IP, IT, Data Protection and Technology

Artificial Intelligence Act: what's new?

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INTRO

We already know that the artificial intelligence (AI) enables traffic control in cities, faster and highly complex production in factories and the automatic dimming of lights at home at exactly the right time. AI is in smartphones, traffic lights, telemedicine systems and fashion sales platforms.

AI is becoming increasingly important. This was recently demonstrated once again by the hype about the chatbot 'ChatGPT' from the US company OpenAI. A look at the company itself shows that this development should be kept in mind and be taken seriously. OpenAI was originally founded to identify not only the opportunities but also the risks of artificial intelligence.

In this respect, 'ChatGPT' has actually worked very well. After each new update, the media and the tech scene overflowed with reports.

AI offers different opportunities but shows various risks. And it has now become clear that many questions arise and we do not have answers yet.

Of course, this article cannot provide these answers either. In the following, however, we will at least try to outline the questions in more detail and raise awareness of them. The topic will be approached by means of the following four questions, which also structure the article:

1. What is artificial intelligence?
2. What opportunities does AI offer (in legal tech)?
3. What legal questions need to be answered?
4. How does legislation deal with the topic?

01 / WHAT IS ARTIFICIAL INTELLIGENCE?

The term 'artificial intelligence' was popularized in 1955 by the US computer scientist John McCarthy. Although there is no uniform definition, lawyers need one to apply law to life. First and foremost, the definition that the law provides is the most decisive. So far, there are no laws specifically written for AI. However, there is a draft for an AI regulation of the European Union (**Artificial Intelligence Act** - AIA). Art 3.I AIA-Draft defines artificial intelligence as follows (the square brackets summarize the content of the referred Annex I):

"Artificial Intelligence system (AI system) means software that is developed with one or more of the techniques and approaches listed in Annex I [machine learning, logic- and knowledge-based, statistical] 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."

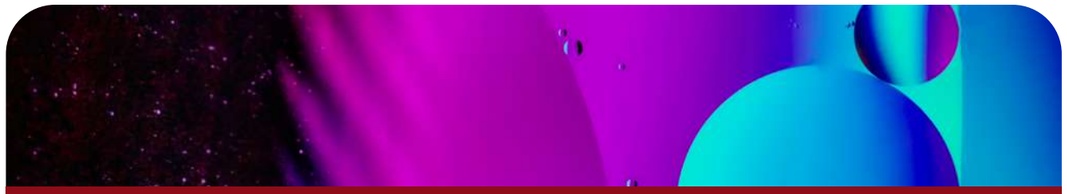
This definition is very general. This shows how many different phenomena are subsumed under the term. On the other hand, the different phenomena also raise different questions. A smart traffic light system is less relevant in terms of data protection law than the electronic patient file. Therefore, different forms of 'artificial intelligence' must essentially be distinguished. These are approximately named in Annex I:

a) Machine learning approaches, including supervised, unsupervised and reinforcement learning, using a wide variety of methods including deep learning (e.g., 'ChatGPT', autonomous cars, chess computers)
b) Logic and knowledge-based approaches, including knowledge representation, inductive (logic) programming, knowledge bases, inference and deductive engines, (symbolic) reasoning and expert systems (e.g., 'answering machines' like 'Watson' from IBM or Amazon`s 'Alexa')
c) Statistical approaches, Bayesian estimation, search and optimization methods. (These are actually procedures and patterns that are part of the functioning in (a) and (b))

Currently, the public discussion is mostly about **Deep Learning** when talking about artificial intelligence. Deep Learning means that the system itself recognizes and processes the relevant data with the help of an artificial neutral network (modelled like a human brain). In this way, the system's processing is faster and achieves better results.

For example, the program 'AlphaGo' beat several of the world's best players in Go in 2017 , and 'ChatGPT' passed the uniform bar exam in the top ten percent in 2023.

It is therefore not surprising that the public focus is currently very much on Deep Learning. Nevertheless, the other forms of artificial intelligence are still relevant and continue to develop. They must therefore continue to be taken into account too.



02 / WHAT OPPORTUNITIES DOES AI OFFER (IN LEGAL TECH)?

Due to the many forms of artificial intelligence and its rapid development, there are of course many possible areas of application, which have also been outlined above. Artificial intelligence is used in automated production, self-service checkouts in supermarkets, software for analyzing consumers and voters. Climate researchers use it to make forecasts and artificial intelligence supports drivers to the extent that cars are becoming more and more autonomous. The same applies to weapons. The areas of application are as varied as the types of artificial intelligence that are used (as shown under 1.). **Particularly interesting in this respect is the Legal Tech sector**.

Legal Tech refers to a variety of applications in the field of law. This can either mean that AI automatically applies the law or that it assists in the legal assessment of a case.

The automated application of law is a particularly sensitive area. The possibility (so far discussed rather abstractly) of having a computer make a judicial decision is likely to be inadmissible under the vast majority of national and international legal systems. For example, Art. 6.I.1 ECHR (European Convention on Human Rights) grants everyone the right to have their case decided by a court. Art. 25 of the Italian Constitution stipulates that no one may be deprived of his or her legal judge. Art. 101.I of the German Constitution and many other national constitutions worldwide stipulate the same.

Although the question - whether this judge must be human - did not arise at the time these laws came into being, today the prevailing opinion seems to be that this is the case - both in criminal and civil court proceedings. The reason for this is the previously prevailing assumption that only a human being would be able to grasp the emotional significance of the case and therefore make a humanly just decision. The Estonian Ministry of Justice has also denied reports that Estonia is testing the use of a 'robo-judge' in minor cases.

In fact, it was only about AI supporting the judges in processing the case by transcribing court hearings and anonymizing judgements. In Germany (famous for its analogue justice system), AI is increasingly being used in mass litigation, where, for example, customers of car manufacturers sue for damages due to the violation of emission standards.

A judicial decision by AI is therefore not to be expected in the near future. On the other hand, AI support in finding justice is becoming more and more common. AI is also increasingly being used by lawyers and authorities in this sense. Law firms use electronic systems for data processing and analysis of facts. However, the limits of AI's capabilities are also becoming apparent. The case of a lawyer who had his statement of claim created by 'ChatGPT' recently caused a stir. The AI argued with precedents that did not exist.

03 / WHAT LEGAL QUESTIONS NEED TO BE ANSWERED?

Legal issues arise from the increasing application of AI in all areas. In terms of criminal law, for example, the question of guilt arises if a person is killed by a self-driving car, as it has recently happened in some cases.

Meanwhile, consumers have used AI to generate music in the image of a well-known musician. In civil law, the question arises as to who holds the copyright to this music and whether the musician can demand an injunction against the distribution of this music.

Civil liability for infringements of rights by AI (e.g. tort or copyright) has also not yet been conclusively clarified. And it is obvious that in the near future - as AI is ever wider used - far more questions will be raised than answered.

As there is no law specifically on AI, legal systems have had to answer these questions with 'analogue' law, sometimes applying new standards.

04 / HOW DOES LEGISLATION DEAL WITH THE TOPIC?

Therefore, as mentioned above, the EU is planning a law on 'harmonized rules on artificial intelligence (Artificial Intelligence Act)'. It had already been announced in 2019 by president of the European Commission Ursula von der Leyen and was proposed by the EC on 21.04.2021. Right now, the Act is being discussed in the formal trilogue meetings. It is expected that the Act will be passed in 2024.

a. What is the law intended to achieve (ratio legis)?

The objectives of the law are listed in point 1.1. of the explanatory memorandum to the AIA. At the end of the first paragraph are two sentences that sum up well the balancing act intended by the Commission.

Given the speed of technological change and possible challenges, the EU is obliged to strive for a balanced approach. It is in the Union's interest to preserve the EU's technological leadership and to ensure that Europeans can benefit from new technologies developed and operating in accordance with the Union's values, fundamental rights and principles.

This is in line with the general approach with which AI is often addressed, which simply results from the ambiguity of the issue. The EU thus seeks to exploit the opportunities offered by AI while minimizing the risks raised. However, this results in a conflict of objectives. Overregulation of AI development could lead to the EU falling behind in technological progress.

And the economic impact of AI is expected to be enormous. In a 2017 study, accounting firm PwC predicts that AI could contribute as much as $15.7 trillion to the global economy by 2030.

b. How is this goal to be achieved (modus operandi)?

As it stands, the draft does not initially differentiate between the various application fields of AI systems. Instead, however, a differentiation is made according to the dangers that can emanate from the respective system. Different security and monitoring requirements are to be established for each category.

- **Prohibited artificial practices**, Art. 5 AIA = e.g., social scoring, biometric video surveillance, subtle behavioral manipulation. Such systems may not be placed on the market, put into service or used. The draft explanatory memorandum explains that research regarding these systems, that distort human behavior should remain possible with legitimate purposes (para. 16). In the case of more precisely defined threats to life or physical safety, the search for victims of crime, and for the investigation of serious crimes, these systems should be able to be used for law enforcement purposes (para. 19).
- **High-risk AI systems**, art. 6 et seq. AIA = systems to be used as security components and those mentioned in Annex III (e.g., biometric facial recognition and road traffic management and operation). These systems are the focus of the draft. They must meet the requirements set out in Art. 8 et seq. AIA. Risk management must be implemented regarding these systems. Strict requirements are set for any data sets used to train the AI. Furthermore, documentation and recording obligations are established. Only in Art. 15 AIA are functional requirements set out regarding accuracy, robustness and cybersecurity.
- **Lower risk systems**, regarding the remaining AI systems, the general requirements of the draft apply. For violations of the respective requirements, Art. 71 f. AIA provides for fines. Individual legal protection for private individuals (e.g. claims for damages) is not granted. For the promotion of technical development on the other hand, Art. 53 AIA provides for AI regulatory sandboxes. In addition, a 'board' is to be set up for the supervision of AI development in the EU.

c. How is the draft received by the public?

In line with the ambivalent approach of the EU, criticism of the draft also comes from two opposite directions. On the one hand, there is criticism that the draft would bring with it overregulation. The required error-free test data would be virtually impossible and no distinction would be made between open source and proprietary software. This is why, for example, the LAION association, which includes various scientists and other experts in this field, has published an open letter to the EU Parliament, which ends with the following warning:

> "Deterring open-source AI will put at risk the digital security, economic competitiveness, and strategic independence of Europe. The consequences are serious. We respectfully urge you to consider these points in the Parliamentary text."

Another criticism is that some of the definitions are too imprecise or far-reaching. According to the current draft, a computerized traffic light system would also be a high-risk system. The focus on bureaucratic rather than substantive requirements is an obstacle to development (see requirements for high risk systems).

On the other hand, there is criticism from various civil rights organizations that the regulation does not go far enough: the complete exemption for military use and the partial exemptions for law enforcement endanger civil rights (e.g. data protection). The EU Parliament has reacted to this by, for example, adding the ban on predictive policing systems. However, the discussion in the trilogue meetings will continue.

The EU expects the AIA to become a global standard like the GDPR.

CONCLUSION

AI is alternately described as a new marvel and as a weapon that would wipe out humanity. As is so often the case, the truth lies in the middle. But one thing is certain: AI will change and shape our lives in the future - more than it already does today.

For more information about Technology in Europe, please contact

Francesco Marconi
European Technology Industry Coordinator
francesco.marconi@it.andersen.com

For more information about IP, IT, Data Protection in Europe, please contact

Themistoklis Giannakopoulos
European IP, IT, Data Protection Coordinator
themistoklis.giannakopoulos@gr.andersenlegal.com

Authors of the insight

Paola Finetto
Andersen in Italy
paola.finetto@it.andersen.com

Luca Rigotti
Andersen in Italy
luca.rigotti@it.andersen.com

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