



The Strategic and
Civilized AI



INDIAN
SOCIETY OF
ARTIFICIAL
INTELLIGENCE &
LAW

Policy Brief

European Union's Legislative Proposal on AI
Governance: Policy Review

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Synopsis of the brief

The European Commission (the "Commission") announced its proposal for an Artificial Intelligence Regulation on April 21, 2021. (The "AI Regulation"). The proposal is the outcome of the Agency's years of effort, which included the release of a "White Paper on Artificial Intelligence." The AI Regulation intends to establish in the EU a robust regulatory regime for Artificial Intelligence ("AI"). The goal is to create a legislative structure that offers the legal certainty required to encourage AI research and investment while simultaneously protecting fundamental rights and ensuring that AI technologies are handled correctly. (European Union: The EU's New Regulation On Artificial Intelligence, 2021) The European Parliament passed numerous AI-related resolutions in October 2020, inclusive of ones on ethics, responsibility, and copyright. In 2021, measures on AI in criminal issues, as well as in education, culture, sphere, were observed adopted to set out a robust and immaculate legal framework. This concept suggests a broad regulation policy for Artificial intelligence that is both equitable and measurable. This proposal is confined to the unadorned prerequisites to recognise the potential problems associated with AI, without inordinately restricting or hampering the scientific progress. The proposition creates a set of harmonised criteria for the evolution, market implementation, and usage of Ai technologies in the Community, with the goal of providing a single AI terminology that is prospectively objective. A board on artificial intelligence is constituted with the intention to implement the proposed regulations under the governance of the member states. **This policy review attempts to present the key provisions of the proposed AI law, their implications for various stakeholders, barriers to AI development, and policy proposals and alternatives.**

Continuous technological innovation is not only producing increasingly sophisticated products, but it is also making these software packages more accessible. It is making it easy for an increasing number of people and organisations to use and create these technologies. While the global democratisation of technology is a desirable development, it cannot be said for all technological applications that are being produced. The proliferation of AI algorithms used in financial companies, corporations, governmental agencies, police, and other organisations is already having an impact on the community. These AI systems can and do make decisions that have profound consequences in people's lives. As a result, the use of various innovations should be governed, or at the very least supervised, to prevent the technology from being misused or abused for detrimental purposes.(Why governments need to regulate AI, 2019)

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The European Approach to Reliable AI

The AI Regulation's primary provisions are the adoption of:

- **AI technologies' constraining principles:** This provision would impose restrictions on information and its administration, documenting, openness and data distribution to consumers, human oversight, and resilience, precision, and protection on owners and consumers of elevated AI technologies. Its central element, foreshadowed in last year's White Paper on Artificial Intelligence, is the necessity for ex-ante compliance check to ensure that elevated AI technologies fulfill the requirements before they can be put up for sale or made operational. A stipulation for a post market surveillance system to identify and alleviate difficulties in use is another major advancement.
- **Facial recognition row:** It should come as no surprise that the first significant area of AI to comply with regulatory laws is facial recognition. This technology is extremely intrusive and has the potential to significantly impact the lives of all citizens in a variety of ways. Throughout the previous decade, AI technologies connected to facial recognition and surveillance has been the source of numerous concerns. These technologies have a more discriminating potential than others. Therefore, a dedicated discussion over regulating these technologies is welcomed.
- **Intolerable risk policy:** AI algorithms that pose an obvious danger to people's safety, prosperity, and interests will be prohibited. This encompasses AI systems or programmes that control people's behavior in order to circumvent consumers' free choice (e.g., toys with voice control promoting risky behaviour in kids) and tools that allow authorities to conduct "social scoring." This will be accomplished by keeping a list of specific restricted AI systems developed after categorizing technologies as high risk, limited risk, and minimal risk. Any AI technology used in key infrastructure, academic or vocational training, security materials, work opportunities, worker management, and self-employment, integral private and public services, law enforcement, migration, asylum, and border protection management, judicial system and democratic processes, and so on is considered high risk and subject to stringent requirements. In general, their live use in publicly accessible areas for law enforcement objectives is illegal. Similarly, AI technologies with explicit transparency obligations, where users should be aware that they are interacting with a machine so that they can make an informed option to continue or pause are considered limited risk technologies. Other harmless AI enabled games and applications are considered to be of minimal risk and the proposed legislation doesn't intervene here. (Europe fit for the Digital Age: Commission proposes new rules and actions for excellence and trust in Artificial Intelligence, 2021)
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- **Approach to AI excellence:** The Coordination Strategy has been comprehensively updated, and concrete collaborative measures for collaboration are proposed to guarantee that all activities are linked with the European Strategy on Intelligence and the European Green Deal, while taking into consideration new problems introduced by the coronavirus outbreak. It presents a vision for accelerating investments in AI, which can help the recovery. It also seeks to accelerate the implementation of national AI strategies, eliminate divergence, and solve global concerns. "The revised Coordinated System will make use of funds from the Digital Europe and Horizon Europe initiatives, as well as the Recovery and Resilience Facility, which has a target of 20% digital expenditure, and Cohesion Policy programmes." (Europe fit for the Digital Age: Commission proposes new rules and actions for excellence and trust in Artificial Intelligence, 2021)
- **Fines and penalties:** Fines of up to EUR 30 million or up to 6 percent of annual revenue, whichever is greater are envisaged in case of non compliance with the new regulations. The vast amounts indicate the sincerity of the commission to achieve the goal of governing AI.

The Scope of Enforcement of the Legislative Proposal

Application to Consumers and Organizations: The AI Regulation offers a comprehensive legislative scope that encompasses all elements of the creation, marketing, and use of AI systems. The AI Regulation will apply to providers who place AI systems on the real economy or put AI systems into service, whether they are based in the Member states or in a third country, users of AI systems in the EU and suppliers and consumers of Ai technologies based in a foreign country where the system's outcome is used in the Union.

Article 114 of the Treaty on the Operation of the European Union (TFEU), is the legal framework for the proposal which allows for the adoption of measures to guarantee the formation and functioning of the internal market aiming a single digital market summary. A proper functioning of the internal market upon the set up harmonized rules with due scrutinisation placing on the Union Market as a distinct AI system.

To reduce the dangers to basic rights and safety presented by AI that are not covered by any current legal frameworks, high-risk AI systems must meet rigorous criteria for high-quality data, documentation and traceability, transparency, human oversight, accuracy, and robustness. Article 288 TFEU in consonance with the regulation formed would decrease legal fragmentation and promote the creation of a single market for lawful, safe, and reliable AI systems.

European Artificial Intelligence Board: In terms of administration, the Commission has proposed that the proposed laws be overseen by national competent regulatory and supervisory authorities, while the establishment of a European Artificial Intelligence Board will assist their execution and accelerate the development of AI norms. The EAIB will help national supervisory authorities and the Committee work together effectively; it will coordinate and contribute to Commission guidelines, and assist national supervisory regulatory bodies and the Commission in ensuring uniform implementation of the Law. Furthermore, voluntary standards of conduct for non-high-risk AI are advocated, as well as regulated sandboxes to enable responsible development. The intelligence board is expected to include members from all AI development stakeholders. This board is designed to serve as a focal point for bringing AI developers and regulators together.

National competent bodies, member Countries must appoint national competent bodies as well as a national supervisory agency to provide help and direction on the AI Directive. Commercial monitoring of Intelligence system is necessary by Member Federal officials. If an authority considers that an Artificial intelligence system poses a hazard to life, security, or basic rights, the body must evaluate the Ai software and, if required, take corrective action. The bodies are further required to penalize developers in case of any violations. Violation of the AI Rules is punishable by fines of up to EUR 10m - EUR 30m, or 2% - 6% of global annual revenue, whichever is greater. The amount of the fine levied is determined on the type of the violation. (European Union: The EU's New Regulation On Artificial Intelligence, 2021)

The AI Law will be implemented by regulatory agencies, with no complaint system or explicit enforceable rights for people. It is uncertain whether Member Countries will designate data security supervisory authorities, standard development bodies, or other organizations to fulfill the function of "relevant authority." Notably, the AI Law does not mimic the GDPR's "one-stop shop" mechanism, raising worries about consistency and collaboration throughout the 27 Member States.

Challenges & Omissions

The European Union's draft artificial intelligence (AI) policy, which was unveiled on April 21, is a severe blow to Silicon Valley's widely held belief that the government could perhaps leave growing technology free. The proposal outlines a sophisticated legal framework that prohibits some AI applications, highly controls high-risk applications, and moderately governs less hazardous Ai technologies. Also, the draft legislation has the potential to discourage new inventions. The following are some of the gaps and omissions in the draft regulation:

- **Algorithmic bias remains largely unaffected:** The recitals supporting the rule are replete with allusions to the well-drafted issues about the hazards of prejudice. However, the regulation's text is notably light on the requirement for performing and releasing disparate impact assessments. There is nothing concrete in the works to address the issue of algorithmic prejudice. Although, in various instances, the legislation refers to differential impact analysis. The information governance rule allows Artificial intelligence providers to use information about sensitive attributes like color, sexuality, and ethnicity to provide "bias monitoring, detection, and correction." According to the resilience rule, some automation technologies must guard against "possibly biased outputs" A system's software design must incorporate "measures used to evaluate... prejudiced affects," as well as relevant data concerning "anticipated unintended consequences and sources of risk to... basic rights and discrimination." These references are largely ambiguous and do not expressly call for impact studies on ethnic minorities. Furthermore, the paperwork, which logically must include a prejudice analysis, is not required to be shared to users, the general public, or others who may be impacted by biased algorithms. It is only available upon request to authorities. In contrast, the Act specifically requires system reliability reviews and transparency. (Machines learn that Brussels writes the rules: The EU's new AI regulation, 2021)

- **Unharmed Big Tech:** Despite being the subject of considerable and growing concern about the usage of Artificial intelligence algorithms and the emphasis of the majority of cutting-edge applied Research in this field, Big Tech emerges almost unharmed under the new AI regulations. The technologies employed in social networking, search engines, online shopping, android market, mobile applications, and operating systems are not considered high risk under the legislation. Some algorithms employed in ad tracking or recommendation engines may be banned as deceptive or exploitative practises. However, as previously said, this would require a review by a regulator. The biggest threat to average people's liberties is posed by major tech companies. The new regulation's incapacity to deal with the threat posed by the big players adds to the anguish of the already beleaguered common man. The demand for AI regulation was mostly driven by uncontrolled AI behemoths such as Facebook and Google, which were functioning freely and frequently exceeding boundaries. If these firms are not brought inside the purview of the proposed law, proponents of AI regulation should not consider it a victory. Their demands are from accepted as of now.
- **Limited information disclosure:** The regulation is scant on information that must be supplied to anyone who would be affected by Ai technologies. The legislation demands that people be told when they "interact with" an AI system or when their feelings, sexuality, religion, ethnicity, or sexual preference are "identified" by an Automated process. They must be informed when "deepfake" technologies deliberately deflate or modify material. In certain circumstances, however, this is not the case. People, for example, do not need to be informed when they are computationally sorted to assess eligibility for public services, finance, training, or employment. Creating measures that allow for the discretionary dissemination of information may allow lack of transparency to creep back into the domain of AI. Furthermore, the huge tech firms can get around the regulation's weakly outlined criteria.
- **Ineffective compliance evaluation:** The compliance evaluation obligation is far less preventive and revealing than it seems. The compliance evaluation is a technique, not a paper, and is an internal check-off for the majority of high-risk Ai program vendors. As a result, there is no independent review available for the people or the regulator to review. Instead, the public receives a "mark" confirming compliance with the regulations affixed to the Ai model. AI system suppliers must create a "declaration of conformance" and "keep it at the disposal of" regulators, although even this declaration of regulation compliance might be kept under wraps. (Machines learn that Brussels writes the rules: The EU's new AI regulation, 2021)

Evaluation and Suggestions

1. This policy seeks to control the market and examine compliance with the obligations and regulations for all high-risk AI systems that have previously been placed on the market-by-market surveillance authorities. Ex post enforcement is accountable for deploying the AI system. Systems used for remote biometric identification, critical infrastructure safety, and other high-risk systems are included on the list. With facial recognition systems producing spurious findings and being forbidden in the United States due to racial bias, voice biometrics could be a viable solution to improve forecast accuracy. Voice biometrics is a unique biological identifying instrument subject to algorithmic credentials.
2. Despite the fact that the EU's joint coordinated plan intends for a risk-based approach, distinguishing between AI applications that pose unacceptable risks, assessing the compliance of trustworthy AI is confusing, especially given the difficulty of implementing EU legislation. The European Intelligence Artificial Board and the European Data Protection Board, as newly constituted bodies with the power to issue directives and administer harmonized laws with penalties imposed for failure to conduct due diligence, would become arbitrary if the entire power was vested without any governance and implemented according to the whims and fancies of the majority of member states.
3. The Directive's analysis revealed the necessity for a varied set of norms and standards at the European level. The number of significant occurrences or AI performances that constitute a serious incident or a breach of fundamental rights obligations was found to be widespread among the AI deployed systems. Though an unified legislative action could boost the internal market regulation; legal uncertainty and the Union Involvement would not be adequate to ensure the effectiveness of the obligations with divergent national rules in safeguarding the fundamental and human rights.
4. With the EU's introduction of new harmonized rules for the establishment of a new regulatory framework; in order to institutionalize AI for the promotion of Digital Europe, investment and participation in R&D should be encouraged for accelerating the Commission's resources to develop a trustworthy AI.
5. In order to ensure that overriding public interests such as health, safety, consumer protection, and the preservation of other essential rights are met, this proposal places some restrictions on corporate freedom. These restrictions are fair and limited to the bare minimum required to avoid and mitigate severe safety challenges and potential infringement of basic human rights. To ensure that both corporate and individual interests are secured and safeguarded in the Union Market, evidence - based analysis based on factual findings must be investigated using standard operating procedures.

Conclusions

The European Commission's Artificial intelligence regulation plan is perhaps the most recent addition to an ambitious digital legislative agenda announced progressively over the last two years by Brussels. Its Digital Services Act and Digital Markets Act targeted the behaviour of U.S. platform behemoths, which may explain why this Artificial intelligence legislation initiative appears to be aimed elsewhere. The committee has also openly presented the AI law as a defence of European values against less ethical Chinese AI researchers.

The European Union takes pride in creating legal systems that have an influence beyond its boundaries, as evidenced by the GDPR. However, whether its Automation legislation becomes the dominant worldwide set of norms in a rivalry with the United States and China is far from certain. The commission's recommendation reflects broad analysis and precise decisions on tough policy issues. For that reason alone, it will be valuable on a global scale, even as it advances alongside the technology it tries to master.

The proposed law is now being considered and discussed by the European Council of Europe. The Rule will enter into force 20 days after it is published in the Official Journal. The Rule will take effect 24 months from that date, while some parts may take effect sooner.

Despite its flaws, the AI Regulation has been widely hailed as the new "GDPR for AI," and it is largely seen as the Agency's thorough and courageous initiative to pave the charge in one of the most quickly evolving fields of technology since the invention of the Internet. It will be interesting to see what happens in the next days. Will the proposed regulation be implemented as it is, or will the proposed bill be completely rewritten? This also could be assessed in the coming months.

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