Editorial

Back in 2012, when I worked at the University of Amsterdam, a new system was introduced at the University Sports Centre: a fingerprint entry system. Students no longer had to show their student card when entering the facility, they could now log in with their finger, after making a digital scan of their fingerprints at the registration desk. Of course, my colleagues and I were interviewed by the university magazine and of course, we were sceptical. My colleagues warned against a surveillance society, I focussed on data protection law, arguing that they could not one-sidedly impose such an intrusive system on students. But the reporter explained that the rationale for introducing this system laid not in the Big Brother or Machiavelli sphere, but had far more mundane origins: students often forgot their student card. They had repeatedly asked for alternative registration systems; they, by large majority, were in favour of introducing this system.

Still, I pointed out that a small group of students might not want to register their fingerprints, but the university sport centre rebuked that they would be allowed to register at the desk and that the gates would be opened manually for them. It would take these students a bit longer to enter the facility, but the largest group of students, logging in through their fingerprinting, would save time when compared to the old situation. The same I encountered when assessing the legitimacy of facial recognition systems years later. In football stadiums and concert halls, visitors can upload their picture when buying a ticket. When they enter the facility, they can walk to their seats straight ahead, because a smart camera will recognise them; for those that refuse, the old way of entering with a print or digital ticket is available, but facilities indicate that they will reduce budget for this registration alternative and there may be long rows for people using this route. This will have the effect, these facilities hope, that people that are against biometric access systems, but not to their bones, will eventually relinquish their resistance. Others will no longer join sport events live in order to stay clear from choosing between Scylla and Charybdis. After a year or two, such a high percentage of visitors would consent to a registration system based on facial recognition that it would be legitimate to decide that for such a small group of fans, it would no longer be cost-effective nor reasonable to maintain an alternative access system.

Another point I struggled with when the fingerprint system was introduced at the sport centre is that even if students did consent, this was not the end of the matter. Consent only gives a legitimate ground for processing and does not have bearing on many other doctrines contained in the data protection framework, such as on the requirements of necessity, proportionality and subsidiarity. I doubted whether such a system would meet any of those requirements, because it did not seem necessary to introduce it, but was merely convenient for student that forgot their student card, it was not proportion-

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ate, as the convenience did not legitimatise the processing biometric/sensitive personal data and there was a very good alternative access system available: the old fashioned student card. But these arguments were to no avail. Neither the university's data protection officer nor the national data protection authority took action (that I know of). In practice, when people consent to their personal data being processed, such processing is often deemed legitimate, even if there might be a conflict with principles contained in the data protection framework.

The same pragmatic approach I encountered when I did a research project on the anti-doping measures athletes are subjected to in the fight against doping. These measures go far. Top athletes, for example, have to register their whereabouts permanently, at least several hours in advance, so that a doping control officer can test them anytime, anywhere; this includes in the middle of the night. This means that if her day goes differently than expected, an athlete misses the buss, spontaneously decides have a drink with friends or sleeps over at a one-night stand, this will count as a 'whereabouts failure'. Interestingly, it has been suggested that athletes could wear permanent location trackers or even implant sensors in their body, so as to allow anti-doping officers to permanently track them. To provide another example of the far-reaching anti-doping measures, athletes can be asked to submit blood or urine at any time, with an anti-doping officer having an obligation to keep a permanent eye on their genitalia when collecting urine. Longitudinal blood profiles are made, so that any fluctuations in substances in their blood over months or years can be identified. Friends and close ones can be interviewed by doping control officers at any time; these officers also have the authority to do scans of social media profiles and other open access sources. Doping controls can be random or targeted, meaning that without any evidence or concrete suspicion, an athlete can be subjected to tests. A minor violation of the rules, such as a basketball player smoking a joint three days before a match, having no effect on the match (if it had any, it would be a performance reducing effect), can lead to a ban on playing basketball on both a professional and amateur level for years, ruining a person's career.

All sports events and sport organisations are private organisations; they have subjected themselves to the authority of the World Anti-Doping Agency (WADA), a private organisation as well. WADA is a legal foundation based in Switzerland, with its headquarters in Canada. Because all clubs have subjected themselves to the anti-doping system, even an amateur athlete playing tennis at her home town for recreational purposes can be asked by anti-doping officers at any time to submit urine or blood. Although it is theoretically possible for athletes that object to the far-reaching anti-doping rules to set up their own sport club, even if these would be commercially viable, the athletes of these clubs could not join in any of the local, national or international competitions under the auspices of WADA. This means that in practice athletes have the choice to either submit to the anti-doping rules or to stop partaking in sports clubs.

Because WADA is a foundation and not an association, there is no internal democracy and athletes only have the opportunity to give non-binding advice. This means that

the anti-doping community is characterised by the absence of any substantial debate about the desirability, the effectiveness and the exact goals of the anti-doping measures, while there are many of these debates that could and perhaps should be had. For example, there is no clarity with regard to why the anti-doping rules are actually in place. Some stress that it is to ban athletes from taking substances that are prohibited by law, but many of the substances that are prohibited by WADA are not prohibited through criminal law. Others say that it is to protect athletes from taking substances that are harmful to their own health, but it is questionable to what extent private foundations should act in such a paternalistic way and many substances do no grave harm to athletes' health. If anything, because the substances are banned, athletes use these them in uncontrolled and unsupervised ways, leading to detrimental medical consequences. Still others stress that it is to prevent athletes from taking performance enhancing substances, but many of the substances (such as cannabis) can hardly be said to be an enhancer for most sports. In addition, substances are being put on the anti-doping list, without any scientific prove as to their performance enhancing effect. For example, even the most infamous of all substances used in sports, EPO, when tested by several academic research teams was found to have no or hardly any performance enhancing effect. A proper debate on the requirements of necessity, proportionality and subsidiarity of the measures is absent. The argument that top sport itself is itself often detrimental to both the physical and mental health of athletes is not discussed seriously.

Not only is internal democracy lacking, judicial control on WADA's activities and decisions is minimal. WADA has set up its own internal rules for testing, the burden of proof and sanctions, which are so designed that anti-doping officers can quickly establish an anti-doping violation and direct action can be taken. It is almost impossible for athletes to object to decisions and when they do, in general, only when anti-doping officials have not followed the rules of procedures might they stand a chance before the disciplinary courts WADA has set up. Because a substantial analysis of an anti-doping measure would require expertise on international law (a Russian athlete, playing at a French club, may be tested when joining a match in Turkey by anti-doping officers acting under Canadian law), of the highly complex anti-doping rules and of how, inter alia, fluctuations in longitudinal blood profiles may indicate substance abuse or not, courts seldom to never challenge the conclusions of anti-doping organisations. Athletes themselves lack time, expertise and money to engage in long and complex legal battles, which may take years; if they want the help of experts in the field of doping, blood profiles or substance abuse, they will hardly be able to obtain their services because most experts do work for the anti-doping organisations and thus decline to join athletes in legal battles, citing a conflict of interests.

Although consequently, the anti-doping system can be criticised on multiple accounts under the human rights frameworks, such as under privacy and data protection law and the right to a fair trial, regulators and even the European Court of Human Rights (see e.g. the case of National Federation of Sportspersons' associations and unions (FNASS) and others v. France 18 January 2018) tend to be lenient. It is unclear why this

is, but one reason might certainly be that like the fingerprint system introduced at the sport centre of the University of Amsterdam, which had the support of the students, most athletes support the anti-doping regime. When asked, if anything, most professional athletes are in favour of even stricter rules and an even bigger authority for the anti-doping officers, because their biggest concern is not that their rights to privacy or fair trial are affected, but that competitors slip through the nets of the anti-doping system. They stress that there is a war against doping, and that WADA's power should be large and broad to tackle this issue adequately and swiftly. They see democratic and judicial control over WADA's executive power as an obstacle, and believe too many checks and balances would endanger the effectiveness of the anti-doping system.

Let me now introduce this issue. It is with great pride that this issue opens with no less than three forewords. Rex Ferguson, by referencing popular culture, analyses the relationship between identity and identification, between who we are, how we are perceived and who we become. David Vincent follows up with a careful reflection on the notions of solitude, loneliness and privacy and how these concepts have gained new meaning in light of the Covid-measures. Finally, our board member Marc Rotenberg has penned a reflection on the future of AI and the choices that are ahead of us with respect to the interrelationship between society, technology and humanity.

This issue also contains three academic reflections that I want to draw your attention to. Hellen Mukiri-Smith and Ronald Leenes have analysed the much debated Brussels Effect, an effect that is inter alia the result of legal transplant. They focus on the Kenyan Data Protection Act and show its relation and resemblance to and deviation from the GDPR. Jockum Hildén has written a thoughtful reflection on the lobbying process and its effects on the GDPR. The lessons Jockum draws are also highly interesting in light of the various legislative proposals now under discussion at EU level and the enormous lobbying power that that has unleashed. Finally, Paul Breitbarth offers an analysis of the legitimacy of international data transfers. Inter alia, he explains why the guidelines of the European Data Protection Board on this point may be expecting too much from organisations.

As always, what makes EDPL stand out from other journals is the reports section led by Mark Cole, who is assisted by Christina Etteldorf. We have four reports on EU level developments. Paarth Naithani assess the EU's legislative approach to fingerprinting and Corina Kruesz deals with the notion of data altruism in EU legislative frameworks. Christina Etteldorf provides an analysis of the EDPB guidelines on Article 23 GDRP and Sandra Schmitz-Berndt reflects on a proposed framework: NIS 2.0. There are also two country reports. Matt Getz and Kimmie Fearnside report on the U.K. Supreme Court's decision on representative actions for personal data breach claims and Giorgia Bincoletto assesses the legal situation of e-Proctoring During Students' Exams in Italy.

There are two case notes in the section led by Maria Tzanou. Róisín Á Costello discusses the case of B v Latvijas Republikas Saeima by the ECJ on the processing of da-

ta about traffic offenders and Sam Wrigley discusses the case of Volodina v Russia by the ECtHR, concerning the positive obligation of states to protect citizens against cyberviolence and the obligation to put in place effective remedies for citizens. Finally, two books are discussed in the book review section led by Gloria Gonzalez Fuster, I have written a review of Dara Hallinan's book on Biobanking and me and Katherine Nolan have reflected on the new book by Susanna Lindroos-Hovinheimo entitled Private Selves.

Let me finally thank all authors, reviewers and board members for there support of EDPL in 2021. For many, 2021 is a year to quickly forget, a year of stress, a year of fear. Still, the journal flourished. Maybe because people were homebound, they started to read more and apparently, what people want to read at their kitchen table is EDPL: subscriptions rose substantially. Also, authors had time to finish articles and reports that they were planning to write. The quality of this year's contributions is perhaps higher than ever. The reviewers, who kindly offer critically engage with the submissions to our journal, getting nothing in return but my eternal gratitude, continued to offer their time, energy and intellectual wit. Our board members, who have consistently supported the journal, by suggesting new areas to cover, authors to contact events to attend; their network and knowledge is the foundation of this journal. Thanks of course to our associate editors: Mark Cole leading the report section and Gloria Gonzalez Fuster in charge the book review section. We are sad that our associate editors for the case note section, Maja Brkan and Tijmen Wisman, had to step down and at the same time are proud to have Maria Tzanou as the newest member of our team! Many readers will already know Maria as a keynote speaker at events, (guest) lecturer and as a prolific writer. Last year alone, Maria published two edited volumes (Health Data Privacy under the GDPR and Personal Data Protection and Legal Developments in the European Union) that are both highly recommended. Last but not least, I want to thank our publisher Lexxion for the continued support for our journal and Jakob McKernan, the Executive Editor of our journal, without whom this journal could not exist.

For those interested in submitting an article, report, case note or book review, please e-mail our Executive Editor Jakob McKernan (mckernan@lexxion.eu) and keep in mind the following deadlines:

- Issue 1/2022: 15 January 2022;
- Issue 2/2022: 15 April 2022;
- Issue 3/2021: 15 July 2022;
- Issue 4/2021: 15 October 2022.

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