THE RIGHT NOT TO BE SUBJECT TO AUTOMATED INDIVIDUAL DECISION-MAKING.

A COMPARISON OF THE APPROACHES OF THE CONVENTION 108+ AND THE GDPR

Jan Kubica

Abstract: Regulation of automated decision-making is among the most important aspects of artificial intelligence regulation. One of the key EU sources of this regulation, the GDPR, directly regulates this procedure in its Article 22, although the interpretation of this Article remains unclear, even though the GDPR has come into force. This Article argues in favour of using the text of the Convention 108+ to clarify some questions of interpretation of Article 22 GDPR. Possible inspiration is presented for four interpretive ambiguities in the GDPR, where for two of them the ECJ has already confirmed an approach that is consistent with the thesis that this Article presents.

Resumé: Úprava automatizovaného rozhodování patří mezi nejdůležitější aspekty regulace umělé inteligence. Jeden z klíčových evropských zdrojů této regulace, GDPR, ve svém čl. 22 daný postup přímo reguluje, interpretace daného článku ovšem zůstává i po vstupu GDPR v použitelnost stále nejasná. Tento článek argumentuje ve prospěch využití textace Úmluvy č. 108+ pro vyjasnění některých otázek interpretace čl. 22 GDPR. Možná inspirace je předestřena na čtyřech výkladových nejasnostech GDPR, kdy u dvou z nich již ESD potvrdil přístup, který je souladný s tezí, kterou tento článek předkládá.

Key words: AI, GDPR, Automated decision-making

About the Author:
JUDr. Jan Kubica, BA, MJur is a PhD. candidate at the Department of European Law of the CU Faculty of Law. The work was supported by SVV grant No. 260750, International and supranational regulation of autonomization and automatization of human and machine decision-making.

1. Introduction

The impact of artificial intelligence (AI) can hardly be overstated and, unsurprisingly, it currently dominates regulatory agendas throughout the world. As a foundational technology, AI is being applied in different sectors and in various ways, introducing a complex array of challenges. One of the uses of AI, and in turn one of the regulatory issues, is the automation of decision-making. Both private and public actors base their decision-making in myriad ways[1] on AI and well-known examples include decisions on loan applications,[2] school results,[3] or e-Recruitment. While this automation promises to bring efficiency gains to the decision-making process and a certain level of standardisation, it also comes with a distinct set of risks. In summary, AI systems and their results can be "*unnerving, unfair, unsafe, unpredictable, and unaccountable*",[4] while simultaneously being opaque in their functioning, and therefore it is difficult for individuals to understand them and to challenge their results.

European regulation has a long history of addressing these risks. The first national law on automated decision-making, French Loi n° 78–17,[5] later inspired EU-level data processing rules, first through a directive,[6] and ultimately culminating in the General Data Protection Regulation (GDPR).[7] Despite this long history, the broad reach of the GDPR and its influence, the regulation of automated decision-making by Article 22 GDPR remains notoriously difficult to interpret and apply. This ambiguity limits its practical significance, despite being designed to respond to a topical challenge of increasing importance. This failure to provide clarity means the current state falls short of achieving the GDPR's dual goals: protecting fundamental rights and facilitating an internal market for data.[8] This situation creates a pressing need, both practical and doctrinal, for clear interpretative guidelines for Article 22 GDPR. While several key aspects have been recently clarified by the ECJ,[9] the Article in question is still far from being clear and the gap, often underestimated,[10] persists.

1 For general modalities, see, e.g. BRENNAN-MARQUEZ, Kiel, LEVY, Karen and SUSSER, Daniel 'Strange Loops: Apparent versus Actual Human Involvement in Automated Decision-Making' (2019) 34 *Berkeley Technology Law Journal*; BINNS, Reuben and VEALE, Michael 'Is That Your Final Decision? Multi-Stage Profiling, Selective Effects, and Article 22 of the GDPR' (2021) 11 *International Data Privacy Law* 319.

2 The practice of credit-scoring forms the factual context of the leading ECJ case-law on Article 22, *SCHUFA* [2023] European Court of Justice C-634/21, ECLI:EU:C:2023:957.

3 USTARAN, Eduardo 'A Forgotten Right Gets into Action in UK A-Level Controversy' (*IAPP*, 17 August 2020) <https://iapp.org/news/a/a-forgotten-right-gets-into-action-in-uk-a-level-controversy>.

4 SELBST, Andrew D. and BAROCAS, Solon 'The Intuitive Appeal of Explainable Machines' (2018) 87 *Fordham Law Review 1087.*

5 Loi n° 78–17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés.

6 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

7 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 (General Data Protection Regulation).

8 Despite the focus of the ECJ and part of doctrine on the protection of data subjects' rights, the goal of European data protection should be twofold—not only protecting the fundamental rights to data protection and to privacy, but also to facilitate the establishment of an internal market by allowing for cross-border data flows. LYNSKEY, Orla *The Foundations of EU Data Protection Law* (Oxford University Press 2015) 47.

9 *Dun & Bradstreet* [2025] European Court of Justice C-203/22, ECLI:EU:C:2025:117; *SCHUFA* (n 2).

10 Where some academics find an aspect to be clear or unproblematic (e.g. Waas with regards to a requirement of certain complexity of the automated systems going beyond "*a simple if-then decision*" Bernd WAAS, 'Artificial

The broader European data protection standard is not based only on EU law, but is also influenced by regulatory instruments of the Council of Europe (CoE). International instruments also present a potential source of inspiration with regard to interpreting Article 22 GDPR. In this regard, the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108+) (CoE) holds special significance. It was developed in parallel with the GDPR and was explicitly designed to be "*fully harmonized*" with it. While it addresses similar subject-matter, it does so from a different angle and with an explicit focus on rights-based goals, but within the European system of data protection.

This Article responds to a relatively underexplored opportunity for the GDPR to draw inspiration from the wording and approach of the Convention 108+. The central argument presented below is that some of the gaps in the interpretation of Article 22 GDPR can and should be resolved with reference to the Convention 108+. Doing so brings substantial benefits for those countries that are to adhere to both the GDPR and Convention 108+, as it avoids an unnecessary double burden. The Article is structured as follows: first, the regulatory object (of automated decision-making) and the regulatory instruments (the GDPR and the Convention 108+) are briefly presented, then four open issues concerning Article 22 are examined, comparing them with the wording of the Convention 108+ and its Explanatory Report. For two of the issues presented, their interpretation has been established by recent ECJ case law, which confirms the working theory that the GDPR should be compatible and at least as strict as the Convention 108+. This makes the case for interpreting the two remaining issues in the same, mutually compatible way stronger and more probable.

2. Regulation in the GDPR and Convention 108+

2.1 Object of regulation

The regulation in Article 22 GDPR and Article 9(1)a Convention 108+ places limits on certain decisions that are based solely on automated processing of data and have a non-trivial impact on an individual. As was briefly hinted above, this type of decision-making is far from being a theoretical application. A classic example within the scope of the regulation, also cited in the (EU) WP29 Guidelines,[11] is an automated decision on imposing a fine for speeding, or deciding on a loan application.[12]

Intelligence and Labour Law' (2022) 2022 Hugo Sinzheimer Institute for Labour and Social Security Law Working Papers 1, 149.), others assert the opposite view with the same confidence.

[11] Article 29 DATA PROTECTION WORKING PARTY, 'Guidelines on Automated Individual Decision-Making and Profiling for the Purposes of Regulation 2016/679 [WP251rev.01]' <https://ec.europa.eu/newsroom/document.cfm?doc_id=47742>.

[12] This example also offers an interesting comparison of the European and American approaches to data protection and privacy in general. James Whitman remarks that "*[I]n the long run, good credit reporting ought to make life easier for everybody and indeed make everybody richer. But, for the continental legal tradition, the basic issue is of course not just one of market efficiency. Consumers need more than credit. They need dignity. The idea that any random merchant might have access to the 'image' of your financial history is simply too intuitively distasteful to people brought up in the continental world.*" WHITMAN, James Q. 'The Two Western Cultures of Privacy: Dignity Versus Liberty' (2003) 113 *The Yale Law Journal* 1192. Compare this wording with the Explanatory Report to the Convention 108+ "(…) *individuals are stigmatised* (…) *where they see their credit capacity evaluated by a software only*".

The limits placed on automated decision-making reflect several normative goals. They include prevention of possible errors in a high-stakes context and ensuring legitimate processing, as well as reflecting the general focus on the protection of dignity. Different authors emphasize different aspects: e.g. while Krištofík bases his analysis on the underlying protection of privacy,[13] Jones focuses on different aspects of protecting dignity,[14] Mates understands the right as a part of the protection of personality rights,[15] while Tambou highlights the concept of information self-determination,[16] originally developed by German jurisprudence. That said, these are mostly different facets, or different levels of abstraction, of the same underlying goal, which is to protect the individual *as an individual* in the face of machine logic, reducing the level of errors, as well as upholding their dignity in the process. When comparing the two regulatory instruments, their rights-based goals are mostly complementary, and both are motivated by an underlying fear that data controllers might be too eager to abandon their responsibility for decision-making to machines[17] and individuals might be treated as mere objects of algorithmic deduction. The GDPR then adds another aspect, the focus on the economic dimension of data, but this aspect is less pronounced in Article 22 than in other provisions of the regulation. We can therefore conclude that there is broadly a normative consistency between the regulatory tools, which is to be expected, as they are often regarded as forming together a single "*European standard*" of data protection,[18] sharing identical principles for the processing of personal data.[19] However, this European approach to automated-decision making is not universally adopted, given the notable difference in the US approach, which, instead of limiting automatization for the sake of keeping a human in the loop, in general "*promotes and fosters full automation to establish and celebrate the fairness and objectivity of computers*".[20]

2.2 Article 22 GDPR

The GDPR represents a comprehensive approach[21] to data protection at the EU level and is arguably one of the most well-known EU regulatory instruments, with a far-reaching scope.[22] Despite this, the regulation of automated decision-making in Article 22 is not a part

[13] KRIŠTOFÍK, Andrej 'The Role of Privacy in the Establishment of the Right Not to Be Subject to Automated Decision-Making' (2024) 14 *The Lawyer Quarterly*.

[14] JONES, Meg Leta 'The Right to a Human in the Loop: Political Constructions of Computer Automation and Personhood' (2017) 47 *Social Studies of Science* 216.

[15] MATES, Pavel (ed), *Ochrana osobnosti, soukromí a osobních údajů* (vydání první, Leges 2019) 85.

[16] TAMBOU, Olivia 'Art. 22' in SPIECKER, Indra and others (eds), *General Data Protection Regulation: Article-by-Article Commentary* (1. Auflage, Nomos / CH Beck 2023) 527.

[17] An elegant and often-cited version of this comes from an internal IBM document: "*A computer can never be held accountable. Therefore, a computer must never make a management decision*". WILLISON, Simon 'A Computer Can Never Be Held Accountable' (*Simon Willison's Weblog*) <https://simonwillison.net/2025/Feb/3/a-computer-can-never-be-held-accountable/> accessed 17 June 2025.

[18] With regard to Convention 108, GREENLEAF, G. 'The Influence of European Data Privacy Standards Outside Europe: Implications for Globalization of Convention 108' (2012) 2 *International Data Privacy Law* 68.

[19] UKROW, Jörg 'Data Protection without Frontiers? On the Relationship between EU GDPR and Amended CoE Convention 108.' (2018) 4 *European Data Protection Law Review* (EDPL) 239, 242.

[20] JONES (n 14) 216.

[21] Or omnibus, as opposed to sectoral, approach. See JONES, Meg Leta and KAMINSKI, Margot E. 'An American's Guide to the GDPR' (2021) 98 *Denver Law Review* 106–107.

[22] For a critique of the "*far-reaching regulatory design, that makes the GDPR impossible to fully comply with*" see BOBEK, Michal and KÜHN, Zdeněk 'Anonymizace judikatury a ochrana osobních údajů. Soudy při výkonu

of its "*centre of gravity*" and is sometimes considered to be even "*forgotten*"[23] or a "*second-class data protection right*", having only a "*symbolic*" force.[24] This may seem surprising, given the growing importance of automatization and the long history of this right, which is clearly based on the previous wording of the Directive, which in turn drew inspiration from the French national regulation from the 1970s. Arguably, the potential of this Article is limited by its interpretational ambiguity—simply put, "*it is impossible to comply with what is not understood*".[25]

Article 22 itself is a complex provision, even compared to the standard of the GDPR. The prevailing interpretation is that it sets out a general prohibition against some automated decisions, with three broad exceptions allowing processing (contractual necessity, consent and authorisation by European or national law), followed by exceptions to these exceptions (decisions based on sensitive categories of personal data are nevertheless restricted …), with a final exception to that (… except for cases of explicit consent[26] and reasons of substantial public interest based on European or national law). Being part of the GDPR, it uses its terminology and refers to the data subject, (explicit) consent, and processing. While it benefits from the overall robust architecture of the GDPR, on the other hand, it is not inherently connected to the core focus of the GDPR, but rather is an articulation of a right that could be both formally and functionally articulated differently and outside the scope of data protection.[27] This loose,[28] and in a way incidental, connection is apparent in the subsequent analysis of the minimum required personal data involvement.

2.3 Article 9 Convention 108+

The Convention 108+ is a Council of Europe (CoE) instrument, a modernisation of the original Convention 108, adopted in 1981.[29] The original Convention 108 remains the only international treaty providing a comprehensive, yet flexible, principles-based data privacy legal framework.[30] The Convention 108 (and its modernised version) is also indirectly linked

soudnictví' [Anonymization of case law and protection of personal data. Courts in the administration of justice] (2025) *Právní rozhledy*; [2021] Opinion of Advocate General Bobek C-245/20, ECLI:EU:C:2021:822 Paragraph 55.

23 USTARAN (n 3).

24 MENDOZA, Isak and BYGRAVE, Lee A. 'The Right Not to Be Subject to Automated Decisions Based on Profiling' in Tatiana-Eleni Synodinou and others (eds), *EU Internet Law* (Springer International Publishing 2017); DE HERT, Paul and LAZCOZ, Guillermo 'Radical Rewriting of Article 22 GDPR on Machine Decisions in the AI Era' (*European Law Blog*, 13 October 2021) <https://europeanlawblog.eu/2021/10/13/radical-rewriting-of-article-22-gdpr-on-machine-decisions-in-the-ai-era/>.

25 DE HERT and LAZCOZ (n 24).

26 It remains unclear how such "*explicit consent*" differs from mere "*consent*", as defined and used elsewhere in the GDPR.

27 HUQ, Aziz Z 'A Right to a Human Decision' (2022) 106 *Virginia Law Review* 79, 628.

28 ALMADA, Marco 'Automated Decision-Making as a Data Protection Issue' [2021] SSRN Electronic Journal [Draft version] <https://www.ssrn.com/abstract=3817472> ('*Automated decision-making is a data protection issue, as many decision-making systems rely on data about natural persons for their operation. […] the proper governance of automated decision-making will require the application of other fields of law, which might be better suited for addressing the gaps in data protection.*').

29 With January 28 being celebrated as the International Data Protection Day.

30 LIPANOVÁ, Kateřina 'K zásadní změně Úmluvy Rady Evropy o ochraně osob se zřetelem na automatizované zpracování osobních dat (Úmluva č. 108)' [On a fundamental amendment to the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention No. 108)] (2020) 2020 *Jurisprudence* 36.

to the European Convention on Human Rights and Fundamental Freedoms (ECHR) and its Article 8. Despite the fact that a failure to meet the obligations under the convention cannot be subject to a review of the European Court of Human Rights (ECtHR) on its own, it can nevertheless be reviewed indirectly, since failing to meet the obligations under the convention can simultaneously constitute a breach of the ECHR's Article 8.[31] The Convention 108 (and its modernised version) itself can therefore be understood as a concrete expression or specification of Article 8.[32] While the Convention 108+ has not reached the required number of ratifications to enter into force, this development is expected to take place this or next year.[33]

Unlike the GDPR and the EU data protection regime in general, the focus of the CoE is not dual, but solely on the promotion of human rights.[34] That said, it is a question of extent, rather than a binary difference, since the Convention 108 as well as the Convention 108+ are not indifferent to the economic reality (e.g. its Preamble explicitly mentions the goal of "*contributing to the free flow of information*", which has an apparent economic aspect), and economic interests are at the same time a realisation of certain human rights.

The importance of the Convention 108 stems from its global influence. While the GDPR has *de facto* influence, the conventions are explicitly opened for non-CoE states, and their impact is then explicit, legal. The original Convention 108 was drafted with the intention to allow accession of (at least) the USA, Canada, Japan, and Australia, but the Convention 108+ goes significantly further in this global ambition.[35] This allows for a further, global, proliferation of the European approach to data protection.

Regarding the regulation of automated decision-making, the original wording of the Convention 108 (similarly to other international instruments, such as the OECD Privacy Guidelines or the APEC Privacy Framework) did not contain any explicit mention of a similar right.[36] However, in the years leading up to the finalization of the Convention 108+, the CoE began to address the issue in two soft-law documents that already referenced a similar right.[37] In the Convention 108+ itself, the right is set as the very first right of the individual in the list of rights under Article 9. As explained below, the prevailing interpretation, supported by the Explanatory Report, is that this stipulates an active right of the data subject while granting the option to authorise by a law certain processing, in which this right shall not apply (Article 9(2), and in general Article 11): the restrictions in Article 9(1)a do not apply

[31] And this then, in turn, has an impact on the EU regulation as well. In this regard, the ECJ ruled that data processing in breach of Article 8 ECHR is also incapable of satisfying the requirements of the (then applicable) Directive 95/46. See point 91 in *Österreichischer Rundfunk and Others* [2023] European Court of Justice C-465/00, ECLI:EU:C:2003:294.

[32] UKROW (n 19) 239.

[33] The text was finalised in 2018 and while the "*complex international situation has slowed down internal national approval processes*", it may still come into force this year (by achieving the necessary number of ratifications), according to GREENLEAF, Graham 'The New Data Protection Convention 108+ and Its Importance for Asia' (2024) 2.

[34] BYGRAVE, Lee A. 'The "Strasbourg Effect" on Data Protection in Light of the "Brussels Effect": Logic, Mechanics and Prospects' (2021) 40 *Computer Law & Security Review* 105460, 7.

[35] Ibid 2.

[36] KUNER, Christopher, BYGRAVE, Lee A. and DOCKSEY, Christopher (eds), *The EU General Data Protection Regulation (GDPR): A Commentary* (Oxford University Press 2019) 528.

[37] In 2010, Recommendation on the Protection of Individuals with Regard to Automatic Processing of Personal Data in the Context of Profiling and then in 2017 Guidelines on the Protection of Individuals with Regard to the Processing of Personal Data in the World of Big Data.

in case of authorisation by a law that lays down suitable measures safeguarding data subjects' rights.

2.4 The relationship between the GDPR and the Convention 108+

As a general principle, EU law should, if possible, be interpreted in a manner consistent with the international agreements concluded by the EU itself, and should also take into account the obligations of Member States under international law, following the principle of sincere cooperation.[38] Given the overlap between EU Member States and the signatories of the Convention 108+, this principle is relevant for the relationship between the Convention 108+ and the GDPR.

In addition, these two instruments were drafted at a similar time, with an explicit intention, reflected in the wording of the Council's Explanatory Memorandum, to create a seamless regime that would put the Convention 108+ and the GDPR "*fully in line*" with each other.[39] This is again not an exceptional development, but rather a practice consistent with close cooperation between the CoE and the EU on a number of regulatory issues,[40] including data protection.[41] The influence in drafting was mutual, as evidenced by the changes to the treatment of biometric data in the GDPR that took inspiration from the provisions of the Convention 108+.[42] As such, there is a broad doctrinal agreement on the intended "*full compatibility*" of these two instruments,[43] with the EU Member States expected to be obliged to make at most "*cosmetic changes*" to adjust their national laws to the Convention 108+.[44]

Furthermore, the text of the GDPR itself refers in its Recital 105 to the Convention 108 (and its additional protocol). Based on the recital, a third country's accession to the Convention should be taken into account by the Commission in determining the particular third country's level of data protection and the country's compatibility with the standard of the GDPR. While the text of the recitals is not binding,[45] it is another clear signal of the intended mutual compatibility between the two instruments. In the Convention 108+, the reference is similarly not contained in the binding text, but in the Explanatory Report, which notes the influence and highlights that "*utmost care was taken to ensure consistency between both* [EU and CoE] *legal frameworks*".

As such, given the information available on the drafting process and the explicit references to each other in the instruments, we can therefore apply the principle of a simple subjective historical interpretation to confidently assert that it was the intention in the drafting to

[38] TOSONI, Luca 'The Right to Object to Automated Individual Decisions: Resolving the Ambiguity of Article 22(1) of the General Data Protection Regulation' (2021) 11 *International Data Privacy Law* 145, 159.

[39] Proposal for a Council Decision authorising Member States to sign, in the interest of the European Union, the Protocol amending the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108), COM(2018) 449 final 2018/0237(NLE).

[40] BYGRAVE (n 34) 7.

[41] KUNER, Christopher *European Data Protection Law: Corporate Compliance and Regulation* (2nd ed, Oxford University Press 2007) 49.

[42] BYGRAVE (n 34) 7.

[43] LIPANOVÁ (n 30) 38.

[44] NONNEMANN, František 'Modernizace Úmluvy 108, základního nástroje Rady' [Modernization of Convention 108, the Council's core instrument] (*EPRAVO.CZ*, 20 July 2018) <https://www.epravo.cz/top/clanky/modernizace-umluvy-108-zakladniho-nastroje-rady-evropy-pro-ochranu-osobnich-udaju-107901.html>.

[45] *Casa Fleischhandels* [1989] European Court of Justice 215/88, ECLI:EU:C:1989:331.

align the two texts and, conversely, avoid any mutually exclusive provisions.[46] As Lenaerts notes, while relying on the drafting history plays only a limited role when compared to other methods, the role is nevertheless not marginal in the system of EU law,[47] especially in cases where other methods yield unclear results.

Given that the binding text in the Convention 108+ on the subject, Article 9, is rather brief (consistent with the regulatory nature of the instrument, which aims to provide a flexible and standards-based approach), we also need to assess the applicability of the non-binding Explanatory Report to the Convention. The Explanatory Report is endorsed by the Committee of Ministers and forms "*part of the context in which the meaning of certain terms used in the Convention is to be ascertained*".[48] With regards to its use within the system of EU law, as noted by Tosoni, other Explanatory Reports on the Council of Europe's instruments on data protection have already been used by the European Commission as well as by WP29/EDPB in interpreting EU law in this area of data protection, and, in other areas, even by the ECJ.[49]

In summary, we can conclude that both the binding text of the Convention, as well as its Explanatory Report, are of relevance for interpreting the GDPR, with the mutual aim of the CoE and EU being to achieve mutual compatibility between the two instruments.

3. Selected open questions regarding Article 22

As was established above, the instruments should be fully compatible and therefore the Convention 108+ and its text (interpreted consistently with the Explanatory Report) might be used to fill in the gaps in Article 22 GDPR. This does not mean that the regulation should be uniform, but a potential discrepancy, in case of an interpretational ambiguity, should be carefully justified and the Convention 108+ should set a minimum standard[50] that the GDPR might further extend by ensuring more substantial and detailed protection of individuals. Article 13 of the Convention 108+ explicitly presupposes that national legislation can make the protection stricter, in the sense that it might grant more rights to individuals. It is in this regard that Greenleaf aptly terms the Convention 108+ a "*GDPR Lite*".[51] The rest of the Article then presents four open questions about Article 22 GDPR, in each case interpreting it with regard to the Convention 108+.

3.1 Does Article 22 represent a right or a prohibition?

One of the key issues about Article 22 was the uncertainty about its core principle: does it represent an active right of a data subject (that has to be exercised) or does it by default represent a restriction, a prohibition against such activities? This distinction is far from being merely theoretical, but has a major effect on data controllers' obligations: in the case of a prohibition, automated decision-making cannot be used unless one of the exceptions

46 In the terminology of WINTR, Jan *Metody a zásady interpretace práva* (2. vydání, Auditorium 2019).

47 LENAERTS, Koen and GUTIÉRREZ-FONS, José A. 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' (2014) 2014 *Columbia Journal of European Law* 55, 24.

48 This explicit reference to Article 31 of the United Nations Vienna Convention on the Law of Treaties is in paragraph 6 of the Explanatory Report.

49 TOSONI (n 38) 156.

50 With regard to Convention 108, but this should apply the same to the Convention 108+ KUNER (n 41) 49.

51 GREENLEAF, Graham 'Renewing Data Protection Convention 108: The CoE's "GDPR Lite" Initiatives' (2016) 17 Privacy Laws & Business International Report.

applies and conversely, if it is right, the usage of automated decision-making is restricted only in case individuals actively protest such usage.[52] In addition, under the previous directive, various national implementations opted for both of these regimes, making the choice of Article 22 rather non-obvious. As a reminder, the wording of Article 22 explicitly states that a data subject "(…) *shall have the right*[53] *not to be subject to* (…)", but this is far from being an unequivocal determination of a positive right to be exercised.[54]

The wording of Article 9 Convention 108+ on this point is equivalent ((…) "*shall have a right* (…) *not to be subject to* (…)"), but the Explanatory Report clearly determines the nature of the right. Based on the Explanatory Report, Article 9 establishes a "*right that every individual should be able to exercise*" and in its paragraph 1, grants "*the right to challenge such a decision by putting forward* (…) *his or her point of view and arguments*." As such, the prevailing interpretation[55] is that this creates an active right of the data subject, who needs to actively challenge a decision to activate the right.

Arguably, the highest compatibility between the two instruments would be achieved if the GDPR were to be interpreted as also granting an active right, though it is possible for the GDPR to give more rights to the data subject. This interpretation, that the GDPR is also stipulating an active right, was in fact reflected in some of the policy documents of the CoE on the similar topic of profiling.[56] In this regard, prohibiting a certain practice can be understood as granting more rights in the sense of a more favourable regime for the individual and would therefore still constitute a compatible solution. As was determined by the ECJ case *SCHUFA,*[57] the GDPR is indeed to be understood as a "*passive right*", or in other words the provision "*lays down a prohibition in principle, the infringement of which does not need to be invoked individually by such a person.*"[58] As such, the ECJ's judgment confirmed the prevailing academic approach.[59] While not identical to the approach of Convention 108+, it is nevertheless still compatible with it (despite not making any reference to it in the Judgment of the Court[60] or the Opinion of the Advocate General Pikamäe[61]), because it adheres to the minimal floor set by the Convention.

3.2 Do individuals have a right to an explanation?

Another key question is whether Article 22 or the GDPR in general grants individuals a right to an explanation of a decision made. Once again, this question has been extensively covered in the academic debate, starting with a brief opening Article by Goodman

[52] WACHTER, Sandra, MITTELSTADT, Brent and FLORIDI, Luciano 'Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation' (2017) 7 *International Data Privacy Law* 76, 95.

[53] In other language versions "*le droit*", or "*das Recht*".

[54] Article 29 DATA PROTECTION WORKING PARTY (n 11) 34.

[55] But note to the contrary DIMITROVA, Diana 'The Right to Explanation under the Right of Access to Personal Data': (2020) 6 *European Data Protection Law Review* 211 ('*Article 9[1][a] bans solely automated decisions* […]').

[56] BENOÎT, Frénay and POULLET, Yves 'Profiling and Convention 108+: Report on Developments after the Adoption of Recommendation (2010)13 on Profiling' 30 ('[Art. 22 GDPR] *entitles the data subject to refuse to be subjected to this type of processing*').

[57] *SCHUFA* (n 2).

[58] *Ibid Paragraph 52.*

[59] With a notable exception of TOSONI (n 38).

[60] *SCHUFA* (n 2).

[61] *Opinion of Advocate General Pikamäe* [2023] European Court of Justice C-643/21, ECLI:EU:C:2023:220.

and Flaxman.[62] In short, there is no explicit mention of such right in Article 22, but an explanation is mentioned in the non-binding text[63] of Recital 71[64] and might be derived from informational duties based on Articles 13–14 or the right to access personal data under Article 15. The core of the debate revolved around whether the right to explanation is a functional necessity to enable the exercise of other, explicitly granted, rights. Simply put, can individuals meaningfully challenge and contest decisions, if they lack any other context or explanation beyond the decision itself? While this reading has been supported by the influential soft law of WP29,[65] an academic consensus has not been reached.[66] The interpretation has been clarified by the case-law. With the first cases confirming this on a national level (the Dutch cases of *Uber* and *Ola*),[67] the right's existence was then recently confirmed on the European level by the ECJ in the case of *Dun & Bradstreet.*[68] While this case is not a straightforward win for the rights of data subjects,[69] the question of existence has nevertheless been clarified.

While the wording of the Convention 108+ does not use the exact phrase "*a right to explanation*", materially this right is given[70] in Article 9(1)c, which gives a right "*to obtain, on request, knowledge of the reasoning underlying data processing where the results of such processing are applied to him or her*". The Explanatory Report then clearly affirms that this right is applicable "*in particular in cases involving the use of algorithms for automated-decision making*."[71] Establishing this right is central to the ambition of the Convention 108+, which is to "*put individuals in a position to know about, to understand and to control the processing* (…)".[72]

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62 GOODMAN, Bryce and FLAXMAN, Seth 'European Union Regulations on Algorithmic Decision-Making and a "Right to Explanation"' (2017) 38 *AI Magazine* 50 <https://ojs.aaai.org/index.php/aimagazine/article/view/2741> accessed 6 March 2021.

63 *Casa Fleischhandels* (n 45).

64 "(…) *In any case, such processing should be subject to suitable safeguards, which should include* (…) *the right* (…) *to obtain an explanation of the decision reached after such assessment and to challenge the decision*."

65 Article 29 DATA PROTECTION WORKING PARTY (n 11).

66 For example, within the Czech academic debate, Otevřel considers the fact this right exists to be "*rather clear*", while according to Ochodek, Article 22 protects "'*only' against the decision*". See OTEVŘEL, Richard 'Článek 14' in Miroslav Uřičař and Vladan Rámiš (eds), *Obecné nařízení o ochraně osobních údajů: komentář* [General Data Protection Regulation: commentary] (Vydání první, CH Beck 2021) 450–474; OCHODEK, Tomáš '„Digitální" základní práva v rukou soukromých subjektů ve světle Listiny základních práv EU' in Magdaléna Svobodová, Harald Christian Scheu and Jan Grinc (eds), *Listina základních práv Evropské unie: deset let v praxi – hodnocení a výhled* [The Charter of Fundamental Rights of the European Union: ten years in practice – assessment and outlook] (Auditorium 2019).

67 There are three cases, first decided by the Amsterdam District Court and subsequently by the Amsterdam Court of Appeal. For references to the cases and a brief summary of them, see NIEUWENHUIZEN, Ady 'Amsterdam Court of Appeal Rules in Favour of Uber and Ola Cabs' Drivers' (*Fieldfisher*) <https://www.fieldfisher.com/en/insights/amsterdam-court-of-appeal-rules-in-favour-of-uber-and-ola-cabs-drivers>.

68 *Dun & Bradstreet* (n 9).

69 See, e.g. METIKOŠ, Ljubiša 'Dun & Bradstreet: A Pyrrhic Victory for the Contestation of AI under the GDPR' (*KU Leuven: AI Summer School Blog*) <https://www.law.kuleuven.be/ai-summer-school/blogpost/Blogposts/dun-bradstreet-a-pyrrhic-victory-for-the-contestation-of-ai-under-the-gdpr> accessed 24 June 2025.

70 Similarly DIMITROVA (n 55) 227.

71 Paragraph 77 of the Explanatory Report.

72 Paragraph 10 of the Explanatory Report.

As such, the Convention 108+, read together with its Explanatory Report, gives a broader right than what is prescribed by the binding part of the GDPR.[73] Given that the GDPR allows for such a broader reading of the relevant provisions cited above, there should be a strong case for this reading in order not to break the intended compatibility between the instruments. Despite the uncertainty preceding the key case-law, with the *Dun & Bradstreet*[74] case we may confirm that this direction was indeed taken by the ECJ.

3.3 What is the standard of personal data processing required by Article 22?

For the next two open questions, we are moving from the "*classic*" ambiguities of Article 22 that have received extensive academic coverage and that benefit from existing ECJ interpretation, to more niche issues. The first of those revolves around the necessary standard of personal data processing that has to be involved in order to trigger Article 22 GDPR. As was explained, Article 22, understandably, uses the terminology of the GDPR and is based on *data protection* principles. Therefore, where it mentions the right of a *data subject* and *processing*, these are clearly connected to the concept of processing of *personal data*. However, the question is, how should we interpret this condition: does Article 22 somehow require qualified, sophisticated processing (e.g. profiling), is the mere presence of any personal data in the decision-making process sufficient, or is a decision (concerning *a person*) by itself enough to place processing under the ambit of Article 22?

The first potential interpretation, which would require profiling to take place in order for Article 22 to be triggered, clearly stems from the previous text of the directive, which explicitly contained this requirement, though the condition was not implemented in all Member States on the national level.[75] Only a minority of authors adhere to this view, which seems to be mostly supported by German jurisprudence.[76] The recent ECJ case-law has confirmed this view, with Advocate General Pikamäe asserting in the *SCHUFA* case that profiling is a "*sub-category* [of automated processing]*, judging by the wording of the provision*"[77] and the Court agreeing with him.

According to a second interpretation, the quality of profiling is not necessarily required, but the process *before* the decision is reached needs to contain personal data. This view is the current academic mainstream[78] and is arguably closest to the simple, "technical" reading of Article 22.

Finally, according to a third view, a decision *on an individual* itself constitutes personal data and, insofar as Article 22 requires processing related to a data subject, this requirement is always sufficiently met by the final decision itself.[79]

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73 With the same conclusion DIMITROVA (n 55) 227.

74 *Dun & Bradstreet* (n 9).

75 For example, the Czech implementation did not contain this condition, which was understood as a deliberate extension of the material scope. JAROLÍMKOVÁ, Andrea 'Článek 22' in Miroslav UŘIČAŘ and Vladan RÁMIŠ (eds), *Obecné nařízení o ochraně osobních údajů: komentář* [General Data Protection Regulation: commentary] (Vydání první, CH Beck 2021) 600.

76 Kamlah, Wulf, 'Artikel 22' in Kai-Uwe Plath and others, *DSGVO/BDSG: Kommentar zu DSGVO, BDSG und den Datenschutzbestimmungen von TMG und TKG* (3. Auflage, Otto Schmidt 2018) 245.

77 Paragraph 33 *SCHUFA* (n 61).

78 E.g. ALMADA (n 28) 7; JAROLÍMKOVÁ (n 75) 600; KUNER, BYGRAVE and DOCKSEY (n 36) 533.

79 CHRISTODOULOU, Paraskevi and LIMNIOTIS, Konstantinos 'Data Protection Issues in Automated Decision-Making Systems Based on Machine Learning: Research Challenges' (2024) 4 *Network* 91, 92.

Seen from a different angle, the process before the decision can be wholly based on situational/environmental data, can just simply accept every tenth request and refuse the other ones and so on, but since the outcome is then applied to an individual, the processing nevertheless is covered within the scope of Article 22. The argument that the decision in itself constitutes personal data is in my view consistent with the ECJ case-law, since in the case *Nowak*[80] the ECJ held that "*the use of the expression 'any information' in the definition of the concept of 'personal data'* (…) *potentially encompasses all kinds of information, not only objective but also subjective, in the form of opinions and assessments, provided that it 'relates' to the data subject*".[81] The information then relates to an individual "*where the information, by reason of its content, purpose or* ***effect****, is linked to a particular person*". Therefore, if a subjective assessment or opinion can constitute (if the other conditions are met) personal data, then a decision, a form of binding assessment linked by its effect to a particular person and therefore relating to it, should meet the definition as well.

Though some authors admit at least the ambiguity of this issue,[82] a majority of authors subscribe to the second interpretation and the ECJ has yet to decide on it. With that, let's turn to the wording of the Convention 108+, which stipulates a right in its Article 9(1)a with regards to "*an automated processing of* ***data***". The definitions in the regulatory instrument define "*personal data*" in Article (2)a and then the other rights listed under Article 9 (as well as other articles in general) seem to carefully distinguish between "*personal*" data and "*data*" in general.[83] While the Explanatory Report mentions in this context that a data subject "*in particular* (…) *should have the opportunity to substantiate the possible inaccuracy of the* ***personal data*** *before it is used*", the opening phrase of "*in particular*" signifies that this is just an example, a typical situation that is being considered, but not necessarily a required part of the definition. In addition, the Explanatory Report with regards to Article 9(1)c (*right to explanation*) carefully mentions only "*data*" again when describing the core of the right. Of course, the overall purpose of the Convention is to protect individuals with regard to the processing of personal data,[84] but personal data is still present in this interpretation in the form of the final decision reached (whose effect is linked to an individual and that is therefore personal data).

Therefore, there is a case for reading the Convention 108+ as subscribing to the broad view of the material scope of automated-decision making, for which the only processing of data that occurs in the process is the decision itself. While this reading highlights the exceptional nature of the right in the context of data protection and, arguably, extends the already

[80] This case interpreted the term under the previous regulations based on the directive, but there are only minor differences between the DPD and the GDPR in this regard. *Nowak* [2017] European Court of Justice C-434/16, ECLI:EU:C:2017:994.

[81] Paragraph 34 ibid.

[82] VEALE, Michael 'Governing Machine Learning That Matters' (Disertační práce, University College London 2019) 106 ('*It is unclear, for example, whether automated decisions evaluating situational or environmental as opposed to "personal" aspects would fall under Article 22.*'); FINCK, Michele 'Smart Contracts as a Form of Solely Automated Processing under the GDPR' (2019) 9 International Data Privacy Law 17, 84 ('*One may however wonder whether there can be situations where input data is not personal data and the output decision is so that Article 22 GDPR nonetheless applies.*').

[83] The Explanatory Report similarly distinguishes just "*data*" (in the context of also anonymised, hence non-personal data) and "*personal data*".

[84] As explicitly stipulated in Article 1.

extensive regulation[85] to other potential areas, it is supported by the textual interpretation and would lead to a higher standard of protection for the individual. In this view, Article 9(1) a Convention 108+ and Article 22 GDPR both represent a forward-thinking provision designed to protect individuals from a specific type of harm unique to the automated age: being judged by a machine logic based on information that is not, at the outset, necessarily about them personally, but which results in a decision that becomes intrinsically personal due to the effect on them. Given the minimum standard that the Convention 108+ sets for the GDPR, the GDPR itself should then be read in the same, extensive way, contrary to the prevailing academic consensus.

3.4 Which effects of a decision trigger the regulation?

The final question to be covered is concerned with the scope of application, specifically with the threshold for the effects of a decision. An academic debate has been opened on, at least, the questions of whether the outcome must be negative in order to trigger the regulation, whether there is a minimal threshold for legal effects and, similarly, how significant the non-legal effects must be.

Taking these questions in turn, the first question concerns a carve-out for positive decisions. Again, mainly German jurisprudence[86] argues in favour, citing, among other reasons, that Recital 71 only mentions a negative decision on a loan application (its "*refusal*").

The second question is, in other words, whether some legal effects can be so trivial and low stakes that Article 22 is not intended to cover them. According to Nulíček, applying Article 22 to situations such as deciding on a discount for customers would be "*absurd*".[87] However, it should be noted that the ECJ has, on a conceptually similar question on the minimum threshold for "*processing*" or "*personal data*", repeatedly refused to introduce such a threshold. While ECJ case-law specifically concerning Article 22 is scarce,[88] in the case of *Dun & Bradstreet*[89] the dispute revolved around a EUR 10/month contract, and neither the Advocate General, nor the Court considered a *de minimis* threshold.[90]

Finally, given the change to the wording in the GDPR (as compared to the DPD), it could be argued that the threshold for non-legal effects has been increased, since their necessary impact is now linked to being similar to the legal effect.[91]

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85 BOBEK and KÜHN (n 22).

86 KAMLAH, 'Wulf Artikel 22' in Kai-Uwe Plath and others, *DSGVO/BDSG: Kommentar zu DSGVO, BDSG und den Datenschutzbestimmungen von TMG und TKG* (3. Auflage, Otto Schmidt 2018); In the Czech Republic, e.g., MORÁVEK, Jakub *Ochrana osobních údajů podle obecného nařízení o ochraně osobních údajů (Nejen) se zaměřením na pracovněprávní vztahy* [Personal data protection under the General Data Protection Regulation (Not only) with a focus on employment relations] (Wolters Kluwer ČR 2019).

87 NULÍČEK, Michal and others, *GDPR (Obecné nařízení o ochraně osobních údajů): Praktický komentář.* [General Data Protection Regulation): Practical Commentary] (Wolters Kluwer 2017) 235.

88 And there was none, on the ECJ level, concerned with the previous regulation in the DPD.

89 *Dun & Bradstreet* (n 9).

90 In general, a number of other key cases of European law could be described as banal in terms of their merits. For more details see the Article and discussion ŠIMÍČEK, Vojtěch 'Chvála Banalit' (*JINÉ PRÁVO*, 4 May 2007) <https://jinepravo.blogspot.com/2007/05/chvla-banalit.html>.

91 *Cf.* Article 15 DPD "*not to be subject to a decision which produces legal effects concerning him or significantly affects him*" and Article 22 GDPR "*not to be subject to a decision* (…) *which produces legal effects concerning him or her or* ***similarly*** *significantly affects him or her*."

Turning to the Convention 108+, its wording is simplified and only refers to "*a decision **significantly affecting** him or her*" without any distinctions being made between the legal or non-legal effects. The Explanatory Report does not mention the qualifier of "*significantly*" at all, rather stating that "*it is essential that an individual who may be subject to a purely automated decision has the right to challenge such a decision* (…)". This interpretation cannot override a clearly set qualifier in the binding text of the Convention, but it supports the view that the threshold should be relatively low. Based on this, the interpretation of the GDPR is proposed as follows: decisions having a positive effect on the individual are covered, since they can significantly affect the individuals and if the Convention gives rights in these situations, the GDPR should also be understood as covering this. On the question of excluding trivial decisions with legal effect, the Convention, by not making this distinction at all and by including the qualifier of "*significantly*", does exclude them and therefore the GDPR could be interpreted in the same manner. However, this does not mean that it should be, since it can extend the right to trivial decisions that have a legal effect as well, as this strengthens the rights of the individuals. This argument is only limited to the fact that the Convention is not the limiting factor here. Finally, while the non-legal effects should not be trivial either, a reading of the GDPR that requires them to be strictly as important as an objective standard of legal impact on an individual would be ill-advised, as it could lower the standard of protection that the Convention grants, that is, it could in some situations exclude decisions that are "*significant*" (and hence covered by the Convention 108+), but nevertheless "*not similarly significant as a decision with legal effects*" (and hence, in an interpretation to the contrary, potentially excluded by the GDPR).

4. Conclusion

This Article briefly presents the regulation of automated decision-making in the two key pillars of the European approach to data protection. The two regulatory instruments, the GDPR and the Convention 108+, were compared with regards to the possibility of using the Convention 108+ to fill in the gaps in the understanding of the GDPR, since the Convention 108+ should be fully compatible and should set a minimal threshold for the level of protection granted by the GDPR. Despite the very brief wording of the Convention 108+ on this topic, its text (and Explanatory Report), was applied to four selected ambiguities in the GDPR. In two of these questions, the ECJ has already produced case-law, and its judgments so far confirm the expected compatibility between the two texts. For the remaining two, the questions are still subject to an intense academic debate, in which the significance of the Convention 108+ might be overlooked. The solutions presented by this Article to these open questions are, in some aspects, even contradictory to the prevailing academic approach. Despite these findings, the interpretation of Article 22 remains an open issue of growing importance and using the Convention 108+ is, understandably, not a panacea for all the numerous issues pertaining to the interpretation of Article 22. That said, it was argued that there is substantial value in using the Convention 108+ to clear up at least some aspects of the GDPR. The mutual influence of these two instruments, which should converge in the intended full compatibility, is in the end beneficial for the further proliferation of the single European standard.