NOTES

AUTOMATED DECISIONS IN PUBLIC ADMINISTRATION PROCESSES: THE CASE OF THE AUSTRIAN PUBLIC EMPLOYMENT SERVICE ALGORITHM

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Abstract

This article examines the complex legal issues surrounding the use of artificial intelligence and algorithmic decision-making by public administrations, focusing on the Austrian Public Employment Service's (AMS) algorithm, the *Arbeitsmarktchancen-Assistenzsystem* (AMAS). The study investigates the growing reliance on automated decision-making systems for enhancing administrative efficiency and objectivity, while highlighting significant risks to individual rights, such as data protection, transparency, and procedural fairness.

Through a detailed analysis of the AMS case, the article explores the application of Article 22 of the General Data Protection Regulation (GDPR), which governs automated individual decision-making and profiling. Central to this discussion is the interpretation of what constitutes an 'automated decision' under the GDPR, particularly in light of the landmark SCHUFA judgment by the Court of Justice of the European Union (CJEU).

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1. Introduction

It is abundantly clear that even the smallest aspects of our lives are increasingly governed (or at least could be) by Artificial Intelligence (AI). This can occur through the use of algorithms, which are expanding every day and in every area of our lives, whether simply by handling our smartphones or just walking down the street in areas monitored by surveillance cameras. While the opportunities and benefits arising from the use of AI are evident and easily encountered, it cannot be denied that its widespread use can create notable risks in various aspects. The impact and damage caused by AI in general are diverse, ranging from personal data breaches to physical injury caused by self-driving cars and purely economic losses resulting from the false information generated by AI systems.

With regard to this scenario, the article focuses on one specific area, namely the use of algorithms and AI technologies by public administrations and the need to ensure the protection of personal data.

Automated administrative decisions, i.e., those made by algorithms, are increasingly being used in many legal systems worldwide. It is generally recognised that automation can bring important benefits in terms of efficiency (the use of algorithms can lead to faster decisions and reduce subjective bias, thereby fostering objectivity). Still, automated administrative decisions pose new threats to many individual rights such as data protection and the

procedural rights of affected individuals, as well as to transparency[1].

The current legal debate seeks to offer analysis and solutions to the new problems and the questions raised by the impact on our lives of the use of AI systems by public administrations[2]. In this regard, several judicial decisions on the matter have been delivered at both national and European levels. These decisions are both significant and interesting, also because they represent an initial test case for identifying and highlighting the problems and risks arising from Automated Administrative Decision Making (ADM) as well as for considering possible solutions, both *de iure condito* and *de iure condendo*. One of these is that of the Supreme Administrative Court of Austria (*Verwaltungsgerichthof* - VwGH) of 21 December 2023[3].

To this end, after outlining the context of the use of algorithms in the public sector (§ 2), we will present the decision of the VwGH concerning the legitimacy of the Austrian Public Employment Service (*Arbeitsmarktservice Österreich* – AMS) using an algorithm to categorise jobseekers (§ 3). We will then examine the key aspects of the judgment, starting with the implications of Article 22 of the General Data Protection Regulation (GDPR) (§ 4), followed by a focus on the landmark *SCHUFA* Judgment by the Court of Justice of the European Union, which the Austrian court had been waiting for in order to resolve the case (§ 5). Lastly, we will apply the principles of Article 22 GDPR and those stemming

[1] See for example H.C.H. Hofmann, *Automated Decision-Making (ADM) in EU Public Law*, in H.C.H. Hofmann, F. Pflücke (eds), *Governance of Automated Decision-Making and EU Law* (2024); S. Schäferling, *Governmental Automated Decision-Making and Human Rights. Reconciling Law and Intelligent Systems* (2024) 93 ff.; L. Tangi et al., *AI Watch. European landscape on the use of Artificial Intelligence by the Public Sector* (2022); K. Yeung, *Why Worry about Decision-Making by Machine?*, in K. Yeung and M. Lodge (eds), *Algorithmic Regulation* (2019); L.A. Bygrave, *Minding the Machine v2.0: The EU General Data Protection Regulation and Automated Decision-Making*, in Yeung and Lodge (eds), *Algorithmic Regulation* (2019).

[2] See *ex multis* H.C.H. Hofmann, F. Pflücke (eds), *Governance of Automated Decision-Making and EU Law* cit. at 1; Issue 1/2023 of the *Journal Ceridap*, entirely dedicated to ADM, and especially the article by F. Merli, *Automated Decision-Making Systems in Austrian Administrative Law*, pp. 41 ff; B. Marchetti, *La garanzia dello human in the loop alla prova della decisione amministrativa algoritmica*, 2, BioLaw Journal, 367ff (2021); M. Infantino, W. Wang, *Algorithmic Torts: A Prospective Comparative Overview*, 28 Transnat'l L. &. Contemp. Probs., 309 (2019).

[3] *Verwaltungsgerichthof*, 21 December 2023, Ro 2021/04/0010-11.

from the *SCHUFA* case to the AMS algorithm (§ 6), which will allow us to draw some final conclusions (§ 7).

2. Public administrations and algorithms

The use of algorithmic tools by public administrations and governments is growing exponentially, both for governance functions and in the management of public programmes, where they serve as a means of allocating resources or providing assistance in policy decision-making[4]. On the one hand, it is clearly a precious instrument for collecting and analysing vast amounts of data, representing an important tool for improving the decision-making process. The advantages with respect to inefficient and time-consuming 'paper-based' decision making are evident[5].

While these AI tools can deliver accurate and efficient results, their potential drawbacks are many and varied. Suffice it to mention the lack of transparency in computer codes, the bias and discrimination arising from algorithms designed according to specific preferences, or even the lack of accountability in cases of incorrect implementation of an algorithm itself[6]. Last but not least, one of the most significant issues associated with the use of AI by public administrations relates to potential violations of data protection.

This was the issue at stake in the case addressed by the Austrian Supreme Administrative Court in the AMS case. As we will see in the next section, the dispute concerned the legality of the Austrian Public Employment Service's (*Arbeitsmarktservice Österreich* – AMS) use of an algorithm to categorise job seekers, specifically whether the AMS' process could be classified as an 'automated decision' subject to the restrictions of Article 22 of the

[4] On the increasing use of AI systems in the public sector, see among many M. Bussani, M. Infantino, *The Law of the Algorithmic State in Central and Eastern Europe. Introduction to the Special Issue*, Italian Journal of Public Law (2025) forthcoming; A. Ferrari Zumbini, M. Conticelli, *The Law of the Algorithmic State in Central and Eastern Europe. Concluding Remarks*, Italian Journal of Public Law (2025) forthcoming; H.C.H. Hofmann, F. Pflücke (eds), *Governance of Automated Decision-Making and EU Law* cit. at 1; J. Boughey, K. Miller (eds), *The Automated State. Implications, Challenges and Opportunities for Public Law* (2021); A. Bradford, *Digital Empires. The Global Battle to Regulate Technology* (2023); M.E. Kaminski, J.M. Urban, *The Right to Contest AI*, 121 Columbia L. Rev. 1957 (2021).

[5] R. Gupta and S.K. Pale, *Introduction to Algorithmic Government* (2021).

[6] Ibid.

General Data Protection Regulation (GDPR). In this regard, as we will see, the definition of the nature of the process is crucial. With the exponential growth in the use of AI technologies by public administrations, the need for clearer interpretations of what actually constitutes an automated decision makes the difference when distinguishing between processes subject to the GDPR and those exempt from its restrictions, and consequently in determining what is lawful – and what is not – under the Regulation. However, before examining the specific issue considered by the Austrian Supreme Administrative Court, the following section will outline the relevant facts of the dispute.

3. The *AMS* case: the facts

In 2021, the AMS developed an algorithm called the *Arbeitsmarktchancen-Assistenzsystem* (AMAS), i.e., the Labour Market Opportunity Assistance System, to support its counsellors in helping jobseekers enter the labour market. The system was not intended to find jobs for jobseekers but only to calculate the probability of their future labour market prospects. Using various categories, such as age, gender, education, health impairment, care responsibilities, employment history, and the regional market situation, the algorithm classified jobseekers into three different groups: individuals with high, medium, or low market opportunities[7]. The results produced by the AMAS were to have been used as useful information for the counselling process, facilitating discussions with jobseekers about their potential and obstacles and helping to define strategies for entering or re-entering the labour market[8]. The classification system was specifically designed to assist the centre's counsellors in prioritising their efforts. Rather than focusing on clients likely to secure a job on their own or those with minimal chances despite support, the system aimed to identify those in the middle ground. These were individuals for whom the centre's guidance and resources could significantly improve their likelihood of finding a job, thereby maximising the impact of their intervention[9]. After the Austrian Data Protection Authority opened an investigation into the

[7] For a more detailed analysis of AMAS see § 6 below.
[8] *Verwaltungsgerichthof*, 21 December 2023, Ro 2021/04/0010-11, § 7.
[9] F. Merli, *Automated Decision-Making Systems in Austrian Administrative Law*, cit. at 1, esp. 46.

application of the GDPR[10], the AMS was essentially barred from using the AMAS for two reasons. Firstly, as a public authority, the AMS was not explicitly authorised to perform data profiling[11]. Secondly, the AMAS's activity could be considered automated individual decision-making and therefore restricted under Article 22 GDPR. In fact, even though the data were processed by AMS employers, the results of the algorithm could still influence final decisions, which were only regulated by non-binding internal guidelines.

As we will see in the next section, the AMS appealed the decision of the Public Authority to the Federal Administrative Court (*Bundesverwaltungsgericht* - BVwG).

3.1 The Decision of the Federal Administrative Court

The Federal Administrative Court annulled the Austrian Data Protection Authority's decision[12].

First, the BVwG declared that there was indeed a legal basis for the AMS's activities[13]. Since the task of the AMS is to efficiently place suitable workers in jobs that correspond as closely as possible to the jobseeker's wishes, and also to mitigate the effects of circumstances that might prevent direct placement, the AMS was, in the view of the BVwG, acting in the public interest.[14] Data processing was therefore permitted under Article 9(2)(g) GDPR. If Article 9 GDPR prohibits the "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", Article 9(2)(g) GDPR

[10] Under Article, 57, 1(h), Article 58, 1(b) and 2(a) GDPR in conjunction with Article 22 of the Regulation itself.

[11] According to Article 4(4) GDPR "'profiling' means any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements".

[12] *Bundesverwaltungsgericht*, 18 December 2020, Zl. W256 2235360-1/5E.

[13] The legal base was found in § 1 (2) DSG, BGBl. I Nr. 165/1999 idF BGBl. I Nr. 14/2019, relating to data processing by public authorities.

[14] Pursuant to § 29 Para. 2 AMSG. *Verwaltungsgerichthof*, 21 December 2023, Ro 2021/04/0010-11, § 11.

exempts cases where data processing is necessary for reasons of substantial public interest[15].

Furthermore, according to the BVwG, Article 22 GDPR on automated individual decisions was not applicable, as the AMAS algorithm was only used as a source of information for a decision by AMS employees, who had the final say on the jobseekers' opportunities[16].

In the light of the above, the BVwG declared that the AMS processed personal data in compliance with the principles of lawfulness, fairness and transparency set out in Article 5 GDPR and therefore declared the appeal admissible.

The decision was appealed by the Austrian Data Protection Authority to the Supreme Administrative Court (*Verwaltungsgerichtshof* - VwGH), whose decision will be examined in the next section.

3.2 The Decision of the Supreme Administrative Court

The *Verwaltungsgerichthof* examined three main issues.

The first decision concerned the nature of the AMS's activity, which was allegedly private in the view of the Austrian Data Protection Authority but public in that of the AMS. The VwGH stated that in order to qualify a public authority activity as *Hoheitsverwaltung* it is irrelevant that the authority in question performs a "public function", since not everything that is "public" is to be carried out in a sovereign manner. The fact that the authority in question works with public funds in connection with the task to be performed is also not decisive with regard to the question of sovereign activity, because the State also acts with public funds in the context of private-sector administration. The only decisive factors are the legal means provided by the legislator, i.e. whether a legal authorisation to act in a sovereign capacity exists, and whether such authorisation is used in a specific case[17]. The Supreme Administrative Court stated that the activity of assisting jobseekers was to be considered as belonging to the field

[15] Under Article 9 (2)(g) GDPR: "processing is necessary for reasons of substantial public interest, on the basis of Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject".

[16] *Verwaltungsgerichthof*, 21 December 2023, Ro 2021/04/0010-11, § 2.

[17] *Verwaltungsgerichthof*, 21 December 2023, Ro 2021/04/0010-11, § 38.

of the AMS' private activity because of the lack (at least in this field) of coercive powers. Therefore, the Austrian provisions on confidentiality of personal data by public authorities (Section 1 (2) of the Austrian Data Protection Act - *Datenschutzgesetz*, DSG) could not apply[18].

The second issue examined by the VwGH concerned the lawfulness of data processing in general[19]. The Court confirmed the lawfulness of AMS's data processing under Articles 6 (personal data) and 9 (sensitive data) of the GDPR [20]. With regard to the processing of personal and sensitive data under Articles 6 and 9, the task must be carried out in the public interest (which becomes substantial in the case of sensitive data), and this task must be defined by clearly and specifically defined by law. In this case, the Court held that the public interest in the advice provided by the AMS (in the light of the functioning of the labour market) was clear, and that the Austrian Labour Market Service Act (*Arbeitsmarktservicegesetz* – AMSG) described the task of the AMS and the purpose of the data processing with sufficient clarity and certainty.

The third issue under scrutiny by the VwGH is the most important for our analysis. The Court addressed the question of whether or not the AMS counselling activity – based on the labour market opportunities calculated by the AMAS algorithm – constituted an automated decision in individual cases, which is prohibited by Article 22(1) GDPR. This Article prohibits decisions based solely on automated processing – including profiling – that produce legal effects concerning data subjects or similarly affect

[18] § 1 para. 2 DSG requires a statutory basis for interference with data protection confidentiality: "(2) Insofar as personal data are not used in the vital interest of the data subject or with the data subject's consent, restrictions of the right to secrecy are permitted only to safeguard overriding legitimate interests of another person, namely in the case of interference by a public authority only on the basis of laws which are necessary for the reasons stated in Article 8 para. 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Federal Law Gazette No 210/1958. Such laws may provide for the use of data that, due to their nature, deserve special protection only in order to safeguard substantial public interests and, at the same time, shall provide for adequate safeguards for the protection of the data subjects' interests in confidentiality. Even in the case of permitted restrictions, a fundamental right may only be interfered with using the least intrusive of all effective methods".

[19] *Verwaltungsgerichthof*, 21 December 2023, Ro 2021/04/0010-11, §§ 33-34. Point 5.2.

[20] *Verwaltungsgerichthof*, 21 December 2023, Ro 2021/04/0010-11, § 62.

them in a significant way[21]. To answer this question, the Austrian Administrative Court referred to the *SCHUFA* decision of the Court of Justice, the judgment of 7 December 2023, C-634/21 – which will be analysed in § 4 below – and clearly states that it awaited this decision in order to resolve the AMS's appeal[22].

First of all, in the light of the outcome of *SCHUFA*, the VwGH emphasised that the activity of the AMAS algorithm was undoubtedly to be understood as a profiling activity, as defined by Article 4(4) GDPR. According to this interpretation, the likelihood of integration into the labour market generated by the AMAS consisted in an 'automated decision' under Article 22(1) GDPR, as it was capable of influencing the allocation of the jobseekers in the market, which had a legal effect on them[23]. Even the fact that the final decision on the allocation in a group lay with AMS employees did not prevent the classification of the AMAS process as an automated decision under Article 22(1) GDPR. Again, according to the CJEU in *SCHUFA*, profiling constitutes an 'automated decision in individual cases' insofar as the decision of the third party to whom the results of the algorithm are sent is 'strongly' influenced by this value[24]. In this context, the BVwG's statement that instructions were given to AMS employees to ensure that the result of the algorithm was not accepted unquestioningly did not, in itself, exclude the possibility that the AMAS results were the final and decisive instrument for categorising jobseekers[25].

Lastly, the VwGH found that the use of the AMAS could be permitted and legitimate, provided that one of the exceptions under Article 22(2), (3), and (4) GDPR applies. More specifically, Article 22(2)(b) GDPR envisages the adoption of an automated individual decision if national legislation authorises it, provided that appropriate measures are in place to safeguard the rights, freedoms, and legitimate interests of the data subject. However, no

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[21] Article 22(1) GDPR: "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."

[22] *Verwaltungsgerichthof*, 21 December 2023, Ro 2021/04/0010-11, § 74.

[23] *Verwaltungsgerichthof*, 21 December 2023, Ro 2021/04/0010-11, § 79.

[24] In the *SCHUFA* case, the ECJ stressed how, when a consumer sends a loan application to a bank, an insufficient probability value will most likely lead the bank to reject it: Judgment of the Court (First Chamber) of 7 December 2023, C-634/21, § 48. See *infra* § 5.

[25] *Verwaltungsgerichthof*, 21 December 2023, Ro 2021/04/0010-11, § 80.

such legal basis existed for the application of the AMAS under the AMSG[26].

For all of these reasons, the case was referred back to the BVwG for reconsideration of the legal aspects of the case in the light of the principles set by the CJEU in *SCHUFA*. The BVwG decision is still pending.

From all the above, it clearly emerges that the decision raises many interesting points. However, the core of the AMS case lies in the implications of the use of an AI system by the public administration. Specifically, as the next section will detail, the question was whether the AMS algorithm could be considered as an automated decision or profiling subject to the limitations of Article 22 of the GDPR.

4. 'Automated decision-making and profiling' under Article 22 GDPR

Prior to the landmark decision in *SCHUFA* by the Court of Justice of the European Union[27], which was explicitly taken into account in the AMS case[28], there had been very few national court decisions concerning Article 22 GDPR[29], but no ruling by the Court of Justice on the issue. As a result, there were very few guidelines regarding the conditions whereby an algorithm qualifies as an automated decision-making system under Article 22 GDPR.

Although the GDPR was adopted in 2016 – eight years before the AI Act[30] – it contains a few provisions concerning the protection of personal data in relation to emerging and new technologies. Article 22 GDPR is one of the most important examples, as it

[26] Nor was the issue examined by the BVwG, as the lower Administrative Court based its decision on the assumption that the AMAS did not provide an automated decision within the meaning of Article 22(1) GDPR.

[27] Judgment of 7 December 2023, C-634/21.

[28] *Verwaltungsgerichthof*, 21 December 2023, Ro 2021/04/0010-11, § 74. See also § 3.2 above.

[29] See for example these decisions under Directive 95/46 (Data Protection Directive): Cour de Cassation, Chambre criminelle, audience publique du 24 septembre 1998, No. de pourvoi 97-81.748, Publié au bulletin; Bundesgerichtshof, Urteil vom 28.1.2014, VI ZR 156/13.

[30] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 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).

prohibits decisions based solely on automated processing, including profiling, that have legal effects on the data subject[31]. This restriction applies only when three conditions are met: there must be (1) a decision (2), it must be based solely on automated processing or profiling, and (3) the decision produces legal effects concerning the data subject or similarly affects them to a significant degree. On the contrary, the automated decision-making process may be lawfully carried out if one of the three exceptions of the second paragraph of Article 22 applies, i.e. in the case of a contract (when the decision "is necessary for entering into, or performance of, a contract between the data subject and a data controller"[32]), statutory authority (when the decision 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"[33]) and consent (when the decision "is based on the data subject's explicit consent"[34]). Moreover, even in the case of a contract or consent, the data subject should be given "at least the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision"[35].

As evidenced by the case description[36], the central issue before the Austrian court concerned the applicability of Article 22 GDPR to the AMAS algorithm. To find a solution, the VwGH referred to the CJEU's judgment in *SCHUFA*, delivered on 7 December 2023. Since the VwGH clearly declared that it was waiting for the judgement in order to resolve the AMS case, a concise overview of the key aspects of this seminal CJEU decision

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[31] L. A. Bygrave, *Article 22. Automated individual decision-making, including profiling*, in C. Kuner, L. A Bygrave, C. Docksey, L. Drechsler (eds.), *The EU General Data Protection Regulation (GDPR): A Commentary*, 522 ff. (2020); L.A. Bygrave, *Minding the Machine v2.0: The EU General Data Protection Regulation and Automated Decision-Making*, in Yeung and Lodge (eds), *Algorithmic Regulation*, 248 ff. (2019); G. Malgieri & G. Comandé, *Why a Right to Legibility of Automated Decision-Making Exists in the General Data Protection Regulation*, 7 Int'l Data Privacy L., 246 (2017). On the impact of artificial intelligence on the General Data Protection Regulation (GDPR) see for example G. Sartor, F. Lagioia, *The impact of the General Data Protection Regulation (GDPR) on artificial intelligence* (2020).

[32] Article 22(2) a.

[33] Article 22(2) b.

[34] Article 22(2) c.

[35] Article 22(3).

[36] See § 3 above.

is necessary for a comprehensive understanding of the Austrian Supreme Administrative Court's subsequent judgment[37].

5. The *SCHUFA* Judgment

In *SCHUFA*, a consumer was denied a loan by a bank based on a negative score provided by SCHUFA, a private company that calculates and provides information on the creditworthiness of third parties. Following the consumer's request to access her personal data held by SCHUFA and to delete inaccurate information, SCHUFA disclosed her score but provided only a very general explanation of the underlying scoring methodology, citing trade secrets as justification for the limited disclosure.

The consumer subsequently lodged a complaint with the German supervisory authority, seeking enforcement of her request for access to information and deletion of incorrect data. Following the rejection of her complaint, the consumer appealed to the *Verwaltungsgericht Wiesbaden* (Administrative Court, Wiesbaden, Germany)[38]. The central legal question before the Court was whether the establishment of a probability value of creditworthiness could be interpreted as an automated individual decision under Article 22 GDPR. If so, such processing would only be lawful if one of the exceptions stipulated in Article 22 GDPR applied, such as the decision being authorised by Union or Member State law to which the controller is subject (Article 22(2)(b) GDPR). Since the German court had doubts about the possibility of applying Article 22(1) GDPR to the activities of companies such as SCHUFA, it referred the case to the CJEU by order of 1 October 2021 with a request for a preliminary ruling under Article 267 TFEU on the interpretation of Article 22 (1) GDPR. In particular, the Wiesbaden Administrative Court asked if Article 22(1) GDPR was to be interpreted "as meaning that the automated establishment of a probability value concerning the ability of a data subject to service a loan in the future already constitutes a decision based solely on automated processing, including profiling, which produces legal

[37] For a commentary on *SCHUFA*, see for example: Sümeyye Elif Biber, *Between Humans and Machines: Judicial Interpretation of the Automated Decision-Making Practices in the EU*, in Herwig C H Hofmann, Felix Pflücke (eds), *Governance of Automated Decision-Making and EU Law*, cit. at 1, 206 ff.

[38] Judgment of the Court (First Chamber) of 7 December 2023, C-634/21, §§ 19-27.

effects concerning the data subject or similarly significantly affects him or her, where that value, determined using the personal data of the data subject, is transmitted by the controller to a third-party controller, and the latter draws strongly on that value for its decision on the establishment, implementation or termination of a contractual relationship with the data subject"[39].

Before the CJEU, it was established that the scores generated by SCHUFA met two of the three criteria of Article 22, i.e. that the processing was automated and that it produced legal effects or significantly affected the data subject[40]. What was uncertain was whether SCHUFA's activity constituted a decision within the meaning of the provision. The central issue was that the information provided by SCHUFA did not represent the final determination regarding the granting or denial of credit, but rather constituted data supplied to third-party commercial actors who ultimately made that determination.

Drawing upon the Advocate General's Opinion, the CJEU observed that, while the GDPR does not explicitly define 'decision' within the meaning of Article 22, the concept of 'decision' represented is broad enough to encompass "the result of calculating a person's creditworthiness in the form of a probability value concerning that person's ability to meet payment commitments in the future"[41]. The fact that when a consumer applies for a loan from a bank, a low probability score provided by SCHUFA almost invariably leads to the denial of the application prompted the CJEU to define the SCHUFA scoring as a decision, and therefore subject to the restrictions set out by Article 22[42].

What emerged from the *SCHUFA* Judgment is that whether profiling can be qualified as a decision largely depends on how the data is used. Profiling may serve as the sole basis for a decision, or it may merely constitute one factor among several in the final determination. As discussed in the following section, these were the same points under scrutiny by the VwGH, which had to determine whether the AMAS algorithm constituted a "decision" within the meaning of Article 22 GDPR.

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[39] Judgment of the Court (First Chamber) of 7 December 2023, C-634/21, § 27.
[40] Judgment of the Court (First Chamber) of 7 December 2023, C-634/21, §§ 47 and 48. Recital 71 GDPR lists as an example of a process creating legal effects the "automatic refusal of an online credit application".
[41] Judgment of the Court (First Chamber) of 7 December 2023, C-634/21, § 46.
[42] Judgment of the Court (First Chamber) of 7 December 2023, C-634/21, § 75.

6. The AMAS Algorithm: a decision under Article 22 GDPR?

By applying the principles laid down by the CJEU in the SCHUFA case, the VwGH sought to determine whether the AMAS algorithm constituted a decision based solely on automated processing. Consequently, a brief analysis of the key characteristics of this algorithm is necessary.

In 2021, the AMS launched the *Arbeitsmarktchancen-Assistenzsystem* (labour market opportunities assistance system - AMAS) to classify jobseekers into groups according to their expected chances of integration or reintegration into the labour market. A statistical model calculated the expected chance of (re)integration of AMS clients into the primary labour market and, on this basis, assigned them to one of three groups: 'H' for high (*hohe Reintegrationschancen*), 'M' for medium (*mittlere Reintegrationschancen*), and 'N' for low (*niedrige Reintegrationschancen*) chances of reintegration[43]. This model aimed to introduce criteria for the distribution of financial resources in programmes for entering or re-entering the job market. In other words, classification into one of these three groups served the purpose of offering jobseekers different financial support: those belonging to the 'H' group received more subsidies to support their high chances of entering the labour market[44].

The main criticism of the AMAS algorithm concerns the criteria used to classify jobseekers. It uses data such as gender, age, and health conditions. For instance, a data entry "Gender: Female" resulted in an automatic deduction of points, so that a woman was assigned to the group with less support for integration into the labour market on the basis of sex alone[45]. The public administration

[43] J. Gamper, G. Kernbeiß, M. Wagner-Pinter, *Das Assistenzsystem AMAS. Zweck, Grundlagen, Anwendung*, SYNTHESISFORSCHUNG, p. 63 (2020), available at https://www.ams-forschungsnetzwerk.at/downloadpub/2020_Assistenzsystem_AMAS-dokumentation.pdf.

[44] D. Allhutte, F. Cech, F. Fischer, G. Grill and A. Mager, *Algorithmic Profiling of Job Seekers in Austria: How Austerity Politics Are Made Effective*, 3, *Front. Big Data*, 2 (2020).

[45] P. Lopez, *Reinforcing Intersectional Inequality via the AMS Algorithm in Austria* (2019) p. 289-290. The author stresses that here, as in many other cases, it is clear that the discrimination produced by algorithms – in our example, gender discrimination – is produced by the bias in the training data of the AI systems themselves, which have no other effect but to reinforce inequalities.

– and in particular the Ministry for Social Affairs, Health, Welfare and Consumer Protection – asserted that the idea behind this model was to objectively reflect the labour market opportunities "as realistically as possible" ("*so realitätsnah wie möglich*") to ensure the most efficient allocation of the existing resources. Furthermore, the system was also intended to take into account the individual needs and problems of each single jobseeker by implementing tailor-made strategies on a case-by-case basis.[46]

With this clarification, the VwGH ruled that the AMAS decision constituted a determination based solely on automated processing that produced legal effects on jobseekers under Article 22 GDPR[47].

First, the AMS algorithm was deemed to constitute a decision producing legal effects on the data subject. The Court did not explain its reasons in detail, but simply referred to the CJEU in *SCHUFA*, stating that automated data processing, such as profiling, inherently constitutes an 'automated decision in individual cases' where the outcome of that processing is decisive for the actions of a third party that are 'significantly guided' by the algorithm's profiling and thus have a substantial impact on the data subject[48].

Second, the key issue under scrutiny by the VwGH was whether the decision had to be taken *solely* on the basis of automated processing, which is also the specific criterion that distinguished the BVwG's decision from that of the VwGH[49]. At first glance, this criterion, stemming from Article 22, appears to suggest that even minimal human involvement in the decision-making process would exclude the applicability of Article 22. However, the Article 29 Working Party clarified that a 'token gesture' of human involvement is not sufficient to satisfy this criterion. Instead, there should be a real and meaningful oversight over the process[50]. In the same way, the VwGH argued that even if the final decision on the grouping of the jobseekers rested with AMS employees, this did not prevent the AMAS being classified as

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[46] *Volksanwaltschaft Österreich*, *Volksanwaltschaftsbericht 2018. Technical report*, 99 (2019), available at https://volksanwaltschaft.gv.at/downloads/72sag/PB-42-Nachpr%C3%BCfend.pdf.

[47] *Verwaltungsgerichthof*, 21 December 2023, Ro 2021/04/0010-11, § 80.

[48] *Verwaltungsgerichthof*, 21 December 2023, Ro 2021/04/0010-11, § 75.

[49] See § 3 above.

[50] Article 29 Data Protection Working Party, *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679*, 3 October 2017, 17/EN WP 251, p. 10.

an automated decision under Article 22 GDPR. As the CJEU ruled in *SCHUFA*, also in this case the Austrian Supreme Court emphasised that even if the final decision is made by a human being, the process may still involve automated decision-making, especially if the automated process significantly influences the outcome. In other words, even if AMS employees had internal guidelines and were trained not to accept algorithmic results without question, this does not necessarily mean that the group assignments were not primarily based on the AMAS. The only way to justify the AMAS was to find a legal basis under Article 22(2)(b), which provides that exceptions to the restriction of the rule are permitted when authorised by Union or Member State law[51]. However, the AMSG did not justify the use of instruments such as AMAS, and no other legal basis was examined by the BVwG, to which the decision was then referred back.

7. Conclusions

The Austrian Supreme Administrative Court decision adds another (small) piece to the puzzle of defining the limits and boundaries of AI technology use by public administrations, especially in relation to the protection of personal data. As noted, the Austrian court underlined that the algorithm used by AMS in the counselling process could have a negative impact on jobseekers by categorising them in ways that limit their opportunities. The Court's interpretation of Article 22 GDPR appears very broad, potentially drawing attention to the risks to individual rights posed by profiling and automated categorisation. It classifies the AMAS as an automated decision under Article 22 GDPR without

[51] Just to provide a few examples, such rules have been adopted in both Germany and France. The first with § 35a of the *Verwaltungsverfahrensgesetz* (Administrative Procedure Act) of 1977, by stating that an administrative act can be issued entirely through automated systems, provided that this is permitted by the law (as long as neither discretion nor a margin of assessment is involved), and the latter with Article 47(2) n. 2, Law n. 78-17 of 6 January 1978 (*Loi n° 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés* - Law related to information technology, files, and civil liberties). Here, after stating that no decision producing legal effects with respect to a person or significantly affecting her may be made on the exclusive basis of automated processing of personal data, including profiling, it adds the exception of individual administrative decisions made under the conditions set out in Article L. 311-3-1 of the Public Relations Code by the administration.

providing a clear rationale. Instead, it focused repeatedly on the need to identify a legal basis for the process in national and EU law and highlighted the importance of a final human contribution in any public decision-making process involving automation. The Court also emphasised that less complex AI systems, where the output is controlled by humans, fall outside the restrictions imposed by the GDPR.

One main question remains unresolved. Whereas the difference on paper between a fully automated decision (*voll-automatische Entscheidung*) and a decision made with reference to a recommendation made by an algorithm (*Entscheidungsempfehlung)* appears straightforward, this difference is not so clear cut in practice. A decision entirely made and delivered to the affected individuals by AI is clearly fully automated. However, the real-world processes are much more complex, since there are a multitude of different processes and decisions, in which the input of artificial intelligence intervenes at different times, in different ways, and with different degrees of influence on public officials. In this case, the Austrian *Verwaltungsgerichtshof*, following the Court of Justice of the European Union on this point, ruled that the AMS's decisions should fall within the scope of Article 22 GDPR even though the final decision was ultimately made by a human being, albeit based on profiling by the AI. At present, defining the precise boundaries of decisions "based solely on automated processing, including profiling" remains a complex and uncertain task. Such decisions inevitably have legal effects on individuals or a similarly significant impact. Numerous factors must be taken into consideration and examined, including the (potential) liability for public officials who choose not to follow AI-generated recommendations, particularly if the algorithm's recommendation actually turns out to be more accurate than the human decision that diverged from it. Moreover, since AI does not (currently) deliver the 'best' decision, but only provides the most 'probable' answer, distinctions should also be made based on the level of probability underlying the AI model. Lastly, the psychological profile of the human in the loop must also be considered (spanning the spectrum from an uncritical acceptance of the AI's response, assuming it to be inherently superior, to a consistently sceptical stance).

The case serves as a reminder of the legal challenges posed by AI technologies in public administration, where the need to balance the efficiency of automation with the rights of individuals

is fundamental. In this context, the search for meaning offered by the courts is not just an exercise in interpretation, as judicial decisions delineate the boundaries between what is lawful and what is not. Consequently, the establishment of clear and precise rules and boundaries in this field – drawn up by legislators, courts, and academics alike – is an urgent requirement.