

Public Consultation on the European Commission's White Paper on Artificial Intelligence – a European Approach

Contribution by the European Union Agency for Fundamental Rights (FRA)

Introduction

On 19 February 2020, the European Commission published a [White Paper on Artificial Intelligence – A European approach to excellence and trust](#). On 20 February 2020, it opened a [public consultation on the White Paper](#) to give stakeholders the opportunity to express their views on the questions it raises and policy options proposed. Alongside its membership of the High Level Expert Group on AI, the European Union Agency for Fundamental Rights Agency (FRA) very much welcomes the opportunity to contribute to this consultation, drawing on the knowledge gained from its on-going research on artificial intelligence (AI), big data and fundamental rights.

The White Paper is an important initiative on an emerging issue with significant implications for the protection of fundamental rights in the EU. Grounding future legislative and policy action in fundamental rights from the outset will ensure that AI retains the trust of all those who use it or may be subject to decisions it supports. Trust is crucial if people are to share their data with – and ultimately use – AI applications, as the [deployment of contact-tracing apps to tackle COVID-19 illustrates](#). Data from FRA's Fundamental Rights Survey, which surveyed 35,000 people across the EU, indicates that four in ten (41%) respondents do not want to share personal data, including their home address, date of birth, citizenship and other types of data with private companies; around a quarter (23%) do not want to share any of these data with public administration.

Based on FRA's previous and ongoing work, the Agency wishes to highlight the following observations with respect to the approach outlined in the White Paper. The main results of FRA's research assessing the positive and negative implications for fundamental rights of using AI and big data, to be published in late 2020, will provide further support to policymakers.

A rights-based approach grounded in evidence

The strong focus on fundamental rights in the White Paper is an important signal that a fundamental rights framework and other legal commitments are the best starting point for any evaluation of the opportunities and challenges brought by new technologies. A rights-based approach to AI is essential to ensure that fundamental rights, enshrined in the Charter of Fundamental Rights of the European Union and the EU treaties, are fully respected. This is particularly important as new technologies are often adopted without detailed knowledge of their consequences, and in the absence of clear standards.

Many AI initiatives are guided by ethical frameworks, which typically are voluntary. A fundamental rights-centred approach to AI is underpinned by legal regulation, where the responsibility for protecting rights rests with the state. Chapter 7 of FRA's [2019 Fundamental Rights Report](#) underlines that a rights-based approach guarantees a high level of protection against possible misuse of new technologies. To this end, it is apparent that the AI community would benefit from a clear legal basis on which to develop AI, where reference to fundamental rights – and their application in practice – is fully embedded, and which – in turn – can draw from ethical frameworks.

A robust evidence base should underpin any policy and legislative actions. FRA's current research identifies concrete applications and case studies of the use of AI-related technologies in the EU. This – and evidence collected by other actors – helps increase understanding of where and how fundamental rights are affected. Only concrete examples allow for a thorough examination of whether the application of a technology is compatible with fundamental rights – and whether any restriction of certain fundamental rights respects the principles of necessity, proportionality and avoidance of discrimination.

[Virtually all fundamental rights can be affected by AI](#)

Data protection and non-discrimination are essential elements of the White Paper. The EU's strong legal standards for respect for private and family life (Article 7 of the EU Charter of Fundamental Rights), protection of personal data (Article 8) and non-discrimination (Article 21) provide a high level of protection. These standards apply equally to new technologies involving the use of AI, machine learning and algorithms, as FRA has consistently underlined (see box on relevant FRA publications).

Nonetheless, the (potentially) wide uptake of AI-related technologies in various sectors affects virtually all fundamental rights, from freedom of expression and information (Article 11) to good administration (Article 41). Any fundamental rights-based approach to AI should take into account the potential impact on the full range of rights, and not be limited to data protection, privacy and non-discrimination.

[High quality data are essential for high quality algorithms that ensure fundamental rights compliance](#)

The strong focus on data quality in the White Paper is an important acknowledgment of this crucial but sometimes overlooked issue. FRA's [focus paper on data quality and AI](#) underlined how low quality training data can negatively affect fundamental rights. AI systems based on incomplete or biased data can lead to inaccurate outcomes that infringe on people's fundamental rights, including non-discrimination, gender equality, data protection and the right to a fair trial and effective remedies.

Being transparent about which data are used in AI systems is necessary to prevent possible rights violations. Descriptions of the data used to build an AI system are an important starting point for transparency. These could include information about: where the data come from and who is responsible for its collection, maintenance and dissemination; what information is included in the data and whether it is appropriate for the purpose of the algorithm; who is covered by or underrepresented in the data; whether there is information missing within the dataset or some units are only partially covered; and the time frame and geographical coverage of the data used for building the application.

[Facial recognition technology presents particular fundamental rights challenges](#)

The White Paper acknowledges that remote biometric identification, including the deployment of facial recognition in public places, carries specific risks for fundamental rights. While the extent to which rights are affected depends on the context in which the technology is used, FRA's [paper on facial recognition technology](#) highlights several important fundamental rights considerations beyond data protection and privacy that would need to be considered in detail by any future legislation. Careful consideration is required of how facial images are obtained and used – and whether this is

done with consent and the opportunity to opt out – given the potential impact on people’s dignity. Any use of the technology needs to be thoroughly assessed for its potential consequences for non-discrimination and the rights of particular groups such as children, older persons and persons with disabilities. Evidence suggests that currently the technology is less accurate for people with certain protected characteristics. Moreover, use of the technology must not undermine freedom of expression and information (Article 11) or freedom of assembly and association (Article 12); the use of facial recognition may create a chilling effect, leading individuals to change their behaviour.

Conducting a thorough fundamental rights impact assessment before deploying any facial recognition technology can help to avoid potential fundamental rights violations.

Fundamental Rights Impact Assessments are key to assessing risk

As noted in the White Paper, the extent to which AI-related technologies can affect fundamental rights depends on the context of their use. An important tool for determining risks to fundamental rights is a fundamental rights impact assessment. The White Paper suggests prior conformity assessments for high-risk applications.

Fundamental rights impact assessments should be conducted prior to the deployment of an AI-system and – drawing on established good practice from other fields – repeated on a regular basis post deployment. They should be transparent and open to engagement by the public. For example, prior impact assessments can identify potential bias in the application of and output from algorithms. This includes potential discrimination on grounds such as gender, age, ethnic origin, religion and sexual or political orientation. Impact assessments can also assess potential discrimination linked to the use of ‘proxy information’ – such as addresses – with respect to protected grounds.

In addition to formal impact assessments, more research, awareness raising and increased digital literacy will each help to better understand AI and avoid negative impacts on fundamental rights.

Effective and independent oversight help to ensure fundamental rights compliance

Interferences with fundamental rights are not easy to predict as new technologies are developed and evolve. Close monitoring of the use of AI-related technologies by independent supervisory bodies is therefore essential. It is important to consider which institutions are best placed to provide the necessary oversight of AI-related technologies. The EU has a well-developed set of bodies with a clear mandate to protect and promote fundamental rights, including data protection authorities, equality bodies, national human rights institutions and ombuds institutions. The appropriate bodies should be equipped with sufficient resources, powers and – importantly – expertise to prevent and assess fundamental rights violations and effectively support those whose fundamental rights are affected by AI. Cooperation between these bodies at the national and European level can help to develop and share expertise and experience.

A joined up approach involving diverse stakeholders is needed

In the cross-cutting area of artificial intelligence, it is of particular importance to work together to promote and protect fundamental rights. Within the normative frame of fundamental rights, we have to bring together different stakeholders and different expertise to ensure that fundamental rights standards are upheld wherever AI is deployed. This requires that regional and international organisations, national and local governments, the private sector, national human rights bodies, academics and civil society all work together. Discussions around the role of AI in combatting the

COVID-19 outbreak, including the development of contact-tracing apps, suggest that there is still a way to go in implementing such a joined-up approach in practice.

FRA's work in the area of artificial intelligence, big data and fundamental rights

FRA's [project on Artificial Intelligence, Big Data and Fundamental Rights](#), on-going since 2018, aims to assess the positive and negative fundamental rights implications of new technologies, including AI and big data. It analyses concrete case studies by carrying out interviews with public administration and businesses in selected Member States, and explores the fundamental rights impact of AI in selected areas, such as health or insurance. The project also collects information on awareness of fundamental rights issues among public administration and businesses applying AI-related technologies. Finally, the project aims to explore the feasibility of studying concrete examples of fundamental rights challenges when using algorithms for decision-making through either online experiments or simulation studies. The main results of this project will be published in December 2020.

FRA has published a number of papers stemming from this project:

- The paper on [Facial recognition technology: fundamental rights considerations in the context of law enforcement](#) (2019) outlines and analyses fundamental rights challenges triggered when public authorities deploy live FRT for law enforcement purposes. It also briefly presents steps to take to help avoid rights violations.
- [Data quality and artificial intelligence – mitigating bias and error to protect fundamental rights](#) (2019): this paper highlights the importance of awareness and avoidance of poor data quality.
- FRA's focus paper [#BigData: Discrimination in data-supported decision making](#) (2018) demonstrates how such discrimination can occur and suggests possible solutions.

Several other FRA publications also address relevant issues:

- The [Guide on Preventing unlawful profiling today and in the future](#) (2018) illustrates what profiling is, the legal frameworks that regulate it, and why conducting profiling lawfully is both necessary to comply with fundamental rights and crucial for effective policing and border management.
- The [Handbook on European data protection law](#) (2018 edition) is designed to familiarise legal practitioners not specialised in data protection with this emerging area of the law.
- Data from FRA's [Fundamental Rights Survey](#), which surveyed a random sample of 35,000 people across the EU, will be research as of June 2020.