

[This is a translation of: 'De AI Wet: Zwak, Zwakker, Zwakst', Mediaforum 2024-3, p. 73-74. The original version of this opinion piece is in Dutch.]

The AI Act: Weak, Weaker, Weakest

By Ljubiša Metikoš¹

The AI Act has been passed!² EU politicians are now proudly presenting themselves as international frontrunners in the field of AI regulation. Which is quite convenient, just before the European Parliament elections. In the past, I have criticized how vague and unclear the European Commission's proposal for the AI Act was.³ But now, a few months later, we see what the final version of the AI Act has become: a long series of watered-down attempts at regulation, resulting in a long list of exceptions.

Weak: Lobbyists and secret negotiations

The legislative process of the AI Act has left much to be desired. The influence of Big Tech lobbyists has been undeniable in recent months. Under the guise of protecting European AI businesses, companies such as the French *Mistral* urged EU politicians not to regulate generative AI. Mistral, as a European champion, would help the EU win the so-called '*AI Race*'. The AI Act should therefore absolutely not harm the competitive position of European companies. Not much later, however, it turned out that Mistral was already negotiating to be taken over by Microsoft *while being in talks* with EU politicians.⁴

Moreover, the trilogue negotiations were anything but transparent to outsiders. The most poignant moment arose when, on the very last day of negotiations, the European Council proposed to allow biometric surveillance based on *race*, when such systems are used by law enforcement agencies. After this news was leaked by journalists on Twitter (X), I hurriedly collected the signatures of 60 fellow academics in an open letter against this proposal.⁵ Fortunately, the final version of the AI Act does not contain this exception. Nevertheless, the European Council did get a lot of other exceptions through the negotiations in return.

Weaker: A wide range of exceptions

One of the main goals of the AI Act is to prohibit AI systems that pose an unacceptable risk to the safety, health, and fundamental rights of citizens (Recital 1 of the AI Act). For example, biometric mass surveillance is prohibited. However, a wide range of exceptions still allow the use of such systems in many specific cases (art. 5 (1) (d) in conjunction with (2) to (7) of the AI Act). A complete ban on dangerous '*predictive policing*' systems is also missing from the AI Act, even though such practices demonstrably violate fundamental rights.⁶

Migrants also have a much lower status under the AI Act than EU citizens. For example, the AI Act prohibits the use of AI systems that analyze the emotions of students and employees, but not those of migrants (art. 5 (1) (f) AI Act). Such a ban is desperately needed, as migrants have been subjected to AI-based lie detection systems in the

¹ Lj. Metikoš is a PhD Candidate in the field of AI regulation and legal philosophy at the Institute for Information Law, the Department of Jurisprudence, and the RPA Human(e)AI of the University of Amsterdam.

² European Parliament legislative resolution of 13 March 2024 on the proposal for a regulation of the European Parliament and of the Council on laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts (COM(2021)0206 – C9-0146/2021 – 2021/0106(COD))

³ Ljubisa Metikos, 'An Interdisciplinary Toolbox for Researching the AI-Act', *Verfassungsblog*, September 8 2023, <https://doi.org/10.17176/20230908-062850-0>.

⁴ Corporate Europe Observatory, 'Big Tech lobbying is derailing the AI Act', Accessed April 10 2024, <https://corporateeurope.org/en/2023/11/big-tech-lobbying-derailing-ai-act>. Michael Parekh, 'AI: Mistral, a Strong AI Wind from France', *Medium* (blog), March 2, 2024, <https://medium.com/@mparekh/ai-mistral-a-strong-ai-wind-from-france-7ca75b582570>. Martin Coulter en Leigh Thomas, 'France Had No Prior Knowledge of Microsoft's Mistral AI Deal, Official Says', *Reuters*, February 28, 2024, sec. Technology, <https://www.reuters.com/technology/france-had-no-prior-knowledge-microsofts-mistral-ai-deal-official-says-2024-02-28/>.

⁵ Luca Bertuzzi [@BertuzLuca], '#AI Act: The Council Is Pushing for Allowing Law Enforcement to Conduct Biometric Categorisation Based on Race. Pressure Is on Parliament to Accept the Package Deal on Prohibitions.', Tweet, *Twitter*, December 7 2023, <https://twitter.com/BertuzLuca/status/1732699687176589698>.

Ljubisa Metikoš [@LjubisaMetikos], 'Over 60 Academics Have Signed the Open Letter Urging the European Parliament to Say NO to Racial Profiling in the AI-Act. Stop Automated Racism! <https://t.co/4uz86RDROF>', Tweet, *Twitter*, December 8 2023, <https://twitter.com/LjubisaMetikos/status/1733217331331895416>.

⁶ Plixavra Vogiatzoglou, *The Era of Pre-Crime: How Mass Data Surveillance and Predictive Policing Intersect and Interfere with Privacy, Data Protection and Due Process Rights in the EU*, Dissertation, Katholieke Universiteit Leuven, 2023.

past, which often have made mistakes.⁷ In addition, the AI Act says nothing about the *export* of dangerous AI systems abroad. European-made surveillance technologies, on the other hand, have been used in the past by countries such as China and Israel to oppress Uyghurs and Palestinians, respectively.⁸

The weakening of the AI Act is also visible in the articles that deal with high-risk AI. For such systems, for example, certain risk mitigation measures must be taken (art. 9 AI Act). Annex III of the AI Act formulates which systems are considered to be 'high-risk'. However, many broad and vaguely formulated exceptions apply to this list. Only profiling systems are always considered to be a high-risk AI system (art. 6 (3) AI Act).

Weakest: The disenfranchised citizen

However, the weakest part of the AI Act appears to be the lack of strong (procedural) rights for individuals. For example, the right to lodge a complaint under art. 85 of the AI Act does not contain any obligation that supervisory authorities must respond within a certain amount of time to that complaint, or even the obligation to respond to a complaint at all. However, the AI Act does contain a new right to an explanation, which will partly fill the gaps in the right to an explanation under the GDPR.⁹ Unfortunately, art. 86 only requires that a superficial description of the AI system in question be provided. In addition, the EU legislator, or any Member State, may restrict the right to an explanation without restriction (art. 86 (2)).

Individuals will therefore only be able to monitor compliance with the AI Act to a limited extent. This is in contrast to, for example, the proposed Brazilian AI Law, where in addition to a '*risk-based approach*', a '*rights-based approach*' is also used.¹⁰ Such rights can stimulate dissent from outside the established order of regulators, developers, and AI users. In the Netherlands, scandals such as the childcare benefits scandal and the SyRi case have shown that we cannot rely on the government when it comes to supervising the use of AI.¹¹ The proposed AI Liability Directive could, in part, have strengthened the position of citizens in this regard by making it easier to gather evidence and sue the developers and users of risky AI systems. However, negotiations for this directive have slowed down significantly and now leave a major gap in the regulation of AI.¹²

Conclusion

The EU has certainly not found a panacea when it comes to regulating AI. The final version of the AI Act appears to have become the child of an opaque and manipulated legislative process. It's full of half-hearted attempts to (not) regulate dangerous AI. Therefore, companies and government agencies that develop and use AI need to go beyond the obligations of the AI Act, if they want to use AI in an ethically responsible way.

⁷ Ryan Gallagher Jona Ludovica, 'We Tested Europe's New Lie Detector for Travelers — and Immediately Triggered a False Positive', *The Intercept*, July 26 2019, <https://theintercept.com/2019/07/26/europe-border-control-ai-lie-detector/>.

⁸ 'Joint Statement - A Dangerous Precedent: How the EU AI Act Fails Migrants and People on the Move', *Access Now* (blog), accessed April 10, 2024, <https://www.accessnow.org/press-release/joint-statement-ai-act-fails-migrants-and-people-on-the-move/>.

⁹ 'Israeli Authorities Using Facial Recognition to Entrench Apartheid', Amnesty International, May 2 2023, <https://www.amnesty.org/en/latest/news/2023/05/israel-opt-israeli-authorities-are-using-facial-recognition-technology-to-entrench-apartheid/>; 'EU Companies Selling Surveillance Tools to China's Human Rights Abusers', Amnesty International, 21 september 2020, <https://www.amnesty.org/en/latest/press-release/2020/09/eu-surveillance-sales-china-human-rights-abusers/>.

¹⁰ Ljubiša Metikoš, 'Leg het me nog één keer uit: het recht op een uitleg na Uber en Ola. Annotatie bij Hof Amsterdam, 4 april 2023', *Privacy & Informatie* 3.

¹¹ 'The road to regulation of artificial intelligence: the Brazilian experience', *Internet Policy Review*, Accessed April 10 2024, <https://policyreview.info/art.s/news/road-regulation-artificial-intelligence-brazilian-experience/1737>.

¹² District Court of The Hague, ECLI:NL:RBDHA:2020:865, 5 February 2020.

Amnesty International, 'Ethnic Profiling is a Government-wide Problem', 2024.

¹² European Commission, Proposal for a Directive of the European Parliament and of the Council on adapting the rules on non-contractual civil liability to artificial intelligence (AI). (2022).

European Parliament, 'AI Liability Directive Legislative Train Schedule', Accessed April 10 2024, <https://www.europarl.europa.eu/legislative-train/theme-legal-affairs-juri/file-ai-liability-directive>.