COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Strasbourg, 26 November 2018 CDPC(2018)18

THEMATIC SESSION
ON
ARTIFICIAL INTELLIGENCE AND CRIMINAL LAW

THE APPROACH IN COUNCIL OF EUROPE MEMBER STATES

THE CASE OF AUTOMATED VEHICLES

28 November 2018
Strasbourg (France)
Palais de l'Europe (Room 9)

PROGRAMME

The Thematic Session on artificial intelligence[1] and criminal law responsibility will focus on the importance of a meaningful approach in legal systems across Europe to deal with the challenging questions posed by the increased presence of artificial intelligence in civil life.

The full-day session will take place on 28 November 2018, at the Palais de l'Europe (Room 9) in Strasbourg.

The Council of Europe aims to achieve ambitious targets, including:

i. Examine and ascertain the current existing scope and substance of relevant national criminal legislation and international law pertaining to the use of automated vehicles (or other AI deployment), as well as to determine where and how regulatory powers are established within the competent national public authorities.
ii. Determine where certain conduct has been or should be prohibited and criminalised in relation to the delegation, division or assignment of tasks, functions and behaviours to automated technologies, and the possible cross-border-relevance.
iii. Illustrate the findings under ii (see supra) using the case of automated driving: should new principles and norms of attribution and accountability for natural or legal persons be established to uphold Council of Europe Conventions' goals if automated driving (or other Artificial Intelligence deployment) operates across borders.
iv. Examine the scope and substance of an international legal instrument to provide common standards for the criminal law aspects of automated technologies, in particular automated vehicles.

Wednesday, 28 November 2018

09:30 - 09:40 *Opening of the Conference and welcome address*

Mr Christos Giakoumopoulos, Director General of Human Rights and Rule of Law, the Council of Europe

Welcome, introduction, purpose of the day

09:40 - 10:50 **SESSION I: Introductory remarks and presentation of the project "Artificial Intelligence and Criminal Law. The approach in Council of Europe member States – The case of automated driving".**
Why artificial intelligence is important for criminal law – The role of the Council of Europe

10:50 - 11:10 *Coffee break*

11:10 - 12:30 **SESSION II: State of play in Council of Europe member States**

[1] There is no agreed upon definition of Artificial Intelligence (AI), but for the purpose of this paper the Council of Europe recognises the term as encompassing systems that are operational and capable of performing complex tasks whose goal is to achieve the imitation by a machine of the cognitive abilities of a human being.
https://www.coe.int/en/web/human-rights-rule-of-law/artificial-intelligence

12:30 - 14:00 *Lunch break*

14:00 - 15:30 **SESSION III: From coach to car to driverless – Criminal Law without a human actor: consequences if we "loose the human actor as possible perpetrator"**

15:30 - 16:30 **SESSION IV: Automated driving, MLA and gathering of evidence. What are the challenges in criminal proceedings in cases of fatal traffic accidents involving automated driving?**

16:30 - 16:50 *Coffee break*

16:50 - 17:20 **Summary of the Thematic Session discussions and Conclusions**

17:20 Close of the Thematic Session and reception

Session I

Presentation of the project "Artificial Intelligence and Criminal Law. The approach in Council of Europe member States – The case of automated vehicles"

Background and purpose of this session:

Technological developments are rapidly evolving in the 21st century and especially in the newly developed sector of Artificial Intelligence. Long-term technological trends in this domain suggest that Artificial Intelligence entities will become more and more involved in modern civil life by operating and engaging in it. Currently, automated vehicles operate at the push of a button and count less and less with the presence of a human driver which used to be entirely responsible for every part of the vehicle's operation. In this exciting age of technology, the State authorities and international organisations are working hand in hand to keep up as there is no common legal framework or international legal instruments addressing the discussed situation in the Council of Europe member States. The purpose of this session is to present the concept of Artificial Intelligence and the role that the Council of Europe can have in such a domain as well as an overview of the issues of criminal law responsibility with automated driving.

Guiding questions/key issues for discussion:

-Why is understanding Artificial Intelligence important to the Council of Europe and to its member States?

-What are the main objectives of the Council of Europe and its Committee on criminal law (the CDPC) with regards to Artificial Intelligence?

-What is the scope/impact that Artificial Intelligence entities can have on everyday life?

-What is understood to be automated driving?

-What are the basic criminal law issues that can arise from such technologies in the case of automated driving?

Agenda

Objective of the session

Rapporteur: Prof. Sabine Gless

Experts input

Prof. Dr. Dominik Herrmann

Prof. Mariarosaria Taddeo

Discussion of guiding questions and formulation of responses and recommendations

Session II

State of play in Council of Europe member States

Background and purpose of this session:

The increased presence of Artificial Intelligence in everyday life presents challenging questions to the Council of Europe member States. Over the last years some member States have made substantial progress in regulating automated driving by focusing legislative efforts on the implementation of general technical standards for special permits allowing automated driving, as well as regulations of the functions that such automated vehicles must possess. This session aims at the comparison and understanding of the different criminal legislations set out by the member States, and to highlight and compare the issues of automated driving at a domestic and international level. It will also provide an excellent opportunity to have an exchange of views on the current works carried out in States with regard to the criminal law regulation of Artificial Intelligence and in particular automated vehicles.

Guiding questions/key issues for discussion:

-What are the recent developments done in Council of Europe member States to regulate automated driving?

-What are the commonalities and differences between the already drafted Council of Europe member States' legislations?

-Who are the different regulative authorities?

-What are the recurring issues in the legislative process, if any?

-Can any lacunas be identified in the realm of legislations?

Agenda

Objective of the session

Rapporteur: Mr Sławomir Buczma, Chair of the Council of Europe Committee on Crime Problems (CDPC)

Experts input

Mr Joël Valmain

Ms Fiona Petersen (United Kingdom)

Prof. Dr. Eric Hilgendorf (Germany)

Mr Pierre-Mathieu Gaite (France)

Prof. Dr. Susanne Reindl-Krauskopf (Austria)

Ms Irene Norsted (Norway)

Discussion of guiding questions and formulation of responses and recommendations

Session III

From coach to car to driverless – Criminal Law without a human actor: consequences if we "loose the human actor as possible perpetrator"

Background and purpose of this session:

The fact that robots have become part of our daily lives raises novel issues in criminal law; driving automation is a prominent example for this. Robots can malfunction and cause serious harm. But as things stand today, they are not suitable recipients of criminal punishment, mainly because they cannot conceive of themselves as morally responsible agents and because they cannot understand the concept of retributive punishment.

The question thus arises whether humans who produce, program, market and employ robots can be subject to (novel) criminal liability? The answer is yes, in cases of intentional conduct if someone knowingly uses a robot to cause harm to others. Liability for negligence is problematic because modern robots are self-teaching so that their actions cannot be fully predicted. A person who allows a robot to interact with humans therefore can foresee that the robot might get out of control and cause harm. In light of the overall social benefits associated with the use of many of today's robots, one could argue in favor of limiting criminal liability of operators and providers to situations where they neglect to undertake reasonable measures to control the risks emanating from robots. At the same time the public will demand that robots are used with utmost care when deployed in the living environment.

Guiding questions/key issues for discussion:

Why do robots challenge traditional notions of criminal law, namely the concept of an actor or a legally relevant act/conduct and eventually the overall idea of responsibility in criminal law?

Is there a "responsibility gap", and if so do we need to close it with criminal law, or can the policy objective of utmost care when employing AI be achieved with civil law torts?

Is there a need to think about new criminal law responsibilities, like that of a provider of an AI service, similar like the responsibility of legal persons, established in Art. 12 of the Cybercrime Convention, ETS 185?

Agenda

Objective of the session

Rapporteur: Prof. Sabine Gless

Experts input

Prof. Bryant Walker Smith

Prof. Bruno Deffains

Ms Dafni Lima, PhD Cand.

Dr. Jérôme Perrin (Renault)

Discussion of guiding questions and formulation of responses and recommendations

Session IV

Automated driving, MLA and gathering of evidence. What are the challenges in criminal proceedings in cases of fatal traffic accidents involving automated driving?

Background and purpose of this session:

The application of AI in the realm of automated driving poses new challenges for the establishment of liability where damages raise the question of possible criminal responsibility. Based on the example of a fatal accident occurring during automated driving, experts in Session IV will address issues related to the cross-border gathering of evidence, fact-finding and evidence evaluation.

The data generated during an automated car journey is not normally stored (fully) in the vehicle, but is saved automatically elsewhere by the producer of the car for example or by someone else. Thus criminal investigation authorities face the usual problems of gathering digital evidence, especially gaining access to data stored with cloud service providers abroad, where the application of the US CLOUD ACT of 2018 vis-a-vis the EU's proposal for a directive on e-production orders are to be taken into account. Both want to solve the problem that through the search of computers and by way of remote access to digital data stored in the cloud or in a computer, data can be obtained however this might infringe on territorial sovereignty.

The biggest problem is that in the case of a fatality connected to automated driving that relies on AI, experts face the so-called "black box problem" (not to be confused with a Data Event Recorder possibly required in an automated car): steering a car in an unknown environment requires such complex computation that in a trade-off between efficiency and explainability, computer scientists opt for a deep learning model that leaves investigation authorities in the dark about the decisions taken during the car journey. Therefore, the investigaton of an alleged crime connected to driving automation might not establish the relevant facts.

Furthermore, in order to determine what safeguards should be adopted during the collection of such data while investigating an accident (criminal or non-criminal liability), clarification on how far these data affect the right to privacy of any person needs to be clarified. If we are to consider that no privacy rights are affected would the same rules on cross-border collecting of meta-data or real time digital data be applied?

In addition as the automated car is a movable device some of the data might be moving around with this car. If the automated car is located in another State and/or travels causing damages/criminal acts along different locations, could the interception of these data be carried out without the assistance from and/or knowledge of the territory where the robot-car caused the accident? Or should only the assistance of the State where the data are stored be requested? Would Articles 19 and 20 on interception of communications of the EU MLA Convention of 2000 be applicable (no parallel rules are to be found in the Council of Europe 2nd Protocol to the MLA Convention of 2001)?

Guiding questions/key issues for discussion:

How will or should international co-operation in criminal matters function with regard to the specific case of AI driverless cars?

Could the traditional/usual instruments of international co-operation apply as they stand or should they be adapted to these new cases?

Does automated driving need a common supranational approach?

Should the rules governing the cross-border evidence involved be different from the retention, gathering and storing of any other digital evidence?

Agenda

Objective of the session

Rapporteur: Prof. Dr. Lorena Bachmeier

Experts input

Mr Andrea Candrian

Prof. Juliette Lelieur

Mr Erik Verbert

Discussion of guiding questions and formulation of responses and recommendations

Conclusions

i. Summary of the sessions' outcomes

Prof. Sabine Gless

ii. Conclusive statement and planning of future work

Mr Slawomir Buczma, Chair of the CDPC

iii. Closing of the Conference

Mr Carlo Chiaromonte, Council of Europe