Global Economy and Development at BROOKINGS

POLICY BRIEF
MAY 2022

The European Union AI Act

Next steps and issues for building international cooperation

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Introduction

In April of 2021, the European Commission submitted its proposal for a European Union regulatory framework on artificial intelligence. The Artificial Intelligence Act represents the first attempt globally to horizontally regulate artificial intelligence (AI). The extraterritorial application of the AI Act and its likely demonstration effect (the so-called "Brussels effect") for policy makers, means that the AI Act will have a range of implications for the development of AI regulation globally, as well as efforts to build international cooperation on AI.

The following outlines next steps for the AI Act as it winds its way through the EU system before becoming law, the key issues in the AI Act that will receive the most attention, and how the AI Act may affect international cooperation in AI. This policy brief draws from discussions in the multistakeholder Forum on Cooperation in AI (FCAI), jointly led by Josh Meltzer, Cameron Kerry, and Andrea Renda, as well analysis originally published in the October 2021 FCAI report, *Strengthening International Cooperation on AI*.

Next steps for AI Act

The European Commission's draft AI Act builds on the work done by the High-Level Expert Group on Artificial Intelligence (AI HLEG), and with input from stakeholders and experts to the Commission process. In terms of what is next for the AI Act: The Commission's submission of the draft proposal to the European Parliament (Parliament) and the Council of the European Union (the Council) initiates the EU's ordinary legislative procedure. While the next step is technically for the Parliament to initiate a First Reading of the draft AI Act, where the Commission's proposal is either adopted or amended before being passed to the Council, there are several intermediate steps that are critical to developing a consensus around the legislation.

Composed of government ministers from each EU country, the Council is one of the main decision-making bodies of the EU alongside Parliament. Before the Parliament considers proposed regulation from the Commission, the Council often adopts a General Approach document that provides the Parliament with a sense of the Council's position, with the intent to "speed up the legislative procedure" and facilitate an agreement between the Parliament and Council prior to the First Reading. In November 2021, pursuant to a General Approach, the Council's Slovenian Presidency published proposed amendments to the first half of the Commission's proposed AI Act, and in February of this year (2022), the Council (now under the French Presidency) proposed amendments to the second half of the AI Act. These amendments by the Council provide the Parliament with important guidance as it considers the AI Act.

In the European Parliament, committees of jurisdiction are responsible for reviewing the Commission's proposed AI Act and producing their own report that proposes changes and amendments to the AI Act. The Parliament has designated two committees with joint responsibility to review the AI Act—the Committee on Internal Market and Consumer Protection (IMCO) with Brando Benifei as rapporteur, and the Committee on Civil Liberties, Justice and Home Affairs (LIBE) with Dragos Tudorache as rapporteur. IMCO and LIBE released a draft report in April covering proposed amendments to the Commission proposal.

In addition to IMCO and LIBE, the Legal Affairs Committee (JURI), the Committee on Industry, Research and Energy (ITRE) and the Committee on Culture and Education (CULT) will also provide input. It is unclear when these Parliamentary committees will finish their work, although currently the IMCO and LIBE committees aim to adopt a joint report by fall 2022. After adopting this report, the joint committee may decide to enter into a series of informal negotiations known as "trilogues," where the Parliament and Council work to reconcile their versions of the AI Act with the Commission as a mediator. A compromise text between the Council and the Parliament could be expected later this year.

A successful outcome would see a provisional AI Act returned to Parliament and the Council, which could be expected to ratify the trilogue outcome. In the Parliament, the provisional AI Act would need to be approved by the joint committee, then debated and voted on by the full Parliament, after which the AI Act is adopted into law.

The AI Act so far: International alignment or divergence?

Based on the Commission's proposed AI Act and work so far by Parliament, there are a range of hot-button issues that will bear ultimately on the AI Act, and their resolution will also have implications for international cooperation on AI regulation. Paramount among these are foundational questions as to how to define what artificial intelligence is and the scope of the risk-based approach. How the AI Act is enforced will also be critical to the successful implementation of such a large regulatory framework.

The following expands on these key issues and what this might mean for international cooperation on AI. Our FCAI report on International Cooperation in AI provides a deeper look at opportunities for building international cooperation in AI including the role of the AI Act in that context.

The Commission's proposal includes specific objectives that it would like a finalized AI Act to accomplish. These include the aim to regulate high risk AI and prohibit AI, which are deemed too risky, while also facilitating investment and innovation in AI. These dual goals of regulating AI and encouraging investment and innovation in AI may be reinforcing or furthering tensions, depending on the final outcome. The need to strike a balance is reflected in the decision to have two Parliamentary Committees consider the AI Act–where LIBE is generally seen as more focused on the implications for fundamental rights, and IMCO is geared more towards promoting innovation.

Defining what is artificial intelligence

The definition of AI (or rather, AI systems), will determine the scope of the regulation. A narrow definition would leave certain types of AI systems out of scope, however, too broad a definition risks sweeping up common algorithmic systems that do not produce the types of risk or harm that AI regulation is focused on.

The FCAI report, provides an overview of the definitions given by its participating governments. While there is "no single definition" of artificial intelligence, a number of efforts have been made towards a common definition of AI. Many countries have defined AI in frameworks, guidelines, or appropriations language, but the definition in the AI Act is the first definition of AI for regulatory purposes. The definition ultimately adopted in the AI Act will likely become a reference point for other AI regulations in other countries, helping build consensus globally It is therefore promising that the Commission based its initial definition on that of the OECD, which has already facilitated some convergence in this area. However, the final outcome is undecided at this stage. The Council's proposed amendments from November 2021 includes a modified definition of AI that would narrow the scope of the regulation to machine learning. Considering that the joint committee's draft report supports a broad definition of AI, debate as to the definition of what is AI will likely continue into the trilogue stage of the process.

According to Article 3(1) of the AI Act, an AI system is "software that 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."

A risk-based approach to regulating artificial intelligence

The AI Act promises a "proportionate" risk-based approach that "imposes regulatory burdens only when an AI system is likely to pose high risks to fundamental rights and safety." Targeting specific sectors and applications, the AI Act classifies risk into four levels: Unacceptable risk, high risk, limited risk, and minimal risk. The regulation and classification of applications at the higher levels, namely those considered unacceptably risky such as social scoring, or high risk, such as AI that interacts with children in the context of personal development or personalized education, will be one key issue under consideration by the Parliament and the Council.

Globally, that regulation of AI should be risk-based is supported by many governments. The 2021 FCAI report Strengthening international cooperation on AI, found that most government participants "explicitly" endorse a risk-based approach to AI regulation. In the U.S. for instance, the United States Office of Management and Budget's Guidance for Regulation of Artificial Intelligence Applications, includes "Risk Assessment and

Management" as one of its ten principles. However, moving from a high-level commitment to risk assessment to its application will reveal different approaches that, if not addressed, threaten to lead to different localized approaches to assessing AI risk and risk management that can create costs to AI development and use.

In the U.S., the National Institute for Standards and Technology's (NIST) is developing an Artificial Intelligence Risk Management Framework (AI RMF) that could facilitate alignment on approaches to identifying and assessing risk. That said, there are already emerging differences in the U.S. and EU approach to risk assessments for AI. For example, the AI Act's division of AI systems into four risk categories may not be reflected in the U.S. approach. In addition, the U.S. has already emphasized that any assessment of AI risk needs to take into account the extent AI systems improve on existing risks, whereas the EU AI Act does not currently explicitly address this issue.

Enforcement and Self-Assessment Mechanisms

Another key issue at play centers on the governance structure of the AI Act. To enforce the new regulation, the EU will create a new European Artificial Intelligence Board (EAIB) comprised of the European Data Protection Supervisor, the Commission, and national supervisors, which is similar to the General Data Protection Regulation's (GDPR) oversight mechanism. One concern with the EAIB cited by Rapporteur Tudorache is that it will lead to a fragmented enforcement landscape, where member states vary in their capacity and willingness to enforce the AI Act. In the Parliament's draft AI report, both rapporteurs agree on strengthening the enforcement role of the EAIB to complement national-level enforcement, though the exact mechanisms (and by extension, support for such a measure) have yet to be determined.

Another unsettled question regarding how the AI Act will be enforced concerns the Commission's proposed conformity assessment requirements for different types of high-risk systems. As currently designed, for AI systems using a product safety component, such as a medical device or a car, Member States' national competent authorities (e.g., government agencies in charge of oversight, implementation, and enforcement of the regulation) will designate third-party notified bodies to conduct conformity assessments. Yet, for "stand-alone" high-risk AI systems, only industry self-assessment will be required. This approach risks divergent approaches and outcomes on everything from whether a system is high risk to questions of compliance. In part because of these concerns, the European Economic and Social Committee (EESC), a consultative body to the Commission, Council, and Parliament, has recommended making third-party assessments obligatory for all systems classified as high-risk. This remains a sticking point in Parliament, where one of the two European co-rapporteurs responsible for the AI draft report, Brando Benefei, remains skeptical that self-assessments will be sufficient to protect consumers and fundamental rights, whereas the other co-rapporteur, Dragoș Tudorache, has expressed concern for overburdening companies with administrative hurdles. Compliance costs will also be a central point of contention, particularly when it comes to the impact on small and medium-size enterprises (SMEs).

How the AI Act resolves these governance issues will matter for international cooperation in several ways. For one, the mechanisms for risk assessment and conformity assessment in the AI Act will likely "pave the way for emergence of an international market of AI auditing standards." Where this happens it can help underpin a globally interoperable approach to assessing conformity. At the same time, inconsistencies or different capacities across sectors and EU member states in AI implementation will likely hinder the development of mutual recognition agreements with other countries that will be needed to facilitate trade in AI. Again, this is where international engagement can help the EU understand the broader implications of its growing digital acquis communautaire.

The AI Act will also influence the development and use of AI standards, which will have implications for AI standards development in the EU as well as globally. Specifically, for high-risk AI systems there is a "presumption of conformity," when these AI systems comply with officially adopted "harmonized standards," which are developed by designated European Standards Organizations (ESO), namely CEN, CENELEC and ETSI. This presumption of conformity will both create demands for AI standards and a strong incentive to design AI systems in compliance with these standards. However, the focus on EU standards means that it will be important to strike a balance between its Euro-centric standards development mechanisms and the need for global, interoperable standards that reduce barriers to the diffusion of AI globally.

The AI Act and the bigger picture

The dynamic and unsettled state of many important elements in the AI Act means that there is currently a window for international partners to help inform how the EU can develop the AI Act so that it achieves the goals of regulating AI to protect fundamental rights and support domestic innovation and investment in AI. In this respect, EU participations in FCAI as well as its membership of the Global Partnership on Artificial Intelligence (GPAI) and collaboration with the OECD AI Policy Observatory (OECD.AI) are important points of engagement. More recently, in September 2021, the inclusion of AI policy in the EU-U.S. Trade and Technology Council (TTC) demonstrates the potential for further proactive regulatory alignment.

Furthermore, it is important to note that the AI Act does not exist in a legislative vacuum. The AI Act is one piece of legislation in the Commission's broader digital strategy. In particular, the Data Governance Act adopted in April this year and the newly submitted Commission proposal for the new Data Act are also relevant as they affect access to data across public and industrial sectors. The EU GAIA-X project aimed at developing a European cloud will also affect how data is used and stored, with implications for AI. Finally, the Commission is also expected to propose a legal framework adapting liability rules in the context of new challenges presented by AI later this year. How these various proposed regulations will interact, and their implications for the strength of the so-called Brussels effect and the EU's international approach remain works in progress, though

not one without risk for the EU as other governments also develop their own regulatory approaches to AI and data access more broadly.[1]

Given the European Commission's emphasis on its intent for the AI Act to function as a new global standard and the European Union's high-level of immersion in this cooperative ecosystem, a successful AI Act has the potential to become a new baseline for other government's approaches to AI regulation. There is the risk however, that the AI Act could diverge in important ways from approaches being developed in the U.S. and elsewhere, creating barriers to international cooperation on AI and creating costs to AI developing in Europe. The forthcoming debate in the Parliament and the European Council will be crucial in setting this course.

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[1] Andrea Renda, Beyond the Brussels Effect", FEPS Policy Brief, March 2022.

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Acknowledgements

The authors are grateful to Andrea Renda and Alex Engler for their helpful comments and feedback.

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