

# THE EUROPEAN UNION REGULATION ON ARTIFICIAL INTELLIGENCE – AN AMBITIOUS LEGISLATIVE “BITE” OR A DOUBLE-EDGED SWORD?

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*This policy brief analyses the draft Regulation of the European Union on artificial intelligence, with particular reference to the scope of the Regulation, the safeguards of human rights and the strictness of the provisions on prohibited practices in relation to artificial intelligence systems.*

## INTRODUCTION

Technological development has brought new legal challenges, especially in the attempt of legislators to balance between stimulating innovative ideas and their realization vis a vis the protection of human rights and freedoms. Such attempts to balance between interests are always a “minefield”, which is further complicated if multiple stakeholders are involved or in situations where reconciling the views of a multitude of stakeholders is necessary. This is also the case with the European Union (hereinafter: EU). Agreeing on a text of legislation in the EU is sometimes a challenge, not only because of the sensitivity of the subject of regulation in the specific regulation but also because of the diversity of social values of member states and the political implications in their domestic political systems. On the other hand, the draft text of the regulation, despite in principle being previously agreed upon by the member states, does not always eliminate possibilities for an abuse, and even for violation of human rights and freedoms.

In this regard, one of the EU legislative undertakings that will have an impact on human rights and freedoms is the Regulation on artificial intelligence (hereinafter: the Regulation).<sup>1</sup> The objectives of the Regulation are: 1. to ensure the safety of the artificial intelligence systems that are on the EU market and the respect for fundamental human rights and EU values; 2. to create legal certainty that will facilitate investment and innovation in artificial intelligence; 3. to increase the regulation and effective enforcement of the already existing law on fundamental rights and safety requirements relating to artificial intelligence systems; and 4. to facilitate the development of the single market for lawful, safe and credible artificial intelligence applications and prevent market fragmentation.

<sup>1</sup> 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, 2021/0106, 21.4.2021.



On the other hand, in announcing such an EU legislative undertaking, the Regulation was characterized as a legal act that has the potential to create a global standard for regulating artificial intelligence. Optimists, that is, critics, are of the view that the Regulation has the same potential as GDPR<sup>2</sup> in shaping the domestic legal framework of the countries around the world. In this regard, the Regulation has created a fertile field for discussion on a global level, and even the Secretary-General of the United Nations, Antonio Guterres, stated at a press conference that he supports the idea of establishing an international oversight body for artificial intelligence, which resembles or is inspired by the International Atomic Energy Agency.<sup>3</sup> Given such an opportunity and having in mind the potential of the Regulation, it is unclear why some sectors or industries are outside the scope of the Regulation, especially those that historically have a huge potential for systemic violations of human rights and freedoms. Moreover, there are no provisions for legal remedies in order to protect human rights and freedoms, and on the other hand, the Regulation contains a closed list of prohibited practices, i.e. artificial intelligence systems.

## SCOPE OF THE REGULATION – THE DANGER OF LEGAL LOOPHOLES ON HUMAN RIGHTS AND INDIVIDUAL CRIMINAL LIABILITY

Article 2 prescribes the scope of the Regulation, i.e. prescribes when the provisions of the Regulation will apply. Article 2 (3) of the Regulation states that “this Regulation shall not apply to artificial intelligence systems developed or used exclusively for military purposes”.<sup>4</sup> In order to justify such a provision, it is stipulated that the Regulation will not apply when the use of artificial intelligence (for military purposes) is under the competence of the Common Foreign and Security Policy of the EU (hereinafter: EU CFSP).<sup>5</sup>

Such a provision, with its rationale, creates ambiguities and thus room for abuse. The confusion is a consequence of the fact that the rationale of the provision, i.e. the part with the competence of the EU CFSP, is not present in the wording of Article 2 paragraph 3 of the Regulation and thus there is a discrepancy between Article 2 paragraph 3 and the rationale. Thus, the provision does not clarify whether the Regulation will not apply to artificial intelligence systems when they are developed or used exclusively for military purposes, regardless of whether they are under the EU CFSP or not.<sup>6</sup> Furthermore, if Article 2 paragraph 3 of the Regulation is read, without its rationale,<sup>7</sup> it follows that the artificial intelligence systems being developed within the framework of the European Defence Fund are exempted from the scope of the Regulation. Such an exemption from the scope of the Regulation can be extremely dangerous, given the fact that the EU is actively involved in developing artificial intelligence systems for military purposes through the European Defence Fund, by working on the Eurodrone project, which develops possibly armed drones.<sup>8</sup> In addition, by not regulating or limiting the application of the Regulation, a space is created to unduly restrict or “sacrifice” certain rights provided for in the EU Charter of Fundamental Rights (hereinafter: the Charter)<sup>9</sup> in the name of national security, through artificial intelligence, in particular the right to life, the right to liberty and security, the right to private and family life, the right to the protection of personal data, but also the protection of the environment.

Aside from the European Defence Fund and the projects funded by it, with the exclusion of artificial intelligence systems for military purposes, the Regulation fails to address an issue that is not only topical but also represents a “hot bone” that requires detailed regulation – autonomous weapon systems (lethal autonomous weapon

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2 Regulation of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), (EU) 2016/679, 27.04.2016.

3 The official statement of the Secretary general of the UN is available at the following link: <https://media.un.org/en/asset/k1y/k1yqlq2lr8>.

4 Article 2 paragraph 3 of the Regulation.

5 Rationale No. 12 of the Regulation.

6 Smuha, Nathalie A. et al., How the EU Can Achieve Legally Trustworthy AI: A Response to the European Commission’s Proposal for an Artificial Intelligence Act, 5 August 2021, p. 22, available at: <https://ssrn.com/abstract=3899991> (hereinafter: Smuha, Nathalie A. et al.).

7 The rationale is subject to controversy within the EU, but also subject to criticism by experts and the European Court of Justice. It is noted that, although the rationales should serve to explain the need for regulation of a particular issue, they are used to set norms. In addition, the European Court of Justice uses rationales for interpretation only when the provisions of legal acts are unclear, and the rationales are precise and can serve to resolve the ambiguity of the provision.

8 Christoph Marischka, Artificial Intelligence in European Defence: Autonomous Armament? The Left in the European Parliament, 14 January 2021, p. 11, available at the following web link: <https://left.eu/issues/publications/artificial-intelligence-in-european-defence-autonomous-armament>.

9 European Union, Charter of Fundamental Rights, 26 October 2012, C 326/291.

systems). According to the International Committee of the Red Cross, autonomous weapon systems may be any type of weapon that chooses and applies force on targets without human intervention. The regulation does not use its pedestal to reaffirm the basic principles of international military and humanitarian law (principle of distinction, proportionality, necessity) in the context of artificial intelligence (autonomous weapons systems) and chooses not to regulate the essential issue of autonomous weapons systems – the need for human control, that is, the principle of individual criminal responsibility.<sup>10</sup> In this regard, the principles resulting from the Martens clause require “significant human control” over autonomous weapon systems,<sup>11</sup> and an important element in maintaining such control is individual criminal responsibility.<sup>12</sup>

Consequently, by excluding artificial intelligence for military purposes from the application of the Regulation, legislators are not using the potential of the Regulation to effectuate the principle of individual criminal responsibility in autonomous weapon systems and to create a standard in terms of whose responsibility it will be when artificial intelligence, i.e. autonomous weapon systems, commit international crimes, regardless of whether the perpetration is intentional or it is a result of a problem in the functioning of the system. In its Resolution 2018/2752 (RSP), the European Parliament referred to and reiterated its call for: the urgent development and adoption of a common position on autonomous weapon systems; an international ban on the development, production and use of autonomous weapon systems capable of launching an attack without meaningful human control; and the launch of effective negotiations to ban them.<sup>13</sup> The current wording of Article 2 of the Regulation does not respond to the call of the European Parliament and does not use the given chance to set an international standard for autonomous weapons systems and the responsibility that comes with them. On the other hand, limiting the application of the Regulation to artificial intelligence used for military purposes can have serious consequences in terms of the enjoyment of fundamental rights.

## THE RIGHT TO AN EFFECTIVE LEGAL REMEDY AND ACCESS TO JUSTICE

A particularly important part of any legal act is the supervision of its application and the measures that can be applied to ensure compliance with the provisions it contains. The regulation is no exception in that regard and provides for monetary sanctions and market restrictions in cases where artificial intelligence systems violate fundamental human rights. Pursuant to Article 65 of the Regulation, if a violation of fundamental human rights has been committed, the competent market surveillance authority may apply measures to address the violation, for example to prohibit or restrict access to markets for the system. However, the Regulation does not provide for the possibility of active litigation of the individual, that is, there is no legal remedy for the individual against the artificial intelligence systems that have committed the violation. Such a legal framework invalidates the purpose of the Regulation – to ensure that AI systems respect fundamental rights. Additionally, monetary sanctions are not individual legal remedies that will ensure the protection of human rights, but are a method of “deterrence”, which does not guarantee success.<sup>14</sup> Consequently, the control and possibility of addressing a breach of the Regulation is under the authority of a market surveillance body and not of the individual whose rights are allegedly violated in the particular situation. In this context, the right to an effective remedy and a fair trial, guaranteed by Article 47 of the Charter, which stipulates that everyone has the right to an effective remedy in cases where their rights and freedoms guaranteed by EU law have been violated, is circumvented. The right of an individual to independently address violations of his or her rights is autonomous and independent of the competences of market surveillance bodies, and one cannot be equated with the other.

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<sup>10</sup> The principle of individual criminal responsibility is a principle that addresses the responsibility of the individual in committing international crimes, by prosecuting the person who committed the international crime and such prosecution does not exclude the responsibility of the state, in accordance with international law.

<sup>11</sup> United Nations, Recommendations to the 2016 Review Conference submitted by the Chairperson of the Informal Meeting of Experts, para. 2 (b); Draft Report of the 2019 session of the Group of Governmental Experts of the High Contracting Parties to the CCW, Geneva, 2019, para. 17 (d).

<sup>12</sup> Rule 102, ICRC Database of International Humanitarian Customary Law.

<sup>13</sup> European Parliament, Resolution on autonomous weapon systems, 12 September 2018, para. L

<sup>14</sup> Smuha, Nathalie A. et al, p. 45.

## THE CLOSED LIST OF PROHIBITED SYSTEMS

Critics of the Regulation find it problematic that the list of prohibited practices in artificial intelligence systems, prescribed by Article 5 of the Regulation, is exhaustive, that is, that there is no method to add new artificial intelligence systems that pose a risk to human rights. In practice, if several years after the adoption of the Regulation there is a new system that should be prohibited, in accordance with the principles arising from the Regulation, there is no possibility for it to be included in the list of prohibited systems. It seems that the list was created to address the latest controversies with artificial intelligence,<sup>15</sup> and not to ensure that safety is protected when using artificial intelligence systems that could arise in the future. Such a method of regulation does not take into account the speed of technological development and leaves room for misuse by operators of artificial intelligence systems. Regardless, it must be acknowledged that the EU's willingness to address the problems created by artificial intelligence in recent years is at a high level and there is interest in envisaging methods to protect the human rights of EU citizens. In this regard, experts who have worked for years on ethical issues regarding artificial intelligence generally agree with the text of the Regulation, but request to ensure that the Regulation will be able to adapt to the new peculiarities and risks of artificial intelligence as they come.<sup>16</sup>

## CONCLUSION

The Regulation is an ambitious EU undertaking, which is to be welcomed, given the challenges faced by all who have had some contact with AI. It is particularly important that the Regulation is seen as a potential instrument for setting an international standard and the public welcomes such a move by the Union. In view of such high expectations of the Regulation, it is necessary to refine it and achieve its overall potential in order to effectively and efficiently meet the set objectives, and in particular the protection of human rights listed in the Charter. It is necessary to be even more ambitious; the rules of the Regulation to also apply to artificial intelligence for military purposes, to provide for additional mechanisms for the protection of human rights and to leave room for introducing new technologies that will enter the EU market in the future.

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<sup>15</sup> Ibid, p. 20.

<sup>16</sup> See more: University of Cambridge, Leverhulme Centre for the Future of Intelligence and Centre for the Study of Existential Risk, Feedback to the Artificial Intelligence Act.

