



ALMA MATER STUDIORUM
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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)

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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?/1

US case-law

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

Indiana Court of Appeals, *Malenchik v. State*, 928 N.E.2d 564, 574 (Ind. 2010)

S. Quattrocolo, "Quesiti nuovi e soluzioni antiche? Consolidated regulatory paradigms vs. risks and fears of 'predictive' digital justice," 4 *Cass. pen.* (2019), 1748 ff

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)

Thank you for your
attention!



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