

ARTIFICIAL INTELLIGENCE AND ADMINISTRATIVE LAW



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**COMPARATIVE STUDY ON ADMINISTRATIVE LAW
AND THE USE OF ARTIFICIAL INTELLIGENCE
AND OTHER ALGORITHMIC SYSTEMS IN
ADMINISTRATIVE DECISION-MAKING IN THE
MEMBER STATES OF THE COUNCIL OF EUROPE**

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Étude comparative portant sur le droit administratif et l'utilisation de l'IA et d'autres systèmes algorithmiques en matière de prise de décision administrative dans les Etats membres du Conseil de l'Europe

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ABBREVIATIONS

ADM:	Automated Decision Making
AI:	Artificial Intelligence
AMA:	Administrative Modernization Agency
APA:	Administrative Procedure Act
CAHAI:	Ad Hoc Committee on Artificial Intelligence
CAI:	Committee on Artificial Intelligence
CDCJ:	European Committee on Legal Co-operation
CDCJ-BU:	Bureau of the European Committee on Legal Co-operation
COM:	European Commission
ECHR	European Convention on Human Rights
ECLI:	European Case law Identifier
EU:	European Union
GDPR:	General Data Protection Regulation
IEEE:	Institute of Electrical and Electronics Engineers
SyRI	Systeem Risico Indicatie
XAI:	Explainable AI

EXECUTIVE SUMMARY

This comparative study reports on the regulation by administrative law of the use of artificial intelligence (AI) systems and other automated systems in several member States of the Council of Europe. The report serves as a preparatory study for a possible revision of the Council of Europe's handbook 'The Administration and You' in the context of automated decision making (ADM) in general and AI-supported decision-making in particular.

Country reports were received from 24 member States. The general (but somewhat incomplete) picture resulting from this study is that there is not much administrative law legislation specifically addressing the use of ADM systems in general and of AI systems in particular. To some extent, this is due to the dominant role of data protection law in regulating ADM. To another extent, administrative law assumes that any instance of administrative decision-making should comply with certain general principles of administrative law, irrespective whether ADM is used or not. Thus, specific legislative provisions on ADM are usually lacking. This holds even more for the use of AI in decision-making, which has not attracted much regulatory attention so far. At the same time, in the absence of specific legislative provisions on ADM or AI, administrative courts resort to general principles of administrative law to evaluate the use of ADM by public authorities.

The impact of AI systems on the principles of administrative law depends on the characteristics of the AI system in use (e.g. simple reasoning or complex learning) and of its role in the decision-making process (supportive or determinative). Nonetheless, each of the principles discussed in the handbook can and should be reconsidered when discussing the impact of AI and ADM applications on administrative decision-making. Much attention is usually paid to issues of non-discrimination, non-delegation and transparency, but there are also underlying questions whether strengthening the rights of individuals at the end of the decision-making process is sufficiently adequate to deal with the challenges posed by complex and impactful AI systems.

1. INTRODUCTION

1. As AI is rapidly evolving, so is its use in administrative decision-making. Public authorities are increasingly discovering the potential of AI systems for running decision-making processes more smoothly and for improving the accuracy of administrative decision-making.¹ At the same time, the increased interest in AI applications raises the question, amongst many other legal questions, whether existing rules and principles of administrative law are sufficiently robust, guiding and futureproof to regulate this new form of decision-making effectively, given concerns about the impact of AI systems on privacy, discrimination, proportionality and due process.

2. Against this background, the European Committee on Legal Co-operation (CDCJ) of the Council of Europe has commissioned research in the form of a comparative study on AI in relation to administrative law. The resulting report should act as a preparatory study for a potential revision of the handbook “The Administration and You”² in the light of the new challenges posed by AI. Because of this underlying objective, this study aims to map how administrative law systems in different member States of the Council of Europe deal with the challenges of ADM in general and those of AI in particular. The reason to pay separate attention to the regulation of ADM in general and to consider AI systems as a subset thereof, is that the current version of the handbook hardly pays attention to ADM as such and that a potential revision of the handbook in the context of AI decision-making cannot neglect the existence of ADM.³

3. This comparative report starts with some key definitions on AI, ADM and administrative law, followed by a brief review of key literature at the intersection of ADM, AI and administrative law (section 2). This review will not contain an in-depth discussion of literature on (legal issues of) AI but will expose some main topics regarding the interplay between administrative law and AI. These topics have formed the input for the questionnaire that has been sent to representatives of the member States. The results of the survey will be presented in the section 3, followed by a thematic discussion of these results in the section 4. The study will conclude with some exploratory remarks on a potential revision of the handbook ‘The Administration and You’ (section 5).

¹ For a general overview, see: Council of Europe, Ad Hoc Committee on Artificial Intelligence (CAHAI): Feasibility Study, CAHAI (2020) 23, Strasbourg, available at: <https://rm.coe.int/cahai-2020-23-final-eng-feasibility-study-/1680a0c6da>, accessed 7 December 2022.

² Council of Europe (2018), “*The Administration and You. A Handbook. Principles of administrative law concerning relations between individuals and public authorities*”, Council of Europe Publishing, Strasbourg.

³ See also CAHAI (2020) 23, *op. cit.*, p.49-50.

2. ADMINISTRATIVE LAW AND ARTIFICIAL INTELLIGENCE: A BRIEF CHARACTERISATION

4. This section contains a very brief review of some key literature at the intersection of ADM, AI and administrative law. The review will focus on the challenges for administrative law and the responses of administrative law to ADM in general and AI decision-making in particular that have been identified in this literature. In the discussion below, the legal topics addressed will be structured on the basis of the different principles of administrative law as discussed in the handbook 'The Administration and You'.

2.1. Setting the scene: defining AI and Administrative Law

5. There is no single definition of AI use in the literature.⁴ Definitions range from very narrow conceptions of AI, limiting it to advanced applications such as deep learning, to rather broad conceptions, equating AI with any use of computer systems. Following the work of the Ad Hoc Committee on Artificial Intelligence (CAHAI), we have adopted a broad definition of AI and now define it as the set of various computer applications based on different techniques, which exhibit capabilities commonly and currently associated with human intelligence. These techniques can consist of formal models (or symbolic systems)⁵ as well as data-driven models (learning-based or case-based systems) typically relying on statistical approaches.⁶ This definition makes clear that the 'intelligence' of computer systems can take different forms (reasoning, learning, etcetera) as well as different intensities, ranging from rather simple reasoning activities (e.g. decision trees) to more complex learning activities (e.g. deep learning).

6. The lack of a uniform definition of AI in the literature implies that the boundary line between AI systems and other algorithmic systems is not always clear. In this report, decision-making by means of AI systems (AI decision-making) is considered a subset of ADM, understood here as decision-making by means of automated (computer) systems.⁷ Given the (considerable) overlap that accordingly exists between AI and ADM, it is important to consider AI in its relationship to ADM in general. General rules on ADM will also apply to AI but may be inadequate to deal with specific challenges of (certain) AI systems. The impact of the automated system (or the AI system) in the decision-making process and the interaction between computer and human can differ from application to application. A common distinction made in this respect is that between, by decision-making based *solely* on automated systems (determinative applications) and decision-making based *partially* on automated systems (supportive applications).⁸ Although this distinction is somewhat artificial from the perspective of the actual practice of decision-making, where supportive systems might act as determinative applications due to lack of human expertise, time constraints, etcetera, this distinction is used in the regulation of ADM, e.g. in the European Union General Data Protection Regulation (GDPR).

⁴ Russell S.J. and Norvig P. (2021), Upper Saddle River: Prentice Hall, p. 19-22. See also CAHAI (2020) 23, *op. cit.*, p.3-4.

⁵ These systems are also referred to as 'rule-based' systems. See Williams R. (2022), Rethinking Administrative Law for Algorithmic Decision Making", *Oxford Journal of Legal Studies*, Vol. 42, Issue 2, p. 470.

⁶ CAHAI (2020) 23, *op. cit.*, p. 4. A similar broad approach to AI applications is adopted by European Commission (2020) in its proposal for an AI Act.

⁷ 'Automated systems' and 'algorithmic systems' are used as synonyms in this report. However, vocabulary is not univocal here. For example, Brkan M. and Bonnet G. (2020), "Legal and Technical Feasibility of the GDPR's Quest for Explanation of Algorithmic Decisions: Of Black Boxes, White Boxes and Fata Morganas", *European Journal of Risk Regulation* Volume 11, p. 24, consider algorithmic decision-making as an overarching notion, encompassing both automated and autonomous (AI) decision-making.

⁸ See Article 22 of the European Union General Data Protection Regulation. See also Coglianese C. and Lehr D. (2017), *Georgetown Law Journal*, p.1170, distinguishing between supportive and determinative applications.

7. Using a broad definition of AI implies that attention should not be restricted to learning approaches (machine learning, deep learning), which are usually considered the most complex and challenging forms of AI. Instead, the broad definition of AI also covers other forms of ‘intelligence’, including less complex rule-based approaches. At the same time, this diversity of AI systems also implies that a ‘one size fits all’ approach to the variety of AI systems might be insufficient to regulate the use of these (different) systems adequately.

8. *Administrative law* is considered to be the set of principles and rules that govern the relationship between public authorities and citizens.⁹ These norms can be incorporated in legislation, but case law is also an important source for administrative law. Principles of good administration, which are usually developed in case law, have a distinct role in protecting citizens against public authorities. While administrative law shows overlap with other relevant legal domains, such as privacy law and data protection law, there are areas of administrative law where these other legal domains do not play a (significant) role. Therefore, administrative law, including case law (‘the common law rules of judicial review’), can (and should) play an important role in regulating ADM,¹⁰ both where it applies beyond the scope of data protection law and where it fills gaps left by data protection law.

9. When AI systems are applied in the context of administrative decision-making, AI enters the realm of administrative law. The central question, then, is what rules and principles of administrative law are affected by ADM and AI and, reversely, what rules and principles of administrative law are particularly relevant for ADM in general and AI in particular. In the discussion below, we will identify some key issues that have been highlighted in recent literature on the interplay between AL, ADM and AI.¹¹ We will discuss these issues following the different principles that are laid down in the handbook. This classification, however, is not set in stone: it is also possible to discuss certain issues of ADM and AI under other principles, even principles that are not mentioned explicitly in section 2.2.¹²

2.2. Key issues of AI and ADM under administrative law

Principle 1: lawfulness and conformity with statutory purpose

“Public authorities shall act in accordance with the law and within the rules defining their powers. They shall not act arbitrarily.”

10. A first important issue discussed in the literature is whether the use of a particular form of ADM in itself is lawful.¹³ Except for some situations that are specified in the GDPR (see below principle 7), the use of ADM is often not excluded explicitly. This might be considered an implicit consent of the legislator to use automated systems in the course of administrative decision-making, although the role of automated systems (supportive or determinative) can also be relevant here. As far as the processing of personal data is involved, the GDPR requires a legal basis for certain instances of data processing by public authorities (e.g. where processing is necessary for

⁹ See also *The Administration and You*, *op. cit.*, p. 7: “*Administrative law regulates the exercise of powers by public authorities and provides for the control of their use.*”

¹⁰ Deeks A. (2019), “The judicial demand for explainable artificial intelligence”, *Columbia Law Review* Vol. 119, No. 7, p. 1831; Williams, *op. cit.*, p. 479.

¹¹ See Annex I for the literature that is discussed in this section.

¹² For a complete list of general principles of good administration in the handbook, see Annex II.

¹³ See Williams, *op. cit.*, p. 473.

compliance with a legal obligation to which the controller is subject). In the absence of such a legal basis, the use of ADM is unlawful.

11. A second issue raised in the literature is to what extent the use of ADM amounts to *de facto* delegation of attributed powers, thereby breaching legal prohibitions to delegate executive powers. Some authors have argued that *fully* ADM is problematic here, as the public authority to which the administrative power has been conferred initially, has no meaningful oversight anymore.¹⁴ Therefore, it has been argued that the use of ADM is lawful only where public officials can show that they have exercised meaningful oversight of the decision rather than just a token gesture, that they have the authority and competence to change the decision and that they have considered all of the relevant data. However, so-called ‘automation bias’ is a big concern here: people tend to trust decisions made by machines, are more likely to defer to machines, and are less likely to exercise meaningful review of decisions made by machines than if the decision was made by a human. Therefore, additional legal guarantees might be necessary to enable decision-makers to demonstrate that they have not simply given effect to an automated system’s decision without the appropriate level of human intervention.¹⁵

12. Where the development of ADM systems has been outsourced to private parties, a third related issue in the context of delegation of public powers is whether public authorities are still using their decision-making powers themselves. In that respect, it is argued that public bodies generally remain responsible and accountable for the quality of decision-making based on contracted-out ADM systems.¹⁶ Again, automation bias can occur here when public officials are unable or incompetent to check the accuracy of the ADM system.

13. A fourth issue relates to the so-called ‘no-fettering’ doctrine: where discretionary powers are conferred to public authorities, the adoption and use of ADM can result in a process of fettering this discretion completely.¹⁷ Especially machine learning systems (as a subset of AI systems) may be inappropriate for decisions where discretionary powers need to be exercised on a case-by-case basis, or in other situations where policy may generally be applied but where exceptions need to be permitted. The same literature, however, points out that administrative law is gradually evolving its view on policies, with growing acceptance that consistently applied policy rules (with appropriate exceptions where necessary to accommodate unusual cases) can provide benefits for good governance, consistency, and predictability.¹⁸ From that perspective, ADM could be an important tool to improve consistency of administrative decision-making, although focusing exclusively on consistency can also have a negative effect on achieving tailor-made decisions, switching from the rule of law to ‘the rule by law’.

14. A fifth and final issue concerns the use of ADM for so-called ‘improper purposes’. Here, the principle of purpose limitation that is rooted in data protection law (see principle 7) can also be relevant to assess whether a public authority has processed data only for the purpose for which these data were collected or for other incompatible purposes.¹⁹

¹⁴ Coglianese and Lehr (2017), “Regulating by Robot: Administrative Decision Making in the Machine-Learning Era”, *The Georgetown Law Journal* 105(5), p. 1177-1184; Cobbe J. (2019), *Administrative Law and the Machines of Government: Judicial Review of Automated Public-Sector Decision-Making*, *Legal Studies*. Vol. 39, p. 645-646; Williams, *op. cit.*, p. 488-490.

¹⁵ Cobbe, *op. cit.*, p. 646.

¹⁶ *Ibid*, p. 649.

¹⁷ *Ibid*, p. 646-647; Williams, *op. cit.*, p. 488-492.

¹⁸ Cobbe, *op. cit.*, p. 646-647.

¹⁹ *Ibid*, p. 647.

Principle 2: equality / non-discrimination

“Public authorities shall treat individuals in similar situations the same. Any difference in treatment shall be objectively justified.”

15. A topic often discussed in relation to ADM, is the risk of *bias* and discrimination.²⁰ This risk is especially, but not exclusively, present in case of machine learning systems, where the relative weights of different factors used in the algorithm *may* not be specified in advance and where the data that serve as input for the algorithm might be biased. The algorithm then determines which factors are important to make distinctions, but these factors can be legally irrelevant (or even prohibited) or unknown. This is due to the so-called ‘black box’ element of machine learning applications, as these systems can be too complex for individuals to understand their inner workings completely.²¹ Cobbe highlights the distinction between group-level differences and individual-level behaviour with respect to this principle: where machine learning applications categorize people as groups of shared characteristics, administrative decision-making should take into account the particularities of individuals.²²

Principle 3: objectivity and impartiality

“Public authorities shall exercise their powers having regard to relevant matters only. They shall not act in a biased manner or be perceived to do so.”

16. It is important that ADM systems function accurately. Apart from the risk of *bias* in ADM (already discussed under principle 2), the algorithm should be free of *errors* as much as possible, as well as the data that serve as input for the algorithm. The quality of the training and test data is therefore often stressed, also from a legal perspective.²³

17. In English literature on administrative law and ADM, emphasis is also put on the doctrine of relevant and irrelevant considerations: only relevant considerations should be taken into account. Since administrative law is concerned with situations where a public authority has acted upon irrelevant considerations or failed to take into account relevant ones, thereby acting beyond its powers (*ultra vires*), this doctrine could have consequences for the evaluation of input data used in AI systems, as correlation between input and output does not necessarily imply causal evidence.²⁴

Principle 4: proportionality

“Measures taken by a public authority in pursuance of its powers shall not be excessive in terms of their impact on the rights and interests of individuals, and shall only go as far as is necessary, and to the extent required, in order to achieve the desired goal.”

18. When it comes to proportionality, the issue is whether the use of an ADM system in general and an AI system in particular is proportionate. Especially when it comes to necessity, the key issue here is, as Williams has put forward, whether the use of ADM is “a sledgehammer to crack a nut”.

²⁰ Cobbe J., *op. cit.*, p. 652-654; Williams, *op. cit.*, p. 485.

²¹ Burrell J. (2019), How the machine “thinks”: Understanding opacity in machine learning algorithms”, *Big Data & Society* Vol. 3 (1), p. 2.

²² Cobbe, *op. cit.*, p. 653. For more details on non-discrimination and machine learning, see Coglianese and Lehr (2017), *op. cit.*, p. 1191-1205.

²³ Cobbe J., *op. cit.*, p. 650-651.

²⁴ Oswald M. (2018), “Algorithm-Assisted Decision-Making in the Public Sector: Framing the Issues Using Administrative Law Rules Governing Discretionary Power”, *Philosophical Transactions: of the Royal Society Mathematical, Physical and Engineering Sciences* Vol. 376, No. 2128, p. 10-14.

The proportionality principle can also be relevant when discussing the necessity of some particular form of ADM, e.g. whether some form of augmented decision making (where ADM systems are merely supportive) might be better than relying on *fully* ADM, i.e. without any human intervention. When it comes to the fair balance test that is inherent to the proportionality principle, the benefits of ADM should be weighed against its impacts and potential disadvantages, such as the potential lack of transparency or its potentially detrimental effect on minority classes of people.²⁵

Principle 6: transparency

“Public authorities shall allow everyone access to official documents held by them. Access shall be granted without discrimination. Public authorities also have a duty to provide information about their work and decisions, and this duty extends to the publication of official documents.”

19. Administrative law regarding transparency and reason-giving requirements is very relevant in the context of ADM.²⁶ In general, transparency requirements apply to both the data and the algorithm.²⁷ Williams identifies two distinct issues here: those regarding the duty to give reasons (if any) after the decision and those specifying the claimant’s right to have notice of the case against them for the purposes of a fair hearing (see also principle 10).²⁸ When it comes to the duty to give reasons,²⁹ the debate on explainable AI (xAI) often focuses on the distinction between technical transparency, *i.e.* disclosure of the source code of the algorithm, and explainability³⁰ or even justification of the decision (explaining why the decision is good),³¹ on the other hand. When it comes to explainability of the decision, further distinction is made between explanation of the model and explanation of individual decisions.³² To what extent it is possible to deliver transparency of the model as such, depends on the AI system used: whereas the underlying model of traditional rule-based systems can be disclosed quite easily, the challenge to explain the inner workings of machine learning models can be more difficult.³³

20. In addition to transparency requirements vis-à-vis persons directly involved in the decision-making process, another issue is whether access to software code should be allowed on the basis of open government legislation (e.g. freedom of information acts). An additional complexity here is that some ADM systems have been developed by private companies who rely on their intellectual property rights and thereby might oppose publication of the software code.³⁴

²⁵ Williams, *op. cit.*, p. 492-493.

²⁶ For more details: Coglianese and Lehr (2017), *op. cit.*, p. 1207-1213 and Coglianese and Lehr (2019), *op. cit.*, Administrative Law Review, p. 19.

²⁷ Finck M. (2020), “Automated Decision-Making and Administrative Law”, in Cane P., Hofmann H., Ip E., and Lindseth P. (eds) (2020), *Oxford Handbook of Comparative Administrative Law*, Oxford University Press, p. 657-676.

²⁸ Williams, *op. cit.*, p. 481-482.

²⁹ Oswald, *op. cit.*, p. 4-10.

³⁰ Coglianese and Lehr (2019), *op. cit.*, p. 19.

³¹ Miller T. (2019), “Explanation in artificial intelligence: Insights from the social sciences”, *Artificial Intelligence* volume 267, p. 8.

³² For more details: Edwards L. and Veale M. (2017), “Slave to the Algorithm? Why a “Right to Explanation” is Probably Not the Remedy You are Looking For”, *Duke Law & Technology Review* Vol. 16, p. 55-59.

³³ For more details: Burrell J., *op. cit.*, p. 35; Coglianese and Lehr (2019), *op. cit.*, 32-36

³⁴ Burrell J., *op. cit.*, p. 2, p. 2; Coglianese and Lehr, *op. cit.*, p. 32-36.

Principle 7: privacy and the protection of personal data

“When processing personal data held in digital or any other format, public authorities shall take all necessary measures to guarantee the privacy of individuals and their right to the protection of personal data.”

21. Data protection law is often taken as the legal starting point for an analysis of the regulation of ADM.³⁵ In European literature, much attention is usually paid to the GDPR of the EU.³⁶ This piece of legislation has two important features that are relevant for ADM (and consequently for AI as a subset of ADM). First, it prohibits certain applications of ADM: the data subject has the right not to be subject to a decision based *solely* on automated processing (including profiling), which produces legal effects concerning him or her or similarly significantly affects him or her.³⁷ Next, the data subject has the right to access information concerning the existence of ADM, including profiling, and, at least in those cases, *meaningful information* about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.³⁸ Since the scope of the GDPR is restricted to the processing of personal data, the GDPR does not cover all instances of ADM by public authorities.³⁹

22. Principle 7 is the only principle in the handbook that already refers to ADM, as it mentions explicitly the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, and the Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. Following this protocol, the individual has the right (i) not to be subject to a decision significantly affecting the individual based solely on an automated processing of data without having his or her views taken into consideration; (ii) to obtain, on request, knowledge of the reasoning underlying data processing where the results of such processing are applied to him or her; and (iii) to object at any time, on grounds relating to his or her situation, to the processing of personal data unless the controller demonstrates legitimate grounds for the processing which override the individual's interests or rights and fundamental freedoms.

Principle 10: right to be heard

“Before a public authority takes an administrative decision affecting the rights or interests of an individual, the person concerned shall be given the opportunity to express his or her views and submit information and arguments to the public authority.”

23. Transparency (principle 6) also relates to the right to be heard: citizens have the right to have notice of the case against them for the purposes of a fair hearing. In as far as AI systems are used simply to generate inferences that constitute but one of several inputs into an independent judgment

³⁵ See for example Edwards and Veale (2017), *op. cit.*, p. 44; Brkan and Bonne, *op. cit.*, p. 19; Williams, *op. cit.*, p. 473.

³⁶ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation). For discussions of the GDPR in relation to ADM, see Brkan M (2019), “Do algorithms rule the world? Algorithmic decision-making and data protection in the framework of the GDPR and beyond”, *International Journal of Law and Information Technology* Vol. 27, Issue 2; Malgieri G. (2019), “Automated decision-making in the EU Member States: The right to explanation and other “suitable safeguards” in the national legislations”, *Computer Law & Security Review* Volume 35, comparing legislation of EU Member States in relation to the GDPR.

³⁷ Article 22 of the GDPR.

³⁸ Articles 13, 14 and 15 of the GDPR.

³⁹ Cobbe, *op. cit.*, p. 640. What is more, some processing of personal data is excluded from the scope of the GDPR due to the existence of more specific EU legislation, such as the Law Enforcement Directive (Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA).

made by human officials, the right to be heard can be integrated in the decision-making process quite easily (although guarantees are necessary that the human official is effectively 'in the loop' of decision-making). More concern exists with regard to fully ADM, as it seems to deny individuals their right to a hearing. Nonetheless, it is debated whether the accuracy of ADM systems could outweigh the need for a hearing prior to the decision.⁴⁰

Principle 11: representation and assistance

"If a public authority intends to refuse an individual's request or considers that it is likely that the request will be refused, in full or in part, it shall give the individual the opportunity to be represented, or otherwise assisted, in putting forward his or her views, particularly where an administrative decision may directly and adversely affect his or her rights or interests."

24. Given the (perceived) complexity of ADM, it is often questioned how equality of arms between public authorities and citizens can be guaranteed, as few individual citizens will possess the mathematical and analytical ability to conduct an investigation of an ADM system without assistance. It has therefore been suggested that ADM might necessitate the establishment of a body of neutral and independent statistical experts to provide oversight and review, or a prior rulemaking process informed by an expert advisory committee or subjected to a peer review process.⁴¹ From the perspective of equality of arms, it is also questioned whether transparency is really the solution for levelling the playing field ('transparency fallacy') or that other accountability mechanisms are equally important and therefore need to be strengthened.⁴²

Principle 19: right to appeal

"Everyone shall be able to seek judicial review of any administrative decision that directly affects his or her rights and interests regarding both the merits and legality of the disputed decision."

25. A point specifically addressed in the context of judicial review is the intensity of review by administrative courts. Where deference to decisions of public authorities might be considered the traditional standard in judicial review, there is the risk that due to a lack of expertise courts will turn to deference even more when complex ADM systems are used by public authorities.⁴³ At the same time, it is argued that administrative law should move away from traditional assumptions about deference towards stronger forms of accountability in terms of transparency and notice, doctrines of relevance and substantive review in particular when it comes to ADM.⁴⁴ Transparency (principle 6) is also relevant here, as courts need to be able to review the ADM systems and the decision taken on the basis thereof. It has been pointed out that the distinction between review of general policy and review of individual decisions gets blurred in the context of ADM: in order to properly evaluate individual decisions taken with the use of ADM, it may be necessary to also evaluate some of those broader processes and choices underlying ADM. However, despite this need, the system of judicial review is often tailored towards the review of individual decisions.⁴⁵

⁴⁰ Coglianese and Lehr (2017), *op. cit.*, p. 1184-1186.

⁴¹ *Ibid*, p. 1189-1191.

⁴² Edwards and Veale (2018), *op. cit.*, p. 46-54.

⁴³ Coglianese and Lehr (2017), *op. cit.*, p. 1207-1209.

⁴⁴ Williams, *op. cit.*, p. 488.

⁴⁵ Cobbe, *op. cit.*, p. 6.

Final observation

26. While this overview is not meant to be exhaustive, it makes clear that different principles of administrative law are affected by the use of ADM systems in general and AI systems in particular. All these principles need to be contextualized to give concrete guidance in the context of ADM and AI. In this process of contextualization, it is important to keep in mind that the impact of ADM systems on principles of administrative law, partially depends on the system in use. For example, transparency concerns might be higher when it comes to the application of (complex) machine learning systems as compared with rule-based systems. Thus, the differences between AI systems – next to the purposes for which the ADM systems are used and their impact on fundamental rights – should be taken into account when regulating AI systems from the perspective of administrative law.

3. RESULTS OF THE SURVEY AMONG THE MEMBER STATES

3.1. Introduction

27. Based on the results of the brief literature review discussed in section 2, a questionnaire has been drafted on the regulation of ADM in general and AI in particular among member States of the Council of Europe. The aim of this questionnaire has been to identify potential challenges for administrative law in regulating the use of ADM and AI systems. Since the development of administrative law is a common effort of legislature, executive and judiciary, the questionnaire has addressed the different issues from the perspective of these three actors. Finally, having in mind the particular role of the Council of Europe and its instruments in this study, separate attention has been paid to the impact of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and other documents of the Council of Europe in regulating ADM.

28. During the meeting of the CDCJ on 1 December 2021, a draft of the questionnaire has been discussed. On the basis of input received during that discussion, the questionnaire has been finalized. On 22 December 2021, the questionnaire 'Use of Artificial Intelligence (AI) systems in Administrative Decision-Making'⁴⁶ was sent by the CDCJ to its member States. Responses were provided by representatives of the domestic Ministries of Justice or similar departments. All responses that were submitted before the end of February 2022 have been taken into account in this comparative study. In total, 24 responses have been received (roughly half of the 47 member States at that time).⁴⁷

29. Below, an overview will be given of the responses received for each question. This overview does not contain a full account of all the answers provided in the questionnaire but combines some general observations with concrete examples as illustrative material. In Annex IV, a table is provided with a compiled overview of the answers given for the questions in that section.

3.2. Legislation

- 1) Has national legislation been adopted on the use of ADM in administrative decision-making procedures?

30. Several member States have adopted national legislation on the use of ADM in administrative decision-making procedures (9 out of 24), but the majority of responding member States have not adopted such legislation so far.

31. Among the member States that have adopted legislation on ADM, those that are also member of the EU have adopted national legislation on ADM to comply with the EU General Data Protection Regulation (Sweden, Portugal). According to Article 22(1) of the GDPR, the data subject shall have the right not to be subject to a decision based *solely* on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her. Article 22(2) allows for exceptions to this prohibition of fully ADM, *inter alia* where the decision is authorised by member State law to which the controller is subject, and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interest. Thus, the GDPR allows member States to authorize certain applications of fully ADM. Other Council of Europe member States that are not member of the EU (e.g. Norway, Switzerland) have adopted similar legislation.

⁴⁶ See Annex III.

⁴⁷ Responses were received from the member States listed in Annex IV.

32. In some Council of Europe member States (Norway, Spain), regulation of ADM takes place in sector-specific legislation, partly to comply with GDPR requirements or with other personal data regulation (Switzerland). In Norway, this holds for example in the areas of taxation (section 5-11 of the Tax Administration Act) and labour and welfare administration (section 4a of the Norwegian Labour and Welfare Administration Act).

33. Other member States have adopted legislation on ADM that is not clearly linked to EU personal data regulation. An interesting example where ADM is explicitly allowed in legislation is the Swedish Administrative Procedure Act (APA).⁴⁸ According to Section 28, a decision can be made by an officer on his own or by several jointly *or be made automatically*. This APA does not contain specific guarantees tailored to ADM, but any decision, either human-made or computer-made, should comply with the requirements on decision-making in the Swedish APA. Another example of legislation on ADM in administrative law legislation, is the German *Verwaltungsverfahrensgesetz*. According to Article 35a, an administrative decision may be issued entirely by automatic means wherever this is permitted by law and wherever there is no margin of administrative discretion.

34. In France, a Law for a Digital Republic has been adopted in 2016.⁴⁹ As a result of this piece of legislation, the Code of relations between the public and the administration contains rules aimed at the provision of information in cases where an individual decision is taken by the administration on the basis of algorithmic processing:

Article L. 311-3-1

"Subject to the application of 2° of Article L. 311-5,⁵⁰ an individual decision taken on the basis of algorithmic processing shall include an explicit statement informing the person concerned. The rules defining this processing as well as the main characteristics of its implementation shall be communicated by the administration to the person concerned if he or she so requests."

35. This obligation to provide information is further operationalized in two provisions:

Article R. 311-3-1

"The explicit statement provided for in Article L. 311-3-1 shall indicate the purpose of the algorithmic processing. It recalls the right, guaranteed by this article, to obtain communication of the rules defining this processing and the main characteristics of its implementation, as well as the procedures for exercising this right to communication and referral, where applicable, to the commission for access to administrative documents, as defined by this book."

Article R. 311-3-2

"The administration shall communicate to the person who is the subject of an individual decision taken on the basis of algorithmic processing, at the latter's request, in an intelligible form and subject to not infringing on secrets protected by law, the following information:

1° The degree and mode of contribution of algorithmic processing to decision making;

2° The data processed and their sources;

⁴⁸ See The Administrative Procedure Act (2017:900), available at:

<https://www.government.se/49855a/contentassets/3c56d854a4034fae9160e12738429fb8/the-administrative-procedure-act-2017900>, accessed 7 December 2022.

⁴⁹ See Law No. 2016-1321 of 7 October 2016 for a Digital Republic.

⁵⁰ This legal provision mentions legitimate reasons for not communicating certain administrative documents.

3° *The treatment parameters and, where appropriate, their weighting, applied to the situation of the person concerned;*

4° *The operations carried out by the processing.*”

36. Another interesting example is provided by the Portuguese Charter of Human Rights in the Digital Age.⁵¹ Instead of being restricted to ADM, this relatively new piece of legislation, adopted in 2021, contains a rich variety of legal provisions on digital administration. One particular example thereof is Article 9:

Use of AI and robots

1. *The use of AI must be guided by respect for fundamental rights, ensuring a fair balance between the principles of explainability, security, transparency and responsibility, which takes into account the circumstances of each specific case and establishes processes aimed at avoiding any prejudice and forms of discrimination.*

2. *Decisions with a significant impact on the recipients that are taken through the use of algorithms must be communicated to the interested parties, being susceptible to appealable and auditable, in accordance with the law.*

3. *The principles of beneficence, non-maleficence, respect for human autonomy and justice, as well as the principles and values enshrined in Article 2 of the Treaty on European Union, namely non-discrimination and tolerance.*

37. Apart from this Charter, the Portuguese Constitution itself also pays attention to (aspects of) ADM. According to Article 35(2) on the use of computerised data, the law shall determine what are personal data as well as the conditions applicable to automatic processing, connection, transmission and use thereof, and shall guarantee its protection by means of an independent administrative body.

2. *If yes, does this legislation distinguish between AI applications, on the one hand, and other forms of algorithmic support, on the other hand, in the context of administrative decision-making?*

38. Legislation dedicated to AI applications is generally lacking. An interesting exception to this rule is the explicit mentioning of AI applications in the Portuguese Charter of Human Rights in the Digital Age (see question 1), stating that the use of AI must be guided by respect for fundamental rights, ensuring a fair balance between the principles of explainability, security, transparency and responsibility. However, the Charter does not provide for an exact delineation of the concept of ‘AI’. Thus, it is unclear to what extent AI needs to be distinguished from other forms of ADM.

3. *Does legislation prohibit explicitly the use of certain applications of ADM (including AI) by public authorities?*

39. As a preliminary remark, it is worth emphasizing that Article 22 of the GDPR – as a main rule – excludes *fully* ADM when the decision affects an individual’s legal status or similarly significantly affects him or her. Since the GDPR has direct effect in the legal order of EU member States, this provision needs no implementation in domestic legislation. At the same time, Article 22(2) of the GDPR leaves room for (domestic) exceptions to this default approach. Thus, instead of prohibiting the use of ADM, some legislation stipulates explicitly in which cases fully ADM can be applied (Latvia).

⁵¹ See Law no. 27/2021 of 17 May 2021, approving the Portuguese Charter of Human Rights in the Digital Era.

40. Additionally, some legislation explicitly states that ADM cannot be applied in cases where administrative authorities have administrative discretion (Norway, Germany). The scope of such provisions is not restricted to the use of personal data.

41. In France, there is an additional exception for decisions of courts, excluding ADM under all circumstances:

"No court decision involving an assessment of a person's conduct may be based on automated processing of personal data intended to evaluate certain personal aspects relating to that person."⁵²

42. This same French legislation allows for exceptions to the prohibition of fully ADM, provided that this decision complies with the requirement of the afore-mentioned Code of relations between the public and the administration and that the data controller ensures control of the algorithmic processing and its developments in order to be able to explain, in detail and in an intelligible form, to the person concerned the way in which the processing has been implemented at his respect. Thus, this law creates a general exception allowing for fully ADM. At the same time, this law also stipulates that no decision by which the administration decides on an administrative appeal may be taken on the sole basis of automated processing of personal data. Thus, decisions in administrative appeal can be based on ADM as long as this decision is not based on ADM *exclusively*.

4. In as far as administrative authorities are allowed to use ADM, what topics are covered by legislation on algorithmic decision-making by administrative authorities?

43. Several member States point out that public authorities should comply with general principles and rules of administrative law, as laid down in some form of Public Administration Act (Denmark, Sweden). Since this general legislation is technology neutral, it is irrelevant whether the decision was based on ADM or not.

44. The scope and contents of legislation tailored to ADM varies among member States. One recurring topic is that of *human intervention*, thereby providing guarantees against *fully* ADM. An example thereof is the German *Verwaltungsverfahrensgesetz*, which aims to preserve administrative discretion conferred to public authorities.

45. Another recurring topic is that of transparency of ADM (in a broad sense). Transparency can be seen in close connection with other topics, such as non-discrimination and the review of the quality of the decision-making process in general (Norway). This topic of transparency varies from the right to be informed on the existence of ADM to explainability requirements and – in some cases – access to software code (Lithuania). In France, the Code of relations between the public and the administration is clear on the issue that source code is also an administrative document, of which the citizen can request communication. These domestic transparency requirements may coincide with GDPR requirements, as much legislation is written down in the context of (personal) data protection and the implementation of EU legislation.

5. Is there any domestic legislation in preparation for regulating the use of ADM and/or AI by administrative authorities?

46. While several member States have reported the absence of legislation on ADM (or AI), some member States are currently preparing legislation on this topic (Estonia, Latvia). In Spain, legislation is in preparation on the establishment of an AI Agency.

⁵² See Article 47 of Law No. 78-17 of 6 January 1978 on Data Processing, Data Files and Individual Liberties, which is the French law on data protection.

47. Some member States stress that legislative developments at domestic level are closely related to developments at the EU level, thereby mentioning the proposal of the European Commission for an AI Act⁵³ explicitly (Latvia).

3.3. Administration

6. *What applications of AI by administrative authorities are known in your country?*

48. Across member States, several examples of AI applications are mentioned, especially in the areas of policing, taxation, traffic (automatic number plate recognition) and border control (face recognition). In Germany, AI applications do mainly serve communication purposes, e.g. chat boxes. Poland provides for an example of ADM where only *positive* visa decisions are taken in a fully automated way.

49. Apart from the different applications known in member States, there is also a difference between the communication of member States on AI applications. Estonia, for example, has launched a general website informing the public on different AI applications.⁵⁴ For other member States, a general overview on the use of ADM in administrative practice is lacking.

7. *Have administrative authorities adopted self-binding policies on how to use ADM?*

50. The majority of responding member States does not report on self-binding policies adopted by administrative authorities. Some member States have adopted some form of a national AI strategy (Türkiye, Ukraine, North Macedonia), but these AI strategies are generally not self-binding policies. Some other member States report on the adoption of self-binding policies by administrative authorities in particular domains (Norway, Hungary) or on the adoption of more general guidelines. In Portugal, the AMA (Administrative Modernization Agency) has released a *Guide for responsible AI* which is part of a framework to promote principles, best practices and recommendations for ethical use of AI. This framework includes an assessment tool for ethical risk and is now in the testing phase. Following this framework and in the absence of specific legislation, administrative authorities are allowed to adopt policy rules themselves for the use of AI in their administrative decision-making procedures.

51. In Switzerland, the Federal Council has adopted Guidelines on Artificial Intelligence for the Confederation in 2020.⁵⁵ These guidelines put first that the legal basis applying to the use of AI is provided both at national and international level, in particular the Federal Constitution of 18 April 1999 of the Swiss Confederation and the standards set forth in the European Convention on Human Rights (ECHR). In addition, these (seven) guidelines, ranging from 'putting people first' to 'transparency, traceability and explainability', must be observed when applying AI. The guidelines also contain an annex discussing the applicable legal framework and pointing out the importance of different provisions in the revised (federal) Data Protection Act.

52. Spain, finally, has adopted a Charter of digital rights. This non-binding instrument distinguishes six different kinds of digital rights: rights of freedom; rights of equality; rights of participation and shaping the public space; rights of the working and business environment; digital

⁵³ See European Commission, *Proposal for a Regulation laying down harmonised rules on artificial intelligence (Artificial Intelligence Act)*, COM(2021) 206 final.

⁵⁴ See Artificial Intelligence Strategy for Estonia, available at: <https://en.kratid.ee/>, consulted 7 December 2022.

⁵⁵ See Guidelines on Artificial Intelligence for the Confederation, [Artificial Intelligence \(admin.ch\)](https://www.admin.ch/gov/en/sections/02631/index.html).

rights in specific environments; and rights of guarantees and efficiencies. It is intended to serve as a guide for future legislative projects and to develop fairer public policies.⁵⁶

8. What approaches are adopted to reconcile the use of ADM with the legal notion of administrative discretion?

53. One recurring topic is the need to preserve some level of human intervention or oversight in order to ensure administrative discretion in the decision-making process. This is made explicit in the legislation of some member States (Germany, Norway), thereby excluding fully ADM.

54. Some jurisdictions have some peculiarities when it comes to fully ADM. In Latvia, for example, only the minimum fine provided for in legislation can be imposed for an administrative offence if that offence has been recorded by technical means. The reason for this provision is that the possibilities of ascertaining the circumstances of the violation in administrative offence proceedings by technical means are limited.⁵⁷

55. Poland reports on the use of the *National Consultation System*, which is used by the Office for Foreigners in decision-making regarding national visa and Schengen visa. Only positive visa decisions are taken in a fully automated way. Conversely, where negative visa decisions are involved, some degree of human intervention is still involved.

9. Does collaboration between public authorities and private parties in developing and deploying ADM systems for administrative decision-making, raise legal issues in your country?

56. Most responding member States do not raise an issue here. However, some member States (Finland, France) observe a (potential) conflict here with regard to the legal doctrine of (non-) delegation of (administrative) powers: these powers cannot be delegated to private parties without a legal basis. This issue is sometimes merely theoretical at the moment. In Norway, for example, ADM applications have been limited to decisions where little discretion has been left to the authorities so far. As a consequence, the issue of delegation of administrative powers has not yet come to fruition. What is more, legal doctrine seems to be nuanced, not entirely excluding delegation of powers as long as private actors involved in a public task are placed under the control of a public authority and if they do not have normative power that could take the form of a prohibition or, conversely, an authorisation.

57. Another issue next to delegation of powers is raised by Poland, which mentions issues of copyright (as well as data governance and cybersecurity) when private parties are involved in developing and deploying ADM systems.

3.4. Judiciary

10. Is there any case law of courts specifically addressing the use of ADM by administrative authorities?

58. Most member States (20 out of 24) indicate no case law dealing with ADM specifically. Among the member States where case law on ADM is available, the legal issues vary.

⁵⁶ See Carta Derechos Digitales, available at: https://www.lamoncloa.gob.es/presidente/actividades/Documents/2021/140721-Carta_Derechos_Digitales_RedEs.pdf, accessed 7 December.

⁵⁷ See Section 161-162 of the Law on Administrative Liability (Poland).

59. In the Czech Republic, administrative courts have confronted with the question whether the administrative authority (in the field of material need benefits) is obliged to give reasons for its decision taken with the employment of an automatic data processing program, the use of which is prescribed by law. The administrative courts stated that the use of this automated system does not relieve the administrative authority of the obligation to provide adequate reasons for its decision.⁵⁸

60. In France, one important case concerns access to algorithmic processing. In its decision of 12 June 2019, the Council of State ruled that the right to communication of the algorithm for processing applications examined in the framework of the national pre-registration procedure via the *Parcoursup* platform and its source codes was not open to students' unions. The Council of State recalled that the applicable legislation on student orientation and success⁵⁹ provided for the possibility for applicants registered on *Parcoursup* to request that they are provided with 'information relating to the criteria and procedures for examining their applications as well as the pedagogical reasons that justify the decision taken'. It considered that these provisions derogated from the ordinary law provisions on the communication of rules defining algorithmic processing (as discussed under question 1).⁶⁰

61. In Lithuania, the Supreme Administrative Court has touched different times upon issues of ADM. For example, it has concluded that the fact that the decision in question was adopted by automatic means and that humans can contest this decision only to a very limited degree, cannot be regarded as an excuse for the violation of imperative rules of law, including principles of legality and good administration.⁶¹ In another case, it has stressed that the rights of the interested parties (on the knowledge of the concrete actions, on the possibility to connect to the system or on the similar circumstances) should be duly assured in the administrative procedure. Also, the quality of supporting material created and collected by automated means (e.g. orthographic photos) has been discussed by the Supreme Administrative Court of Lithuania.

62. In Portugal, most relevant case law has to do with difficulties in the computer systems of the tax authority, e.g. in joining or un-joining tax executions, in complying with the legal limits on the assets attachment or with the principle of proportionality in automatic attachments, to substantiate reversion acts with standardized justification models that does not adapt to the specifics of each case, and also with the tax authority's difficulty in correcting errors, when inserting data, in the computer system.

11. If yes, is there any case law of courts specifically addressing the use of AI by administrative authorities?

63. Where case law on ADM is not very prevalent in most member States, this holds even more for judgments on AI. Switzerland mentions the example of an automated system, consisting of the usability of recordings made by cantonal police using an automated vehicle search and traffic monitoring system. The Federal Court observed that this system, which pursues the dual objective of attributing unsolved offences to a specific person and enabling recognition in future acts, went beyond the mere collection and storage of identifying information, as the data were combined with other files and compared in an automated manner to enable the simultaneous serial processing of large and complex data sets in a fraction of a second. In these circumstances, the Federal Court held that the making and storing of recordings by this surveillance system constituted an infringement of the fundamental rights of the persons concerned, in particular the protection of their private

⁵⁸ See Supreme Administrative Court of Czech Republic, Case No. 3 Ads 33/2012 – 30.

⁵⁹ See Law No. 2018-166 of 8 March 2018 on the orientation and success of students.

⁶⁰ See Council of State of France, ECLI:FR:CECHR:2019:427916.20190612, 12 June 2019.

⁶¹ See Supreme Administrative Court of Lithuania, Case No. A-275-822/2020.

sphere. The Federal Court also found that there was no sufficiently precise legal basis for the use of this surveillance system in the canton concerned. The appeal was therefore allowed, as the infringement of privacy inherent in this surveillance system therefore violated Article 13 of the Federal Constitution (protection of privacy) in conjunction with Article 36 of the Federal Constitution (any restriction of a fundamental right must be founded on a legal basis).⁶²

64. In France, there is hardly any case law on the use of AI by administrative authorities, but some decisions appear to be noteworthy in the context of AI as they are innovative. One relevant decision of the Council of State concerns the use of an algorithm for the evaluation of personal injury, called *DataJust*.⁶³ *DataJust* aimed to develop an algorithmic system responsible for automatically extracting and exploiting the data contained in court decisions relating to compensation for personal injury. In its decision of 30 December 2021, the Council of State validated this system, considering that this decree merely authorised the collection of data necessary for the development of an algorithm for personal injury compensation without derogating from the law of 6 January 1978 on data processing, data files and freedoms. It had neither the purpose nor the effect of laying down rules relating to the fundamental guarantees granted to citizens for the exercise of public freedoms. The Council of State considered in particular that the system should allow easier access to case law on personal injury compensation in order to guarantee the accessibility and predictability of the law. It also considered that the decree met sufficiently precise objectives and that the nature, volume and processing of the data collected were appropriate.⁶⁴ Nonetheless, the Ministry of Justice has decided to abandon the experiment (which fell under private law).

12. Which general principles of good administration play a role in case law on the use of ADM (including AI) by administrative authorities?

65. In as far as member States have reported on case law on ADM, a recurring topic is the application of general principles of administrative law. For example, in The Czech Republic, although the aforementioned case law does not explicitly mention any general principle of administrative law, the requirement to provide reasons for an administrative decision generally derives from the principles of prohibition of abuse of power and administrative discretion and the principle of protection of the public interest. Similarly, in France, the principle of non-discrimination, which has been enshrined on several occasions in the case law of the Constitutional Council and the Council of State,⁶⁵ applies to any administrative decision, and *a fortiori* to algorithmic decisions. The same holds for the principle of proportionality. Latvia, although not reporting on any specific case law on AI and ADM, mentions the principle of prohibition of arbitrariness.

66. In Lithuania, several general principles of good administration appear to be relevant: the right to be heard, the proportionality principle, the principle of equality and non-discrimination and the principle of equality of arms. Under its case law, the Supreme Administrative Court has also emphasized the fundamental principles of 1) the right to be duly informed of one's rights and legal status, 2) the right to evidence-based process and 3) adversarial proceedings.

67. In Switzerland, finally, it is emphasised that the only case law on the use of AI that has been identified to date, is of principled value because it incorporates principles that have been widely developed by legal scholars on the basis of Article 36 of the Federal Constitution and that also appear in other judgments concerning data processing. Again, these principles (such as the right to be

⁶² See the Federal Court of Switzerland, Case No. 6B_908/2018, 11 October 2019.

⁶³ See Décret n° 2020-356 du 27 mars 2020 portant création d'un traitement automatisé de données à caractère personnel dénommé « DataJust » - Légifrance, available at: <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000041763205/>, accessed 7 December 2022.

⁶⁴ See Council of State of France, ECLI:FR:CECHR:2021:440376.20211230, 30 December 2021.

⁶⁵ Reference is made for example to Council of State of France, ECLI:FR:XX:2013:351183.20130522, 22 May 2013.

heard, the proportionality principle, the principle of equality/non-discrimination and the principle of legality) apply regardless of whether the decision-making is algorithmic or not.

68. By contrast, Spain highlights six principles enshrined in Article 2 of Royal Decree 203/2021 that the public sector must respect in its actions and electronic relations specifically:

- a) *Technological neutrality and adaptability to the progress of electronic communications technologies.*
- b) *The principle of accessibility, to guarantee equality and non-discrimination in the access of users, in particular of the people with disabilities and the elderly.*
- c) *The principle of ease of use, which determines that the design of electronic services is focused on users.*
- d) *The principle of interoperability.*
- e) *The principle of proportionality, by virtue of which only the guarantees and security measures appropriate to the nature and circumstances of the different electronic procedures and actions will be required.*
- f) *The principle of personalization and proactivity.*

69. Although the scope of these principles goes beyond the use of ADM as such by the public sector, there is some overlap with general principles of good administration, e.g. with the principle of proportionality.

13. What are the main topics addressed in case law on the use of ADM (including AI) by administrative authorities?

70. There is a rich variety in the range of topics discussed in the case law of member States. For example, the Czech case law deals with the explainability of administrative decisions. This is also the case for the Lithuanian case law, next to discussions on the use of ADM/AI as such. In France, most attention is paid to the use of ADM/AI as such and to issues of privacy and data protection. The latter issues are also mentioned in the Swiss context. Interestingly, the topic of the right to human intervention is not mentioned separately here.

3.5. Council of Europe

14. Does the European Convention on Human Rights (ECHR) play a role in the regulation of the use of ADM (including AI) by administrative authorities in your country?

71. Not every member State answers this question affirmatively. Apart from three member States leaving this question unanswered, seven member States (Bulgaria, Finland, Montenegro, North Macedonia, Slovenia, Sweden and Türkiye) indicate that the ECHR does not play a role in regulating ADM practices. By contrast, fourteen member States indicate that the ECHR is relevant here. The most relevant provisions pointed out here are Article 6 (right to a fair trial), 8 (respect for private and family life) and 14 (prohibition of discrimination). In addition, Norway observes that the right to an effective remedy (Article 13) could become relevant in cases where the use of ADM limits the opportunity of individuals to get an explanation, reply, correction etc. from a competent authority.

72. Several other member States (Germany, Latvia, Poland, Portugal) highlight that the ECHR applies to *any* form of administrative action, thereby also applying to ADM and AI.

15. Do other instruments of the Council of Europe play a role in the regulation of the use of AI by administrative authorities in your country (in legislation, policy rules or case law)?

73. Again, with two member States leaving this question unanswered (Denmark and Ukraine), eleven member States answer this question negatively. The other eleven member States gives a positive answer to this question. Most references here are to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. Latvia, however, stresses that more impact is expected of EU legislation at the moment, in particular the proposal for an AI Act. Portugal mentions the role of both the EU and the Council of Europe (CAHA) here.

74. Member States also mention more than once that Council of Europe instruments have indirect impact, i.e. without explicit reference to these documents in national legislation and policymaking (e.g. Spanish Constitution, Polish AI Strategy, Czech National AI Strategy).

16. Is there any domestic debate among legal scholars on shortcomings of administrative law to address the challenges of ADM and AI in particular in the context of administrative decision-making?

75. In as far as the respondents have an overview of the domestic scholarly debates on ADM and AI in the context of administrative decision-making, ten member States do not report on any domestic debate, while eleven other member States do. There is a variety in the topics under discussion and the positions taken in the debate. France, e.g., reports that the development of AI raises legal questions, but does not seem to create any particular debate about possible gaps in administrative law. In the same vein, Latvia reports that except for one special issue of a domestic legal journal devoted to general issues of AI, there is no wider discussion on the use of ADM or AI in the administrative sanctioning process.

76. However, the implementation of the EU AI Act is expected to require regulatory action at the domestic level. Topics mentioned in domestic debates are high-risk application, big data collection, liability for the use of ADM systems (Czech republic), data protection safeguards, accountability and transparency (Finland), the need for a (separate) legal basis for ADM through revision of administrative law legislation (Norway), the tension between administrative discretion and ADM (Poland), the tension between the implementation and the regulation of AI systems, the costs and granularity of transparency (Portugal), the establishment of fair, ethical and contemporary standards for use and development of AI, issues of discrimination, the need for a human-centric approach (Slovenia), transparency, outsourcing, a too demanding legal framework (Sweden) and optimal regulation of AI, i.e. making ad hoc adaptations of existing norms in the relevant areas of law instead of considering a single text ("AI law") that would deal with the issues raised by AI applications in many areas (Switzerland).

77. Germany reports that the debate at domestic level essentially corresponds to the debate at European level. Türkiye reports several discussions, e.g. on legal personality of AI systems, but also observes that administrative action taken via algorithmic decision-making mechanisms has not yet been the subject of administrative cases in Türkiye and that scholars have mostly explained the issue through foreign court decisions.

4. SUMMARY OF THE RESULTS

No complete overview

78. The results of the survey presented in section 3 do not give a complete overview of the regulation of ADM and AI in the different member States of the Council of Europe. Instead, this comparative study gives some insight in the regulation of ADM and AI in roughly half of the member States. By building on the returned questionnaires as input for the comparative report, the study does not pay attention to, thereby missing relevant developments in other member States. However, where practices of ADM and AI are characterized more than once by some form of bottom-up approach (see the responses to question 6), central institutions, which have returned the questionnaire, do not always have a complete overview of what is going on in their jurisdictions and in (domestic) debates in academic and professional literature. Despite these limitations of the survey, it is nonetheless possible to identify and discuss some general patterns and different approaches to the subject-matter.

Regulation of ADM and AI in its infancy

79. First of all, where the use of AI applications in administrative decision-making is in its infancy, this holds even more for the regulation of these applications. This is not only the case for AI (*stricto sensu*) but extends to ADM in general. One possible explanation is that the use of automated systems is usually just one element in the administrative decision-making process without being the only element thereof. Thus, where administrative law focuses on the final decision being taken by a competent authority (human official), the supportive role of automated means can remain somewhat unnoticed.

80. The lack of regulation of ADM in general and AI in particular does not only concern legislation, but also extends to case law. In general, there is not much case law available on ADM. This is even more the case with the application of AI systems in administrative decision-making.

No dedicated AI-law

81. One key finding is that some form of dedicated “AI law” is generally lacking across member States of the Council of Europe. In several jurisdictions, the added value of separate AI law is even questioned explicitly. Even where legislation refers exceptionally to ‘AI’ (e.g. Portugal), its exact scope is often left undefined. For case law, the same holds: there is hardly any case law in the member States on AI applications. Again, one explanation could be that the use of AI applications by public authorities is still in its infancy. This can be illustrated by a decision of the district court of The Hague (the Netherlands) on the algorithmic system SyRI (*Systeem Risico Indicatie*) that was used to detect possible cases of fraud with social security benefits.⁶⁶ Although this case has not been mentioned in the country reports discussed in section 3,⁶⁷ it is still worth discussing this case. In this judgment, the court ruled that the applicable legislation enabling the use of the algorithmic system SyRI did not comply with Article 8 of the ECHR. Pursuant to Article 8 ECHR, the Netherlands as a party to the ECHR has a ‘special responsibility’, according to the court, when applying new technologies to strike the right balance between the benefits which the use of such technologies brings as regards preventing and combating fraud on the one hand, and the potential interference with the exercise of the right to respect for private life through such use on the other hand. Even though there were currently no indications of ‘deep learning’ or data mining or the development of risk profiles in the implementation of the SyRI legislation, the SyRI legislation did provide scope for the development and application of a risk model using ‘deep learning’ and data mining, and for the

⁶⁶ See District Court the Hague (the Netherlands), 5 February 2020, see ECLI:NL:RBDHA:2020:1878.

⁶⁷ The Netherlands did not submit their replies to the questionnaire.

development of risk profiles. Thus, the mere potential of applying AI techniques in an automated system gave reason to the court for a closer and more critical examination of the system.

Who is in the lead?

82. Although the illustrative material collected through this survey is limited, it is clear that different actors are involved in the regulation of ADM. Interestingly, the involvement of the judiciary and the legislature does not go hand in hand. In some member States (e.g. France and Portugal), specific legislation on ADM is accompanied by court decisions on ADM. In other member States (e.g. Czech Republic, Lithuania), general legislation on ADM is lacking, but this does not prevent administrative courts from ruling about the use of ADM. In other member States (e.g. Poland and Switzerland), general guidelines on the use of AI have been adopted. This 'soft law' aims to steer the development of AI, especially in the absence of legislation on this matter. It is also clear that the regulatory framework is constantly evolving; different member States have indicated that legislation is in preparation, while new legislation can result in new case law. The Council of Europe has contributed to the regulation of automated data processing with the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108) and with the Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 223).

83. Apart from the issue of division of powers and responsibilities among state actors, another issue is at which level (local, national, European, global), rules on the use of ADM and AI need to be set. Some member States (e.g. Latvia) are clearly waiting for the legislative developments at the EU with the proposal for an AI Act.

Dominant role of data protection legislation

84. In several member States, the applicable legal regime on ADM is heavily determined by data protection legislation. In as far as EU member States are concerned, the EU GDPR plays a key role, especially Article 22, which prohibits decision-making that is solely based on automatic processing of personal data. Other member States of the Council of Europe which are not part of the EU, have similar data protection legislation in force, also addressing issues of ADM.

An upcoming role for administrative law legislation?

85. Despite the dominant role of data protection legislation, it is certainly not the case that the regulation of ADM and AI is not an issue of administrative law regulation. In several member States (France, Germany, Sweden), general provisions on ADM by the public sector have not been enshrined in data protection legislation, but in administrative law legislation (e.g. some Administrative Procedure Act). The added value of this regulatory approach is that the scope of the applicable provisions is not limited to administrative decision-making where the processing of personal data is involved. However, where regulation of ADM evolves independently of data protection regulation, there is a need for coordination between data protection law and administrative law guarantees.

A variety of topics

86. There is not one single topic standing out when it comes to the regulation of ADM and AI. Both the case law and national debates in literature show that a variety of topics is relevant when public authorities resort to ADM. Some topics are a bit overlooked, e.g. access to software code, but transparency issues are clearly associated with ADM and AI.

87. When it comes to legal responses to the challenges of ADM, several approaches can be discerned. First and foremost, general principles of administrative law are applicable in any context

of administrative decision-making, including ADM and AI. Public authorities are bound by these principles, also in the context of ADM. It is not entirely clear whether this flexible application solves all the issues associated with ADM, as general principles might fall short in protecting citizens in the context of ADM or public authorities face difficulties in contextualizing these general principles.

88. In addition to this principle-based approach, some jurisdictions have adopted specific rules that are tailor-made for (specific instances of) ADM. An example thereof is the rule that an *adverse* decision always requires some form of human intervention or that an automated decision in the form of the imposition of a fine cannot exceed a certain amount. In addition, the GDPR also provides for some rules on ADM, although these rules are of a rather general nature.

89. Finally, there is also a human rights-based approach, vested in some charter of digital rights. The binding nature of such charters is sometimes point of discussion, as this charter may have an ethical more than a legal character.

5. CONCLUDING REMARKS

90. This comparative study has been written as a potential 'building block' for a revision of the Council of Europe's handbook 'The Administration and You'. This handbook contains 21 principles of administrative law concerning relations between individuals and public authorities. It distinguishes between substantive principles, procedural principles, liability and redress issues and reviews and appeals. The approach taken in the handbook is a combination of a list of relevant Council of Europe sources, a commentary on the principle involved and a discussion of relevant case law of the European Court of Human Rights.

91. This comparative study provides for the following input for a potential revision of the handbook:

- 1) The use of ADM and AI raises a lot of different legal issues. Legal attention is not restricted to a single issue that needs to be addressed. Instead, many different and diverse legal issues are discussed in relationship to ADM and AI. The intensity of the topic under discussion depends on the jurisdiction at stake.
- 2) Following this first observation, each of the principles elaborated in the handbook, can be discussed and re-considered from the perspective of ADM and AI. For some issues, this is rather evident (e.g. transparency). The use of ADM and AI puts emphasis on different dimensions of transparency, e.g. explainability and access to software code. The principle-based approach which is characteristic for the handbook is also adopted by different member States when it comes to the regulation of ADM and AI.
- 3) At the same time, there are certain shortcomings in generally applicable rules. Where 'the devil is in the details', it is always necessary to contextualize general principles, in case law or in legislation. This holds even more where the blanket term 'AI' covers a variety of algorithmic systems, sometimes with their own distinct challenges in terms of transparency, accuracy, etcetera.
- 4) Whereas the handbook focuses on the relationship between public authorities and individual citizens, one returning issue is whether individuals are sufficiently equipped to deal with the new challenges posed by AI. Other accountability mechanisms might be necessary in addition to individual legal protection.
- 5) Especially when it comes to the use of AI, there is hardly any guiding legal material available among member States. When it comes to the regulation of AI, EU member States are waiting for the developments on the proposed AI Act. However, even when enacted, the proposed EU AI Act will not contain an all-encompassing regulatory framework for AI applications, as its focus is on high-risk AI systems, whereas public authorities will also use other AI systems. What is more, as far as the regulation of high-risk AI systems is concerned, the focus of the EU AI Act is on the provider of AI systems rather than the user of AI systems.
- 6) There seems to be a need for coordinating several legal developments with regard to AI and ADM. This holds for the approach taken in the proposed EU AI Act, especially where the principle of loyalty and sincere cooperation under EU law de facto prevents EU member States from adopting new legislation that is not in line with the proposed EU AI Act. It also holds for the relationship with data protection law. In this respect, it is interesting to note that only principle 7 on privacy and the protection of personal data refers to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (including the recent protocol amending this convention), while this study shows the need of regulating ADM beyond the domain of privacy law.

92. Thus, the report supports the need to re-interpret and contextualize the different principles enshrined in the handbook in the context of ADM in general and AI in particular. However, a bottom-up approach building on the experiences of different member States is not characteristic for the handbook. Instead, the handbook currently builds in a more top-down manner on different Council of Europe sources, including case law of the European Court of Human Rights. Therefore, a revision of the handbook with the aim of updating it for ADM and AI applications, would require a different approach (building more on member States experiences than before and collecting regulatory ‘best practices’ in other member States as well). The revision of the handbook might also benefit from the ongoing work of the Committee on Artificial Intelligence (CAI).⁶⁸

⁶⁸ The CAI was set up by the Committee of Ministers under the Article 17 of the Statute of the Council of Europe and entrusted with the tasks such as (a) establishing an international process and conduct work to elaborate an appropriate legal framework on the development, design, and application of AI, (b) maintaining a transversal approach, also by coordinating its work with other intergovernmental committees and Council of Europe’s entities equally addressing the implications of artificial intelligence. It will follow the same path in its work as the CAHAI which completed its mandate on 3 December 2021, (CAI Terms and References, available at: <https://rm.coe.int/terms-of-reference-of-the-committee-on-artificial-intelligence-for-2021/1680a74d2f>, accessed 7 December 2022).

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APPENDIX II: ADMINISTRATIVE LAW PRINCIPLES IN THE ADMINISTRATION AND YOU

Principles of administrative law concerning relations between individuals and public authorities

SUBSTANTIVE PRINCIPLES

- Principle 1 – Lawfulness and conformity with statutory purpose
- Principle 2 – Equality of treatment
- Principle 3 – Objectivity and impartiality
- Principle 4 – Proportionality
- Principle 5 – Legal certainty
- Principle 6 – Transparency
- Principle 7 – Privacy and the protection of personal data

PROCEDURAL PRINCIPLES

- Principle 8 – Access
- Principle 9 – Participation
- Principle 10 – Right to be heard
- Principle 11 – Representation and assistance
- Principle 12 – Time limits
- Principle 13 – Form and notification of administrative decisions
- Principle 14 – Execution of administrative decisions
- Principle 15 – Administrative sanctions

LIABILITY OF PUBLIC AUTHORITIES, COMPENSATION AND OTHER REMEDIES

- Principle 16 – Liability and redress

REVIEWS AND APPEALS

- Principle 17 – Internal review
- Principle 18 – Non-judicial review
- Principle 19 – Right to appeal
- Principle 20 – Interim or provisional protection
- Principle 21 – Execution of court decisions

APPENDIX III: CDCJ QUESTIONNAIRE ON USE OF AI SYSTEMS IN ADMINISTRATIVE DECISION-MAKING

Introduction

This questionnaire aims to map the role of **administrative law** in regulating the use of **AI** systems in **administrative decision-making**. As the use of AI systems is only in its infancy, the objective is not to achieve a detailed overview of (the regulation of) all applications of AI in Member States, but to collect illustrative material from Member States, containing concrete examples and best practices in the regulation of AI systems. This more eclectic approach can be helpful in providing concrete input for the topics to be addressed in the revision of the handbook 'The Administration and You'.

The questionnaire below is structured by considering the different **State actors** (legislator, administration, judiciary) separately, followed by a final part on the impact of Council of Europe documents in the regulation of AI in administrative decision-making. In total, the questionnaire contains 16 questions.

For the purposes of this questionnaire, **algorithmic decision-making (ADM)** is understood as any form of administrative decision-making by using (fully or partially) automated systems. **AI** refers to computer applications based on different techniques, which exhibit capabilities commonly and currently associated with human intelligence.⁷⁰ AI systems display that intelligent behaviour by analysing their environment and taking actions – with some degree of autonomy – to achieve specific goals.⁷¹ The element of 'autonomy' in this definition is considered characteristic for AI systems. In this questionnaire, administrative decision-making with the support of AI systems is considered as a subset of **algorithmic decision-making (ADM)**. Some questions deal with ADM in general, as the distinction between AI and other forms of ADM is not always clear and the dividing line is drawn differently among people, dependent on a narrow or broad definition of AI.

Note: In as far as you are hesitant in classifying a certain application of ADM as AI, feel free to include this application in this questionnaire (and mention your hesitance).

A. Legislation

This first part of the questionnaire discusses the role of the **legislator** in regulating the use of AI in administrative decision-making. The legislator may have adopted legislation in the context of administrative decision-making, but the legislator's response to new technological developments is sometimes lagging behind. This may hold in particular for the legislator who is hesitant or struggling in drafting general rules on ADM or AI.

1. Has national legislation been adopted on the use of ADM in administrative decision-making procedures?

Yes / No

⁷⁰ CAHAI (2020) 23, *op. cit.*, p. 4.

⁷¹ European Commission (2018), *Coordinated Plan on Artificial Intelligence*, COM (2018) 795 final, Brussel.

If the answer is 'yes' please provide further details, including any relevant legal provisions.

2. If yes, does this legislation distinguish between AI applications, on the one hand, and other forms of algorithmic support, on the other hand, in the context of administrative decision-making?

Yes / No

If the answer is 'yes' please provide further details, including any relevant legal provisions.

3. Does legislation prohibit explicitly the use of certain applications of ADM (including AI) by public authorities?

Yes / No

If the answer is 'yes' please provide further details, including any relevant legal provisions.

4. In as far as administrative authorities are allowed to use ADM, what topics are covered by legislation on algorithmic decision-making by administrative authorities? (several answers are possible)

- *Right of individuals to be informed on the use of ADM*
- *Right to explanation of individual decisions*
- *Prohibition of discrimination / prevention of bias*
- *Right of individuals to human intervention*
- *Right of individuals to have access to software code*
- *Privacy / Protection of personal data*
- *Other: ...*

Please provide further details to illustrate the different topics.

Several legislative initiatives on the regulation of ADM (including AI) have been launched recently (e.g. the EU Commission Proposal for an Artificial Intelligence Act in April 2021).⁷² This raises the question how domestic legislation relates to these international initiatives.

5. Is there any domestic legislation in preparation for regulating the use of ADM and/or AI by administrative authorities?

Yes / No

If the answer is 'yes' please provide further details, including any relevant legal provisions.

⁷² See also Council of Europe, CAHAI Possible elements of a legal framework on artificial intelligence, based on the Council of Europe's standards on human rights, democracy and the rule of law (CM (2021)173-add), available at: <https://rm.coe.int/possible-elements-of-a-legal-framework-on-artificial-intelligence/1680a5ae6b>, accessed 7 December 2022.

B. Administration

This second part of the questionnaire discusses the role of the **public administration** (executive) in using and regulating AI. The absence of legislation on ADM in general and AI in particular does not need to prevent administrative authorities from deploying these algorithmic systems.

6. What applications of AI by administrative authorities are known in your country?

In the absence of legislation, administrative authorities can bind themselves by adopting policy rules on the use of AI in their administrative decision-making procedures.

7. Have administrative authorities adopted self-binding policies on how to use ADM?

Yes / No

If the answer is 'yes' please provide further details, including any relevant legal provisions.

One specific issue that raises concern is the tension that the use of ADM (including AI) might cause with discretionary powers conferred to administrative authorities by legislation: where legislation confers some leeway to authorities in exercising their administrative powers, the use of ADM (including AI) may restrict this freedom.

8. What approaches are adopted to reconcile the use of ADM with the legal notion of administrative discretion?

Another issue that raises concern is the 'outsourcing' of administrative powers to private parties. Public authorities collaborate with market parties that develop AI software, but this may amount to some form of (illegal) delegation of administrative powers.

9. Does collaboration between public authorities and private parties in developing and deploying ADM systems for administrative decision-making, raise legal issues in your country?

Yes / No

If the answer is 'yes' please provide further details on the issues that may cause problems in this relationship (copyright restrictions, delegation of administrative powers, etc.)

C. Judiciary

This third part of the questionnaire discusses the role of the **judiciary** in regulating AI. (Administrative) courts can play a pivotal role in regulating ADM (including AI), either by applying legal norms dedicated to ADM or by applying and concretizing general principles of good administration in the context of ADM.

10. Is there any case law of courts specifically addressing the use of ADM by administrative authorities?

Yes / No

If the answer is 'yes' please provide further details on the issues addressed in this case law, including any relevant links.

11. If yes, is there any case law of courts specifically addressing the use of AI by administrative authorities?

Yes / No

If the answer is 'yes' please provide further details, including any relevant links.

12. Which general principles of good administration play a role in case law on the use of ADM (including AI) by administrative authorities? (several answers are possible)

- *Right to be heard*
- *Proportionality principle*
- *Principle of equality/non-discrimination*
- *Principle of equality of arms*
- *Other: ...*

13. What are the main topics addressed in case law on the use of ADM (including AI) by administrative authorities? (several answers are possible)

- *Use of ADM / AI as such*
- *Explainability of administrative decisions*
- *Right to human intervention*
- *Privacy / Protection of personal data*
- *Other: ...*

D. ADM/AI, administrative decision-making and the Council of Europe

This final part of the questionnaire addresses the (potential) role of the Council of Europe in regulating the use of AI systems by administrative authorities. Like many other national and international institutions, the Council of Europe is considering its responsibility in regulating AI in administrative decision-making.

14. Does the European Convention on Human Rights (ECHR) play a role in the regulation of the use of ADM (including AI) by administrative authorities in your country?

Yes / No

If yes, please refer to the relevant provisions in the ECHR.

There are several other instruments of the Council of Europe that might be relevant for the regulation of AI (e.g. the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data or the Recommendation on the exercise of discretionary powers by administrative authorities).

15. Do other instruments of the Council of Europe play a role in the regulation of the use of AI by administrative authorities in your country (in legislation, policy rules or case law)?

Yes / No

If yes, please refer to the relevant instruments and discuss the State actors involved (legislator, administration, judiciary).

The Council of Europe handbook 'The Administration and You' aims to provide concrete examples and best practices in the context of administrative decision-making. To that end, it is important to identify those legal issues that deserve explicit attention from the Member States' perspective.

16. Is there any domestic debate among legal scholars on the shortcomings of administrative law to addresses the challenges of ADM and AI in particular?

Yes / No

If yes, please give a very brief impression of this debate: what shortcomings of administrative law are identified, etc.

APPENDIX IV: RESPONSES TO QUESTIONNAIRE (COMPILED)

Questions

- 1) *Has national legislation been adopted on the use of ADM in administrative decision-making procedures?*
- 2) *If yes, does this legislation distinguish between AI applications, on the one hand, and other forms of algorithmic support, on the other hand, in the context of administrative decision-making?*
- 3) *Does legislation prohibit explicitly the use of certain applications of ADM (including AI) by public authorities?*
- 4) *In as far as administrative authorities are allowed to use ADM, what topics are covered by legislation on algorithmic decision-making by administrative authorities?*
- 5) *Is there any domestic legislation in preparation for regulating the use of ADM and/or AI by administrative authorities?*

Table 1: responses (questions 1-5)

	Q1	Q2	Q3	Q4	Q5
Belgium	no		yes		no
Bulgaria	no	no	no		no
Croatia	no	no	no		no
Czech republic	no	no	no		no
Denmark	no		no	no specific topic, but need for compliance with Danish Public Administration Act, Danish Public Information Act and general legal principles supplementing the legislation	no
Estonia	no	no	no		yes
Finland	no				yes
France	yes	no	yes	right to be informed; explanation; human intervention, access to software code	no
Germany	yes	no	yes	right to explanation; human intervention; privacy	yes
Hungary	no	no	no		no
Latvia	yes	no	yes	right to be informed; non-discrimination; human intervention; privacy	yes
Lithuania	no	no	no	human intervention; access to software code	no
Montenegro	no		no		no
North Macedonia	no	no	no		no

	Q1	Q2	Q3	Q4	Q5
Norway	yes	no	yes	human intervention; privacy; regular quality control	no
Poland	no		no		no
Portugal	yes	no	no	right to be informed; explanation; non-discrimination; human intervention; privacy	no
Slovenia	no		no		no
Spain	yes	no	no	right to be informed; non-discrimination; human intervention; privacy	yes
Sweden	yes	no	no	explanation; non-discrimination; privacy	no
Switzerland	yes	yes	no	right to be informed; non-discrimination; human intervention; access to software code; privacy	no
Türkiye	no		no		no
Ukraine	no	no	no		yes

Questions

- 6) *What applications of AI by administrative authorities are known in your country?*
- 7) *Have administrative authorities adopted self-binding policies on how to use ADM?*
- 8) *What approaches are adopted to reconcile the use of ADM with the legal notion of administrative discretion?*
- 9) *Does collaboration between public authorities and private parties in developing and deploying ADM systems for administrative decision-making, raise legal issues in your country?*

Table 2: responses (questions 7-9 - executive)

	Q7	Q8	Q9
Belgium	no	n/a	no
Bulgaria	no	n/a	no
Croatia	no	n/a	no
Czech Republic	no		no
Denmark	no	compliance with Danish Public Administration Act, Danish Public Information Act and general legal principles supplementing the legislation.	no
Estonia	no	every discretionary decision is presumably special and unique	no
Finland	no		yes

	Q7	Q8	Q9
France	no	the administration retains a discretionary power in the decisions it takes on the basis of automated processing of personal data	yes
Germany	yes	see answers to questions 1 and 5	
Hungary	yes		no
Latvia	no	minimum fine in case of ADM	no
Lithuania	yes	Need for human intervention	no
Montenegro	no		no
North Macedonia	no	National AI strategy	
Norway	yes	Norwegian legislation regarding ADM does in several cases forbid the use of ADM in decisions that require discretionary application of the law, unless the law in reality leaves no room for doubt.	yes
Poland	yes	see answer to question 6	yes
Portugal	yes	see answer to question 8	no
Slovenia	no		
Spain	no	The main principle is that administrative discretion has the same limits whether decisions are taken with an ADM or not.	no
Sweden		Need for human intervention	
Switzerland	yes	The new DPA provides that the data controller must give the data subject, if he so requests, the opportunity to express his views in the case of an automated individual decision.	no
Türkiye	yes		no
Ukraine	no		

Questions

- 10) *Is there any case law of courts specifically addressing the use of ADM by administrative authorities?*
- 11) *If yes, is there any case law of courts specifically addressing the use of AI by administrative authorities?*
- 12) *Which general principles of good administration play a role in case law on the use of ADM (including AI) by administrative authorities?*
- 13) *What are the main topics addressed in case law on the use of ADM (including AI) by administrative authorities?*

Table 3: responses (questions 10-13 - judiciary)

	Q10	Q11	Q12	Q13
Belgium	no			
Bulgaria	no	no		
Croatia	no	no		

	Q10	Q11	Q12	Q13
Czech republic	yes	no	reason-giving: the principles of prohibition of abuse of power and administrative discretion and the principle of protection of the public interest	Explainability of administrative decisions
Denmark	no	no		
Estonia	no	no		
Finland	no			
France	yes	yes	principle of proportionality; principle of non-discrimination	use of ADM/AI; privacy
Germany	no	no		
Hungary	no	no		
Latvia	no		principle of the prohibition of arbitrariness	
Lithuania	yes	no	right to be heard; proportionality; non-discrimination; equality of arms; right to be duly informed of one's rights and legal status; right to evidence-based process and adversarial proceedings	use of ADM/AI; explainability
Montenegro	no	no		
North Macedonia	no	no		
Norway	no	no		
Poland	no	no		
Portugal	yes	no		
Slovenia	no			
Spain	no	no	technological neutrality; accessibility; ease of use; interoperability; proportionality; principle of personalization and proactivity	
Sweden	no	no		
Switzerland	no	yes	right to be heard; proportionality; non-discrimination; legality	privacy
Türkiye	no			
Ukraine	no	no		n/a (but possible applications in the near future)

Questions

- 14) Does the European Convention on Human Rights (ECHR) play a role in the regulation of the use of ADM (including AI) by administrative authorities in your country?
- 15) Do other instruments of the Council of Europe play a role in the regulation of the use of AI by administrative authorities in your country (in legislation, policy rules or case law)?
- 16) Is there any domestic debate among legal scholars on shortcomings of administrative law to address the challenges of ADM and AI in particular in the context of administrative decision-making?

Table 4: responses (questions 14-16 - Council of Europe)

	Q14	Q15	Q16
Belgium	yes	no	no
Bulgaria	no	no	no
Croatia	yes	no	no
Czech republic	yes	yes	yes
Denmark			
Estonia	yes	yes	no
Finland	no	no	yes
France	yes	yes	no
Germany	yes	no	yes
Hungary		no	
Latvia	yes	yes	yes
Lithuania	yes	yes	no
Montenegro	no	no	no
North Macedonia	no	no	no
Norway	yes	no	yes
Poland	yes	yes	yes
Portugal	yes	yes	yes
Slovenia	no	no	yes
Spain	yes	yes	no
Sweden	no	no	yes
Switzerland	yes	yes	yes
Türkiye	no	no	yes
Ukraine			