

The political agreement on the AI Act - Part 3

Podcast transcript - Feyo Sickinghe (Of Counsel, Netherlands), Dr. Simon Hembt (Senior Associate, Germany) & Oliver Belitz (Senior Associate, Germany)

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Feyo Sickinghe:

Welcome to Part 3 of Bird & Bird's podcast on key insights from the political agreement on the AI Act. I am Feyo Sickinghe, your host, and I am joined by my colleagues Simon Hembt and Oliver Belitz both AI and legal regulatory specialists. Many thanks for being with us here. In the previous episode we touched upon the fundamentals of the Act, the high-risk approach and regulation of general-purpose AI models and systems, and if this is the first episode you are listening to, I suggest you start with [Part 1](#) and [Part 2](#) to get the full picture.

In this episode, we will discuss bias in AI systems, how to deal with it, enforcement of the new rules, penalties, what individuals can do and some key takeaways that might be useful to you including the timing of the rest of the regulatory process and what to expect. So, starting off, Simon, with bias, how does the regulation deal with it?

Dr. Simon Hembt:

Many thanks Feyo. Yes, actually it is one of the most major ethical aims that the AI Act is following and trying to achieve. The main idea behind it is to design the models and safeguard them in a way that they are not generating any discriminatory or biased content. We have found in several provisions of the AI Act that they have tried to ensure these goals.

First thing is, as a basic principle, the AI system has to be technically robust. In practice, this means you have to make sure that it is fitting its purpose,

that it is giving right answers and that they are not affecting protected groups. So, in practice, what does this mean? If I am using an AI tool in an assessment centre, for instance, trying to evaluate the candidates and I am not using a very robust system, in essence, one that determines that a person is not suitable for this job due to his age, and I am relying on this, I am potentially making a decision that is disproportionately affecting a protected group, in this instance, older people. So, this is something which is a basic principle of the AI Act.

We have several further provisions, such as, we have to use sufficiently representative datasets. What does that mean? I think one of the biggest fears is that some AI tools use specific datasets which are biased, for example data sets containing texts which are affecting protected groups, racial bias for instance. Using this provision, it tries to ensure that only sufficiently representative datasets which contain different opinions, different views are used for training the AI.

Then, of course, the monitoring of the AI before and after placing it on the market is very important just to see how the AI tool works, when it is used, when masses of users are using the AI, how does the AI react and do we have to install or establish some safeguards.

Feyo Sickinghe:

As a user or deployer of the data access, if I want to use such a model, how do I know it is free from

bias? Do I need to test it? Or has it already been done?

Dr. Simon Hembt:

Actually, I think we cannot be 100% clear on that. I think it is something that is investigated ex-post, after it's used. Of course, we get some testing periods upfront, sure, where the AI is tested. But when millions of people are using it, then we really see what kind of output it generates. So, that kind of after placing on the market monitoring and surveillance is required just to evaluate whether its biased or not.

Feyo Sickinghe:

When I was in the US, I spoke to some companies who are working on taking out bias in AI systems and putting them into a testing environment, sort of what we would call a sandbox, and then putting a stamp on it: "This has been tested for bias and the system is ok". So, there will be a large market for data scientists and data analytics specialists to look into those, and it all contributes to the whole principle that we want trustworthy AI which is free from bias. Certainly, a point to look into if you want to rely on the outcome of automated decision making, especially when it affects people in the workplace. Thanks for that.

Let's talk about the enforcement of the AI Act. We have an AI board, we have an AI office, there will be national competent authorities, how is all of this supposed to work together?

Dr. Simon Hembt:

Yes, we see in other Acts, like the DSA, that the national competent authorities have to be designated by member states, and these national authorities are obliged to supervise the application and implementation of the AI Act in the member states. They are also doing the market surveillance as well. So, the basic work is made on a member state level and then we also have to bring everyone together, to align these authorities. For that, every member state has to designate a National Supervisory Authority which is representing the individual member states in the European Artificial Intelligence Board. This is kind of a point of contact where all of the authorities come together, align their actions and talk with each other about the latest developments. So, this is kind of a board which brings all of the national views and all the national authorities together.

Also, we have an advisory forum which is kind of bringing in the technical expertise and this is staffed by experts from the industry or from

academia. Then we also have the European AI Office, as you mentioned and as Oliver mentioned earlier today ([to learn more, please listen to Part 2 of this podcast series here](#)), within the commission which is supervising the general-purpose AI models.

Feyo Sickinghe:

So, when we come to enforcement we also need to talk about penalties. There are some penalty provisions in the AI Act but does that mean that those penalties will be the same across the entire European Union?

Dr. Simon Hembt:

The member states will have to lay down the penalties in the first place so they can post the fines which are tiered in the AI Act. We got different tiers like for infringement of provisions on prohibited systems which can be up to 35 million, 7% of the total worldwide annual turnover. Then we got 50 million or 3% of the total worldwide annual turnover for any other infringements, like for infringements of provisions of high risk or general-purpose AI models and then we got 7.5 million or 1% of the total worldwide annual turnover for providing misleading information to the police.

We can say the individual member states can impose these fines and have to fine proportionate in effect of penalties, but the commission will draw up guidelines here just to kind of harmonise it to make sure that the differences between the member states are not too big.

Feyo Sickinghe:

Then lastly on this point, if I am an individual and I think I am negatively affected by the outcome of automated decision making, what rights do I have in this respect?

Dr. Simon Hembt:

Yes, this is an important question actually. I think the very beginning of any potential claims, which an individual person can assert, is information. So, if a person feels that there is a kind of infringement, they can in the first-place lodge a complaint with the national authority. This is the way the AI Act provides. So, the authority is informed and now knowing that there is something going, it can then decide whether they launch activities or not. So, this is one way which a user can take. From a civil law perspective they can then use, for instance, the AI liability directive which provides some claims to information, which can be used to get the required knowledge to evaluate whether there are

claims or not. So, yes, if they open the black box and they feel that the high-risk system is infringing their rights, they can claim for information and can check whether it is right or not. So, there are some disclosures of evidence in this AI liability directive.

Also, we have a revision of the product liability directive when some products are using AI, like cars or household goods are using AI, and I am suffering some personal injuries I can also use the additional claims in the product liability directive just to enforce my rights.

Feyo Sickinghe:

Thank you, Simon. Before we close Part 3 of this podcast series, if you are in Brussels, you may want to [join our in-person event on the AI Act on 19 March](#) with speakers from the European commission and the industry. During this event, we will dive into the challenges and practicalities of the implementation by businesses and if you're interested in attending, please send an email to the address mentioned in the show notes¹.

A bit later on we will come back to you with Part 4 of our podcast series on AI liability and the opportunities that are provided to the market through regulatory sandboxes. Sandboxes are used to test new applications before releasing them to the market, meanwhile we hope you have enjoyed this episode. Stay safe and keep exploring AI.

¹ Brussels in-person event: Register here: [https://www.twobirds.com/en/events/belgium/2024/all-you-need-is-ai-what-businesses-should-do-to-](https://www.twobirds.com/en/events/belgium/2024/all-you-need-is-ai-what-businesses-should-do-to-prepare-for-the-ai-act)

[prepare-for-the-ai-act](#). Email: Brumarketing@twobirds.com for any queries about our in-person event.

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