

Horizon Scanning – Where Next for Information Law?

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Areas of Interest

- Data Protection after Brexit
- Facial recognition technology
- AI, algorithms and automated decision-making
- Regulating online harms
- “Surveillance capitalism”

- Continued effect of EU law in the “implementation period”: European Union (Withdrawal Agreement) Act 2020
- Incorporation of GDPR into UK law at the end of the implementation period: European Union (Withdrawal) Act 2018
- Modification of GDPR to enable it to operate as part of UK law: SI 2019/419
- How will UK data transfers to EU work?
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- EU Commission recommendation re future UK/EU relationship – 3rd February 2020
- European Parliament resolution – 12th February 2020
- European Parliament identifying obstacles to adequacy assessment, e.g. in relation to UK approach to immigration data
- EDPS Opinion, 24th February 2020 – drawing attention to European Parliament's concerns

Facial recognition technology (FRT) in the UK **11KBW**

- Bridges v Chief Constable of South Wales Police and Secretary of State [2019] EWHC 2341 (Admin)
- Limited pilot project with FRT in South Wales
- FRT interfered with Article 8 right but interference was justified and not unlawful
- FRT also involved processing of personal data
- Assessed by reference to law enforcement provisions in DPA 2018, use of FRT was lawful

How is FRT faring elsewhere?

- August 20th 2020, Swedish DPA fined a school SEK 200,000 for its use of FRT
- Breaches of GDPR Articles 5, 9, 35, 36: no legal basis for processing of biometric data; no DPIA/prior consultation
- Widespread media reports that EU might ban FRT in public areas for up to 5 years
- But see 19th February 2020 – EU White Paper on AI – little mention of FRT

AI, algorithms and automated decision-making **11KBW**

Use of terminology in this area

- Collection of personal information and application of rules: how much difference does technology make
- What are algorithms?
- What is "big data"?
- What is "artificial intelligence" and "machine learning"?

Context for use of technology

- Possible public sector and private sector uses
 - Credit scoring
 - Assessing risk of re-offending
 - Medical diagnosis
 - Welfare benefits
 - EU settled status scheme
 - The justice system?

- Does AI make decision-making opaque?
- Does AI rule out human judgment/application of discretion?
- Does AI replicate existing sources of bias: e.g. by reference to race or sex?
- Effect of AI on perceived legitimacy of decision-making
- What legal controls are available?

- * GDPR Article 22 (decisions taken on basis of “profiling”); see definition of profiling in Article 4(4)
- Also wider GDPR constraints by reference to: fair processing (Art 5(1)(a)); fair processing information (Art 13/14); DPIAs
- FOIA 2000 – obtaining information about algorithms used in Government decision-making
- Judicial review techniques: right to reasons; “systemic challenge”
- Regulating algorithms in advance? See lecture by Lord Sales (2019)

Some key recent contributions to the AI debate **11KBW**

- Sales lecture, 2019
- ICO consultation on AI auditing framework (start date 19th February 2020)
- EU White Paper 19th February 2020

- Concerns about harm: extremist content, hate speech, offensive images/video, political impact
- 12th February 2020 – Government response to initial consultation on Online Harms White Paper
- Proposed wider role for OfCom
- How will OfCom relate to the ICO?

- The Age of Surveillance Capitalism: Zuboff, 2019
 - “a new economic order that claims human experience as free raw material”
 - “a parasitic economic logic in which the production of goods and services is subordinated to a new global architecture of behavioural modification.”

Or alternatively: lots of great services, for free?