



The Law of Artificial Intelligence and the Protection of Fundamental Rights: The Role of the ELI Guiding Principles

By Marc Rotenberg¹

In a remarkable judgment earlier this year, the Court of Justice found that certain Artificial Intelligence (AI) techniques may be incompatible with the protection of fundamental rights. *Ligue des droits humains*, C-817/19, concerned the processing of passenger records to identify serious threats to public safety.² Human rights groups objected that the Passenger Name Record (PNR) Directive authorized mass surveillance that was incompatible with the Charter. The Court's ruling upheld a narrowed version of the Directive but also drew a red line for machine learning techniques, which typically rely on statistical inferences to make decisions about people. 'Given the opacity which characterises the way in which artificial intelligence technology works', the Court explained, 'it might be impossible to understand the reason why a given program arrived at a positive match'.³ The practical consequence would be to deny individuals the right to an effective judicial remedy.

The *Ligue des droits humains* case is a timely reminder of the growing importance of legal review of the new technologies that shape our lives. While AI techniques have brought forward innovations in medical

science, language translation, and image recognition, these same techniques also raise new challenges when decisions are made concerning border crossings, employment, education, public administration, and credit scoring. Fairness, accountability, and transparency must therefore be coded into the design of these systems to ensure that automated decision systems are non-discriminatory. And courts must look closely at these systems to assess their impact on fundamental rights and public safety.

The ELI's Guiding Principles set out 12 principles to assist developers, courts, and lawmakers in understanding and assessing the use of AI techniques.⁴ The Guiding Principles are similar to an earlier framework – the Universal Guidelines for AI – that set out the rights and responsibilities for the use of AI systems.⁵ But the Guiding Principles provide more focus and practical application. These Principles also fill in gaps left open in other areas of EU law, such as Article 22 of the GDPR and the Digital Services Act. Returning to the *Ligue des droits humains* case, we can see the particular relevance of the Principles concerning Traceable Decisions and Reasoned Decisions.

The Traceability Principle is not equivalent to the well-known Principle of Transparency.⁶ Traceability focuses on the concrete path of a particular decision.⁷ The ELI Paper explains that AI systems must include traceability by design. The Traceable Decisions Principle, and the subtle distinction with transparency, aligns perfectly with the Opinion of the Advocate General Pitruzzella in *Ligue des droits humains* who wrote of the PNR Directive that algorithms 'must function transparently, and that the result of their application must be traceable'.⁸ Machine learning systems

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may provide impressive results, but their legal status will remain unclear until traceability is established.

The Reasoned Decision Principles provides further insight into the assessment of AI techniques. Here the ELI advises that the complexity and opacity of algorithms should not render decisions that are 'unreasoned, arbitrary, or unfounded.'⁹ This understanding is also reflected in the *Ligue des droits humain* judgment and the Court's specific concern about the modification of assessment criteria without human intervention.

The ELI Guiding Principles also help inform the rapidly evolving field of AI policy frameworks. In 2019, the OECD member countries set out

the AI Principles, the first global framework for AI policy.¹⁰ The OECD AI Principles emphasized human-centric and trustworthy AI. In 2021, 193 nations backed the UNESCO Recommendation on AI Ethics, the most comprehensive approach to date for the governance of AI. Now the EU is pursuing the AI Act, and the Council of Europe is developing a Convention on AI.

A clear articulation of foundational principles for AI systems provides direction for lawmakers who develop new frameworks to govern AI and courts that examine disputes arising from the deployment of AI techniques. The ELI Guiding Principles are a major milestone in the development of the field of AI law.

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He has served on expert panels for the OECD, UNESCO, the UN, among others. He has published in the *Economist*, the *European Data Protection Law Review*, the *European Law Journal*, the *Financial Times*, the *Harvard International Review*, the *Japan Economic Forum*, the *New York Times*, *Scientific American*, the *Stanford Technology Law Review*, among others. Marc is a graduate of Harvard College, Stanford Law School, and Georgetown Law.

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² CJEU – C-817/19 – *Ligue des droits humains v Conseil des Ministres*, Judgement, 21 June 2022.

³ Par 195.

⁴ ELI, *Guiding Principles for Automated Decision-Making in the EU* (May 2022).

⁵ The Public Voice, *The Universal Guidelines for AI* (2018).

⁶ Marc Rotenberg, *Artificial Intelligence and the Right to Algorithmic Transparency* in Information Technology, Life Sciences, and Human Rights (CUP 2022).

⁷ ELI Guiding Principles at 18.

⁸ CJEU – C-817/19 – *Ligue des droits humains v Conseil des Ministres*, Opinion, 21 June 2022, par 228.

⁹ ELI Paper at 19.

¹⁰ OECD, *Recommendation of the Council on Artificial Intelligence*, 21 May 2019.