

Position Paper

# AI governance decisions by European Parliament: two steps forward, one step back

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## Introduction

Artificial Intelligence was the central topic in the three proposals that the European Parliament (EP) adopted on Oct. 20. Three Parliament resolutions set the stage for the development and deployment of artificial intelligence, robotics and related technologies in the EU. The resolutions comprise a Framework for the ethical aspects of artificial intelligence, robotics and related technologies, a Civil Liability regime for artificial intelligence and a Resolution on the intellectual property rights for the development of artificial intelligence technologies. [https://www.europarl.europa.eu/doceo/document/TA-9-2020-10-20-TOC\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2020-10-20-TOC_EN.html)

In this position statement we want to share our first assessment of these policy documents in the light of our research on governance of digitalization today and tomorrow ([www.digov.eu](http://www.digov.eu)). In sum, we hold these decisions to be an important move forward for the EU to show where we stand in the global playing field of breakthrough technologies. A clear policy helps to avoid unhealthy competition between member states and to prevent a race to the bottom for the involved industries. However, the instrumental approach of the European Parliament is in our view disappointingly conservative and insufficiently futureproof.

On the ethical framework we will stress that the risk-based approach and the principle of human centric technology application are a good starting point. The elaboration however does not end well. On the liability issue we will point at the important policy choice in favor of the operators' liability, which is promising under certain conditions. The intellectual property policy resolution we appreciate as an example of running without moving an inch.

## I Framework for the ethical aspects of artificial intelligence, robotics and related technologies

### *Sectoral versus generic governance*

Applying a risk-based approach the European Parliament proposes a sectoral governance diversification, with a special position for high risk sectors, that are listed in an annex. We witness that the concept of risk is difficult to handle because it comprises chances for failure, chances for damage,

nature/seriousness of damage and chances for loss of trust. The EP focusses on risk for breach of fundamental rights and safety rules and combines the list of sectors with a list of high risk uses or purposes. In the annex however we see references to injury or harm, which is not the same as violation of those rights and rules. So, the concept is murky in the EP resolution already. Furthermore, even when the concept is clear, the appreciation of the probabilities is highly influenced by political views and economic interests. So, we have doubts whether the risk variation on the two scales provides widely acceptable guidance to lead us to prioritizing the real risks from the perspective of individual businesses and citizens. For example, we wonder how employment can be a sector (on the first list), beside health care, transport and energy, where recruitment (on the second list) is indeed a well-documented risky purpose. Fortunately, the EP resolution demonstrates awareness of this difficulty by promoting a mechanism for regular review of the risk lists.

We do prefer a sectoral approach to governance of AI over a generic approach. In our view, the commonality of the used technology is insufficient to support a generic approach. In no way does the AI governance topic resemble the issues that the EU has generically dealt with, such as data-protection. In comparison, the GDPR could be produced as a technology-insensitive piece of regulation for the protection of ingrained European values, importantly building on decades of practices developed under the preceding governance regime. But AI does not represent a common European value, it is a technological novelty, very impactful indeed, that appears in a number of, if not all social and economic sectors of our society. Those sectors have in the past managed with the emergence of other technologies, that disrupted their ways of working and communicating, and we are not convinced that AI is in that respect fundamentally different. So, the topic is not suitable for a generic approach, but we have an additional argument.

The technology will have great impact on many aspects of our lives, when, where and to the extent we allow that to happen. This is not an inevitability, it is a policy decision on the level of individuals, families, companies/employers, doctors and nurses, public administrators and governments. The governance should be tailored towards the concrete effects on the interests that are impacted. That can only be properly assessed, discussed and decided at the lowest level possible, where the consequences of policy choices play out in real life. It is obvious that general high-over principles give some guidance such as the principles cited by the EP: transparency, explainability, fairness, accountability and responsibility. It is also undoubtable that in many instances the principles give contrarious guidance. That controversy can only be resolved by the persons or institutions that will experience the consequences of the choice for solution A or solution B. This implies that in our view the governance should reflect to the extent possible the specificities of the interests at stake, which cannot be expected to happen in a meaningful way across sectors. It is not the technology that dominates the governance issues, it is the concrete interests that must be balanced in the governance approach. This leads us to underscore that a sectoral approach is an inevitability.

With these arguments we criticize the proposal to establish designated independent authorities for the monitoring of the norms and regulations (see art. 18 of the proposed Regulation in the annex). Specialized agencies, be it at a member state or at the Union level, could indeed provide for the necessary generic expertise and weigh in seriously against other actors when executing its duties, such as professionals, tech providing industry etc.. But we do not see convincing evidence that this institutional framework, like the one for data protection, is the panacea to overcome all governance diversification, if that is the aim. It will remain a continuous pulling and pushing to achieve sustainable

coordination and cooperation with sectoral institutions. Moreover, the trade-off would be a greater distance towards the specific sectors, resulting in a less effective governance ecosystem.

Moreover, the EP's approach leads to extra supervision pressure on the industries and service providers in the sectors, adding another inspector/regulator to the ones they already must placate in their daily businesses. We encourage the EU to investigate alternative routes for coordination, communication and joint expertise, so that in a sectoral governance structure contradictory and mutually damaging policies are prevented.

In sum, we find the cross sectoral supervision an inconsistency in itself and an unwarranted increase of the burden on businesses, hospitals and all other organizations. In our view, it is much better to reinforce existing regulators or inspectorates, tailor-made for the specific purpose of supervising the use of these technologies in the field.

One important aspect with regard to those agencies is their relationship with legislatures. A legislature typically fears losing control over agencies ("mission creep") and therefore it tends to restrict the flexibility of agencies. In case of new technologies this leads to a trade-off that has to be wisely balanced: On the one hand any agency regulating new technologies needs a strong legitimacy back-up by legislatures, on the other hand there must be room for flexibility of regulation, because of the technological dynamics and to prevent a situation in which innovation and growth become stifled. Thus, in every regulatory context the balance should be defined between the formulation of *regulatory standards* on the one hand and *highly specific rules* on the other. We believe the specialized agencies are in the best position to achieve that balance.

Our argument leads to the question of coordination at the Union level. In that regard we would encourage to take the matter a step further than the EP does. At the Union level we could imagine an effective control and coordination function for a designated supervisor for these technologies in our scenario the duplication of supervision is not a burden on the industries, but on the sectoral supervising agencies and inspectorates. This represents a better-balanced system of coordination and sectoral specification than included in the EP resolutions.

**The sectoral approach to governance of AI, robotics and related technologies is supported but should be maintained when it comes to establishing supervisory institutions. The EP scenario leads to reduced efficacy and an unwarranted increase of the burden on the industries that work with the new technologies.**

### ***Human Centred AI***

The EP Framework promotes an ecosystem of trust, for which an important building block is to place the humans center stage. This is indeed in line with the variety of ethical guidelines that we have seen in the recent years. However, this raises as many new questions as it answers. We believe that the answer to the question: "what does it mean to say, that humans are at the center?", can only meaningfully been given when one approaches the matter at the concrete level, in the particular setting where the AI system has its impact; for example, in the health care sector, one of the high-risk sectors on the list of the EP resolution. The question is then rephrased as: "What does human centeredness bring the individual as entitlements towards the medical service provider, whenever she is confronted with an AI powered system or robot?"

First of all, it is far too simple to say: she always has the right to ask a personal intervention by a human. Effectively that right only exists in special circumstances (such as under art. 22 GDPR). Moreover, what is the sensibility of that entitlement, when a human intervention rises the chances for biased decisions, negligence and delays? The conditions under which the human intervention leads to a meaningful reassessment of the case are yet to be fully researched, considering the legal, psychological and also organizational ramifications. So, the entitlement should not be absorbed by allowing/prescribing human intervention. The right to a human intervention in health care situations is also promoted by others with the argument that it would bring the responsibility of a human into view. We have difficulty in connecting responsibility to a human when the intervention opportunity would effectively be below a minimum of meaning, but that needs further study in the legal/ethical area, with an eye for the sectoral specificities. As regards liability we come back to the human responsibility below.

In our view, the individual is entitled to be treated as individual, to the extent necessary for the specific context, where human dignity requires respect for the capacities as well as the fallibilities. This is true for treatment by an AI powered machine or robot to the same extent as it is for treatment by a human. This brings some specific requirements for AI implementation. The benefits of the EP resolution are that the values at stake are clearly underscored: non-discrimination, non-bias, social responsibility, gender equality, environmental sustainability and respect for individual privacy and protection of personal data.

We should mention here the provision in the draft regulation of the EP on human oversight and human control (art. 7 in the annex). That article requires the technologies to be developed and deployed in such a way that there can be full human oversight at any time. Furthermore, full human control should be possible to be regained when needed, including through the altering or halting of those technologies. In our assessment this effectively rules out learning algorithms and the increase of autonomy in robotic systems in all the high-risk sectors. We doubt whether in the current situation that is a viable option and we want to underscore that enforcement of these requirements will present huge efforts to the supervisors, where we would prefer to so these efforts in function of the risks of the specific deployment in a specific sector.

**The EP specifications of human centric AI may not bring the expected effective safeguards. The values at stake are clearly listed and deserve further elaboration at the sector level.**

## **II Civil liability regime for artificial intelligence**

The EP seeks to come to a future-oriented civil liability framework, which merits our support. We see that the EP recognizes what legal complications need to be tackled in order for a liability regime to be effective. The increasing autonomy of AI powered systems and the connectivity between systems represent a tough test to the existing approaches to liability for any harm. Also, the resolution correctly refers to the issues of insurance for those that use AI powered systems in their daily business, which requires the assessment of future legal obligations as clearly as possible. That common rules across the EU market are a benefit is a reiteration of the underlying paradigm for existing EU liability regulation, such as the Product Liability Directive. The EP proposes, as the EC has done, to redefine the concepts of this regulation, so that it comprises digital content and digital services. It will be a step forward, but it will also bring up a host of new issues, especially when we consider that digital products have a high volatility, even higher than products as it is now understood. For example: Will every person, who had added to the (millions of) code entries of a system, be conceived as producer?

The EP also opts for Operator Liability. The operator is the actor that is controlling a risk associated with the AI-system and will be in many cases the first visible contact point for the affected person. She/he benefits from the workings of the AI powered system, so it is only fair to pinpoint the liability on this person, being either a natural or a legal person. Offhandedly the EP rejects the recognition of an AI as separate legal entity, without paying much attention to the possible benefits. In our view, that is a flaw in the resolution, where in 2017 the EP had adopted a report stating the opposite. We believe that the debate should remain open and strongly focussed on the pragmatic benefits of this possibility, not hindered by any legal doctrinal fundamentalism.

As we have put forward in our reply to the EC White Paper in AI in June 2020, a particular challenge lies in the situations where the final harm is the result of a complex combination of activities and contributions in a value chain or decision-making process. The EP takes this into account and seeks to minimize the downsides of this reality for a person suffering harm. Operators that have joint control over the risks in the system that has caused the harm should be “jointly and severally liable while having the right to recourse proportionately against each other”. As long as control and the distribution of it is the underlying criterion, the liability is based on fault, i.e. the shortcomings of the operators in avoiding or neutralising the risk.

The risk-based approach mentioned above is also included in this resolution on liability. The EP defends a diversification of the liability regime along the lines of risk categories, with a distinct mix of fault liability and strict liability for each category. As annex to a future regulation a list should be provided and updated regularly in which guidance is included in these risk categories. To arrive at that the production and revision of the list is delegated to an expert group, which impresses as a complex and not very transparent procedure. Moreover, the procedure does not and should not preclude a full reassessment of that list when the proposal for the next version comes to the Parliament for approval. Legislative decisions with such huge impact should stay with the Parliament, and not hidden away into an annex updating procedure.

As regards the insurance aspects, the EP sets an important step forward. A mandatory scheme, as is common for motor vehicles, is proposed for all operators of high-risk systems in the list. Where in the observation of the EP the real high-risk systems are relatively rare and the risks highly uncertain, a mandatory scheme could prevent that “insurance premiums (become) prohibitively high and thereby an obstacle to research and innovation”. Besides, the mandatory insurance scheme would benefit the individual facing a complexity of operators in the system that caused harm. We propose that in the next steps towards regulation the position of the individual receives appropriate attention regarding point of entry for the claim, but also with regard to the burden of proof. A correction mechanism for the flaws causing the harm – upstream as well as downstream – to prevent further damage in the future should be considered as well.

**The operator liability would be a step forward. Also, the mandatory insurance for high-risk AI applications would resolve important difficulties. The position of the individual vis-à-vis networks or chains of operators merits further attention, including the correction of flaws in a complex system.**

### **III Intellectual property rights for the development of artificial intelligence technologies**

The resolution on intellectual property we find the least innovating of all three assessed here. Although the EP includes much of the innovative developments regarding copy rights, patents etcetera, it sticks to the paradigm of human involvement and originality. Thereby the discussion on other solutions is postponed, for example on the attribution of non-material property rights to the digital entity itself or to any form of commons. This is an important question, because if in the future machines become less a tool for invention, but more a creator, it must to be decided to whom the intellectual and commercial merits accrue. Is it then necessarily the maintenance crew of the machine that goes with the profit? Or, would we not see society or any other form of commons the rightly benefiter of the invention made by the machine? This is not a crazy question, if one recalls the heated debates about the social use of patent law some 150 years ago. In any case, by sticking to the current system the EU would pass on an opportunity to become global leader in developing new business models for AI developers, which still need a lot of thinking and experimenting, for which a legal enclave should have been put forward more prominently. The EP should have encouraged this legal innovation instead of reformulating the current paradigm.

**By sticking to the current paradigm for intellectual property, the EP missed an opportunity for legal innovation.**