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AI Regulation in the World

A QUATERLY UPDATE

OCTOBER-DECEMBER 2020

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by

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ABOUT THE AUTHOR

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ABOUT THE REPORT

This report brings together some of the most recent significant global developments pertaining to AI and regulation that took place during the last quarter of 2020. While the focus of the report is on new legislation, law proposals and recommendations on how to shape the future regulatory framework to govern artificial intelligence, it naturally highlights updates pertaining to related fields (such as data protection).

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Overview

2020 was a challenging year that shifted how our society functions and can continue to function in the future. Major crises such as pertaining to the global pandemic, but also to public affairs, political events and climate disasters seemed to be chasing one another.

As the implications of these events continue to unfold, one apparent observation is the evolving role that technology will continue to operate in almost every facet of our lives. Be it online social platforms that play a significant part in civic society debates and physical clashes, predictive models employed to forecast virus spread or patterns of wildfire routes, tracking applications used to prevent and minimize infection rates of a disease, or novel technologies that allow rapid development of "game-changing" vaccines.

Along with the tremendous promise of the positive implications of technological tools, there are also significant concerns as to intended and unintended risks that such technologies may entail. Which can and are not limited to include potential harms to values such as human life, free speech, fairness and data protection and privacy. The question of how to harness technology to promote its beneficial powers while guarding from its potential risks remains to be unanswered. The nature and characteristics of artificial intelligence (AI), however, seem to make it an even more complex question to answer, with far-reaching consequences. This is as a result of AI system's rapid and dynamic developments, unpredictable and inexplainable nature, has rendered potential risks associated with such systems less anticipated and less controllable. While the degree and type of decision-making processes influenced by AI are increasingly growing such that the potential damages might have an impact on a very large number of people).

It is no surprise, then, that countries and other stakeholders worldwide have been very engaged in recent years in developing regulatory framework suited for AI technology, rather by examining whether existing legal frameworks are suitable to account for the new challenges posed by AI, or by developing new regulatory mechanisms when needed. While the main principles that need to be adhered to have generally been identified (including accountability of these systems, fairness and equality, assurance of privacy)—the question of how do to so in practice remains a challenge dealt with in national and global levels.

While 2020 was a "dark year" on many fronts, it was fruitful in the number and magnitude of deliberations and concrete work products aimed at setting clearer legal boundaries to the development and usage of AI. During the final quarter of 2020, various policy choices were made or proposed with respect to the regulation of AI, including whether such regulation is to be based on "hard law" or on "soft regulation" approach. While several EU member states have advocated the latter, the EU commission and parliament have proposed several binding acts addressing issues of privacy and data governance, obligations of digital service providers and AI ethics, liability and IP rights issues. Legislation proposals setting mandatory rules have also been advanced in Canada and in China, with respect to data privacy and data protection.

Another principal choice that was reflected in the fourth quarter of 2020 was the centric value or approach AI regulation ought to revolve around. Among the statutes adopted and proposed, several followed a "rights-based" approach, focusing on how to minimize harms that AI and the related worlds of data collection and publication may cause to individuals' rights. A "risk-based" approach was also prevalent in other jurisdictions, where the proposed regulatory framework to apply to AI (for example, in connection with the liability regime) would be dependent upon the level of potential risk posed by the AI system.

Naturally, the various directions explored by different jurisdictions and stakeholders vary in numerous respects, including the type of entities as well as the type of AI systems that would be subject to regulation, and the type of regulatory measures required (or, where the “soft-law” approach will prevail, the type of mechanisms used to encourage desired results). It is interesting to analyze whether the increased sense of globalization forced on us is due to the pandemic, coupled by greater international collaborations and the increased usage of AI technology for purposes that would have relevant implications for the entire human race. The scaling importance of the implication of AI technology would also lead to more harmonization of multiple country approach’s towards the regulation of AI.

Principles for Developing a Regulatory Framework to Govern AI

Stakeholders globally are working intensively on policy design for AI. International organizations, standards bodies, private companies, and many countries are participating in the race to set the tone for governing artificial intelligence. The directions sought by various countries and stakeholders, as reflected in the following updates, demonstrates the distinctive weight differences that jurisdictions place on different values, as well as varying basic approaches towards the role AI and the terms in which it should be measured.

NOVEMBER 2020

Canada: Recommendations to regulate AI in Canada based on a "rights-based" approach

Based on a public consultation conducted earlier this year, the Office of the Privacy Commissioner of Canada (OPC) released recommendations for regulating AI in a manner that would both promote innovation as well as ensure its responsible development. Among the key recommendations is the amendment of the *Personal Information Protection and Electronic Documents Act* (PIPEDA) allows for personal information to be used for new purposes, while entrenching privacy as a human right and a necessary element for the exercise of other fundamental rights.

One of the key issues addressed in OPC's recommendations for amending the PIPEDA is the principle of consent. Acknowledging its importance as well as the barrier it might pose on further development of AI systems, OPC recommended several new exceptions to the requirement of consent. Among them is the use of de-identified personal information for research and statistical purposes internal to the organization. Said exception is designed to encourage AI development in Canada, given the reliance of AI systems on statistical analyses. Another envisioned exception is when information is used for a new purpose that complies with the original purpose for which consent was already given. The exception aims to allow greater flexibility for businesses who could use more information in order to train AI. A general "legitimate commercial interest" exception too was proposed, one that could be used in case of unforeseen reasonable purposes. Along with the proposed exceptions to the requirement of consent, a number of safeguards were also suggested. These include conducting a privacy impact assessment (PIA), as well as conducting a balancing test to ensure that fundamental rights are protected. Another central issue addressed by the recommendations is that of automated decision-making and how it ought to be defined. Per the recommendations, individuals subject to automated decision-making ought to be granted the right to a meaningful explanation of automated decision-making, as well as the right of consent.

RELATED READING

- Teresa Scassa, "A Human Rights-Based Approach to Data Protection in Canada", in Elizabeth Dubois & Florian Martin-Bariteau (eds.), *Citizenship in a Connected Canada: A Research and Policy* Agenda (Ottawa University Press, 2020). Online.
- Ignacio Cofone, "Policy Proposals for PIPEDA Reform to Address Artificial Intelligence Report" (Office of the Privacy Commissioner, 2020). Online.

OCTOBER 2020

Europe: 14 EU member states urge European Commission to adopt a "soft law approach"

A position paper signed by 14 EU member states calls on the European Commission to shape a European approach for an innovation-friendly single market for AI. According to the signatories, the goal is to avoid setting burdensome barriers and instead incentivizing AI developers and deployers and adopting "soft law" voluntary solutions.

Signed by Denmark, Belgium, the Czech Republic, Finland, France Estonia, Ireland, Latvia, Luxembourg, the Netherlands, Poland, Portugal, Spain and Sweden, the position paper has proposed the following soft law solutions for addressing AI in a manner that accounts for the vast potential of AI as well as its possible challenges and risks: self-regulation; voluntary labelling; other voluntary practices; robust standardization process as a supplement to existing legislation.

The position paper also called for the application of an evidence-based approach, one that would assess existing legislation regulating the application of AI as well as identify potential shortcomings of addressing risks associated to AI. Referring to the proposed classification of "high risk" and "low risk" AI systems introduced by the European Commission white paper, the 14 states' position paper stressed that the category of high-risk AI ought to be the exception rather than the rule.

RELATED READING

- Gary E. Marchant, Lucille Tournas and Carlos Ignacio Gutierrez, "Governing Emerging Technologies Through Soft Law: Lessons for Artificial Intelligence" (2020) 61:1 Jurimetrics 1. Online.

OCTOBER 2020

Global: GPA adopts resolution on Accountability in the development and usage of AI

In its October 2020 session, the Global Privacy Assembly has resolved to urge organizations developing or using AI systems to consider implementing various accountability measures, including assessment and disclosure of the system's impact on human rights, testing AI systems' robustness, reliability and accuracy, and ensuring transparency by disclosing the use of AI as well as the data and logic used.

In addition to several other accountability measures organizations ought to be urged to undertake, the GPA resolution also calls for governments to consider making legislative changes to personal data protection laws and clarify the legal obligations pertaining to AI and accountability. It also calls for various types of stakeholders in the field of AI to collaborate with data protection authorities in order to establish relevant standards, principles and accountability mechanisms.

DECEMBER 2020

Global: GPAI releases a report with recommendations on how to promote "Responsible AI"

A report prepared by "The Future Society" for the global partnership on AI (GPAI) maps current AI initiatives for promoting "responsible AI" across the globe and provides recommendations for future actions in that field. Among the recommendations is the need to prioritize resources to address the most pressing global issues, the need to strengthen the existing ecosystem, and to champion diversity and inclusion strategy.

As part of its prerogative to help promote and foster the responsible development and use of AI globally, the GPAI has commissioned a report designed to review and analyze existing initiatives worldwide for the promotion of responsible AI. The report, prepared by The Future Society, has reviewed 214 worldwide initiatives for promoting AI, divided to the categories of "AI & Ethics," "AI & Governance" and "AI & Social good." Having analyzed 30 of these initiatives in-depth and identifying future opportunities as well as gaps and challenges, the report provides four main recommendations for the GPAI on areas for future action. These include building a systemic process to identify how to allocate resources such that the most pressing global issues are prioritized (based on potential initiatives' impact, urgency, feasibility and relevance). It also includes developing a common taxonomy and international measurement system among GPAI governments in order to allow for the measurement of the initiatives' impact which, in turn, could maximize the impact. The report also invites to strengthen the ecosystem and support systematic collaboration and cooperation among different stakeholders, as well as to promote diversity and inclusion by shaping spreading good D&I practices and collecting representative input from marginalized groups.

OCTOBER 2020

United States: USPTO expresses confidence that existing U.S. IP laws are well-suited for AI technological advancement

Having issued a request for comments on patenting AI inventions in 2019, the U.S. Patent & Trademark Office published its report on "Public Views on AI and IP Rights." In general, most participating commentators believe current U.S. IP laws, complemented by commercial law principles adequately address the evolution of AI. Specific insights were drawn with respect to each classification of IP rights.

In its October report analyzing public views on AI and the IP regime, the USPTO reveals that the majority of commentators believed the existing U.S. intellectual property laws are calibrated correctly to address the evolution of AI. Among the repeating themes pertaining to Patent Law was the agreement by most that AI is to be treated as a subset of computer-implemented inventions. Among the issues flagged as requiring attention was that AI may generate a proliferation of prior art that would render finding relevant prior art much more difficult. As to trademarks, the general agreement was that AI would improve the efficiency trademark applications' examination. The field of Trade secrets generated numerous comments, among them debates over whether advances in AI warrant a sui generis IP system for data rights.

New & Upcoming Pieces of Legislation

As legislation processes are often slow, and since legislation proposals may indicate relevant trends whether or not they are later approved, this section aims to address the updates on both current legislation as well as law proposals or parliamentary efforts.

DECEMBER 2020

Europe: E.U. Commission published a Digital Services Act package, comprising of two pieces of proposed legislation

The proposed Digital Services Act ("DSA") and Digital Markets Act ("DMA") set out to update and harmonize the rules governing digital services across the European Union. The package of rules purports to create a safer digital space where fundamental rights of users are protected, while establishing a level playing field that would support EU and global innovation, growth and competitiveness. Focusing on digital platforms that are classified as "gatekeepers"—ones with a systemic role in the internal market that functions as a bottleneck between businesses and consumers fort digital services. As a result, the DMA imposes various types of obligations that are proportionate to the type and size of the platform, among them ones pertaining to transparency, risk management and mechanisms for solving crises and legal disputes. The DSA focuses on protecting users' fundamental rights while tackling mechanisms for addressing illegal or potentially harmful online content as well as the liability of online intermediaries for content of third parties.

Dividing the potential impact of the proposed Digital Services Act package based on the identity of those who would be influenced by it, the proposed pieces of legislation are expected to bring about several changes to the world of digital services. Focusing on users, the package is to provide a safer online environment (by, among other things, imposing obligations on platforms pertaining to methods of reporting illegal content, goods or services, and requiring certain procedures to address the spread of illegal content such as hate speech, terrorist content or sexual abuse materials) as better protect consumers—for example by limiting the platforms' ability to delete users' content without informing them, by increasing transparency as to the identity of online sellers and the terms and conditions used by them and the platforms and by subjecting certain platforms to a duty of risk assessment with respect to their services and users' rights.

For business, the package is designed to increase legal certainly and allow digital services to grow, given that the underlying rules would be identical across the European Union and thus allow even small companies to comply with the requirements of each member state. While digital business will be subject to several obligations, such as the ones described above, small and micro-enterprises would be exempted from the costliest obligations.

As to the platforms themselves, they too would enjoy legal certainty as the category of "gatekeepers" that they belong to would be clearly defined, and thus the type of obligations they need to respect would be known and clear. While certain obligations would apply to all types of gatekeepers, including transparency reporting, appointing points of contacts and adhering to requirements in terms of service and human rights, other types of obligations will depend on the type and size of the platform. Specifically, "very large platforms," which are those that reach more than 10% of the EU's population, would also be required to, among other things, set mechanisms for external risk auditing, for crisis response cooperation and for appointing compliance officers.

With respect to AI and in specific the use of algorithms, the acts contain transparency requirements related to content moderation that is algorithmically based, as well as algorithms that are used to optimize the information presented to users.

RELATED READING

- Michael G. Jacobides, *Regulating Big Tech in Europe: Why, so what, and how understanding their business models and ecosystems can make a difference* (2020). Online.
- Lorna Woods, "Overview of Digital Services Act", *EU Law Analysis* (2020). Online.

OCTOBER 2020

Europe: E.U. Parliament adopted three legislative initiatives on AI rules

In its quest to strike the optimal balance between promoting AI innovation and protecting citizens from its potential risks, the European Parliament has adopted three initiatives addressing different aspects of AI regulation. The initiatives include focusing on AI ethics, civil liability rules and IP rights are based on a high-risk/low-risk classification of AI systems, which would determine the eligibility of which rules can be applied.

Adopted by the European Parliament on October, three legislative initiatives concerning AI purport to address several "burning" aspects of AI and regulation. First, a framework of ethical aspects of AI, robotics and related technologies calls for a comprehensive, future-proof European legal framework of ethical principles for the development, deployment and use of these systems. As a starting point, a set of criteria ought to be developed in order to distinguish "high-risk" and "low risk" AI applications (based on their target sector as well as on the potential risk derived of their intended use). Guidelines pertaining to human oversight, transparency, accountability, non-bias and non-discrimination, social responsibility and gender equality, environmental sustainability and privacy considerations would then be developed, based on the systems' classification of risk.

The second initiative focuses on civil liability for damage caused by AI systems, proposing to subject operators of a high-risk AI system to strict liability for damage caused by such systems, be it physical damage or verifiable economic loss (strict liability to be also applied in cases of low-risk AI systems that repeatedly cause serious harm or damage). Lastly, an initiative on IP rights for the development of AI technologies calls for an impact assessment on the implications of AI and related technologies under the current IP framework in order to create European standardization.

RELATED READING:

- Henrique Sousa Antunes, *Civil Liability Applicable to Artificial Intelligence: A Preliminary Critique of the European Parliament Resolution of 2020* (2020). Online.

NOVEMBER 2020

Europe: Proposed data governance act by the EU

Aimed at fostering the access of public sector data for general use, the European Commission has published its proposal for regulation on European data governance, pertaining to both personal and non-personal data. Being the first of a series of measures announced in the 2020 European strategy for data, the proposed act purports to increase trust in data intermediaries and to strengthen data-sharing mechanisms across the EU.

Based on an online public consultation as well as an impact assessment and a series of workshops with different stakeholders, the proposed act—which focuses on public sector data- seeks to increase data-sharing in a manner compliant with human rights and with existing EU legislation. Among other things, the proposed data governance act addresses the creation of a mechanism for re-using certain categories of protected public sector data (although public sector data, the type of data addressed, is not without sharing limitations but rather involves the rights of others, for example because it is personal data or because it is subject to IP rights). The proposed act purports to provide a set of conditions under which the re-use of such data may be allowed. It also seeks to increase trust in sharing of such data, and to lower transaction costs linked to B2B and C2B data sharing—by creating a notification regime for data sharing providers.

RELATED READING

- Inge Graef, Greta Krasteva and Tjasa Petročnik, *Response to the European Commission's Public Consultation "A European Strategy for Data"* (2020). Online.

NOVEMBER 2020

Canada: Proposed data privacy legislation changes in Canada

A new bill tabled by the Minister of Innovation, Science and Industry proposes to replace Canada's private sector privacy framework–*Personal Information Protection and Electronic Documents Act* (PIPEDA)–by enacting a *Consumer Privacy Protection Act* (CPPA). It also calls for the establishment of an administrative tribunal as an appellate instance over certain decisions made by the Privacy Commissioner.

Proposing to update Canada's data protection laws, Bill C-11 addresses several challenges raised in the era of big data and AI-based automated decisions. Among other things, the bill focuses on individuals' rights for explanation on decisions or predictions made by automated decision-making systems. Another individual right envisioned by the bill is that of having the individual's personal information deleted upon the individual's request. With respect to individuals' right to be asked for their consent to usage of their data, the bill contains several new exceptions not found in PIPEDA. For example, when there is no direct relationship with the individual such that obtaining their consent would be impractical.

RELATED READING

- Yuan Stevens, M. J. Masoodi and Sam Andrey, *Home Ice Advantage, Securing Data Sovereignty for Canadians on Social Media* (Ryerson Cybersecurity Policy Exchange, 2020). Online.
- University of Ottawa Centre for Law, Technology and Society, "Towards a New Privacy Deal" (2020). Video.
- Teresa Scassa, "Data for Good?: An Assessment of the Proposed Exception in Canada's Private Sector Data Protection Law Reform Bill" (2020). Online.
- Teresa Scassa, "How do new data protection enforcement provisions in Canada's Bill C-11 measure up?" (2021). Online.

OCTOBER 2020

China: Proposed Data Protection Legislation in China

The People's Republic of China has released a draft of a new *Personal Data Protection Law*, which would regulate the use of personal data, including "sensitive personal data," defined as "data that, once leaked or illegally used, may lead to discrimination against an individual or serious harm to an individual's personal or property safety."

In addition to China's Civil Code, which addresses privacy and personal information protection (Chapter 6), a draft of a new national law that focuses on personal data protection was released in October. According to the draft proposal, "sensitive personal data," which is defined under article 29 as "personal data that, once leaked or illegally used, may lead to discrimination against an individual or serious harm to an individual's personal or property safety, including information on an individual's race, ethnicity, religious beliefs, personal biological characteristics, medical health, financial accounts, personal whereabouts, etc" may be handled only if a specific purpose and sufficient necessity exist. In such cases, the data handler is to inform the individual whose sensitive personal data is handled of the necessity and of the expected impact on said individuals.

RELATED READING

- Jamie P. Horsley, "How will China's privacy law apply to the Chinese state", *Brookings* (2021). Online.