



Deepening the ‘Brussels Effect’ to avoid Dystopia: Ethics and the Globalisation of EU Identity and Influence

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Abstract

Two fundamental points are to be noted about the document issued by the Commission on 21 April 2021 (COM (2021) 206 final), *Proposal for a Regulation laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union legislative acts* (European Commission 2021): the first is the stated aim to create a regulatory framework for AI respecting ethics and fundamental rights; the second is the explicit statement of the Commission's desire to apply these principles globally, i.e. to exercise the EU's sovereignty and influence not

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just within the Union itself but throughout the world. One can conclude that the Commission is deeply concerned about the potential for harm embedded in AI and wishes to avoid a disturbingly dystopian future in which EU values, and with them EU identity itself, are significantly threatened by commercial or state-imposed practices principally coming from elsewhere. As the EU document *Ethics Guidelines for Trustworthy AI* notes, “The use of AI systems does not stop at national borders” (High-Level Expert Group, 2019b). However, there are two areas placed outside the proposed regulations: defence and international law enforcement. These exclusions reveal a great deal about the world in which the Commission wishes to exercise its influence.

Background

First, two Canadian voices:

On May 5th 2021, the Centre for International Governance Innovation in Waterloo (Ontario) published a cogently argued paper “American Internet, American Platforms, American Values” (Haggart 2021) urging Canada to create a set of governance values for the internet in order to avoid being swamped by values and practices inherently embedded in the internet practices of its neighbour. These practices and values of American companies, expressing and instrumentalising American identity, inevitably reach deep into other countries, influencing social values and commercial practices. I shall come back to this document later.

On May 22nd 2021, Sue Gardner, former executive director of the Wikimedia Foundation and former head of the internet platform cbc.ca published an opinion piece in the *Globe and Mail* (the English-language newspaper of record in Canada) under the heading “Cracking Down on Big Tech” (Gardner 2021). In it she argues against the business model of “big tech” and adds “perhaps most fundamentally, we need to limit companies’ ability to collect, store and analyze personal information, because that is the root of many of the harms we are seeing.” That is, writing as someone who has worked on the inside of what is now called “Big Tech” she is urging strict oversight and limits on its uses of AI.

These analyses and admonitions were published three or four weeks after the concrete and far-reaching legislative proposals contained in the European Commission’s document *A 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* (European Commission 2021; henceforth, AI Regulation Proposal) which is dated 21 April 2021. It had been carefully prepared over a number of years together with the European Parliament, the European Council, stakeholders and the High-Level Expert Group on Artificial Intelligence. It embodies the ethical principles for AI laid down in this group’s report “Ethics Guidelines for Trustworthy AI” (2019b), particularly respect for human autonomy, harm prevention, respect for privacy, non-discrimination and accountability.

The proposal, which is in fact a draft of binding legislation, has two aims: a) to ensure that the humane values on which the Europe Union is founded are not overwhelmed by internet practices, particularly those relating to AI, and b) to enhance AI development in Europe by preventing fragmentation of efforts. AI is increasingly deeply imbedded in data collection, analysis and use, often in a clandestine manner (see, for example, the references to Clearview in Gould 2021a, or the whole Cambridge Analytica affair), and frequently ignores fundamental questions of consent, privacy, potential for harm, transparency, oversight, protection of the vulnerable, etc. To facilitate compliance, the regulation contains provisions for significant penalties and fines.

This commentary follows two earlier ones in which I discussed the intersection of questions arising from EU identity and its value system on the one hand and the EU's promotion of, and concerns about, Artificial Intelligence on the other. In the first, the discussion centred on the potential difficulties of vigorously promoting the vision of AI faced by the EU in the current financial situation due to the impact of COVID-19 (Gould 2020). The second commentary discussed the Commission's actions in doing this, exerting sovereignty in a situation which the Commission itself called one of "systemic rivalry" (Gould 2021a).

Introduction

This third commentary continues the discussion of EU identity and values within a situation of systemic rivalry. In the section How? it will touch on point b) above, but will principally examine the AI Regulation Proposal from the perspective of point a): the protection of EU values from commercial or state-imposed AI practices coming from elsewhere in the world and the promotion of rules-based and lawful European AI throughout the world. As was outlined in the previous commentaries on earlier documents, the Commission is following the path of asserting its distinct identity by energetically promoting an AI with values different from those of other international actors.

The EU is acting in this way in order to avoid being digitally overwhelmed by commercial and / or state-centred or state-controlled principles and forces. These are manifest in the multiplicity of current and foreseeable visible and covert AI activities and practices. Such activities emanate principally from China or the United States, though neither is mentioned by name in the AI Regulation Proposal. Many of them are in conflict with EU values and legislation (particularly GDPR with its insistence on consent and privacy)² and also with the Commission's legislative proposals.

² As evidenced by the frequently updated entries in the "None of your business" website www.noyb.eu created in connection with the Schrems affair arising from the unapproved export of data to the US.

In the Proposal's own words, the new legislation is to have the following aims:

“The proposal also shapes significantly the Union's role to help shape global norms and standards and promote trustworthy AI that is consistent with Union values and interests. It provides the Union with a powerful basis to engage further with its external partners, including third countries, and at international fora on issues relating to AI” (p. 5).

“A solid regulatory framework for trustworthy AI will also ensure a level playing field and protect all people while strengthening Europe's competitiveness and industrial basis in AI. Only common action at Union level can also protect Europe's sovereignty and leverage its tools and regulatory powers to shape global rules and standards” (p. 6).

The legislation will extend to:

- a) Providers placing on the market or putting into service AI systems in the Union, irrespective of whether those providers are established within the Union or in a third country;
- b) Users of AI systems located within the Union;
- c) Providers and users of AI systems that are located in a third country, where the output produced by the system is used in the Union. (pp. 38-39)

In other words, it is to be, quite literally, global in its scope, and potentially will apply to virtually all internet use by natural and legal persons in the EU – given that AI is increasingly and inevitably present in data collection and analysis processes relating to activities on the web, processes which are daily becoming more extensive. The aim includes doing what Gardner argues needs to be done, limit the activities of businesses to mine, analyse and then sell for shareholders' profit information drawn from people's data and internet use; this is their current business model.

However, it is important to consider also the section Caveat below, which deals with two exclusions referring to certain state activities.

The global scope is the key to the use in this commentary's title of the expression 'Brussels Effect', the phrase coined by Anu Bradford (Bradford 2012) to refer to the world-wide impact of EU regulatory power arising from its global market share. This power was subsequently reinforced by the impact of GDPR, including its influence on data protection legislation in the many countries throughout the world which subsequently aligned their regulations in large measure on those of the EU (Bradford 2020).³ The Commission is wishing to extend and intensify the 'Brussels Effect'.

³ However, it is to be noted that, although influential, the principles of GDPR are not universally accepted and on occasion are even actively resisted (Gould 2020b, and significant material contained on the website noyb.eu). The commentary will have to return to this matter.

The commentary will now proceed in three stages: first Why? Then What? And finally How? These are to be followed by the Caveat.

Why?

The Proposal defines AI systems as software which “can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with” (p. 39). That is, such systems can be given a significant role in business – in its many forms, in public administration, health care, policing, the justice system, education, etc. The Commission was advised also in the report “A Definition of AI: Its main capabilities and disciplines” by its High-Level Expert Group on Artificial Intelligence (2019a) that, as AI systems depend on human inputs both in the form of data and the structuring of the decision process, they have a capacity for error and bias, and also poor decision making (p. 5). Both earlier and subsequent publications make clear this is a widely shared view (See Fry (2018, 2020, 2021); Hagendorff (2021); Ebell et al. (2021); Kliegr et al. (2021), etc.).

The same expert group’s report “Ethics Guidelines for Trustworthy AI” (2019b) makes clear a range of real and potential ethics concerns. The basic position of this ethics guidelines report is, “Like many technologies, AI systems can equally enable and hamper fundamental rights” (p. 15). And just as the Commission’s AI Regulation Proposal is explicit in its desire to exert influence throughout the world, the document on ethics guidelines also aims “to foster research, reflection and discussion on an ethical framework for AI systems at a global level” (p. 3). This is clearly necessary as “the use of AI systems does not stop at national borders, neither does their impact. Global solutions are therefore required for the global opportunities and challenges that AI systems bring forth.” What is necessary is an “international consensus ... promoting and upholding our fundamental rights-based approach” (p. 5). Thus, as expressed in the AI Regulation Proposal, the Commission wishes this global consensus, which it is intending to lead, to reflect EU-European values.

In short, fundamental rights of persons are seriously threatened by AI-based activities everywhere. And these are “our” fundamental rights, i.e. those of the European Union, “enshrined in the EU treaties, the EU Charter, and international human-rights law” (p. 9). Without going into the treaties or international human-rights law the AI Regulation Proposal contains a list of thirteen charter rights in particular need of protection (see below). Such rights for the protections of persons are one of the pillars of the Union. The stakes are very high indeed – both in the sense of what is at stake and also in the sense of effective governance of AI. Brussels cannot be seen NOT to be acting decisively nor can it NOT be seen to be acting decisively.

That there are serious grounds for concern is evident from the recent paper by Hagendorff “The Ethics of AI Ethics: An Evaluation of Guidelines” (2020). On the basis of a survey of 22 of the

major ethics guidelines to which developers are supposed to adhere, he has to conclude that most often they have no impact on human decision-making. Much of the ethics guidelines in commercial enterprises is no more than ethics-washing (my term) “to suggest to legislators that internal self-governance in science and industry is sufficient and to suggest that no specific laws are necessary to mitigate possible technological risks and to eliminate scenarios of abuse.” In the race to develop new programmes, economic incentives are paramount. Consequently, Hagendorff states, “the purposes for which AI systems are developed and applied are not in accordance with societal values or fundamental rights such as beneficence, non-maleficence, justice, and explicability.” With its draft legislation the Commission is proposing curtailing a situation of significant laissez-faire, deception and maleficence.

The extent of what Hagendorff calls “scenarios of abuse”, i.e. real-existing uses of AI resulting in a wide range of discriminations, disinformation, surveillance, ‘social-credit’ systems, etc. is to be found on such sites as <https://www.aiethicist.org/>, www.github.com, or in such popularising but very-well founded works as those of Hannah Fry of University College London (2018, 2020, 2021).

Conscious or unconscious social biases (including those concerning race) and ones relating to gender or gender orientation are present in AI programmes used for social, medical or political analysis. The concerns of the civil-society organisation We and AI arising from the recent British *Race and Ethnic Disparities Report 2021* are significant (We and AI 2021), while in the *British Medical Journal* Leslie and others (2021) ask the very pertinent question “Does AI stand for Augmenting Inequality in the Era of COVID-19 Healthcare?” Among other things, Leslie and colleagues argue that “The use of AI threatens to exacerbate the disparate effect of covid-19 on marginalised, under-represented, and vulnerable groups, particularly black, Asian and other minoritized ethnic people, older populations, and those of lower socio-economic status”. To repeat: the concerns of the Commission are very real and very well founded.

The 2017, 2018 and 2019 reports of the AI Now Institute of New York University corroborate and also add to all the concerns mentioned above, including many arising from the actions of institutions, governments and businesses in the United States (AI Now Institute 2017, 2018, 2019). However, as noted already, many of these have a global impact, including within the EU, and consequently are of real disquiet to the Commission. Or, as Hagendorff, quoting Floridi, puts it, “The AI race stands in stark contrast to the idea of developing an AI4people”.

Clearly, the Commission is facing a very real, world-wide and complex ethical, governance and political problem. What is at stake is not just ethical principles but questions of internal EU values and identity and the political weight and influence necessary in the world in order to assert and protect this identity. In the face of the extensive literature of all types on the present and future impact of AI and of the pressures to override ethical concerns for the sake of commercial success

in a situation of fast-moving and strong competition it is scarcely possible to overstate the justification for the Commission's concern and desire to act. And what is being proposed is, as in the case of GDPR, a binding set of enforcement mechanisms and sanctions with the goal of preserving and propagating European identity as expressed in a set of humane values.

What?

In the face of this, what, implicitly or explicitly, is threatened and is to be asserted, protected, and developed?

The immediate answer is to be found in the fundamental rights guaranteed by the EU Charter of Rights which are, or are likely to be, significantly impacted by AI. As listed in the AI Regulation Proposal, those that are particularly endangered are (p. 11):

- 1) Human dignity (Article 1),
- 2) Respect for private life and protection of personal data (Articles 7 and 8),
- 3) Non-discrimination (Article 21),
- 4) Equality of women and men (Article 23),
- 5) Freedom of expression (Article 11),
- 6) Freedom of assembly (Article 12),
- 7) Effective remedy and fair trial, presumption of innocence and right to defence (Articles 47 and 48), and
- 8) The right to good administration.

Additionally,

- 9) The rights of specific groups, such as workers' rights to fair and just working conditions (Article 31),
- 10) Consumer protection (Article 31),
- 11) Children's rights (Article 24),
- 12) Integration rights of persons with disabilities (Article 26), and
- 13) The right of environmental protection (Article 37).

Any AI system impacting, or potentially impacting, the above is classified as high risk and is made subject to particular oversight and regulation. Systems which would directly negate any such rights are to be prohibited.

It is admitted that protecting these rights will mean some restrictions of the freedom to conduct business (Article 16), including trade: buying, selling, importation, distribution, use of AI programmes (it should be noted that the movement, use etc. of data of EU-based persons and entities is already covered by GDPR); and of art and science (Article 13). These restrictions are

necessary for the sake of what the document calls “responsible innovation”. Different rights have to be balanced against each other and proportionate solutions found. But, clearly, commercial interests are not paramount.

Similarly, given the “power imbalance” between state agencies (e.g. police, border services, etc.) and individuals, it is clear that the proposed legislation would place restrictions on certain internal law-enforcement activities, including, for example, the use of constant facial recognition in public places or on other AI systems relating to the granting of visas, the administration of justice, etc.⁴ Such restrictions would extend also to other administrative procedures, that is, they directly affect both EU institutions and those of member states.

With respect to these rights listed by the Commission in its AI Regulation Proposal it is important to note that it is above all the person who is to be protected, not businesses seeking to extend their reach or maximise their profits; nor is it any state apparatus within the EU wishing to make unrestrained and effective use of its control and power (but see Caveat below). The over-riding focus is the avoidance of harm to individuals and the promotion of their wellbeing. It is this which separates the Commission’s legislative proposal from the fundamental nature of a great deal of US-based thinking on the internet as outlined by Haggart (2021).

The literature quoted above (and there is also much more on the subject) sketches ways in which the fundamental rights cited by the Commission have been or are currently being breached by existing data-gathering and AI practices. This means that particular aspects of EU identity are being overridden or denied, usually for the sake of commercial advantage. One example is the information in the 2017 Report of the AI Now Institute (p. 31) that Facebook had been mining data to reveal teenagers’ emotional state (in order to sell it on to advertisers) and had been deliberately targeting depressed teenagers. In the literature this and other harms are usually expressed in well-founded generalising or aggregated statements or by means of specific but depersonalised examples, all in the neutral language of scholarship and analysis. However, among the online documentation concerning the whole area of AI and its uses that is available on EU websites there is one item which is very different. It forcefully and insightfully presents the capacity for harm of AI-enabled and electronically mediated communication. It indicates also the multiple breaches of personal rights arising from unchecked commercially-oriented analysis of information conveyed by adolescents’ cell phones and by an equally unchecked feed-back to the individual adolescent. The novelette *I let it happen* (Martianova 2021) is a first-person fictional narrative of a sixteen-year-old living in Chicago in 2030/31 who recounts the increasing stresses, anxieties and conflicts in her life. These are significantly exacerbated by the algorithm-created feed-back she constantly receives from her phone, which leads in the end to paranoia and a breakdown. The fictional algorithm was clearly quite unaware of, or uncaring about, the possible, or even foreseeable, consequences of the information, comments and instructions given to the young narrator which

⁴ For some indications of problems in this area, see Fry 2018, chapter “Justice”.

culminate in her detention by the police. The fundamental rights guaranteed by the EU Charter which are breached in the process of these AI-driven electronic communications and analyses are at least the following: the right of human dignity, of private life, of children's rights (although an adolescent, the narrator is still a minor) and consumer protection – in this case from maleficence. In addition, there is arguably a breach of the right of good administration as the legislative or administrative situation in the fictitious Chicago where she lives allowed the defective, and ultimately destructive, AI feedback logarithm to operate, as well as authorising the constant surveillance of public spaces coupled to a personal identification logarithm. Under the legislation proposed in the AI Regulation Proposal, the uses of AI described in the novelette would be significantly restricted and subject to strict oversight. In addition, practices pertaining to manipulation and exploitation of vulnerable groups (including children) are specifically prohibited by the legislation (Title II).

The fictional narrator does not hide her share of responsibility, admitting she could have avoided her problems. The subtitle of the narrative is “I could have changed it every click ago”. She recounts she did not want to be bothered reading the user agreement of her ‘Talkie’ phone companion and advisor. Speaking of her personal information, she demonstrates youthful naivety (shared by very many adults), explaining, “I mean, all companies or owners of the website probably wouldn’t want to do anything with it” (p. 31).

But nevertheless, and although this is fiction and set outside the EU, it is all very credible as a narrative of a dystopian possibility. It is well within the range of the technologies currently available, if perhaps not yet all on the retail market. Read from its complementary perspective and in conjunction with the scholarly expressions of concern around AI, or the arguments and the proposed administrative and legal sanctions contained in the AI Regulation Proposal, it is indicative of the EU’s conviction of the urgent necessity of protecting persons and their rights from breaches brought about by unchecked uses of AI in commerce or public administration.

How?

The principal focus of this commentary on the AI Proposal is the propagation and protection of EU values and identity as relating to the rapidly expanding field of AI, whether within Europe or globally. Nevertheless, given the fact that the document is in fact draft legislation, it is appropriate to sketch briefly how it proposes achieving this important end.

Firstly, by promoting and enabling an EU-wide approach to the development of AI systems it obviates the creation of possibly contradictory national legislations which, if left untouched, could impede the development of an EU-wide AI industry which would also provide *de facto* guidance and influence beyond the Union. Secondly, the proposal does not intend to regulate all AI activities, only those considered containing a high risk of violation of fundamental rights; this is

to be complemented by a code of conduct for activities judged not to be high risk. However, AI activities deemed to be in direct contravention of fundamental values are prohibited. Thirdly, this proportionality will reduce the compliance costs (in terms of both time and money) for research, business and public administrations. Together, these measures are to promote public trust, implementation and above all increased “digital autonomy”, i.e. autonomy from foreign-based systems and their indirect and direct pressures in a world defined as being in a state of systemic rivalry.

Respecting the notion of subsidiarity, the administrative mechanisms to achieve the above ends are at the level of both the Commission and the Member States. There is to be a European Artificial Intelligence Board to assist the Commission in its responsibilities; it will do the same with regard to the Supervisory Authority which each Member State is to set up, and will ensure co-ordination across the Union.

In the event of infringements, provision is made for the various authorities to impose proportionate sanctions. In egregious cases administrative fines can be levied up to EUR 30,000,000 (thirty million Euros) or up to 6% of the offending company’s total worldwide turnover, whichever is higher (Article 71).

Caveat

Despite the importance of protecting values and individual rights as outlined above, there are two significant areas explicitly placed outside the scope of the proposed legislation: AI systems developed or used exclusively for military purposes (Article 2.3), and AI systems employed in third countries within the framework of international agreements for law enforcement and judicial cooperation with the Union or with one or more member states (Article 2.4). Most EU member states are also members of NATO and dependent on the protection which it affords. And NATO is dominated by the United States. One must conclude that the Commission is aware that to insist on the application of the proposed Artificial Intelligence Act to such dealings with foreign powers in fact would mean the curtailment of cooperation considered essential for European security and EU / member-state participation in international law enforcement. *Idealpolitik* has had to yield to *Realpolitik*. In other words, European values and identity as a whole are to be protected by breaching those same values and by overriding such considerations in the use of AI in the designated areas. The fundamental rights of some individuals have to give way in order to promote the common good. The reader is left with a palpable sense of the irony of the situation. But at the same time, it illustrates the difficulty of the task which the EU has set itself: to create, promote and preserve some decency in a fundamentally ruthless world with few ethical considerations.

Conclusion

The fundamental point of Haggart's paper (2021) is that 'global' internet businesses and their platforms are American companies, with everything that that implies for their views of the world, of society and its values, of state values and practices, and of commercial values and practices. They are vehicles which assert power and convey American values across the whole world. On the other hand, this commentary is showing how the European Union is now energetically creating a regulatory and governance framework to protect directly, i.e. by its own actions, its values and identity from the 'global' but in fact 'American' value system broadly exercised by internet platforms.⁵ It is at the beginning of a process of taking back at least some of the power that Rone (2021), writing about the problem of disinformation on the net, describes as having been abandoned. The proposed legislation will be complementary to other legislation, including GDPR with its wide impact outside the US and even, although modestly, within that country. The final version of the legislation will have to be approved by the Commission, and the Council, passed by the European Parliament and will be enforced by the European Data Protection Supervisor, the member states' data protection authorities (subject in part to the member state's legislation), and to the courts of the member states. The European Union is proceeding from a basis of democratic legitimacy anchored in the weight of its economic and political community of approximately 450 million people.

How much the EU will be able effectively to assert its influence globally will be the important question, once the legislation is passed and then goes into force. But there is already a 'Brussels effect' that this legislation can build on. On the other hand, one thing is quite clear, the sphere of effective action by individual states, whether EU member states, or Canada, for example, is very limited. They do not have sufficient weight and influence to be able to exert their authority strongly in the situation which has evolved, largely unchecked (except perhaps by GDPR), over the past twenty-five years whereby large "global" platforms have achieved a quasi-hegemony over values and de facto are pushing users in the direction of their practices which consequently become normalised. Individual states outside the EU will have the choice of doing what little they can separately, or, in order to protect their citizens, of passing legislation to graft themselves as much as is possible on to what will be the new European Union protections, replicating also its enforcement mechanisms with their significant penalties and sanctions.

Keywords: Brussels Effect; AI, Ethics, EU Identity, Harm prevention, Dystopia avoidance.

⁵ The other increasingly global, but in reality, national force is China. The EU is equally aware of this and has warned internet users accordingly (see Gould 2021a).

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