COURT OF JUSTICE
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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)

Advocate General Pikamäe: the automated establishment of a probability concerning the ability of a person to service a loan constitutes profiling under the GDPR

Courts must be able to exercise a full judicial review over any legally binding decision of a supervisory authority of the GDPR

Case C-634/21 concerns proceedings between a citizen and Land Hessen, represented by the Data Protection and Freedom of Information Commissioner for Hesse (the 'HBDI'), regarding the protection of personal data. As part of its economic activity, which consists in providing its clients with information on the creditworthiness of third parties, SCHUFA Holding AG ('SCHUFA'), a company governed by private law, provided a credit institution with a score for the citizen in question, which served as the basis for the refusal to grant the credit for which the latter had applied. The citizen subsequently requested SCHUFA to erase the entry concerning her and to grant her access to the corresponding data. The latter, however, merely informed her of the relevant score and, in broad outline, of the principles underlying the calculation method for the score, without informing her of the specific data included in that calculation or of the relevance accorded to them in that context, arguing that the calculation method is a trade secret.

In so far as the citizen concerned claims that SCHUFA's refusal is contrary to data protection rules, the Court of Justice is called upon by the Administrative Court of Wiesbaden to rule on the restrictions which the General Data Protection Regulation [1] ('GDPR') imposes on the economic activity of reporting agencies in the financial sector, in particular in data management, and on the effect to be accorded to trade secrets. Similarly, the Court will have to clarify the scope of the regulatory powers which certain provisions of the GDPR confer on the national legislature by way of derogation from the general objective of harmonisation pursued by that legal act.

In his Opinion, Advocate General Priit Pikamäe states, first of all, that **the GDPR establishes a 'right' for the person concerned not to be subject to a decision based solely on automated processing, including profiling**.

The Advocate General then **finds that the conditions for that right are satisfied** because:

1. the procedure at issue constitutes 'profiling',

2. the decision produces legal effects concerning the person concerned or similarly significantly affects him or her, and

[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 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 (OJ 2016 L 119, p. 1).

3. the decision is based solely on automated processing.

The provision of the GDPR laying down that right is therefore applicable in circumstances like those in the main proceedings.

The Advocate General points out that, under another provision of the GDPR, the person concerned has the right to obtain from the controller not only confirmation as to whether or not personal data concerning him or her are being processed, but also other information, such as on the existence of automated decision-making, including profiling, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the person concerned. He considers that that the obligation to provide 'meaningful information about the *logic involved*' must be understood to include sufficiently detailed explanations of the method used to calculate the score and the reasons for a certain result. In general, the controller should provide the person concerned with general information, notably on the factors taken into account for the decision-making process and on their respective weight on an aggregate level, which is also useful for him or her to challenge any 'decision' within the meaning of the GDPR, recognising the 'right' not to be subject to a decision based solely on automated processing, including profiling.

The Advocate General takes the view that that provision is to be interpreted as meaning that **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, which produces legal effects concerning that person or similarly significantly affects him or her, where that value, determined by means of personal data relating to that person, is transmitted by the controller to a third-party controller and the latter, in accordance with consistent practice, draws strongly on that value for its decision on the establishment, implementation or termination of a contractual relationship with that same person.**

The Administrative Court of Wiesbaden has brought two further requests for a preliminary ruling concerning the GDPR (**Cases C-26/22 and C-64/22**). Those requests have been made in two sets of proceedings between two citizens and Land Hesse, represented by the HBDI, concerning requests, made, respectively, by them to the HBDI to take steps to ensure the deletion of an entry relating to discharge from remaining debts from the records of SCHUFA. In the insolvency proceedings in respect of them, both citizens were granted early discharge from remaining debts and that circumstance was subject to official notification on the internet, which was deleted after six months SCHUFA has entered published information relating to early discharges from remaining debts in its own databases, but does not delete it until three years after entry. The questions referred by the national court concern, among other things, the legal nature of the decision taken by the supervisory authority hearing a complaint and the scope of the judicial review which the court may exercise in the context of proceedings brought against such a decision. The cases also concern the question of the lawfulness of the storage of personal data from public registers by credit information agencies.

In his Opinion, Advocate General Pikamäe recalls, in the first place, that the lawfulness of processing must be apparent from a balancing of the various interests at stake in which the legitimate interests pursued by the controller or by a third party must take precedence. It is for the supervisory authority, which, under the GDPR, will have to handle any complaint lodged by the person concerned alleging the infringement of his or her fundamental rights, to ascertain whether those conditions are met. Lastly, if that person decided to seek a remedy against the decisions of the supervisory authority, under the GDPR, it would be for the national courts to carry out an effective judicial review. In the Advocate General's view, **a legally binding decision of a supervisory authority is subject to a full substantive judicial review, which guarantees an effective judicial remedy.**

In the second place, the Advocate General states that, under the GDPR, the processing of personal data may be lawful, inter alia, when the three following cumulative conditions are satisfied:

- first, the pursuit of a legitimate interest by the data controller or by the third party or third parties to which the

data are communicated,

- second, the need to process personal data for the purposes of the legitimate interest pursued, and

- third, the fundamental rights and freedoms of the person concerned by the data protection do not take precedence.

Mr Pikamäe observes that the considerable negative consequences that the storage of data will have on the person concerned after the period of six months in question seem to override the commercial interest of the private agency and its clients in storing the data after that period. In this context, he points out that the discharge from remaining debts granted is intended to allow the beneficiary to re-enter economic life. That objective would be frustrated if private credit information agencies were authorised to store personal data in their databases after the data have been erased from the public register

The Advocate General takes the view that **the storage of data by a private credit information agency cannot be lawful**, under the provision of the GDPR laying down the conditions set out above, **once the personal data concerning insolvency have been erased from public registers.** As regards the period of six months during which the personal data are also available in public registers, it is for the referring court to balance the abovementioned interests and impacts on the person concerned in order to determine whether the parallel storage of those data by private credit information agencies is lawful on that basis.

In the third place, the Advocate General points out that the GDPR provides a right for the person concerned to obtain the erasure of his or her personal data where he or she objects to the processing or where those data have been unlawfully processed. In the Advocate General's view, in such situation, **the person concerned** therefore **has the right to obtain from the controller the erasure of personal data concerning him or her without undue delay**. It is for the referring court to examine if, exceptionally, there are overriding legitimate grounds for the processing.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

Unofficial document for media use, not binding on the Court of Justice.

The full text of the Opinion (C-634/21 and C-26/22 and C-64/22) is published on the CURIA website on the day of delivery.

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