

Dear members of the Committee on the Internal Market and Consumer Protection (IMCO) and Committee on Civil Liberties, Justice and Home Affairs (LIBE) in the European Parliament

May 12, 2021

RE: The EU's AI Act Needs to Better Protect People on the Move and Regulate High-Risk Border Technologies

As a group of international migration academics with expertise on the impacts of high-risk technologies on people crossing borders, we are gravely concerned that the proposed Regulation on Artificial Intelligence tabled by the European Commission needs to better regulate high risk technologies employed in the context of border management, migration, and asylum.

In our work, we see time and again how [AI systems are developed, tested and deployed on migrants and people on the move in harmful ways](#), including refugees, asylum seekers, migrants, and others. The AI Act must prevent this.

In the field of migration, asylum, and border management, AI systems such as algorithms, lie detectors, polygraphs and emotion recognition and facial recognition, are increasingly used to make predictions, assessments, and evaluations about people in a wide variety of contexts. We see how AI tools are developed and used within a broader framework of racialised, generalised suspicion against people on the move. Many of these systems are inherently discriminatory, pre-judging people on factors outside of their control. The current draft fails to guarantee people's fundamental rights.

In order to strengthen human rights protections for people crossing borders and interacting with high-risk technologies, we endorse the recommendations for amendments to the AI Act as set out by EDRi (European Digital Rights), namely that:

The AI act must be updated in three main ways to address AI-related harms in the migration context:

1. **Update the AI act's prohibited AI practices (Article 5) to include 'unacceptable uses' of AI systems in the context of migration, asylum, and border management.** This should include prohibitions on: AI systems for individual risk assessments and profiling drawing on sensitive personal data; AI polygraphs in the migration context; predictive analytic systems when used to interdict, curtail and prevent migration; and a full prohibition on remote biometric identification and categorisation in public spaces, including in border and migration control settings.
2. **Include within 'high-risk' use cases AI systems in migration control that require clear oversight and accountability measures, including:** all other AI-based risk

assessments; predictive analytic systems used in migration, asylum, and border management; biometric identification systems; and AI systems used for monitoring and surveillance in border control.

3. **Amend Article 83 to ensure AI as part of large-scale EU IT systems are within the scope of the AI Act** and that the necessary safeguards apply for uses of AI in the context of migration, asylum, and border management.

In particular, we would like to draw your attention to the impacts of Article 83.

As it currently stands, this article excludes *all* information systems for third-country nationals from the protective scope of the AI Act. The systems which are excluded encompass ETIAS (European Travel Information and Authorization System) and VIS (Visa Information System) which will employ algorithmic profiling through screening rules when examining applications for residence permits, visas, and travel authorisations. Other large scale information systems also envisage the processing of facial images and encompass the use of facial recognition technology. This type of technology enables biometric identification, which has been time and time again recognized as posing high risks to fundamental rights and safety. Moreover, in the migration context, every third-country national with an administrative or criminal law link with the EU will be affected by the exclusion clause, which will impact procedural and fundamental rights of millions of people. Furthermore, the exclusion clause creates an unjustified divide between AI systems employed at the EU level and the national level, effectively signaling that the EU is beyond reproach. The exclusion clause is also an admission that the safeguards of the AI Act cannot be respected in the case of large-scale AI systems. The backstories of ETIAS, Eurodac, VIS and SIS - where the deployment of AI systems was added without impact assessments - are testaments to a [systematic differential approach to fundamental rights in the context of migration](#).

Moreover, this exclusion currently applies unless systems are subject to ‘significant changes’ in design or intended purpose. We would like to draw your attention to the [Joint Opinion of the European Data Protection Supervisor \(EDPS\) and the European Data Protection Board \(EDPB\)](#) which highlights that the threshold for ‘significant changes’ is not clear. Recital 66 of the Proposal specifies a lower threshold for a conformity re-assessment ‘whenever a change occurs which may affect the compliance.’ At minimum, a similar threshold is appropriate for Article 83 for high-risk AI systems such as those used in migration. Furthermore, according to the European Commission’s own report on the [opportunities and challenges for the use of AI in border control, migration and security](#), additional initiatives are already underway, including automated application triaging. These initiatives should be considered a ‘significant change’ to the functioning of the systems, subjecting them to the safeguards of the forthcoming AI Act. Considering that the entry into application is envisaged for 24 months following the entry into force of the future Regulation, exempting AI systems already placed on the market for an even longer period is not appropriate. If several new initiatives are to be adopted and implemented within the next few years, the exclusion clause cannot stand.

Overall, the current draft of the AI Act does not sufficiently recognize the harm perpetuated by high-risk border technologies. As such, we urge the IMCO and LIBE committees to endorse the above amendments to protect the fundamental rights of people crossing borders and take a global leadership role in governing AI type technologies.

Happy to provide further clarification,

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