European Union

The 'Bouncing Ball' Effect of the EU Artificial Intelligence Act on Employment Relations

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I. Setting the Scene: The Scope of the EU AI Act in the Workplace

The EU Artificial Intelligence Act (AI Act)[1] has been shaped into a considerable omnibus Regulation that covers a wide range of issues, including AI systems[2] used within the employment context.[3] The broad scope of this Regulation mandates EU-wide compliance of AI systems and could also influence international standards. The nature of the Regulation guarantees the AI Act's applicability in all Member States without requiring additional legislative action, thereby facilitating EU-wide cross-border harmonisation. It is therefore evident that the AI Act applies to all employers and workers within the EU.

At the same time, the Regulation is designed to ensure compliance within the AI supply chain: its development, introduction to the EU single market, and deployment. With the first draft of the AI Act presented in April 2021 and the final text approved in May 2024, it aims to protect from the potentially harmful effects of AI systems. It does so by categorising AI systems into prohibited[4] and high-risk[5] applications. High-risk AI, subjected to strict obligations[6], include those 'to be used for recruitment' and '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.' By imposing obligations on the development and deployment of AI systems used in the workplace, provisions on high-risk AI cover a wide range of employment issues. Upon closer examination, however, questions arise regarding the distribution of responsibility for ensuring these obligations.

The AI Act places obligations on economic operators along the AI supply chain, namely 'deployer', 'provider', 'authorised representative', 'importer', 'distributor', 'operator', 'downstream provider' and 'product manufacturer'.[7] While it also references parties to the employment relations, such as workers, employers, and workers' representatives, the AI Act does not define these terms. Building on a product-safety approach, the AI Act does not link the actors in the AI supply chain to those in employment relations. This raises the following question: what is the relevance of the actors in the AI supply chain to the employment context?

Since the 2021 draft, there have been concerns that employers might not be subjected to sufficiently clear and explicit obligations. By adopting a 'risk-based' rather than a 'rights-based' approach, the Regulation fails to directly identify parties of employment relations. Although the final version of the AI Act offers more context and coherence regarding the rights and

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1 On 21 May 2024, the AI Act was approved by the Council of the European Union. After being signed by the presidents of the European Parliament and of the Council, it will be published in the EU's Official Journal and enter into force 20 days after this publication.

2 The definition of 'AI system' as per definition in art 3(1) of the AI Act.

3 This article is based on the approved text of the Artificial Intelligence Act of 14 May 2024 <https://data.consilium.europa.eu/doc/document/PE-24-2024-INIT/en/pdf> accessed 14 June 2024.

4 Ch II of the AI Act.

5 Ch III of the AI Act.

6 See s 2 on 'Requirements for High-Risk AI Systems' of ch III AI Act.

7 Art 3 AI Act also identifies other actors, including the 'notifying authority', 'market surveillance authority', 'law enforcement authority', 'AI Office', 'national competent authority', 'subjects' and 'downstream provider'. These actors are not considered in this report as there is no ambiguity about whether they can be either workers or employers.

obligations of all actors along the AI supply chain, it remains necessary to understand who the employers and workers are under the AI Act.

The aim of this report is twofold. First, it explores the actors identified by the AI Act within the AI supply chain to pinpoint the specific roles of employers and workers within the employment context. It subsequently evaluates whether those actors are located inside or outside the EU. Second, this report examines the potential external effects of the AI Act by analysing its personal and territorial scope. This report concludes that while the Act might not have a significant direct impact on external labour markets, it might nonetheless have a 'bouncing ball' effect – leaving its marks on the EU, EU's partners, and other parties outside the EU.

II. Who Are the Employers?

Employers may be categorised under the definitions of actors in the AI Act. Starting with the most probable scenario, the role of the employer falls under the definition of a *deployer*. Article 3(4) defines a deployer as 'a natural or legal person, public authority, agency, or other body using an AI system under its authority', indicating that both private and public employers fall under the scope of the AI Act. Employers which use high-risk AI system are obliged to ensure that, *inter alia*, human oversight[8] and monitoring are in place,[9] the input data of AI system are representative,[10] logs generated by high-risk AI are saved,[11] workers subjected to AI systems are notified[12] and compliance with the EU registration obligations is observed[13].

If deployers are employers, they would typically have their place of establishment or location in the EU. However, the scope of the Regulation also includes deployers located outside the EU. As Article 2(1)(c) states, the Regulation applies to '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* [emphasis added].' The use of the AI system's output in the EU serves as a precondition to trigger and extend the scope of the AI Act. For example, international employers using high-risk AI systems to monitor and evaluate the performance of EU workers must make sure that the system complies with the AI Act.[14] Hence, the deployers include both EU employers as well as employers located outside the EU who intend to use AI systems in the EU, that is, on EU workers.

Another actor within the AI system supply chain is the *provider*, defined in Article 3(3) as 'a natural or legal person, public authority, agency or other body that *develops an AI system* [...] and places it on the market or puts the AI system into service under its own name or trademark, whether for payment or free of charge [emphasis added].' Employers might play a dual role as both provider and deployer when AI systems are developed and used within the enterprise.

Similar to deployers, the AI Act applies to providers within the EU and in third countries if the *output* of the AI systems is used in the EU, as stated in Article 2(1)(c). In addition, Article 2(1)(a) stipulates that providers placing or putting into service AI systems in the EU are also covered by the AI Act, 'irrespective of whether those providers are established or located within the Union or in a third country.' An example of this provision is a recruitment tool for screening candidates, which was created by the employer outside of the EU and is used predominantly in a third country. If there is an intent to use this tool in the EU territories, the employer outside of the EU must warrant that the tool complies with the AI Act.

Although all employers using high-risk AI systems are deployers, not all employers are AI system providers. Ultimately, only a limited number of enterprises have the in-house capacity and/or need to manage the AI supply chain. These enterprises usually have an international presence, are technologically oriented, employ a team of engineers, and possess the resources to experiment with AI. Many of these are large tech enterprises, such as the Big Five: Alphabet, Amazon, Apple, Meta, and Microsoft. Employers who classify as providers of a high-risk AI

8 Art 26(2) AI Act.

9 Art 26(5) AI Act.

10 Art 26(4) AI Act.

11 Art 26(6) AI Act.

12 Art 26(7) AI Act.

13 Art 26(8) AI Act.

14 Recital 22 further elaborates that 'To prevent the circumvention of this Regulation and to ensure an effective protection of natural persons located in the Union, this Regulation should also apply to providers and deployers of AI systems that are established in a third country, to the extent the output produced by those systems is intended to be used in the Union.'

system are obliged to ensure that the AI system is created in conformity with the relevant requirements laid down in the AI Act and that it is properly documented.[15]

There are five remaining actors to consider as potential employers — authorised representatives, importers, distributors, operators, and product manufacturers. Some of those actors' responsibilities are not yet fully clear concerning labour law and within the context of the AI Act alone. *Authorised representatives* are defined in Article 3(5), as their responsibilities are outlined in Article 22. Providers of high-risk AI systems from third countries appoint an EU-based authorised representative[16], which verifies conformity, retains documentation for 10 years after the AI system's market release,[17] cooperates with authorities,[18] and can terminate the mandate if the provider violates obligations.[19] Considering this set of responsibilities, authorised representatives perform more of an administrative middleman position.

The *importer*, as per Article 3(6), is 'a natural or legal person located or established in the Union that places on the market an AI system that bears the name or trademark of a natural or legal person established in a third country.' Their main responsibility is to 'ensure that the system is in conformity with this Regulation', as per Article 23. Respectively, a *distributor* is defined in Article 3(7) as 'a natural or legal person in the supply chain, other than the provider or the importer, that makes an AI system available on the Union market.' Both importer and distributors have similar purpose of the third-party intermediaries, with slightly deviating procedural obligations. Nonetheless, their role remains unclear vis-à-vis labour law and will have to be applied in practice.

It can be concluded from the definitions and functions of the AI supply chain actors that authorised representatives, importers, and distributors would not be individually classified as employers under the AI Act. These actors might cooperate with employers to ensure that the AI system fulfils its obligations under EU market rules. In practice, they will introduce a level of bureaucracy in the EU AI supply chain, serving as an additional layer of compliance with the AI Act.

Furthermore, *operator* is a term used to collectively refer to the actors within the scope of the AI Act. Article 3(8) defines an operator as a term to point out to the 'provider, product manufacturer, deployer, authorised representative, importer, or distributor.' Therefore, employers are considered operators under this definition, primarily within the meaning of deployer or, in limited circumstances, provider.

The final actor that deserves consideration is a *product manufacturer*, who has not secured a definition in the AI Act. Nevertheless, these actors play a role in the AI supply chain. Manufacturers become relevant to the question of AI production when they integrate high-risk AI systems into their products and must assume responsibility for ensuring the AI system's compliance. They have the same obligations as those imposed on the providers of AI systems under this Regulation if: '(a) the high-risk AI system is placed on the market together with the product under the name or trademark of the product manufacturer; (b) the high-risk AI system is put into service under the name or trademark of the product manufacturer after the product has been placed on the market.'[20] Employers might fall within the definition of the product manufacturer if they produce high-risk AI systems used in a workplace.

To summarise, among the listed actors, deployers are most closely align with the role of employers. Providers might also act as employers in situations where they develop their own high-risk AI systems. While authorised representatives, importers, distributors, or product manufacturers are not employers, those actors must work with employers mostly on high-risk AI systems. Both deployers and providers, whether based inside or outside the EU, might be categorised as employers. This extends the territorial scope of the AI Act to include international enterprises employing workers in the EU.

III. Who Are the Workers?

Identification of workers is a rather straightforward task. Even if the AI Act does not define workers within the articles on scope and definitions, it does confine its application to 'affected persons that are locat-

15 Art 16 AI Act.

16 Art 22(1) AI Act.

17 Art 22(3)(b) AI Act.

18 Art 22(3) AI Act.

19 Art 22(4) AI Act.

20 Art 25(3) AI Act.

ed in the Union.'[21] It is therefore logical that the Act does not foresee any provisions directly related to AI systems used to manage workers outside the EU. Beyond categorising some labour AI systems as high-risk applications, the AI Act includes several critical clauses related to workers. Notably, Article 5 prohibits the deployment of AI systems created 'to infer the emotions of a natural person in the areas of workplace.'[22] This prohibition is significant, as it categorically curtails the deployment of controversial AI products that might be available on the market.

Furthermore, Article 26(7) mandates that employers who fall under the category of deployers 'shall inform workers' representatives and the affected workers that they will be subject' to the high-risk AI system. This is another remarkable addition to the Regulation since the April 2021 AI Act draft. It is important to note that Article 26(7) uses the phrase 'all affected workers' and not 'employees', meaning that the employing party in the EU has the responsibility to notify everyone subjected to AI systems. This can be interpreted as an obligation towards all workers, even those who do not have a formal employment contract with an employer.

A similar conclusion cannot be immediately drawn regarding the responsibility towards the self-employed. Recital 57 as well as Annex III include self-employed workers within the scope of the Regulation with regards to application of high-risk AI systems. The text, however, does not make it conclusively clear whether the responsibility to inform within the meaning of Article 26(7) is also extended to self-employed workers in the EU. Despite this possible omission, the broad scope is welcomed as a pertinent step in empowering workers with knowledge and setting a baseline standard to ensure that workers are aware of their exposure to AI systems.

The disclosure obligation under Article 26(7) comes with the workers' right to lodge a complaint and the employer's obligation to explain individual decision-making. Article 85 provides that 'any natural or legal person having grounds to consider that there has been an infringement of the provisions of this Regulation may submit complaints to the relevant market surveillance authority.' Meanwhile, as per Article 86 'any affected person' may ask the deployer for an explanation of the decision that was taken.

IV. The 'Bouncing Ball' Effect

This contribution offers a perspective on those affected by the AI Act in the world of work by identifying the actors involved. While workers within the EU are (relatively) easily identifiable,[23] some provisions might also involve workers outside the EU. Previous sections indicate that under the EU Act, employers can be from within or outside the EU, while workers must be based in the EU. Nevertheless, there may be some limited cross-border impact on international workers, particularly those monitored by AI systems originating from or relevant to the EU AI supply chain.

International enterprises that provide their services in the EU, as well as EU enterprises providing their services abroad, will be most impacted by the EU Regulation. For example, the rights and obligations imposed by Articles 85 and 86 ensure transparency and accountability in the use of high-risk AI systems in the workplace. Although these provisions primarily affect the EU, the requirement to involve workers' representatives could serve as a model for regulatory authorities in third countries. Additionally, the wording of these clauses, such as 'any affected person' and 'any natural or legal person', suggests that workers outside the EU might also benefit from the rights granted by Articles 85 and 86 if their enterprise has a presence within the EU.

Article 5 could also have a minor international impact. Considering the AI Act's prohibitions, developers and product manufacturers worldwide might reduce their focus on AI systems development in this area. Developers may also lack sufficient data to train these systems, potentially decreasing their overall use and deployment. The effect, nevertheless, may be limited, as emotional recognition AI systems are exempted in the AI Act for military, defence, or national security purposes, are not banned and are actively used in many other parts of the world.[24]

One of the important developments is the establishment of AI authorities, which might remedy one of the greatest problems—the obscurity of AI prod-

21 Art 2(1)(g) AI Act.

22 Art 5(1)(f) AI Act.

23 For a discussion cf N Kountouris, 'The Concept of "Worker" in European Labour Law' (July 2018) 47(2) Industrial Law Journal 192–225.

24 Art 2 AI Act.

ucts available on the market. The EU database for high-risk AI systems will enhance transparency for AI systems used in the EU, as a coherent list does not currently exist.[25] Significant institutional changes will be required, including the creation of market surveillance authorities[26], EU AI Board,[27] EU AI Office,[28] advisory forum,[29] and scientific panels of independent experts.[30] The AI systems list, along with the creation of AI institutions, will help identify suppliers and potentially evaluate the geographical scope of countries most involved with the EU in AI system trade.

This information will be crucial in assessing the EU AI Act's effect on EU AI system partners, comparable to 'the effect of a bouncing ball'. This effect describes the dynamics of a ball thrown downward that impacts and rebounds off a surface. With each subsequent hit, the ball's impact becomes more frequent yet less strong due to decreasing velocity. Similarly, the impact of the AI Act on labour markets and employment outside the EU will be felt by countries with ties to the EU, who will experience the second or third bounce of the ball.

The AI Act might have an indirect impact—a secondary or third bounce of the dropped ball—on the development of prohibited AI system practices. In particular, the AI Act particularly influences global standards for high-risk and prohibited AI systems, enforcing compliance by leveraging the substantial EU market and existing product safety frameworks. Whilst it will have a minimal direct impact on tangible protection for workers, it will provide indirect protection through product safety regulations.

V. Discussion and Conclusion

While the monumental effort that is the AI Act has attempted to get ahead of the dynamic and constantly evolving AI industry, its effect is yet to be fully determined. The AI Act influences global standards for high-risk AI systems, leveraging the substantial size of the EU single market to enforce compliance. The full potency of the AI Act cannot be comprehensively evaluated within this report. Other factors, such as procedural obligations, must be considered to draw further conclusions on the potential effects of the AI Act within the employment context outside the EU. However, it can already be said that the AI Act's provisions are limited in their impact. Given the key risk areas emerging in the global market,[31] the provisions presented in this report are not sufficiently far-reaching to expect the AI Act's impact on external labour markets.

As the text of the AI Act is finalised, employers in the EU who assume any of the roles outlined in the AI Act need to heed compliance with the legislation. The primary aim of the Act is to enhance AI product safety through the imposition of considerable obligations on the intermediaries located within and outside the EU. The effects of the AI Act in protecting labour rights may be limited, potentially creating only the 'bouncing ball effect' in the global market. This effect, whereby the initial impacts are strong but diminish over time and the proximity, suggests that although the Act's influence may resonate globally, it does so with decreasing intensity as it extends beyond the EU's borders.

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25 Annex III AI Act.

26 As per art 3(26) AI Act market surveillance authority 'means the national authority carrying out the activities and taking the measures pursuant to Regulation (EU) 2019/1020' on market surveillance and compliance of products.

27 The Artificial Intelligence Board will be composed of one representative per Member State as per art 65 AI Act.

28 As per art 64 AI Act.

29 As per art 67 AI Act.

30 As per art 68 AI Act.

31 These risk factors include fair profit distribution from AI productivity tools, exploitation in informal markets facilitated by AI exacerbating income inequalities, concerns about data subject rights, the substitution of human skills, and a patchy macro regulatory framework.