

ARTIFICIAL INTELLIGENCE IN EUROPEAN LAW

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Abstract

The emergence of Artificial Intelligence (AI) is a topic still fresh and new to law scholars. The aim of the Regulation regarding artificial intelligence is to present a unified and harmonised core legislation, from which the EU Commission and member states to tackle the growing aspects concerning this new sector of economic market, social and administration. As it will be seen in the present article, the EU legislator is still fixed on the existing AI, known to us until now, governing strict rules as response to some countries in Asia having made use of facial, biometric and location recognition AI to control their people and also to award behavioural points and keep score of the „perfect citizen“.

The draft Regulation is followed by an EU Commissions Directive regarding the liability of all aspects regarding AI development, usage and participants. But the core principles, necessary for such a new matter are laid down in the present Regulation. The document is divided into chapters, addressing mainly the definitions of the main notions used, including one for artificial intelligence system, the types of AI that are considered unacceptable and major-risk in respect to fundamental rights and values of the EU, special regulations regarding transparency, registration of AI systems and the necessity to have a special European authority, backed by national authorities, in charge of validating the usage of AI systems.

Keywords: artificial intelligence, European law, proposal, regulation, control, registration.

1. Introduction

European Parliament and Council have laid down a draft proposition of, to be voted and included in the European Union's (EU) legislation. It resulted in the draft proposition of Regulation of the European Parliament and of the Council harmonised rules on Artificial Intelligence (Artificial Intelligence Act)¹. The same draft is set to amending certain other EU legislative acts.

In the current political context, the EU Commission is looking to present a unified regulation regarding AI, having these specific objectives:

- i) ensure that AI systems placed on the Union market and used are safe and respect existing law on fundamental rights and Union values;
- ii) ensure legal certainty to facilitate investment and innovation in AI;
- iii) enhance governance and effective enforcement of existing law on fundamental rights and safety requirements applicable to AI systems;
- iv) facilitate the development of a single market for lawful, safe and trustworthy AI applications and prevent market fragmentation.

In light of these objectives, the draft Regulation whites to approach all matters in a balanced manner, but also to tackle some or all the risks that might arise. This must be done as to not hinder any technological development, nor to increase expenditures unreasonably. A juridical and economic framework must be created, adapted to the necessities of modernity, progress and future challenges. This can be achieved by having a strong set of principles, unified in matters of AI.

The scope of this paper follows the scope of the Regulation, is to present a summary of the provisions introduced by this draft proposal, in order to scrutinise aspects that will definitely have an impact, should it be voted in current form. Aspects like risk management, that does not create unnecessary restrictions for commerce, but also addresses general concerns regarding AI, those which are justified, are subject to this presentation.

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¹ For all EU languages see <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0206>, consulted on 04.05.2023.

The draft Regulation is not against introducing AI, but looks to set forth private and safe places for testing, rules for creating and using AI and introduction on the market, balanced by a careful risk management. A unified definition is a premiere, and also the forbiddance of certain AI practices that are broadly considered dangerous.

In corelation with other EU law, the draft Regulation is drafted in accordance with the EU Charter for Human Rights, bun also consumers, data protection², non-discrimination, equality and other core legislation. Romanian legislation is few, but we indicate the forming of the Romanian Committee for Artificial Intelligence³, by the Ministry of education, under the patronage of the Romanian Government.

At the same time as this draft Regulation, the EU Commission has advanced a draft for a Directive⁴, whit purpose to bring under regulation aspects of liability regarding AI developing, marketing and use.

2. Presentation of the main provisions of regulations

Regarding the content of the draft Regulation, it's expected to improve and to facilitate good market functioning, by setting forth a unified juridical frame, necessary for creating, developing, marketing and use of AI in conformance whit EU policies. It is also worth mentioning that the possibility of a member state to limit these freedoms regarding AI shall be limited. AI systems are free to be implemented in all sectors of economic, private life and society. Because certain member states have already implemented restrictions, they may remain if their goal is to ensure the safe us of AI and general laws and human rights. The free trade principal, at the core of EU law and philosophy, is met by this approach. It also prevents the fragmentation of the single market, by having various legislation for each member state.

2.1. Scope and definitions (Title I)

The general objectives of the draft Regulation are harmonising the single market with the putting into service and use of AI, to enjoin certain practices considered dangerous, to assure transparency for AI created to interact with people and overall to monitor the market for this new merchandise.

The provisions of the draft Regulation shall apply non discriminatory to all AI providers, regardless of them being from EU or tertiary. Given the nature of AI, all systems that are introduces to EU must obey the principles of the Regulation and EU law. However, military developed special AI is excluded from the domain of the draft Regulation, being subject only to foreign policies of the EU and common security⁵.

The different terms used by the draft Regulation are given a definition in art. 3. The most important definition is the one given to the notion of „artificial intelligence system” (AI system) meaning software that is developed with one or more of the techniques and approaches listed in the Regulation and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with. The approaches referred to are⁶:

- (a) Machine learning approaches, including supervised, unsupervised and reinforcement learning, using a wide variety of methods including deep learning;
- (b) Logic- and knowledge-based approaches, including knowledge representation, inductive (logic) programming, knowledge bases, inference and deductive engines, (symbolic) reasoning and expert systems;
- (c) Statistical approaches, Bayesian estimation, search and optimization methods.

AI is basically a software, that should follow the rules of intellectual property. Thus, the draft Regulation gives definitions for „market introduction”, meaning the first release of a system on the UE market, „making available on the market” meaning any supply of an AI system for distribution or use on the Union market in the course of a commercial activity, whether in return for payment or free of charge, and „putting into service” means the supply of an AI system for first use directly to the user or for own use on the Union market for its

² Regulation regarding data protection [Regulation (UE) 2016/679] and Directive on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data [Directive (UE) 2016/680].

³ Order no. 20484/2023 regarding the setting up, organization and function of the Romanian Committee for Artificial Intelligence, issued by the Ministry of Education, Innovation and Digitalisation, published in Official Gazette of Romania, Part I, no. 382/04.05.2023.

⁴ See proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive), <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0496>, consulted on 04.05.2023.

⁵ Foreign policy and security are regulated under Title V of the Treaty on the European Union (TEU).

⁶ See Annex I of Regulation regarding artificial intelligence (AI), as mentioned in footnote 1.

intended purpose. Alongside it defines „reasonably foreseeable misuse” meaning the use of an A.I. system in a way that is not in accordance with its intended purpose, but which may result from reasonably foreseeable human behaviour or interaction with other systems.

2.2. Forbidden artificial intelligence practices (Title II)

This title lists practices that are considered dangerous. The draft Regulation ranks them into three categories, based on risk, resulting in unacceptable risks, high risk and low risk AI products.

Deriving from this, unacceptable risks are considered forbidden, due to their potential harm to EU values. All practices that may, in any way, influence people without them being aware or that exploit vulnerabilities of specific categories of people, in order to materially distort their behaviour in a manner that is likely to cause them or another person psychological or physical harm, are listed in this category. Also, any social behaviour evaluation, made by private or public entities and using biometric identification in real time and in public places, even for the purpose of law enforcement, are forbidden, with only specific exceptions strictly regulated. The notion of „real-time remote biometric identification system” is defined in the previous title and means a remote biometric identification system whereby the capturing of biometric data, the comparison and the identification all occur without a significant delay.

Not last, AI cannot be used to evaluate a person’s credibility, over a specific time frame, based on behaviour, personal preferences or known personality statistics, known or suggested, nor to create scores of one’s demeanour.

In respect to where an adult person might have a choice, to use or benefit or allow to be used regarding him/her any aspect set forth by AI, these practices are forbidden only if they fall under the before mentioned examples and are not regulated by other EU law, such as data privacy.

2.3. Major-risk AI systems (Title III)

The second category, as mentioned before, of risk evaluated AI are major/high risk products/software. They are considered such due to their big potential risk to the safety, health or rights of natural persons. Thus, they are permitted to be used only after careful evaluation of conformity with the laws and values of UE. This evaluation is based not only on the intended scope of the AI system, but also on the function and the means by which these are used.

The draft Regulation splits into two categories the major risk AI:

- AI destined to be used as components of products, subject to conformity verification by third parties;
- other AI autonomy programs that may have implications in fundamental rights⁷, such as biometric identification, operation of critical infrastructure, education and training, employment, private life, freedom, law enforcement, public administration etc.

In order to implement and manage these risks the draft Regulation sets forth a system for documenting and administer them. This will be a continuous process, at the fist introduction to market and spanned over the entire usage of an AI systems, including verification regarding known and possible associated risks derived from miss usage, growing data collections and adaptability of the AI. High-risk AI systems shall be tested for the purposes of identifying the most appropriate risk management measures. Testing shall ensure that major-risk AI systems perform consistently for their intended purpose and they are in compliance with the requirements set out in the Regulation. For this, all major-risk AI must have technical documentation, in which to prove that the program abides by the necessary requirements and norms, also facilitating public organism set for verification all aspects needed to evaluate them at all time. These must be placed in records that must pe kept for specific period of time. Not last, all AI must be supervised by humas during creation and implementation, including cybernetic security.

These are the first of many distinct obligations that the draft Regulation ageists to providers. Chapter 3 sets these responsibilities, which expand to importers, distributors and all traders that deal in AI. One of the main obligations of providers is to ensure that AI functions in law abiding, that they provide usage manual to users and that they obtain EU conformity certificates (CE conformity). Another obligation is to monitor ant take immediate measures, should the AI not perform in allowed parameters.

⁷ See Annex III of Regulation regarding artificial intelligence (AI), as mentioned in footnote 1.

Creators of AI system special ensure that their product is ready to be released to market and that it pre-obtained authorisation and necessary conformity certificates. If a provider or creator does not have an official agent in EU or merchandises the product without a designated importer, it must name an authorised agent in EU. Agents or importers will be held liable for obtaining and holding conformity certificates, issuing of technical documentations and usage instructions for consumers. Collaboration with public authorities is mandatory for all.

Users of AI also have obligations, to read and abide by the user instruction manual or rules provided by provider, to not bring or render any harm to other users and to not use it abusively or in such manner as to restrict right or liberties. Users of an AI system that generates or manipulates image, audio or video content that appreciably resembles existing persons, objects, places or other entities or events and would falsely appear to a person to be authentic or truthful ('deep fake'), shall disclose that the content has been artificially generated or manipulated.

The same title, in chapter 4 institutes how and when competent public authorities must be informed in order to evaluate the conformity of AI systems. In continuation, in chapter 5 a detailed evaluation procedure can be found, to be followed by all AI systems catalogued as high-risk. The approach tends to reduce the work load on both the parties involved and the public authorities. However, for AI destined to be used as components of products shall be verified before and after release to ensure their conformity with special laws from their area of implementation and the provisions of the draft Regulation.

After verifications had been concluded and a conformity certificate is to be released, the providers must register their AI systems into a common data base, managed by the EU Commission. Its purpose is to ensure the transparency and to facilitate on-going verifications by authorities. Any modifications, transformations, updates etc. to an AI must be reflected in this data-base.

2.4. Transparency and innovation (Titles IV and V)

Transparency is a very important part of the rules that should stop all derail of any AI system. As innovation develops, because of the sensitive aspects of the matter, transparency and constant control of the systems must be at the highest priority. Some risks that some AI incur may degenerate in manipulation. Transparency obligations shall apply foreground to systems interacting with people, those that are used to detect emotions and/or may render certain associations with social categories or use biometrical data and those that create fake and deepfake information. Regarding the last, as mentioned before, it is considered a violation of rights as may lead to the obligation to disclose that the info was fake.

Transparency means that whenever a user interacts with an AI it must be made aware of this situation and, if any aspect their behaviour is recognised, analysed and stored, by automatic means, it must be under the same awareness. All these allow a possible victim of manipulation by an AI to take a step back and reassess.

Interesting to see is that the draft Regulation managed to expresses necessary balance needed to exist between innovation and human rights. Innovation is a part of human nature and the scope of the draft Regulation is to provide a safe and legal manner in which to be expressed. So the draft Regulation is in favour of innovation, adapted to the future needs and resistant to possible deviations. For this purpose, member states are encouraged to develop safe spaces for testing and verifying AI. Also, because, the present Regulation cannot include all aspects, national competent authorities should set up regulatory sandboxes and sets a basic framework in terms of governance, supervision and liability.

2.5. Governance, implementation and code of conducts (Titles VI, VII, VIII and IX)

In respect to governance of the entire aspects regarding AI, as regulated by the draft Regulation, proposals are made towards both European and national levels. At EU level, there is the proposition to constitute a European Committee for AI governing, having participants from all member states. This committee should facilitate a harmonised introduction and verification of all AI, contributing to the on-going cooperation between the national AI surveillance authorities and the EU Commission. Separately, at national level, the draft Regulation suggests that all member states create national public authorities, entrusted to authorise, survey and implement the directions set by present Regulation and other special laws in topic.

Having mentioned before that a common data base is required, in order to keep track of major-risk AI systems at European level, because of their potential implications regarding fundamental rights, this will be created by the EU Commission and shall be supplied with data from providers of AI systems, which are required

to register their products before releasing them onto market, or in any way making them usable. This data base will be similar and have the same purpose as, for example, the trade registry of companies.

Creating such a data base is not the only step, its role is to assure transparency and to aid the public authorities in their on-going verification and release of conformity certificates. Providers must feed information regarding all aspects and allow to be examined by public authorities, after the release of a product or system. Investigating potential incidents and dysfunctionalities are a core component. The competent authorities, first the national ones, must control the market and investigate the obedience of the participants obligations and their conformity with present Regulation and other EU and national laws. This mainly refers to major-risk AI systems, but will include the evidence of all systems.

In other words, the draft regulation specifically mentions that public authorities should be granted the funds and the tools necessary for them to be able to intervene in the event that a system generates unforeseen risks and/or damages. A quick and prompt response is highly necessary.

All this does not affect the existing system and the distribution of powers for the ex-post application of fundamental rights obligations in the member states. Where necessary for the performance of their mandate, the existing supervisory and compliance authorities shall also have the power to request and access any documentation kept in accordance with this Regulation and, if necessary, to require market surveillance authorities to organize high-risk AI system testing by technical means.

As it can be observed, the draft Regulation implements different sets of codes of conduct for the three categories of AI systems, ranked by risk. If regarding major-risk category the dispositions are mandatory, it is also firmly suggested that even low risk providers to abide by the same principles. Although it is presumed that their impact is minimal, we are dealing with new and in permanent developing systems, making need for awareness from both sides, the main actors in the market and the public authorities.

3. Conclusions

The importance of the AI sector is immense, the importance of having a unified law is greater and the importance of regulating, at least the main aspects that concern the entire EU, is the up most importance. The present paper did not include the sister legal act, the directive regarding liability deriving from AI implementation and usage, because of its size and complexity.

De lege ferenda one might suggest that an even more detailed approach should be made, as we are sure that due to the inevitable development of this sector of technology, all regulations shall be extended from the current one.

The impact cannot be denied, any attempt to banning the use of AI will be a fail attempt from the very beginning, as showed by the case of Italy regarding the famous Chat GPT. The solution is to acknowledge, monitor, register, control and educate people to this new domain which, even more than the invention of the calculus machine, alone brings a new industrial revolution.

References

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