07.12.2023

Effects of the Schufa judgement on AI applications - automated decisions must not play a decisive role

Fuchs: "Judgement also of ground-breaking importance for AI-based decisions"

With its ruling of 7 December 2023, the European Court of Justice (ECJ) has strengthened the rights of data subjects. It protects citizens from becoming the object of opaque decision-making proposals. Specifically, the ECJ has categorised Schufa's debtor assessment as an automated decision that data subjects only have to put up with in exceptional cases and by overcoming high hurdles. According to Article 22 of the General Data Protection Regulation (GDPR), everyone has the right not to be disadvantaged by purely automated decisions. What now applies to algorithmically calculated Schufa scores has consequences far beyond the scope of credit agencies - because it is transferable to the use of many AI systems.

The ECJ has now categorised even the abstract assessment of the risk of payment default by Schufa as a decision with legal effect. This stance is understandable when you consider how heavily banks and companies generally rely on this preliminary assessment without being able to check the score. On the contrary, final decision-makers are effectively forced to blindly trust the Schufa assessment. Many AI applications are also non-transparent and therefore equally relevant to the ECJ judgement.

The ECJ's reasoning also applies to many AI systems

Similar to credit agencies, AI systems are also frequently used to draft preparatory bases for decisions. These computer-generated suggestions can already be categorised as independent according to the standards of the ECJ if they play a decisive role in the decision-making process. For example, if artificial intelligence is used to pre-sort applications or to analyse for medical institutions which patients are particularly suitable for a study, the results are only pure suggestions at first glance.

Hamburg

However, if these preparatory representations are created on the basis of barely comprehensible criteria developed independently by the AI, they are very similar to the mode of operation of a credit agency assessment as defined by the ECJ judgement. So what applies to Schufa scores also applies to the output of artificial intelligence. In accordance with the judgement, such AI-based assessments must be linked to a human assessment.

This poses a number of challenges for users, as the person making the final decision needs expertise and enough time to be able to scrutinise the machine-generated preliminary decision. However, according to the ECJ's new standards, this is precisely what is now essential: being able to understand and, if necessary, override the logic behind the computer-generated proposal.

Humans have the last word

This requirement is fundamentally in conflict with the functioning of autonomous assessments by artificial intelligence and can only be met through close human control of AI training. The decision-making processes of an AI can often only be understood and influenced during the development phase. It is therefore the task of the developers to create transparency, and it is the task of the users to familiarise themselves with how it works and to check it in each individual case.

If this distinction between humans and machines is not successful, assessments of individuals by artificial intelligence are only permissible within the narrow limits of Article 22 GDPR.

By way of exception, automatic decisions may then only be adopted in the following cases:

- if the data subject has expressly consented
- if the automated decision is necessary in exceptional cases for the fulfilment of a contract, for example because immediate and binding feedback is required in an online application

But even in these cases, data subjects are not defenseless. If they feel that the AI has made the wrong judgement, they have the right to present their individual point of view and request a review by a human. This right to a new decision will become more important in future according to the new standards of the ECJ.

Thomas Fuchs, the Hamburg Commissioner for Data Protection and Freedom of Information: *"The judgement is of ground-breaking importance for the digital society. Those affected by non-*

transparent decisions, both from credit agencies and from AI-based systems, will be empowered. The Court of Justice has thus concretised the rules for the use of artificial intelligence. AI systems often resemble a black box in their decision-making and assess people in a way that is not comprehensible. The same applies to artificial intelligence as to credit agencies: They must not be trusted blindly. Humans must always have the last word, and data subjects can demand this. Decision-makers must actually be in a position to scrutinise the proposals of an AI and they must take the individual situation of the individuals into account. This requires expertise, sufficient resources and insight into the decision-making processes within AI."

<u>Contact for queries:</u>

Eva Zimmermann
Phone: +49 40 428 54-4044
E-Mail: presse@datenschutz.hamburg.de

Hamburg