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REPORT ON THE CONFERENCE "AI REGULATION IN THE EU: WHAT IS THE RIGHT MIX?"

(May 31, 2021)

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In line with President von der Leyen's political commitment for a human-centric artificial intelligence (AI) that "must always comply with people's rights",[1] on April 21, 2021 the European Commission presented its proposal for a future regulation on AI (the so-called Artificial Intelligence Act), laying down a set of requirements and obligations for the development and deployment of AI systems.[2] According to the Commission, this legislative initiative has the dual aim of fostering AI innovation across the EU economy while limiting or prohibiting AI applications that threaten EU citizens' rights. In this regard, the proposal follows a risk-based approach and differentiates between uses of AI that pose (i) an unacceptable risk, (ii) a high risk, (iii) a limited risk, or (iv) a minimal or no risk to health, safety or fundamental rights. Depending on the specific level of risk, the proposal prescribes different and proportionate obligations on providers, users, and other participants across the AI value chain (e.g., importers, distributors, authorized representatives). Accordingly, no obligation is set out for those AI systems and application that fill in the last category (minimal or no risk).

The Artificial Intelligence Act was at the centre of the conference "*AI Regulation in the EU: what is the right mix*?" held on May 31, 2021 and organized within the research project of national interest (PRIN) on "*Governance through/by Big Data*: *challenges for European Law*". The event brought together international scholars with different backgrounds, as well as members of public bodies and representatives of non-governmental organizations to analyse the strengths and weaknesses of this recent proposal. Following the format of the initiative, this report outlines the key messages taken from the contributions.

The opening remarks and the panel moderation were entrusted to Professor Giovanni Sartor, professor of legal informatics at the University of Bologna and at the European University Institute. As the legislative procedure has just begun, Professor Sartor stressed the importance of both the academic scrutiny and the public debate for

[1] Press remarks by President von der Leyen on the Commission's new strategy: Shaping Europe's Digital Future, available at <https://ec.europa.eu/commission/presscorner/detail/en/speech_20_294> (accessed: 14 June 2021).

[2] European Commission, "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.

the evolution of the final text of the future Regulation. The session then turned to the six members of the panel who were asked to present their preliminary remarks on the proposal.

Paul Nemitz (Principal Advisor in the Directorate-General for Justice and Consumers of the European Commission) strongly emphasized the need of addressing the new risks posed by certain AI applications to the fundamental rights of individuals and to the core values of our European society. Nemitz provided an insight into the core concepts of the proposal, with a specific focus on the broad notion of AI systems laid down in Article 3. Despite some criticism of this definition for being too broad, the wording of Article 3 is intended to be technology neutral and as future proof as possible, whereas a more detailed definition would hardly keep pace with the fast development of the AI sector. Nemitz concluded with the risk-based approach, pinpointing the different obligations and risk mitigation measures provided for each category of AI system.

His speech was followed by the presentation of Mireille Hildebrandt, professor of "Interfacing Law and Technology" at Vrije Universiteit Brussels (VUB) and of "Smart Environments Data Protection and the Rule of Law" at Radboud University. Hildebrandt welcomed the first legislative initiative specifically addressing the issue of AI governance and its good balance between public and private interests. However, she underlined some critical aspects of the new proposal. Particularly, she argued that other performance metrics for high-risk AI systems should be added to Article 15, as the current requirements (i.e., accuracy, robustness, cybersecurity) might be insufficient to mitigate every risk. Moreover, she stressed that the strict requirements for high-risk AI systems – set out in Title III, Chapter 2 – should be extended to every system of emotion recognition and biometric categorisation, because of the unreliability of these practices. Finally, she suggested to consider more "legal tech" AI applications as highly risky, whereas the proposal only addresses AI systems intended to assist judicial authorities.

Francesca Fanucci, representative of the European Center for Not-for-Profit Law Stichting (ECNL), presented the position of the organization, which advocated for a more flexible regulatory approach to determine the level of risk of an AI system. Since the gravity of the risks may depend on the dataset to which the algorithms are trained or on the geographic and socio-economic context in which the AI systems are deployed, a continuous risk assessment is needed in order to take into account every

possible variation. In addition, Fanucci noted that the Commission established a procedure to update the list of high-risk AI systems but not an analogue procedure for amending the list of prohibited practices. While she welcomed the introduction of an EU database for high-risk AI systems, Fanucci also invited to consider the adoption of an open register for all AI systems used in the public sector regardless of the level of risk, as already considered within the Council of Europe.

The following speaker to take the floor was Tiziana Catarci, professor of Engineering in Computer Science at Sapienza University of Rome, who highlighted the current absence of consolidated techniques or methodologies to help humans understand and interpret predictions made by machine learning models. In this regard, the "XAI" (explainable AI) research field is still at a preliminary stage. As Catarci pointed out, the problem is exacerbated by the lack of a shared definition of AI within the community of computer scientists. She also stressed the importance of granting an appropriate technical education to every EU citizen to give everyone the instruments to understand these new technologies and support their active participation in the digital transformation.

Giorgio Resta, professor of Comparative Legal Systems and of Digital Technologies & the Law at Roma Tre University, first noted the unprecedent extension of the territorial scope of application of the new legal framework, as it affects "providers and users of AI systems that are located in a third country, where the output produced by the system is used in the Union" (Article 2(1)(c) of the proposal). Such expansion might constitute a breach of the principle of international comity, with the risk of generating frictions or phenomena of tit-for-tat in the application of jurisdictional norms relating to digital relationships. Resta also stressed a problem of coordination between Article 10(5) of the proposal – which enables the processing of special categories of personal data for training techniques of bias monitoring – and Article 22 of the GDPR (General Data Protection Regulation)[3] that prohibits the processing of the same categories of personal data for automated decision-making. Thus, he suggested considering a revision of Article 22 of the GDPR, as to authorize the processing of

[3] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation).

"sensitive data" for the sole purpose of avoiding biases in automated decision-making. In addition, Resta argued that the regulation appears to overestimate the impact of some AI systems used by public authorities while overlooking the risks posed by the very same AI applications deployed by private actors. He took the example of Article 5(1)(c) of the proposal that prohibits the application of AI systems by public authorities for practices of social scoring but does not provide a similar ban on private actors, whereas the sharing economy heavily relies on such forms of personal scoring.

Nicolas Petit, professor of Competition Law at the European University Institute and the Robert Schuman Center for Advanced Studies, opened his presentation with some critical remarks on the notion of AI system provided in the proposal. In particular, he noted a contradiction between the rationale expressed in recital 6, which argues for a flexible notion of AI system based on the functional characteristics of AI, and the technical definition embraced in Article 3 and Annex I of the proposal that is clearly focused on a set of specific technologies. Petit also pointed out a lack of coherence between the notion of "harm" provided in Article 5, which refers to "physical and psychological harm", and the one set out in recital 4, which states that the proposal covers "material or immaterial" harm. He concluded by expressing some concerns on the future implementation of the EU database for high-risk AI systems. In his view, if this mechanism requires the revelation of strategic and business sensitive information, it could have a chilling effect on innovation and investments in the internal market.

Alessandro Mantelero, professor of Private Law and Law & Technology at the Polytechnic University of Turin, welcomed the EU proposal as it drew a line between what is technically feasible and what is legally possible for AI developers. As Mantelero pointed out, the Artificial Intelligence Act speeded up the regulatory debate on the governance of AI applications worldwide: for instance, within the Council of Europe. Moreover, the EU regulation of AI is intended to be the global gold standard for AI governance. Nevertheless, Mantelero remembered that other legislative instruments, whose influence extended far beyond the EU borders – such as the GDPR – were the result of decades of legal evolution in a certain field. On the contrary, the current proposal is the first legislative measure in an uncharted area: thus, its global acceptance remains unpredictable. From this perspective, Mantelero suggested limiting the future AI regulation to some core elements: for instance, a list of banned practices, a risk

management system, and some compliance tools; all elements already present in the proposal. Accordingly, this regulation could be subsequently adjusted or expanded to tackle future developments in the AI sector, following a cautious step-by-step approach. Furthermore, he argued that the risk-based approach adopted in the proposal appears to be more technology-centered rather than human rights-oriented, because it merely identifies in advance a list of technologies and practices that are considered or not considered sources of risk *per sé*. Contrariwise, a human rights-oriented approach would entail a closer investigation on the potential prejudices to fundamental rights and freedoms, for instance by requiring a case-by-case human rights impact assessment of each AI deployed. In this regard, Mantelero raised the question as to whether the proposal should have embraced a decentralised and empirical approach to risk assessment, on the model of the data protection impact assessment (DPIA) laid out by Article 35 of the GDPR.

A round table discussion between the conference participants concluded the event, which represented a precious opportunity to hear international panelists with different backgrounds and points of view about the governance of data-intensive technological trends. The full conference video is available on the Youtube channel of the Roma Tre Law Department.[4]

[4] See <https://youtu.be/pZu-WPplJ9E> (accessed: 26 July 2021).