Meijers Committee

Meijers Committee
Standing committee of experts on international immigration, refugee and criminal law

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To	European Commissioner Margrethe Vestager
Date	7 March 2023
Subject	Reaction of the Meijers Committee on the amended proposal for an AI Regulation

Dear Commissioner Vestager,

On 21 April 2021 the European Commission published a proposal for an AI Act. In reaction to this proposal, the Meijers Committee published a comment on 22 February 2022 addressing specific gaps in protection in the AI proposal and providing some suggestions for improvement, amongst others: 1) include individual safeguards to ensure transparency and accountability of the use of AI systems; 2) expand the scope of the AI Act to databases in the field of migration and asylum law; 3) prohibit the use of polygraphs, lie detectors, and social scoring systems.

The Meijers Committee took note of the fact that the Council of the EU suggested amendments to the proposal in its 'common position' of 25 November 2022 and its general approach, as published on 6 December 2022.[1] We welcome the fact that some of those amendments are in line with our recommendations, such as the clarification in several provisions that the rules of the proposed AI Act will not prejudice existing rules of legal protection, including the regulation of liability and accountability, also in the GDPR. We also welcome the amendment in Article 52, emphasizing the transparency obligations for providers and users of certain AI systems.

With this letter, the Meijers Committee repeats its earlier concern with regard to the increasing use of AI and automated decision making in border, immigration and asylum policies. We urge the EU legislator to ensure that the AI Act protects the fundamental rights of every person affected by the use of AI systems within the scope of EU law, regardless of status or nationality. Furthermore, with this letter, we highlight certain elements of the amended proposal that still need some further consideration and amendment.

Firstly, the Meijers Committee observes that the proposal does not give further clarification on the adverse consequences when using social scoring or risk models in Article 5 (1) sub c under I and ii. The current text lacks clarity on what is meant by the phrases 'detrimental or unfavourable treatment' and 'unjustified or disproportionate'. The Meijers Committee therefore submits that the final AI Act should further specify those definitions.

Secondly, the Meijers Committee raises concerns regarding the fact that the possibility of developing polygraphs or lie detectors as high-risk AI has been

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[1] See Council document 14954/22, 25 November 2022 and Council document 15698/22, 6 December 2022.

maintained in Annex III to the AI Act. In our comment of 22 February 2022, we called for an absolute prohibition of polygraphs or any tools to detect the emotional state of natural persons in the fields of law enforcement and migration, asylum and border management, or in any other field in which the use of such technologies can damage the integrity and human rights of individuals. Scientific evidence for the reliability of lie-detectors or polygraphs is lacking. In addition, experts have emphasised the serious fundamental rights impact and flaws, and ethical problems of using such methods. As such, we find it worrisome that the use of polygraphs and/or lie detectors has still been maintained in this proposal, and specifically within the context of law enforcement and migration, asylum, and border control management. We urge the EU legislator to exclude the reference to the use of 'polygraphs and similar tools to detect the emotional state of a natural person' from the proposal in its entirety.

Thirdly, the Meijers Committee observes that in the amended proposal the exclusion of large-scale databases has been maintained. In our comment from 2022, we stated that the current proposal lacks justification for this exclusion. Taking into account the already provided use of automated decision making and risk assessment on the basis of large-scale data systems, as currently in the Etias Regulation, it is important to ensure that these practices will be covered by the same level of procedural guarantees and limitations as proposed in the AI Act. In this regard we also refer to the judgment *Ligue des droits humains* (C-817/9), in which the CJEU addressing the implementation of the PNR Directive, put a general ban to the use of artificial intelligence in self-learning systems. To this end, we call upon the EU legislator to ensure that the use of existing large-scale databases will fall within the scope of the AI Act.

Fourthly, in our comment from 2022 we observed that the proposed AI Act did not include any general reference to the prohibition of automated-decision making in Article 22 GDPR. The Meijers Committee notes that the amended recital 58a explicitly states that data subjects 'continue to enjoy all the rights and guarantees' awarded to them by EU law 'including the rights related to solely automated individual decision-making, including profiling'. We also welcome the addition of a specific reference to Article 22 GDPR in Article 54 (f) concerning the further processing of personal data developing certain AI systems in the public sector. Considering these amendments and also the aforementioned judgment of the CJEU, we propose to provide an explicit and general reference in the AI Act, clarifying that any provision of the AI Act shall be without prejudice to Article 22 GDPR.

Fifthly, the Meijers Committee observes that the general reference to freedom of expression in the provision on deep fakes has been replaced by 'or where the content is part of an evidently creative, satirical, artistic or fictional work or programme'. This phrase is similar to Article 85 of the GDPR, exempting the processing of personal data for 'journalistic purposes and the purposes of academic, artistic or literary expression' from certain obligations under the GDPR. Nonetheless, as suggested in our comment from 2022, we recommend fully aligning these freedom of expression-related exemptions in the AI Act and GDPR. In particular, the AI Act should specify that deep fakes used for journalistic purposes are exempted from the transparency obligation.

Lastly, we observe that a clarification has been given in recital 70 on the definition of 'vulnerable persons' with regard to high-risk systems. However, the proposal now includes an addition that allows AI systems to be used to place persons in certain categories based on their 'sex, age, hair colour, eye colour, tatoos, personal traits, ethnic origin, personal preferences and interests or to other aspects such as sexual or political orientation'. The Meijers Committee is of the opinion that the latter addition constitutes a discriminatory and freedom-restricting addition. Moreover, the provision contains a reference to the EU Charter regarding the right to artistic expression and freedom of expression, but not to the prohibition of discrimination or the right to political opinion.

We hope that you will take the previous comments and proposals for amendment and clarification on board during the further negotiations on the AI Act. As always, we remain at your disposal for further information and to answer your questions.

Yours faithfully,

Prof. dr. A.B. Terlouw,
Chairwoman