

# Data reform: Unlocking AI to boost innovation across industry

Proposed potential reforms include introducing further clarity on how the UK GDPR's fairness obligation would be applied in this context. By **Alexander Dittel** of Wedlake Bell LLP.

Article 22<sup>1</sup> regulates automated decision-making (ADM) which is often integral to artificial intelligence (AI) systems. AI is deployed to assist a human decision-maker or to make decisions automatically. Article 22 only regulates the second scenario which is said to cause confusion and the UK Government proposed removing it. In response, the Information Commissioner's Office (ICO) is suggesting to expand Article 22 to all ADM.<sup>2</sup>

This is unsurprising. Article 22 is the only explicit legal rule about ADM and an important building block for future AI-related jurisprudence. It guarantees transparency and human intervention designed to protect humans against the "negative, even catastrophic, effects" of AI on human rights, as highlighted in the UN High Commissioner's recent report.<sup>3</sup> In contrast, whilst appreciating the risks of AI, the Government's "pro-growth and innovation-friendly" data protection reform is intended to pave the UK's path to becoming a global AI superpower.<sup>4</sup> However, any reduction in data protection could affect the UK's adequacy status with the European Union (EU).

At the same time, there is a race for science and technology dominance among superpowers like the US and China. As AI is much to do with our fundamental rights and freedoms, the need for the UK's continued contribution to building ethical standards for AI cannot be underestimated. The Government is poised not to let the General Data Protection Regulation (GDPR) cost us that race. The ICO welcomes the Government's proposals but warns that "the devil will be in the detail" of the final package.<sup>5</sup>

## WHAT IS AI / ADM?

In 1955, Professor John McCarthy suggested a research study based on the premise that every "feature of

intelligence can in principle be so precisely described that a machine can be made to simulate it".<sup>6</sup> The term "artificial intelligence" was born.

Today, AI is the use of digital technology to mimic the problem-solving and decision-making capabilities of the human mind, whilst not being limited to "methods that are biologically observable".<sup>7</sup> Machine learning is a subset of AI finding patterns in large amounts of data and performing repetitive tasks and improving with experience.

Automated decision-making is a machine-made decision not involving a competent human reviewer.

## RISKS

Professor Stephen Hawking said AI "will either be the best thing that's ever happened to us, or it will be the worst thing. If we're not careful, it very well may be the last thing."<sup>8</sup> The pressing need to develop AI and harness its benefits is overshadowed by the risks of AI. The UN High Commissioner's report highlights a number of significant risks of AI in law enforcement, public services, employment and online content management.

AI in law enforcement could lead to arbitrary and unlawful interference with the right to privacy which plays a pivotal role in the balance of power between the state and the individual. Based on a large dataset, AI can flag likely suspects and trigger a search of a person without a reasonable suspicion that is transparent and explainable.

AI can identify patterns of human behaviour, draw conclusions about people and predict likelihood of future behaviour or events. AI-made inferences and predictions, despite their probabilistic nature, can be the basis for decisions affecting people's lives. AI intensifies and incentivises the interference with human rights by encouraging large scale data collection for instantaneous automated processing.

Predictive biometrics, despite their unreliability, could be deployed to deduce people's emotional and mental state to gauge if they present a security threat or to assess their suitability for employment. Remote biometric recognition reveals unique characteristics and key attributes of a person and allows users to systematically identify and track individuals.

AI helps to rank and personalise content based on user profiles. AI can be used to counter perceived online harms without appreciating the severe impact of AI on privacy and people's capacity to form opinions.

AI will arguably lead us on a path of ever-decreasing human intervention in decision-making. The private and public sector are chasing after a cost-saving which can only be achieved if qualified and arguably expensive staff are replaced with AI and low-cost workers. These workers are unable to understand or challenge the AI's exceptional decision-making abilities. Even today, the "lack of skilled people gives AI the lead."<sup>9</sup> Escalation to a human reviewer will lose significance, the AI will receive fewer and fewer corrections to learn from. AI oversight will perish.

In future, AI will fully take over important decisions and functions in our lives, and machine "unlearning" will become impossible. AI is going to change our lives forever. For this reason, AI outputs must be benchmarked against the noblest examples of humanity and do far better than any human could to win the trust of humans.

## NEW AI REGULATION?

The reform is about innovation, and innovation is often about AI. Dubbed as "one of the most important innovations in human history",<sup>10</sup> the Government sees AI as a force to "drive substantial economic growth" of £1.04 billion over ten years and talks about

“hundreds of unforeseen benefits that AI could bring to improve everyday life”. Meanwhile, the UN High Commissioner urges countries to adopt adequate laws to address the “multifaceted adverse human rights impacts” of AI which due to AI’s scalability can dramatically increase even with seemingly small error rates.<sup>11</sup>

The EU’s draft AI Regulation<sup>12</sup> already offers an example of what the law might look like. The EU’s GDPR and AI Regulation create a pioneering AI compliance framework which could possibly only be rivalled by the recent Chinese draft Algorithm Regulations.<sup>13</sup>

In the UK, anti-discrimination laws, judicial review and various torts offer remedies against unfair ADM alongside the GDPR. However, achieving justice is reserved for those who understand their rights and can afford it, while AI will most likely affect those less informed and less privileged. Sectoral regulation, such as the Financial Conduct Authority’s Treating Customers Fairly Principles, will assist as regulators turn their attention to AI. Technical standards for AI are being developed.<sup>14</sup>

Acknowledging that AI risks and harms go beyond the scope of data protection laws, the Government is expected to publish a White Paper in early 2022 on AI governance and regulation.<sup>15</sup> The UN High Commissioner suggests that such law should establish black box and training data transparency, manufacturer and operator liability, core principles such as equality, participation, accountability and proportionality, prohibition on social scoring of individuals by the Government, and other high-risk use cases, a moratorium on remote biometric recognition technologies in public spaces, human rights due diligence on AI systems and additional obligations on public sector use of ADM.

### ACCESS TO DATA

The Government wishes to harness the “huge potential for linkage and re-use of datasets across organisations, domains and sectors”. Training data, input, output and baseline data are essential for AI systems to operate.

Under the reform, access to training data (data used to train AI systems) will

be ensured through freedom to experiment where it does not cause harm, underpinned by new provisions about lawful basis, transparency and anonymisation.

Research “without unnecessary recourse to consent” will be achieved by proposing a new lawful basis for research, a new wider definition of “research”, explicitly identifying research purposes as compatible further processing, permitting further processing for incompatible purposes which safeguard important public interest and allowing valid consent to be given for unknown future research. Private companies which act for a public body will be able to rely on public task processing.

An exhaustive list of legitimate interests including improving the safety of a product, internal research and development, and business innovation, will not require the balancing test of operational need and individual rights. The ICO clarified that the balancing test would remain but the Government would be responsible for it. Hence the list must be very specific, which is currently not the case.<sup>16</sup>

A clarified disproportionate effort exemption will reduce the transparency burden in relation to data sharing, retention and other aspects of research.

Statutory provisions will clarify that personal data held by one controller could be considered anonymous data in the hands of another controller if it is impossible for that controller to identify the individuals without spending unreasonable time, effort or resources. This is already known as the ICO’s “motivated intruder” test.<sup>17</sup>

In relation to input data, the Government wishes to ensure the explainability, accountability and trust in AI. New safeguards will be implemented to enhance the existing protections under the GDPR in respect to inferred data. A biased decision could be made if individuals are judged on belonging to an algorithmically defined group, for example, people living in certain postcodes. Individuals will have no visibility about what inferences organisations may draw about them. The recent Deliveroo fine in Italy highlighted the excessive data collection and inferring data about delivery riders’ performance which could affect the workers’ future employability.<sup>18</sup>

In relation to output data, the Government is proposing to clarify the concept of fairness which currently includes expectation fairness, fairness of process and outcome fairness. As such broad interpretation could hinder experimental innovation, the Government envisages a narrower definition of “fair processing”. However, what could be better suited to govern the growing complexities of AI than a powerful concept like fairness? The ICO expressed the view that it would be “deeply concerned” about any removal of “the centrality of fairness in how people’s data is used”.<sup>19</sup>

As discussed, Article 22 will not be triggered unless the ADM is “based solely on automated processing” and has “legal effects ... or similarly significantly affects” the individual and is based on personal data. The provision is often circumvented in practice by introducing human review in the process. However, there is an argument that an unskilled workforce will often not offer meaningful human intervention and Article 22 must be complied with. The ICO’s counterproposal is extending the provision to all ADM, as removing it could have a significant impact on public support for AI.

Trustworthiness will also depend on human oversight and the explainability of ADM. In the above mentioned case, Deliveroo was ordered to explain to its riders how jobs are allocated and how individuals’ rights including human intervention can be invoked to substantially correct the functioning of the system. The company was ordered to implement regular AI oversight activities. Regrettably, the UK Government is not formulating any requirements about AI or human rights due diligence as suggested by the UN High Commissioner.

Nevertheless, the UK reform highlights that AI providers must be held to a high standard, otherwise the responsible party could face claims for compensation from its disgruntled service users. Ideally, your provider should have an internal algorithmic audit team with a record of successful interventions, oversight investigations and transparency about unfair outcomes of ADM and their mitigation. Providers must be firmly self-critical and not take undue comfort from positive metrics.

This is because many AI outputs below par will not be flagged by service users if they are misunderstood or it is inconvenient to do so, so significant learning opportunities for the AI system will be missed. If the provider claims that no personal data is processed or cannot point to a mature set of policies including a Data Ethics Policy, you might do well by walking away. Public authorities will not be able to comply with the proposed enhanced transparency about the use of ADM if their provider does not support such reporting.

Finally, the Government wishes to give immunity from fines to those organisations that seek the advice of the ICO to encourage a proactive, open and collaborative dialogue with the regulator.

In relation to baseline data, the Government wishes to make it easier for organisations to access fair baseline data to benchmark the AI's performance and implement novel bias mitigation techniques and stop "cementing ... bias in society". The use of special category data "for the purposes of identifying or keeping under review the existence or absence of equality of opportunity or treatment of [specified

vulnerable] people" will be specifically authorised, to offer an alternative to the use of explicit consent.

Data intermediaries are expected to become trusted guardians of data and support data collection, sharing, and pooling in high public-interest applications.

## CONCLUSION

The Government's AI ambitions are commendable and it would be irresponsible not to explore opportunities to build on the UK's leadership in AI.

The Government wishes to maintain a high standard of data protection while giving organisations more freedom to experiment with less accountability and fewer rules. Yet, it is hard to imagine how applying the new rules, which ought to apply to very specific circumstances and will be subject to safeguards, could be relied upon without a substantive compliance assessment of sorts.

Another question is how might the new rules change the ICO's enforcement policy. Arguably, with more freedom to experiment and fewer compliance obligations the regulator should take an active role in setting the

right examples and ensuring that people's rights are not interfered with disproportionately.

Data protection remains a strong framework to regulate AI and it is hoped that the Government will enhance the protections it offers rather than diminishing them. We will await the proposed legislative text with great interest.

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## Government consultation on post-Brexit data protection reforms

**Marta Dunphy-Moriel** of Dunphy-Moriel Legal Services Ltd reviews the planned changes which will steer the UK further away from the GDPR.

In a bold move, the Government has taken a significant step to reform the UK's data protection regime post-Brexit, a few weeks after receiving an Adequacy declaration from the European Commission.

The consultation paper: *Data: A*

*new direction* (consultation) is a clear declaration of intentions which sets out the Government's proposals to update the UK privacy regime and diverge from the EU GDPR.

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## Trends in GDPR enforcement across Europe and the UK

Analysis by **Richard Jeens, William Doyle, Ross O'Mahony** and **Alex Buchanan** of Slaughter and May.

The introduction of the General Data Protection Regulation (EU) 2016/679 (the GDPR) in May 2018 was a dramatic step forward in empowering data protection authorities (DPAs) across the EU to tame the "wild west" of the new digital economy and safeguard

data rights. Post-Brexit, the UK has (so far) maintained this data protection enforcement framework through the retention of the GDPR in UK domestic law (as the "UK GDPR").

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## New avenues for the UK – or a road block ahead?

The government issued its extensive data protection consultation document back in September. Now, just a few days remain of the consultation period which ends on 19 November. We have studied the proposals in detail – much of it is aimed at cutting red tape and boosting innovation (p.1). The plans would reduce GDPR protections which are onerous in part. But are the changes justified just to make life easier for companies? At the end of the day, data protection is about individuals. Large organisations that *PL&B* deals with are likely to stick to GDPR standards anyway due to their international presence.

Some of the changes seem to have been put forward just to test the waters. For example, is there a need to change DPO requirements as someone will have to do the job anyway, or be part of a person's job in all organisations. On the other hand, no doubt there is support for reducing the data breach notification duty. It occupies much time both at the ICO and at companies which have felt obliged to report even small breaches with no real risk to individuals.

Much of the consultation is about Artificial Intelligence (p.13). One of the more radical proposals is removing Article 22 of the UK GDPR, (the right not to be subject to a decision based solely on automated processing) as recommended by the Taskforce on Innovation, Growth and Regulatory Reform (*PL&B UK Report* July 2021 p.23).

Is all this a step too far for retaining EU adequacy? The EU has so far been silent, as this is after all just a consultation at this point.

Read on p.16 how to process employees' location data within the parameters of the law. This is a topical issue now that many more people work from home. The ICO recently called for views on its employment practices code which is being revised to meet these new challenges. We also report on enforcement trends in the UK and abroad (p.1), and what is required by the ICO for a Transfer Risk Assessment document (p.10).

Laura Linkomies, Editor

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