What about information obligations – Art. 15(1)(h) GDPR?

Legal basis: Art. 22 GDPR

1. 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 him or her**.
2. Paragraph 1 shall not apply if the decision:
 - (a) is necessary for **entering into, or performance of, a contract** between the data subject and a data controller;
 - (b) is **authorised by Union or Member State law** to which the controller is subject and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests; or
 - (c) is based on the **data subject's explicit consent**.

Findings of the CJEU – (1)

- Art. 22(1) GDPR lays down a **prohibition in principle**, the infringement of which does not need to be invoked individually (i.e., “inherent right”)
- Any processing of personal data must, first, comply with the **principles established in Art. 5 GDPR** and, secondly, satisfy at least one of the **conditions for lawfulness of the processing listed in Art. 6 GDPR**
- Accordingly, Member States cannot adopt, under Art. 22(2)(b), regulations with authorise profiling in disregard of the requirements laid down in Art. 5 and 6 GDPR

Findings of the CJEU – (2)

- **Three conditions** of Article 22(1) GDPR
 - (1) Decision → (?, +/-)
 - (2) Based solely on automated data processing → (+), profiling (Art. 4(4) GDPR)
 - (3) Produce legal effects or significantly affect the data subject → (+/-), cf. (1)
- **Broad concept of “decision”** – capable of many acts with may affect the data subject in many ways, including the establishment of a probability value
- It is a **factual finding of the referring court**, according to which the third party draws “strongly” on the credit score / leads “in almost all cases” to refusal of loan

Findings of the CJEU (3)

- **Three exceptions** to the general prohibition in Art. 22(2) GDPR
 - Referring court must verify whether Paragraph 31 of the German data protection law (BDSG) constitutes a legal basis under Article 22(2)(b) GDPR
- **Risk of a lacuna in legal protection**
 - Circumvention of Art. 22 GDPR because the establishment of a probability value would escape the specific requirements of Art. 22(2) to (4)
 - Right of access to the specific information referred to in Art. 15(1)(h) GDPR would not be effective

Summary and Outlook

- Art. 22(1) GDPR establishes a **prohibition in principle** / inherent right –
Art. 22(1) decision **can be authorised (only) in the cases of Art. 22(2) GDPR**
- Decisional nature depends on the future use of the score
 - Factual predetermination by the referring court
 - Compliance in practice when it is difficult to anticipate future uses?
 - Information rights (Art. 13 / 14 GDPR) must be implemented before the data is processed
- All situations affected where a score / profile produced by one entity (private or public) is used by another → broad **impact with respect to AI?!**