

CHAPTER 14

CASE 1 – DENIAL OF A BONUS

A. Austria

Matthias Zußner

The facts of the case suggest that the algorithm-driven blocking of an application for the payment of the bonus *ex lege* is to be considered a formal rejection. In Austria, a formal decision is an ‘official notification’. Under these conditions, the blocking would be considered as an official notification that denies the application for the payment of the bonus. Such a decision may be appealed by filing a *Beschreibbeschwerde* with the competent administrative court¹.

On the basis of the appeal against the decision, an administrative court must in principle decide on the admissibility of an appeal against the decision itself². In the context of the substantive review of the decision, the administrative court must itself decide on the basis of its own findings of fact, which must be duly substantiated³. In this respect, the algorithm-based blocking of the bonus payment would not be protected from review, which applies generally, i.e. regardless of whether a deterministic algorithm or a machine learning algorithm is used. The constitutional right of appeal against a decision cannot be excluded by ordinary law. The administrative court must examine the reasons for the blocking (refusal), supplement the investigation of the facts if necessary, and make its own decision on the question of whether the bonus should have been granted or refused.

¹ Art 130 Abs 1 Z 1 B-VG.

² § 28 para 2-4 of the Austrian Proceedings of Administrative Courts Act (*Verwaltungsgerichtsverfahrensgesetz – VwGVG*, BGBl. I No. 33/2013).

³ See Austrian Supreme Administrative Court (VwGH) 24.08.2023, Ra 2020/22/0128.

B. China

Xixin Wang

In China, Mrs Ratatouille can challenge the denial of the economic bonus through administrative reconsideration or administrative litigation under the Administrative Reconsideration Law (ARL) and the Administrative Litigation Law (ALL), both of which explicitly state that aggrieved citizens can petition government welfare decisions. She can argue before the superior administrative agency or the court that the algorithmic decision violated principles of legality, transparency, and procedural fairness, all of which are recognised in Chinese law. The Chinese judiciary is authorised to scrutinise the algorithm's operation, ensuring that it adheres to standards such as fairness, transparency, and due process, regardless of whether it is deterministic or based on machine learning. Specifically, Article 24 of the PIPL prohibits private entities from imposing unreasonable differential treatment on individuals in terms of transaction price and other transaction conditions, which, under Article 33 of the same law, should also be applicable to the administration. Furthermore, Article 24 states that "where automated decision-making has a significant impact on individual's rights and interests, he/she has the right to require the personal information processor to give an explanation, and to refuse to accept that the personal information processor makes such decisions in a completely automated fashion". This means that if the platform provided no explanation or opportunity for resubmission, Mrs Ratatouille could assert violations against the PIPL and demand that the administrative authority justify the decision by providing an explanation as to why she was denied the bonus. Additionally, she could invoke the Regulations on Open Government Information (OGI Regulation) to request detailed criteria for eligibility and the reasons for her disqualification. Whether the algorithm used is deterministic or employs machine learning, reliance on its output does not insulate the decision from administrative reconsideration or judicial review. The administrative authority remains obliged to ensure that the decision is legally and procedurally sound.

C. Estonia

Katrin Nyman-Metcalf

Mrs Ratatouille can challenge the decision in court. The claim does not depend on whether the decision was taken by any form of algorithm or by a person. She can present her case and the facts that support her entitlement to the bonus. The analogy to be found in Estonia is from a number of cases on permissions for felling forest, where one of the issues claimed was that the decisions were taken by AI, which is not permitted if there is room for discretion.

The court stated that the respondent (the forestry authority) shall not be relieved of liability or control of the legality or justification of its decision if the decision is proposed by a computer program, AI, etc. Although different tools including AI can be used, the relevant authority remains ultimately responsible for the correctness of the decision. However, in the forestry cases, the relevant authority had not used AI but other electronic tools that did not exclude the discretion of the personnel⁴.

The case sounds rather unlikely in Estonian circumstances, as the country has relied almost exclusively on e-governance and thus online digital applications for all kinds of public services for approximately 20 years. The service providers are responsible for maintaining the quality of the services and, for example, if an application is cut off in the middle (because the internet goes down or because of an error by the applicant) the service must allow the application process to take up where it left off or to start again. Failure to provide such possibilities could lead to liability on the part of the service provider. Transparency of decisions is a key value and is not dependent on whether the decision is automated or not.

⁴ Tallinn Administrative Court, Case 3-22-206, 6 December 2022 and Case 3-22-369, 16 December 2022. There have also been similar cases on the same issue in other courts, but the key circumstances of interest for us are the same. The decisions were challenged with the support of an NGO, which is why a large number of cases were brought.

D. European Union

Leonardo Parona

Although the disbursement of bonuses of the kind envisaged by this hypothetical scenario does not fall within the typical functions of EU institutions and bodies, it is possible to adapt the case to the specific characteristics of the EU legal order and administration. As is well known, several European funding programmes are directly managed by the European Commission⁵, which, in such cases, is tasked with launching calls for proposals or applications, evaluating submissions, signing grant agreements, monitoring project implementation, and so forth.

In these instances, either the Commission's departments or its executive agencies use an online platform – the Funding and Tenders Portal – to publish calls and collect applications or proposals⁶. For example, one programme managed by the Commission (through the European Innovation Council and the SME Executive Agency) concerns the Competitiveness of Enterprises and Small and Medium-sized Enterprises (COSME). Although COSME's primary objective is to support the creation and expansion of SMEs, it is not implausible to imagine the disbursement of an economic bonus of the kind considered in this hypothetical scenario⁷.

Having re-framed the context of this hypothetical case, it is now possible to address the legal issues and questions that it raises by recalling two preliminary considerations. Firstly, these issues have not yet been directly addressed by the Court of Justice, although in the last couple of years it has established some principles that might help frame

⁵ It is estimated that about 20% of the EU budget 2021-2027 is implemented in direct management. For updated information see https://commission.europa.eu/strategy-and-policy/eu-budget/long-term-eu-budget/2021-2027_en.

⁶ The online platform is called the Single Electronic Data Interchange Area (SEDIA) and is managed by the Directorate-General for Research and Innovation of the European Commission. The platform can be accessed at: <https://ec.europa.eu/info/funding-tenders/opportunities/portal/screen/opportunities/calls-for-proposals?isExactMatch=true&status=31094501,31094502&order=DESC&pageNumber=1&pageSize=50&sortBy=startDate>.

⁷ As is well known, sums dedicated to remedying the economic consequences of the Covid-19 pandemic have been – and are being – disbursed by the EU in the forms of loans and grants to the Member States through the Recovery and Resiliency Facility.

the case in question. Second, an algorithm as the kind employed here does not appear to qualify as a high-risk AI system⁸.

The fact that, when approaching the competent office, Mrs Ratatouille is simply told that “the platform blocking an application amounts to a formal denial of the bonus”, means that the decision had essentially been made through fully automated means⁹. This is problematic in the light of Article 24 of Regulation (EU) No 1725/2018 on the processing of personal data by Union institutions, bodies, offices, and agencies¹⁰. The first paragraph of the provision, which substantially reproduces Article 22 of the GDPR, establishes in fact the “right not to be subject to a decision based solely on automated processing”. Article 24(2) exceptionally establishes the legitimacy of automated processing when the latter “(b) is authorised by Union law, which also lays down suitable measures to safeguard the data subject’s rights and freedoms and legitimate interests; or (c) is based on the data subject’s explicit consent”.

Since the present hypothetical does not indicate that Mrs Ratatouille explicitly consented to the automated processing of her bonus application, nor – more importantly – does it mention any Union law authorising the fully automated decision and establishing suitable safeguards for her rights and legitimate interests¹¹, it is reasonable to infer that neither exception applies. As a consequence, on the basis of EU secondary law, the issuance of a fully automated decision of this kind would not be allowed.

Moreover, in the light of recent EU case law, it should be recalled that the CJEU has established that for an automated decision-making system to be lawfully employed, the law (or, as it seems reasonable to add, a legal act issued by the competent authority) must pre-establish

⁸ Annex III, n. 5(a) of the AI Act refers in fact to systems used “to evaluate the eligibility of natural persons for essential public assistance benefits and services, including healthcare service”. The benefit (or ‘bonus’) at stake in our case does not, in our view, qualify as a benefit under such provision, nor does it qualify under the other provisions of Annex III.

⁹ This clarification, for instance, eliminates the possibility that the blocking of the application was merely a technical issue, in relation to which the Commission has developed a Proposal Submission Service User Manual (updated 11th October 2023, and available at: https://ec.europa.eu/info/funding-tenders/opportunities/docs/2021-2027/common/it-manuals/user-manual_sep_en.pdf), and has established an IT Helpdesk

¹⁰ As is well known, the regulation ensures that the guarantees established by the GDPR (Regulation No 679/2016) with regard to the Member States also apply to the EU Institutions and bodies.

¹¹ According to Article 24(3), suitable measures shall include “at least the right to obtain human intervention on the part of the controller” and provide the data subject the right “to express his or her point of view and to contest the decision”.

adequate “models and criteria”¹². In more decisive terms, the CJEU has also established that the errors to which automated systems may be prone, impose that any outcome “must be subject to an individual re-examination by non-automated means before an individual measure adversely affecting the persons concerned is adopted”¹³. It may be worth noting that these conclusions were reached by the CJEU before the approval of the AI Act – regardless of the distinctions that it introduces with reference to the different levels of risk posed by AI systems.

Mrs Rataouille could therefore resort to the traditional remedies available in the EU legal order with regard to an unlawful activity by EU Institutions and bodies, namely judicial protection as ensured by the Court of Justice (here in the form of the quashing of the bonus denial and/or the award of damages); a complaint to the European Ombudsman (as is well known, however, even if it ascertains a violation by the proceeding authority, it can only issue non-binding recommendations and assign a deadline); and administrative remedies in the form of appeals and internal reviews, the structure and regime of which vary depending on the EU body they concern. It should furthermore be borne in mind that, had an infringement of the AI Act occurred in this case, then Mrs Rataouille could also resort to the European Data Protection Board in the light of Article 85, as already clarified in the answers to the general questions.

Since judicial protection constitutes a fundamental right under Article 47 CFR, from a normative perspective, reliance on the algorithm’s output cannot insulate the decision from judicial review. The Court of Justice would therefore admit a potential action for annulment filed by Mrs Rataouille under Article 263 TFEU, and the fact that the denial had been issued through an automated online platform cannot circumvent the lawfulness review that the Court is required to carry out in these cases. From this perspective, the violations of the right to good administration established by Article 41 CFR seem relatively manifest in the present hypothetical. First of all, the blocking of the application and its automatic denial have deprived Mrs Rataouille of the right to be heard under Article 41(2) CFR. Secondly, the fact that the non-eligibility determination has been issued “without further explanation and without

¹² Case C-511/18 *La Quadrature du Net* [2020] ECLI:EU:C:2020:791, para 180. See H.C.H. Hofmann, *Assessing Cyber delegation in European Union Public Law*, in H.C.H. Hofmann, F. Pflücke (eds.), *Governance of Automated Decision-Making and EU Law* (2024) 51.

¹³ Case C-511/18 *La Quadrature du Net*, para 182. See on this point O. Mir, *Algorithms, Automation, and Administrative Procedure at EU Level*, in H.C.H. Hofmann, F. Pflücke, cit. at 26.

indicating which requirements are either missing or have not been met”, breached the duty to give reasons, which – as is well known – also constitutes part of the fundamental right to good administration under Article 41(2) CFR, besides being a mandatory requirement with which every EU body must comply under Article 296 TFEU.

The reviewability of an automated decision, as well as the type and effectiveness of the judicial remedy that can be obtained, depends on whether a deterministic algorithm is employed rather than a machine learning one. Under the circumstances of this case, it is, however, unspecified which type of algorithm was used by the online platform; it is, moreover, not specified whether the eligibility requirements were designed in such a way that the issuance of the bonus was discretionary or not. For economic bonuses of this kind, it is reasonable to imagine that the requirements were precise and did not allow room for discretion in the adjudication of each individual case. As a consequence, it is also reasonable to imagine that the platform employed a deterministic algorithm, which allows for the ex-post reconstruction of which requirements had not been met. Hence, in this case, the Court would not only quash the denial and send the case back to the administration, but also judicially ascertain whether Mrs Ratatouille was actually eligible, and possibly order the award of the bonus.

E. France

Maximilien Lanna

Mrs Ratatouille, believing that she meets all the requirements to benefit from a €5,000 economic bonus, fills in an online application dedicated to restaurant owners that have experienced meaningful losses during the Covid pandemic. After filling in all the fields, the platform set up by the administration blocks the application without further explanation. It also tells her that she is not eligible for the bonus, without further explanation and without indicating which requirements are missing.

In this case, the question of law raised is whether a person who has been refused access to a service based on an algorithm has a remedy enabling a judge to annul the decision taken.

On this matter, GDPR(22) states : “The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning

him or her or similarly significantly affects him or her”. Several exceptions apply: when the decision is necessary for entering into, or performance of, a contract between the data subject and a data controller; when it is authorised by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject’s rights, freedoms, and legitimate interests, or when it is based on the data subject’s explicit consent.

French Data Protection Act no. 78-17, as reformed by Order no. 2018-1125 of December 12, 2018, states in its Article 47 that “no decision producing legal effects with regard to a person or significantly affecting him or her may be taken solely on the basis of automated processing of personal data, including profiling”. Various exceptions are also mentioned, and individual administrative decisions can be algorithm-based.

The Law for a Digital Republic (Law no. 2016-1321 of October 7, 2016) introduced transparency requirements (into the Code of Relations between the Public and the Administration) for administrations that use algorithmic processing to base their decisions. More specifically, the administration may only make individual administrative decisions on the exclusive basis of an algorithm under certain conditions. When these decisions are taken, citizens will benefit from enhanced information and will be able to appeal against them.

When the administration bases its individual administrative decision on algorithmic processing, it will only be able to do so on condition that it complies with several information obligations.

Firstly, the administration must explicitly mention that its decision is based on algorithmic processing (Article L. 311-3-1 of the CRPA). This mention must include an information notice setting out the purpose of the algorithmic processing, the right to obtain communication of the rules defining this processing and the main features of its implementation, as well as the procedures for exercising this right to communication and for referring the matter to CADA, where appropriate.

Secondly, the authority must be able to communicate the main features of the algorithmic processing at the request of the data subject. This information does not have to be provided initially, but only if the data subject requests it.

In this case, the authority must be able to provide the following information in intelligible form at the request of the interested party:

- how and to what extent the algorithmic processing contributes to the decision-making process.

- the data processed and its source, the processing parameters and, where applicable, their weighting, applied to the data subject's situation.
- the operations carried out by the processing.

Lastly, administrations with more than 50 staff or full-time equivalent employees who use algorithmic processing are required to publish online the rules defining the main algorithmic processing operations used in the performance of their missions when they form the basis of individual decisions (Article L. 312-1-3 of the CRPA).

When the administration bases its individual administrative decision on algorithmic processing, the data subject must be able to appeal against this decision. As part of this appeal against an administrative decision based on algorithmic processing, since July 1, 2020, claimants have been able to invoke the nullity of the decision. In effect, an administrative decision based on algorithmic processing that does not contain the explicit information stipulated in Article L. 311-3-1 of the CRPA will be null and void.

In the case of Mrs Ratatouille, she will be entitled to have the decision nullified, on the grounds of lack of information relating to automated decision-making.

Whether the decision was taken by a machine-learning algorithm or by a deterministic one does not change much in the case of Mrs Ratatouille; the data controller ensures that the algorithmic processing and its evolution are under control, so as to be able to explain, in detail and in an intelligible form, to the data subject how the processing has carried out in her case. This implies that machine-learning processing that cannot be explained can be used solely as decision support tools, keeping a human in the loop.

F. Germany

Cristina Fraenkel-Haeberle & Charlotte Langer

Mrs Ratatouille can first file an appeal (*Widerspruch*) against the decision. This is a pre-trial procedure in some Federal states' administrative law, giving the administration the opportunity to review both the lawfulness and the expediency of the challenged decision before

the matter is brought to court¹⁴. If the appeal is rejected, Mrs Ratatouille can then bring a claim against the legal entity whose agency issued the administrative act at the competent administrative court¹⁵.

The initial question posed by this case concerns the legal nature of the statement “You are not eligible for the bonus” displayed on Mrs Ratatouille’s screen. This is relevant because an appeal is only admissible against an “administrative act” (*Verwaltungsakt*)¹⁶. According to the legal definition (§ 35 sentence 1 *Verwaltungsverfahrensgesetz*, VwVfG; Administrative Procedure Act), this refers to any official measure or decision made by a public authority to regulate an individual case within public law, with immediate legal effect outside the administration. Most of these requirements are met: the program is employed by a public authority, it concerns an individual case in public law, and its decision immediately affects someone outside the administration. However, the regulatory aspect warrants inspection: the measure in question must be a binding determination of the subject’s rights and/or duties¹⁷. In the present case, this could be disputed, as the statement could be read as merely informing the applicant that she is ineligible without providing a final, legally binding decision on her application. The subsequent statement from the competent office that this “amounts to” a formal rejection is ambiguous: it does not expressly say that the program’s decision is, in itself, a formal rejection. However, the office thereby signals that it will not make a separate, formal decision about Mrs Ratatouille’s application; rather, it considers the matter settled by the algorithm’s decision. This indicates that the office views the program’s decision as a final and binding halt to the procedure and therefore affords it regulatory effect. Consequently, the court will conclude that the program’s statement “You are not eligible for the bonus” is an administrative act.

The next point of inquiry is whether Mrs Ratatouille actually brought an appeal by asking the office for an explanation. This is not the case: while an appeal does not necessarily have to be titled to that effect¹⁸, it does have to evince the subject’s will and aim to contest the decision¹⁹.

¹⁴ W.R. Schenke, § 68, in W.R. Schenke, F. Kopp (eds), *Verwaltungsgerichtsordnung Kommentar* 915 (2022).

¹⁵ *Ibid.*, 892.

¹⁶ F. Hufen, *Verwaltungsprozessrecht* 86 (2021).

¹⁷ U. Ramsauer, § 35, Begriff des Verwaltungsakts, in U. Ramsauer, F. Kopp (eds), *Verwaltungsverfahrensgesetz Kommentar* (2022).

¹⁸ F. Hufen, *Verwaltungsprozessrecht* (2021), cit., 423.

¹⁹ *Ibid.*

Merely asking for information or clarification concerning the reasons for a decision fails to meet that requirement²⁰.

The extent of judicial review

The administrative court conducts a full review of the lawfulness of the decision, regardless of how it was made by the authority²¹. It is not competent to review the expediency of the decision; this lies solely with the discretion of the authority²².

In the present case, the court will focus on several formal aspects of the administrative act and Mrs Ratatouille's eligibility for the bonus according to the pertinent substantive law.

Firstly, it appears questionable whether a fully automated decision is permitted here in the first place. Under § 35a VwVfG, administrative acts can only be issued by fully automated systems if the administrative agency has no *Ermessen* (discretion) or *Beurteilungsspielraum* (margin of appreciation). This is because the German legislators did not trust an automated system to lawfully and reliably evaluate competing factors of a judgment decision and weigh them against each other to produce an equitable result²³, nor to interpret uncertain legal terms and assign the appropriate meaning to ambiguous ones²⁴. Rather, full automation was to be permitted only where the facts of the case would lead to a single lawful outcome²⁵. The case at hand gives no details concerning the nature of the requirements for eligibility for the bonus. Assuming that they are objectively determinable facts and do not grant a margin of appreciation or discretion, full automation is permissible.

Secondly, the question arises as to whether hearing requirements were met. According to § 28(1) VwVfG, the subject of an administrative act that encroaches upon the subject's rights (*belastender Verwaltungsakt*) must be given the opportunity to state relevant facts prior to passing a decision. There is some controversy about whether the rejection of an

²⁰ W.R. Schenke, § 68, cit., 915.

²¹ F. Hufen, *Verwaltungsprozessrecht*, cit., 423.

²² *Ibid.*

²³ H. Schmitz, L. Prell, *Neues zum E-Government: Rechtsstaatliche Standards für E-Verwaltungsakt und E-Bekanntgabe im VwVfG*, 18 *Neue Zeitschrift für Verwaltungsrecht* 1276 (2016).

²⁴ A. Berger, *Der automatisierte Verwaltungsakt: Zu den Anforderungen an eine automatisierte Verwaltungsentscheidung am Beispiel des § 35a VwVfG*, *Neue Zeitschrift für Verwaltungsrecht* 1260 (2018).

²⁵ H. Schmitz, L. Prell, *Neues zum E-Government: Rechtsstaatliche Standards für E-Verwaltungsakt und E-Bekanntgabe im VwVfG*, cit., 1276.

application amounts to an encroachment in this sense, triggering the hearing requirement²⁶. While the majority of the legal literature answers this in the affirmative²⁷, the interpretation of the courts is more restrictive²⁸. They argue that, in the case of an application for a favourable decision, the right in question is yet to be established by the desired administrative act (meaning that there is no pre-existing right to be encroached upon), leading the courts to exclude this situation from the hearing requirement established by § 28(1) VwVfG²⁹. In practice, the court would therefore find no violation of the hearing requirements in the present case.

Thirdly, the main question posed by this case concerns the requirement to give reasons, as none were given either by the algorithm or the office. In principle, as stated in § 39(1) VwVfG, all written and electronic administrative acts must include a justification stating the principal factual and legal reasons for the decision. Subsection (2) lists several exceptions to this rule: 1) the administration approves an application, and the resulting administrative act does not encroach upon the rights of another person; 2), the relevant reasons are already known to the subject of the decision or are clearly identifiable from the decision itself; 3), the agency issues large numbers of administrative acts or does so with the help of automated facilities, and a justification is not required by the particulars of the case; 4) another law specifies that no reasons need be provided; 5) the decision is a publicly announced general decree. Of these, point 3 may apply in this case, as the decision was made with the aid of an automated program. The question remains whether the particulars of the case make a justification necessary. This is a somewhat vague requirement, open to interpretation in each case. Its generally accepted interpretation is quite narrow and is considered equivalent to the preceding options: namely, reasons need not be provided if, considering the legitimate interests of the subject, it appears unnecessary because they are self-evident or otherwise easily identifiable³⁰. This is not the case here: it is wholly inexplicable why the algorithm found Mrs Rataouille ineligible for the bonus. Additionally, she has a legitimate

²⁶ U. Ramsauer, § 28 *Anhörung Beteiligter*, in U. Ramsauer, Ferdinand Kopp (eds), *Verwaltungsverfahrensgesetz Kommentar*, cit., 595.

²⁷ *Ibid.*, the main argument being that the goal of this provision as interpreted in the light of the rule of law is to protect the subject from any legal disadvantages, including missing out on a potential legal advantage, without sufficient opportunity to be heard.

²⁸ BVerwGE 66, 184 (186); BVerwGE 68, 267 (270); VGh Mannheim NVwZ 1994, 919.

²⁹ *Ibid.*

³⁰ U. Ramsauer, § 39 *Begründung des Verwaltungsakts*, in U. Ramsauer, F. Kopp (eds), *Verwaltungsverfahrensgesetz Kommentar* 920 (2022).

interest in knowing why her application was rejected so that she can verify whether she or the program simply made an error, or – if the rejection was lawful – whether and how she can adjust her situation to fit the requirements. Therefore, the court would conclude that the rejection of Mrs Ratatouille’s application is formally flawed in that it does not give reasons for the decision. However, this flaw can still be rectified by providing a justification either in the appeal procedure (*Widerspruchsverfahren*) or during the court proceedings pursuant to § 45(1) Nr. 2 VwVfG. Based on the administration’s justification and the requirements set out in the relevant legal framework, the court will examine Mrs Ratatouille’s eligibility for the bonus³¹. If she is eligible, the court will grant the bonus directly. If she is ineligible, the court will uphold the decision even if it is formally defective. If the rejection was unlawful but the administration still has room for discretion, the court will direct it to make a new decision – without relying on the algorithm, as the automation of discretionary decisions is not permitted under § 35a VwVfG.

Differences between algorithms

The type of algorithm used would make no difference. Unless one of the exceptions in § 39(2) VwVfG applies, reasons must be given. The standards of reason-giving for administrative acts remain the same irrespective of the methods used³². It should be remarked here that it appears doubtful whether the use of machine-learning algorithms to automate administrative acts would be advisable under the current legal framework in Germany. As § 35a VwVfG only allows automated decisions in “if-then” cases without room for discretion or judgment, the scope for algorithmic decision-making is limited to what deterministic algorithms can already do. Therefore, the additional effort of programming a more sophisticated self-learning algorithm and prolonged testing to ensure that it extracts the correct rules from its training data seems excessive.

³¹ As the action she must file is a *Verpflichtungsklage* (action for the issue of an administrative act, i.e., granting the bonus), the court does not review the unlawfulness of the rejection but rather her claim for the desired act. For details, see W.R. Schenke, R.P. Schenke, § 113, in W.R. Schenke, F. Kopp (eds), *Verwaltungsgerichtsordnung Kommentar* 1508 (2022).

³² For details on the requirement to give reasons, see J. F. Lindner, D. Jahr, *Der unzureichend begründete Verwaltungsakt: Das Verhältnis der §§ 39, 40, 45 VwVfG zu § 114 S. 2 VwGO*, Juristische Schulung 673, 2013.

G. Italy

Stefano D'Ancona

In this case, we are dealing with an automated decision. According to the case law of the Italian Council of State, the use of a computerised procedure that leads directly to the final decision should not be censured, but rather, in principle, encouraged. In fact, the absence of human intervention in the mere automatic classification of numerous requests, according to predetermined rules – albeit created by humans – and entrusting this activity to an efficient computer both appear as a “dutiful interpretation of Article 97 Cost. [i.e. the principle of good administration] consistent with current technological developments” (Council of State, section VI, 8 April 2019, no. 2270). The court states, however, that the use of ‘robotised’ procedures cannot be a reason for “circumventing the principles that shape our legal system and regulate the conduct of administrative activity”.

The technical rule governing the algorithm holds legal value even when it is expressed in mathematical terms, so it must be subject to the principles of administrative action (e.g. the principles of transparency, publicity, reasonableness, and proportionality) and is open to review before a court. According to the court, the Italian system envisages “the need for the administration to perform an ex-ante role of mediation and settlement of interests, also by means of constant tests, updates, and ways of perfecting the algorithm (especially in the case of progressive and deep learning)” (Council of State, section VI, 8 April 2019, no. 2270). However, when an authority fails to fulfil this control function, the responsibility for ensuring legitimacy shifts to the courts when a private party seeks recourse.

The question states that the platform does not allow the applicant to re-submit her application. This circumstance appears to be contrary to the principle of non-exclusivity of the decision, whereas case law affirms, on the basis of European legislation on the protection of privacy (Article 22 Regulation 679/2016), that the private individual has the right to have a public official involved in issuing the administrative decision, unless a provision specifically allows a solely automated decision or the citizen has given their consent or it is necessary for the conclusion of a contract between the data subject and the data controller³³.

³³ Council of State, section VI, 8.04.2019, no. 2270.

The question highlights a court's capacity to determine the legitimacy of the decision, distinguishing between a robotic decision made through a rule-based algorithm and one made by an AI machine learning system.

The Council of State, in its Judgment no. 2270 dated 8 April 2019, stated that it is possible to request a court to review the legality of an automated decision. The court stated that the algorithmic rule must be both cognisable on its own and subject to the complete cognisance and review of the administrative court. This responds to an "inalienable need to be able to review how the power was concretely exercised, in the final analysis posing itself as a direct declination of the right of defence of the citizen, who cannot be precluded from knowing the modalities (even if automated) by which a decision destined to affect his legal sphere was concretely taken". According to the Council of State, a full assessment of the decision's legitimacy can only be achieved in this way; this assessment must provide the same scope of review as a court would have when exercising power through traditional means, even if the choice was made using a computerised procedure.

In this sense, the automated administrative decision requires the judge to first assess the correctness of the IT process in all its components: from its construction to data entry, to its validity, and to its management. Hence, as mentioned above, there is a need to ensure that the process, at the administrative level, takes place in a transparent manner, through the knowability of the input data and the algorithm itself.

Secondly, the court must be able to scrutinise the very logic and reasonableness of the automated administrative decision, i.e. the 'rule' that governs the algorithm.

This reasoning has been confirmed in recent years by the administrative court, stating that "one must contemplate the possibility that it is the court which "must carry out, for the first time on a 'human' level, evaluations and assessments made directly by automatic means", with the consequence that the robotised decision "requires the judge to assess the correctness of the automated process in all its components" (TAR Campania, Naples, section III, 14 November 2022, no. 7003).

On the possibility of reviewing the court's decision with reference to different algorithmic systems (machine learning or ruled-based), courts seem to have outlined a solution only for ruled-based ones. In fact, the "multidisciplinary characterisation" of the algorithm "does not exempt from the need for the "technical formula", which in fact represents the algorithm, to be accompanied by explanations that translate it into the "legal rule" underlying it, and that make it readable and comprehensible.

With the already identified consequences in terms of knowledge and reviewability” (Council of State no. 8473/2019).

In case law, it has also been explained that the court can review the initial stages of programming or construction of the algorithm, and that “Attention must be shifted upstream, to the construction of the algorithm; on how the parameters of the algorithm are chosen (a subjective operation in itself), and how they combine with each other; and even before that, on how the terms taken as a parameter are realised”³⁴. In fact, the question of the identification of the terms to be assumed for the construction of the algorithm indicates the moment in which the choice characterised by discretion is made, so much so that the guarantees that must accompany every choice of the administration must be anticipated at these stages – prior to the actual use of the algorithm. To achieve this goal, it is essential to guarantee transparency, ensuring that the construction of the algorithm is understandable, and, if necessary, relates to the syndication of the act adopted based on it. As a consequence, “the automated administrative decision requires the judge to assess first of all the correctness of the computerised process in all its components: from its construction, to the data input, to its validity, to its management” (cf. Council of State, section VI, no. 2270/2019).

On the theoretical level, the flaws of legitimacy related to the use of the algorithm in the decision may be different: for example, there may be a defect in the construction of the algorithm underlying the program; a defect in the design and implementation of the program; an incorrect imputation of the data used by the software; a malfunction of the hardware³⁵.

In a recent judgment on tariff calculation - akin to the subject of automated decisions - the Regional Administrative Court stated that the “calculation formula (i.e. the technical formula) must translate the regulatory precept” must comply with its *ratio decidendi*, ensuring all the essential conditions to guarantee its correct functioning³⁶. In the case at hand, the Regional Administrative Court had, therefore, ascertained that the incompleteness was due to a partial transposition of the preceptive content of the regulatory framework of reference.

³⁴ TAR Naples, 14 November 2022, no. 7003.

³⁵ See A.G. Orofino, *La patologia dell'atto amministrativo elettronico: sindacato giurisdizionale e strumenti di tutela*, Il foro amministrativo- C.d.S. 2256 (2002) ; as well as, again, F. Saitta, *Le patologie dell'atto amministrativo elettronico e il sindacato del giudice amministrativo*, Rivista di diritto amministrativo elettronico 17 (2003).

³⁶ TAR Lazio Rome section III[^] ter, 29 August 2024 no. 155998.

More problematic, however, is the court's reviewability of public administration decisions based on AI machine learning systems. In the legal scholarship, it has been noted that "open-structure algorithms by their very nature suffer from a certain degree of opacity"³⁷. All too often, in machine or deep learning devices, the so-called black box does not allow the tracking of the steps that produce the answer from the question. Precisely for this reason, the Artificial Intelligence Act (or AI Act) – the European regulation on artificial intelligence Reg. (UE) 2024/1689– provides for certain information and transparency obligations based on the principle of reasonableness and proportionality, the intensity of which changes according to the degree of risk. These are essential minimum requirements, as it is preferable to address the black box with measures that are adequate to at least know the basis of the logical process adopted by the system rather than with the imposition of extensive, but hardly feasible, obligations³⁸. The unknowability of the entire cognitive path of the machine is therefore still an unresolved problem of a technological, even more than legal, nature, and one must be aware of this if one wants to use AI in the field of administrative activity without hypocrisy³⁹.

H. Netherlands

Louise Verboeket & Jacobine van den Brink

In this case, we are dealing with a single-case decision (*beschikking*) under Dutch law, as defined by Article 1:3(2) of the General Administrative Law Act (GALA, *Algemene wet bestuursrecht*), which refers to a decision (*besluit*) that is not of general scope, including the rejection of a request for such a decision⁴⁰. The administration's formal denial of the bonus requested by Mrs Ratatouille falls within this definition. A parallel can be drawn with a judgment by the District Court

³⁷ F.A. Pasquale, *The black box society. The secret algorithms that control money and information* (2015).

³⁸ M Casonato, B Marchetti, *Prime osservazioni sulla proposta di regolamento dell'Unione europea in materia di intelligenza artificiale* (2024), in www.teseo.unitn.it/biolaw/article/view/1793.

³⁹ N. Durante, *Intelligenza artificiale e "lavoro" del giudice amministrativo* (2024), from giustizia-amministrativa.it.

⁴⁰ Under Art. 1:3(1) GALA, the decision must be taken by an administrative authority (*bestuursorgaan*). The definition of an administrative authority can be found in Art. 1:1 GALA.

of Amsterdam, which also concerned the rejection of a 2020 application for COVID-19 support, applied for through a digital form⁴¹. The applicant objected to a screenshot stating that he was not entitled to the support because his housing costs were too low, preventing him from completing the digital form. According to the administrative authority (*bestuursorgaan*), the screenshot did not constitute a decision as defined by Article 1:3 of the GALA against which the applicant could file an objection (*bezwaar*) with the administrative authority and subsequently appeal (*beroep*) to the administrative court (*bestuursrechter*). However, the court considered the screenshot to be a decision, since, for example, emails can also be classified as such. Moreover, the statement in the screenshot was intended to have a legal consequence, as the application for reimbursement was denied, and the screenshot included the reason for the rejection. Therefore, the screenshot was subject to objection and appeal. The same applies to the remedies available to Mrs Ratatouille against the formal denial of the bonus. She must first lodge an objection with the administration, and then she can appeal the decision on the objection (*beslissing op bezwaar*) to the administrative court⁴².

As for the appeal phase, the fact that the decision was based on an algorithm's output certainly does not shield the decision from juridical review. Based on the case law discussed in the answer to the fourth question within the chapter devoted to the Netherlands, contained in Part II, the administrative authority is required to provide adequate reasoning for a decision made using an algorithm. Without insight into and explanation of the algorithm, the fairness of administrative processes driven by algorithms cannot be verified⁴³. The administrative court would therefore be not only open to, but obliged to, review the lawfulness of the decision to deny Mrs Ratatouille the bonus, as well as the procedure leading up to that decision.

In this context, the administrative court would apply the framework previously examined⁴⁴. In this case law, it is notable that the administrative court closely scrutinises the choices made by the administration, as well as the data and assumptions which inform the

⁴¹ District Court of Amsterdam 17 May 2022, ECLI:NL:RBAMS:2022:3066.

⁴² Arts. 7:1 and 8:1 GALA. Appeals against decisions regarding applications for some forms of COVID-19 support can be lodged with the highest administrative court, such as the Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven*) as the court of first and only instance. See Annex 2, Art. 4 GALA in conjunction with the Framework Act on EZK and LNV subsidies.

⁴³ Ministry of the Interior and Kingdom Relations, *Overheidsbrede visie Generatieve AI* (The Hague 2024) 26.

⁴⁴ See the answer to the fourth question in the Chapter on the Netherlands in Part II.

algorithm. It can thus be inferred that the administrative court subjects the underlying algorithms to a quite stringent review⁴⁵. However, it should be noted that the Dutch standard of review for automated administrative decision-making has been formulated in cases concerning decisions made using rule-based algorithms, not case-based algorithms⁴⁶. It is not expected, however, that (drastically) different rules would apply to decisions based on case-based algorithms. Therefore, it does not seem to make a significant difference whether the decision is made by a deterministic (rule-based) algorithm or by a machine learning (case-based) model.

I. Spain

Agustí Cerrillo-i-Martínez

The first question to ask is whether this bonus can be awarded automatically. The answer to this question depends on the type of administrative power being exercised. If the regulations governing the bonus determine each and every requirement to be met to obtain it, it is a regulated action, which can be automated. This is confirmed by several Spanish regulations. For example, Law 26/2010 of 3 August on the legal regime and procedures of the public administrations of Catalonia rules that public administrations “may perform automated actions to check the requirements established in the legal order are met, declare the predetermined consequences, adopt the resolutions and transmit or certify the data, actions, resolutions or agreements existing in their information systems, using their chosen electronic signature system” (Article 44). Similarly, Decree 622/2019 of 27 December on e-government, simplification of procedures and organisational rationalisation of the Regional Government of Andalusia rules that automated government actions will be applicable, among other uses, in “the adoption of an agreement or government decision via the application of mathematical formulas and other purely mechanical processes involving quantifiable values which can be expressed in numbers and percentages” or “the purely mechanical checking of

⁴⁵ ABRvS 17 May 2017, ECLI:NL:RVS:2017:1259 (*AERIUS I*), paras. 15-27, C.J. Wolswinkel, *Willekeur of algoritme? Laveren tussen analoog en digitaal bestuursrecht* (2020), 43.

⁴⁶ Council of State (*Raad van State*), *Digitalisering. Wetgeving en bestuursrechtspraak* (2021) 73.

requirements specified in the applicable regulations, and the subsequent declaration, if applicable, of the legal consequence specified therein". It is not permissible, however, "to use automated government actions to perform activities involving value judgements" (Article 40). Meanwhile, Law 5/2021 of 29 June on the Organisation and Legal Regime of the Regional Public Sector of Aragon rules that "automated government actions will not be considered when subjective decision-making criteria must be applied, whether individually or collectively" (Article 43).

Based on these regulations, some authors consider that only regulated decisions can be automated, which does not include the exercise of discretionary powers⁴⁷, and that automated government actions should be reserved for "simple actions that do not require deliberation"⁴⁸. Along these lines, considering the use of artificial intelligence in automating public administration, Ponce Solé refers to the need to establish that "certain decisions must be reserved for humans to make, which we call here a humanity reservation" (in other words, a human-in-the-loop) and recommends "prohibiting the use of AI in relation to the exercise of discretionary powers"⁴⁹.

In any case, apart from the cited regulations approved before AI was introduced for use by public authorities, the answer to this question must be governed by the precautionary principle. At the same time, it means analysing not only the type of decision to be made but the environment in which it is made, the availability and quality of data, and the personal abilities needed to be able to make good decisions. Together with this analysis, the development level of the technology must be known in order to check its suitability for the above process (for example, there already exist algorithms that can make complex judgements or deliberations, such as those in self-driving cars or can analyse emotions, as in the latest developments in artificial intelligence). The ability of public authorities to explain how and why the decision was made, and the ability of the interested parties to understand it, must also be considered.

⁴⁷ J. Valero Torrijos, *El régimen jurídico de la e-Administración* (2007).

⁴⁸ F. J. Bauzá Martorell, *Identificación, autenticación y actuación automatizada de las administraciones públicas*, in E. Gamero Casado, S. Fernández Ramos, J. Valero Torrijos (eds.), *Tratado de Procedimiento Administrativo Común y Régimen Jurídico Básico del sector público* (2017).

⁴⁹ J. Ponce Solé, *Inteligencia artificial, Derecho administrativo y reserva de humanidad: algoritmos y procedimiento administrativo debido tecnológico*, 50 *Revista General de Derecho Administrativo* (2019).

Next, we must be aware that Spanish law recognises the right of people to use electronic means in their relations with public administrations, being able to choose at any time whether to use electronic means to communicate with public administrations in the exercise of their rights and obligations (Article 14 of Law 39/2015 of 1 October on the Common Administrative Procedure of Public Administrations). However, in certain cases, interested parties are obliged to use such means. In particular, legal entities, people whose work requires membership of a professional association (i.e. lawyers), or those representing them, are obliged to communicate with the public administration through electronic means for any administrative procedure. Also, public administrations may also establish rules requiring individuals without such legal obligations to communicate with them via electronic means for certain procedures, if their financial circumstances, technical ability, profession, or other reasons indicate that they have access to and use of the necessary electronic means. Here, different regulations approved by various public administrations have increased the cohort of individuals obliged to use electronic means in their relations with the public administrations, such as business owners, or the self-employed (for example, Law 4/2019 of 17 July on the digital government of Galicia). In all cases, this increase must be properly justified, as the Supreme Court noted in its ruling 635/2021 of 6 May [ECLI:ES:TS:2021:1587], declaring that “Given that the imposition of the obligatory use of electronic means is established as an exception to the recognition of the right of persons to communicate with the public administration by electronic means, recognised in Article 14 Law 39/2015, all the criteria justifying such an imposition must be fully met, such as the necessary formal instrument, which is the regulation.”

Another aspect to consider arises from Article 22 of the GDPR, which in some cases may limit the generalised automation of certain procedures when they may involve processing personal data.

The fact that an algorithm was used in this case does not open any specific path to challenge the government’s decision. Furthermore, in Spain, no distinction has yet been made based on the type of algorithm used (deterministic or machine learning). Similarly, no specific mechanisms have been established to challenge automated decisions (Article 22.2 of the GDPR). Thus, regarding the legal options available to Mrs Ratatouille, Spanish legislation provides that interested parties may present appeals and requests for reconsideration against administrative decisions. Such appeals must be based on any of the reasons of invalidity or nullification provided in Articles 47 and 48 of Law 39/2015 (for

example, rulings which deny or ignore the legally established procedure, or which are issued in a way which denies or ignores the legally established procedure).

Finally, regarding the scope of judicial control, the same degree of control must be applied to decisions automated with AI as would be applied to a non-automated decision made without AI. In cases where AI is used, Ponce states that “For the *regulatory attribution of powers and responsibility*, the judge must first check whether a humanity reservation is applicable or explicitly established in the regulations”. He also states that, “For the *exercise of responsibility with impartiality and objectivity*, the judge may detect the programmers’ cognitive biases transferred to the system (...). If such biases exist, they may legally declare a breach of the impartiality or of the objectivity of the government due to taking irrelevant elements into account, and thus, a breach of good governance.” Lastly, Ponce states that other rulings to be considered are Article 9.3 CE and Article 35 of the LPAC, as well as Article 86 of the Artificial Intelligence Act on reasoning, such that “the judge must check that the reasoning of the final decision explains what impact the use of the algorithmic system has had on it, and show that the cognitive biases explained above, the anchoring effect, *illusory correlation*, *statistical hallucination*, or automation bias, have not occurred”⁵⁰.

In cases where the automated decision includes personal data processing, the stipulations of the GDPR must also be considered. In this respect, Supreme Court ruling of 15 February 2022, ECLI:ES:TS:2022:543, states that “In the obligations of the result there is a commitment to compliance with a given objective, ensuring the proposed goal or result, in this case guaranteeing the security of personal data and the absence of leaks or security breaches. The obligations regarding resources involve a commitment to adopt the technical and organisational resources, and to work diligently in their implementation and use in order to achieve the desired result with resources which can be reasonably classified as suitable and sufficient to achieve it, thus they are called obligations ‘of diligence’ or ‘of conduct’”.

⁵⁰ J. Ponce Solé, *Inteligencia Artificial, decisiones administrativas discrecionales totalmente automatizadas y alcance del control judicial: ¿Indiferencia, insuficiencia o deferencia?*, 9 Revista de Derecho Público: Teoría y Método 9 (2024).

L. United Kingdom

Gordon Anthony

This question can be answered in short order, as Mrs Ratatouille would have strong grounds for challenging the decision in this scenario, where her remedy would be an application for judicial review. Her starting point would be the principle of *Wednesbury* unreasonableness, whereby a decision will be unlawful if it is “so unreasonable that no reasonable decision-maker” could have taken it⁵¹. On the facts that are presented here, that threshold would appear to be met: Mrs Ratatouille was (in effect) invited to make an application, which was rejected on an entirely arbitrary basis. The decision is arguably unreasonable by design.

There are other features of the scenario that would breach common law standards, although they would likely be subsumed within a wider finding of unreasonableness. One such feature is the failure to give reasons for the refusal, either at the time the application was blocked or when Mrs Ratatouille approached the appropriate office. While there is no general common law duty to give reasons for administrative decisions, the law will impose a reason-giving obligation where that is required in the interests of “fairness”⁵². Any reasons given must then be “proper, adequate and intelligible”⁵³, as this is said to lend itself to transparency that may alert an affected individual to an unlawfulness in the decision-making process⁵⁴. It is difficult to think that the common law would not impose a duty on these facts.

Two further points remain to be addressed.

The first is whether reliance on the algorithm’s output would insulate the decision from judicial review. The answer is “no”. Courts in the UK are very mindful of the need to safeguard their role through judicial review, as doing so ensures that the rule of law can be upheld in potentially any case⁵⁵. That principle would apply even in the event that decisions follow an algorithm: an individual’s rights can be equally

⁵¹ *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223, 233. On the relationship between *Wednesbury* and proportionality see G. Anthony, *Judicial Review in Northern Ireland* (2024), especially Chapter 6.

⁵² *Dover DC v Kent* [2017] UKSC 79, [2018] 1 WLR 108, 124-5, para 51, Lord Carnwath.

⁵³ *Dover DC v Kent* [2017] UKSC 79, [2018] 1 WLR 108, 121, para 37, Lord Carnwath.

⁵⁴ *R v Higher Education Authority, ex p Institute of Dental Surgery* [1994] 1 WLR 242, 256-7, Sedley J.

⁵⁵ *Anisimic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; and *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2020] AC 491.

affected irrespective of whether a decision is based upon human or automated reasoning.

The second is whether it would make any difference if the decision was taken by a machine learning algorithm or by a deterministic algorithm. Again, the answer is “no”. Much of the logic of administrative law is the need to protect the individual in the face of public decision-making, irrespective of the form of that decision-making. A public authority decision is either lawful or it is not – and it would matter not whether it is taken in one or other automated form.

In sum: Mrs Ratatouille has strong grounds for challenging this decision, which is unreasonable, unsupported by reasons, and subject to review, notwithstanding its automated character.

M. United States

Catherine M. Sharkey & Caterina Barrena Hyneman

Background

The United States had many similar COVID-19 recovery programs for small businesses, both at the federal and state levels⁵⁶. Some programs did utilize AI, but unlike Mrs. Ratatouille’s denial, they did not use AI to determine whether businesses were eligible for the benefits. Instead, AI was largely used to detect fraudulent claims⁵⁷, and to a lesser degree, to improve the efficiency of grant distribution processes⁵⁸. As such, there is no exact parallel for this hypothetical in the U.S.

⁵⁶ Cfr. K. Smith, *Our Big List of Covid-19 Assistance Programs*, Instit. for Loc. Self-Reliance (May 26, 2020), <https://ilsr.org/articles/information-on-covid-19-small-business-assistance-programs/>, with U.S. Chamber of Com., *COVID-19 Financial Assistance Programs for Small Businesses* (Dec. 2, 2020), <https://www.uschamber.com/security/pandemic/covid-19-financial-assistance-programs-for-small-businesses> (claiming that only 30 states have state-wide programs).

⁵⁷ Press Release, U.S. Dep’t of Treasury, *U.S. Dep’t of the Treasury Releases Rep. on Managing A.I.-Specific Cybersecurity Risks in the Fin. Sector*, <https://home.treasury.gov/news/press-releases/jy2212>; D. M. West, *Using AI and Machine Learning to Reduce Government Fraud*, Brookings (Sept. 10, 2021), <https://www.brookings.edu/articles/using-ai-and-machine-learning-to-reduce-government-fraud/>.

⁵⁸ D. M. West, *Using AI and Machine Learning to Reduce Government Fraud*, cit.

Answer

If these agencies had adopted similar measures, Mrs. Ratatouille could argue that the denial of her benefits constituted a violation of her due process rights. In general, the U.S. Supreme Court has held that welfare benefits are a “matter of statutory entitlement” for those who qualify for them. Therefore, if an agency terminates a person’s benefits, the applicant is entitled to certain procedures so that they are afforded their procedural due process rights⁵⁹. While Mrs. Ratatouille’s welfare benefits were not terminated—they were denied from the onset—she may still be entitled to other due process protections.

First, if her application is formally denied, she may be entitled to receive information about her denial. Citizens are entitled to notice that an adverse action is being taken against them and on what grounds⁶⁰. However, the Trump administration may argue that agencies only need to provide internal notice to government auditors about the use of AI and do not need to notify individual citizens when adverse actions are taken against them. It is worth noting that this position has not yet been challenged in the U.S., and Ms. Rataouille may have substantial grounds for challenging this definition of “notice.”

Second, the fact that the agency’s decision was a formal and final denial of the bonus does not insulate the decision from judicial review. This finality is what allows it to come under the purview of the courts. Section 704 of the APA generally limits judicial review to final agency action.

The courts would likely not differentiate based on whether the decision was taken by a machine learning algorithm or a deterministic algorithm. As discussed above⁶¹, the ECRA has applied to less sophisticated, non-AI algorithms underwriting credit decisions for decades⁶² and will continue to apply to AI and ML decisions⁶³. Moreover, plaintiffs have challenged decisions made by less sophisticated algorithms during the pandemic. For example, under the CARES Act, enacted during the pandemic, many borrowers had their student loan

⁵⁹ *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970).

⁶⁰ J. Dempsey, S. Landau, *Challenging the Machine: Contestability in Government AI Systems*, Lawfare (Mar. 11, 2024), <https://www.lawfaremedia.org/article/challenging-the-machine-contestability-in-government-ai-systems>.

⁶¹ See the answer to the fourth question in the Chapter on the United States in Part II.

⁶² K. Smith, *Our Big List of Covid-19 Assistance Programs*, Instit. for Loc. Self-Reliance, cit.

⁶³ Consumer Fin. Prot. Bureau, *Consumer Financial Protection Circular 2022-03* (2022) <https://www.consumerfinance.gov/compliance/circulars/circular-2022-03-adverse-action-notification-requirements-in-connection-with-credit-decisions-based-on-complex-algorithms/>.

payments suspended⁶⁴. In one federal district court case, the Plaintiff's loan servicer incorrectly reported her loans in forbearance, and her score consequently fell by 97 points⁶⁵. The Defendants were told that the report had an inaccuracy, but the Defendant's algorithm did not correct it and the Plaintiff was denied housing as a result⁶⁶. While the case was dismissed for other reasons⁶⁷, the court found that the algorithm did not adjust to account for the CARES Act, nor was there sufficient human oversight and intervention to review the information given to them by the loan servicers to prevent injury⁶⁸. Similarly, a mortgager brought a punitive class action in federal district court for violation of the FCRA, alleging that the Defendant lowered their score because of improper reporting of mortgage payment suspension during the pandemic⁶⁹. The case was dismissed for lack of subject matter jurisdiction and lack of injury⁷⁰.

Mrs. Ratatouille may likewise face difficulty establishing an injury sufficient to confer standing to sue. In a case brought in U.S. federal court, the Plaintiff alleged that the IRS discriminated against him, showing "deliberate indifference to his disability," because the agency failed to fix a "computer error," which led to the denial of his COVID-19 stimulus payment⁷¹. The court dismissed the case (not reaching the merits) on the ground that the denial of a stimulus check was not enough to establish injury⁷². Before Mrs. Ratatouille can argue that she was not afforded due process, she must also pass this standing hurdle. To establish standing, Mrs. Ratatouille must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the Defendant, and (3) that is likely to be redressed by a favorable decision"⁷³. To show injury-in-fact, the most important of the three prongs (and the one *Grauman* and *Rahoi*

⁶⁴ Hafez v. Equifax Info. Servs., LLC, No. 20-9019, 2021 WL 1589459, at *2 (D.N.J. Apr. 23, 2021).

⁶⁵ *Ibid.*

⁶⁶ *Ibid.* at *3.

⁶⁷ The court found that the Plaintiff did have standing because she faced real injury from having a housing application denied. However, the case was dismissed for several reasons, which included that the Plaintiff "does not sufficiently allege an inaccuracy in her credit reports" and that the Defendants were not alleged to be a consumer reporter agency under the FCRA's definition. *Hafez*, 2021 WL 1589459, at *4-7.

⁶⁸ *Hafez*, 2021 WL 1589459, at *5.

⁶⁹ *Grauman* v. Equifax Info. Servs., LLC, 549 F. Supp. 3d 285, 288-89 (E.D.N.Y. 2023).

⁷⁰ *Ibid.* at 292-93.

⁷¹ *Rahoi* v. Internal Revenue Serv., No. 20-cv-1289-bhl, 2021 WL 2717164, at *1 (E.D. Wis. July 1, 2021).

⁷² *Ibid.* at *3.

⁷³ *Ibid.* at *2 (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016)).

failed to show), she must demonstrate that she suffered “an invasion of a legally protected interest” that is “concrete and particularized and actual or imminent, not conjectural or hypothetical”⁷⁴. It is unclear whether or not the denial of her COVID-19 business benefits would suffice. On the one hand, *Goldberg* established that people entitled to welfare benefits have a statutory right to them⁷⁵ and the denial is extremely particularized to the data that the algorithm used about Mrs. Ratatouille. On the other hand, *Rahoi* was also a case about someone denied COVID benefits based on a computer error, and the Plaintiff in that case was unable to establish standing⁷⁶. However, we may be unable to generalize *Rahoi*’s conclusion to other cases because it was brought against the IRS and may have been decided in the context of more particularized taxation law principles.

⁷⁴ *Spokeo*, 578 U.S. at 339 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

⁷⁵ *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970).

⁷⁶ *Rahoi*, 2021 WL 2717164, at *3.