

AMNESTY INTERNATIONAL SUBMISSION TO THE EUROPEAN COMMISSION'S CONSULTATION ON ARTIFICIAL INTELLIGENCE

June 2020

Amnesty International welcomes the opportunity to provide feedback on the European Commission's White Paper 'On Artificial Intelligence - A European approach to excellence and trust'.¹ We have highlighted five key recommendations for the Commission towards establishing an effective regulatory framework to ensure that the development and deployment of artificial intelligence is carried out in with human rights.

1. Mandate comprehensive public reporting on all state use of AI technology in public services.

There is an absence of any clear picture of the use of AI applications in the public sector in Europe, as experimental pilots are rolled out in trials in a haphazard approach, with no consistent assessment or reporting. The result is an obfuscation of the real landscape of algorithmic deployment in any one state's public sector, let alone across the EU. Amnesty recommends that any algorithmic or automation deployment in the public sector is reported publicly, in a consistent format, to build public trust and allow for meaningful scrutiny by civil society – including where this is implemented or outsourced to private sector actors under partnerships or contracts. We welcome and endorse the proposal by Access Now and Algorithm Watch for legislation to be enacted at the EU level to mandate that member states establish public registers of AI /automated decision-making systems.² Currently, public knowledge of any AI use by states is largely uncovered through investigations by journalists and NGOs, which are resource-heavy, and are not always successful due to the opaque nature of the technology and its use, placing a burden on civil society that should be carried by states. Only with a representative overview of state use of AI in Europe will the Commission, member states and civil society be able to meaningfully address the questions and proposals put forward in the AI White Paper.

2. Ban member states from using any biometric technology, including facial recognition, for identification purposes.

Biometric technologies for identification (1:n model) pose significant threats to human rights.³ They seriously compromise the rights to Privacy, Non-Discrimination, and the Right

¹ https://ec.europa.eu/info/publications/white-paper-artificial-intelligence-european-approach-excellence-and-trust_en

² Access Now, *Submission to the Consultation on the White Paper on Artificial Intelligence*, June 2020, https://www.accessnow.org/cms/assets/uploads/2020/06/EU-white-paper-consultation_Access_Now_June2020.pdf

³ Biometric technologies for authentication or verification purposes (1:1) should be considered separately. Though their use still may undermine the fulfilment and enjoyment of human rights, this risk is significantly less than the identification model and use.

to peaceful Assembly and Association, as provided for in the EU Charter of Fundamental Rights, the European Convention on Human Rights, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The European Union's Fundamental Rights Agency has stated that facial recognition for identification purposes poses such a severe threat to the ability to peacefully protest, inhibiting peaceful demonstrations with a chilling effect, that it recommends use during protests must meet an even higher threshold than routine law enforcement use.⁴ Use of facial recognition technologies by state authorities to identify and track – and in some cases penalise – peaceful protesters in Hong Kong, India and the US in 2019 should give serious cause for concern for such adoption in the EU. Reports of a pan-European facial recognition identification database for law enforcement use are deeply disturbing. Amnesty recommends that these plans are halted with immediate effect.⁵ Amnesty International calls for a ban on the use, development, production, sale and export of facial recognition technology for identification purposes by both state agencies and private sector actors.⁶

3. Legally require both public and private sector actors to conduct human rights due diligence in the development and deployment of all AI systems.

Amnesty International strongly recommends against the Commission's proposal that the mandatory requirements of a new regulatory framework should only apply to pre-defined 'high-risk' AI applications. AI systems have the potential to pose a risk to human rights across a wide range of sectors and use cases, and the rapidly developing and iterative nature of the technology means that new risks are likely to emerge in a variety of unforeseen contexts, even in the deployment of a single application. As such, it is vital that the EU legally requires that *all* AI systems are subjected to an ongoing process of human rights due diligence, in line with international standards.⁷ The onus must be on the company or public sector body developing and deploying an AI system to identify the actual and potential impacts on human rights, for example through a Human Rights Impact Assessment (HRIA), and to demonstrate that it has taken appropriate action to address these risks, on an ongoing, transparent and dynamic basis. It is well established, for example in OECD Guidance, that the extent of due diligence is commensurate with risk, and can also take into account a company's size or other circumstances.⁸ This means that

However, all implementation of biometric technologies must be open to consultation and scrutiny from civil society, especially where national security and law enforcement exemptions may apply under the GDPR and related data protection laws.

⁴ European Union Agency for Fundamental Rights, *Facial recognition technology: fundamental rights considerations in the context of law enforcement*, 2019, p 30 https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-facial-recognition-technology-focus-paper.pdf

⁵ <https://theintercept.com/2020/02/21/eu-facial-recognition-database/>

⁶ *Amnesty International Calls for Ban on the Use of Facial Recognition Technology for Mass Surveillance*, 11 June 2020, <https://www.amnesty.org/en/latest/research/2020/06/amnesty-international-calls-for-ban-on-the-use-of-facial-recognition-technology-for-mass-surveillance/>

⁷ UN Guiding Principles on business and human rights

⁸ OECD Due Diligence Guidance for Responsible Business Conduct, 2018, p 16-17, <http://mneguidelines.oecd.org/due-diligence-guidance-for-responsible-business-conduct.htm>

in the many cases where an AI system genuinely poses a low risk to human rights, the process need not be onerous, particularly for SMEs. Public sector bodies should at a minimum conduct a HRIA for all AI applications, given both the inherent risk that such use cases will impact people's rights, and States' role as primary duty bearers for the realization of human rights. Ultimately, the likely consequence of the Commission's proposal as it stands will be to create loopholes in which high-risk AI applications remain unregulated. The proposal is also inconsistent with the emerging recognition within the EU and member states of the need for legally binding frameworks to ensure that all corporate actors conduct human rights due diligence throughout their operations.⁹

4. Ensure accountability and the right to an effective remedy for human rights harms linked to AI systems.

The Commission must ensure that any new regulatory framework on AI has clear measures for enforcement at the EU or national level, as well as enabling access to remedy for victims. The onus is on States to make systems visible, allow outputs or impact to be queried and appealed, and create accessible and practical routes for remedy and redress when human rights are negatively impacted. Companies must be held legally accountable for human rights harms linked to such systems, including negative impacts resulting from the optimization decisions of algorithmic systems. Amnesty recommends the Commission mandates the creation of independent AI oversight boards at national level to monitor any consideration and deployment of algorithmic and automated systems in the public sector – including through public-private partnerships. This would serve to create a consistent approach among member states; encourage public debate and expert consultation; and crucially create means to scrutinise, monitor and hold the use of AI systems to account. Such national oversight boards already exist in some guise in many member states, but a pan-European approach to their make-up, role and governance position could significantly strengthen accountability and trust in state use of AI. We recommend that oversight boards comprise domain experts from academia and civil society, with particular consideration for representation of marginalised and disadvantaged communities, as these populations are at heightened risk of privacy and non-discrimination rights infringements as a result of AI systems.¹⁰

5. Prioritise fundamental rights over incentivising tech innovation.

The White Paper prioritises both a drive for AI innovation and human rights protections. There is a fundamental disconnect and tension between these two aims, and Amnesty reminds the Commission that existing human rights law outlines states' obligations with

⁹ Business and Human Rights Resource Centre, *EU Commissioner for Justice commits to legislation on mandatory due diligence for companies*, 29 April 2020, www.business-humanrights.org/en/eu-commissioner-for-justice-commits-to-legislation-on-mandatory-due-diligence-for-companies

¹⁰ See *The Toronto Declaration* from Amnesty International and Access Now for full justification and explanation for the increased human rights risks faced by marginalised populations in the deployment of algorithmic systems: <https://www.torontodeclaration.org/declaration-text/english/>

regards to securing rights under their jurisdiction. We have observed that ‘innovation’ is often used as a driver for an ‘AI arms race’ where powerful new technologies are adopted without careful consideration of their societal impact, particularly on already marginalised populations. The White Paper does not adequately recognise that the promotion of AI uptake and innovation may in practice conflict with the need to ensure that these technologies are implemented in line with human rights, and that the latter must take priority over the former. Governments need to challenge the underlying assumption, which is often driven by the incentives of the surveillance-based business model underpinning the current data ecosystem, that ‘datafication’ and the ever-increasing extraction and accumulation of vast amounts of data is both desirable and in order to enable innovation in the field of artificial intelligence.¹¹

Any innovation efforts should include means for free, active, and meaningful participation of relevant stakeholders, including experts and researchers in human rights, poverty, social welfare, labour rights, discrimination (particularly racial and gender) and other relevant fields. It is especially important to ensure the meaningful participation of the most marginalized population groups and those likely to be impacted by AI systems.

¹¹ Amnesty International, *Surveillance Giants : How The Business Model Of Google And Facebook Threatens Human Rights*, November 2019, <https://www.amnesty.org/download/Documents/POL3014042019ENGLISH.PDF>