AI & processo penale: la prospettiva del giurista

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Right to an effective remedy

Several potential (legal) fairness violations:

- Individual vs statistical assessment
- Presumption of innocence: irrebuttable presumptions?
- Right to remain silent
- ...

Article 13 ECHR
Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity

Article 47 CFREU
Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article [...]

Which remedy is effective?

- Available both on the books and in action
- if it can prevent an alleged infringement from persisting or provide an adequate response for past infringements (concrete assessment)
- judicial authority/independent and impartial authority
- Effective remedy as full judicial review (authority with the power to rule both on questions of fact and of law)

.Pending cases before the CJEU:
- Joined cases C-67/20, C-68/20 and C-69/20 (Dublin III Regulation 604/2013)
- Case C-831/219 (Unfair Terms Directive 93/13)
- Joined cases C-225/19; C-226/19 & C-121/20 (Visa regulation 810/2009)
Article 11, Dir. 2016/680

Automated individual decision-making, including profiling

1. Member States shall provide for a decision based solely on automated processing, including profiling, which produces an adverse legal effect concerning the data subject or significantly affects him or her, to be prohibited unless authorised by Union or Member State law to which the controller is subject and which provides appropriate safeguards for the rights and freedoms of the data subject, at least the right to obtain human intervention on the part of the controller.

➢ See also Article 22 GDPR

Art29WP:

• If a human being reviews and takes account of other factors in making the final decision, that decision would not be ‘based solely’ on automated processing.

• The controller cannot avoid the Article 22 provisions by fabricating human involvement.

• [oversight of the decision] should be carried out by someone who has the authority and competence to change the decision.

➢ But...limited human skills in reviewing automated decisions...

➢ Access to relevant information...
Is this really a new problem?

The problem of “human black boxes”

• Jury verdicts
• Prognosis based on the judge’s “intuition,” “sense of justice,” or “experience”
  • Application of measures alternative to detention
  • Application of pre-trial measures
  • …

➢ Different level of tolerance for human and machine mistakes
Which possible solutions?

US case-law

- Supreme Court of Wisconsin, *State v. Loomis*, 881 N.W.2d 749 (Wis. 2016)


M. Gialuz, “Quando la giustizia penale incontra l’intelligenza artificiale: luci e ombre dei rischi assessment tools tra Stati uniti ed Europa,” Dir. pen. cont., 29.05.2019

No violation if the tool is correctly administered = supported by other independent factors and not determinative factor

- Also when the tool is used for purposes different from the original ones

- Can we really distinguish between partially and totally automated decision-making?
Which possible solutions?/2

Creative proposals

- Certification
- Explicable AI
- Redundancy approach: Right to a second automated assessment (to substitute the first one?)
  - Adequate structures in Court of Appeals (expert witness approach)

Contissa, Lasagni, Sartor, Quando a decidere in materia penale sono (anche) algoritmi e IA: alla ricerca di un rimedio effettivo, «DIRITTO DI INTERNET», 2019, 4, pp. 619 – 634
Thank you for your attention!

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