

To:

Members of the European Commission

Bits of Freedom
Prinseneiland 97hs
1013 LN Amsterdam

Nadia Benaissa
+31 6 55 16 46 33
nadia@bitsoffreedom.nl

bitsoffreedom.nl
IBAN: NL73 TRIO 0391 1073 80
KVK: 34 12 12 86, Amsterdam

Bits of Freedom welcomes the European Commission's objective to ensure that AI systems are used safely and with respect to fundamental rights and Union values. We agree that the future of AI depends on public trust in the safety and compliance of AI with fundamental rights and that a human-centric approach is essential. Therefore we welcome the opportunity to share our concerns relating to the protection of fundamental rights in the Artificial Intelligence Act. In particular, we are worried that the scope of prohibited AI practices and high-risk classifications, and the support offered to citizens effected by AI to exercise their fundamental rights, fall short. In order to provide a regulatory framework that truly respects fundamental rights, we encourage the Commission to revise the proposal and provide additional safeguards.

1. Prohibited practices

Bits of Freedom welcomes the prohibition of AI-practices that create unacceptable risks to fundamental rights. However, one could argue that the proposal's broad exceptions, limited scope and vague wording render these prohibitions meaningless. Therefore, Bits of Freedom advises the Commission to prohibit the practices in article 5 without exceptions. We would like to clarify why we feel such a measure is necessary.

Article 5(1)(a) and (b) prohibit manipulation and exploitation of vulnerabilities only when it causes or is likely to cause physical or psychological harm. If passed into law, this will place an unreasonable burden of proof on individuals to demonstrate future or actual harm, as it is extremely difficult if not impossible for individuals to gather information or evidence on these practices. Furthermore, one could argue that tracking, analysing and scoring people's behavior to classify their trustworthiness, as meant in article 5(1)(c), are not commensurate with an open and free society in which fundamental rights are protected.

We agree with the Commission that biometric surveillance systems need to be banned from publicly accessible spaces. However, the prohibition as drafted in article 5(1)(d) does not offer the necessary protection, as the prohibition itself is too narrowly defined and the exceptions, in turn, not narrow enough. First of all, the prohibition is limited to biometric identification, neglecting many problematic systems that make use of AI for the automated recognition of human features, and practices like singling out. Secondly, the prohibition is limited to real-time systems and therefore would not only allow for post-systems to be deployed, a distinction that is unsustainable and irrelevant from a fundamental rights perspective, but furthermore releases the deployment of post-systems from the “burden” of the restrictions and safeguards that do apply to real-time systems. Thirdly, the prohibition is limited to the use of biometric systems for law enforcement purposes, leaving people vulnerable to fundamental rights violations that occur in other contexts. Fourthly, the exclusion of online spaces from the definition of publicly accessible spaces suggests that the Act may not bring a halt to the scraping of online sources in order to develop commercial databases, leaving many problematic business models intact. Online spaces must be included in the definition of publicly-accessible spaces, and the data scraped from online spaces (such as from social media) included in the prohibition.

Combined, these exceptions will ensure the availability and accessibility of biometric surveillance infrastructure and practices, and may even enable and encourage its use. The exceptions furthermore risk undermining the protections offered by the General Data Protection Regulation with regard to the use of biometric data. Finally, wording such as “potential” victim and “preventive” use does not allow for enough guidance as to the limits of the use of biometric systems, therefore creating unnecessary and disproportionate risks.

Because of the unacceptable risks to society these exceptions introduce, Bits of Freedom urges the Commission to more comprehensively prohibit the practices identified in article 5.

2. High risk classification

In article 6 the Commission suggests a higher level of protection is needed for AI systems that are considered high risk. We agree with the Commission. However, by only providing effective rules for AI systems that are classified as high-risk, people might fail to be protected from AI systems that are not subject to this definition. To provide a sufficient level of protection, regulatory measures must also address these AI-systems.

3. Transparency

Article 13 prescribes transparency in order to enable users of AI-systems to interpret the output of those systems. However, transparency alone is not enough to allow users to verify whether output is just and legitimate. This will result in private and public entities using decisions made by AI while not being able to justify these decisions to the people effected by them.

The proposal offers people no possibility to verify AI-output that effects their lives. If passed into law, this would result in a lower level of protection than the GDPR and domestic legislation currently offer. In the Netherlands, for example, acts by public authorities always require motivation of decisions and transparency. Bits of Freedom urges the Commission to raise the level of protection offered to natural persons and users to guarantee that they can review and verify AI-output and -decisions.

Concluding

Bits of Freedom welcomes the European Commission's step towards ensuring that AI systems are used safely and with respect to fundamental rights and Union values, and encourages the Commission to strengthen the proposal to be in line with the ambitions set in the Commission's White Paper on Artificial Intelligence and the explanatory memorandum of the Artificial Intelligence Act.