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Enhancing the Commission's AI Act Proposal:

Ensuring the Procedural Dimension of the Rule of Law with Ex Post Safeguards in the Public Sector

Abstract:

The Commission's AI Act Proposal aims at deploying safer AI systems in the Internal Market. Although many welcome aspects in the Proposal contribute to it, the Proposal as it is currently drafted does not go far enough to protect fundamental rights. A procedural framework to ensure fundamental rights' protection is required, particularly rights essential in the light of the rule of law that are the right to good administration and the right to an effective remedy. Overall, policymakers need to pay more attention to protecting the procedural dimension of the rule of law.

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The EU stands on the brink of the Fourth Industrial Revolution, where emerging technological breakthroughs in the field of artificial intelligence (AI) will generate new opportunities that can enhance the way public administrations operate. The recent wave of digitisation and datafication in the public sector has created momentum for the use of algorithms that take advantage of vast public datasets to improve governance. At the same time, the impact algorithms could have on fundamental rights is a concern for lawmakers at the highest levels of the EU.

The European Council has highlighted the importance of ensuring that European citizens' rights are fully respected,[1] emphasising the need to ensure that AI systems are compatible with fundamental rights and that the proper enforcement of legal rules is facilitated.[2] Further, the European Parliament has requested that measures be taken to prevent practices that would undoubtedly undermine fundamental rights.[3] Responding to these requests, in April 2021 the Commission published a proposal for a regulation laying down harmonised rules on artificial intelligence (hereafter referred to as the Proposal).[4]

While the proposed improvements for a safer application of AI systems in the EU are welcome, the Commission should aim higher when it comes to establishing safeguards to ensure that natural and legal persons' fundamental rights are effectively protected through a procedural framework. To illustrate the importance of such a framework, it is worth considering how automated decision-making systems are being increasingly deployed in the public sector in individual administrative cases.[5]

1 European Council (2019), 'Artificial intelligence: b) Conclusions on the coordinated plan on artificial intelligence – adoption', 6177/19, 11 February, https://data.consilium.europa.eu/doc/document/ST-6177-2019-INIT/en/pdf.

2 European Council (2020), 'Presidency conclusions: the Charter of Fundamental Rights in the context of artificial intelligence and digital change', 11481/20, 21 October, https://www.consilium.europa.eu/media/46496/st11481-en20.pdf.

3 European Parliament (2020), 'European Parliament resolution of 20 October 2020 with recommendations to the Commission on a framework of ethical aspects of artificial intelligence, robotics and related technologies', 2020/2012 (INL), 20 October, https://www.europarl.europa.eu/doceo/document/TA-9-2020-0275_EN.html#title1. See also Renew Europe (2020), 'Renew Europe position paper on artificial intelligence', 10 February, https://reneweuropegroup.app.box.com/s/r952h94i2dwgs8sjgks6z10m-fx82ykog.

4 European Commission (2021), 'Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (artificial intelligence act)', 21 April, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0206.

5 G. Misuraca and C. Van Noordt (2020), 'AI Watch – artificial intelligence in public services', http://dx.doi.org/10.2760/039619.

The promises and pitfalls of automated decision-making systems (ADS)

The challenges algorithms pose to public administrations are as significant as the benefits they could bring. More particularly, the deployment of ADS using machine-learning technology is a promising method to enhance administrative decision-making with regard to both businesses and citizens. Machine learning stands out for its accuracy and adaptivity. Predictions generated through machine-learning techniques offer public officials new efficiencies that tap the power of their administrative data.[6] By analysing vast amounts of data – far beyond the capacity of a single public servant – machine-learning algorithms could help public actors make more accurate decisions and prioritise needed policies or enforcement.

Yet, while administrative decisions can be automated (or improved in the case of recommender systems) by algorithms, governments are constrained by constitutional and administrative principles. The deployment of AI systems within public administrations may in fact clash with some of the very principles on which liberal democracies are based. While this paper cannot address the objections to ADS exhaustively, it is critical to highlight some major concerns.

Firstly, the black-box nature of ADS renders some algorithms inscrutable and non-intuitive, making it difficult to detect flaws or even explain their output.[7] In general, algorithms are opaque to most people because understanding them requires a high level of technical literacy.

Secondly, the uneven way that democratic legal safeguards are embedded in ADS is another challenge for public administrations. Although the use of ADS promises efficiency in administrative decision-making, public servants' involvement in the decision-making process typically decreases with rising levels of automation. The diminishing decision-making role of humans raises questions about whether democratic controls over the procedural application of the law are coming under threat or even disappearing completely when ADS are used. In this sense, code-as-law 'might create a situation where important decisions are taken at the software level'.[8]

Finally, in cases when ADS could supplement traditional law as a regulatory instrument, norms embedded in the technology must allow the same level of democratic scrutiny as there would be if these norms were written as laws. After all, '[i]f code is a lawmaker, then it should embrace the values of a particular kind

6 D. F. Engstrom and others (2020), 'Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies', Report submitted to the Administrative Conference of the United States, February, https://dx.doi.org/10.2139/ssrn.3551505.

7 D. F. Engstrom and others (2020), 'Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies', Report submitted to the Administrative Conference of the United States, February, https://dx.doi.org/10.2139/ssrn.3551505.

8 L. Asscher (2006), '"Code" as Law: Using Fuller to Assess Code Rules', in E. Dommering and L. Asscher (eds.), Coding Regulation: Essays on the Normative Role of Information Technology (The Hague: Asser Press), p. 71.

of lawmaking'.[9] The same reasoning should apply in the context of administrative decision-making. In principle, to reach a valid legal decision, public administrations must follow constitutional and administrative principles that restrain them from acting as they please. Administrative procedures were made to avoid the arbitrary use of power. Therefore, the use of ADS should not bypass the constraints on these procedures in a way that affects fundamental rights.

Good administration and the right to an effective remedy for administrative justice

In comparison to the private sector, the public sector in a liberal democracy has strong legal requirements to justify its decision-making; subjects of ADS must therefore know or understand the reasoning behind an automated decision. If they do not, it raises a major problem since subjects cannot scrutinise whether a decision about them complies with the legal protections offered by law. Without detailed and reasoned accounting of administrative decisions, natural or legal persons cannot adequately contest automated decisions before the courts. In such cases, judicial review becomes impossible, and decision-makers fail in their duty to ensure accountability. The difficulty in understanding ADS in the context of administrative decision-making stems from this confounding situation. In the end, deploying ADS could jeopardise the ability of public agents to fulfil their administrative duties and lead to lesser accountability, undermining citizens' right to an effective remedy.

At stake in the deployment of ADS within the public sector is the public sector's compliance with the rule of law, which guarantees to natural and legal persons, among other rights, a clear understanding of the reasons behind an administrative decision and the right to an effective remedy if a decision infringes on their individual guarantees. These individual guarantees stem from both the principle of good administration and the right to an effective remedy as enshrined in the European Charter of Fundamental Rights (hereafter referred to as the Charter).[10]

Lastly, a related question arising from the use of ADS in public administration concerns how these essential guarantees stemming from the procedural dimension of the rule of law can be protected, as well as what procedural framework the Commission could set up to ensure the protection of fundamental rights.

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9 L. Lessig (1999), Code: And Other Laws of Cyberspace (New York: Basic Books), p. 224.

10 C-222/84, Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary (1986) ECLI:EU:C:1986:206; Case C-97/91, Borelli (1992) ECLI:EU:C:1992:491; see also Article 47 of the Charter. The right to good administration is protected both as a general principle of EU law and in Article 41 of the Charter. As a general principle in EU law, the right to good administration applies to both EU institutions and Member States' administrations when they enforce EU law. On the contrary, the principle to good administration in the context of Article 41 of the Charter has a limited personal scope and applies only to EU institutions, bodies, offices, and agencies.

Going further: establishing a procedural framework to ensure fundamental rights

It should be first noted that the Proposal takes into account many welcome aspects of the deployment of safer AI systems, such as the prohibition of certain AI practices, specific obligations regarding 'high-risk AI systems', and transparency obligations. Moreover, the protection of fundamental rights is central to the Proposal. It is admitted that certain AI systems may significantly impact the rule of law and adversely affect several fundamental rights enshrined in the Charter, such as the right to an effective remedy and the right to good administration.[11] However, as it is currently drafted, the Proposal does not go far enough in its aims as far as protecting fundamental rights is concerned. Therefore, policymakers need to pay more attention to protecting the procedural dimension of the rule of law.

Before specifying how the Commission should better ensure the protection of fundamental rights, it is useful to first briefly outline the classifications made in the Proposal. The AI Act distinguishes between prohibited AI practices (Title II), high-risk AI systems (Title III), AI systems that have transparency obligations (Title IV), and all other AI systems not falling within the scope of the other three categories. Taking into account this classification of AI systems and the specific requirements attached to each category, policymakers should pay heed to two important ways to effectively respect natural and legal persons' fundamental rights when AI systems are deployed in the public sector: (1) expanding the definition of high-risk AI systems, and (2) creating ex post procedural safeguards.

Broaden the definition of 'high-risk AI systems' in the public sector

The mandatory ex ante requirement for high-risk AI systems in the Proposal aims at ensuring that these systems do not pose unacceptable risks to fundamental rights.[12] Although still inadequate to guarantee rights protections, these updated requirements could at least limit the risks of bias and help build more transparent systems, ultimately decreasing some of the threats to fundamental rights. More importantly, new requirements pertaining to high-risk AI systems likely contribute to delivering on procedural guarantees. For example, if a high-risk AI system has

11 For impact on the rule of law, see Recital 40 of the Proposal. For the right to an effective remedy and the right to good administration, see Recital 28 of the Proposal.

12 See Title III of the Proposal.

to comply with record-keeping requirements and transparency obligations,[13] affected subjects would be able to build a better defence against unlawful AI systems.

> In the context of the use of ADS in the public sector, the Proposal has only partially addressed the issue.

ADS are only considered high-risk AI systems in the context of AI systems that 'evaluate the eligibility of natural persons for public assistance benefits and services'.[14] So while particular welfare-provision decisions made by AI systems have to comply with a set of mandatory *ex ante* requirements and a conformity assessment, such requirements do not apply to all other AI systems, which are not considered high-risk in the Proposal. Thus, the current classification potentially undermines the effect mandatory requirements could have from a procedural perspective.

Recommendations

The very narrow definition of which AI systems are considered high-risk in the public sector will likely undermine the smooth functioning of a procedural framework in the future. Firstly, other AI systems deployed in the public sector might also impact natural persons' fundamental rights and should therefore be considered high-risk. To address this issue, policymakers should broaden the definition of high-risk AI systems to go beyond just those concerning public assistance benefits and include, for instance, AI systems related to taxation, due to their impact on an individuals' lives. *Policymakers should extend the mandatory ex ante requirements set out under Title III to other non-welfare contexts where citizens engage with public authorities via AI systems*. The current power asymmetries between citizens and the AI-wielding public administration could lead to unchecked abuses of power,[15] a matter not to be taken lightly. Wrongful automated decisions have the potential to erode citizens' trust in their administration and to increase overall political distrust.

Secondly, the Proposal remains silent on the fundamental rights of businesses. These rights should also interest policymakers, especially the rights of small and medium-sized enterprises (SMEs). First off, businesses are granted fundamental rights by the Charter (much like natural persons) and therefore mandatory *ex*

13 For record-keeping requirements, see Article 12 of the Proposal. For transparency obligations, see Article 13 of the Proposal.

14 Article 6 (2) and Annex III 5 (a) of the Proposal.

15 N.A. Smuha and others (2021), 'How the EU Can Achieve Legally Trustworthy AI: A Response to the European Commission's Proposal for an Artificial Intelligence Act',Social Science Research Network, 5 August, https://dx.doi.org/10.2139/ssrn.3899991.

ante requirements should also apply to avoid unacceptable risks to their rights. Further, other fundamental rights, such as the right to free movement of goods, should be taken into account.[16] Consider as an example ADS deployed in the administration of a Member State that grant market access to a product made by a small enterprise in another Member State. If the ADS wrongfully deny market access, power asymmetries between SMEs and public authorities become an issue; since it has been shown that SMEs do not have enough time and resources to challenge administrative decisions.[17] Not offering *ex ante* guarantees when the subjects of AI systems are SMEs is risky, as the latter does not have the opportunity to contest unlawful automated decisions. Taking this example further, if AI systems raise non-tariff barriers, it could harm not only SMEs' fundamental rights, but also the EU economy as a whole.[18]

Additionally, policymakers should pay attention to other risks inherent in the Proposal's classification of AI systems. The list-based approach of high-risk AI systems is likely to lead to situations where other AI systems affecting fundamental rights pass under the radar of the Proposal, as they are not required to comply with the mandatory *ex ante* requirements and conformity assessments.[19] Although the Commission is empowered to adopt delegated acts to update the list of high-risk AI systems, the[20] process is far too slow given that ADS would continue to affect fundamental rights while the list is updated. Instead, *a fast-track emergency procedure should be put in place to ensure procedural guarantees at the request of any natural or legal persons.*

Create ex post procedural safeguards

> The Proposal should include procedural guarantees allowing natural and legal persons to protect themselves.

Although mandatory *ex ante* requirements are established in the Proposal to serve as a protection of fundamental rights, these technical requirements are not sufficient to ensure that procedural rights are effectively protected.[21] *Ex post safeguards*, (i.e., those

16 The European Court of Justice has recognised free movement of goods as a fundamental right. See Case C-320/03 Commission v Austria (2005) ECLI:EU:C:2005:684, para. 63.

17 In the context of the free movement of goods for non-harmonised goods, see European Commission (2017), 'Refit evaluation accompanying the document "Proposal for a regulation of the European Parliament and of the Council on the mutual recognition on goods lawfully marketed in another Member State"', SWD(2017) 475 final, 19 December, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52017SC0475, 52.

18 Non-tariffs barriers cost the EU economy billions. See RAND Europe (2014), 'The cost of non-Europe in the single market: I – free movement of goods', European Parliamentary Research Service, PE 536/353, September, https://www.europarl.europa.eu/EPRS/EPRS_STUDY_536353_CoNE_Single_Market_I.pdf.

19 Smuha and others, 'How the EU Can Achieve Legally Trustworthy AI', 13.

20 Article 7 of the Proposal.

21 For an analysis, see Smuha and others, 'How the EU Can Achieve Legally Trustworthy AI', 11–12.

acting after decisions are made based on an AI system) *should be put in place to comply with the procedural dimension of the rule of law*. In addition to the technical requirements imposed on providers and users of AI systems, the Proposal should go further than it does at present to *include procedural guarantees allowing natural and legal persons to protect themselves against unlawful decisions by AI systems*.

A brief overview outlining two components of the procedural dimension of the rule of law is needed to understand their importance better. On the one hand, the right to good administration includes, but is not limited to:

- offering all information that might be useful and necessary for the defence of the adversely concerned person[22]
- a guarantee of the ability of persons to put forward their points of view on the reality and the relevance of the alleged facts and the documents used,[23] as well as a right to access any relevant case file (fair hearing)[24]
- the obligation to state the reasons for a decision that are specific and concrete enough to allow the person concerned to understand why their application was rejected (duty to give reasons)[25]

On the other hand, anyone whose legally guaranteed rights and freedoms are violated has the right to an effective remedy, a right that is 'inherent in the existence of the rule of law'.[26]

Recommendations

Given the utmost importance of these procedural rights, policymakers should build procedural safeguards to address the duties to provide good administration and to give proper enforcement mechanisms for natural and legal persons seeking to challenge an administrative decision based on AI systems. Today, there is no specific provision related to either component (excluding the particular case of data protection). Additional provisions are required to ensure that duties related to good administration are respected, and that EU citizens and SMEs subject to high-risk AI systems have all the relevant information to properly assess whether the system is compliant with the Proposal's requirements. More particularly, *policymakers should focus on provisions that (1) give flesh to the duty to give reasons and fair hearing, and (2) set up legal instruments empowering natural and legal persons to challenge AI systems affecting their rights under EU law.*

22 See, for example, T-36/91 Imperial Chemical Industries plc v Commission of the European Communities (1995), paras. 111 and 117; C-41/69 ACF Chemiefarma NV v Commission of the European Communities (1970) ECLI:EU:C:1970:71, para. 27.

23 See, for example, C-328/05 P SGL Carbon v Commission (2007) ECLI:EU:C:2007:277, para. 71.

24 Article 41(2) (a) and (b) of the Charter. The right to access relevant case files is limited for the legitimate interests of confidentiality, and of professional and business secrecy. See Article 41(2)(b) of the Charter.

25 C-166/13 Sophie Mukarubega v Préfet de police and Préfet de la Seine-Saint-Denis (2014) ECLI:EU:C:2014:2336, para. 48; Article 41(2)(c) of the Charter.

26 C-362/14 Maximillian Schrems v Data Protection Commissioner (2015) ECLI:EU:C:2015:650, para. 95.

could be achieved through specific information requirements with regard to natural and legal persons and effective redress provisions.

In this regard, the literature also suggests additional recommendations, such as:

- 'An explicit right of redress for individuals who are subjected to non-compliant AI systems, similar to the rights of data subjects under data protection law'.[27]
- 'A provision which mandates a complaints mechanism before the national supervisory authority for individuals who suspect that an AI system they are subjected to does not meet the requirements'.[28]
- A rule-of-law impact assessment prior to the deployment of certain AI systems.[29] This *ex ante* requirement could ensure that ex post procedural safeguards have been correctly put in place.

Concluding remarks

Efficiency within public administrations is desirable, so turning away out of fear from the analytical capabilities that algorithms offer would deprive the EU of important opportunities. At the same time, the challenges AI systems pose in terms of the procedural dimension of the rule of law must be further studied and tackled at the legislative level. Otherwise, there is a risk that a wave of pleas against administrative decisions will overwhelm courts, undercutting the belief that AI in the public sector can render public services more efficiently. Allowing the spread of AI systems that do not comply with constitutional and administrative principles could later lead to the administration having to bear the cost of abandoning (high-risk) AI systems after purchasing them. ■

Author bio

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27 Smuha and others, 'How the EU Can Achieve Legally Trustworthy AI', 59.
28 Ibid., 58.
29 N.A. Smuha (2021), 'Beyond the Individual: Governing AI's Societal Harm', Internet Policy Review, 10(17), https://doi.org/10.14763/2021.3.1574.

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