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How to Ensure Effective Enforcement of the Artificial Intelligence Act?

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Why Effective Enforcement Matters

With its Proposal for an Artificial Intelligence Act (AIA Proposal), the European Union is on its way to enact uniform rules for AI systems. This blog post looks into the compliance mechanisms envisaged in the AIA Proposal and especially into the question, whether the proposed instruments are sufficient to enforce the AIA (uniformly) in the internal market. More precisely, this article does not address the (preliminary) question of how to define the term "artificial intelligence", which AI systems should be banned and/or subject to mandatory legal requirements, what requirements should be imposed, and who should be the addressee of such obligations (cf. thereto, for example Ebers et al., and Veale/Zuiderveen Borgesius). Instead, I will focus on the question whether we can expect effective enforcement under the AIA Proposal. Ultimately, this aspect is of crucial importance: If the argument put forward in this paper proves to be true, that there is a lack of effective enforcement mechanisms, many rules of the AIA would indeed exist only on paper, without having any significant practical impact.

Ex Ante Conformity Assessment by Providers of High-Risk AI Systems

One of the shortcomings of the enforcement tools foreseen in the AIA Proposal is that for so called high-risk AI systems, the draft regulation relies mainly on an ex ante conformity assessment which "should be carried out as a general rule by the provider under its own responsibility" (Recital 43(1) AIA Proposal). For most so-called standalone AI systems, i.e. those regulated in Annex III of the AIA Proposal, the Proposal does not provide for an ex-ante conformity assessment by external third parties. This approach is inappropriate because it will lead to a conflict of interest. Providers would have to make the difficult decision of whether to carry out a resource- and time-intensive conformity assessment which may require a costly redesign of the system, or try to place the AI system on the EU market as quickly as possible at a lower cost.

Moreover, it seems problematic that the AIA Proposal does not even specify *how* the internal conformity assessment should be carried out. While the proposal emphasizes which types of risks posed by an AI system should be assessed using a sector-by-sector approach (AIA Explanatory Note, p. 8), it does not

[1] The views expressed in this paper are those of the author and do not necessarily reflect the views or policies of the Knowledge Center Data & Society or KU Leuven CiTiP. The paper aims to contribute to the existing debate on AI.

provide any sector-specific guidance on what type of documentation is required (cf. also Mökander/Floridi).

The AIA Proposal also lacks appropriate disclosure requirements for the conformity assessment carried out by providers. According to Art. 48 AIA Proposal, providers only have to issue an EU declaration of conformity and provide a copy of it to the relevant national authorities upon request. In contrast, how providers ensure compliance with the AIA, is not disclosed to the public.

A possible solution for the above problems could be to subject (certain) high-risk systems to an ex ante control by independent third parties - either systematically or through ad hoc audits. In any case, the AIA should provide for stricter transparency obligations to make the conformity assessment accessible to a wider audience.

Harmonized Standards as a Benchmark for Assessing the Conformity of High-Risk AI Systems

In order to assess (ex ante or ex post) the conformity of high-risk AI systems, the AIA Proposal relies mainly on harmonized standards developed by private European Standardization organizations (CEN, CENELEC, ETSI), with far reaching impact. As I have explained elsewhere (cf. Ebers), harmonized standards have binding legal effects that are close to those of legal norms, mainly because Member States must accept all high-risk AI systems which are in conformity with harmonized standards (Art. 40 AIA). Such a delegation of power is problematic, above all due to the lack of democratic oversight, the missing possibilities of relevant stakeholders (civil society organizations, consumer associations) to influence the development of standards, and the lack of judicial means to control them once they have been adopted.

Therefore, the European Commission should reconsider its approach. Instead of delegating fundamental decisions to private European Standardization organizations, the AIA should establish *legally binding provisions* for the essential requirements of high-risk AI systems.

Ex Post Surveillance by Member States

In addition to the self-assessment carried out by the providers, Art. 63 AIA Proposal provides for an ex post market surveillance by Member State authorities according to the Market Surveillance Regulation 2019/1020.

Although market surveillance authorities can issue high fines and require that a non-compliant AI system be withdrawn or recalled from the market, this may not be sufficient to ensure effective enforcement. The experience with the GDPR shows that overreliance on enforcement by national authorities may lead to very different levels of protection across the EU (cf. Irish Council for Civil Liberties, and euractiv). Admittedly, unlike the GDPR, the AIA Proposal does not provide for a one-stop-shop mechanism. Consequently, each supervisory authority may be competent to carry out supervisory procedures. This, however, might result in the fragmentation of cross-border supervision over AI systems as authorities have different financial resources and expertise, but also different views on when and how (often) to take action.

Unclear Role of the European Artificial Intelligence Board

The enforcement problems described above would also not be overcome by way of the newly created "European Artificial Intelligence Board" (EAIB). Although the EAIB is aimed at facilitating the harmonized implementation of the AIA, the proposal does not confer any powers to the EAIB regarding the

enforcement. Instead, the EAIB's main purpose would be to issue opinions and recommendations on the implementation of the AIA, especially on standards and common specifications (Art. 58 AIA).

Furthermore, the ambition of the European Commission to facilitate consistent and harmonized application of the AIA may seem dubious for several reasons. Firstly, the functioning of the EAIB does not seem to be entirely independent from any political influence, insofar as the AIA has allotted a predominant role to the European Commission, which not only chairs the EAIB, but also has a right of veto for the adoption of the EAIB rules of procedure. Secondly, the mechanism for cooperation between either the national supervisory authorities and the individuals affected by the AIA, or among different national supervisory authorities, remains unspecified under the AIA. Therefore, there is an apparent need to revise the provisions of the AIA in order to ensure greater autonomy to the EAIB.

Lack of Individual and Collective Remedies

Finally, the AIA Proposal – and this is arguably the most crucial point – does not provide for any individual or collective remedies. Although the proposal is intended to protect fundamental rights, it lacks remedies by which individuals can seek redress for a breach of the regulation. In particular, the proposal does not give individuals a right to explanation of AI-based decisions, a right to a fair or reasonable decision or at least to appropriate scrutiny, a right to complain to a national supervisory authority, a right to trigger public enforcement or injunctive relief.

While it is true that the AIA Proposal does not exclude the possibility for individuals to claim damages caused by AI systems under national law, it is not very likely that such claims will succeed. Even if it were possible under national law to invoke the tort of breach of statutory duty (or similar torts), it would be rather difficult to identify violations, establish causation, calculate damages, or address the negative externalities beyond the harm to a single individual.

Likewise, the AIA Proposal does not grant rights to civil rights organizations, consumer protection groups or other collective bodies, such as a right to complain to market surveillance authorities or to sue a provider or user for violations of the AIA.

As a result, the proposal also lacks effective means of private enforcement to compensate for weak public enforcement.

Private Enforcement as a Supplementary Enforcement Tool

In order to address the aforementioned enforcement deficits, the European legislators should consider private enforcement as a supplementary tool for enforcement.

Scholars in the field of law and economics have long debated the optimal form of law enforcement. While Becker/Stigler in their paper "Law Enforcement, Malfeasance, and Compensation of Enforcers" (1974) stated that private enforcement is superior to public enforcement, Landes/Posner disagreed with this thesis only a short time later in their paper "The Private Enforcement of Law" (1975), arguing that the social costs of private enforcement are higher than the social benefits due to the excessive use of resources. The debate over optimal law enforcement has not died down since then. For the most part, it is assumed, that optimal enforcement in many areas can only be achieved through the right mix of public and private legal tools.

This is exactly the path that the European Union has also taken in antitrust law with the Antitrust Damages Directive 2014/104 after the ECJ ruled in the Courage case that the full effectiveness of EU law would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition, since actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the EU.

Against this background, it is a step in the right direction that the European Commission has announced that it will present two proposals at the end of September 2022, namely a proposal for a revised Product Liability Directive and a proposal for an AI Liability Directive. Irrespective of these proposals, which only concern actions for damages and presumably contain much fuel for discussion, it is preferable to include essential non-damages-related individual rights in the AIA itself, in particular a right to an explanation of algorithm-based or algorithm-influenced decisions as well as a right to independent scrutiny of individual decision-making (as suggested also by Wendehorst).

Conclusions

For the GDPR, many complain that effective enforcement mechanisms are currently still lacking. Although European data protection law provides both for public and private enforcement, the gap between the law in the books and the law in action appeared to be so great that some of the GDPR's strongest supporters warned that it risked becoming a "fantasy law" (cf. Lancieri).

This concern applies even more to the AIA Proposal, which lags far behind the GDPR in terms of enforcement tools. If the current negotiations do not result in more effective enforcement mechanisms, the AIA will suffer from an enforcement gap, with a wide discrepancy between the stated obligations in the Act on the one hand and the reality of how companies comply with the regulation in practice on the other.