

**Turkish-Czech Cross-Border Trade Infrastructure:
Ensuring The Door Between Central and Eastern Europe
and The Near East Remains Open**

Alexander J. Bělohlávek

Lenka Kauerová

Jan Šamlot

(editors)



LEX LATA

1st edition

The Hague, 2024

COPYRIGHT © 2024

BĚLOHLÁVEK, Alexander, J.; KAUEKOVÁ, Lenka; ŠAMLOT, Jan (editors).
Turkish-Czech Cross-Border Trade Infrastructure: Ensuring The Door Between
Central and Eastern Europe and The Near East Remains Open
The Hague: Lex Lata, 2024, 1st edition. 209 p.
ISBN/EAN: 978-90-833234-6-6

Edited by:

Prof. Dr. Alexander J. Bělohlávek[©]
Doc. Ing. Lenka Kauerová, CSc.[©]
JUDr. Jan Šamlot[©]

Review by:

Doc. Ing. Milan Rejchl, CSc.



LEX LATA

Lex Lata B.V.
Mauritskade 45-B
2514 HG – The Hague
The Netherlands

Printed in the EU.

Turkish-Czech Cross-Border Trade Infrastructure: Ensuring The Door Between
Central and Eastern Europe and The Near East Remains Open

- © prof., prof. zw., Dr. et Mgr., dipl. Ing. Alexander J. Bělohlávek,
prof. hon., dr. h. c., 2024
- © Assoc. Professor (doc.), dipl. Ing. Lenka Kauerová, CSc., 2024
- © Assoc. Professor (doc.), dipl. arch. Patrik Kotas, 2024
- © dipl. Ing. et Mgr. (iur.) Leona Němečková, 2024
- © dr. iur. (JUDr.) et dipl. Ing. Petr Koblovský, Ph.D., LL.M., 2024
- © dr. iur. (JUDr.) Jan Šamlot, 2024
- © Lex Lata B.V., 2024
Mauritskade 45-B, NL – 2514 HG The Hague, The Netherlands

All rights reserved. No part of this publication may be reproduced in any form or by any electronic or mechanical means including information storage and retrieval systems without permission in writing from the publisher.

ISBN/EAN: 978-90-833234-6-6

On 11 October 1924, the Republic of Türkiye [*la République de Turquie*] and the Czechoslovak Republic [*la République Tchèqueoslovaque*] signed the Friendship Treaty [*Traité d'amitié entre la Tchèqueoslovaquie / et la Turquie*]. Since its effect in 1925, this treaty has established and officially declared diplomatic and consular relationships between both signatories, which gave rise to the subsequent cooperation between the two countries.

This year, we commemorate the centennial anniversary of this important treaty. Naturally, those dealing with the mutual relations between those two countries could not let this important event go unnoticed. This book therefore celebrates this historic milestone by presenting articles from different professional fields as well as other documents, with a focus on the mutual ties between both countries.

Alexander J. Bělohávek

Lenka Kauerová

Jan Šamlot

as editors
on behalf of all authors

Contents

Contents	7
List of Abbreviations	10

ARTICLES

Alexander J. Bělohávek Airspace, its Limitations and Significance of “Bosphorus Region” in the Time of Crisis	13
Lenka Kauerová Analysis of the Marketing Environment of Turkey	31
Petr Kobloušský In-group Bias in Cross Border Disputes	45
Patrik Kotas Architecture, City Planning and Traffic Engineering Reflected in Relationship between Prague and Istanbul	59
Leona Němečková Buildings with Commercial, Public and Transport Infrastructure in One Unit	71
Jan Šamlot The Artificial Intelligence Act and its Application on Non-EU Persons	95

ANNEXES

ANNEX 01	Index of Annexes	
	&	
	Overview of bilateral agreements (bilateral treaties) in effect as concluded between the Republic of Türkiye and the Czech Republic.	
	Transcripts have been made by editors either from the original version (all French transcripts have been made from the original) or from the language version (English), which has been identified (either as original, or found in proper sources).....	111
ANNEX 02	Treaty on Friendship entered by the Türkiye and the Czechoslovakia on 2 October 1924 and in effect as from 1925. [transcript - French].....	115
ANNEX 03	Treaty Between Czechoslovakia and Turkey on the Mutual Relationships in Civil and Trade Judicial Matters concluded on 22 August 1930. [transcript - French]	123
ANNEX 04	Agreement on Court, Arbitration and Settlement Proceedings Between Czechoslovakia and Turkey concluded on 17 March 1931. [transcript - French]	135
ANNEX 05	International Road Transport Agreement Between the Government of Czechoslovakia and the Government of Turkey concluded on 30 June 1981. [transcript - English].....	141
ANNEX 06	Air Transport Agreement Between the Government of the Czech Republic and the Government of the Republic of Turkey, concluded in Ankara on 15 April 1996. Attached a transcript of the document published in the Collection of International Treaties of the Czech Republic. [transcript - English].....	149
ANNEX 07	Agreement Between the General Staff of the Republic of Turkey and the Ministry of Defence of the Czech Republic on Mutual Cooperation in the Field of Military concluded on 22 October 1997. [transcript - English]	161

ANNEX 08	Convention Between the Czech Republic and the Republic of Turkey for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income concluded on 12 November 1999. [transcript - English]	167
ANNEX 09	Agreement Between the Czech Republic and the Republic of Turkey on Social Security concluded on 2 October 2003. [transcript - English]	185
ANNEX 10	Agreement Between the Czech Republic and the Republic of Turkey for the Reciprocal Promotion and Protection of Investments concluded on 29 April 2009. [transcript - English]	201

List of Abbreviations

AK Party	The Justice and Development Party
ANA	The All Nipon Airways
BA/CA	The Building Act – 183/2006 Coll. on spatial planning and building regulations (no longer valid)
CA	The Construction Act – 283/2021 Coll.
CCTV	The Closed-Circuit Television
COTIF	The Convention concerning International Carriage by Rail
CTKs	Cargo Tonne-Kilometres
EU	The European Union
FIR	The Flight Information Region
GDP	The Gross Domestic Product
CHP	The Republican People’s Party
IATA	The International Air Transport Association
ICAO	The International Civil Aviation Organization
ICC	The International Chamber of Commerce
ICJ	The International Court of Justice
IMF	The International Monetary Fund
IPI	The Industrial Production Index
IPR	The Prague Institute of Planning and Development
IT	The Information Technology
KUP	The Prague City Committee for Changes to the Prague City Land-use Plan (advisory body to the RHMP)
LNG	The Liquid Natural Gas
MRD	The Ministry for Regional Development
NATO	The North Atlantic Treaty Organization
OECD	The Organisation for Economic Co-operation and Development
RCT	Realistic Conflict Theory
RHMP	The Prague City Council
SBs	Stakeholder bodies
SIT	Social Identity Theory
UN	The United Nations
USD	The United States Dollar
UZR MHMP	The Spatial Development Department, Prague City Hall
VURM	The Zoning Development and Land-use Plan Committee, Prague City Assembly (advisory body to Prague City Assembly)
ZHMP	The Prague City Assembly

ARTICLES

Alexander J. Bělohávek Airspace, its Limitations and Significance of “Bosphorus Region” in the Time of Crisis	13
Lenka Kauerová Analysis of the Marketing Environment of Turkey	31
Petr Koblavský In-group Bias in Cross Border Disputes	45
Patrik Kotas Architecture, City Planning and Traffic Engineering Reflected in Relationship between Prague and Istanbul	59
Leona Němečková Buildings with Commercial, Public and Transport Infrastructure in One Unit	71
Jan Šamlot The Artificial Intelligence Act and its Application on Non-EU Persons	95

Jan Šamlot

ORCID iD 0009-0002-4225-7851

<https://orcid.org/0009-0002-4225-7851>

Key words:

AI | artificial intelligence | AI Act | AI Act application scope | AI system | high-risk AI system | non-EU persons



The Artificial Intelligence Act and its Application on Non-EU Persons

Abstract | *Probably one of the currently most important legal acts of the EU is the newly adopted Artificial Intelligence (AI) Act. The European Union is the first body in that regard that has actually began to implement legal regulation of AI technologies. As the AI Act is a regulation, it will be directly effective in all EU countries and will substantially affect the treatment of AI systems by natural and legal persons in the EU.*

However, the AI Act will not affect only persons seated in the EU. Given the nature of the internet and the online world, AI systems cannot be given strict national boundaries. Thus, for the regulation to be effective, the AI Act also embodies its cross-border reach beyond the EU in certain situations. This article therefore aims to clarify the basic aspects of this new regulation and draw attention to its possible application also to non-EU natural and legal persons.



JUDr. (Dr. iur.) Jan Šamlot, attorney trainee, completed the Master's Programme and successfully passed the Post-Master's Examinations (Examen Rigorosum) for the law of civil procedure at the Faculty of Law of Charles University in Prague. He is entered as an arbitrator at the PRIAC – Prague International Arbitration Court, Czech Republic, CBMA – Centro Brasileiro de Mediação e Arbitragem, Brasil, KMA – Казахстанский Международный Арбитраж, Kazakhstan and ICA CCI – The International Court of Arbitration in Affiliation with The Chamber of Commerce and Industry of The Kyrgyz Republic. E-mail: jan.samlot@ablegal.cz

I. Introduction

- 6.01. On May 21, 2024, the Council of the EU adopted the AI Act.^{1/2} The AI Act aims to:
- ... improve the functioning of the internal market and promote the uptake of human-centric and trustworthy artificial intelligence (AI), while ensuring a high level of protection of health, safety, fundamental rights enshrined in the Charter, including democracy, the rule of law and environmental protection, against the harmful effects of AI systems in the Union and supporting innovation.³
- 6.02. This regulation is the first general act seeking to regulate artificial intelligence. The AI Act lays down, inter alia, prohibitions of certain AI practices, introduces special rules for so-called high-risk AI systems, and harmonises rules for placing on the market, putting into service, and using AI systems in the EU.⁴
- 6.03. It, of course, follows that every EU member state is directly bound by this regulation. The AI Act thus applies to all providers and their authorised representatives, deployers, importers and distributors, product manufacturers, and affected persons throughout the whole EU.⁵ Interestingly, however, the AI Act specifically defines its application also to persons located outside the EU. To properly understand the content of this regulation, it is necessary to introduce what the AI Act means by ‘AI system,’ what the basic principles of the introduced regulation are, and to point out how this EU regulation may also affect natural and legal persons from third countries (non-EU countries).

II. Definition of AI System

- 6.04. Article 3(1) AI Act defines an AI system as:
- ... a machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments.

¹ As the AI Act has not yet been officially published at the time of writing this article, the text of the AI Act is taken from Corrigendum to the position of the European Parliament adopted at first reading on 13 March 2024 with a view to the adoption of Regulation (EU) 2024/..... of the European Parliament and of the Council laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) P9_TA(2024)0138 (COM(2021)0206 – C9-0146/2021 – 2021/0106(COD)), available at https://www.europarl.europa.eu/doceo/document/TA-9-2024-0138-FNL-COR01_EN.pdf (accessed on 02 July 2024).

² Risto Uuk, *The EU AI Act Newsletter #53: The Law Is Finally Adopted*, The EU AI Act Newsletter. 28 May 2024, available at <https://artificialintelligenceact.substack.com/p/the-eu-ai-act-newsletter-53-the-law> (accessed on 02 July 2024).

³ Article 1(1) AI Act.

⁴ Article 1(2) AI Act.

⁵ Article 2(1) AI Act.

- 6.05. This definition must be read in the context of Recital 12 AI Act which gives an overview of the purpose of the created definition. The definition attempts to be all-encompassing yet generalised so that it can flexibly adapt to rapid developments in AI.⁶ On the other hand, traditional software that is not an AI system *per se* cannot fall under the definition. Therefore, the definition must be based on the key characteristics of the AI system.⁷
- 6.06. According to the regulation, the main feature that distinguishes AI from classical software is probably its inference capability.⁸ This means the process of: ‘... obtaining the outputs, such as predictions, content, recommendations, or decisions, which can influence physical and virtual environments, and to a capability of AI systems to derive models or algorithms, or both, from inputs or data.’⁹ Next to the inference, the differentiation from any other software is secured by the word ‘autonomy’. Due to the combination of those words, no regular software with predetermined output by algorithm shall fit in this category. This should ensure that this definition will not become outdated in the near future.¹⁰
- 6.07. The definition of an AI system has changed over time due to negotiations during the legislative process.¹¹ The definition chosen in the final version of the regulation follows the latest definition of the Organisation for Economic Co-operation and Development (OECD):
- An AI system is a machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments. Different AI systems vary in their levels of autonomy and adaptiveness after deployment.¹²
- 6.08. However, in contrast to the OECD definition, the definition adopted in the AI Act emphasises the adaptive and autonomous nature of the AI system.

⁶ Recital 12 AI Act: ‘The notion of ‘AI system’ in this Regulation should be clearly defined and should be closely aligned with the work of international organisations working on AI to ensure legal certainty, facilitate international convergence and wide acceptance, while providing the flexibility to accommodate the rapid technological developments in this field.’

⁷ Recital 12 AI Act: ‘Moreover, the definition should be based on key characteristics of AI systems that distinguish it from simpler traditional software systems or programming approaches and should not cover systems that are based on the rules defined solely by natural persons to automatically execute operations.’

⁸ Recital 12 AI Act: ‘A key characteristic of AI systems is their capability to infer.’

⁹ Recital 12 AI Act.

¹⁰ Frederiek Fernhout, Thibau Duquin, *The EU Artificial Intelligence Act: our 16 key takeaways*, Stibbe, 13. February 2024, available at <https://www.stibbe.com/publications-and-insights/the-eu-artificial-intelligence-act-our-16-key-takeaways> (accessed on 02 July 2024).

¹¹ Cf. the definition of AI system presented in the original proposal: ‘artificial intelligence system’ (AI system) 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’. See Article 3 point 1 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, 21 April 2021, COM(2021) 206 final, 2021/0106(COD), {SEC(2021) 167 final} - {SWD(2021) 84 final} - {SWD(2021) 85 final}.

¹² OECD, *Explanatory Memorandum on the Updated OECD Definition of an AI System*, 8 OECD Artificial Intelligence Papers, OECD Publishing (2024), at 6.

III. Impact of the AI Act on Third Countries, Non-EU Countries

- 6.09. Article 2 AI Act refers to the scope of its application. As the AI Act is by its nature a regulation, it applies within the EU according to the general rules applicable to regulations. It is therefore a legal act that has general application and direct applicability in EU Member States. However, it is important to note that the wording of Article 2 also gives this regulation scope outside the EU. It may therefore also affect natural and legal persons from third (non-EU) countries.
- 6.10. Pursuant to Article 2(1), the AI Act applies to:
- (a) providers placing on the market or putting into service AI systems or placing on the market general-purpose AI models in the Union, irrespective of whether those providers are established or located within the Union or in a third country;
 - (b) deployers of AI systems that have their place of establishment or are located within the Union;
 - (c) providers and deployers of AI systems that have their place of establishment or are located in a third country, where the output produced by the AI system is used in the Union;
 - (d) importers and distributors of AI systems;
 - (e) product manufacturers placing on the market or putting into service an AI system together with their product and under their own name or trademark;
 - (f) authorised representatives of providers, which are not established in the Union;
 - (g) affected persons that are located in the Union.
- (emphasis by Author)
- 6.11. The AI Act has a broad scope and does not apply strictly to EU providers. Placement on the EU market is the main determinant. For this reason, the AI Act can very simply apply to natural and legal persons seated in third countries. Therefore, it is necessary to identify in particular the obligations that apply to providers and deployers, as this is the position in which non-EU persons dealing with AI systems are most likely to be.¹³

III.1. Placing an AI System on the EU Market

- 6.12. As stated above, the main determinant for the scope of application is whether a natural or legal person places on the market or puts into service AI systems or places on the EU market a general-purpose AI model. It is therefore necessary to elaborate on what exactly it means to ‘place’ an AI system on the market and when an AI system is considered to be placed on the market. Assessing these questions is even more challenging in the online world.

¹³ See also Recital 21 AI Act: ‘In order to ensure a level playing field and an effective protection of rights and freedoms of individuals across the Union, the rules established by this Regulation should apply to providers of AI systems in a non-discriminatory manner, irrespective of whether they are established within the Union or in a third country, and to deployers of AI systems established within the Union.’

- 6.13. Article 3(9) AI Act defines ‘placing on the market’ as: ‘the first making available of an AI system or a general-purpose AI model on the Union market’. This definition is based on the common concept of *placing on the market* used in EU law. For example, pursuant to Decision No 768/2008/EC on a common framework for the marketing of products,¹⁴ the term ‘placing on the market’ shall mean: ‘... the first making available of a product on the Community market’.¹⁵ A comparison can therefore be made by interpreting these related and similar legal acts.
- 6.14. The concept of placing the AI system on the market is linked to the first time the AI system is made available on the EU market. Individual AI system can therefore only be placed once on the EU market. With regards to the internet, the rule in relation to products generally states that: ‘Products offered for sale online or through other means of distance sales are deemed to be made available on the Union market if the offer is targeted at end users in the Union’.^{16/17} An offer targeted at end users in the EU is the offer where the relevant economic operator directs (by any means) its activities to a member state.¹⁸ Nevertheless, these activities need to be truly directed to one of the member states of the EU. The general accessibility of a given online market from an EU country, without being intended for that market, is not sufficient.¹⁹
- 6.15. This concept should probably also apply appropriately to the possible commercial provision of AI systems. Nevertheless, it will always depend on the form in which the AI system is provided. Different rules can apply e.g. in the situation where an AI system is just a part of a final product that is being sold within the EU market. One can also imagine the online

¹⁴ Decision No 768/2008/EC of the European Parliament and of the Council of 09 July 2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC, as amended.

¹⁵ Annex 1, Chapter R1, Article R1, point 2 Decision No 768/2008/EC of the European Parliament and of the Council of 09 July 2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC, as amended. See also European Commission, Commission Notice, *The ‘Blue Guide’ on the Implementation of EU Products Rules 2022*, Information from European Union Institutions, Bodies, Offices and Agencies (2022/C 247/01), at 16: ‘For the purposes of Union harmonisation legislation, a product is placed on the market when it is made available for the first time on the Union market. The operation is reserved either for a manufacturer or an importer, i.e. the manufacturer and the importer are the only economic operators who place products on the market (49). When a manufacturer or an importer supplies a product to a distributor (50) or an end-user for the first time, the operation is always labelled in legal terms as ‘placing on the market’. Any subsequent operation, for instance, from a distributor to distributor or from a distributor to an end-user is defined as making available.’

¹⁶ European Commission, Commission Notice, *The ‘Blue Guide’ on the Implementation of EU Products Rules 2022*, Information from European Union Institutions, Bodies, Offices and Agencies (2022/C 247/01), at 21.

¹⁷ In relation to products, the Blue Guide also defines when, on the other hand, the product is not placed on the market, e.g. where a product is: ‘— manufactured for one’s own use unless Union harmonisation legislation covers products manufactured for own use in its scope; — bought by a consumer in a third country while physically present in that country and brought by the consumer into the EU for the personal use of that person; — transferred from the manufacturer in a third country to an authorised representative in the Union whom the manufacturer has engaged to ensure that the product complies with the Union harmonisation legislation’. See European Commission, Commission Notice, *The ‘Blue Guide’ on the Implementation of EU Products Rules 2022*, Information from European Union Institutions, Bodies, Offices and Agencies (2022/C 247/01), at 20.

¹⁸ European Commission, Commission Notice, *The ‘Blue Guide’ on the Implementation of EU Products Rules 2022*, Information from European Union Institutions, Bodies, Offices and Agencies (2022/C 247/01), at 21.

¹⁹ Judgment of the CJEU of 12 July 2011, C-324/09, *L’Oréal SA and Others v. eBay International AG and Others*, ECLI:EU:C:2011:474, point 64: ‘Indeed, if the fact that an online marketplace is accessible from that territory were sufficient for the advertisements displayed there to be within the scope of Directive 89/104 and Regulation No 40/94, websites and advertisements which, although obviously targeted solely at consumers in third States, are nevertheless technically accessible from EU territory would wrongly be subject to EU law.’

accessibility of stand-alone AI-system without integration into the product, which is only accessible via a web interface. In practice, it will therefore always be necessary to approach each situation on a case-by-case basis in order to properly assess the liability of the subjects and their obligations pursuant to the AI Act.

III.2. The Usage of AI System's Output as a Reason for Application to Non-EU Persons

- 6.16. The scope of application defined as placing on the market, putting into service, or using in the EU (Article 2(1)(a)) is, however, not the only way of looking at the possible application of the regulation to non-EU persons. The AI Act is applicable to non-EU persons also due to the strictly 'digital nature' of AI systems.²⁰ This concept is intended to prevent circumvention of the regulation. A typical example provided by the Recital 22 AI Act is the situation where:
- '...an operator established in the Union contracts certain services to an operator established in a third country in relation to an activity to be performed by an AI system that would qualify as high-risk. In those circumstances, the AI system used in a third country by the operator could process data lawfully collected in and transferred from the Union, and provide to the contracting operator in the Union the output of that AI system resulting from that processing, without that AI system being placed on the market, put into service or used in the Union.'²¹
- 6.17. Therefore, the AI Act shall also apply to non-EU providers and deployers if the output produced by the AI system is intended to be used in the EU. For this reason, the application for non-EU persons also arises from Article 2(1) (c), which uses the determinant of where the outcome will be used. Should the use be within the EU, the AI Act applies also to those non-EU providers and deployers.
- 6.18. However, the AI Act must be seen in the context of related regulation,²² here especially with regards to the liability of providers of intermediary services. Therefore, Article 2(5) states that this regulation does not affect the liability regime as set forth in Chapter II Regulation 2022/2065.²³

²⁰ See Recital 22 AI Act: 'In light of their digital nature, certain AI systems should fall within the scope of this Regulation even when they are not placed on the market, put into service, or used in the Union. (...).'

²¹ Recital 22 AI Act.

²² See Recital 9 AI Act, which states that harmonised rules applicable to the placing on the market, the putting into service and the use of high-risk AI systems should be laid down consistently with the existing regulation, especially with regulation No 765/2008 of 09 July 2008, setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93, as amended, decision No 768/2008 of 09 July 2008, on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC, as amended, regulation 2019/1020 of 20 June 2019, on market surveillance and compliance of products and amending Directive 2004/42/EC and Regulations (EC) No 765/2008 and (EU) No 305/2011, as amended. These rules should also be without prejudice to existing EU law on (*inter alia*) data protection, consumer protection, labour law, fundamental rights, product safety etc.

²³ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act).

IV. Prohibited Practices

- 6.19. The AI Act categorises AI systems by risk and adjusts the condition for each category. However, in addition, the regulation also defines AI practices that are entirely prohibited. Article 5 states that prohibited shall be AI systems that deploy subliminal techniques beyond a person's consciousness, deceptive techniques or in other sense manipulate people's decisions, work on a principle of people's evaluation or classification (social score) based on social behaviour or personal/personality characteristics, make risk assessments assessing or predicting the risk of committing a criminal offence based solely on profiling, create or expand facial recognition using data from the internet or CCTV footage, etc.²⁴ For these the AI systems defined in Article 5 are prohibited to:
- place them on the market,
 - put them into service, or
 - use them.
- 6.20. Pursuant to Article 5(1)(g)-(h), one of the prohibited AI systems is also a biometric categorisation system. This means the system that:
- ‘... categorise[s] individually natural persons based on their biometric data to deduce or infer their race, political opinions, trade union membership, religious or philosophical beliefs, sex life or sexual orientation’²⁵ However, this prohibition does not cover: ‘... any labelling or filtering of lawfully acquired biometric datasets, such as images, based on biometric data or categorizing of biometric data in the area of law enforcement’.²⁶ The exception therefore applies to law enforcement, which is the exception in the area of biometric systems in general.²⁷ This can be seen in the prohibition of the use of ‘real time’ remote biometric identification systems.²⁸ Pursuant to Article 5 paragraph 1(h), it is prohibited to use ‘real-time’ remote biometric identification systems in publicly accessible spaces for the purposes of law enforcement. However, this does not apply if and in so far as such use is strictly necessary for one of the following:
- (i) the targeted search for specific victims of abduction, trafficking in human beings or sexual exploitation of human beings, as well as the search for missing persons;

²⁴ For a full list, see Article 5(1) AI Act.

²⁵ Article 5(1)(g) AI Act.

²⁶ Article 5(1)(g) AI Act.

²⁷ For the purpose of the AI Act, ‘law enforcement’ means: ‘... activities carried out by law enforcement authorities or on their behalf for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including safeguarding against and preventing threats to public security.’

²⁸ Pursuant to Article 3(42) AI Act, ‘real time remote biometric identification system’ means: ‘...a remote biometric identification system, whereby the capturing of biometric data, the comparison and the identification all occur without a significant delay, comprising not only instant identification, but also limited short delays in order to avoid circumvention.’

(ii) the prevention of a specific, substantial and imminent threat to the life or physical safety of natural persons or a genuine and present or genuine and foreseeable threat of a terrorist attack;

(iii) the localisation or identification of a person suspected of having committed a criminal offence, for the purpose of conducting a criminal investigation or prosecution or executing a criminal penalty for offences referred to in Annex II and punishable in the Member State concerned by a custodial sentence or a detention order for a maximum period of at least four years. Point (h) of the first subparagraph is without prejudice to Article 9 of Regulation (EU) 2016/679 for the processing of biometric data for purposes other than law enforcement.

- 6.21. Enforcing the law and meeting the objectives set out in Article 5(1)(h) by using ‘real-time’ remote biometric identification systems in publicly accessible spaces shall be done only to confirm the identity of the specifically targeted individual. Simultaneously, it needs to take into account:
- (a) the nature of the situation giving rise to the possible use, in particular the seriousness, probability and scale of the harm that would be caused if the system were not used;
 - (b) the consequences of the use of the system for the rights and freedoms of all persons concerned, in particular the seriousness, probability and scale of those consequences.
- 6.22. The usage for the purpose of law enforcement of the objectives in question must also comply with: ‘... necessary and proportionate safeguards and conditions in relation to the use in accordance with the national law authorising the use thereof, in particular as regards the temporal, geographic and personal limitations.’²⁹ In this sense, the law enforcement authority must also comply with the remaining paragraphs of Article V.

V. High-Risk AI Systems

- 6.23. The principle of setting rules for AI systems must be based on a risk-based approach.³⁰ The more *dangerous* the AI system is, the stricter the regulation must be.
- 6.24. The AI Act sets special rules for ‘high-risk AI systems’. An AI system is classified as high-risk in multiple ways. First of all, pursuant to Article 6, an AI system shall be considered to be high-risk if it cumulatively fulfils two conditions:

²⁹ Article 5(2) AI Act. For this usage of the AI system, the law enforcement authority is obligated to complete a fundamental rights impact assessment pursuant to Article 27 and register the AI system in the EU database pursuant to Article 49. However, Article 5(2) *in fine* allows for the exception of ‘justified cases of urgency’, in which the registration does not need to be done before the use of the AI system. In this case, the registration must be completed without ‘undue delay’.

³⁰ Recital 26 AI Act: ‘In order to introduce a proportionate and effective set of binding rules for AI systems, a clearly defined risk-based approach should be followed. That approach should tailor the type and content of such rules to the intensity and scope of the risks that AI systems can generate. It is therefore necessary to prohibit certain unacceptable AI practices, to lay down requirements for high-risk AI systems and obligations for the relevant operators, and to lay down transparency obligations for certain AI systems.’

- (a) the AI system is intended to be used as a safety component of a product, or the AI system is itself a product, covered by the Union harmonisation legislation listed in Annex I;
- (b) the product whose safety component pursuant to point (a) is the AI system, or the AI system itself as a product, is required to undergo a third-party conformity assessment, with a view to the placing on the market or the putting into service of that product pursuant to the Union harmonisation legislation listed in Annex I.
- 6.25. If the defined conditions apply, the AI system is considered high-risk, irrespective of whether it is placed on the market or put into service independently of the products referred sub (a) and (b).³¹
- 6.26. It follows, therefore, that Annex I is crucial for the classification of a high-risk AI system. Annex I provides a list of EU harmonisation legislation. Annex I is divided into two parts, Section A – List of Union harmonisation legislation based on the New Legislative Framework and Section B – List of other Union harmonisation legislation. For defining high-risk AI systems pursuant to Article 6, both of these Sections are relevant. Therefore, whether the AI system is the product itself, or it shall be used *only* as a safety component of a product, a prerequisite for being defined as a high-risk AI system is that at least one of the legal acts listed in Annex I is applicable to the resulting product. At the same time, however, the second condition must also be met. Pursuant to Annex I, this product must also be subject to the obligation of a third-party conformity assessment: ‘... with a view to the placing on the market or the putting into service of that product.’³²
- 6.27. Secondly, pursuant to Article 6(2) AI Act, the AI system is considered high-risk if Annex III refers to it. Annex III lists the following cases of use of the AI system that result in its classification as high-risk:
1. Biometrics, in so far as their use is permitted under relevant Union or national law;³³
 2. Critical infrastructure: AI systems intended to be used as safety components in the management and operation of critical digital infrastructure, road traffic, or in the supply of water, gas, heating or electricity;
 3. Education and vocational training;³⁴

³¹ Article 6(1) AI Act.

³² Article 6(1)(b) AI Act.

³³ This point further states: ‘(a) remote biometric identification systems. This shall not include AI systems intended to be used for biometric verification the sole purpose of which is to confirm that a specific natural person is the person he or she claims to be; (b) AI systems intended to be used for biometric categorisation, according to sensitive or protected attributes or characteristics based on the inference of those attributes or characteristics; (c) AI systems intended to be used for emotion recognition.’

³⁴ This point further states: ‘(a) AI systems intended to be used to determine access or admission or to assign natural persons to educational and vocational training institutions at all levels; (b) AI systems intended to be used to evaluate learning outcomes, including when those outcomes are used to steer the learning process of natural persons in educational and vocational training institutions at all levels; (c) AI systems intended to be used for the purpose of assessing the appropriate level of education that an individual will receive or will be able to access, in the context of or within educational and vocational training institutions at all levels; (d) AI systems intended to be used for monitoring and detecting prohibited behaviour of students during tests in the context of or within educational and vocational training institutions at all levels.’

4. Employment, workers management and access to self-employment;³⁵
5. Access to and enjoyment of essential private services and essential public services and benefits;³⁶
6. Law enforcement, in so far as their use is permitted under relevant Union or national law;³⁷
7. Migration, asylum and border control management, in so far as their use is permitted under relevant Union or national law;³⁸
8. Administration of justice and democratic processes.³⁹

6.28. Even though an AI system is referred to in Annex III it still does not have to necessarily be considered high-risk. Article 6(3) provides for an exception from the overall rule set by Article 2(2). The AI Act will not consider the system to be high-risk if it: ‘... does not pose a significant risk of harm to the health, safety or fundamental rights of natural persons, including by not

³⁵ This point further states: ‘(a) AI systems intended to be used for the recruitment or selection of natural persons, in particular to place targeted job advertisements, to analyse and filter job applications, and to evaluate candidates; (b) AI systems intended to be used to make decisions affecting terms of work-related relationships, the promotion or termination of work-related contractual relationships, to allocate tasks based on individual behaviour or personal traits or characteristics or to monitor and evaluate the performance and behaviour of persons in such relationships.’

³⁶ This point further states: ‘(a) AI systems intended to be used by public authorities or on behalf of public authorities to evaluate the eligibility of natural persons for essential public assistance benefits and services, including healthcare services, as well as to grant, reduce, revoke, or reclaim such benefits and services; (b) AI systems intended to be used to evaluate the creditworthiness of natural persons or establish their credit score, with the exception of AI systems used for the purpose of detecting financial fraud; (c) AI systems intended to be used for risk assessment and pricing in relation to natural persons in the case of life and health insurance; (d) AI systems intended to evaluate and classify emergency calls by natural persons or to be used to dispatch, or to establish priority in the dispatching of, emergency first response services, including by police, firefighters and medical aid, as well as of emergency healthcare patient triage systems.’

³⁷ This point further states: ‘(a) AI systems intended to be used by or on behalf of law enforcement authorities, or by Union institutions, bodies, offices or agencies in support of law enforcement authorities or on their behalf to assess the risk of a natural person becoming the victim of criminal offences; (b) AI systems intended to be used by or on behalf of law enforcement authorities or by Union institutions, bodies, offices or agencies in support of law enforcement authorities as polygraphs or similar tools; (c) AI systems intended to be used by or on behalf of law enforcement authorities, or by Union institutions, bodies, offices or agencies, in support of law enforcement authorities to evaluate the reliability of evidence in the course of the investigation or prosecution of criminal offences; (d) AI systems intended to be used by law enforcement authorities or on their behalf or by Union institutions, bodies, offices or agencies in support of law enforcement authorities for assessing the risk of a natural person offending or re-offending not solely on the basis of the profiling of natural persons as referred to in Article 3(4) of Directive (EU) 2016/680, or to assess personality traits and characteristics or past criminal behaviour of natural persons or groups; (e) AI systems intended to be used by or on behalf of law enforcement authorities or by Union institutions, bodies, offices or agencies in support of law enforcement authorities for the profiling of natural persons as referred to in Article 3(4) of Directive (EU) 2016/680 in the course of the detection, investigation or prosecution of criminal offences.’

³⁸ This point further states: ‘(a) AI systems intended to be used by or on behalf of competent public authorities or by Union institutions, bodies, offices or agencies as polygraphs or similar tools; (b) AI systems intended to be used by or on behalf of competent public authorities or by Union institutions, bodies, offices or agencies to assess a risk, including a security risk, a risk of irregular migration, or a health risk, posed by a natural person who intends to enter or who has entered into the territory of a Member State; (c) AI systems intended to be used by or on behalf of competent public authorities or by Union institutions, bodies, offices or agencies to assist competent public authorities for the examination of applications for asylum, visa or residence permits and for associated complaints with regard to the eligibility of the natural persons applying for a status, including related assessments of the reliability of evidence; (d) AI systems intended to be used by or on behalf of competent public authorities, or by Union institutions, bodies, offices or agencies, in the context of migration, asylum or border control management, for the purpose of detecting, recognising or identifying natural persons, with the exception of the verification of travel documents.’

³⁹ This point further states: ‘(a) AI systems intended to be used by a judicial authority or on their behalf to assist a judicial authority in researching and interpreting facts and the law and in applying the law to a concrete set of facts, or to be used in a similar way in alternative dispute resolution; (b) AI systems intended to be used for influencing the outcome of an election or referendum or the voting behaviour of natural persons in the exercise of their vote in elections or referenda. This does not include AI systems to the output of which natural persons are not directly exposed, such as tools used to organise, optimise or structure political campaigns from an administrative or logistical point of view.’

materially influencing the outcome of decision making.’ This rule applies if any of the following conditions pursuant to Article 6(3) *alinea secunda* is fulfilled.

- (a) the AI system is intended to perform a narrow procedural task;
- (b) the AI system is intended to improve the result of a previously completed human activity;
- (c) the AI system is intended to detect decision-making patterns or deviations from prior decision-making patterns and is not meant to replace or influence the previously completed human assessment, without proper human review; or
- (d) the AI system is intended to perform a preparatory task to an assessment relevant for the purposes of the use cases listed in Annex III.

6.29. Nevertheless, the AI system will always be considered to be high-risk where it performs profiling of natural persons. For those AI systems, the exception stated above does not apply.⁴⁰

6.30. If provider or deployer finds out based on the criteria above that its AI system is considered to be high-risk, it needs to fulfil additional obligations. These obligations will also apply to providers and deployers seated in non-EU country if they fall within the scope of application of the AI Act under its Article 2 (see above). Providers of high-risk systems must fulfil the obligations pursuant to Article 16.⁴¹ Special obligations for the deployer are set out in Article 27. However, it should be borne in mind that the obligations of the provider may, under certain conditions, apply equally to other subjects. Pursuant to Article 25(1), any distributor, importer, deployer or other third-party shall be considered to be a provider of a high-risk AI system, thus equally obligated under Article 16, in any of the following circumstances:

- (a) they put their name or trademark on a high-risk AI system already placed on the market or put into service, without prejudice to contractual arrangements stipulating that the obligations are otherwise allocated;
- (b) they make a substantial modification to a high-risk AI system that has already been placed on the market or has already been put into service in such a way that it remains a high-risk AI system pursuant to Article 6.

6.31. If one of these circumstances occurs, the initial provider is no longer considered to be a provider in the meaning of AI Act. Nevertheless, pursuant Article 25(2), the initial provider shall:

- ... closely cooperate with new providers and shall make available the necessary information and provide the reasonably expected technical access and other assistance that are required for the

⁴⁰ Article 6(3) *in fine* AI Act.

⁴¹ Article 16 AI Act: ‘Providers of high-risk AI systems shall: (a) ensure that their high-risk AI systems are compliant with the requirements set out in Section 2; (b) indicate on the high-risk AI system or, where that is not possible, on its packaging or its accompanying documentation, as applicable, their name, registered trade name or registered trade mark, the address at which they can be contacted; (c) have a quality management system in place which complies with Article 17; (d) keep the documentation referred to in Article 18.’

fulfilment of the obligations set out in this Regulation, in particular regarding the compliance with the conformity assessment of high-risk AI systems.

VI. Rules for Using the General-Purpose AI Model

- 6.32. In addition to AI systems, it is also necessary to pay attention to the rules for AI models pursuant to Chapter V AI Act. The AI Act introduces the term “general purpose AI model”. Pursuant to Article 3(63) this term means:
- ... an AI model, including where such an AI model is trained with a large amount of data using self-supervision at scale, that displays significant generality and is capable of competently performing a wide range of distinct tasks regardless of the way the model is placed on the market and that can be integrated into a variety of downstream systems or applications, except AI models that are used for research, development or prototyping activities before they are placed on the market.⁴²
- 6.33. Article 2(1)(a) states that this regulation also affects providers placing on the market general-purpose AI models in the EU.⁴³ Providers of general-purpose AI model thus must comply with the obligations under Article 53.
- 6.34. Article 51 defines a special category of general-purpose AI models with systemic risk. Pursuant to paragraph 1 of this Article, a general-purpose AI model shall be classified as a general-purpose AI model with systemic risk if any of the following applies to it:
- (a) it has high impact capabilities evaluated on the basis of appropriate technical tools and methodologies, including indicators and benchmarks;⁴⁴
- (b) based on a decision of the Commission, ex officio or following a qualified alert from the scientific panel, it has capabilities or an impact equivalent to those set out in point (a) having regard to the criteria set out in Annex XIII.
- 6.35. The provider of a general-purpose AI model meeting the criteria of Article 51(1) is pursuant to Article 52 obligated to notify the European Commission without delay, however in any event within two weeks: ‘... after that requirement is met or it becomes known that it will be met.’ With the notification, the provider must also submit the information necessary to demonstrate the criteria are met. However, if the provider is of the opinion that even though conditions pursuant to Article 51(1) are formally met, the relevant AI model does not present a systemic risk, he is allowed to present sufficiently substantiated arguments to demonstrate that. These arguments are presented together with the notification. If the provider is successful with its argumentation, the European Commission will conclude

⁴² Cf. the term ‘general-purpose AI system’ which Article 3(66) AI Act defines as: ‘an AI system which is based on a general-purpose AI model and which has the capability to serve a variety of purposes, both for direct use as well as for integration in other AI systems’.

⁴³ On the meaning of the concept of ‘placing on the market in the EU’ see above in the context of AI systems.

⁴⁴ The presumption laid down in Article 51(2) AI Act provides that it has high impact capabilities when: ‘... the cumulative amount of computation used for its training measured in floating point operations is greater than 10²⁵.’

that the AI model shall not be classified as an AI model with systemic risk. To the unsuccessful provider, Article 52(5) gives the applicant a chance for a reassessment.

- 6.36. Providers of general-purpose AI model with systemic risk must comply with the obligations under Article 55. The European Commission ensures the existence of a list of AI models with systemic risk.

VII. AI Codes of Conduct

- 6.37. Along with the implementation of AI systems in the commercial world, the creation of so-called codes of conduct should also go hand in hand. The AI Act refers to codes of conduct only briefly in Articles 95 and 96. Pursuant to Article 95(1), it is a task for the AI Office and the member states to encourage and facilitate the creation of codes of conduct and related governance mechanisms. The aim of these codes of conduct and governance mechanisms should be, most importantly, voluntary application of Chapter III Section 2 AI Act, dealing with the requirements for high-risk AI systems, on other AI systems as well. In other words, the authorities shall try to encourage natural and legal persons to voluntarily comply with the rules for high-risk AI systems even with regards to non-high-risk AI systems.
- 6.38. In June 2018, the Independent High-Level Expert Group on Artificial Intelligence released Ethics Guidelines for Trustworthy AI (AI Guidelines). As this document has had a major influence on the formulation of the AI Act, and is even specifically referred to in the AI Act,⁴⁵ it can work and is meant as an inspiration for creating codes of conduct in practice.⁴⁶
- 6.39. The AI Guidelines ‘set out a framework for achieving Trustworthy AI’.⁴⁷ According to these AI Guidelines, trustworthy AI means that:
1. it should be **lawful**, complying with all applicable laws and regulations;
 2. it should be **ethical**, ensuring adherence to ethical principles and values; and
 3. it should be **robust**, both from a technical and social perspective, since, even with good intentions, AI systems can cause unintentional harm.
- 6.40. These components should be met throughout the whole life cycle of the AI system.⁴⁸ At the same time, the drafters of the AI Guidelines were aware

⁴⁵ See Recital 7, 27 and 165 AI Act.

⁴⁶ Independent High-Level Expert Group on Artificial Intelligence, *Ethics Guidelines for Trustworthy AI*, European Commission (2019), at 5: ‘These guidelines are addressed to all AI stakeholders designing, developing, deploying, implementing, using or being affected by AI, including but not limited to companies, organisations, researchers, public services, government agencies, institutions, civil society organisations, individuals, workers and consumers. Stakeholders committed towards achieving Trustworthy AI can voluntarily opt to use these Guidelines as a method to operationalise their commitment, in particular by using the practical assessment list of Chapter III when developing, deploying or using AI systems.’

⁴⁷ Independent High-Level Expert Group on Artificial Intelligence, *Ethics Guidelines for Trustworthy AI*, European Commission (2019), at 2. See also European Commission, *White Paper on Artificial Intelligence – A European approach to excellence and trust*, COM(2020) 65 final, Brussels (2020), available at https://commission.europa.eu/document/download/d2ec4039-c5be-423a-81ef-b9e44e79825b_en?filename=commission-white-paper-artificial-intelligence-feb2020_en.pdf (accessed on 02 July 2024).

⁴⁸ Independent High-Level Expert Group on Artificial Intelligence, *Ethics Guidelines for Trustworthy AI*, European

of the fact that in practice it can be challenging to implement all three components simultaneously as a tension can arise between them. Still, everyone should be trying to implement all three components to their AI systems as much as possible. At the moment, however, the AI Act works with the concept of codes of conduct for natural and legal persons on a voluntary basis. Thus, whether it is persons within or outside the EU who are affected by the AI Act, all of them are provided with the AI Guidelines and similar documents as sources of inspiration for possible implementation in their practice.

VIII. Conclusion

- 6.41. The AI Act is at the beginning of its existence. In particular, the subsequent delegated acts, which have not yet been drawn up, will give more insights and reveal how this regulation will be interpreted and how effectively applied. Either way, however, it is already necessary to get acquainted with this regulation in detail and prepare for the need to comply with it.
- 6.42. The regulation is based on the distinction between AI systems and high-risk AI systems. Should the AI system fall within the category of high-risk systems, additional and very strict obligations apply. However, the AI Act keeps in mind that this risk-based approach must always be made with regard to codes of conduct and ethics guidelines.⁴⁹
- 6.43. The whole world will now have to pay attention to this regulation. Because of its scope and its attempt to cover any AI influence within the EU, this regulation will in many cases also apply to natural and legal persons outside the EU.



Bibliography:

European Commission, Commission Notice, *The ‘Blue Guide’ on the Implementation of EU Products Rules 2022*, Information from European Union Institutions, Bodies, Offices and Agencies (2022/C 247/01).

European Commission, *White Paper on Artificial Intelligence – A European approach to excellence and trust*, COM(2020) 65 final, Brussels (2020), available at https://commission.europa.eu/document/download/d2ec4039-c5be-423a-81ef-b9e44e79825b_en?filename=commission-white-paper-artificial-intelligence-feb2020_en.pdf (accessed on 02 July 2024).

Frederiek Fernhout, Thibau Duquin, *The EU Artificial Intelligence Act: our 16 key takeaways*, Stibbe, 13 February 2024, available at <https://www.stibbe.com>.

Commission (2019), at 5.

⁴⁹ Recital 27 AI Act: ‘While the risk-based approach is the basis for a proportionate and effective set of binding rules, it is important to recall the 2019 Ethics guidelines for trustworthy AI developed by the independent AI HLEG appointed by the Commission.’

com/publications-and-insights/the-eu-artificial-intelligence-act-our-16-key-takeaways (accessed on 02 July 2024).

Independent High-Level Expert Group on Artificial Intelligence, *Ethics Guidelines for Trustworthy AI*, European Commission (2019).

OECD, *Explanatory Memorandum on the Updated OECD Definition of an AI System*, 8 OECD Artificial Intelligence Papers, OECD Publishing (2024).

Risto Uuk, *The EU AI Act Newsletter #53: The Law Is Finally Adopted*, The EU AI Act Newsletter. 28 May 2024, available at <https://artificialintelligence-act.substack.com/p/the-eu-ai-act-newsletter-53-the-law> (accessed on 02 July 2024).