# BEITEN BURKHARDT

# Tech Law Briefing

**July 2021**

## Dear Reader,

Please find attached our Tech Law Briefing July 2021.
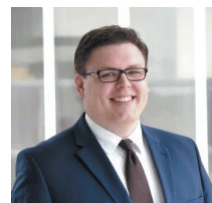
Kind Regards,

BEITEN BURKHARDT
Rechtsanwaltsgesellschaft mbH

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# 1. Proposed EU Regulation: The "Artificial Intelligence Act"

The EU Commission intends to harmonize the law on artificial intelligence (AI) across the EU. Therefore, on 21 April 2021, it proposed a new Regulation, the so-called "Artificial Intelligence Act".[1]

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## Overview

The Regulation

- applies to the placing on the market, putting into service and use of "AI systems",
- establishes prohibitions on certain AI practices,
- imposes requirements specifically for AI systems posing a high risk, and
- requires high transparency regarding the use of "AI systems intended to interact with natural persons" as well as emotion recognition and biometric categorization systems, and image, audio or video content generation or processing systems.

According to the EU Commission, the proposal aims to "turn Europe into the global hub for trustworthy Artificial Intelligence".[2]

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## Details

The Regulation affects both EU and non-EU providers offering AI systems in the EU. It also applies when the output of non-EU based AI systems is used in the EU.

The definition of "AI systems" is quite broad: An AI system shall be software which is "developed with one or more of the techniques and approaches listed in Annex I 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".[3] The techniques listed in Annex I are, for instance, machine-learning or logic- and knowledge-based approaches such as inductive (logic) programming, among others.

The Regulation provides for specific rules that are largely based on the risk posed by the respective system:

AI systems creating an "unacceptable risk" are to be prohibited. These are, for example, systems that use subliminal techniques to manipulate human behavior and thereby harm people, or systems that enable authorities to assess people's trustworthiness based on their social behavior to their disadvantage.

The real-time use of "remote biometric identification systems" is to be prohibited in principle. Exceptions may apply, e.g., for the search for a missing child, the prevention of danger to life or terrorist attacks.

"High risk" systems (e.g. in critical infrastructures, but also in product safety or law enforcement and justice) must meet strict requirements. Such systems shall, *inter alia*, have adequate risk assessment and mitigation systems, automatically record operations for traceability ("logs"), have adequate human oversight and be sufficiently robust, secure and accurate. High-risk systems using techniques where models are trained with data are to be developed based on certain additional requirements. Before such systems may be placed on the market or put into service, certain technical documentation shall be drawn up and kept up to date. In addition, a specific conformity assessment procedure is needed which verifies the requirements for high-risk systems, as well as an EU declaration of conformity and the bearing of a CE marking. To this end, the Regulation provides for a list (to be regularly adjusted) of systems that pose a "high risk" in any case.

Importers and distributors are subject to several obligations, in particular regarding the assessment of conformity requirements. Users must use high risk systems according to the instructions for use and monitor operation; in case they make modifications to such systems they will be subject to various requirements applicable to high-risk AI providers.

For the development of high-risk AI systems, providers, notified bodies, innovation and research institutions shall be able to access and use "high quality datasets" which are related to this Regulation. The common European data spaces (to be set up by the EU Commission, cf. the EU Commission's "European data strategy")[4] and a facilitation of data exchange between companies in the public interest shall be "instrumental to provide trustful, accountable and non-discriminatory access to high quality data for the training, validation and testing of AI systems".[5]

The EU Commission, but not the actual text of the Regulation, further differentiates between "low" risk and "minimal" risk AI systems.[6]

For AI systems with "low risk", primarily transparency requirements are to apply. This relates to systems intended for interaction with natural persons or enabling the processing of audio-visual content, etc. (e.g. chatbots, but also "deep fakes").

All other systems are considered systems with a "minimal risk" where no further requirements apply. These systems are to be freely usable. This shall relate to, among others, AI supported video games or spam filters, and is supposed to cover "the vast majority of AI systems".[7]

## Enforcement

When prohibited AI systems are operated, fines shall be up to EUR 30 million or, for companies, up to 6% of the previous total worldwide annual turnover, whichever is higher. These penalties will also apply to those who fail to meet the requirements for high-risk systems using techniques that train models with data.

With regard to all other AI systems, infringements shall be fined with up to EUR 20 million or, for companies, up to 4% of the previous total worldwide annual turnover, whichever is higher. The supply of incorrect, incomplete or misleading information to notified bodies and national competent authorities shall be fined with up to EUR 10 million or, for companies, up to 2% of the previous total worldwide annual turnover, again whichever is higher.

Compliance with the Regulation is to be monitored by the national market surveillance authorities. Also, the Member States shall designate authorities responsible for the assessment, designation, and notification of conformity assessment bodies and for their monitoring. A "European Artificial Intelligence Board" is to accompany the implementation, supplemented by voluntary codes of conduct and "regulatory sandboxes". Those "regulatory sandboxes" enable specific, structured experiments that allow, for instance, innovative technologies or services to be tested in a real environment for a limited period of time or in a limited part of an industry or territory under regulatory supervision.

## Summary

Overall, the Artificial Intelligence Act leads to significantly more regulation but may also hold some potential for the introduction and use of AI systems of various "risk levels". If it led to AI systems that are "safe", as best as possible, it could actually promote the acceptance and use of AI systems.

However, the effort is high: Providers of AI systems must check whether, and to what extent, their systems are permissible. Particularly providers of "high risk" AI systems

must fulfil the above requirements to place their products on the EU market. Although the EU Commission assumes that most systems currently represent AI systems with minimal risk, numerous systems are still likely to be affected.

The specific requirements are likely to be subject to further amendments in the legislative process. However, the EU Parliament already endorsed a risk-based approach before.[8]  Also, the EU Commission has already taken up the Parliament's proposal to draw up a regularly updated list of high-risk AI systems, even if the practicability of this approach may be doubted. The required conformity assessment and the necessity of bearing a CE marking are likely to prevail, although it may be questioned how the latter can be meaningfully applied in practice, especially in the case of software or complex AI systems.

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# References

[1] Proposal for a Regulation of the European Parliament and of the Council laying down harmonized rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, 21 April 2021, COM(2021) 106 final, 2021/0106 (COD), hereinafter referred to as "Artificial Intelligence Act" or "the Regulation".

[2] https://digital-strategy.ec.europa.eu/en/policies/european-approach-artificial-intelligence.

[3] Article 3 (1) Artificial Intelligence Act.

[4] https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/european-data-strategy_en.

[5] Artificial Intelligence Act, Rec. 45.

[6] Cf. https://digital-strategy.ec.europa.eu/en/policies/european-approach-artificial-intelligence.

[7] https://ec.europa.eu/commission/presscorner/detail/en/QANDA_21_1683.

[8] Cf. European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL)).

## Editor in Charge:

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