Article 41: the right to good administration

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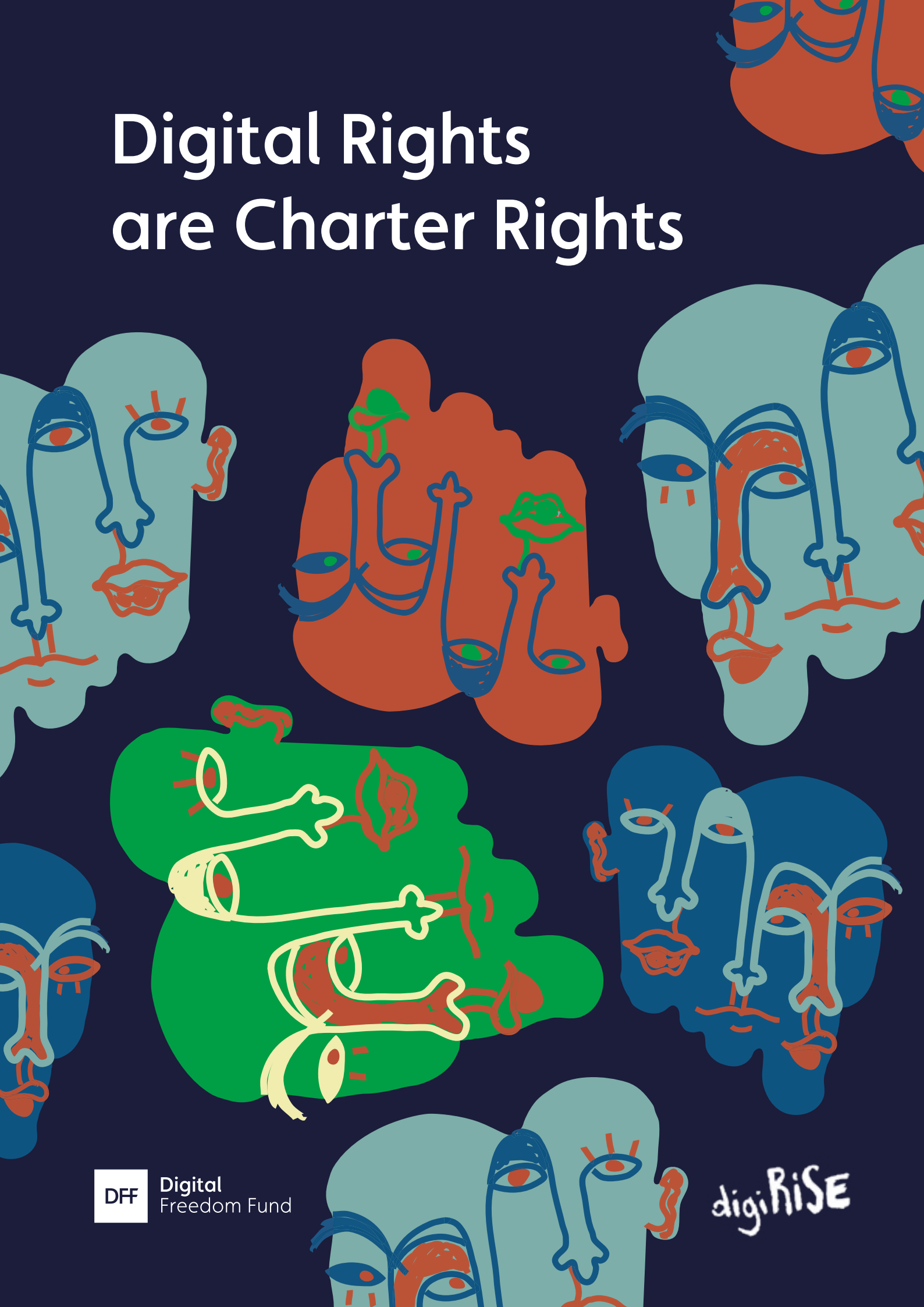
Digital Rights are Charter Rights



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Developing Information, Guidance, and Interconnectedness for (Charter) Rights Integration in Strategies for Enforcement

Article 41: The right to Good Administration

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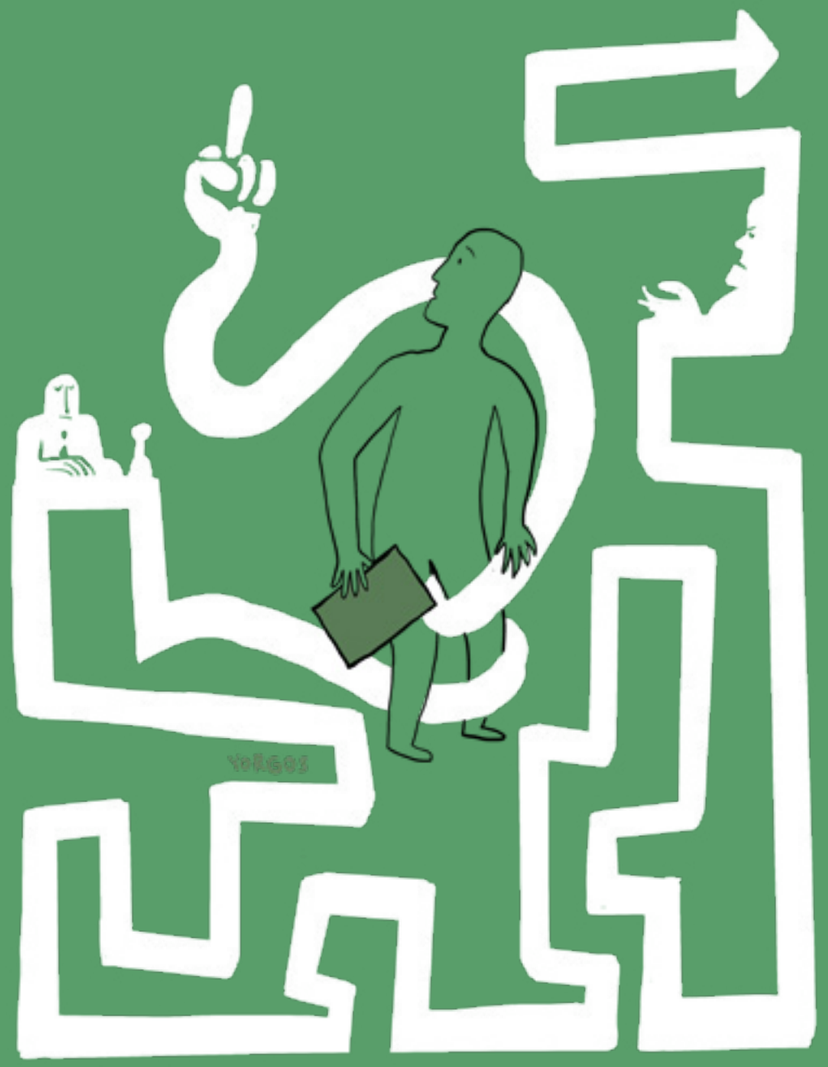

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The right to good administration, safeguarded under Article 41 of the Charter of Fundamental Rights of the European Union (EU) ('the Charter'), enshrines the analogous general principle developed in EU case law[1] into constitutional law. This right embodies the EU's position as a rule-of-law community, wherein individuals are protected from arbitrary administrative decision-making and entitled to fundamental guarantees in their interactions with EU institutions and bodies designed to ensure just and fair administrative procedures.

Under the framework of good administration, Article 41 bundles together several procedural rights. While each of these rights may have implications for the digital environment, some are particularly relevant in this context, including the right to be heard, the right to a reasoned decision, the right to damages, and the broader principle of transparency. This essay first outlines the scope of application of this provision, and subsequently discusses each of these rights in turn, culminating in a broader reflection on Article 41's relevance in the digital context.

Scope of Obligations under Article 41

Article 41's reach is confined to the EU administration in the strict sense, encompassing EU institutions, bodies, offices and agencies. By excluding member states as recipients of the obligations, Article 41 deviates from the more generally applicable rule in Article 51(1), wherein the Charter also applies to member states 'when they are implementing Union law'. On occasion, the Court of Justice of the European Union (CJEU) has seemingly implied a broader scope of application of Article 41 (see, for instance, MM v Minister for Justice, paras 81-94[2]). However, more frequently, the CJEU adopts a literal interpretation, excluding member states from the purview of Article 41 (see, for instance, R.N.N.S and K.A v Minister van Buitenlandse Zaken, para 33[3]).

Article 41, frequently perceived as a codification of the general principles of law shaped by EU courts, has significant overlap with these principles. However, contrary to Article 41, the right to good administration applies not only to the EU itself, but also to member state authorities when they operate within the ambit of EU law. This was explicitly indicated by the CJEU in R.N.N.S. and K.A. (para 34[4]). By extending the right to good administration to the entirety of the EU administration, these general principles fulfil an independent role from Article 41.

While the right to good administration solely applies to EU public authorities, a pertinent question in the digital context is whether the right itself – or the values enshrined therein – can be extended to private entities. This query becomes especially relevant when such entities collaborate with public authorities, or when they employ large-scale digital technologies that significantly impact individuals' lives, leading them to exercise powers of a quasi-public nature. Various references to the principle of good administration have been included in the proposed EU Artificial Intelligence Act (AI Act), suggesting the applicability of this principle within the remit of the regulation, and hence to private entities.

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The Right to be Heard

Article 41(2)(a) confers upon every person the right to be heard prior to the imposition of any individual measure that would adversely affect them. This right stipulates that individuals should have the opportunity to present their perspectives to the authorities during the actual procedure within which the relevant measure is decided (Technische Universität München, para 25[5]). Further, these views must be considered by the authorities, and must be reflected in the statement of reasons for the decision (Elf Aquitaine, para 167[6]). By permitting the affected individual to influence the decision-making process by sharing their views, the aim is ultimately to ensure more equitable decisions. By infusing elements of procedural fairness into the interaction between individuals and administrative bodies, Article 41(2)(a) is intimately tied to Article 47 of the Charter, which safeguards the rights to a fair trial and effective remedy.

Integrating the right to be heard under Article 41 into the digital landscape presents distinct challenges. One such challenge is determining how to ensure that an individual's views are considered in decision-making processes that incorporate some degree of automation. In this context, it is also necessary to address whether an individual needs to be heard by a human or if an automated tool can sufficiently meet this requirement. Of note in this respect is Article 22 of the General Data Protection Regulation (GDPR), which mandates the involvement of a human in most instances of automated decision-mak-

ing. As suggested by Article 22(3) of the GDPR, human intervention may be instrumental in preserving the right to be heard in the digital landscape.

A pertinent example is the European Travel Information and Authorisation System (Regulation (EU) 2018/1240), which is set to become operational at the end of 2023 and (partially) automates[7] the decision regarding the entry of third-country nationals into the EU. While the current regulations[8] only stipulate a right to appeal in the case of refusal, Article 41(2)(a) of the Charter will be instrumental in ensuring that individuals can effectively be heard before a travel authorisation refusal becomes final.

The Right to a Reasoned Decision

Article 41(2)(c), rooted in Article 296 of the Treaty on the Functioning of the European Union (TFEU), stipulates that the right to good administration includes 'the obligation of the administration to give reasons for its decisions'. According to the CJEU, the statement of reasons must be sufficiently clear and unequivocal so as to allow the Court to assess the legality of a decision and to equip the affected parties with adequate information to discern whether the decision is sound and contest it if it appears otherwise (Elf Aquitaine, paras 147-148). Therefore, the duty to state reasons is not merely a standalone obligation for transparency; it is instead designed to foster accountability and facilitate individuals' access to justice. In this regard, the CJEU often cites Article 47 of the Charter, the right to effective remedy, to bolster the requirement of reason-giving (R.N.N.S. and K.A., para 43).

There is a tension between the duty of the administration to articulate the reasons for its decisions and the incorporation of artificial intelligence (AI) to assist the decision-making process. The crux of this issue lies in the possibility of AI systems becoming so complex that humans cannot comprehend how or why a system reached its conclusion (referred to as the 'black box' problem[9]). Human decision-makers may struggle to clarify the specific reasons that underpin a decision heavily influenced by a 'black box'. Consider an individual denied entry to EU territory based on an AI system's[10] designation of them as a 'security risk'. If the AI system's internal processes are too opaque for the officer relying on it to understand what factors contributed to that classification, the officer's explanation cannot extend beyond 'because the AI system said so'. Such justification fails to meet the standards delineated under Article 41[11].

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In recent years, an animated debate has unfolded about whether the GDPR creates a 'right to an explanation' (for[12] and against[13]). However, its existence and precise content remain uncertain. Moreover, it would not be applicable to all AI use-cases in the public sector. The proposed AI Act delineates responsibilities for manufacturers to make high-risk AI intelligible to humans (Article 13), thereby facilitating the right to explanation. Nevertheless, it does not lay down any obligations for AI users to justify or explain their decisions to those affected by them, much less a corresponding right for individuals to demand such explanations. Therefore, currently, Article 41 of the Charter, alongside the corresponding general principle of law, offers the most robust protection of the right to demand a reasoned decision from EU public authorities.

The Right to Damages

Article 41(3) guarantees every individual the right to reparation for any damage caused by the Union 'in accordance with the general principles common to the laws of the Member States'. This provision echoes Article 340(2) of the TFEU, under which the Court has consistently ruled that liability only arises for breaches deemed sufficiently serious, meaning that the authority in question has 'manifestly and gravely disregarded the limits on its discretion' (Bergaderm, para 43[14]).

The crucial question lies in how the decision to employ digital tools such as AI to support decision-making would affect the evaluation of the seriousness of an authority's mistake. The CJEU has previously determined that a reasonable reliance on another authority's assessment constitutes a pertinent factor (see, for instance, British Telecommunications, para 43[15] and Robins, para 81[16]). It remains to be seen whether this principle – that authorities may trust specific sources of information without verification – is applicable in the digital context and, if so, under what conditions. This would significantly increase the threshold for breaches of the law by decisions based on an AI system's recommendations deemed serious enough by the CJEU to warrant liability. Consequently, the prospects of successfully contesting such decisions could be slim.

In September 2022, the European Commission proposed an AI Liability Directive with the aim of adapting non-contractual liability rules to accommodate the unique challenges posed by AI systems. This directive would introduce disclosure rules and rebuttable presumptions to counteract the evidentiary difficulties that victims of damage caused (partially) by AI may encounter, particularly given the complexity and opacity of some AI systems. The Directive does not directly modify the liability rules under Article 340 of the TFEU or, by extension, Article 41(3) of the Charter. However, it may eventually influence the EU's public liability regime by impacting the 'general principles common to the laws of the Member States', which form the foundation for Article 340 of the TFEU. Additionally, the rationale underpinning the AI Liability Directive may guide the development of a more fitting approach to AI liability, especially in relation to damage caused by the EU administration through the use of AI systems.

Transparency

The principle of transparency is intimately intertwined with the right to good administration. Certain rights mentioned in Article 41 are intrinsically tied to transparency rights themselves, notably Article 41(2)(b), which guarantees everyone access to their own file, as well as the right to a reasoned decision. Beyond these specified rights, however, the principle of transparency, which is presented as a general objective of the EU throughout the Treaties, is a fundamental prerequisite for good administration.

Within the digital landscape, algorithmic opacity – whether resulting from intellectual property rights, a lack of expert knowledge, or the characteristics of the algorithm itself – poses a significant challenge to the principle of transparency. While much debate has centred on explanation rights, a pressing question is whether the principle of transparency would require much broader rights,[17] such as access to training data, source codes, or other information pertaining to the algorithm itself.

Digital sector-specific legislation often incorporates explicit transparency-related rights. For example, the GDPR outlines various information rights. These include a right to information regarding the existence and implications of automated decision-making, as well as 'the logic involved' in it (Article 13, GDPR). The proposed AI Act mandates a certain level of algorithmic transparency, but solely to enable system users to interpret the algorithms (Article 13, AI Act). Individuals impacted by the actual use of the algorithms only have a limited right: to be informed when they are interacting with an algorithm rather than a human (Article 52, AI Act). The principle of transparency, in conjunction with the right to good administration, including the right to access one's own files, may provide a more robust legal foundation for extending broader rights to the recipients of administrative algorithmic decisions.

Conclusion

The right to good administration holds significant value in regulating the use of technology by the EU administration. Specifically, by ensuring that individuals are heard and administrative decisions are reasoned, it operates as a tool for exercising the right to an effective remedy under Article 47 of the Charter.

Nevertheless, its significance extends well beyond this instrumental role. Article 41 of the Charter establishes the conditions for administrative decision-making that strikes a fair balance between societal and individual interests. This balance is particularly important in light of the profound changes in public administration ushered in by the rapidly increasing use of digital technologies, particularly when these technologies are developed and marketed by private entities.

Importantly, ensuring that administrative decision-making is reasoned and fair also enhances the likelihood of the resultant decisions conforming to the law. This conformity reduces the need for costly litigation before already overtaxed judicial institutions. Therefore, the right to good administration plays a pivotal role in ensuring that the adoption of new technologies does not undermine administrative justice and, more broadly, the rule of law.