

## CASE FOR COURSE INTRODUCTION TO DATA PROTECTION LAW 2023

**Alex** is a citizen of Newtonia, a member state of the EU and member of the European Convention of Human Rights and Fundamental Freedoms. Alex has been diagnosed with severe anxiety and depression, and lives alone. In the past, he has had problems keeping a job for longer than a few months. He is currently employed by the city of Leibnitz as part of a program to digitalise public administration. He earns €1700 a month and has held the position for 7 months.

**AR-PLIK** is a leading IT company from Kalifardia, whose company mission is to 'take everything one step further.' Kalifardia has very liberal laws when it comes to using personal data. Therefore, the European Union had, for a long time, considered it as a non-adequate country in terms of data protection due to three aspects of Kalifardian law:

1. The absence of a general data protection law,
2. The strong position of the security services, which have collected records on millions of citizens of foreign countries; and
3. The lack of legal redress for individuals.

Nonetheless, Kalifardia is a powerful country and has been able to negotiate an agreement with the European Union called the 'Privacy Bridge.' The Privacy Bridge is an adequacy decision, which is a 1:1 copy of the EU-US Data Privacy Framework. It works as a self-certification mechanism, and AR-PLIK has self-certified under the framework.

One of AR-PLIK's products is **Athena**, a next-generation AI bot that uses the latest generative AI models to offer a conversation interface. Athena is highly customizable and could act as a mentor, a sibling, or a friend. Athena can also act as a romantic partner if the user wishes ('Special Friend Mode'). In that case, Athena shares occasional intimate messages and pictures based on users' choices. Regardless of the role which it takes, Athena reacts to the user's mood and is programmed to generally spread a positive mood, although there have been some conversations where Athena seemed unaware of a user's suicidal thoughts and made insensitive remarks. Athena stores all conversations.

Athena is free in its basic version. With this basic version, users cannot use the Special Friend Mode and chat time is restricted to 30 minutes a day. AR-PLIK also offers two advanced versions. The 'Silver' plan costs €10 per month and gives users an hour of free conversation, plus the ability to buy extra conversation time at a rate of €1 for every fifteen minutes. Meanwhile, the 'Gold' plan gives unlimited conversation time and costs a flat rate of €300 per month. Both Silver and Gold provide access to the Special Friend Mode. Users can like or dislike answers from Athena and the algorithm is constantly improving based on this input, with emphasis given to input provided by paid users.

In the last months, Alex has spent €249, €280, €310, €299, €360, €320, and €350 respectively per month. He has chosen the Silver plan. This is a big part of his disposable income. He has regularly asked Athena to take different roles in his life, including by asking it to act as a mentor, as a girlfriend in Special Friend Mode, and as a source of advice for dealing with his anxiety and depression.

Vicky is working for the NGO 'You Are Seen' (URS). URS's mission is to raise awareness about the human rights impacts of vulnerable persons, particularly of those persons data protection-related rights.

On 14<sup>th</sup> August 2023, Alex and Vicky met in a workshop organized by the city of Leibnitz, where Vicky convinced Alex to mandate URS to exercise his rights under Article 80 GDPR. Accordingly, she contacts the Data Protection Authority of Newtonia. She has the following demands:

1. The DPA should issue a stop of processing of all data processing regarding Athena and should issue a fine of at least 2 Mio EUR, as this corresponds to 4% of the annual global turnover of AR-PLIK. The DPA should further find that AR-PLIK is targeting vulnerable

persons, offering a free version as a 'gateway drug' and then charging an enormous amount of money, as seen by Alex's monthly payments. This is unfair under Article 5(1)(a) GDPR. European Data Protection Authorities have issued various declarations, papers, and statements regarding the protection of the vulnerable.

2. There was no legal basis for the processing. The service is unethical.
3. The DPA should order AR-PLIK to delete all records older than 3 months.
4. The DPA should stop all data transfers from Newtonia to Kalifardia and evaluate the Privacy Bridge for its compliance with European Data Protection Law. Further, the DPA should find that the Privacy Bridge is a copy of the EU-US Data Privacy Framework—itsself, in effect, a copy of the so-called Privacy Shield, which was declared invalid by the Court of Justice of the European Union. At the very least, the most sensitive types of data, such as data regarding sexual orientation, health, or political and religious views, should not be transferred to Kalifardia, where they would be accessible by the Kalifardian secret service.

The DPA of Newtonia gives AR-PLIK the chance to respond to these points. AR-PLIK states in its response:

1. The term 'vulnerable' is not defined in law, and statements by other EU DPAs can hardly be used to draw any conclusions about the law. Fairness is also not defined in the law and therefore cannot be used to draw conclusions on lawfulness. Therefore, no fine may be issued.
2. AR-PLIK also strongly disagrees with the characterization of its service as 'unethical.' It is indisputable that Alex is over 18 years old and has accepted the Terms and Conditions of Athena, which inform about the different plans available and also offer help. The service is therefore based on public interests.
3. AR-PLIK believes that it is entitled to keep the records in personalized form as long as the user does not object to it. Even with the objection, AR-PLIK will keep the data for 13 months after it was collected first. The additional 13 months are needed, as some users that deleted their accounts might come back. AR-PLIK's experience shows that users love the personalized birthday greetings and anniversaries with their Athena friend, which is not possible without keeping all personal data. AR-PLIK is further entitled to keep the data in anonymized form to improve the algorithm for the good of humanity.
4. AR-PLIK is following the existing law and was one of the first companies to self-certify under the Privacy Bridge. This means that all data transfers, including sensitive personal data, are justified. The EU itself stated in public declarations that all the relevant concerns of the Court of Justice of the European Union have been addressed in a statement regarding the Data Privacy Framework, which is a copy of the Privacy Bridge. No one is also forced to use Athena, therefore the contracts with the users can also serve as a legal basis under the GDPR.

## **Instructions**

Assume you are the DPA of Newtonia and need to decide the case. Please draft a decision 3000-4000 words long, where you address the points raised. Give reasons for your decisions and address the raised points.