6 April 2020

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European Commission AI HLEG Expert Group
OSEPI's Recommendations

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The Open Society European Policy Institute (OSEPI) works to enrich and inform EU policy debates by offering evidence, analysis and recommendations drawn from the work of the Open Society Foundations in more than 100 countries, with the goal of placing human rights and open society values at the heart of what the EU does.

1. The EU must adopt a human-centric approach to all AI and ADM public policies

The use of automated decision-making technologies by the private and public sectors present new forms of challenging asymmetries of power between companies and public administrations on the one hand, and consumers and citizens on the other, with important implications for the enjoyment of fundamental rights and liberties. Such asymmetry may lead to a significant loss of trust in the absences of fairness, transparency and accountability, potentially undermining people's autonomy and generating arbitrary discrimination. The use of self-learning machines without meaningful human control and oversight, in particular, can lead to discrimination through data bias, incompleteness and bad governance that disproportionately affect the most vulnerable in society.

ADM technology can be detrimental to individuals and society in a myriad of ways

The use of automated decision-making technologies can lead to discrimination against – or the exclusion of – vulnerable groups. This is all too often due to biases embedded in the data that inform algorithmic decision-making in policing, but also in the access to services such as banking and health care. These biases can directly affect citizens' ability to enjoy their fundamental rights, including freedom of expression and information, freedom of assembly and of association, and privacy and data protection.

Beyond the issue of bias embedded in the data they are fed, algorithms can worsen discriminatory situations when they rely on datasets that leave out segments population segments that tend to use new technologies less, such as the elderly and people with certain types of disabilities.[1] Unless wisely managed, the digitalization of public services or services of general interest (e.g. energy, postal, financial services) can also lead to exclusion, amplifying existing gaps in access and creating new inequalities.[2]

First, data is already used in some European jurisdictions to inform surveillance and policing practices that often target people of colour and low-income communities as 'at risk of high crime'. Since the selection and choice of data used to feed the machine learning is based on assumptions, the algorithms used for these practices can tend to embed structural discrimination and racism, reinforce biases against groups that are already over-policed, and prioritize crimes such as terrorism and gang-related activities over others.[3] In the Netherlands, for instance, Crime Anticipation Systems (CAS) pilots are being implemented in different

[1] European Disability Forum (2018), Plug and Pray – A disability perspective on Artificial Intelligence, automated decision-making and emerging technologies.
[2] Report of the UN Independent Expert on the enjoyment of all human rights by older persons, 21 July 2017, A/HRC/36/48.
[3] Rosamunde Van Brackel, Paul De Hert (2011), Policing, Surveillance and Law in a Pre-Crime Society: Understanding the Consequences of Technology-Based Strategies; Liberty (February 2019), Policing by Machine: Predictive Policing and the Threat to Our Rights.

districts, using large datasets to predict crime.[4] Although there is no clear evidence that this is preventing crime, the CAS has been rolled out nationwide because it may benefit law enforcement.

Second, data is increasingly used to 'police' people who are undocumented, for instance when they access services such as health care, social services, and education or when they approach public authorities to demand protection or to report a crime. By approaching authorities and public administrations, undocumented people face the risk of their personal data being used against them for immigration enforcement actions. This seriously affects their social rights, fundamental rights to privacy and data protection, and can lead to racial profiling and discrimination in practice.

Third, automated decision-making based on AI poses serious risks of discrimination against vulnerable segments of the population also in areas such as employment (automated screening for recruitment) and financial services. If an algorithm determining the price of an insurance policy establishes a correlation between disability and higher costs for the health system, for instance, persons with disabilities may end up paying more or being denied insurance cover.

Against these potentially very detrimental outcomes for European societies, it is essential that EU and national governments lead the way by building a governance framework for these new technologies that put people's interests at the forefront.

This human-centric approach should be championed by the public sector in an exemplary manner. The public sector can play a very important role, both as customer and investor, in scaling the impact of technology for social good (i.e. digital social innovation). This is particularly true considering public procurement accounts for 14% of GDP across the EU, and the public sector is the dominant or the only player in sectors where DSI has the highest potential (e.g. healthcare, education, employment support). At the same time, DSI can help public services become more efficient and involve citizens as co-creators – rather than just users of services – through open, collaborative, bottom-up DSI initiatives in e-government. Slowness to engage with DSI in the public sector has left huge untapped potential.

2. Recommendations on ADM and new technologies in the Public Sector

Concerned with the numerous societal challenges brought about by the digitalisation of our societies and in particular by the increasing roll-out and use of ADM, a diverse group of experts and representatives of human and digital rights groups, sectoral organisations and think tanks produced A Human-Centric Digital Manifesto for Europe. This manifesto outlines possible for ways for Europe to shape the digital transformation in the public interest. The following list of recommendations is a synthesis of all policy advice related to public sector activity and to ADM/AI that the group of experts and representatives of different civil society groups put together.

Public Sector Digital Technology

1. Steer **EU-funded research and innovation** towards areas that result in the **greatest possible societal benefit**. Innovation funded with public money must not focus on economic growth alone, but must also aim to solve societal problems by prioritising projects that reflect the values to which Europe aspires. It must aim to create a digital space that strengthens public institutions and democratic governance, that promotes equality and justice, and that protects diversity and inclusion in Europe.

[4] See Sagar Harinarayan, 20 June 2017, "Predicting crime using big data," *Holland Times*; 4 June 2018, "How data-driven policing threatens human freedom," *The Economist*.

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2. **Prioritise the procurement of digital technology that protects citizens' personal data, privacy and security, and is accessible and affordable for all** - regardless of age, ability, gender, nationality and socioeconomic circumstances. To do so, review the eligibility and selection criteria embedded in procurement rules and processes implemented by EU institutions and agencies, launch an EU-wide review of public procurement rules applicable to national public contracts, and develop guidelines for Member states to prioritise the procurement of accessible and affordable digital technologies.

3. Procure technologies regularly through **smaller contracts, pre-commercial procurement and open-source procurement**, and diversify the number of suppliers, to deliver better services for citizens.

4. Provide guidance and support to Member States to ensure the **availability, affordability and accessibility of new technologies** that are critical to accessing basic services; support people in vulnerable situations to enhance their access to digitalized public services; and ensure that personal data obtained from people who access these services is not re-purposed for law or immigration enforcement purposes.

5. **Promote new forms of public sector technology usage that empowers citizens to become active participants** rather than just passive recipients. Particularly, engage with civil society and citizens to build a positive shared model of innovation and governance that safeguards democratic values and rights in the interaction between citizens and technology (i.e. civic action plan for a new model of innovation and governance, implemented by civil society and the Commission).

6. **Develop a strategy on the governance of public sector technology** that aims to develop open standards, guidelines and rules for the effective procurement of human-centric digital technology, and defines good practice in public-private digital technology partnerships.

7. **Establish a strong community of local authorities, public bodies, governments and civil society organisations** committed to the socially responsible development, procurement and use of digital technologies.

8. **Help e-government professionals in different member states exchange information, experience and best practices**, and support the development of inter-operable solutions for public administrations, businesses and citizens (e.g. through the *Joinup* project).

Automated Decision-Making

1. Ensure a **legislative binding framework for AI-powered automated decision-making (ADM) technologies that guarantees that they are fair, transparent and accountable for citizens, and that they do not negatively affect their fundamental rights**. In all stages of their life cycles, including during design, development and deployment, ADM systems should be subject to impact assessments in order to ensure compliance with fundamental rights, consumer rights and the rule of law.

2. Enact legislation on the EU level to **mandate Member States to establish public registers of ADM systems used by the public sector**. Such registers should come with the legal obligation for those responsible for the ADM system to document the purpose of the system, an explanation of the model (logic involved) and the information on who developed the system.

3. Work towards a **clear definition of when an ADM system has a relevant impact on an individual, a specific group or on society**. Such cases should trigger an extended transparency requirement for

private sector ADM systems equivalent to the one suggested above for the public sector. Authorities should be vested with the power to take up cases in which the use of ADM systems has a relevant impact on a specific group, or the society, e.g. if a certain group is structurally discriminated against.

4. Undertake an **in-depth mapping exercise and evaluation of all relevant EU legislation** - including competition, consumer, safety, security, product liability, privacy and data protection laws – that applies to the development and deployment of AI and ADM systems. Based on that, propose the **necessary legislative updates of all relevant EU laws**, working with relevant national and European regulatory authorities where appropriate. This exercise should include an evaluation of the existing mechanisms for the enforcement of fundamental rights, and propose improvements where necessary.

5. **Develop a comprehensive strategy to safeguard against the use of ADM systems in ways that perpetuate discrimination and exclusion**, particularly against groups who already face high levels of inequality. Such strategy should include:
    a) Closely reviewing the implications for communities of colour, and other at-risk groups, of the use of technology in predictive policing and immigration control;
    b) Facilitating dialogue, providing training and launching infringement proceedings, where necessary, to ensure that the GDPR and fundamental rights are upheld for everyone without discrimination;
    c) Empowering equality bodies, data protection authorities, and other relevant public bodies to ensure accountability for the implications of digital technologies such as ADM systems and data processing for human rights and discrimination.

6. **Ensure effective remedies against ADM systems with faulty design premises and implementation errors**. This would require strengthening people's right to inspect and contest ADM systems, documentation, protocols and decisions, at the same time ensuring that the burden of safeguarding the legality of state decisions does not shift from the state to the citizen.

7. **Citizens should be given the right to opt out of being processed by ADM systems**. This can apply e.g. when the given task or the circumstances allow for reasonable doubt that the ADM system will properly deal with it.