ENNHRI Common Position on EU Artificial Intelligence Act

Introduction

The European Network of National Human Rights Institutions (ENNHRI) welcomes the upcoming adoption of the EU Artificial Intelligence Act ('EU AIA'). It constitutes an ambitious piece of legislation with the potential for better protection of fundamental rights. This ENNHRI Common Position sets out recommendations on how to enhance and ensure its potential for better fundamental rights protection.

The European Commission ('Commission') first published a proposal to regulate artificial intelligence in the European Union in April 2021. The Council adopted its general approach in December 2022. In June 2023 the European Parliament ('Parliament') adapted their position on the AI Act.

ENNHRI sets out below its recommendations for improvement to the AI Act before its finalization in relation to the following areas:

- Ensure a broad scope of application of the AI Act;
- Improve transparency, accountability and redress;
- Ensure effective oversight in cooperation with National Human Rights Institutions;
- Refrain from harmful and discriminatory surveillance by national security, law enforcement and migration authorities.

1. Ensuring a broad scope of application and removing unnecessary loopholes

a. Ensure objective classification of high-risk systems

ENNHRI underlines the importance of **objective classification of high-risk systems.** The proposal of the Commission provides for such an approach. ENNHRI is concerned by the inclusion by the Parliament of the double qualifier in article 6. It requires an additional subjective evaluation by AI providers as to whether the AI in question poses a 'significant' risk for fundamental rights. This approach creates legal uncertainty and would be difficult to enforce. It would also incentivize AI providers to downplay the risks posed by their AI systems in order to reduce regulatory scrutiny.

b. Avoid broad exceptions to bans

Technology can be inherently harmful or be misused, infringing on fundamental rights. ENNHRI welcomes the proposed approach to ban AI systems that contravene fundamental rights (article 5). However, the scope and list of prohibited AI systems in the Commission and European Council ('Council') proposals is too narrow and fails to include certain AI systems that are incompatible with European and international human rights conventions. ENNHRI supports the amendments made by the Parliament in this regard. ENNHRI is concerned by the proposals of the Council and Commission providing for a wide scope and range of exceptions to the bans. Emotion recognition technology; biometric categorisation for the purpose of predicting ethnicity, gender, political or sexual orientation or other protected characteristics, and risk assessments for criminal justice and asylum should be prohibited entirely. See also III. B.

c. Ensure obligations are not limited to AI providers

ENNHRI is concerned that the obligations generally pertain to AI providers[1] only (article 43 (2), articles 8-15), failing to consider those pertaining to AI users[2] (article 29), commonly understood as deployers. ENNHRI urges policymakers to develop parallel obligations on users of AI systems (e.g. Fundamental Rights Impact Assessment, see also II.a), particularly those operating in the public sector, given that they are best positioned to understand the specific context in which the systems are deployed, and importantly, the impacts that the use will have on affected rightsholders.

d. Ensure applicability to cooperation outside the European Union

ENNHRI underlines the AI Act should apply in the framework of international cooperation or agreements for law enforcement and judicial cooperation with public authorities in countries outside the European Union and with international organisations. ENNHRI welcomes the requirement of an "adequacy check" proposed by the Parliament (article 2 paragraph 4) providing that the AI Act shall be fully applicable unless it can be proven that the international organisation or non-EU State in question offers equivalent protection to rights-holders to that offered by the AI Act. The absence of checks and balances in the context of international cooperation would

[1] Article 3 (2) defines 'provider' means a natural or legal person, public authority, agency or other body that develops an AI system or that has an AI system developed with a view to placing it on the market or putting it into service under its own name or trademark, whether for payment or free of charge;

[2] Article 3 (4) defines 'user' means any natural or legal person, public authority, agency or other body using an AI system under its authority, except where the AI system is used in the course of a personal non-professional activity;

enable providers to easily circumvent the AI Act, which could result in non-EU States or international organisations using AI in a way that is contradictory to the AI Act.

e. Ensure a robust framework for foundation models, general and dual purpose AI

The regulation needs to provide for **robust rules regarding general purpose AI and foundation models.** Given their versatility, these can create important risks regarding fundamental rights and should be treated as high-risk systems. At a minimum, the Act should introduce robust technical requirements, increase transparency obligations, and ensure meaningful human oversight.

f. Ensure the applicability of the regulation to research activities

ENNHRI is equally concerned by the proposal of the Council to exclude the application of the regulation "to **any research and development activity regarding AI systems**" (article 2.2.7). An exclusion of those activities from the scope of the regulation would severely undermine its efficacy. It would notably undermine the objective that AI must be developed and conceived from the outset in a way that reduces the risks for fundamental rights.

2. Improve transparency, accountability and redress

a. Ensure adequate fundamental rights impact assessments

ENNHRI welcomes the amendments by the European Parliament on **fundamental rights impact assessments (FRIA).** Whereas the obligation to conduct a FRIA is limited to high-risk AI systems, AI-systems that may not be considered as high-risk AI systems, could also negatively affect persons who are (knowingly and unknowingly) subjected to such a system. ENNHRI stresses that **(a form of) FRIA** should be compulsory for providers and users before deployment for **all AI systems.** AI systems that do not fall under the high-risk category should – at the minimum - be subject to periodical "light touch" assessment - with meaningful stakeholder participation - so that potential significant risks are detected early and, in that case, demand a full FRIA to review and include them in the high-risk category of AI systems. In order to avoid this "light touch" form of FRIA to be a mere formality, it should entail, as a minimum, mapping and documenting of potential risks to fundamental rights, evaluation of these risks during the periodic assessments, and reporting to the national supervisory body if one of the potential risks occurs.

Additionally, in terms of frequency, a (form of) FRIA should be caried out **periodically** during the entire lifecycle of the AI system, and not just prior to putting it into use, or at the moment the deployer believes that the criteria as outlined in the amendment (article 29 a) are no longer met.

The question of whether the AI-system serves the purpose it is intended for should be one of the first questions to consider. If the AI system does not serve its purpose (anymore), the deployer should refrain from using the AI system. ENNHRI recommends specifying this within the text of the AI Act.

It is equally important to explicitly provide for **meaningful stakeholder participation**, especially marginalised and vulnerable groups, in the impact assessment process (e.g. article 43.3).

b. Broaden the obligation to register AI systems

A registration system for AI, such as the proposed EU database, is an important basis for achieving transparency. Additionally, it allows society to understand for what purpose and within what context AI is used and to what extent they themselves are/can be affected by it. Currently, the registration requirement only applies to high-risk AI systems. **ENNHRI recommends a compulsory registration of all AI based systems that make or assist in making decisions or evaluations about individuals**, such as systems that try to predict behaviour or systems that sort eligible applications for jobs, higher education access, etc. Although certain types of systems can have a (far-reaching) impact on (a part of) a person's life, they are not always classified as high-risk.

As far as the public sector is concerned, all AI systems used should be published due to the position of the government in relation to its citizens and the potential (far-reaching) consequences that government decisions can have. In addition, private sector organisations should be encouraged by the AI Act to also register the AI based systems that they use. Furthermore, ENNHRI notes that transparent decision-making by public bodies is not addressed by the text of the AI Act nor the amendments. It is desirable to **standardise transparency requirements for decisions of public bodies regarding individuals and provide guidance on what information should be included.** ENNHRI believes that when making decisions concerning individuals, the public body should explain in a comprehensible manner not only that they were subjected to an AI system and how the algorithm works (compliant to article 52), but also how it has worked out for the individual in that specific case and how they can seek redress.

c. Ensure right to effective remedy

ENNHRI welcomes the amendments by the European Parliament on redress (article 68a, b, c, and d), i.e., **introducing the right to lodge a complaint with a national supervisory authority.** These provisions are crucial and must remain in the final text. However, they should be reinforced

in accordance with article 47 EU Charter of Fundamental Rights on the right to an effective remedy and to a fair trial.

A remedy can only be considered effective in light of article 47 EU Charter when it is accessible for the person concerned, which requires a minimum level of transparency and information regarding the AI system at hand. ENNHRI welcomes article 68 c providing for the **right to explanation** and underlines that this right should be complemented with a **publicly available FRIA** to be meaningful (II. a.). Moreover, people affected by AI systems should be **notified when affected by AI-assisted decisions and outcomes.** When providers or users do not comply with one of these obligations, the burden of proof should be shifted to the provider/user and not on those affected, rendering the right to remedy ineffective.

Lastly, ENNHRI underlines the need to properly **address the collective and societal impact on fundamental rights** of AI-systems and welcomes 3.5. explanatory memorandum of the AI Act and the proposed article 68 d in this regard. The proposed amendment does not provide proper protection for all affected groups, since not all AI subjects are "consumers" (i.e., linked by a contractual relationship with the deployer of the AI-based system). **A right of representation of all natural persons** is crucial to ensure the right to an effective remedy. ENNHRI recommends that public interest organizations can submit complaints to supervisory authorities, including in their own name and without identifiable victim requirement in line with article 80 GDPR 'Representation of data subjects'.

3. Effective oversight in cooperation with National Human Rights Institutions

a. Ensure meaningful cooperation with existing human rights structures

ENNHRI emphasizes the importance of **independent oversight and enforcement mechanisms** at national and EU level, mandated to receive and respond to complaints, and welcomes the amendments by the Parliament (recital (84a) and article 68 a).

ENNHRI welcomes the general enforcement approach proposed in the AI Act to **coordinate** between relevant supervisory authorities **(article 63)** and welcomes the amendments by the European Parliament explicitly underlining the importance of **cooperation with national human rights structures** such as NHRIs in **Recital 79.** ENNHRI recalls that its members, with their broad mandate to promote and protect human rights, their powers and expertise, can provide assistance at the national level to ensure that any use of AI technologies complies with existing human rights standards. A specific objective of the regulation is to ensure that AI systems placed

on the Union market and used are safe and respect existing law on fundamental rights. To effectively strengthen fundamental rights enforcement, supervisory authorities should not only coordinate but **cooperate with existing fundamental rights enforcement mechanisms.** The interinstitutional cooperation between the supervising authorities and other authorities protecting fundamental rights is concretised in article 64, providing for **access to data and documentation and the possibility to trigger investigations.** Effective cooperation requires **safeguards on accessibility and clarity, as well as resources for existing fundamental rights enforcement mechanisms such as NHRIs, for ensuring meaningful cooperation in the implementation of the EU AIA.** ENNHRI recommends specifying this explicitly within the text of the AI Act.

b. Ensure the allocation of sufficient recourses

The AI Act should ensure adequate resources will be allocated for the national supervisory authority to carry out its mandate effectively, including in terms of funding, staffing and expertise. ENNHRI welcomes the amendments by the European Parliament on article 59, highlighting the need for **specialised personnel of national supervisory authorities,** including **in–depth understanding of fundamental rights.** To ensure this required knowledge, ENNHRI proposes to amend article 59 so as to include that training of personnel of supervisory authorities on non-discrimination and fundamental rights is supported through collaboration with NHRIs and other relevant national authorities or bodies which supervise the application of Union fundamental rights law. Evidently, this need for expertise also applies to the remedy mechanisms.

4. Refrain from harmful and discriminatory surveillance by national security, law enforcement and migration authorities.

a. Ban discriminatory biometric and predictive practices

ENNHRI welcomes the proposed amendments by the European Parliament regarding migration, including the **full ban on biometric surveillance** (article 5.1). The complete prohibition of real-time remote biometric identification (RBI), such as the use of facial recognition, in public spaces and most uses of post or retroactive RBI, and a ban on emotion recognition in law enforcement, border management, workplaces, and education is of particular importance in the context of migration. ENNHRI also welcomes the bans on **discriminatory biometric categorisation, predictive policing,** and the **mass scraping of biometric data** to create surveillance databases.

ENNHRI notes that the AI Act could be further strengthened to protect migrants. The use of **predictive analytics** for the purpose of curtailing or preventing migration should be prohibited.

These systems generate predictions as to where there is a risk of "irregular migration" and such technology risks facilitating human rights violations such as pushbacks and violence at the borders, undermining the right to seek asylum and the principle of non-refoulement.

b. Include EU migration databases in the scope of the AI Act

ENNHRI welcomes the Parliament's amendment broadening the application of the AI Act **to existing AI systems which are components of large-scale IT systems established by European Union law (article 83).** These include most current existing databases used within the EU to collate, share and use information pertaining to migration and law enforcement (see annex IX) systems. This exclusion in the proposals of the Council and Commission leaves the door open to systemic fundamental rights violations, including through automated risk profiling of migrants.

c. Avoid loopholes for law enforcement and migration control

ENNHRI also notes that the common position of the Council **introduced several exceptions to the applicability of the AI Act regarding systems used for law enforcement and migration control.** These notably reduce the requirement of human oversight (article 14.5) or the obligation to register operators of high-risk AI systems (article 51.2). This approach fails to acknowledge that uses of AI in the context of law enforcement and migration control can lead to systemic fundamental rights violations against vulnerable persons. ENNHRI recommends that oversight requirements in those contexts are reinforced instead of weakened.

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