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THE AI REGULATION



The European Commission has presented a necessary proposal for a regulation on artificial intelligence (AI)

On 21 April 2021, the European Commission has announced the launch of a new project named « *Regulation and actions for excellence and trust in artificial intelligence* ». ¹

This future regulation of artificial intelligence will be the first one to be implemented worldwide.

Background

The European strategy for artificial intelligence has effectively started in 2018. One year later, the guidelines for a trustable AI were published. In 2020, the Commission shared a White Paper on AI, setting out a clear vision for AI in Europe. A « *report on the safety and liability implications of artificial intelligence, the internet of things and robotics* » was also joined to the White Paper. The regulation concerning AI was eventually proposed in 2021 by the Commission.

Definition of an AI System

According to Article 5 of the proposed regulation, an AI System is a software which can, for specified set of human-defined purposes generate results (such as contents, prediction, recommendations, or decisions) that influence the environments with which it interacts.

Common examples include software that recommends personalized content to users based on their search or purchase history, or even music recommendation algorithms.

A risk-based approach

The European Parliament contemplates to adopt a set of new rules that will follow a risk-based approach, being specified that the proposal focuses only the AI systems that present the most risk for the public.

There are **four categories of risks** ranked by the proposal regulation: unacceptable, high, limited and minimal. The last category is not covered by the proposed text: the legal proposal indeed allows the free use of applications such as AI-enabled video games or spam filters. According to the European Parliament, the vast majority of AI systems fall into this category.

Unacceptable risks are the most important risks and apply to AI systems considered to be a clear threat to the safety, livelihoods and rights of people. Those AI systems will be banned and prohibited.

Article 5 of the proposed regulation lists the AI practices that are prohibited. Unacceptable risks notably include (i) AI systems or applications that manipulate human behavior (also known as “*subliminal techniques*”) to circumvent users’ free will (such as toys using voice assistance encouraging dangerous behavior of minors) or (ii) AI systems that allow ‘social scoring’ by governments.

High-risk practices are basically listed in Annexes II and III of the proposed regulation. In particular, AI system identified in Annex III are considered as being high-risk per se. AI systems identified as high-risk include *inter alia* (i) AI technology used in critical infrastructures (such as transport), that could put the life and health of citizens at risk, (ii) AI technology used in educational or vocational training that may determine the access to education and professional course of someone’s life (for instance scoring of exams) or (iii) AI technology used in Safety components of products (for example AI application in robot-assisted surgery).

High-risk AI systems will be subject to strict requirements before they can be put on the market. High-risk AI systems will thus be governed by a detailed



compliance mechanism, which will be primarily the responsibility of the provider. For instance, the AI systems will have to be provided with a detailed documentation with all information necessary on the system and its purpose for authorities to assess its compliance as well as a clear and adequate information to the user and an appropriate human oversight measures to minimize risk.

Systems with a low risk are only subject to some transparency requirements. It is the case for systems which intend to interact with a physical person, emotion recognition or biometric categorization systems and deep fake systems. For instance, when using AI systems such as chatbots, users should be aware that they are interacting with a machine so they can take an informed decision to continue or step back.

Sanctions for non-compliance

Under Article 71 of the proposed regulation, a range of penalties depending on the nature of the breach is established. A set of various penalties is provided in the event where the requirements are not respected. Significant penalties are contemplated. The amount of the fine depends on the degree of the violation and may be up to Euros 30M. or up to 6% of the annual turnover.

¹ European Commission's press release «Europe fit for the digital age: Commission proposes new rules and actions for excellence and trust in artificial intelligence», 21 April 2021.

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Creation of regulatory authorities

The regulation will create a European AI Board. According to Article 58 of the proposed regulation, the European AI Board will collect expertise and good practices and will share them among the Member States. The Board will also contribute to the harmonization of practices and will be entitled to formulate notices, recommendations or written proposals on issues related to the implementation of the regulation.

In addition to the creation of a board at the European stage, Member States will have to designate a competent national authority to ensure the implementation of the regulation. National authority may provide guidance and advice on the implementation of the regulation. In France for instance, the CNIL, the current French data protection authority, has already stated that it should be designated as the French national AI authority since it already deals with similar matters. The articulation between the future AI regulation and the GDPR will be one of the major challenges for sure.

The views of the European Data protection authorities

The European Data Protection Board (EDPB) and the European Data Protection Supervisor (EDPS) have issued a joint opinion on the proposed Regulation in June 2021. Theirs recommendations are mainly to extend the list of the prohibited systems and to define them more precisely to make the list of high-risk systems more general and to prohibit the use of AI when aiming at inferring emotions of an individual. They have also recommended the prohibition of any type of social scoring, a better articulation between the proposed regulation and the GDPR and the designation of the national data protection authorities as the new AI national supervisory authorities.

The AI regulation constitutes a big challenge for the European commission in a world more and more digitalized. Numerous steps are still to be taken, being recalled that no expected date has been set yet for the adoption of the regulation or for its implementation. However, one thing is sure: once in force, this regulation will have a significant impact on the companies that use AI systems.