

# Editorial

With this issue, we celebrate the third anniversary of the European Data Protection Law Review (EDPL). Three years have passed since our team first sat together on the balcony of the Computers, Privacy & Data Protection (CPDP) conference's main hall in 2015. Now, with this thirteenth edition of EDPL, let me thank all readers that write to us with suggestions and comments and the authors of the many high quality submissions we get for every edition. Thanks to our publisher Lexxion for continuing to promote the journal all over the world, the associated editors that lead the reports, case note and book review section and the whole editorial board for their academic and personal support.

There are three internal developments that I would like to briefly mention. Eleni Kosta recently gave her inaugural lecture for her appointment as a professor entitled 'Surveilling masses and unveiling human rights – Uneasy choices for the Strasbourg Court'. Second, we are sad that Kirsty Hughes will no longer be part of our editorial team. We thank her for her enthusiasm and efforts in promoting EDPL and helping the journal grow over the last three years. Kirsty's work on the jurisprudence and theory on Article 8 of the European Convention on Human Rights will remain a source of inspiration to us and we wish her all the best with her upcoming research. Third, we are happy that we have a new board member - Wojciech Wiewiorowski, Assistant Supervisor at the European Data Protection Supervisor, author of numerous studies and publications who has widely lectured in the field of personal data protection, IT law, e-government and legal informatics.

Before introducing the contents of this edition, I want to make a small remark on the terms used in many current debates, such as profiling, personalised advertising and predictive policing. I do so after an inspiring discussion at the Saturday event of CPDP 2018, the Privacy Law Scholars Conference, where we discussed Mireille Hildebrandt's outstanding paper 'Privacy in the era of machine learning: if what counts cannot be counted Purpose binding and the first law of informatics'. The discussion we had reminded me again of how misleading words can be and how terms influence and sometimes misdirect the way we think. In that sense, I think maybe we should try and find alternatives for the word 'profiling', 'personalised' and 'predictive', the latter two terms used both in connection to profiling. Let me briefly explain why.

*Profiling:* Let's start with the word 'profiling'. Profiling is used to describe processes in which a data-profile is made of a person, for example by companies for advertising purposes, by banks when deciding on loans and by law enforcement agencies to assess risks. The word profile derives from *per* (forward) + *filum* (thread).<sup>1</sup> It signified

drawing the lines and contours of a person's face or figure from the side – it can still be found in the French term *en profil*. Doing so, the lines of a person are drawn, sometimes in silhouette. To use this term for the practices currently deployed is misleading at least in four different ways. First, the term profile signifies the outer form of a person, while data-profiling tends to look more and more to personal aspects of one's life, such as one's health, sexuality and political inclination. Second, and related, a profile is the line of a person's contours, while data-profiling is used to make claims about almost every aspect of a person's life. A data-profile is not a rough sketch of a person, it can uncover things previously unknown and unknown to the person him/herself. Third, the truthfulness of the data and the profile is of only secondary importance to most data profilers. Fourth and final, drawing a line around the contours of someone's face or body is an abstraction, but an abstraction of reality. Data-profiling is not based on an abstraction of a person, it is based on an extrapolation of characters imposed on a figure and a caricature of a person's characteristics. A person may be reduced to three of four essential data-characteristics.

*Personalised*: The second term used in this respect is 'personalised', such as in personalised medicine, personalised advertising, personalised content, etc. Personalisation is the process of turning something general into something tailor made for a specific person:

'a. To render personal rather than impersonal or purely professional: personalized the doctor-patient relationship. b. To make or alter so as to meet individual needs, inclinations, or specifications: personalize a drug regimen; personalize emails to potential customers. c. To have printed, engraved, or monogrammed with one's name or initials: personalized the bath towels.'<sup>2</sup>

In reality, however, products, medicine and content are not personalised; rather, general or group characteristics are projected on an individual. It is known, for example, that of the people that live in Amsterdam and have enjoyed higher education, 70% go to the Concert Hall more than three times a year; that 40% of the people that read sport news are also interested in articles about pop music; that 78% of the males aged 50 or above will respond positively with regard to a certain medical treatment. If a person possesses the characteristics of a certain group, he is treated as a member of that group and treated as such. In fact, the medicine, advertisement and content are de-personalised or at most categorised, but certainly not personalised.

*Predictive*: The third term often used in this respect is 'predictive', the ability to predict the future, such as the events that will unfold or the behaviour of persons. Stemming from the Latin *prae* (before) and *dicere* (to say), prediction signifies claims made about events before they have occurred. As such, this seems like a neutral matter, a mere knowledge claim. I predict that Barcelona will win the Champions League. But

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2 The Free Dictionary, 'personalisation' <<https://www.thefreedictionary.com/Personalisation>> accessed 10 March 2018.

the processes revolving around data profiling are of course non-neutral. They are biased, both because databases and algorithms are biased, and they are often used to nudge – that is, not to predict behaviour, but to influence behaviour. More in general, profiles are usually used to take certain action – if a person might be interested in a concert ticket, he will be offered a ticket; if an earthquake is predicted to occur, preventive measures will be taken; if predictive policing suggests that there is a high chance that a crime will occur in a certain neighbourhood, the police will send out more police forces there; if it is predicted that a person has a significant chance to have a high sugar level, that person will be put on a diet. Consequently, data profiles are traditionally not used for the prediction, but for the determination of the future.

Terms can often feed misconception and mislead the debate. Nudging, for instance, sounds very friendly but in fact is not. We can write articles all we want about how nudging is really not so friendly as it sounds, or we might as well say that nudging is simply not the right word for the phenomenon we are trying to describe. Maybe rather we should say manipulating. The same, I have argued earlier in my discussion with Raphaël Gellert, holds true for the word balancing, in the sense of balancing interests or rights – one can balance things that have weight but not concepts or ideas. There are no weights, there is no scale, there is no objective method of weighing. This point also holds true for ‘predictive’, ‘personalised’ and ‘profiling’. There are many articles and books that argue that profiling is used to steer people, rather than merely predict their behaviour, that people are treated as part of a group, rather than as an individual, and that profiles are often used to make very intimate speculations on the basis of three or four data points. Maybe then, ‘personalised’, ‘predictive’ and ‘profiling’ are simply not the right words to describe the phenomena we are currently witnessing.

This edition of EDPL starts with a tribute to the winner of the 2<sup>nd</sup> EDPL Young Scholars Award, Eike Gräf, who wrote about the republican approach to privacy protection. We have invited two of the most renowned authors in the field of republicanism and modern technology to write forewords to this edition: Andrew Roberts (Melbourne Law School) and Bryce Newell (University of Kentucky). They build on the work of Phillip Pettit and others to understand the problems of, inter alia, modern mass surveillance and the aspect of domination.

The article section contains three top class articles. Michèle Finck gives a very careful analysis on the topic of blockchain and data protection in the European Union. I would also like to point the reader to the insightful and thought-provoking article by Jiahong Chen, who discusses the dark side of the Data Quality Principle. Finally, there has been an extensive discussion about the notion of post-mortem privacy: what happens with your data when you are dead? Kärt Pormeister and Łukasz Drożdżowski pose a diametrically different question: how are the data of the unborn protected? Presumably, this question will be on the table for the years to come.

We are honoured by a discussion between Chris Hodges (University of Oxford) and Hielke Hijmans. Christopher Hodges is one of the most renowned scholars working

on dispute resolution, class actions and compliance. He has analysed the regulatory approach adopted in the General Data Protection Regulation and the ways in which it is enforced. He argues that there is a new paradigm emerging. Hielke Hijmans, who has worked for the European Data Protection Supervisor, and has written the book *The European Union as a constitutional guardian of internet privacy and data protection: the story of Article 16 TFEU*, has penned down a careful response. He suggests that trust should be at the core of Data Protection Authorities' performance, but strong sanctions cannot be missed, that ethical approaches are key and that complaint handling is an essential component of their work.

As always, special mention should be made of the reports section, led by Mark Cole, which is one of the reasons that EDPL is read and cited so widely. This edition contains three reports in the GDPR Implementation Series, namely France, Latvia, Sweden. They are written by Olivia Tambou, Andis Burkevics and Christine Storr and Pam Storr. Then, there are two country reports from Germany, one about a dispute concerning Facebook's terms and services, written by Christina Etteldorf, and the other by Sebastian Klein, concerning storage and use of telecommunications metadata by the Federal Intelligence Service. Finally, Teresa Quintel has analysed the Article 29 Data Protection Working Party opinion on the Law Enforcement Directive.

The case note section contains two case notes: one on the opinion of Advocate General Bot in the case *Wirtschaftsakademie Schleswig-Holstein*, written by Nicolas Blanc, and an analysis of the ongoing *Satamedia* saga, by Magdalena Jozwiak. Finally, the book review section contains two book reviews. Edoardo Celeste comments on *Human Rights Futures*, edited by Stephen Hopgood, Jack Snyder and Leslie Vinjamuri, and Sascha van Schendel has reviewed *The Fundamental Right to Data Protection: Normative Value in the Context of Counter-Terrorism Surveillance*, written by Maria Tzanou.

If you are interested in submitting an article, report, case note or book review, please observe the following deadlines:

- EDPL 2/2018: 1 April 2018
- EDPL 3/2018 (special issue on data protection and healthcare): 15 July 2018
- EDPL 4/2018 (3<sup>rd</sup> EDPL Young Scholars Award): 1 October 2018

I hope you enjoy reading this edition of the European Data Protection Law Review!

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