

Lessons from the EU

Indian companies operating in the EU or seeking to access EU markets will now have to define their internal AI policies and adopt the EU's AI rules

Last month, the European Union reached political agreement on its proposed Artificial Intelligence Act, which will be enforced by 2026, with certain provisions such as prohibited AI systems and AI systems classified as General Purpose AI (GPAI) becoming operative after six and 12 months, respectively. While negotiations on the final wordings of the EU Act continue, it is important to take a closer look at the publicly reported provisions of the EU Act and assess whether it may be desirable to introduce AI restrictions in India.

Brief overview of the Act

Extra-territoriality: The EU Act will apply extra-territorially and imposes compliance burden on non-EU entities that either have AI systems in the EU market or install AI into their services provided in the EU. Additionally, the EU Act will apply when the 'outputs' of an AI system are used or intended for use within the EU. Moreover, if the development occurs offshore but the output is on EU soil, the offshore development will be regulated.

Definition of AI: The EU Act proposes to have a narrow definition of AI, which will specifically exclude traditional computation processes and software. The language of the definition is reported to be in alignment with the OECD's definition, emphasising objective-based output generation that influences its environment.

Risk-based classification: The EU Act classifies AI systems based on their risk-level, namely, unacceptable, high, limited, and minimal or no risk. AI systems that manipulate human behaviour, undertake social scoring or predictive policing, engage in emotion recognition systems, or undertake real-time remote biometric identification for law enforcement purposes are per se prohibited. High-risk AI systems are those that pose a significant risk to an individual's fundamental rights, given their intended applications in areas such as education, employment, border control, and the administration of justice. They will be subject to more stringent obligations, including the requirement to conduct fundamental rights impact assessments. Companies have the option of performing self-assessments to avoid classification within this category if their AI systems are designed for specific procedural tasks, result review of completed human activities, pattern detection, and



AKIL HIRANI

preparatory assessments (the 'Filter System').

General purpose AI (foundation models): GPAI or foundational models, trained on extensive data at scale and designed for generality of output, that can be adapted to a wide range of distinct tasks are sought to be regulated under the EU Act by introducing transparency-related obligations and copyright safeguards. Stricter obligations apply to GPAIs with 'systemic risks', necessitating notification to the Commission and ensuring compliance. The EU Act categorises models trained using computing power greater than 10^{25} floating point operations (FLOPs) as models carrying 'systemic risk'. In this regard, providers of foundation models must mitigate risks, adhere to specific designs, provide information, undertake environmental compliance and register the models in an EU database.

Enforcement: The EU Act proposes to ensure enforceability by assigning national authorities at the member state level to monitor compliance within their respective territories. A centralised European Artificial Intelligence Office will coordinate enforcement efforts. In the event of non-compliance, the maximum fine can go up to €35,000,000 or, for companies, up to 7 per cent of their total worldwide annual turnover for the preceding financial year, whichever is higher. Fines for small and medium-sized enterprises and startups will be proportionately capped.

With the finalisation of the EU Act underway and global discussions on AI regulation gaining momentum, it is an opportune moment for the Indian government to monitor AI initiatives and tools being designed, trained, implemented and used within India and undertake an impact assessment in the Indian context. As we are the most populous country in the world with a very large working age population, it is imperative to ensure that AI does not adversely displace human job seekers in our country, many of whom are low skilled. Additionally, training Large Language Model AI systems by feeding data that may be proprietary can be detrimental to owners of such data.

AI regulation may be necessary, especially to deal with concerns such as breach of data privacy and intellectual property rights in training AI. Lawsuits have been filed against Open AI and Meta in the US on these critical issues. The US has

The author is managing partner, Majmudar & Partners, International Lawyers, India



also recently classified AI as a risk to the financial system. In all these areas, Indian laws offer little to no guidance and the EU Act can serve as a valuable reference point.

A prudent initial step will be to identify and regulate unacceptable or high-risk AI systems and analyse the potential harm they can cause. If guard rails need to be put in place, then they should be. Although this may add to the compliance burden of entities in terms of the preparation of fundamental rights impact assessments, self-assessments for the Filter System and preservation of such records, protecting the fundamental rights of citizens is paramount.

The foregoing will also align with MeitY’s position of regulating AI to mitigate harm for users. Other area-specific concerns may continue to be addressed with sector-specific laws (that can be modified as required), inter alia, related to data

protection, privacy, intellectual property, and cybersecurity. For instance, the Digital Personal Data Protection Act, 2023 addresses AI’s data scraping practices. The MeitY has also issued an advisory to social media platforms to remove deepfakes, and the Securities Exchange Board of India has released a consultation paper to regulate algo trading, among other initiatives. Copyright concerns may need to be considered in light of the fact that the success of AI will depend on data abundance and its free use.

Furthermore, Indian businesses should also begin regulating AI use at an internal level. A self-governed regime will ensure hygienic AI use without throttling innovation. In any case, Indian companies and businesses operating in the EU or seeking to access EU markets will have to start defining their internal AI policies and adopting the EU’s AI policies. ♦

