

**BEYOND DATA PROTECTION CONFERENCE:**  
**REGULATING INFORMATION AND PROTECTION**  
**AGAINST RISKS OF THE DIGITAL SOCIETY**

***“GDPR in a Metaversal post-digital World: the Law of Everything  
or the Law of Nothing?”***

**ABSTRACT**

Persistent technology advancements, including the advent of the metaverse, are rapidly ushering us into a postdigital era where everything is digital and the distinction between analogue and digital becomes less significant.<sup>1</sup> While a definitive definition of the metaverse is lacking, researchers emphasize its immersive nature.<sup>2</sup> Immersion will be facilitated through novel interfaces, transitioning from current computers, phones and tablets to wearable interfaces, such as glasses or more sophisticated connected clothing.<sup>3</sup> These interfaces will utilise various sensors to process real-world input - encompassing body movements, voice, pupil movements, gaze, and gait - which will be displayed in or influence the digital world, known as the metaverse. Consequently, the metaverse has been coined an ‘always-on recording system’.<sup>4</sup> In addition, actions undertaken by individuals within the metaverse - potentially through avatars - will also be subject to processing. Against that background, the metaverse will lead to the processing of a substantial amount of personal data as well as special data - ie mostly biometric (gaze, voice, face) and health data (heart rate, blood pressure, skin conductance). These developments have raised concerns that our emotions and affect may be commodified.<sup>5</sup>

The aim of this contribution is to assess whether the General Data Protection Regulation (GDPR) adequately governs the processing of personal data in the context of the metaverse.

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<sup>1</sup> Elizabeth M Renieris, *Beyond Data: Reclaiming Human Rights at the Damn of the Metaverse* (The MIT Press 2023) 99.

<sup>2</sup> Adrien Basdevant, Camille François and Rémi Ronfard, ‘Mission exploratoire sur les métavers’ (October 2022) <<https://www.economie.gouv.fr/files/files/2022/Rapport-interministeriel-metavers.pdf>> accessed 7 June 2023 ; Ben Egliston and Marcus Carter, ‘Critical Questions for Facebook’s Virtual Reality: Data, Power and the Metaverse’ (2021) 10(4) *Internet Policy Review*.

<sup>3</sup> Basdevant, François and Ronfard (n 2).

<sup>4</sup> Ryan Calo and others, ‘Augmented Reality: A Technology and Policy Primer’ (University of Washington School of Law, 2016) <<https://digitalcommons.law.uw.edu/techlab/1/>> accessed 7 June 2023.

<sup>5</sup> Tambiama Madiega and others, ‘Metaverse: Opportunities, Risks and Policy Implications’ (European Parliament, June 2022) <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733557/EPRS\\_BRI\(2022\)733557\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733557/EPRS_BRI(2022)733557_EN.pdf)> accessed 7 June 2023.

We first examine whether the GDPR may become the ‘law of everything’.<sup>6</sup> Given the digital nature of the metaverse, everything will become data, resulting in increased data processing. The application of the GDPR is thus expected to be triggered even more often than today. As PURTOVA puts it, it may lead to a system overload for controllers and processors.<sup>7</sup> Moreover, it intensifies the burden placed on data subjects via the notice and consent mechanism, which lies at the heart of the GDPR. This individualistic and decentralized approach to personal data governance becomes an even bigger ‘fantasy’<sup>8</sup> or ‘illusion’<sup>9</sup> in the context of the metaverse.<sup>10</sup>

Secondly, we give a critical analysis of the opposing view that the GDPR may become the ‘law of nothing’. To the extent that the GDPR only applies if an individual is identified or identifiable, it might be under-inclusive.<sup>11</sup> HÄUSELMANN has already demonstrated that emotions and affect might not necessarily be considered personal data and thus lack protection under the GDPR.<sup>12</sup> Consequently, our emotions could be processed without violating the GDPR, potentially fostering a misleading sense of privacy. Due to its focus on personal data, the GDPR may fail to achieve its objective of protecting people.

We conclude our contribution with a discussion of some potential solutions to address the identified flaws of the GDPR. We first argue that the metaverse will render even more compelling the need to rethink consent as the cornerstone of modern data protection legislation. In addition, we critically assess the view that personal data may not have been the right locus of regulation. In this context, SOLOVE recommends a regulatory shift, from the regulation of personal data to the regulation of uses, harms, and risks.<sup>13</sup> In the same vein, PURTOVA argues that regulation should target ‘information-induced harms’.<sup>14</sup> Building upon the same critique, RENIERIS proposes a complete prohibition on certain objects of datafication, including the datafication of our thoughts, feelings and emotions. If datafication is permitted, it should not be regulated through data protection legislation, but on the basis of broad human rights. Indeed, ‘personal’ data are interpersonal in nature and impact the society at large. Furthermore, the right to data protection – with its focus on personal *data* - fails to achieve its ultimate objective, which is to effectively safeguard the fundamental rights of the *people*.<sup>15</sup>

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<sup>6</sup> Nadezhda Purtova, ‘The law of Everything: Broad Concept of Personal Data and Future of EU Data Protection Law’ (2018) 10(1) *Law, Innovation, and Technology*.

<sup>7</sup> *ibid.*

<sup>8</sup> Renieris (n 1) 64.

<sup>9</sup> Woodrow Hartzog, ‘Privacy’s Blueprint’ (Harvard University Press 2018) 62–67.

<sup>10</sup> Daniel J Solove, ‘Murky Consent: an Approach to the Fictions of Consent in Privacy Law’ (forthcoming) 104 *Boston University Law Review*.

<sup>11</sup> Raphaël Gellert, ‘Personal Data’s ever-expanding Scope in Smart Environments and Possible Path(s) for Regulating Emerging Digital technologies’ (2021) 11(2) *International Data Privacy Law* 205.

<sup>12</sup> Andreas Häuselmann, ‘Fit for Purpose? Affective Computing Meets EU Data Protection Law’ (2021) 11(3) *International Data Privacy Law* 248.

<sup>13</sup> Daniel J Solove, ‘Data Is What Data Does: Regulating Use, Harm, and Risk Instead of Sensitive Data’ (forthcoming) 118 *Northwestern University Law Review*.

<sup>14</sup> Purtova (n 6) 34.

<sup>15</sup> Renieris (n 1) 134-144 and 149-172.