European Center for Not-for-Profit Law

EUROPEAN CENTER FOR NOT-FOR-PROFIT LAW STICTHING

Category: Civil Society Organization
Main area of work: Protection of civic space, public participation
Website: www.ecnl.org
Country: The Netherlands

ECNL mission is to create environments which enable individuals, movements and organisations to exercise and protect their civic freedoms and to put into action transformational ideas that address national and global challenges. We envision a space in which everyone can exercise their rights freely, work in solidarity and shape their societies supported by enabling policies and legal frameworks.

ECNL has been working since 2005 on protecting civic space and for the last few years, also in the field of the impact of technology and Artificial Intelligence (AI) on civic rights and freedoms.

We urge the European Commission to clearly prioritise the public interest, the protection of individual rights, non-discrimination, and equal access to resources and participation, as the core concern of any future strategy/regulative framework on Artificial Intelligence. While the European Commission highlights the potential risks of AI, we share concerns raised by the civil society community that the White Paper's overall narrative/framing suggests a worrisome reversal of EU priorities, putting global competitiveness ahead of the protection of fundamental rights.

I.   Risk based approach limitations:

We believe that a human rights-based approach is essential to ensure that AI developed and deployed in the EU can be truly trustworthy and widely accepted. Where AI systems
pose a threat to any of our fundamental rights, the EU must ensure that states uphold their obligation to protect and promote those rights and that companies conduct due diligence according to their responsibility. Any risk-based approach to AI must centre on the potential harm for the individual as well as for society at large and must follow clear and transparent rules. In that regards, we can envision first a human rights impact assessment to determine any effect or potential harm upon fundamental rights and freedoms of an AI system. Then, there could be role for a limited application of a risk-based approach as a secondary mechanism with assigned levels of safeguards and actions, but more elaborated than just high vs low risk. We caution against any regulatory model that is based on a sole distinction between high- and low-risk applications. As we have seen with the GDPR, there are still loopholes left and we must avoid a situation in which those responsible for deploying an AI system can shirk their responsibilities by ignoring risks.

The process by which an AI system is determined to be high or low risk must be reliable, verifiable, trustworthy, contestable and should be reassessed throughout the system's life cycle. If other actors, in particular those affected by a given system, determine that a system does in fact carry risks despite having been determined to be low risk, mechanisms must be in place to facilitate a contestation of the initial risk assessment. Where any system is determined to pose any risk to the rights and freedoms of natural persons, it must be subject to a human rights impact assessment. Moreover, following the Council of Europe's recommendation, all assessment must be publicly viewable. In addition, we believe national liability rules should be adapted and harmonised to ensure proper compensation and allocation of liability for the operation of AI. However, when establishing standards for liability, we recommend taking account of the findings of the Council of Europe Study DGI(2019)05, (https://rm.coe.int/responsability-and-ai-en/168097d9c5).

The Study establishes that a distinction must be drawn between "human rights violations, on the one hand, and tangible harm to human health, property or the environment on the other (although a single event may result in both tangible harm and a violation of human rights)". Responsibility for human rights violations "is widely understood as 'strict'", that is, once it is established, "there is no need for proof of fault." On the contrary, liability for tangible harm to health or property "may be legally distributed in accordance with a variety of historic responsibility models." (i.e., intention/culpability, risk/negligence or mandatory insurance schemes)."

II. Automated Decision Making:

Special attention must be given to the use of AI systems in the public sector. Contrary to the idea that AI uptake must be prioritized in the public sector, it is here that the utmost precaution must be taken. In their report In our report Automating Society, the Algorithm Watch has shown how automated decision making (ADM) is shaping people's daily life in the EU. The EU should revise and realign the risk-based approach and work towards clear and coherent criteria as to when AI an ADM system has a relevant or potentially harmful impact on an individual, a specific group or society at large – especially their rights and freedoms. Such systems that affect individual and collective rights must not only be made public in clear and accessible terms, but everyone must be able to understand how decisions are reached and how to contest and correct them if deemed necessary. To put it bluntly - we do not want to end up in a situation where automated decision making is the standard option and we do not know how we ended up with such a decision. There must be a system of accountability of the public sector when using the AI as well as publicly available registry of automated decision- making systems in public use, per country and sector. Such registers should be used to make public the results of Algorithmic Impact Assessments (AIA) / Human Rights Impact Assessments (HRIA) undertaken by public authorities. They should come with the legal obligation for those responsible for the ADM system to disclose and document the purpose of the system, an explanation of the model (logic involved) and the information on who developed the system. This information has to be made available in an easily-readable and accessible manner, including structured digital data following on a standardised protocol. Moreover, we agree with the Council of Europe's Commissioner for Human Rights that an individual who has been subject to a

decision by a public authority that is solely or significantly informed by the output of an AI system should be notified without delay. Moreover, when subjected to a decision made with the assistance of an ADM system, individuals must be able to retrieve all relevant information about what happened and about what has led to the outcome of the decision. We therefore propose to strengthen people's right to inspect ADM systems, documentation and protocols. Complementary to this, individuals must have accessible, affordable and effective remedies at hand to guarantee an impartial review of their claims. For details, see Council of Europe (2019): Unboxing Artificial Intelligence. 10 steps to protect Human Rights.

III.   Impact on democracy, civic space and participation:

With regards to the risk-based approach, the White Paper does not include the possible effects of AI systems on democracy. Although digital technology has delivered a range of benefits to society and civic participation, it has also created the conditions for malign actors to interfere in elections, fuel polarization and spread hatred. Technological developments, including AI applications, without clear regulations have hereby proved to have a negative impact on democracy[i], simultaneously contributing to backsliding of democracy globally, including Europe.

This backsliding of European democracies goes hand in hand with another trend, closing civic space. Civicus's definition of civic space entails "*the place, physical, virtual, and legal, where people exercise their rights to freedom of association, expression, and peaceful assembly. By forming associations, by speaking out on issues of public concern, by gathering together in online and offline fora, and by participating in public decision-making, individuals use civic space to solve problems and improve lives. A robust and protected civic space forms the cornerstone of accountable, responsive democratic governance and stable societies*". In other words: democracy is intertwined with civic space and public participation in political decision making. Any negative impact on civic space, has a negative impact on our democracy and vice versa.

The social and political impact of AI systems is therefore important to take into consideration when developing and deploying AI. This also means that the engagement of civil society in EU AI efforts is indispensable, as they have the knowledge, expertise and experience to help assess possible impacts on society and particular groups or values (such as expression). We therefore urge the Commission to foster dialogue between civil society and the EU institutions, Member States and private sector by making public participation a mandatory requirement in all phases of AI development and deployment and to allocate financial resources for this purpose.

---

[i] Ben Hayes and Poonam Joshi, *Rethinking civic space in an age of intersectional crises: a briefing for funders*, pp. 13-14, May 2020.