

Remedies and Review Procedures of Public Procurement Contracts in the Era of Decisions Adopted by AI or Algorithms. The Elephant in the Room?*

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1. Introduction

Within the context of European Public Procurement Law, digitalisation has transitioned from being a matter of debate (“if”) to a mandatory requirement (“must”). The European Parliament, in its resolution of 09.09.2025 on public procurement, affirmed that digitalisation is a crucial component of the overall reform of the public procurement system. Consequently, the focus must shift towards simplifying award procedures, lowering costs, enhancing legal certainty and coherence, boosting transparency, encouraging the participation of Small and Medium-sized Enterprises (SMEs), and automating decision-making processes.□

Within the sphere of public procurement, decision-making is inherently human-centred, whereby the human element constitutes the decisive component. This anthropocentric approach ensures legitimacy by focusing on the individual. The justification for human involvement arises directly from humanism, underscoring the necessity of positioning the individual as the supreme value and unique dimension within society. The individual is not merely an inert recipient of a decision, but rather a holder of fundamental rights that require protection.

Moreover, until recently, the technological factor’s participation in deci-

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sion-making was not direct, but instead fulfilled a support role, utilizing a set of static ‘if-then’ rules,¹ referred to as Robotic Process Automation (RPA).² A fundamental transformation occurs, however, upon the introduction of AI systems employing Deep Learning technology into the decision-making process.

Decisions adopted by contracting authorities, whether during the public procurement contract award or the subsequent execution phase, impact the rights and obligations held by tenderers and economic operators. The safeguarding of the rights and legitimate interests of actors in public procurement is ensured by the remedies and review procedures set forth in Council Directive 89/665/EEC of 21 December 1989 on the coordination of review procedures concerning the award of public supply and public works contracts (the Remedies Directive).³

The purpose of the remedies is to ensure effective and swift redress mechanisms⁴ for interested parties, specifically where there has been an infringement of Union law in the field of public procurement.⁵ Furthermore, the provisions of the Remedies Directive seek to ensure full compliance with the right to an effective remedy and to a fair trial, as those rights are recognised by the provisions of art. 47 of the Charter of Fundamental Rights of the European Union (CFR).⁶

Our analysis herein examines the existing framework of post-contractual remedies,⁷ seeking to ascertain if the necessary standard of effectiveness remains sustainable amidst the rise of automated decision-making processes.⁸ More specifically, the core question is whether the adoption of algorithmic decisions is structurally capable of undermining the existing

¹ No. 28, 29, 34, 35, P10_TA(2025)0174 *Public procurement, European Parliament resolution of 9 September 2025 on public procurement (2024/2103(INI))*.

² A. Rizk – I. Lindgren, *Automated decision – making in public administration: Changing the decision space between public officials and citizens in Government Information Quarterly*, 42 (3), 2025, 1 ff., 1, 2.

³ B. McGurk KC – J. Tomlinson, *Artificial Intelligence and Public Law*, 2025, 1 ff., 4.

⁴ In the case of utilities contracts, the system of remedies and review procedures is governed by the provisions of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on procurement procedures of entities operating in the water, energy, transport and telecommunications sectors. It is useful to note that the provisions of the two Directives are, for the most part, similar, though certain differences exist which are not, however, fundamental.

⁵ Recital 3, Council Directive 89/665/CEE.

⁶ The case-law of the CJEU has established that the provisions of Directive 89/665/EEC are designed to protect tenderers against the arbitrary action of the contracting authority, while simultaneously aiming to reinforce existing mechanisms to ensure the effective application of Union rules on the award of public procurement contracts, particularly at a stage where infringements can still be remedied. See, ECJ, C – 19/13, *Fastweb* (2014), §34.

⁷ Recital 36, Directive 2007/66/CEE.

⁸ With reference to the provisions of Directive 89/665/EEC, this category shall include: the award of damages, ineffectiveness and the imposition of alternative penalties. Furthermore, art. 73(a) of the Directive mandates that Member States regulate the possibility of terminating a contract during its term where the contract has been subject to a substantial modification that would have required a new award procedure. As regards pre-contractual remedies, these shall be represented by the adoption of interim measures and the annulment of decisions unlawfully taken by the contracting authority.

post-contractual remedies framework.

This paper ascertains that a reconfiguration of the remedies system is not deemed necessary – at least at this incipient stage of AI development – but rather calls for a seamless integration of AI and data protection regulations into the judicial and administrative-jurisdictional framework.

Consequently, Title II of this paper will be dedicated to a brief presentation of post-contractual remedies. Next, Title III will focus on the obligation to state reasons for administrative decisions. Title IV will subsequently analyse this specific obligation in light of the unique challenges posed by the implementation of algorithmic decision-making. Building upon these findings, Title V will seek to determine the necessity of reforming the post-contractual remedies system to effectively meet these new technological realities. Finally, a series of pertinent conclusions will be set forth in the concluding section.

2. Post-Contractual Remedies: The Big Picture

Understanding the specificities of the public procurement contract is the requisite starting point for any presentation on post-contractual remedies as they represent a fundamental factor. Contract execution entails more than merely complying with the relativity of contract effects. While the contract award necessitates compliance with formal rules,⁹ aimed at ensuring the selection of the Most Economically Advantageous Tender (MEAT) – by upholding transparency, non-discrimination, and full competition requirements – the subsequent contract execution equally demands adherence to a specific regulatory framework.

Furthermore, it must be noted that the performance of public procurement contracts does not benefit from regulation as detailed as that for the award phase; rather, it is comparatively limited.

Thus, by way of illustration, should a contracting authority unlawfully adopt a decision, the aggrieved party shall be entitled to the award of damages for the full reparation of the loss sustained. Equally, during the performance of a public procurement contract, circumstances may arise necessitating the modification of its effects (e.g., the increased cost of materials utilised). Consequently, the contracting parties shall be obliged to comply with regulations aimed at preventing discrimination, ensuring a high degree of transparency, and simultaneously precluding the artificial restriction of competition.¹⁰

Non-compliance with these rules shall lead to the ineffectiveness of the contract. Furthermore, in the event that substantial modifications have

⁹ In this respect, we will refer exclusively to hybrid ADM systems, which entail an interaction between AI and the human factor. Specifically, the definitive endorsement of the decision rests with the human factor, while the entire subsidiary process—including the analysis and corroboration of data, the identification of potential solutions, and the proposal of a decisional direction—is undertaken by the AI system (“human in the loop”).

¹⁰ This refers to the award of public procurement contracts with an estimated value at least equal to, or exceeding, the thresholds regulated by the provisions of art. 4 of Directive 2014/24/EU.

been implemented requiring a new procedure, the contracting authority shall be entitled to early termination of the contract. Lastly, circumstances may arise where the public interest necessitates maintaining the effects of an unlawfully awarded contract, consequently requiring the imposition of alternative penalties.

In this context, the parties involved in the contract performance are entitled to utilize specific remedies and review procedures aimed at either preventing resulting loss or securing the reparation of an infringement of a right or legitimate interest. The Remedies Directive establishes a framework for minimum harmonisation, its objective being to regulate solely the essential criteria that national legal systems must satisfy to guarantee full compliance with EU public procurement law.¹¹

Although the award of damages constitutes an established remedy within the national legal systems of Member States – pertaining to both public and private law spheres – it regrettably encounters the most significant practical difficulties. Moreover, from a public policy perspective, damages constitute a sensitive subject, as their regulation can have a significant impact on the public budget.¹² The uncertainty is compounded by the fact that the provisions of the Remedies Directive provide no further clarification regarding the notion of damages or the criteria for their award.¹³

In this respect, the possibility of awarding damages is provided for by the provisions of art. 2(1)(c) of the Remedies Directive, according to which «The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to: c) award damages to persons harmed by an infringement.». Beyond these normative provisions, our attention is drawn to the stipulations set out in art. 2(6) and art. 2(7), second subparagraph of the Remedies Directive.¹⁴

The case-law of the ECJ¹⁵ and the EFTA Court¹⁶ has intensely debated the issue of damages. For instance, in Case C-568/08, *Combinatie Spijker*, it

¹¹ S. Van Garsse – S. Verhoeven – A. Verschave, *Substantial Modifications of Public Contracts and Their Consequences: European and Belgian Procurement Law Perspectives* in *European Procurement & Public Private Partnership Law Review*, 16 (4), 2021, 284 ff.

¹² ECJ, C-327/00, *Santex SpA* (2003), § 47; ECJ, C-314/09, *Stadt Graz* (2010), § 33. As a result of the principle of procedural autonomy, Member States retain broad regulatory power concerning the conditions for exercising remedies and review procedures, jurisdictional competence, and procedural organisation. However, this autonomy is not absolute, being conditional upon compliance with the principles of effectiveness and equivalence.

¹³ A. Țoca – D. C. Dragoș, *Damages in Public Procurement Procedures: On the Convergence of EU and Romanian Law* in *European Procurement & Public Private Partnership Law Review*, 20 (1), 2025, 99 ff.

¹⁴ E. Danovskis, *Arguments against damages as a legal remedy in public procurement proceedings*, Riga, 2024, 156 ff., 156.

¹⁵ Art. 2(7), second subparagraph, of the Remedies Directive stipulates the following: «Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract in accordance with Article 1(5), paragraph 3 of this Article or Articles 2a to 2f, the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement.»

¹⁶ ECJ, C-275/03, *Commission v. Portugal* (2004); ECJ, C-314/09, *Strabag Graz* (2010).

was established that the right to reparation is based on the Member State's liability for a breach of EU law, thus evoking the Francovich doctrine.¹⁷ Another relevant judgment, Case C-547/22, *INGSTEEL*, confirmed that national law cannot completely preclude the award of damages for the loss of a chance to obtain a contract. The Court emphasised that full reparation of the loss sustained is a fundamental principle of Union law.¹⁸ The remedies encompassing ineffectiveness and alternative penalties were instituted through the amendments made to the provisions of the Remedies Directive by Directive 2007/66/EC. Their fundamental role is to combat the unlawful award of contracts¹⁹ and to preclude the prevalent practice whereby contracting authorities hasten to sign the contract immediately following the conclusion of the award procedure – a phenomenon known as the “rush to sign the contract”. Before these measures were introduced, interested parties were solely confined to seeking the award of damages. Ineffectiveness is triggered when a contract is awarded without the mandatory prior publication of a notice in the Official Journal of the European Union, unless an explicit exemption is granted under the prevailing EU law.²⁰ Furthermore, another instance triggering the incidence of this remedy is represented by non-compliance with the standstill period, provided this is combined with an infringement of the provisions of Directive 2014/24/EU.²¹

Pursuant to art. 2d(2) of the Remedies Directive, Member States are at liberty to regulate the manner in which this remedy operates.²² Specifically, they may choose whether the effects are to be produced retroactively (*ex tunc*) or prospectively (*ex nunc*). However, should the *ex nunc* solution be chosen, national legislation must mandatorily provide for alternative sanctions.²³ Furthermore, these may be ordered, in certain cases,²⁴ in lieu of ineffectiveness, following an assessment of all relevant factors, such

¹⁷ EFTA, E-16/16, *Fosen-Linjen AS* (2017); EFTA, E-7/18, *Fosen-Linjen AS* (2019). It is worth noting that the first EFTA Court ruling served as an advisory opinion, prompted by the fact that the referring court (Frostating Court of Appeal - Norwegian: Frostating lagmannsrett) had encountered difficulties in reconciling the CJEU judgments in *Commission v. Portugal*, *Strabag AG*, and *Spijker*. The Court held that, under art. 2(1)(c) of the Remedies Directive, a mere breach of procurement law suffices to engage the contracting authority's liability, provided a causal link is established. The referring court opted not to adhere to the initial advisory opinion. Consequently, the Norwegian Supreme Court asked the EFTA Court to determine if every procurement law infringement justifies compensation for positive contractual interest. The EFTA Court's second judgment clarified that liability is contingent upon a ‘sufficiently serious breach,’ thereby excluding simple errors from the scope of damages for loss of profit.

¹⁸ ECJ, C-568/08, *Spijker* (2010), § 86

¹⁹ ECJ, C - 547/22, *INGSTEEL* (2024), § 33, 35, 43, 44.

²⁰ The ECJ's jurisprudence confirms that the direct award of a public procurement contract without observing mandatory procedural requirements represents the gravest infringement of Union procurement law, as stipulated in Case C-26/03, *Stadt Halle*. See ECJ, C-26/03, *Stadt Halle* (2005), § 33, 37.

²¹ Art. 2d, para. 1, lit. a), Council Directive 89/665/CEE.

²² Art. 2d, para. 1, lit. b), Council Directive 89/665/CEE.

²³ Art. 2d (2) of Directive 89/665/EEC stipulates the following: «The consequences of a contract being considered ineffective shall be provided for by national law».

²⁴ Art. 2d, para. 2, Council Directive 89/665/CEE.

as the gravity of the infringement or the conduct of the contracting authority. Alternative sanctions consist of imposing fines on the contracting authority or reducing the duration of the contract,²⁵ and must be effective, proportionate, and dissuasive.

While the conditions for their exercise differ from one remedy to another, the common element is nonetheless that all remedies invariably relate to the existence of a decision adopted by the contracting authority. The decision represents the manifestation of the contracting authority's will (the outcome of the decision-making process) within the objective reality of contract performance, with implications for the rights and legitimate interests of the interested parties.

Equally, the adoption of the decision may involve a more restricted or more extensive degree of discretion on the part of the contracting authority. This manifestation of will, must articulate the underlying rationale for the decision. Specifically, this refers to causality, namely the exposition of the factual elements retained, as well as the identification of the applicable legal provisions. In short, this entails adherence to the obligation to state reasons for decisions, which incumbent upon the public administration and contracting authorities. This fundamental obligation will be the focus of the subsequent title.

3. The Old Duty: The Core Requirement of Justification

In the field of administrative law, the issuing body must first ensure compliance with a designated framework of procedural guarantees before adopting a formal decision. These procedural guarantees include the obligation of due diligence, transparency, proportionality, the right to a defence, and the obligation to state reasons for decisions. All these procedural guarantees are inherently interconnected.²⁶ Of all these procedural guarantees, we will focus our attention in this article on the obligation to state reasons for decisions,²⁷ which we deem to be of paramount importance, as it thereby confers legitimacy upon the decision and reflexivity within the administrative decision-making process.²⁸

The aforementioned procedural guarantees are collectively encompassed by the right to good administration, as stipulated in art. 41 of the Charter of Fundamental Rights (CFR). In this respect, art. 41(2)(c) stipulates that the right to good administration includes, *inter alia*, the administration's

²⁵ Art. 2e, para. 1, Council Directive 89/665/CEE.

²⁶ Art. 2e, para. 2, Council Directive 89/665/CEE.

²⁷ S. Demkova, *Automated Decision-Making and Effective Remedies. The New Dynamics in the Protection of EU Fundamental Rights in the Area of Freedom, Security and Justice*, 2023, 63. For instance, compliance with the obligation of due diligence will be demonstrated by the fact that the decision is reasoned.

²⁸ Legal scholarship suggests that the statement of reasons for decisions constitutes a mechanism for reinforcing democratic influence over the administration, by virtue of the transparency it confers upon governance. See, M. Shapiro, *The Giving Reasons Requirement in University of Chicago Legal Forum*, 1 (8), 1992, 179 ff.

obligation to state reasons for its decisions. This right must be considered in consonance with the right to effective judicial protection, as governed by the provisions of art. 47 of the CFR.

The case-law of the ECJ has established that the right to good administration reflects a general principle of Union law.²⁹ It is useful to recall that the provisions of art. 41 of the CFR have a limited scope of application³⁰. Nevertheless, the guarantees accompanying the right to good administration, including the obligation to state reasons, also constitute general principles of EU law. Consequently, their applicability is not restricted solely to the scope of art. 41 of the CFR.³¹ It follows that these requirements shall also apply to the authorities of the Member States when implementing Union law,³² even in cases where there is no express or implicit reference to them within the Union legislation.³³

It follows from the foregoing that the obligation to state reasons can be viewed both as an intrinsic requirement of the right to good administration and as a general principle of Union law, consequently leading to an extension of its scope of application.³⁴

The duty to state reasons finds its firm grounding in political theory, as indicated by legal doctrine, originating in the concept of authority (irrespective of its type). This concept naturally conveys the impression, at least, that the decision-maker will be capable of articulating the underlying rationale for their decision should the necessity arise.³⁵ Equally, it has been contended that the statement of reasons inherently entails compliance with the obligation of due diligence, namely that the decision was adopted on the basis of the most complete, accurate, reliable, and coherent information possible.³⁶

The obligation to state reasons has been examined within the case-law of the ECJ by reference to the two functions this obligation fulfils. Firstly, the obligation relates to the courts' ability to exercise the function of

²⁹ H. P. Olsen – J. Livingston (eds), *What's in the Box? The Legal Requirement of Explainability in Computationally Aided Decision – Making in Public Administration*, in *Legal Studies Research Paper Series*, 84, 2019, 1 ff. The authors contend that legitimacy pertains both to the individual decision and to the entire administrative decision-making process. By stating the reasons for the administrative act, the grounds for its legality are indicated. Reflexivity concerns the complex process of improving the decision-making process by reference to decisions previously adopted.

³⁰ ECJ, C-604/12, *HN* (2014), § 49; ECJ, C-521/15, *Spain v Council* (2017) § 89; ECJ, C-141/12 and C-372/12, *YS* (2014), § 68.

³¹ The provisions of art. 41 of the CFR are addressed solely to the institutions, bodies, offices, and agencies of the Union, and not to the Member States. See, in this regard, ECJ, C-496/18 and C-497/18, *Hungeod and Others* (2020), § 63.

³² S. Demkova, *Automated Decision-Making and Effective Remedies*, cit., 61.

³³ See, in this respect, ECJ, C-604/12, *HN* (2014), § 49; ECJ, C-225/19 and C-226/19, *R.N.N.S., KA* (2020), § 34.

³⁴ S. Demkova, *Automated Decision-Making and Effective Remedies*, cit., 66

³⁵ The obligation to state reasons is also recognised concerning the procedure for the adoption of acts by the EU institutions, namely by the provisions of art. 296(2) TFEU, which stipulates that «Legal acts shall state the reasons on which they are based [...]».

³⁶ M. Shapiro, *The Giving Reasons Requirement in University of Chicago Legal Forum*, 1 (8), 1992, ff, 179.

judicial review, while the second refers to the interested party's ability to comprehend the grounds for the rejection of their application and, consequently, to determine whether or not to challenge the act in question.³⁷ In this latter case, the obligation to state reasons is closely linked to the right to an effective remedy, as governed by the provisions of art. 47 of the CFR.³⁸ Thus, the obligation to state reasons constitutes the corollary of exercising the right to a defence, through the possibility of pursuing an effective remedy.

Essentially, the duty to state reasons requires the administrative body to perform two simultaneous actions: first, to fully establish the factual circumstances through an impartial analysis; and second, to correctly identify and apply the corresponding legal rule (the legal qualification). The duty to state reasons is not fulfilled simply by the existence of a decision; rather, it mandates that the resulting decision possess specific, articulated content.³⁹ Fundamentally, the grounds are contingent upon the circumstances of the case, the nature of the measure to be ordered, and the interests at issue that may be affected by the ensuing measure.⁴⁰

The arguments presented must be logical and internally consistent, ensuring that the former can be readily comprehended.⁴¹ Lastly, the statement of reasons may be rendered in a succinct manner for matters following an established line of precedent; conversely, a detailed rationale is required for novel issues that necessitate a higher degree of discretion or complexity.⁴²

4. The Shifting Sands of Justification: is the Old Duty Still Standing?

Decisions adopted subsequent to a semi-automated algorithmic decision-making process consequently involve, as previously noted, an interaction or, more precisely, a partnership between the AI system and the human factor. Thus, the AI system will undertake the complex tasks and utilise algorithms based on which it will propose a specific solution, with the final decision being taken by the human factor. The algorithm implies the existence of a specific set of rules that are implemented in a successive order to achieve a certain outcome.⁴³ It is useful to note that the two methods of reasoning employed are distinct and cannot be considered similar. Whereas the current AI system relies on correlation (the description of a statistical relationship between multiple variables) – specifically, on identifying mathematical patterns within data sets and offering a probabili-

³⁷ H. Hofmann, *Automated Decision – Making (ADM) in EU Public Law* in H. Hofmann – F. Plücker, *Governance of Automated Decision-Making and EU Law*, Oxford, 2024, 1 ff, 19.

³⁸ ECJ, C-166/13, *Sophie Mukarubega* (2014), § 48; ECJ, C-131/15 P, *Club Hotel Loutraki and Others v Commission* (2016), § 46;

³⁹ ECJ, C-225/19 and C-226/19, *R.N.N.S., KA* (2020), § 43.

⁴⁰ H. P. Olsen – J. Livingston (eds), *What's in the Box?*, cit., 8.

⁴¹ ECJ, C-521/09 P, *Elf Aquitaine SA* (2011), § 150.

⁴² *Ibid.*, § 150.

⁴³ *Ibid.*, § 155.

ty prediction – human reasoning is fundamentally based on the concept of causality.⁴⁴ Causality signifies the capacity to draw a conclusion based on the actual dependence and association between a cause and its effect. Causality, in stark contrast to correlation, signifies a fundamental understanding of the conclusion, as it permits intervention (control), ethical judgment (accountability), and counterfactual reasoning.

The involvement of the AI system in the *ex ante* phase of decision-making does not lead to the alteration of the obligation to state reasons for the adoption of the decision. Nevertheless, the explanation (statement of reasons) will unavoidably be contingent upon the AI system's capacity to produce explainability,⁴⁵ which must subsequently be understood and analysed by the human factor. This explainability requires the AI system to be transparent, meaning it must be capable of providing sufficient elements to enable the human factor to effectively understand how the system operates, what its limitations are, and the risks entailed by its use.⁴⁶

The deficiency of AI system transparency directly undermines the obligation to state reasons, since the human factor must first comprehend the underlying rationale for the AI system's recommendation before being able to adopt a decision. The manifest incapacity of the human factor to comprehend this reasoning will consequently result in the failure to provide the grounds substantiating the decision. The resulting decision will be mechanical ("rubberstamping") rather than informed, and the accompanying statement of reasons will be formal, not substantive. Should an objective inability to comprehend arise, we are faced with technical opacity, commonly referred to as the "black box" problem.⁴⁷ We shall not elaborate on this point, merely noting that, at least in the context of the obligation to state reasons, explaining the process by which a given outcome was reached holds greater importance than the outcome itself.

Given that the AI system relies on probability (correlation) rather than human causality, doctrine suggests that ADM involvement mandates a highly detailed justification.⁴⁸ This requires explicitly detailing the data considered and explaining precisely how that information shaped the decision's outcome. The human-AI interaction is deemed critical within the hybrid ADM process, establishing the importance of the manner in which the human factor addresses the algorithm's output.⁴⁹

Building upon these endorsed premises, substantive justification is precluded unless the human factor undertakes a concrete analysis, as opposed to merely adopting the recommendations provided by the AI. The situation bears a resemblance to the presentation of an opinion by specialists

⁴⁴ M. Busuioc, *Accountable Artificial Intelligence: Holding Algorithms to Account in Public Administration Review*, 81, 2021, 825 ff., 828.

⁴⁵ B. McGurk KC – J. Tomlinson, *Artificial Intelligence and Public Law*, 2025, 6; M. Fink – M. Finck, *Reasoned A(I)dmistration: Explanation Requirements in EU Law and the Automation of Public Administration in European Law Review*, 47(3), 2022, 385.

⁴⁶ *Ibid.*, 384.

⁴⁷ Recitals 72, 73, and 93, Regulation (EU) 2024/1689.

⁴⁸ H. Hofmann, *Automated Decision – Making (ADM)*, cit., 20.

⁴⁹ M. Busuioc, *Accountable Artificial Intelligence*, cit., 828.

or experts in a given case. The decision-maker cannot simply adopt the expert opinion arbitrarily or prejudicially without articulating the specific grounds for its validation. Consequently, it is imperative to demonstrate precisely which recommendations provided by the AI system were retained and to what extent those recommendations are relevant, pertinent, and conclusive for the adoption of the final decision.⁵⁰

Furthermore, we endorse the doctrinal view that, concerning the obligation to state reasons, the transparency of the mathematical algorithm employed by the AI system,⁵¹ is less relevant than the transparency regarding explainability, which enables the human factor to comprehend and correct the proposed decision trajectory. Equally, even in the case of traditional decision-making, transparency regarding the neurological processes involved in human judgment is not required. Instead, the mandate is merely to provide complete and substantive factual and legal grounds to support the decision in question.

Consequently, we assert that the obligation to state reasons should suffer no structural modification stemming from the involvement of AI in the decision-making process, concerning decisions based on a hybrid ADM model. Nevertheless, this obligation requires adaptation to the current context, primarily to ensure that the affected individual is informed of two facts: that the decision was taken with the assistance of an AI-based algorithm, and the precise manner in which the human factor addressed the AI system's recommendation. Furthermore, adapting the obligation to state reasons will serve administrative authorities by enhancing the quality of the acts they issue. Equally important, the quality of justice will improve, as courts will be able to verify the merits and legality of the issued acts more easily.

5. Remedies in the Algorithmic Age: Reform or Adaptability?

The remedies and review procedures under the Remedies Directive does not affect the procedural organisation or competence of the Member States' judicial bodies. These prerogatives shall be reserved for the Member States, pursuant to the principle of procedural autonomy and subject to the limitations of this principle imposed by the principles of effectiveness and equivalence. The Directive's provisions strictly delineate the minimum necessary criteria that national frameworks are obliged to meet for compliance with EU public procurement rules.⁵²

⁵⁰ S. Demkova, *Automated Decision-Making and Effective Remedies*, cit., 173; M. Fink – M. Finck, *Reasoned AI(D)ministration: Explanation Requirements*, cit., 385; ECJ, C-525/04 P (2007), *Spain v Lenzing*, § 57; ECJ, C -584/10 P, C-593/10 P and C-595/10 P (2013), *European Commission and Others v Yassin Abdullah Kadi*, § 116.

⁵¹ H. P. Olsen – J. Livingston (eds), *What's in the Box?*, cit., 8, 9, 23; ECJ, C – 203/22, *Dun & Bradstreet Austria* (2025), § 60.

⁵² In light of these considerations, the rules governing the admissibility and presentation of evidence, the deadlines for exercising review procedures, and the procedural sanctions for non-compliance with these rules shall be governed by the domestic law of each Member

The specific manifestation of the contracting authorities' will is generally the administrative act, which may assume various forms and denominations (e.g., decision, formal communication, notification, etc.), depending on the provisions of the applicable national law. The activity of contracting authorities is not restricted solely to the contract award phase but extends subsequently throughout the contract performance period. By way of illustration, the modification or termination of the public procurement contract will necessitate a formal decision by the contracting authority.

Decision explicitation is intrinsically linked to compliance with the duty to provide reasons and is a direct guarantee of the right to good administration. Therefore, the duty to provide reasons emerges as essential for guaranteeing compliance with EU law provisions in the field of public procurement, as well as for ensuring the effectiveness of remedies.

When confronted with a decision by the contracting authorities concerning the performance of the public procurement contract – a decision adopted with AI support – the remedies shall operate in a conventional manner. More precisely, the remedies system, *per se*, lacks the necessary instruments to distinguish or evaluate an algorithm; consequently, it will treat the decision as being solely the result of the human factor. The integration of AI-based algorithms into the decision process falls outside the intended scope of the Remedies Directive. On the other hand, the remedies system must not be considered in isolation from the Union's broader normative framework; instead, it requires a synergistic approach alongside other legal provisions.

In this context, the provisions of Regulation (EU) 2024/1689 (the AI Act) are relevant concerning the field of artificial intelligence. Moreover, for the subject matter of this endeavour, conceptual relevance attaches, in a strictly tangential manner concerning the right to receive an explanation,⁵³ to the provisions of Regulation (EU) 2016/679 (the GDPR), Regulation (EU) 2018/1725 (the EUPDR), and Directive (EU) 2016/680. This latter right, subject to doctrinal debate regarding its existence and nature,⁵⁴ appears inextricably linked to the obligation to state reasons, serving essentially as an adaptation of that duty for the automated processing of

State.

⁵³ In addition to these legal provisions, the Union has adopted further regulations addressing the digital ecosystem, specifically Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector (Digital Markets Act) and Regulation (EU) 2022/2065 on a single market for digital services (Digital Services Act). However, these latter regulations do not include legal requirements applicable to contracting authorities employing AI-driven algorithms in their decision-making processes.

⁵⁴ M. Fink – M. Finck, *Reasoned Administration: Explanation Requirements*, cit., 388. Equally, we recognize that the right to receive an explanation operates as a necessary safeguard for upholding the rights, freedoms, and legitimate interests of the data subject. It is true that this right is not expressly stipulated within the provisions of art. 22(2) of the GDPR or art. 24(2) of the EUPDR. Instead, it is merely noted by way of illustration in Recital 71 of the GDPR and Recital 43 of the EUPDR. Nevertheless, the grammatical interpretation of the aforementioned provisions suggests that the use of the adverbial phrase “at least” indicates the establishment of a minimum lower threshold without, however, being strictly limited thereto. Consequently, the data controller shall be entitled to establish additional safeguards, such as the right to receive an explanation. See, ECJ, C – 203/22, *Dun & Bradstreet Austria* (2025), § 57.

personal data via algorithms.

Legal doctrine highlights that the EU's regulatory framework for AI is inherently human-centric, aiming to safeguard the fundamental rights and legitimate interests of European citizens.⁵⁵ To enhance the functioning of the internal market, the AI Act seeks to introduce a uniform normative framework that governs the entire lifecycle of AI systems – from development and placement on the market to their final use – all in accordance with Union values.⁵⁶ Furthermore, the purpose of these norms is to guarantee an elevated level of protection for public interests and fundamental rights, aligning with their recognition and safeguarding under Union law.⁵⁷ Furthermore, the entire regulatory approach to AI is structured around the proportionality of risk, ensuring it is adapted precisely to the magnitude and nature of the risks the systems generate.⁵⁸ Consequently, the risk structure is segmented into three categories: an unacceptable risk, entailing the prohibition of certain AI practices;⁵⁹ a high risk, necessitating detailed regulation of the requirements and duties incumbent upon the actors involved; and a specific risk related to transparency.

High-risk AI systems constitute the core focus of the normative framework. Introducing or using these systems requires adherence to a specific set of mandatory requirements concerning their market placement and operational status. These requirements include, *inter alia*, the obligation to ensure the operational transparency of the systems prior to their placing on the market or putting into service.⁶⁰ Consequently, implementers will be able to properly comprehend, utilise, and interpret the system.⁶¹ Consequently, this *ex ante* transparency establishes the prerequisites for fulfilling the obligation to state reasons within the semi-automated decision-making process. As affirmed in the 2019 Ethics Guidelines for Trustworthy AI, drafted by the AI HLEG,⁶² a decision cannot be effectively challenged in the absence of a transparent process.⁶³

Equally, human oversight, alongside transparency, constitutes a mandatory requirement applicable to high-risk AI systems. As established by the provisions of art. 14(2) of the AI Act, human oversight is intended to prevent and minimise risks to health, safety, or fundamental rights. The effective measures entailed by human oversight include, for the purpose of this research, at least two crucial aspects: being aware of the potential for automatically or excessively relying on the AI system's output (automa-

⁵⁵ B. McGurk KC – J. Tomlinson, *Artificial Intelligence and Public Law*, cit., 31; Recital 6, Ch. I, para. 1, Ch. III, para. 8, European Declaration on Digital Rights and Principles for the Digital Decade 2023/C 23/01; Recital 6, Regulation (EU) 2024/1689.

⁵⁶ Recital 1, Regulation (EU) 2024/1689.

⁵⁷ Recital 8, Regulation (EU) 2024/1689.

⁵⁸ Recital 26, Regulation (EU) 2024/1689.

⁵⁹ Art. 5, Regulation (EU) 2024/1689.

⁶⁰ Recital 72, Regulation (EU) 2024/1689.

⁶¹ Art. 13 para. 1, Regulation (EU) 2024/1689.

⁶² The High-Level Expert Group on Artificial Intelligence (AI HLEG) established by the European Commission.

⁶³ Ch. I, para. (53), *Ethics Guidelines for Trustworthy Artificial Intelligence (AI)*.

tion bias)⁶⁴ and possessing the power to decide at any time to abstain from using the system, or to ignore, override, or reverse the results generated by the high-risk AI system.⁶⁵

Similar to the regulations governing personal data protection, the AI Act confers upon any affected individual the right to obtain an explanation for a decision based on the output of specific high-risk AI systems. The right to an explanation possesses a subsidiary character, applying only in instances where this right is not already provided for under Union law.⁶⁶

While the explanation of a decision relying on a high-risk AI system corresponds to a right for the affected individual, it conversely imposes an obligation upon the implementing public authority. Thus, by virtue of this obligation, the articulated explanation must be clear and substantive regarding the AI system's role in the decision-making procedure.⁶⁷

It is relevant to note that the CJUE has concluded that, in the context of personal data protection, the mere communication of a complex mathematical formula (e.g., an algorithm) or a detailed description of the steps of an automated decision-making process does not constitute a concise and intelligible explanation.⁶⁸ Practically, the involvement of the AI system in the decision-making process must be unambiguously explained. Furthermore, the core components of the adopted decision must likewise be provided, thereby enabling the affected individual to exercise their rights, remedies, and review procedures.⁶⁹

A major objective of the AI Act's enactment is to promote the exercise of fundamental rights protected under Union law, including the critical rights to an effective remedy and a fair trial.⁷⁰ At least within the European Union, AI systems are mandated to adhere to a series of minimum requirements before being placed on the market. For high-risk AI systems, the minimum requirements are structured to emphasize transparency, the absolute importance of human oversight, and the right to explanation, thereby mitigating profound and irreparable harm to fundamental rights. In the absence of a specific AI normative framework, the judicial systems of the Member States would have experienced immense pressure alongside an additional consumption of resources. These challenges stem precisely from the manifold risks entailed by decision-making under ADM. One need only imagine the insurmountable burden that would be placed upon the judiciary if AI-based algorithms employed in the decision-making process were to lack transparency. Our analysis encompasses not only the intrinsic opacity of the systems,⁷¹ but also the case of illiterate opacity. The burden of proof would become significantly more onerous and costly due to expert intervention; this procedural necessity would risk prolong-

⁶⁴ Art. 14 para. 4 lit. b), Regulation (EU) 2024/1689.

⁶⁵ Art. 14 para. 4 lit. d), Regulation (EU) 2024/1689.

⁶⁶ Recital 171, art. 86, para. 3, Regulation (EU) 2024/1689.

⁶⁷ Art. 86 para. 1, Regulation (EU) 2024/1689.

⁶⁸ ECJ, C – 203/22, *Dun & Bradstreet Austria* (2025), § 59.

⁶⁹ *Ibid.*

⁷⁰ M. Fink – M. Finck, *Reasoned A(I)dmistration: Explanation Requirements*, cit., 390.

⁷¹ B. McGurk KC – J. Tomlinson, *Artificial Intelligence and Public Law*, cit., 143.

ing litigation deadlines, ultimately deterring parties from seeking review. Consequently, from the standpoint of public procurement remedies and review procedures, the fundamental principles of effectiveness, efficiency, and celerity would be fundamentally impaired. These requirements are essential across both pre-contractual and post-contractual remedies. The semi-automated adoption of decisions via algorithms does not entail a fundamental reconfiguration of the system of remedies and review procedures – for instance, to address challenges stemming from opacity – but rather appears to necessitate an adaptation. Adaptation requires the integration of requirements imposed by normative acts governing Artificial Intelligence and, where appropriate, personal data protection, into the judicial or administrative-jurisdictional framework. Moreover, adaptation necessitates the acceptance that the “elephant in the room” can no longer be disregarded.

Evidently, challenges will persist, particularly concerning phenomena like automation bias, which is notoriously difficult to substantiate in judicial review due to its profoundly subjective nature. The mechanical adoption of the resulting output structurally impairs the obligation to state reasons, consequently rendering compliance with this duty purely formal. A potential solution lies in the implementation of an ADM system log, designed to record the specific activity of the human factor when conducting a substantive analysis of the decision trajectory proposed by the system. This focused verification can be achieved through open-ended questions (rather than template-based ones) addressed to the system to elucidate its underlying reasoning. The relevance and conclusiveness of the questions posed could serve as objective benchmarks for substantiating the effective involvement of the human factor in the decision’s adoption.

6. Concluding Remarks

The integration of AI-based algorithms into the decision-making process of public authorities has long been a reality across various domains. This integration has not been linear, exhibiting instead a varying degree of maturity contingent upon the specificities of each sector. This context further encompasses the domain of public procurement, which is now confronted with the mandate for reform. Reform is not driven solely by digitalisation and the increased use of ADM in the qualification and/or selection of tenderers or in decision adoption, yet these remain pivotal factors.

The system of remedies and review procedures contributes significantly to the dynamism of public procurement, irrespective of the procedural stage at which they are invoked. Consequently, subjective rights do not exist solely as mere assertions. The activity of contracting authorities is often manifested through the act of deciding, which takes various forms. While heretofore the act of deciding exclusively involved human intervention, this paradigm has now shifted. Regardless of this evolution, all decisions adopted by contracting authorities must remain fully reasoned.

The adoption of decisions via a hybrid ADM in no way fundamentally

alters the duty to provide reasons but necessitates its careful adaptation. The principle of transparency is central to this process. The scope of transparency required is broad, extending from the level of AI system explainability to the necessity of disclosing the ADM system's usage in the final decision.

Consequently, the need for adaptation necessarily impacts the framework of remedies and review procedures. A reconfiguration of the remedies system is not deemed necessary, at least at this stage of development of AI-based algorithms. Instead, the requisite solution is the effective integration of the requirements established by current AI and, where appropriate, data protection regulations into the judicial and administrative-jurisdictional framework.

Abstract

The provisions of Directive 89/665/EEC ensure rapid and effective procedural mechanisms for challenging breaches in public procurement. This imperative for effectiveness is closely linked to the right to effective judicial protection under art. 47 of CFR. The established paradigm of human decision-making in procurement is changing due to the growing use of algorithms and Artificial Intelligence (AI) by contracting authorities. While AI promises efficiency and minimised errors, its influence significantly challenges the current system of remedies. This article analyses the effectiveness of the existing remedies framework, particularly post-contractual remedies, against the backdrop of increasing digitalization and AI adoption in public procurement. The study explores whether the current architecture can accommodate these technological realities, or if a necessary reform is needed to maintain rapid and effective review procedures.

Keywords

public procurement remedies – Directive 89/665/CEE – effective judicial protection – Artificial Intelligence – automated decision-making