

Rules for the Future: Regulating Artificial Intelligence in the EU

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November 2021



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1. Introduction

Artificial Intelligence (AI) is at the forefront of developments in digital technology with its unique ability to provide opportunities in driving productivity, while also allowing society to reap the benefits through the applications based upon it. It is estimated that AI could contribute up to “\$15.7 trillion to the global economy in 2030, more than the current output of China and India combined.”¹

Despite the elusive perception around the purported idea of AI, businesses are engaged in real life applications of AI in everyday industrial activities, such as the use of virtual personal assistants, language recognition in task management, and more.

Artificial Intelligence refers to software which can imitate human cognition and learning, enabling devices and machines to perform tasks which would otherwise require human input. It has many applications ranging from autonomous cars to smart appliances, robotic manufacturing, surveillance systems, and speech, image, and language processing.

When regulating AI, typically a risk management approach is taken. The swift evolution and use of AI brings enormous benefits, but also potential harm in the spheres of safety, privacy, equality and more.

Given the existing and projected economic benefits of AI, it was only a matter of time before the move towards the regulation of the AI market would become an important political incentive and prompt for leaders and their respective markets globally. President von der Leyen called² for the importance of developing a “coordinated European approach on the human and ethical implications of Artificial Intelligence”³, while the Biden Administration announced the newly formed National Artificial Intelligence (AI) Research Resource Task Force⁴ whose focus was “to road map for expanding access to critical resources and

¹ Rao & Verweij, “PwC’s Global Artificial Intelligence Study: Exploiting the AI Revolution”, 2017 <Accessible here: <https://www.pwc.com/gx/en/issues/analytics/assets/pwc-ai-analysis-sizing-the-prize-report.pdf>>

² Ursula von der Leyen “A Union that Strives for More – My Agenda for Europe” <Accessible here: https://ec.europa.eu/info/sites/default/files/political-guidelines-next-commission_en_0.pdf>

³ *Ibid* at p. 13

⁴<https://www.whitehouse.gov/ostp/news-updates/2021/06/10/the-biden-administration-launches-the-national-artificial-intelligence-research-resource-task-force/>

educational tools that will spur AI innovation and economic prosperity nationwide.”⁵ In China, President Xi Jinping again indicated the importance of his previous pledge to support the mass expansion of the digital economy in China during the 34th collective study session of the Political Bureau of the CPC Central Committee.⁶

In line with this, we have seen an upwards trend whereby regulators and lawmakers around the world have highlighted that the introduction of new laws will soon shape how companies use AI. This was reflected by the swift release of the Federal Trade Commission’s Guidelines on AI⁷ calling for businesses to act equitably and truthful in their use of AI.

Following on from this, the EU Commission followed suit publishing a white paper which declared that AI would “change our lives by improving healthcare, increasing the efficiency of farming, contributing to climate change mitigation and adaptation, improving the efficiency of production systems through predictive maintenance, increasing the security of Europeans, and in many other ways that we can only begin to imagine.”⁸

This proposed ecosystem of excellence would benefit industry globally in line with the coinciding development of an ecosystem of trust, both mutually interdependent given the importance of trust as an indispensable condition for the adoption and use of AI.

The aforementioned narrative was brought to the forefront upon the publication of the April 2021 proposal for a regulation laying down harmonized rules on Artificial Intelligence,⁹ the first comprehensive response aimed at the use of AI which this paper will examine.

⁵ *Ibid*

⁶ http://www.news.cn/politics/leaders/2021-10/19/c_1127973979.htm

⁷ Jillson, “Aiming for truth, fairness, and equity in your company’s use of AI” FTC, 2021 <Accessible here: <https://www.ftc.gov/news-events/blogs/business-blog/2021/04/aiming-truth-fairness-equity-your-companys-use-ai>>

⁸ EU Commission, “WHITE PAPER On Artificial Intelligence - A European approach to excellence and trust” Brussels, 19.2.2020 COM(2020) 65 final <Accessible here: https://ec.europa.eu/info/sites/default/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf>

⁹ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL LAYING DOWN HARMONISED RULES ON ARTIFICIAL INTELLIGENCE (ARTIFICIAL INTELLIGENCE ACT) AND AMENDING CERTAIN UNION LEGISLATIVE ACTS COM(2021) 206 final 2021/0106(COD) <Accessible here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0206>> [hereinafter “Draft AI Regulations”]

2. The Draft AI Regulations

On 21 April 2021, in line with Article 114 of the Treaty on the Functioning of the European Union (TFEU), which provides for the adoption of measures to ensure the establishment and functioning of the internal market, the Draft AI Regulations were published constituting a new core part of the EU digital single market strategy.

These draft regulations command a number of mandatory requirements applicable to the design and development of certain AI systems which manufacturers will have to follow, as well as highly specific rules on the protection of individuals with regard to the processing of personal data – “notably restrictions of the use of AI systems for ‘real-time’ remote biometric identification in publicly accessible spaces for the purpose of law enforcement”¹⁰, prohibitions of certain AI practices, harmonized transparency rules for AI systems and rules on market surveillance and monitoring.¹¹

The scope of the draft regulation applies to the following;

- Providers placing on the market or putting into service AI systems in the Union, irrespective of whether those providers are established within the Union or in a third country
- Users of AI systems located within the Union and providers and users of AI systems that are located in a third country, where the output produced by the system is used in the Union¹²

Excluded from the scope of the regulation are any AI systems developed for military purposes. According to the Draft AI Regulations, any system providing output within the European Union would be subject to it, regardless of where the provider or user is located, therefore encompassing individuals or companies located within the EU placing an AI system on the market or using an AI system within the EU.

¹⁰ Ibid at Section 2.1 of the Explanatory Memorandum.

¹¹ Supra note 10 at Article 1

¹² Ibid at Article 2

When regulating AI, typically a risk management approach is taken whereby any systems that pose a serious or unacceptable risk will be banned outright. These typically include systems used for indiscriminate surveillance applied in a generalized manner and the use of 'real-time' remote biometric identification systems in publicly accessible spaces for the purpose of law enforcement.

Following on from this, high risk systems shall be highly regulated i.e. critical infrastructure, certain safety of products components, among other things. These AI are required to use high quality data sets to ensure that it does not present bias and does not discriminate. They must provide transparent and open information to users, ensure recordkeeping and logging is undertaken to ensure traceability should an incident occur, and finally, undergo sufficient conformity assessment procedures to ensure that the above has been met. Under the proposed regulation, the European Union would review and potentially update the list of systems included in this category on an annual basis.

Finally, the use of low risk AI systems designed to interact with humans, such as chatbots etc., will be obligated by an information requirement to inform the user of the use of AI.

Legislators are also looking at algorithmic exploitation to ensure that the use of AI does not lead to discriminatory working conditions and it is also proposed that the Market Surveillance Regulation will apply to AI products. Should the proposal for the AI regulation be adopted in the EU, manufacturers of AI systems as medical devices shall comply with both Medical Devices Regulation requirements and with those laid down in the Artificial Intelligence Regulation.

Manufacturers who engage with high risk AI will be looking at the following obligations under the draft regulation;

- Ensuring they are not engaging in unacceptable risk systems which use exploitative or manipulative processes, i.e. a social scoring system
- Assessing the level of risk their AI system will operate at. High risk systems such as those that affect critical infrastructure, software that affects workers performance reviews etc, will be regulated at a higher level ensuring human oversight of the system is maintained

- Determining the level of autonomy the AI system will have. Some will require human input to prevent bias or unethical practises, some may require semi human interaction such as automated driving directions whereby human input can still overrule the AI output, and finally, no human input i.e. fully autonomous self-driving cars
- Ensuring explainability and use of good data sets. It is unlikely that developing AI systems in the western world will be opaque and therefore high level explainability will be required to ensure a reduction of bias and ensure fairness
- Ongoing monitoring of AI systems with reporting protocols to ensure proper compliance management; and
- Adhering to labeling and conformity assessment requirements

3. Conclusion

While the proposed AI regulation is a welcomed step from legislators and regulators it does not come without its shortcomings. Firstly, legislators and regulators struggle to define AI in a way that is flexible enough to allow technical progress while also being precise enough to provide legal certainty.

Those in business are posed with the question of whether existing business models will be threatened by the regulation of AI or to what impact, if any, the regulations will have on existing organizations. This is also seen whereby currently there is not a list of criteria for the identification of high risk AI and subsequent relevant sectors.

Similarly, the move towards AI poses questions for businesses regarding their productivity and how they may be affected against competitors who engage in the use of AI systems that have the potential to be transformative in cost, timing and overall effect on market share. The potential impact of gain and loss on those in sectors such as transport and logistics is most prevalent here.

Some have been critical of the Unions proposal on AI on the basis of the proposed legislation catering for the interests of business rather than citizens with a “worrying gap for discriminatory and surveillance technologies used by governments and companies.”¹³

Similarly, one might also express dissatisfaction at the notion that the legislation fails to implement protections for those who develop the relevant AI technology, with the developer more likely to be blamed where an error occurs rather than institutions or companies using said technology.

Regardless, as mentioned previously, AI is at the forefront of the myriad of developments in digital technology in business with its unique ability to change how companies interact with consumers and ergo, is never too early to be compliant.

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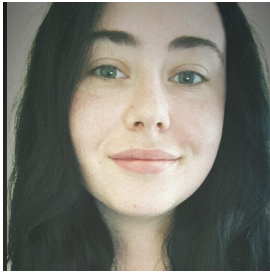
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¹³ EDRI, EU's AI proposal must go further to prevent surveillance and discrimination <Accessible at <https://edri.org/our-work/eus-ai-proposal-must-go-further-to-prevent-surveillance-and-discrimination/>>

About the Author



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Chelsea is a Regulatory Specialist working at Compliance & Risks since September 2019, specializing in the area of Artificial Intelligence, Ecolabeling, developments in the EU Drinking Water Directive & the Gas Appliances Regulation. Her work is focused on conducting extensive legal research for clients as well as monitoring and analyzing global regulatory developments. Chelsea holds a Bachelor of Civil Law (BCL) and an MSc in International Public Policy & Development from University College Cork.

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