Consumer Protection Safeguards after the AI Act

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Abstract

The long-awaited introduction of the AI Act, notwithstanding its originality, does not introduce any regulation outside the existing framework. It supplements the safeguards provided in numerous sectors of the EU legislation, inter alia, consumer protection. An examination of the basic EU law along with national legislation of the most influential legal orders, i.e. the French and German one, and model rules of the Draft Common Frame of Reference (DCFR) confirms that the new AI Act sheds light on pre-existing vague legal concepts. In this respect, this novel piece of legislation promotes a better understanding of traditional notions of law applicable to the modern digital reality without introducing totally new rules. Accordingly, certainty of law is reinforced where consumer protection had languished, not because of legislative shortage, but for facts and situations described as necessary conditions of certain rights were contested on the basis of contrary possible interpretations of decisive terms. Ultimately, the very importance of the AI act regarding consumer protection lies not in the introduction of new rights and obligations, but in a multiple practical assistance to the implementation of existing rules adjusting thus the traditional legal concepts with technological development beyond their original scope.

Keywords: *AI Act, AI Convention, consumer protection, comparative law, contractual fairness, data protection, Draft Common Frame of Reference, EU law, good faith, information accuracy, product safety.*

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1. Introduction

1.1. AI as the subject of regulation

An original and innovative initiative can be approached in one of two ways. One possible approach is to prohibit the phenomenon in question from occurring due to a fear of the unknown. Such a treatment is, in the first instance, ineffective, as the threat of sanctions and the potential use of law enforcement in this direction will have little impact if the initiative corresponds to the fulfilment of a certain need and does not conflict with any contrary culture.

The alternative approach is one of controlled permission[3]. Such acceptance, on the one hand, presents few or no obstacles to innovation, while, on the other hand, allows for a significant degree of control in order to prevent abusive or unfair activities. The treatment of the use of artificial intelligence (AI) is similarly subject to this distinction.

1.2. The AI Act and relevant legislative developments

1.2.1. The AI Act

After years of deliberation and compromise[4], the European Parliament made the first move

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[3] John Frank Weaver, 'Regulation of artificial intelligence in the United States,' in *Research Handbook on the Law of Artificial Intelligence*, eds. Woodrow Barfield and Ugo Pagallo (Cheltenham: Elgar, 2018), 155-56.
[4] See documents of the Council of the European Union ST 7536 2024 INIT (Brussels, 18 March 2024), p. 1, 2.

by adopting the 'legislative resolution of 13 March 2024 on the proposal for a regulation of the European Parliament and of the Council on laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts (COM – 2021 – 0206 – C9-0146/2021 – 2021/0106 – COD)'. The document will become the Artificial Intelligence Act (AI Act) and may be identified until its publication in the Official Journal of the European Union under the number P9_TA (2024)0138. Following this, the process of evolution proceeded rapidly and in a chained manner.

Given that the position of the European Parliament was the result of a preceding deliberation with the Council of the European Union and the Committee, the Council approved the resolution without any disagreement. It could be argued that there was still a margin of appreciation by the Council of the European Union and referral back to the European Parliament, according to article 294 (5) TFEU. This was unlikely, as the Council of the European Union would be in contradiction with itself were it to reject the approved text. At this time, the approved text, which was sent on 14 May 2024 as document PE-CONS 24/24, is pending publication in the Official Journal of the European Union. This final version of the AI Act is cited as hereinafter. Nevertheless, the AI Act is no longer the only binding text regarding artificial intelligence.

1.2.2. The AI Convention

Despite receiving minimal attention, the Council of Europe drafted a Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law. This was subsequently adopted as text in the 133rd Session of the Committee of Ministers (Strasbourg, 17 May 2024; CM – 2024 – 52 final; hereinafter AI Convention). The future multilateral AI Convention is of greater significance than the AI Act in terms of the countries that are bound by it.

Although not yet open for signature, the Convention is addressed to a wider circle of countries than those participating in the Council of Europe. This is explicitly stipulated in Article 30(1). It is notable that powerful economies, including the United States of America, Japan, Australia, and Canada, participated as observers in the preparatory works[5]. This capacity allows them to sign the AI Convention. Furthermore, the AI Convention devotes a whole article to the federal states of loose central government (art. 33), which includes the United States of America. These observations lead to the reasonable conclusion that the AI Convention editors directed it to countries far outside the borders of Europe.

1.3. Expectations and results of the regulatory framework

It was reasonable to expect that the AI Act would provide for specific rights of consumers and obligations of providers[6], given that the economic exploitation of artificial intelligence is at the core of its usefulness. However, in a milieu of opposing views and conflicting interests, it was not anticipated that a clear and unambiguous introduction of new rights to the advancement of consumer protection[7] would be forthcoming. While acknowledging the necessity for a later framework, the European legislator is currently focusing on a comprehensive regulatory framework for the circulation of AI products and applications within the EU, as far as the activity of their providers or manufacturers is concerned[8].

In contrast to the AI Act, the AI Convention is more indefinite. The latter is limited to the introduction of guarantees that must be undertaken by the contracting parties. The guarantees comprise two levels. At the first, general level, the AI Convention reiterates the protection of human

[5] Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law: Explanatory Report (CM – 2024 – 52-add-final), § 3.
[6] Ugo Pagallo, 'Dismantling Four Myths in AI & E.U. Law Through Legal Information "About" Reality,' in *Multidisciplinary Perspectives on Artificial Intelligence and the Law,* eds. Henrique Sousa Antunes et al. (Cham: Springer, 2024), 253-54.
[7] Cf. AI Convention, arts. 4–22.
[8] See AI Act, arts. 1(2)(c), (e) & (f) and 2(1).

rights already guaranteed by the participating country (art. 4) and ensures the respect for democratic institutions and judicial integrity. In the second, specific level, the international lawgiver introduces certain guidelines for the regulation of artificial intelligence (art. 6), including respect for human dignity and individual autonomy (art. 7), equality and non-discrimination (art. 10), privacy and personal data (art. 11). In the same level, the participating countries are instructed to ensure particular quality characteristics in both their regulatory framework of artificial intelligence and in the systems affected. These include transparency and all-embracing supervision of the systems affected (art. 8), reliability (art. 12) and safety (art. 13). Furthermore, there must be persons accountable for their operation (art. 9).

Compared to the AI Act, the AI Convention is more abstract and brief. However, it devotes more provisions to the general principles common to both instruments. In other words, the AI Convention is more concerned with the 'what', while the AI Act focuses more on the 'how'. Despite the different view of the subject of regulation, the AI Convention, in its generality, offers the minimum standard below which regulation cannot go (cf. Art. 27 – 1) and thus provides a valuable aid to the interpretation of the AI Act.

The narrow scope of the AI Act may give the impression that it does not contribute significantly to consumer protection[9]. This misconception stems from the belief that the regulation of artificial intelligence only affects a limited sector of the economy that does not interact with other sectors. However, a closer look at the concept of AI reveals that it is involved in virtually every aspect of the modern economy[10]. In this sense, the AI Act does not ignore consumer protection (recitals 9 and 45). However, it remains to be seen whether the AI Act will have a particular impact on existing regulation[11].

An overview of the basic derived EU legislation, together with the provisions of the most representative legal systems of the European Union, such as French and German, as well as the model rules of the Draft Common Frame of Reference (DCFR), leads to the conclusion that existing consumer protection safeguards will be strengthened under the AI Act. The question is which consumer protection safeguards are most affected and how this is done.

2. Existing consumer protection safeguards affected by the AI Act

2.1. Preliminary remarks

Upon initial examination, it becomes evident that the existing consumer safeguards bear no resemblance to the recently introduced AI Act, as they do not directly address the technological factor[12]. Upon closer examination, it becomes evident that the existing legislation is undergoing a subtle amendment due to the influence of artificial intelligence. This intervention in the existing legislative framework is explicitly indicated in the AI Act, which refers to data protection (recital 9 – 2 – and art. 2 – 7), product safety (recitals 9 – 2 – and – 3 and art. 2 – 9), information accuracy (recital 48 – 1)[13], and contractual fairness (recital 74 – 3).

The aforementioned safeguards can be found in both EU law and in the national laws of major legal systems, such as France and Germany. They can also be found at the transnational level, such as the Draft Common Frame of Reference[14], which is a restatement of the principles of civil law accepted throughout the European Union[15]. The disparate origins of the rules in question do not

[9] Cf. Ana Teresa Freitas, 'Data-Driven Approaches in Healthcare: Challenges and Emerging Trends,' in *Multidisciplinary Perspectives*, *op. cit.*, 74.
[10] See AI Act, recitals 16(3) and 29(9).
[11] Cf. AI Act, recital 133 (2), 142 (2), and art. 2(9).
[12] Alexander J. Wulf, *Institutional Competition between Optional Codes in European Contract Law: A Theoretical and Empirical Analysis* (Wiesbaden: Springer, 2014), 87–88.
[13] Cf. AI Act, recitals 16(3), 29(8) & 133 (1).
[14] For the text of which see Christian von Bar, Eric Clive, and Hans Schulte-Nölke, eds., *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR). Outline Edition* (Munich: Selier, 2009).
[15] Cf. von Bar, Clive, and Schulte-Nölke, *DCFR*, 6.

preclude their clear classification according to subject matter. With regard to this matter, the specific safeguards can be divided into those concerning data protection, product safety, accuracy of information and contractual fairness. The distinction is somewhat schematic, since the scope of application of any derivative European legislation cannot be limited to a single purpose.

2.2. Specific safeguards

2.2.1. Data protection

The protection of data has been a significant concern in Europe. The initial focus was on the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 108), which was followed by the development of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[16]. Although data protection does not concern only consumers, it is evident that professionals are less vulnerable to data infringements than consumers[17]. Consequently, data protection is primarily a consumer issue.

The current data protection framework comprises three categories of data, each of which is subject to a distinct regulatory framework.

- The first category is personal data, which is governed by Regulation 2016/679/EU of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)[18].

- Non-personal data is subject to the provisions of Regulation 2023/2854/EU of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (Data Act)[19].

- Personal data gathered in the course of the provision of digital content is subject to the provisions of Directive 2019/770/EU of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services and national implementation acts[20].

A comparison of the existing framework with the original one reveals that the protection originally offered was based on a categorisation between personal data (Reg. 2016/679/EU, art. 4 – 1 – [21]; Dir. 2019/770/EU, arts. 2 – 8 – & 3 – 1 – 2[22]) and non-personal data, with the latter category receiving minimal attention. In its current form, data protection has deviated from the former commitment to the exclusive protection of personal data. Although the distinction between personal and non-personal data remains, non-personal data is now protected[23] as data alongside personal data (Regulation 2023/2854/EU, Article 1 – 2)[24].

From the outset, data protection legislation incorporated a technological factor known as automatic processing. This technological factor has been consistently preserved in legislation since its inception. The concept of automatic processing is defined in part by its effects, that is, by the modification of the status of the data – including archiving, eliminating, interconnecting or modifying (Reg. 2016/679/EU, art. 4 – 2; Reg. 2023/2854/EU, art. 2 – 7 ; Dir. 2019/770/EU; recitals 19 – 1 – & 37) – and in part by its means, which necessitates technical means, although not

[16] OJ L 281, 23.11.1995, p. 31.
[17] Eduardo Magrani and Paula Guedes Fernandes da Silva. 'The Ethical and Legal Challenges of Recommender Systems Driven by Artificial Intelligence,' in *Multidisciplinary Perspectives, op. cit*., 154.
[18] OJ L 119, 4.5.2016, p. 1.
[19] OJ L 2023/2854, 22.12.2023.
[20] OJ L 136, 22.5.2019, p. 1.
[21] Jochen Schneider, 'Datenschutz und IT-Management', chap. A in *Handbuch EDV-Recht*, ed. Jochen Schneider, 5th ed. (Cologne: Otto Scmhidt, 2017), No. 501. Ana Teresa Freitas, 'Data-Driven Approaches,' 73.
[22] Martim Farinha, "Modifications on the digital content or digital service by the trader in the Directive (EU) 2019/770", *Revista Electrónica de Direito* 25, no. 2 (June 2021): 89.
[23] Mindy Nunez Duffourc and Dominick S. Giovanniello, 'The Autonomous AI Physician: Medical Ethics and Legal Liability,' in *Multidisciplinary Perspectives, op. cit.,* 212.
[24] Nadezhda Purtova and Diletta Huyskes, 'General Principles of Code', *Technology and Regulation* 6 (2024): 132.

confined to computers[25]. Indeed, the means of automatic processing can be implemented in a variety of ways, certainly covering them and machines of equal results[26]. The legislation does not define the specific function of the means of automatic processing, nor does it address the sophistication of these means or the extent to which their operation requires human involvement. This ambiguity is not a lacuna; it is deliberately elaborated in order to prevent any escape clauses for the legislative framework from interfering. This is merely one aspect of the matter.

The other side of the coin is that any regulatory demand that introduces safeguards against the particular function of the means of automatic processing necessarily reflects on the protection of personal data[27]. In other words, the enactment of legislation that affects this technological process necessarily affects the application of data protection legislation[28].

2.2.2. Product safety

The safety of products is regulated by Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products[29], as well as by national implementation acts. These regulations pertain directly to consumers, but not to modern technological goods[30]. The scope of application is somewhat more limited, focusing on the traditional category of moveable objects[31] as understood in Roman law. It is unsurprising that the inclusion of water, gas, heat and electricity supply were equated only after the amendment of the Directive in 1999. The Directive's purpose is typical of societies before the advent of computer technology: to ensure the safety and health of consumers[32].

In the past, a safe device was one that functioned properly due to the proper functioning of its mechanical parts. However, this is no longer the case. It is evident that devices possess mechanical components, the functionality and integrity of which directly impact the health and safety of the user. However, these devices increasingly incorporate computer technology and rely on artificial intelligence[33]. Examples of devices that rely on artificial intelligence in our daily lives include televisions that adjust their brightness to the ambient light in the room, automated vehicles that use sensors and cameras to navigate autonomously[34] or notify the driver of potential dangers, dolls interacting with their users[35], and alarm clocks that automatically adjust to daylight saving time and display local weather information.

Similarly, product safety is directed towards the achievement of a certain result, or indeed a certain status, regardless of the medium of achievement and even the very nature of the product. Consequently, the regulation of artificial intelligence has an impact on the operation of a certain

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[25] Cf. Reg. 2023/2854/EU, arts. 2(8) & (39); Dir. 2019/770/EU, recital 37(2).
[26] Cf. Reg. 2016/679/EU, arts. 21(5), 22(1), 35(3)(a), 47(2)(e); Reg. 2023/2854/EU, arts. 33(1)(c) & (d); Dir. 2019/770/EU, recitals 48 in f., 57 in f. & 60(2).
[27] Freitas, "Data-Driven Approaches," 71.
[28] Fumio Shimpo. 'The principal Japanese AI and robot strategy toward establishing basic principles,' in *Research Handbook on the Law of Artificial Intelligence*, *op. cit.*, 137-38; M. Patrão Neves and A. Betâmio de Almeida, 'Before and Beyond Artificial Intelligence: Opportunities and Challenges,' in *Multidisciplinary Perspectives*, *op. cit.*, 122; Magrani and Fernandes da Silva. 'Ethical and Legal Challenges,' 151; Rafaella Nogaroli and José Luiz de Moura Faleiros Júnior. 'Ethical Challenges of Artificial Intelligence in Medicine and the Triple Semantic Dimensions of Algorithmic Opacity with Its Repercussions to Patient Consent and Medical Liability,' in *Multidisciplinary Perspectives*, 232.
[29] OJ L 210, 7.8.1985, p. 29.
[30] William T. Vukowich, *Consumer protection in the 21st century: a global perspective* (Ardsley, NY: Transnational Publishers, 2002), 374.
[31] Ana Taveira da Fonseca, Elsa Vaz de Sequeira, and Luís Barreto Xavier, 'Liability for AI Driven Systems,' in *Multidisciplinary Perspectives*, 307.
[32] Gian Antonio Benacchio and Barbara Pasa, *A Common Law for Europe*, trans. Lesley Orme (Budapest: Central European University Press, 2005), 70.
[33] Ming-Yu Bob Kao, 'Product Liability and AI,' in *Encyclopedia of Artificial Intelligence: The Past, Present, and Future of AI*, eds. Philip L. Frana and Michael J. Klein (Santa Barbara: ABC Clio, 2021), 274-75.
[34] Ikechukwu Ugwu, Anna Stephanie Elizabeth Orchard, and Argyro Karanasiou, 'Driverless Vehicles and Liability,' in *Encyclopedia of Artificial Intelligence*, 131.
[35] Alessandro Mantelero, *Beyond Data: Human Rights, Ethical and Social Impact Assessment in AI* (Berlin: Springer, 2022), 61.

product and, accordingly, on the health and safety standards with which a machine must comply[36].

2.2.3. Accuracy of information

Certainly, before the conclusion of the contract and in lots of cases after it, the supplier of goods or services must provide his customer with a series of information. Although the conclusion of contract is not something particular to consumers, they are the weakest party, therefore guarantees concerning the conclusion of contract address primarily to them.

The regulatory framework that guarantees contract information accuracy comprises two directives and their respective implementation acts:

- The one, more recent, refers to an off-premise contract in general[37] and is regulated by Directive 2011/83/EU of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council[38].

- The other, older, refers to e-commerce and is regulated by Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')[39].

From this information some is more abstract regarding the identity and residence of the seller or supplier or his field and some other more specific regarding the particularities of the contract to be concluded[40] (Dir. 2000/31/EC, arts. 5 & 6; Dir. 2011/83/EU, 5 & 6 – 1 – & – 2)[41]. In the modern era of automation, where a significant number of contracts is concluded online, a large part of the necessary information is provided automatically.

To the extent that the form defines the content as a dynamic agent and not a static carrier, the form of communication of information also defines its content. Again the factor of automation, despite the fact that it is not disregarded[42], it is not specially regulated. In this case, all these provisions regarding the particular characteristics of the information provided depend highly on the mechanism that supplies them. So, every new essential precondition regarding the employment of artificial intelligence impacts on the amount and quality of the information provided with the use of it.

2.2.4. Contractual fairness

Two major concepts underlie every significant popular movement since the French Revolution of 1789: liberty and equality. Although they are expressed in different words, in fact, they form together a single, more general idea: the demand of every citizen to act without any limitation from an illegitimate power[43] and pursue his own interest without harming or being

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[36] Isabelle Wildhaber. 'Artificial intelligence and robotics, the workplace, and workplace-related law,' in *Research Handbook on the Law of Artificial Intelligence*, 591. Da Fonseca et al., « Liability for AI Driven Systems, » 307.

[37] Gina Orga-Dumitriu, 'Reception of Contract Group Theory in European Contract Law,' *International Investment Law Journal* 2, no. 1 (February 2022): 65.

[38] OJ L 304, 22.11.2011, p. 64. 16.

[39] OJ L 178, 17.7.2000, p. 1.

[40] Peter Kindler, 'The Law Applicable to Consumer Contracts in the Digital Single Market,' in *European Contract Law and The Digital Single Market: The Implications of the Digital Revolution*, ed. Alberto de Franceschi (Cambridge: Intersentia 2016), 180; Alina Popescu, 'Particularities of the consumers' right to information in electronic commerce,' *Juridical Tribune – Tribuna Juridica* 8, no. 2 (June 2018): 481-82. Bert Keirsbilck and Sandra Rousseau, 'The Marketing Stage: Fostering Sustainable Consumption Choices in a "Circular" and "Functional" Economy,' in *Consumer Protection in a Circular Economy*, eds. Bert Keirsbilck and Evelyne Terryn (Cambridge: Intersentia 2019), 103.

[41] In French and German legislation, see Law n° 2004-575 of 21 June 2004 regarding confidence in the digital economy [*loi pour la confiance dans l'économie numérique*], art. 6(I)(1), (2), (5) & (7), art. 6(II) – (IV); German Civil Code [*Bürgerliches Gesetzbuch, BGB*], § 312a(2).

[42] See Dir. 2000/31/EC, art. 12 (2); Dir. 2011/83/EU, art. 3(3)(l). Nuno Ferreira, *Fundamental Rights and Private Law in Europe: The case of tort law and children* (London: Routledge, 2011), 24.

[43] John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, 2nd. ed. (Stanford: Stamford University Press, 1985), 17.

harmed unacceptably[44]. This conception is expressed in private law through the notion of fairness[45]. The parties are free to conclude any contract they choose, provided they act out of free will and do not violate public policy[46]. Contractual fairness is an abstract guarantee, but as with any other guarantee relating to the conclusion of a contract, it primarily concerns consumers[47].

The concept of free will does not imply isolation or a lack of incentives or other people's initiatives. However, a mere expression of will does not guarantee that it is a product of free choice. The area of gray between freedom and illegality is that of misrepresentation during the conclusion of the contract[48].

The legislative framework on contractual fairness is the most complex, encompassing:

- A soft, contract law restatement in the form of the DCFR.

- Two directives and respective national implementation acts on contracts. As in the previous examples, the one directive is more general in nature and pertains to fixed terms in consumer contracts. This directive is Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts[49]. The other directive introduces a revision of the consumer and non-consumer sales law. It concerns Directive 2019/771 of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC[50].

- A regulation that concerns digital services, namely Regulation 2022/2065/EU on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act)[51].

The knowledge necessary for the conclusion of a contract on behalf of the consumer is obstructed not only when a future party is given false or inaccurate information[52], but also when the conclusion of the contract is presented in such a way that the consumer is discouraged[53] from seeking further information. In this stage, the legislator must ensure that the parties, especially the financially weaker ones[54], enjoy the opportunity to have full and accurate knowledge of the responsibilities that they are going to undertake with the contract[55] (DCFR, arts. II. – 3:101 & II.– 3:301; Dir. 93/13/EEC, art. 5; Dir. 2019/771, art. 6; Reg. 2022/2065/EU, art. 14 – 1)[56].

In the modern era of automated or online contract conclusion, the safeguards deal largely with the operation of automated systems[57]. Consequently, when the operation of such a system is particularly regulated, this legislative intervention affects the interpretation of existing safeguards regarding the conclusion of a contract[58].

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[44] Cf. Christian von Bar and Ulrich Drobnig, *The Interaction of Contract Law and Tort and Property Law in Europe: A Comparative Study* (Munich: Selier, 2004), 224. 2. Maria Magdalena Bârsan and Maria Magdalena Cardiș, 'Theoretical and practical considerations regarding the right of retention,' *Juridical Tribune – Tribuna Juridica* 7, no. 1 (June 2017): 83.

[45] Marţian Iovan, 'Values and ethical principles for practicing as a magistrate/legal advisor out of the perspective of the codes and national and international statements of principles,' *Juridical Tribune – Tribuna Juridica* 6, special issue (October 2016): 129. Simon Whittaker, 'Contracts, Contract Law and Contractual Principle,' in *The Code Napoléon Rewritten: French Contract Law after the 2016 Reforms*, eds. John Cartwright and Simon Whittaker (Oxford: Hart, 2017), 33.

[46] DCFR, art. II. –1:102 (1). Cf. von Bar and Drobnig, *Interaction*, 200.

[47] Cf. § 2.2.3 above.

[48] Fumio Shimpo. 'The Japanese AI strategy,' 139-40.

[49] OJ L 95, 21.4.1993, p. 29.

[50]OJ L 136, 22.5.2019, p. 28.

[51] OJ L 277, 27.10.2022, p. 1.

[52] Cf. von Bar and Drobnig, *Interaction*, 246.

[53] Sunimal Mendis, 'Copyright Enforcement on Social Media Platforms: Implications for Freedom of Expression in the Digital Public Sphere,' in *Introduction to Digital Humanism: A Textbook*, eds. Hannes Werthner et al. (Cham: Springer, 2024), 467.

[54] Stacy-Ann Elvy, 'The artificially intelligent Internet of Things and Article 2 of the Uniform Commercial Code,' in *Research Handbook on the Law of Artificial Intelligence*, 566.

[55] Thomas Pfeiffer and Martin Ebers, 'Article 2:101: Good faith,' in *Principles of the Existing EC Contract Law (Acquis Principles): Contract II*, ed. Research Group on the Existing EC Private Law (Acquis Group) (Munich: Sellier, 2009), 101.

[56] In French and German legislation, see French Consumer Code [*Code de la Consommation*], arts. L111-1 and L111-6; BGB, §§ 307 (1) & 327 (1).

[57] Stacy-Ann Elvy, 'Internet of Things', 570.

[58] Woodrow Barfield, 'Towards a law of artificial intelligence,' in *Research Handbook on the Law of Artificial Intelligence*, 27.

3. The impact of the AI Act on existing consumer protection safeguards

3.1. Preliminary remarks

As previously outlined, the AI Act appears to impact existing consumer safeguards that are not directly related to its regulatory objective. It is evident that there is not a singular form of influence; rather, the implications may vary according to the relationship between artificial intelligence and the subject matter of the specific safeguards.

The objective of the AI Act is to safeguard against the misuse and abuse of artificial intelligence (AI Act, art. 1 – 1) The manner in which such an application is wrongfully applied acquires meaning from the objectives that it serves. In general, the AI Act is engaged in one of the following ways: as a hindrance to abusive precontractual behaviour, as a definition of the object of the contract, as a clarification of the provider's obligations, and as a preservation of the contractual equilibrium.

Given that an artificial intelligence application or system is as dangerous as its capacity, the AI Act (art. 3 – 1 – & – 13) prohibits or controls it for the prevention of a potentially wrongful result. The prohibition or control of an AI application or system for the prevention of a potentially wrongful result shifts the focus from the result to the effort. Consequently, rather than being required to demonstrate the existence of a wrongful consequence, the AI Act moves the burden of proof from the consequence itself to the capacity of the AI Act to cause harm. Since it is more difficult to prove the extent of the harm than the harmful capacity, which is inherent and objective, the practical consequence is an assumption of harm that substitutes for the actual harm.

The AI Act and the specific consumer protection guarantees have the same objective[59]. The introduction of the AI Act has led to a multiplication of legal recourse and a confluence of claims[60]. Since both the AI Act and the specific consumer protection safeguards are founded on the same facts and are directed towards the same objective, one can invoke the one in order to use the other. It is therefore beneficial to invoke the AI Act provisions, which have fewer prerequisites, in order to implement the particular consumer protection guarantees.

Despite the fact that the AI Act affects specific fields of activity and, consequently, of legislation, the impact in each one is not uniform, since the particular forms of impact vary within the same field. This differentiated influence lies in the particular scope of application of each legislative piece affected.

3.2. Specific forms of impact

3.2.1. Prevention of abusive precontractual conduct

It is of the utmost importance that precontractual information, including the circumstances and terms of the contract, is made available to the parties involved in order to ensure the validity of the contract, which is defined as one made out of free will, full and accurate knowledge. The AI Act prohibits the utilisation of artificial intelligence systems with the intention of misleading the users to whom they are addressed (art. 5 – 1 – a).

The utilisation of Artificial Intelligence Systems in the production of precontractual information that is misleading in nature contravenes the obligation to provide comprehensible and accurate notice, as set out in the DCFR (art. II.–3:101) and more specifically in the field of fixed contract terms (Dir. 93/13/EEC, art. 5), electronic commerce (Dir. 2000/31, art. 6) and digital services (Reg. 2022/2065/EU, art. 14 – 1). From this perspective, the utilisation of artificial intelligence systems in the aforementioned manner constitutes a contravention of the legal obligation to provide precontractual information.

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[59] Cf. AI Act, art. 2(7).

[60] Magrani and Fernandes da Silva. 'Ethical and Legal Challenges,' 160. Duffourc and Giovanniello, 'The Autonomous AI Physician,' 220. Cf. von Bar and Drobnig, *Interaction*, 196.

3.2.2. Definition of the subject matter of the contract

The integration of artificial intelligence (AI) into modern technological goods is not merely a peripheral phenomenon; it is an intrinsic component of these products. The AI act prohibits the use of AI systems that, through their intended operation, elicit specific sentiments in educational and working environments (art. 5 – 1 – f).

The emotions described in the AI act are not limited to negative ones, such as fear, anger or hatred. They also include phenomenally positive ones, such as friendliness, affinity or sympathy. This is because the letter of the provision makes no distinction. It is not the emotion per se that renders these artificial intelligence systems illegal. Otherwise, it would be a form of shifting responsibility from the one that expresses the sentiments to the one who gives the pretext of their manifestation. The legislator disapproves of the manifestation of sentiments in question because it is produced in an unreasonable manner. In other words, it is the system that manipulates its users, leading them to emotional expressions that they would not otherwise show.

This deliberate and unjustified induction of sentiments contravenes the demand for a safe product or safe object of sales, since these do not correspond to the usual qualities of the thing agreed to be sold (Dir. 85/374/EEC, art 6 – 1 – b; Dir 2019/771/EU, art. 7 – 1 – a). Consequently, when artificial intelligence becomes the subject of regulation, the latter defines an integral part of the goods in question. In this way, the AI Act regulates the object of the contract, although not in an overt manner.

3.2.3. Clarification of the supplier's obligations

One of the ways in which the AI Act affects the application of existing legislation is by clarifying further the obligations of providers. The most illustrative and practical example of such obligations is the processing of consumer data.

Irrespective of whether automation refers to data processing or to the core of the creditor's activity, any legislation regulating this automated process directly affects the subject matter of the contract and, inter alia, the application of data protection legislation in the direction of a precise delimitation of the provider's obligations[61]. Exploitation of the weak position of a contracting party to its detriment is expressly prohibited by the AI Act (Art. 5 – 1 – b). Thus, such exploitation in the context of the contract bond is contrary to the creditor's obligation to respect the consumer's fundamental rights and renders the processing unlawful.

Data processing as described above is contrary to the element of freedom from consent (Reg. 2016/679/EU, art. 1 – 1 – a)[62] and the protection of the contractual performance (Reg. 2016/679/EU, art. 1 – 1 – a), so that it is carried out unlawfully. The same breach also relates to the fundamental requirement of security of the collection of non-personal data (Reg. 2023/2854/EU, art. 3 – 1), conformity with national standards, objective functionality and security of digital services (Dir. 2019/770/EU, art. 8 – 1 – a & b).

3.2.4. Maintaining the contractual balance

If freedom and equality are among the core values of a liberal system of private law in a modern democratic society, this is not due to any unjustified fixation, but rather to the achievement of a certain contractual equilibrium[63]. It is freedom of choice that underpins the equal treatment of parties to a contract, and if that freedom is disturbed, then there can be no equal treatment.

The AI Act explicitly prohibits any artificial intelligence system that analyses and exploits

[61] Freitas, 'Data-Driven Approaches,' 74. Magrani and Fernandes da Silva. 'Ethical and Legal Challenges,' 152.
[62] Magrani and Fernandes da Silva. 'Ethical and Legal Challenges,' 144.
[63] Ádám Fuglinszky, 'Some Structural Questions on the Relationship Between Contractual and Extracontractual Liability in the New Hungarian Civil Code,' in *New Civil Codes in Hungary and Romania*, eds. Attila Menyhárd and Emőd Veress (Cham: Springer, 2017), 114.

personal characteristics in order to steer them towards a particular transactional choice against their legitimate interests (art. 5 – 1 – b). The operation of such a system violates the generally accepted principle of good faith in negotiations (DCFR, art. II.-3:301 – 1 & 2)[64] and the non-dissemination of illegal content (AI Act, art. 6 – 1– a). By prohibiting all activities, in particular those of the provider, which is detrimental to the potential customer by taking unfair advantage of him, the AI Act complements the preservation of the balance between the parties to the contract, in the sense that neither of them takes advantage of the other.

4. Conclusion

The AI Act introduces a novel element into the existing legislative framework, and as is to be expected, this has met with a degree of resistance from those who are opposed to change. This opposition has manifested in various ways, with some expressing concern about the extent of regulatory intervention, while others have expressed scepticism about the potential effects of the new legislation. Most significantly, this reaction demonstrates a general mistrust of anything that challenges the status quo, which is characterised by ignorance and ineffectiveness.

The AI Act, despite all counteraction, represents a significant step forward in the legislative landscape. In less than two months, two pieces of legislation have been enacted, each addressing the subject of artificial intelligence from a distinct perspective. The AI Convention, in particular, has the potential to expand the scope of existing frameworks by engaging countries beyond Europe.

The AI Act marks a shift from a sectorial approach to the regulation of artificial intelligence to a comprehensive and holistic framework. This broadened approach inevitably leads to a confluence of claims and a new interpretation of existing consumer protection safeguards that may appear unrelated to its regulatory objectives. It is crucial to acknowledge that there are various forms of influence, and the implications may vary depending on the relationship between artificial intelligence and the specific safeguards. The AI Act is engaged in one of the following ways: it hinders abusive precontractual behaviour, defines the object of the contract, clarifies the provider's obligations, and preserves the contractual equilibrium.

The AI Act employs a range of regulatory approaches, from the complete prohibition of certain practices to the conditional permission of them. Article 5(1)(a) – (c) & (f) of the AI Act addresses the prohibition of economic activities in specific detail. These provisions prohibit any activity that could persuade a person to enter into a contract or accept a modification that is detrimental to their interests. Such actions are null and void. The deliberate misrepresentation of facts, the promotion of the use of artificial intelligence to individuals with limited resistance, the profiling of individuals on the basis of their characteristics, and the manipulation of sentiment is prohibited activities. The use of artificial intelligence in the form of an application or the integer part of a device is permitted under certain conditions, such as for educational or professional training purposes, access to employment opportunities, or the tracking of fraud. It is the responsibility of providers of such applications or devices to ensure that AI is not used to cause harm to recipients.

The introduction of the AI Act serves to reinforce the accountability for contravention of the extant legislation pertaining to the protection of the consumer, by streamlining the conditions thereof. The specific harm resulting from a violation has been redefined as the employment of an artificial intelligence capable of causing harm. In fact, there is no shortage of harm; rather, there is a lack of consensus regarding the definition of harm. In this regard, the burden of proof has shifted from the consumer to the provider.

The significance of the AI Act in relation to consumer protection is not to be found in the introduction of new rights and obligations, but rather in the provision of practical assistance for the implementation of existing rules, thereby adjusting traditional legal concepts to accommodate technological developments.

[64] Cf. von Bar and Drobnig, *Interaction*, 222.

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