CHAPTER 24

AUTOMATED ADMINISTRATIVE RESTRICTIVE DECISIONS: GIVING REASONS, TRANSPARENCY, AND REMEDIES

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Abstract

This chapter conducts a comparative analysis of procedural guarantees applicable to automated administrative decisions that adversely affect individuals. Focusing on three scenarios—AI-driven tax assessments, algorithmic fraud detection in welfare administration, and predictive-policing systems—the chapter examines how different jurisdictions address the requirements to give reasons, ensure transparency, provide access to algorithmic information, and guarantee effective administrative and judicial remedies. It identifies a general trend toward reinforcing human oversight and expanding the duty to give reasons in response to increasing automation, while also highlighting significant divergences in transparency regimes, access to source code and training data, and the availability of collective standing. The chapter further shows how prohibited AI practices (such as predictive policing under the EU AI Act) reshape the legal framework of accountability. The concluding comparative assessment distils the convergences and persistent variations across the examined legal systems and reflects on their implications for the evolving architecture of algorithmic administrative law.

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1. Introduction

This chapter presents a comparative analysis of the scope and depth of procedural rights and remedies regarding automated administrative decisions that adversely affect their recipients. The analysis will focus on the national experts' responses to the hypothetical cases central to the 'factual analysis' underpinning the Common Core-inspired research projects[1]. It aims to identify commonalities and differences among eleven jurisdictions, seven of which are EU Member States (Austria, Estonia, France, Italy, Germany, the Netherlands, and Spain), one is the EU itself; another is a European country outside the EU (the UK), and the other two (China and the US) are non-European[2].

The hypothetical cases on which the analysis is based (cases 5, 6, and 7) involve the use of AI-driven systems that result in administrative decisions with adverse effects on individuals. These seem to be the cases in which technology can most affect individuals' rights, making it essential to adopt procedural safeguards for automated administrative

[1] See *http://www.coceal.it/* (visited 15 September 2025) and G. della Cananea & M. Bussani, *The 'Common Core' of administrative laws in Europe: A framework for analysis*, 26 Maastricht J. Eur. & Comp. L. 217–250 (2019) and G. della Cananea, *The Common Core of European Administrative Laws. Retrospective and Prospective* (2023). The scientific results of the CoCEAL project are published in a dedicated Oxford University Press series on 'The Common Core of European Administrative Law', edited by G. della Cananea & M. Bussani: see *https://global.oup.com/academic/content/series/c/the-common-core-of-european-administrative-law-coceal/?cc=it&lang=en&*.

[2] For a comparison across Eastern Europe countries, conducted, as this Special Issue, under the "Research Project of Relevant National Interest"entitled "The dark side of algorithms under the comparative lens: automated administrative decisions between efficiency and due process" (2023–2025), from the Italian Ministry of University and Research grant no. 2022LSRL82, Principal Investigator Angela Ferrari Zumbini, see in this review, Special Issue no. 4/2025, edited by A. Ferrari Zumbini, P. Monaco and S. Venier.

decisions, such as the requirements to give reasons, to provide transparency, and to ensure effective remedies[3].

The chapter is structured as follows. For each hypothetical case, after a brief description of the case studies and the questions they raise, the analysis compares different approaches to three cases in the jurisdictions examined, distinguishing between substantive and procedural aspects. In conclusion, it illustrates the commonalities and variations among these alternatives and their importance in the broader debate on algorithmic administration[4].

2. An erroneous determination by an AI-led tax program

The case to be addressed concerns a notice for payment of an additional amount of taxes due for fiscal year 2022 and a penalty for alleged tax fraud. The notice of payment was issued by a data-mining algorithm designed to detect potential tax fraud by analysing a variety

[3] Arguing that procedural guarantees are particularly necessary in the case of automated decisions that have unfavourable effects on individuals (as shown by Article 41(2) of the Charter on Fundamental Rights of the EU, which limits the right to a hearing to administrative decisions that adversely affect the addressee), see O. Mir, *Algorithms, Automation, and Administrative Procedure at EU Level*, in H.C.H. Hofmann & F. Pflücke (eds.), *Governance of Automated Decision-Making and EU Law* (2024), 53, 60.

[4] The legal literature on administrative automated decision-making is extremely broad, and growing: see C. Coglianese & D. Lehr, *Regulating by Robot: Administrative Decision Making in the Machine-Learning Era*, 105 Geo. L.J. 1147 (2017); C. Coglianese, *Administrative Law in the Automated State*, Daedalus 104 (2021); D. Freeman Engstrom, D.E. Ho, C.M. Sharkey, M.-F. Cuellar, *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies*, (2020), available at *https://www-cdn.law.stanford.edu/wp-content/uploads/2020/02/ACUS-AI-Report.pdf*; Z. Engin and others, *The Algorithmic State Architecture (ASA): An Integrated Framework for AI-Enabled Government*, (2025), available at *https://doi.org/10.48550/arXiv.2503.08725*.

In the Italian legal literature, see, among the first ones, G. Avanzini, *Decisioni amministrative e algoritmi informatici* (2019); among the most recent contributions, see B. Marchetti, *Amministrazione digitale*, in B.G. Mattarella, M. Ramajoli (eds.), *Funzioni amministrative*, Enc. Dir., I tematici, III, (2022), 75; D.U. Galetta, R. Cavallo Perin, M. Losano, *Il diritto dell'amministrazione pubblica digitale* (2025); L. Torchia, *Lo Stato digitale. Una introduzione* (II ed. 2025); B.M. Armiento, *Pubbliche amministrazioni e intelligenza artificiale: strumenti, principi e garanzie* (2024); C. Ramotti, *Administrative action in the age of algorithmic transformation From rule-based procedures to principle-guided decision-making* (2025).

For a comparative perspective, see H.C.H. Hofmann & F. Pflücke (eds.), cit. at 3, and H.C.H. Hofmann, *Comparative Law of Public Automated Decision-Making. An Outline*, 1 CERIDAP 1 (2023); M. Conticelli, A. Ferrari Zumbini & M. Infantino, *Automating Administrative Decisions in Europe and The United States: The Algorithmic State From a Comparative Perspective*, 12 JICL 179 (2025).

of parameters and historical data held by public bodies. No other reason beyond the use of the algorithm was provided, despite the recipient's income and taxes paid in 2021 being identical to those in 2022.

The questions to be addressed centred on: a) whether the requirement to give reasons would be considered to have been breached in the various legal systems and what remedies would be available to the recipient, in particular, b) whether an administrative remedy would be available, in addition to a judicial one, and c) whether the court would issue the injunction directly.

2.1 The requirement to give reasons and provide evidence

In many jurisdictions (such as Italy, the Netherlands, Spain, the EU, and the UK), a notice for a penalty and a fine would be annulled due to an infringement of the requirement to give reasons; in other jurisdictions, however, the fine would be quashed because of a lack of contradictory evidence.

The precise meaning of the procedural guarantee concerned – the requirement to give reasons – in the context of automated decision-making, together with its relationship with the related concept of explainability and of the guarantees of human oversight and of transparency, is extensively debated[5].

In Italy (the first group), the requirement to give reasons within automated decision-making is recognised both by the case law of the Council of State and the recently approved law of 2025[6]. On this basis, the recipient of the penalty would be entitled to know the grounds for the decision, and the failure to give reasons would lead to the annulment of the penalty[7]. The lack of reasons would also render the tax decision invalid under Spanish law[8].

In the Netherlands too, the notice and the fine would be annulled for non-compliance with the requirement to give reasons, which is specifically provided for under the Dutch General Administrative Law

[5] C. Coglianese, D. Lehr, cit. at 4, 1207; M. Fink & M. Finck, *Reasoned A(I)administration: Explanation Requirements in EU Law and the Automation of Public Administration* 47 European Law Review 376 (2022); D. Liga, *The Interplay Between Lawfulness and Explainability in the Automated Decision- Making of EU Administration*, in H. CH. Hofmann & F. Pflücke (eds.), cit. at 3, 239; A.D. Selbst & J. Powles, *Meaningful information and the right to explanation*, 7 Int.l Data Privacy L. 233 (2017).

[6] Law no. 132 of 23 September 2025, *Disposizioni e deleghe al Governo in materia di intelligenza artificiale, art. 3 (3).*

[7] See the paragraphs on Italy in Part II and III.

[8] See the paragraphs on Spain in Part II and III.

Act (GALA)[9]. Regarding automated decision-making, Dutch administrative and civil court case law has clarified that the obligation to give reasons – together with the principle of the duty of care and the related requirements of transparency and explainability – obliges the administrative authority to fully and promptly disclose the assumptions and the data used for its decisions. The party concerned would be entitled to request access to the data used, thereby preventing the decision from becoming a 'black box'[10].

In Austria, the decision could be considered an algorithmic error and annulled as unlawful by the Federal Fiscal Court under Article 130(1), No. 1 of the Austrian Federal Constitutional Law[11].

The EU case makes a further distinction, holding that the relevance of the requirement to give reasons depends on, and is linked to, the need to respect the non-exclusivity principle and the human-in-the-loop principle[12]. Fully automated decisions are unlawful under the EU AI Act[13]. Thus, if the AI-based fiscal system described in the questionnaire is fully automated, it will not comply with the principle of human intervention. The other guarantees for high-risk systems – in particular, the right to an explanation of individual decision-making under Article 86 – would not apply because of the exception set out in Annex III, art 5, (b), which excludes "AI systems used for the purpose of detecting financial fraud" from high-risk systems. In contrast, if the decision is not fully automated, it could be challenged for failing to comply with the requirement to give reasons under Article 296 TFEU[14].

In the UK, the fiscal decision would probably be considered unlawful for lack of reasons. The latter, however, is not recognised as a formal duty in administrative decisions; rather, it has been developed

[9] See the paragraphs on the Netherlands in Part II and III.

[10] F. Pasquale, *The Black Box Society: The Secret Algorithms that Control Money and Information* (2015); Y. Bathaee, *The Artificial Intelligence Black box and the Failure of Intent and Causation*, 31 Harv. J.L. & Tech. 890 (2018).

[11] See the paragraphs on Austria in Part II and III.

[12] For a broader discussion on the human in the loop, see *Infra*, Section 2.2., and footnote 28.

[13] The legal literature on the AI Act is extremely broad. From the perspective of its impact on public administration, see – in addition to the paragraphs on the EU in Part II and III – J. Ponce, A. Cerillo-I-Martinez (eds.), *The EU Artificial Intelligence Act and the Public Sector. Humans and AI Systems in Public. Administration in the Light of the European Regulation on Artificial Intelligence of 2024* (2024); O. Mir Puigpelat, *The AI Act from the Perspective of Administrative Law: Much Ado About Nothing?* 15 Eur. J. Risk Regul. 1 (2024); O. Mir Puigpelat, *The Impact of the AI Act on Public Authorities and on Administrative Procedures* 4 CERIDAP 238(2023).

[14] See the paragraphs on the EU in Part II and III.

under the principle of fairness, requiring any reasons provided to be "proper, adequate and intelligible"[15].

Also, in the US, the lack of reasons could be linked to and stem from a different general principle, namely that the administration should not act arbitrarily or capriciously. This was the basis of the judgment of the New York State Court in a case in which an algorithm had been used to reassess property values, but the properties whose values had diminished did not have their taxes lowered[16].

In the second group of cases, the fine could be annulled for lack of or contradictory evidence. In Germany, the notice requiring additional payment could be annulled for lack of evidence. The charge of tax fraud, however, falls within the competence of the criminal court, where the use of algorithms as evidence is wholly excluded[17].

In Estonia too, the fiscal authority would need to prove the accuracy of the decision; most notably, orders issued automatically would be admissible only if the prerequisites for making the order can be verified automatically. This is a fundamental requirement. Essentially, automation may be used in administrative decision-making only when the criteria applied can be verified by automated means[18].

In France, the main principle governing a challenge to the lawfulness of a fine is the principle of contradictory evidence, under which both the tax authorities and the taxpayer must prove their claims. For this purpose, the relevant instrument would be the right of access. However, it is unclear how far this guarantee would go in the French system in cases regarding automated anti-fraud procedures. On the one hand, French tax law allows taxpayers to access all documents held against them by tax authorities. Additionally, the French *Code des relations entre le public et l'administration* (CRPA) imposes an obligation to provide information upon request to any person affected by an individual decision made using an algorithm (Article L.311-1-3), to clarify the extent of the reliance on algorithms to make the decision, together with the criteria used and their weighting by the computer program (Article R.311-3-1-2), and to disclose the algorithm's source code (Article L.300-2). On the other hand, the CRPA also recognises certain exceptions, such as the prevention of offences and for investigative purposes (2° of Article L.311-5 of the CRPA). As tax fraud

[15] See the paragraphs on the UK in Part II and III.
[16] See the paragraphs on the US in Part II and III.
[17] See the paragraphs on Germany in Part II and III.
[18] See the paragraphs on Estonia in Part II and III.

would fall within the latter case, the recipient of a penalty in this context would not have access to the algorithm's source code[19].

In China, a tax decision may be annulled either for lack of reasons or for lack of evidence. In any case, Chinese law expressly forbids unfavourable or burdensome decisions being based solely on technology without human oversight. Furthermore, a specific technical verification mechanism must be in place. Under Article 41 of the PRC's Administrative Punishment Law, administrative agencies that use electronic monitoring equipment to gather and record evidence of illegal acts are subject to legal and technical review to ensure the equipment complies with the required standards. This entails human verification of the methodology used to gather evidence intended to detect the fiscal fraud in question, and that the technical system has been demonstrably reviewed in accordance with applicable standards[20].

2.2 Administrative review and human oversight

Regarding administrative remedies, the main distinction lies between jurisdictions where administrative review of a penalty is obligatory before recourse to a court, and those where an administrative remedy is an additional tool, available at the recipient's discretion.

Under Article L. 190 of the French Tax Procedures Code (LPF), taxpayers must submit a claim to the tax authorities before bringing their case before a tax court[21]. In Germany, the administrative review remedy for automated decision-making in tax matters is also obligatory: the tax notice must be challenged through an appeal in a pre-trial procedure (*Vorverfahren*) under the German Tax Code (AO). If the appeal is rejected, the plaintiff can file a lawsuit before the Fiscal Court[22].

Similarly, in the Netherlands, it would be obligatory to first request a review from the Tax Authority before appealing to the Court. The relevance of the administrative review phase is two-fold. First, in conducting a *de novo* and *ex nunc* review of the contested decision, the administrative body could rectify its reasoning. Second, legal scholars suggested that a mandatory objection phase is a key instrument for identifying potential errors at an early stage in automated decision-making[23].

[19] See the paragraphs on France in Part II and III.
[20] See the paragraphs on China in Part II and III.
[21] See the paragraphs on France in Part II and III.
[22] See the paragraphs on Germany in Part II and III.
[23] See the paragraphs on the Netherlands in Part II and III.

In the UK too, it is compulsory to first follow a pre-action protocol, which allows a public body to reconsider a challenged decision. The primary rationale for this mechanism is to reduce costs by settling the case at an early stage[24].

In Spain, various mechanisms for administrative review are available in the tax sphere (such as special review procedures, appeal for reconsideration, and economic-administrative claims). The request for these review mechanisms, however, must be specifically justified, with the General Tax Law requiring a brief reference to the facts and legal grounds for the request[25].

In the EU, the hypothetical case cannot be entirely transposed, since the Union has no fiscal power. However, some adaptations could be considered, given the growing number of direct enforcement and sanctioning powers the EU has across a range of domains, such as the financial and banking sectors[26]. From this perspective, it may be observed that the EU has adopted an increasing number of internal administrative remedies, including the establishment of several Boards of Appeal. Whether recourse to these mechanisms is mandatory depends on the specific sectoral provisions[27].

In some legal systems, the requirement for the public administration to ensure that an administrative review remedy is available is linked to the principle of non-exclusivity or the "human-in-the-loop" (HITL) principle[28]. For automated decision-making to be

[24] See the paragraphs on the UK in Part II and III.

[25] See the paragraphs on Spain in Part II and III.

[26] See the paragraphs on the EU in Part II and III. See, generally, the increasing direct enforcement powers of the EU, M. Scholten & M. Luchtman (eds.), *Law Enforcement by EU Authorities. Implications for Political and Judicial Accountability* (2017).

[27] On the expansion of administrative remedies in the EU, see B. Marchetti (eds.), *Administrative Remedies in the European Union. The Emergence of a Quasi-Judicial Administration* (2017); L. De Lucia & P. Chirulli, *Non-Judicial Remedies and EU Administration. Protection of Rights versus Preservation of Autonomy* (2021); M. Chamon, A. Volpato & M. Eliantonio (eds.), *Boards of Appeal of EU Agencies: Towards Judicialization of Administrative Review?* (2022); J. Alberti (ed.), *Quo vadis, Boards of Appeal? The Evolution of EU Agencies' Boards of Appeal and the Future of the EU System of Judicial Protection*, Special Issue of the Rivista del Contenzioso Europeo - Revue du Contentieux Européen -Review of European Litigation (2024).

[28] B. Marchetti, *La garanzia dello human in the loop alla prova della decisione amministrativa algoritmica*, Biolaw J. 367 (2021). See also S. Civitarese Matteucci, *Umano, troppo umano. Decisioni amministrative automatizzate e principio di legalità*, 1 Dir. pubbl. 5 (2019), and, for a discussion on ethical aspects, M. Falcone & E. Pili (eds.), *L'irriducibile umano. Etica e diritto delle intelligenze artificiali* (2025).

lawful, there must be human input to check, validate, or refute the computerised decision.

Based on this principle and building on Article 22 of the GDPR[29], the Council of State holds that, under Italian law, if an automated decision produces legal effects concerning or significantly affecting a person, that person has the right to ensure that the decision is not based solely on automated processing[30]. Respect for human autonomy has been further confirmed in Law 132/2025 (Art. 3(3)). Applying this principle to the case at hand, the recipient of the fiscal penalty would be able to request an administrative review regarding the fine in accordance with the principle of human intervention[31].

The imperative to ensure that a human decision-maker is involved is also at the heart of the notice-and-appeal process that has been put in place in the US to challenge the tax decisions of the Internal Revenue Service (IRS), which has been experimenting with an AI fraud-detection algorithm. Within this system, a mechanism for appeal, in line with federal guidelines for implementing an AI system, envisages recourse to a human decision-maker who can explain or quash the decision[32].

In China, there exist both administrative and judicial remedies to challenge a tax decision, and the recipient may choose to go directly to court or to pursue an administrative remedy. In this second case, the recipient can apply for administrative reconsideration (i.e., an internal hierarchical review) under the PRC Administrative Reconsideration Law. The higher tax authority can review both the legality and reasonableness of the challenged decision. If it is found to be

[29] Under art. 22 (2) GDPR, there are several exceptions to the right not to be subject to a decision based solely on automated processing: this is why, according to A. Simoncini, *Amministrazione digitale algoritmica. Il quadro costituzionale,* in R. Cavallo Perin & D.U. Galetta (eds.), *Il diritto dell'amministrazione pubblica digitale,* (2020), 1, 22-30, the ruling of the Italian Council of State expands significantly the guarantees under the GDPR.

[30] Council of State, section VI, 8 April 2019, no. 2270; Council of State, section VI, 13 December 2019, no. 8472; Council of State, section VI, 4 February 2020, no. 881 Among the many commentaries, see F. Donati, *Intelligenza artificiale e giustizia*, 1 Rivista AIC 415 (2020); A. Simoncini, *L'algoritmo incostituzionale: l'intelligenza artificiale e il futuro delle libertà*, BioLaw J. 1 (2019); E. Picozza, *Intelligenza artificiale e diritto. Politica, diritto amministrativo and artificial intelligence*, 7 Giurisprudenza italiana 1657 (2019); E. Carloni, *I principi della legalità algoritmica. Le decisioni automatizzate di fronte al giudice amministrativo*, 2 Diritto Amministrativo 271 (2020); S. Civitarese Matteucci, *Umano troppo umano. Decisioni amministrative automatizzate e principio di legalità*, 1 Diritto Pubblico 5 (2019).

[31] See the paragraphs on Italy in Part II and III.

[32] See the paragraphs on the US in this volume.

unreasonable and unlawful, the decision can be annulled. If not, the recipient of the penalty can challenge the decision before a court[33].

At the other end of the spectrum, an administrative review of the decision by the competent tax authority is wholly excluded in Austria (where only the Federal Fiscal Court may intervene)[34].

2.3 Judicial remedies

In all the jurisdictions examined, the tax penalties could be challenged before a Court and annulled either because there is no requirement to give reasons or because of error or lack of evidence (*supra*, A).

One significant distinction concerns the Court's powers: whether it can determine the correct tax amount or not. The power to set the penalty is granted in a minority of cases. In Germany, the tax Court could both annul the decision for lack of evidence and determine the correct amount of tax to be paid[35]. In France, too, the tax court's power would not be limited to the annulment of the decision; on the contrary, falling within a case of *contentieux de "pleine juridiction"*, the tax court can order the discharge of taxation, or its reduction, or else grant the taxpayer a right to a deduction[36]. In Austria, the Federal Fiscal Court would be the only entity entitled to issue a new decision, determining the relevant facts and giving reasons. The tax authority, on the other hand, cannot issue a new decision[37].

In other cases, it is the Court that orders the Tax Authority to issue a new decision.

In the Netherlands, the Court's powers to issue directions to the competent administrative body could create an administrative loop, a sort of 'parallel administrative procedure'. The Court could order the administration to decide again within a specified period, giving instructions[38]. As a result, if it has not already done so during the mandatory administrative review phase, the administrative body has a further opportunity to rectify the flawed reasoning of the contested decision and repair its defects.

Also in the EU, provided that the decision in question was not fully automated (which is directly prohibited under EU law), and was

[33] See the paragraphs on China in Part II and III.
[34] See the paragraphs on Austria in Part II and III
[35] See the paragraphs on Germany in Part II and III.
[36] See the paragraphs on France in Part II and III.
[37] See the paragraphs on Austria in Part II and III.
[38] See the paragraphs on the Netherlands in Part II and III.

therefore deemed unlawful for breach of the requirement to give reasons under Article 296 TFEU, and provided that the case in question was not of a fiscal nature (coming under an area where the EU has direct sanctioning powers), the EU competent authority should issue a new decision, taking into account the criteria provided by the Court of Justice in its judgment[39].

In the UK, if the matter is not solved through the obligatory pre-action remedy and goes to court, the Court's order would quash the decision, making it void *ab initio.* It would not redetermine the sanction, but it could provide guidance by issuing a declaration on how the authority should decide (the guidance would take the form of a declaration concerning the public body's duties and responsibilities rather than an actual injunction)[40].

3. A distorted fraud algorithm

Case 6 considers the release of a fraud alert notice, issued on the basis of a data mining algorithm, requiring the beneficiary of an unemployment benefit – flagged as a potential fraudster – to provide proof of unemployment; in the absence of such evidence, repayment of the sum received and payment of a penalty would be necessary.

The key questions at the heart of the case are: a) whether an argument based on alleged discrimination would be considered by a Court, given that the majority of the unemployment beneficiaries flagged as potential fraudsters lack nationality; b) whether access to the code of the algorithm would be provided, together with records of all the warnings issued by the administration; and c) whether a non-governmental organisation representing unemployed people would have standing to participate in a proceeding brought by the recipient of the administrative decision, requesting access to the source code on which the algorithm is built.

3.1. Discrimination and proof

As a preliminary remark, it should be noted that in some of the jurisdictions examined, a Court would not address whether the algorithm was discriminatory, as the absence of proof of unemployment would lead it to dismiss the case without undertaking any examination.

[39] See the paragraphs on the EU in Part II and III.
[40] See the paragraphs on the UK in Part II and III.

In Germany, without proof of unemployment, the Court would not annul the notice demanding repayment and would not consider the discrimination argument. However, a further distinction would be made between the demand for repayment – for which the "substantive burden of proof" would be on the claimant – and the criminal allegation of benefit fraud – for which the assumption of innocence applies, so that the burden of proof lies with the prosecution[41]. The absence of corroborating evidence would also be difficult to overcome before a US court or before the CJEU.

As for discrimination – which is one of the main problem areas in algorithmic decision-making, due to the many cases of bias that have been detected over time[42] – two different aspects are taken into account: whether specific rules on discrimination exist in a given jurisdiction and how to prove discrimination, which is in turn linked to whether access to the source code and the data used to train the algorithm is possible or not.

Specific anti-discrimination rules exist in several jurisdictions. In Estonia, the Equal Treatment Act could apply to the case in question. To date, there have been no cases of discrimination by AI dealt with by the Gender Equality and Equal Treatment Commissioner. However, the Commissioner specifically encouraged the public to report all cases of discrimination in automated decision-making[43].

In France, there is both general and specific legislation to protect persons against digital discrimination[44].

In Germany, the General Equal Treatment Act identifies disadvantaged groups protected under the Act due to their race or ethnic origin, sex or sexual identity, religion, disability, or age. This means that discrimination based on nationality, as in the hypothetical case, would not be protected under such an act. The Federal anti-discrimination office has censured this restrictive approach[45].

An anti-discrimination law specifically aimed at detecting discrimination in automated decision-making is New York Local Law 144, which requires employers to conduct annual audits of their automated decision-making tools[46]. This law constitutes a best practice;

[41] See the paragraphs on Germany in Part II and III.
[42] On the different types of algorithmic discrimination, P. Hacker, *Teaching Fairness to Artificial Intelligence*, 55 Common Mkt. L. Rev. 1146 (2018).
[43] See the paragraphs on Estonia in Part II and III.
[44] See the paragraphs on France in Part II and III.
[45] See the paragraphs on Germany in Part II and III.
[46] See the paragraphs on the US in this volume.

however, its scope of application is limited both to state level and to employment decisions.

3.2. Access and transparency

Limitations to transparency are among the most sensitive and controversial aspects of automated decision-making[47]. In the context of an increased reliance on machine learning algorithms, providing the rationale behind decision-making requires disclosing algorithmic specifications, as well the source and type of data used to generate input variables[48]. Providing "evidence of all nodes' action"[49] is deemed necessary to make human oversight meaningful, ie. capable of providing ex post verification[50]. At the same time, though, full access could encounter several limitations, for instance due to trade secrets or confidential business information[51].

The comparative analysis shows that, in several jurisdictions, in the hypothetical case mentioned above, full access would be denied on the basis of several types of exceptions.

In Austria, a general request for information concerning the actions of administrations can be made under the Federal Information Disclosure Act and the Information Disclosure Acts of the federal states. However, access to the source code could be limited due to confidentiality concerns, in particular, data protection, business, and trade secrets[52]. A more limited request concerning the number of people without nationality who are automatically flagged as potential fraudsters

[47] C. Coglianese & D. Lehr, *Regulating by Robot: Administrative Decision Making in the Machine-Learning Era*, at no. 4, 1209-13; C. Coglianese & D. Lehr, *Transparency and Algorithmic Governance*, 71 Admin. L. Rev.7 (2019); H. Palmer Olsen, J. Livingston Slosser, T. Troels Hildebrandt, *What's in the box?*, in H. Micklitz, O. Pollicino, A. Reichman, A. Simoncini, G. Sartor, G. De Gregorio, *Constitutional Challenges in the Algorithmic Society* (2022), 219; M. Ananny & K. Crawford, *Seeing Without Knowing: Limitations of the Transparency Ideal and Its Application to Algorithmic Accountability* 20 New Media & Soc'y 973 (2020).

[48] H. CH. Hofmann, *Automated Decision- Making (ADM) in EU Public Law*, in H. CH. Hofmann & F. Pflücke (eds.), *Governance of Automated Decision-Making and EU Law*, cit. at 3), 1, 19-20.

[49] A. Z. Huq, *Constitutional Rights in the Machine Learning State*, 105 Cornell L. Rev. 1875 (2020).

[50] D. R. Desai & J. A. Kroll, *Trust but Verify: A Guide to Algorithms and the Law*, 31 Harv. J.L. & Tech. 1 (2017), 10– 11.

[51] C. Coglianese & D. Lehr, *Regulating by Robot*, cit. at 4, 1210.

[52] Austrian Supreme Administrative Court (VwGH) 28.06.2021, Ro 2021/11/0005.

would not breach confidentiality interests; such a request ought to be successful under Austrian law[53].

In the Netherlands, case law excludes access to risk models and indicators used in automated decisions similar to the one in question. The State justified its refusal to make this information public on the grounds that people could adjust their conduct accordingly ('gaming the system'). In the *SyRI* judgment[54], on the one hand, the Court did not grant the request to disclose; on the other hand, though, it considered that, without access to such information, it was not possible to assess whether the States's interference in private life was justified and proportionate under Article 8(2) ECHR and declared the underlying legislation invalid being incompatible with the provision[55]. As in the Austrian case, the administrative body can be obliged to provide 'bare' statistics regarding the warnings issued, such as the nationalities of the recipients[56].

In France, as already mentioned in relation to the previous case, the French *Code des relations entre le public et l'administration* (CRPA) explicitly laid down both the obligation to provide information at the request of the recipient of an individual decision (Arts L.311-1-3), to make explicit reference to the purposes of processing, together with the criteria used and their weighting by the computer program (Article R.311-3-1-2), and to disclose the source code of the algorithm (Art L.300-2). However, the CRPA recognises some exceptions: for example, access is excluded if it would impair the purpose of investigation and prevention of offences (Article L.311-5 CRPA). As prevention of tax fraud would fall within the scope of the exception, in hypothetical Case 6 (as in Case 5), access to the source code of the algorithm would be ruled out, as already stated by the *Commission d'accès aux documents administratifs* (Commission for access to administrative documents)[57].

A similar pattern – the exclusion of the right to access, explicitly recognised and codified in the context of automated decisions, on the basis of specific exceptions – emerges under the AI Act. Although, at first sight, it appears to qualify as a high-risk system, the use of an algorithm to detect fraud would fall within one of the exceptions provided under

[53] See the paragraphs on Austria in Part II and III.
[54] District Court of The Hague, judgment of 5 May 2020, *Federation of Dutch Trade Unions v. The State of the Netherlands*, ECLI:NL:RBDHA:2020:1878.
[55] District Court of The Hague, 5 February 2020, *SyRI*, ECLI:NL:RBDHA:2020:1878 para. 7.2.
[56] See the paragraphs on the Netherlands in Part II and III.
[57] See the paragraphs on France in Part II and III.

the AI Act: either as a preparatory act under Article 6(3)(c) and (d)[58], or – and definitively – because of the specific exception under annex III, art. 5, (b), excluding "AI systems used for the purpose of detecting financial fraud") from high-risk systems. As a result, none of the guarantees for high-risk systems – such as art. 13, mandating that providers shall ensure that their systems are designed and developed in a way that their operations are sufficiently transparent to enable deployers to interpret a system's output and use it appropriately - would apply [59].

The scope of the right to access and its limitations are more uncertain in Spain. On one hand, several Autonomous Communities use algorithms in their systems to detect fraud in tax and social welfare areas. However, sectoral legislation does not provide citizens with any procedure to access data use. On the other hand, the Council of Transparency and Good Governance upheld the claim brought by an individual against the Ministry of Inclusion, Social Security and Migration for refusing to provide access to the algorithm used to calculate the pension programme. By resolution, the Council of Transparency urged the Social Security Treasury General to grant access to the code[60].

Access to the source code and the data used for training can be granted on the basis of case law in only a limited number of jurisdictions.

In Italy, according to the case law of the Council of State, during the judicial proceeding, the (individual) plaintiff may request access to the accuracy of the data and the criteria used by the programmer in operating the automatic decision-making system[61]. The cases examined by the Council of State, however, did not specifically concern tax fraud.

In the United Kingdom, the Court would rule on the case on the basis of the Human Rights Act of 1998 and of the ECHR, as the recipient of the notice and the fine could successfully argue that disproportionate – and hence unlawful – interference with its property rights had occurred. The administrative body, however, could argue that the interference was justified in the public interest [62]. In assessing the proportionality of the interference, the request made for proof of

[58] Art. 6(3)(c) : "the AI system is intended to detect decision-making patterns or deviations from prior decision-making patterns and is not meant to replace or influence the previously completed human assessment, without proper human review"; Art. 6(3)(d): "the AI system is intended to perform a preparatory task to an assessment relevant for the purposes of the use cases listed in Annex III".

[59] See the paragraphs on the EU in Part II and III.

[60] See the paragraphs on Spain in Part II and III.

[61] See the paragraphs on Italy in Part II and III.

[62] See the paragraphs on the UK in Part II and III.

unemployment, as an opportunity to provide evidence, would have to be taken into account (making the interference more proportionate).

Lack of access to the algorithm could be deemed to infringe the beneficiary's due process rights in the US. The Idaho Federal District Court, for instance, found that Idaho's refusal (citing 'trade secret' issues) to give access to the code of the automated program for calculating developmentally disabled adults' benefits under Medicaid violated constitutional due process. The Court ruled that the applicants for Medicaid must have access to proprietary information about the assessment tool that feeds the system[63]. It also stipulated that the State must ensure there is a human representative to assist applicants in challenging outcomes[64].

There are, however, some differences between the hypothetical case and those that emerged in practice: in the latter, the automated systems required payment immediately[65]. If, as in the hypothetical case, the system is not entirely automated, with the algorithm's role limited to flagging potential fraudsters and giving them an opportunity to provide documentation, an infringement of due process rights would be less likely to be found.

In China, Article 24 of the PRC's *Personal Information Protection Law* (PIPL) explicitly bans unreasonable and unfair treatment of data subjects by data processors. As the burden of proof is on the defending administration, the government would need to disclose the parameters used by the automated decision-making system to rule out bias against non-citizens[66].

3.3. The standing of an association

In several of the jurisdictions, an association like the one described in the hypothetical case would lack standing altogether.

In France, where, in principle (with numerous exceptions that would probably apply to this case, as seen above), access to the code is granted by law, only an individual, and not an association, is entitled to access. In the UK, too, the application for standing would most likely be rejected, as proceedings under the Human Rights Act 1988 do not allow *actio popularis* claims, and the application as described would be treated

[63] K.*W. v. Armstrong*, 683 F. Supp. 3d 1125 (D. Idaho 2023),

[64] Ib. For a broad discussion of the case, S. Landau *et al*., *Challenging The Machine: Contestability In Government AI Systems*, 20 (2024), available at *https://arxiv.org/pdf/2406.10430, 37.*

[65] See the paragraphs on the US in Part II and III.

[66] See the paragraphs on China in Part II and III.

as such[67]. In China, neither class actions nor representative standing are available in administrative litigation[68].

In Germany, as a rule, voluntary third-party intervention is not allowed in administrative court procedure. Associations representing the public interest are entitled to participate only in limited circumstances, such as environmental matters. Most notably, even if the German General Equal Treatment Act does permit anti-discrimination organisations to act as legal representatives, the act, as noted earlier (sub A), applies only to specific disadvantaged groups (on grounds such as race or ethnic origin). Discrimination based on nationality therefore falls outside its scope. Consequently, an association of the type described in the hypothetical case – primarily concerned with employment status – would most likely lack standing.

In the second group of cases, standing might be granted, as the specific requirements of national legislation could be met in the specific hypothetical case considered above.

In Italy, according to case law, an association must demonstrate that it has an interest distinct from that of the individual plaintiff to be recognised as having standing to initiate proceedings. It must show that the collective interest that it seeks to advance is directly related to its interests as an association, defined in its statutory purposes[69]. Thus, an association representing unemployed people, such as the one described in the hypothetical case, could be given standing if it can show that its interest is independent of the plaintiff's[70].

In the Netherlands, under the Dutch General Administrative Law Act (GALA), an association is granted legal standing if three cumulative criteria are met: the organisation must have legal personality; the collective interest it seeks to promote in court must be listed among its statutory objectives; it must be able to derive its collective interest from its actual activities. On this basis, it is likely to be able to initiate proceedings before an administrative court as a party concerned[71]. However, as the decision to use an automated system and the use of that system do not qualify as administrative decisions under Dutch law, the association would need to meet the conditions for standing required of associations under the Civil Code, which are, in part, similar and, in part,

[67] See the paragraphs on the UK in Part II and III.
[68] See the paragraphs on China in Part II and III.
[69] TAR Lazio Rome, section II, 3 January 2024, no. 199.
[70] See the paragraphs on Italy in Part II and III.
[71] See the paragraphs on the Netherlands in Part II and III.

additional. Moreover, the association could be entitled to start a collective action under the Dutch Civil Code.

In the EU, an association qualifies as a non-privileged applicant, and, according to Article 40(2) of the CJEU Statute, could intervene as third party in direct actions (such as the action for annulment under art. 263 TFEU)[72]. The association must demonstrate to have «an interest in the result of the case» (art. 40(2)), meaning a «direct» and not merely hypothetical interest in the outcome of the case[73]. However, the association could only be recognized the possibility of an intervention *ad adiuvandum*[74].

In other jurisdictions, the standing of associations is broadly recognised. In Spain, an association would have standing to intervene. In Austria, NGOs are recognised as a 'social watchdog' under the case law of the Austrian Supreme Administrative Court, in compliance with Article 10 (1) of the European Convention on Human Rights[75]. They are entitled to request information and may first submit such a request to the administrative authority and, if rejected, bring the case before an administrative court (which may require the authority to provide the requested information).

In the US, the necessary conditions an association must meet to have standing are the following: "(a) its members would otherwise have standing to sue in their own right; (b) the interest it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit"[76]. Several such actions have been successfully litigated in similar cases in the US over the past decade [77].

When no standing is granted to an association, alternative avenues may be available in some jurisdictions. In Estonia, for example, an association would not have standing, but it could file a complaint before the Gender Equality and Equal Treatment Commissioner.

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[72] C. Amalfitano, *Standing (Locus Standi): Court of Justice of the European Union* (ad vocem), in *Max Planck Encyclopedias of International Law,* 2021, paras. 41 ff. and V. Passalacqua, *Amicus curiae e intervento di terzo davanti alla Corte di giustizia dell'Unione europea e alla Corte europea dei diritti dell'uomo: alcune riflessioni critiche alla luce delle recenti modifiche e della prassi*, 4 Eurojus (2015).

[73] , Order of the President of the Court of Justice of the European Union, Case C-104/16 P, *Council of the European Union v Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario)*, ECLI:EU:C:2016:443, para. 10.

[74] See the paragraphs on the EU in Part II and III.

[75] Austrian Supreme Administrative Court (VwGH) 29.05.2018, Ra 2017/03/0083.

[76] *Hunt v. Wash*. State Apple Advert. Com'n, 432 U.S. 333, 343 (1977).

[77] See the paragraphs on the US in Part II and III.

4. A discriminatory predictive policing AI

In Case 7, due to the use of AI for predictive policing, a heavily tattooed person first receives a warning identifying him as a potential hooligan and, second, after being accused of assaulting a supporter of a rival team, he immediately receives a Hooligan Ban, i.e., a temporary restriction order prohibiting him from attending sports events.

The key questions raised are: a) whether the warning and the ban can be challenged on the grounds of discrimination; b) whether the person would be able to identify the basis of his identification as a potential hooligan; and c) what remedies he would have, and, in particular, d) whether he could claim damages.

4.1. The unlawfulness of a restrictive measure resulting from discriminatory predictive policing AI

The first aspect addressed by the experts' replies concerns the unlawfulness of the restrictive measure in the specific context of AI use in this hypothetical case, namely, predictive policing.

Predictive policing is a prohibited AI practice under Article 5(1)(d) of the EU AI Act, which forbids "[…] the use of an AI system for making risk assessments of natural persons in order to assess or predict the risk of a natural person committing a criminal offence, based solely on the profiling of a natural person or on assessing their personality traits and characteristics". Even if the same point specifies that "this prohibition shall not apply to AI systems used to support the human assessment of the involvement of a person in a criminal activity, which is already based on objective and verifiable facts directly linked to a criminal activity", this exception does not appear to cover the case described (given that the ban was based on an allegation, which had not been verified). As a result, this practice is now forbidden in the Member States and is therefore unlawful[78].

If it were not already a prohibited practice from the outset, challenging the warning and the ban could be possible in several Member States on grounds other than those set out in the warning and the ban.

For example, in Germany, as a legal basis authorising the police to act is needed, without a specific law to introduce it, the warning would be illegal. In any case, proof of a sufficient threat to public safety would be required; i.e., the ban should be based on objective facts that justify an

[78] Explicitly on this point, see the paragraphs on France and Estonia in Part II and III.

assessment of an imminent or ongoing threat. Since these are lacking, the Court would annul both the warning and the ban[79].

Similarly, in the Netherlands, for both the warning and the ban to be considered lawful, the administration would need to show that serious public order disruption has occurred and that there is a significant risk of recurrence; otherwise, the proportionality of the public interference on the right to private life would be infringed, in breach of Article 8 ECHR.

In Austria, a warning could be annulled if it were issued entirely through automation (for lack of reasoning); if it were not wholly automated, its plausibility would be assessed. The ban could also be quashed for lack of reasoning.

Challenging the warning or the ban on grounds of discrimination would, however, be more difficult to demonstrate. As examined in Case 6 (*supra*, Section 3.1), anti-discrimination laws often identify specific grounds of discrimination (race or ethnic origin, sex or sexual identity, religion, disability, or age), so that bias based on physical characteristics such as tattoos is usually not included among them. In Estonia, for example, the Equal Treatment Act does not include tattooed persons among the groups protected against discrimination, nor does German law. However, as Art. 5(1)(d) of the AI Act refers only to "personality traits and characteristics", the scope of discrimination is broader and would also cover tattoos.

Outside the EU Member States, questions concerning the lawfulness and proportionality of measures resulting from the use of predictive AI in police enforcement, such as those raised in hypothetical Case 7, would be framed differently.

In the UK, the question of whether it would be lawful for the police to use predictive policing technology resulting in the imposition of bans would be approached from a human rights perspective, based on Articles 6 and 8 ECHR.

For the requirements under Article 8 ECHR to be met, it would be necessary to verify, first of all, not only that a legal basis for a public interference on the right to private life exists, but also that the criterion of the 'quality' of such legislation is met. In *Bridges*, automated facial recognition technology was found to breach Article 8 ECHR because the legislative framework lacked clarity[80]. Second, public interference on the right to private life should be proportionate, a requirement for which

[79] See the paragraphs on Germany and the EU in Part II and III.

[80] See, for example, *R (Bridges) v Chief Constable of South Wales Police* [2020] EWCA Civ 1058.

procedural guarantees, such as prior notice and the availability of an administrative review, would be relevant. In the specific case illustrated above, the decision to issue the notice could be challenged on the grounds of the absence of both hearing rights and the availability of administrative review, which could amount to a lack of proportionality of the public interference under Article 8 ECHR, and an infringement of procedural safeguards under Article 6 ECHR (given that a precautionary restrictive measure such as the Hooligan Ban would be qualified as a criminal sanction under settled Strasbourg case law)[81].

While the warning and the ban would probably be found to be in breach of Articles 6 and 8 ECHR in the UK, the argument based on discrimination would be more difficult to prove, as it is dubious that "tattooed" would be a "protected characteristic" for the purposes of Article 14 ECHR. However, if the plaintiff were able to show that tattooed people are statistically more frequently flagged as potential hooligans, he could challenge the notice on grounds of unreasonableness (as demonstrated in *Short v Poole Corporation*[82], which addressed discrimination against a red-haired teacher specifically because of such physical characteristic)[83].

In the US, a case involving a temporary restrictive measure that amounts to a criminal sanction would involve due process safeguards, such as prior notice, the opportunity to be heard, and a neutral arbiter. In a case involving a similar automated system (under which a person who had received at least one criminal justice disqualification notice would be automatically disqualified from food assistance benefits), the Court ruled that due process should apply[84]. Following this reasoning, the Hooligan ban would be declared unlawful, as an opportunity to be heard and to present evidence must be provided, at least through an appeal process that ensures timely human review[85]. In the US too, discrimination based on tattoos does not fall under general anti-discrimination law.

In China, the burden of proof for discrimination would be on the administration: i.e., it would need to prove that no discrimination was embedded in the algorithm[86].

[81] See the paragraphs on the UK in Part II and III.
[82] *Short vs. Poole Corporation* [1926] Ch 66, 90, 91.
[83] See the paragraphs on the UK in Part II and III.
[84] *Barry v. Lyon*, 834 F.3d 706, 711 (6th Cir. 2016).
[85] See the paragraphs on the US in Part II and III.
[86] See the paragraphs on China in Part II and III.

4.2. Access and transparency

As predictive policing constitutes a prohibited AI practice under the AI Act, the principles established for high-risk systems, such as explainability and human oversight, would not apply and would be irrelevant, as the practice would be unlawful from the outset[87].

If profiling in the context of police enforcement was not entirely prohibited, access would in any case, face limitations in several jurisdictions. In Austria, for instance, the recipient would not have access to the source code generating the warning[88]. In France, access to the source code would be refused on grounds of public safety under Article L.311-5 of the CRPA, and, in this case, the Commission for access to administrative documents would most likely confirm the exception[89].

In Spain, while the Council of Transparency and Good Governance has sustained the request for access to the technical specification of the software used in automated decision-making systems, in this case, no access to the algorithmic code or to the data used to train it would probably be granted. In the specific area concerning the case at hand, i.e. police enforcement, information held by public administrations is usually classified as 'reserved' or constrained by public security requirements (one of the exceptions specifically listed under Law 19/2013 of 9 December on transparency, access to public information, and good governance)[90].

Access would be granted in some jurisdictions, however; mostly on the basis of case law (and in broader terms than in Case 6, given the specific sector in question).

In Italy, the recipient of the ban would have the right to access the AI system that produced the warning. More specifically, according to the case law of the Council of State, he would be entitled to: (a) complete knowability of prior parameters of the module used and the criteria applied; and (b) accountability of the decision by the authority in question, which must be able to verify the logicality and legitimacy of both the choice and the outcomes assigned to the algorithm[91]. Within the administrative process, the recipient could request technical verification of the accuracy of the data entered and the criteria used by the automated system to prove discrimination[92].

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87 See the paragraphs on the EU and Germany in Part II and III.
88 See the paragraphs on Austria in Part II and III.
89 See the paragraphs on France in Part II and III.
90 See the paragraphs on Spain in Part II and III.
91 Council of State, no. 8472/2019.
92 See the paragraphs on Italy in Part II and III.

In the Netherlands, leading case law has stated that – by virtue of the general principles of good administration, such as the requirement to give reasons and the principle of due care, in addition to the proportionality principle – an administrative body must disclose, fully and promptly, the data and assumptions used by the AI system in the context of automated administrative decision-making. However, a distinction has been drawn, clarifying that the administration does not need to disclose the entire data set, provided it explains the choices made regarding the input data used to reach the decision in question (in this case, the warning)[93].

In the US too, the recipient of the ban would be entitled to access the algorithms and the data used to train them based on their due process rights, as clarified in the relevant case law[94].

The outcome of the decision on access would be more uncertain in the UK. Even if a notice and a ban like those described in the hypothetical case would most likely be considered unlawful due to a lack of proportionality of the public interference on the right to private life under Article 8 ECHR or because of insufficient procedural safeguards under Article 6 ECHR, it would still be debated whether access would be granted to all the information or in a reduced form for reasons of public interest[95].

4.3. Remedies

Challenging both the notice and the ban could lead to difficulties in several jurisdictions.

In Austria, whether or not the notice is issued as an administrative decision (*Bescheid*) determines the type of legal remedy. If it is issued as a decision, it can be challenged before an administrative court; if not, it cannot be challenged autonomously. In any case, the ban is subject to judicial review and will be annulled for lack of reasoning[96].

In the EU too, an action for annulment under Article 263 TFEU could be brought against the ban, which could be quashed on the grounds of a violation of secondary law as a prohibited practice under Article 5(1)(b) of the AI Act. The notice, however, could not be challenged directly as it produces no immediate and detrimental legal effect[97].

[93] See the paragraphs on the Netherlands in Part II and III.
[94] See the paragraphs on the US in Part II and III.
[95] See the paragraphs on the UK in Part II and III.
[96] See the paragraphs on Austria in Part II and III
[97] See the paragraphs on the EU in Part II and III.

In China, a warning similar to the one described in Case 7 would not be considered an administrative act; it would most likely be a factual or, alternatively, a preparatory act. In both cases, the notice would not be reviewable. If it is qualified as a preparatory act, it can be challenged together with the ban[98].

In Germany, on the other hand, even if it is not deemed an administrative act, the notice is, in any case, a measure infringing the recipient's rights; hence, both the notice and the ban can be challenged before an administrative court, which may annul them[99].

In the Netherlands, not only would the notice – as a precondition for the exercise of sanctioning power – be considered a decision subject to judicial review, but it would also be possible to challenge the potentially discriminatory use of AI before a civil court, seeking a declaratory ruling that the AI system is unlawful. Moreover, a collective action could be brought, which appears best suited to challenge the discriminatory flagging of potential hooligans based on their physical characteristics[100].

4.4. Damages

As to whether damages can be claimed, several distinctions need to be made in relation to the examined jurisdictions, revolving around the likelihood that a court will acknowledge the constitutive elements of liability – unlawful conduct, causal link, and damage.

Since, in the hypothetical case, the ban is discriminatory, it would be assumed in the Netherlands that it is both an unlawful act and attributable to the administrative body[101].

In Italy, however, the Council of State holds that, for the administration's conduct to be unlawful in the context of automated decision-making, negligence of the administration in conducting its organisational duties must be proven, meaning that either a significant error in programming the algorithm occurred, or the authority seriously failed to carry out ex-post checks on the correct functioning of the system. For this requirement to be fulfilled, the administration would need to have conducted periodic verification, including testing, updates, and improvements to the algorithm[102].

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98 See the paragraphs on China in Part II and III.
99 See the paragraphs on Germany and the EU in Part II and III.
100 See the paragraphs on the Netherlands in Part II and III.
101 See the paragraphs on the Netherlands in Part II and III.
102 See the paragraphs on Italy in Part II and III.

In Austria, the causal link between the notice and the damage resulting from the ban could be disputed. If the prohibition is not a fully automated decision and is issued by a human being, proving the causal link between the discriminatory notice and the damage resulting from the ban would be difficult[103].

A last distinction concerns the type of damages (financial/non-financial).

In Germany, damages for breaches of public law are awarded only for material loss. In this case, only compensation for the loss of the stadium tickets that the applicant was unable to use would be available[104]. In Austria too, damages would be awarded only if the ban results in financial loss[105].

In the Netherlands, it would also have to be shown that the damage is concrete and sufficiently related to the area ban, whereas in Spain, it would need to be demonstrated that discrimination caused harm[106].

In Italy, on the contrary, non-pecuniary damages can also be claimed, as they are recognised as encompassed within the improper processing of personal data[107].

In the US too, the person affected by the ban could have grounds to request both economic and non-economic compensatory damages (the first arising from the cost of the ticket that he had bought but was unable to use, and the second being linked to the emotional stress and ostracism stemming from being flagged as a hooligan). Punitive damages may also be awarded by a court to convey a strong message against discrimination, and some courts have done so in AI discrimination cases. However, it is too soon for these cases to constitute precedents[108].

In China, in addition to property damage (for loss to the value of the ticket), the plaintiff could seek to prove he had suffered psychological damage. If psychological harm is established, the person could receive not only a consolation payment, but also an apology from the government intended to restore their reputation[109].

[103] See the paragraphs on Austria in Part II and III.
[104] See the paragraphs on Germany and the EU in Part II and III.
[105] See the paragraphs on Austria in Part II and III.
[106] See the paragraphs on the Netherlands in Part II and III.
[107] See the paragraphs on Italy in Part II and III.
[108] See the paragraphs on the US in Part II and III.
[109] See the paragraphs on China in Part II and III.

5. Concluding Remarks: Commonalities and Differences

Several commonalities emerge in how procedural principles adapt and evolve in the context of automated decision-making in the examined jurisdictions.

A first common element is the evolution of the requirement to give reasons, which is closely linked to the principles of non-exclusivity and the human-in-the-loop. In the majority of cases, fully automated decision-making is prohibited, while human control is necessary. The connection between the two principles appears evident in the increasing development of administrative remedies. Although their initial spread could be linked to the prospect of providing quicker and more affordable remedies[110] (a rationale still regarded as central in the UK)[111], in the context of automated decision-making, administrative remedies become the means through which a human controller can explain and rectify a computer-generated outcome[112]. The relationship between human oversight and the requirement to give reasons explains why administrative remedies are compulsory in many of the cases examined.

This expansion, however, also indicates an evolution with regard to the requirement to give reasons: whereas the requirement to give reasons would previously – as a rule – have been fulfilled when a decision was taken and could be postponed under exceptional circumstances[113], in automated decision-making the ordinary use of administrative remedies as a venue for explanation and justification results in an iterative process, which emerges as the area of the human-in-the-loop.

One notable exception in this development is the Austrian case, where no administrative remedy would be available. Moreover, the court would wholly substitute a penalty found to be unlawful (with no possibility for the administration to replace it). This exception might be linked to the historical evolution of Austrian administrative law[114].

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[110] B. Marchetti, *La tutela non giurisdizionale*, Riv. it. dir. pubbl. comunit. 423 (2017).

[111] See the paragraphs on the UK in Part II and III.

[112] On administrative remedies as a means for effective HITL, B. Marchetti, *La garanzia dello human in the loop alla prova della decisione amministrativa algoritmica*, cit. at 12, 22. For the connection between explainability and meaningful human oversight on automated decisions, B. Wagner, *Liable, but Not in Control? Ensuring Meaningful Human Agency in Automated Decision-Making Systems*, 11 Policy & Internet 113 (2019).

[113] Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, EU:C:2008:461, para. 336.

[114] G. della Cananea, A. Ferrari Zumbini, O. Pfersmann (eds.), *The Austrian Codification of Administrative Procedure. Diffusion and Oblivion (1920-1970)* (2023).

Whereas convergence can be traced in the adaptation of the duty to give reasons in the context of automated decision-making (through its connection with human ex post oversight and explainability), the scope of the means to ensure transparency varies significantly in the jurisdictions examined.

Exceptions that can generally constitute a limitation to access to the source code of an AI system are the protection of business and trade secrets. In the cases considered in this contribution – covering tax, fiscal fraud, and police enforcement –, exceptions relating to investigation and prevention, as well as public security, would also apply. When these exceptions are recognised, only limited access to bare statistical data would be granted.

However, in some jurisdictions, transparency has been recognised more broadly. This appears to be mostly connected with the action of the Courts, both common law and civil law ones. For example, not only in the US but also in Italy and the Netherlands, the Courts would require administrative bodies to provide access not only to the source code but also to the data used to train it (even though further distinctions within the data could be made). This trend suggests that the specific challenges posed by automated decision-making – and the key role of access in establishing discrimination and bias – call for an approach that extends beyond sectoral exceptions familiar from well-known specialised access legislation, prompting courts to consider and assess AI's impact from general principles.

At the same time, the approach based on the introduction of periodic verification mechanisms on the functioning of AI to rule out discrimination emerges both in (Italian) case law and in sector-related legislation (as in a New York law), showing that traditional approaches to access to data would, in the area of administrative decision-making increasingly relying on AI, need to be coupled with other mechanisms (such as verification surveys)[115].

Substantial differences across jurisdictions emerge regarding the treatment of predictive AI and the legal remedies available. Predictive AI policing is prohibited under the EU AI Act, while its lawfulness would need to be verified on case-by-case basis both in the UK and in the US. In

[115] For an assessment of the impact of the guarantees set forth in the AI Act for administrative-decision- making, see O. Pollicino, *Regolazione e innovazione tecnologica nell'"ordinamento della rete"*, 2 Rivista AIC 119 (2025), 166-7. Calling for further action to increase guarantees beyond the AI Act in the context of administrative decision-making, B. Marchetti, *Pubblica amministrazione e intelligenza artificiale: basta l'AI Act?*, to be published.

the UK, the legality of this practice would be assessed against human rights standards (most notably the ECHR). On the other hand, in the US, compliance with due process obligations would have to be verified (in this regard, the scope and depth of procedural guarantees would be decisive).

In terms of legal remedies, similarities emerge in the treatment of warnings and bans, the challenge of which would be fraught with similar difficulties in several jurisdictions, as they would often be framed as preparatory acts (with the notable exception of Germany and of the Netherlands, where a notice flagging a potential fraudster is considered to infringe the recipient's right, and hence constitutes a challengeable act). More significant differences emerge regarding whether associations can have standing. A broader recognition of standing – similar to that gradually emerging in environmental law – could be explored, since cases involving discriminatory algorithms would, by their very nature, affect a large number of people and may be more readily established through class action, as demonstrated by the US experience[116].

[116] In general terms, on the challenges to the right to effective judicial protection in the digital age, see G. De Gregorio, S. Demkova, *The Constitutional Right to an Effective Remedy in the Digital Age: A Perspective from Europe*, in C. van Oirsouw, J. de Poorter, I. Leijten, G. van der Schyff, M. Stremler, M. de Visser (eds.), *European Yearbook of Constitutional Law* (2024), available at SSRN: *https://ssrn.com/abstract=4712096 or http://dx.doi.org/10.2139/ssrn.4712096*.