



Big Data



Border Enforcement



Migration  
Decision-Making

# Algorithmic decision-making in migration & security in the EU: challenges in ensuring effective legal remedies

“AI in the EU and access to justice”

Expert Panel Discussion

[organised by CEU, Leiden University and ESIL IG EUGLOBAL]

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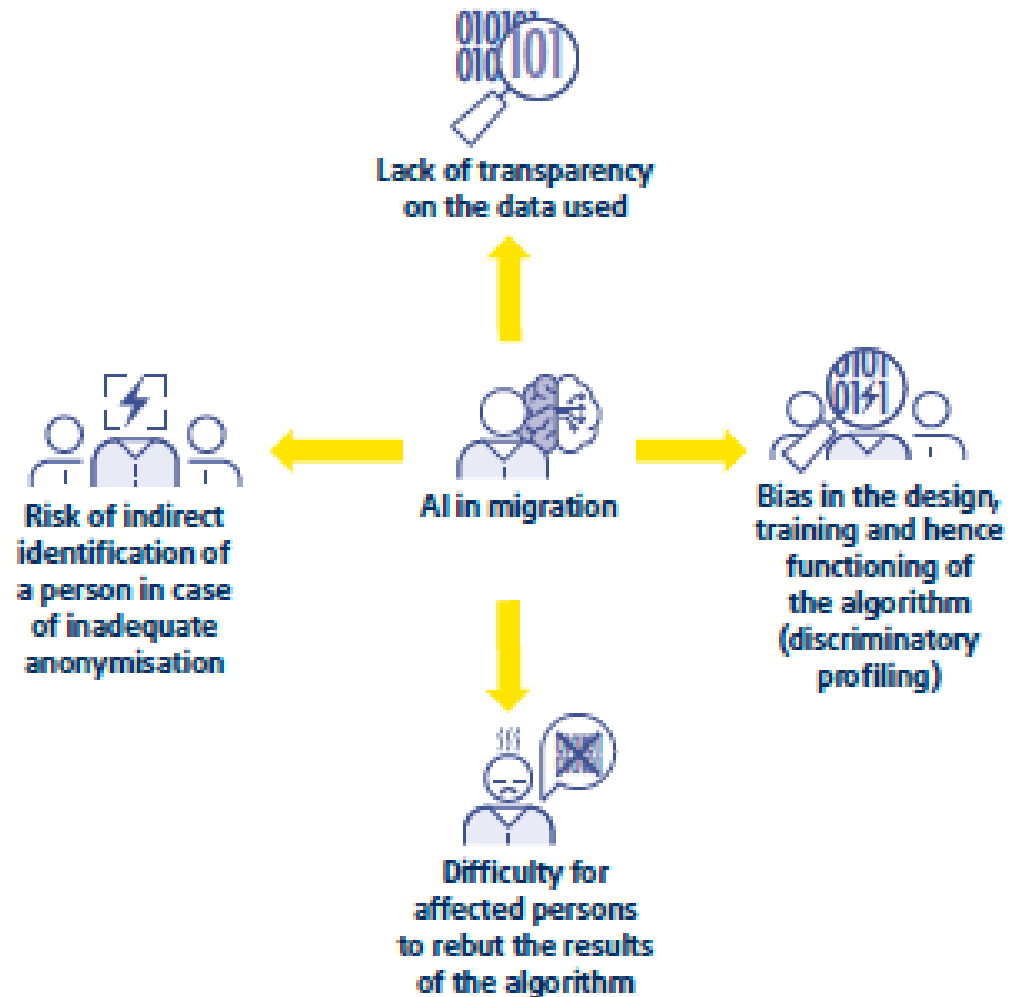
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# 1 – Setting the scene

- Discussions intensified in EU on use of AI in asylum, migration & border control
- Opportunities and risks of AI-driven decision making

FIGURE 6.8: KEY FUNDAMENTAL RIGHTS RISKS OF USING ARTIFICIAL INTELLIGENCE IN HOME AFFAIRS



Source: FRA, 2021

## 2 – Cross-cutting issues: Fundamental rights framework & key challenges

- Primary EU law: right to an effective judicial remedy (Art. 47 CFR) & right to good administration (GPL)
- EU data protection law reconfirms this

Σ: right to an effective remedy covers decisions taken with the support of **AI technologies/by algorithms**

- AI used for decision making in migration/security can challenge access to justice:
  - Persons not always aware of the use of AI
  - Lack of explainability & transparency (“black box effect”) → right to a reasoned decision = limited; need to find a way to provide meaningful information!
  - Limited availability of specialised legal support
  - No access to info about AI in the process → individuals may not be able to defend themselves

Σ: access to remedy – more difficult against decisions supported by AI. Qs = how to **empower** judges; **avoid** ‘automation bias’ of judiciary; provide **equality of arms** btw victim & defendant? (e.g. by sharing/shifting the burden of proof)

## 3 – Case studies in the field of migration & security

### ***Example 1: screening rules of the European Travel Information and Authorisation System (ETIAS) [Reg. 2018/1240]***

Example	What it is	Purpose	Who uses it	Safeguards
ETIAS Screening rules	An algorithm that compares the data provided in a visa-free traveller online application with specific risk indicators corresponding to identified security, irregular migration or public health risks (Art. 33 (1), recital 27)	To assess a traveller's risks of irregular migration, or to security and public health, and, if so, to review the application manually (recital 27)	Frontex (ETIAS Central Unit) verifies application data against the risk indicators (Art. 7, Art. 22); authorised national authorities (ETIAS national units) assess the risks (Art. 26 (6))	Targeted and proportionate use (Art. 33 (5))
	The risk indicators are based on a combination of data on age range, sex, nationality, place of residence, education and occupation (Art. 33 (4))			<p>Not revealing protected attributes – in compliance with non-discrimination principle (Art. 33 (5))</p> <p>Human review of the risk assessment and of the individual case (Art. 22, Art. 26)</p> <p>Regular reviews of the risks, ex ante and ex post evaluations of the indicators (Art. 33 (3), Art. 33 (6), Art. 7)</p> <p>ETIAS Fundamental Rights Guidance Board with FRA as a member (Art. 9 (5) and Art. 10)</p> <p>Access to remedy (Art. 64)</p>

### 3 – Case studies in the field of migration & security (cont.)

***Example 2: use of real-time facial recognition technology by law enforcement [see [FRA report](#)]***

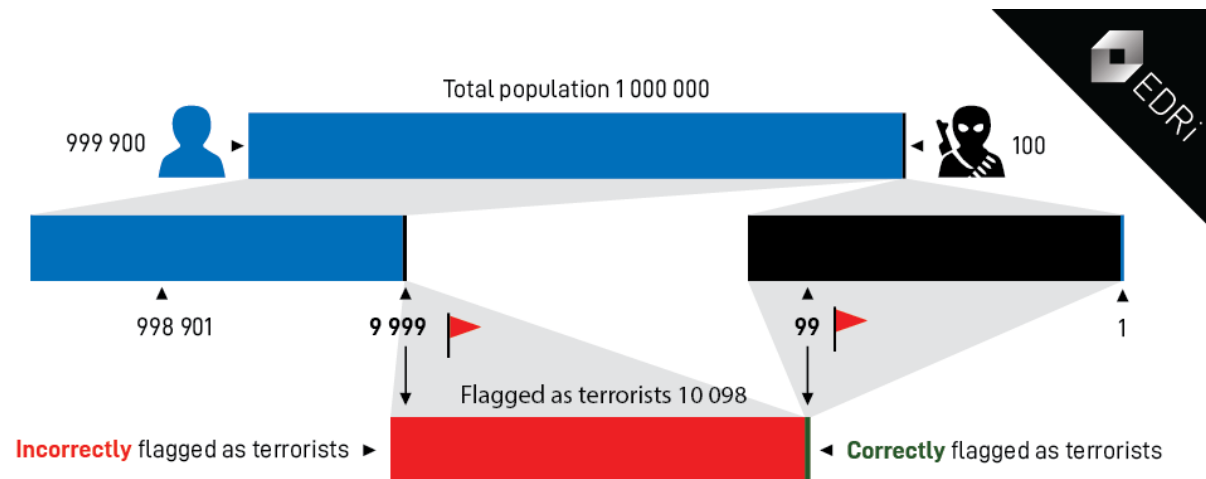


## 3 – Case studies in the field of migration & security (cont.)

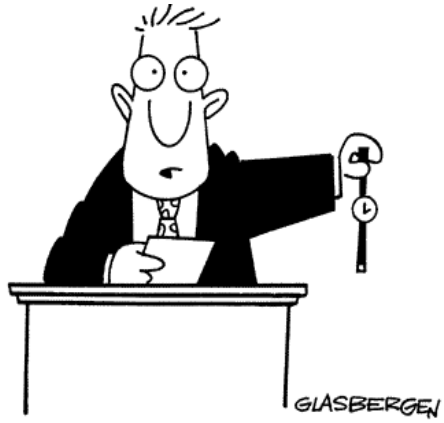
### ***Example 3: use of algorithmic decision-making under the Passenger Name Records (PNR) Directive [Dir. 2016/681]***

- PNR data = info collected by airlines for commercial/operational purposes in providing air transportation services  
→ Directive allows LEA to use PNR data, both from extra-EU (compulsory) and intra-EU (optional) flights → to combat serious crime & terrorism

- Analysing PNR data using 'pre-determined criteria' and checking PNR data against 'relevant databases' = made by algorithms (can lead to many 'false positives') → see CJEU, [Case C-817/19](#) [pending]



▶ The probability that the person who gets flagged as a terrorist is actually a terrorist is 0,9 % and more than 99 % of those flagged as terrorists are not terrorists. ◀



**Thank you for your kind attention!**

**? Questions ?**