Center for AI & Digital Policy (CAIDP)

**Statement on
AIDA Rapporteur's Draft Report on
Artificial Intelligence in the Digital Age**

16 December 2021

CAIDP welcomed the opportunity to exchange views with the delegation from the Special Committee on Artificial Intelligence in a Digital Age ("AIDA") in Washington, DC last November.[1] In the spirit of continued dialogue on AI policy, we provide these comments on the AIDA Rapporteur's Draft Report on Artificial Intelligence in the Digital Age.[2] This contribution follows from CAIDP's earlier statements on the EU AI Proposal.[3]

CAIDP is an independent, non-profit organization established to advise national governments and international organizations on AI and digital policy. Our network includes more than 100 participants in about 30 countries.

We applaud Europe's goal to establish comprehensive regulations for the development, design, and deployment of Artificial Intelligence. As we wrote in our initial statement on the EU AI Proposal, "this initiative may be the single most important legal framework for the digital economy to ensure the protection of fundamental rights."[4] Just as the GDPR paved the way to many data protection regulations around the world, we hope that another global standard is set with the EU AI regulation that safeguards fundamental rights, democracy and the rule of law. We also support the open and inclusive process to seek public comment on the development of AI policy. We believe that meaningful public participation in the development of AI strategies is a key indicator of the health of democratic institutions.

However,-we are concerned that the Report in its current state would both amplify problems previously identified in the proposed EU AI Act and introduce new difficulties. And we fundamentally disagree with an assessment that a regulatory framework that supports human-

---

[1] European Parliament, *Transatlantic AI cooperation: AIDA MEPs delegation to Washington* (Oct. 30, 2021), https://www.europarl.europa.eu/news/en/press-room/20211029IPR16220/transatlantic-ai-cooperation-aida-meps-delegation-to-washington

[2] Special Committee on Artificial Intelligence in a Digital Age, *Draft Report on artificial intelligence in a digital age* (2020/2266(INI)) https://www.europarl.europa.eu/doceo/document/AIDA-PR-680928_EN.html

[3] Center for AI and Digital Policy ("CAIDP"), *Statement on Proposed EU AI Act* (28 July 2021) https://www.caidp.org/app/download/8334787563/CAIDP-Comments-on-EU-AI-Act-28072021.pdf; CAIDP, *Statement on Draft EU AI Regulation* (20 Apr. 2021), https://www.caidp.org/app/download/8312964663/CAIDP-EU-AI-20042021.pdf

[4] CAIDP, *Statement on Draft EU AI Regulation* (20 Apr. 2021), https://www.caidp.org/app/download/8312964663/CAIDP-EU-AI-20042021.pdf

centric and trustworthy AI is at odds with innovation. CAIDP sets out below a dozen recommendations in response to the Report.

1) A Risk Framework Should Not Minimize Risk or Obscure Determinations

A high risk system is defined as one that poses significant risks to health and safety and fundamental rights of persons (right to non-discrimination, freedom of expression, human dignity, privacy, data protection). As per the Report:

Report Item #106. *"Agrees with the conclusion drawn by the Commission in its 2020 White Paper on artificial intelligence that there is a need to establish a risk-based legal framework for AI, covering high-level ethical standards combined with appropriate liability rules and sector-specific provisions, while at the same time providing the private sector with enough flexibility, practicability and legal certainty to develop new business models based on AI technologies"*
Report Item #109. *"Specifies that the classification of technologies as 'high-risk' should be based on the concrete use and context, complexity and autonomy of the AI system, the probability and likelihood of the worst-case scenario, the severity of the harm and its irreversibility, the techniques used and the governance arrangements adopted; stresses that this classification should be introduced together with best practices and guidance for AI developers and should also recognise that AI technologies can significantly reduce certain risks"*

However, it is not clear how the Commission made the assessment on which systems should be high risk and why the wording of especially the prohibited cases is so narrow. *The Commission's assessment in the White Paper is itself a black box system. We are surprised that a draft report by the European Parliament would endorse it at face-value.*

- Further, the designation should equally apply to systems that will be put in market AND those that are already in place when draft legislation becomes law. This would prevent any gaps in implementation and enforcement as well as discourage providers/users rushing to launch these systems to avoid compliance.
- An annual assessment of risks to human rights should be implemented to identify risks that were not foreseen or in different contexts. New risks identified should be routinely included in both updates of Prohibited and High-Risk system lists.

2) Do Not Imbue AI with Elemental Authority

From the Rapporteur's Report:

Report Item #7. *"Notes that AI is the control centre of the new data layer that surrounds us and which can be thought of as the fifth element after air, earth, water and fire."*

This "Fifth Element" analysis of AI recalls the children's lyric "one of these things is not like the other. One of these things just doesn't belong."[5]

CAIDP warns against technological determinism and framing AI as an inevitable system that cannot be regulated and is above human dignity and fundamental rights. AI systems are created by humans and for humans – and ideally for their benefit. To characterize AI as a natural element invites a necessary acceptance and authority that could diminish the need for accountability and regulation, and should be considered extremely dangerous.

3) Close the Gap Between Technological Development and Regulatory Coverage

From the Rapporteur's Report:

Report Item #61. *"Warns that legislative cycles are therefore often out of sync with the pace of technological progress, while many policymakers tend to argue for categorical bans on certain AI technologies or use cases without sufficient prior analysis of the proportionality and necessity of an outright ban; is concerned that such a policy approach to AI could, on the one hand, lead to overregulation which hampers innovation and the competitiveness of EU companies and, on the other hand, even be counter-productive in terms of safeguarding security and fundamental rights."*

Report Item #151. *"Considers it to be of paramount importance for the safety and security of citizens that law enforcement agencies are well advanced in AI development, making full use of the potential of digital technologies to prevent and investigate serious crimes through realtime facial recognition in select locations; underlines that diligently developed algorithms for crime prevention and investigation, based on highly qualitative data, may provide a higher level of efficiency, neutrality and legal certainty than human law"*

CAIDP fully supports innovation and technological progress within the context of the rule of law, the protection of fundamental rights, and respect for democratic institutions. CAIDP warns against an analysis that regulations which promote trustworthy and human-centric AI are at odds with innovation. Regulation provides businesses with clearer guidelines and incentives to invest in AI systems. Regulation establishes better, safer and more trustworthy systems. Human dignity, fundamental rights and democratic values should not be tossed aside so that companies can indiscriminately deploy these technologies, impact society, and derive profit without any regard for the harms or externalities that result. The history of innovations, from the railways to automobiles and air travel, has made clear that long-term sustainable growth is only possible within the context of thoughtful regulation.

---

[5] Sesame Street, "One of these Things is Not Like the Other" (1969),
https://muppet.fandom.com/wiki/One_of_These_Things

4) Biometric Identification for Mass Surveillance should be Banned

Report Item #62. *"Finds in this regard that using AI to acquire biometric data, by analysing fingerprints or typing cadence, or using voice or facial recognition, can be highly appropriate and beneficial for the individual as well as the general public"*

Many AI systems – for hiring decisions, educational assessments, loan determinations -- should only be allowed **after** sufficient testing and certification. Compliance with fundamental rights should be a necessary precondition for market participation or access.[6] **And AI systems must necessarily be prohibited if they are incompatible with the protection of fundamental rights. CAIDP recommends that** biometric recognition (facial, voice and gait) systems used for mass surveillance purposes be prohibited. Indiscriminate mass surveillance, whether implemented by public or private companies, or whether it is real-time or not, is intended precisely to manipulate or coerce social behavior and to control populations. This recommendation is in line with those of the European Data Protection Board and Supervisor,[7] and the governments of several EU countries, MEPs in European Parliament who voted in favor of ban of facial recognition in public spaces,[8] UNESCO Recommendations,[9] as well as demands of over 65 groups in the Reclaim Your Face campaign, co-led by EDRi.[10]

According to written comments on the AI Proposal from EU Member States obtained by POLITICO's Laura Kayali, Slovakia, Belgium, Austria and Bulgaria also support restrictions on private companies. Belgium supports a full ban on the technology, as recommended by the European Data Protection Supervisor, Slovakia and Austria want the remote biometric restriction extended to private companies.[11]

If biometric identification systems are to be used by law enforcement authorities for specific investigation purposes 'after' due process is followed and 'for the specific location and

---

[6] CAIDP Statement (20 Apr. 2021)

[7] EDPB-EDPS Joint Opinion 5/2021 on the proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act). https://edps.europa.eu/system/files/2021-06/2021-06-18-edpb-edps_joint_opinion_ai_regulation_en.pdf

[8] Use of artificial intelligence by the police: MEPs oppose mass surveillance. https://www.europarl.europa.eu/news/en/press-room/20210930IPR13925/use-of-artificial-intelligence-by-the-police-meps-oppose-mass-surveillance

[9] UNESCO Recommendation on the Ethics of AI (2021), https://unesdoc.unesco.org/ark:/48223/pf0000377897

[10] Reclaim Your Face campaign: https://reclaimyourface.eu/

[11] Melissa Heikkila, *Data watchdog warns Europe 'is not ready' for AI-powered surveillance*, POLITICO (Nov. 2, 2021) ("Europe's data watchdog calls for a clearer definition of what kind of AI the EU wants to regulate"), https://www.politico.eu/article/data-watchdog-europe-ai-surveillance-wojciech-wiewiorowski/

target person(s)', there should also be a time limit of how long these records are retained. The regulation should clearly state that the records cannot be retained infinitely. There should also be independent oversight of the deployment, management, and termination of these AI-based surveillance techniques.

CAIDP recommends that these use cases require informed consent and be subject to an impact assessment for necessity, proportionality[12], justifiability and legality.

5) The Ban on Social Scoring should be Expanded

The Rapporteur's Report states:

Report Item #63. "*Acknowledges at the same time that the very same AI technologies used to address fundamental societal problems and achieve important public policy goals could also pose crucial ethical and legal questions; notes that there have already been documented instances which have led to serious wrongdoing within the EU; notes that in practice, Member States rely heavily on the police to collect data, but also on private entities whose activities are often not supervised and who regularly sell the collected and highly sensitive data to other third parties; clarifies that this practice runs counter to European values and undermines the high level of fundamental rights in the EU, in particular the right to privacy*"

CAIDP agrees that if a system is a risk to fundamental rights and democratic values, and deemed prohibited or high-risk, then the use case should **apply equally to both private and public entities**.

The conformity assessments obligations and transparency requirements should also apply equally to systems that will be put in market and to those that are already in place when draft legislation becomes law to avoid any gaps or loopholes.

Report Item #64. "*Stresses that many authoritarian regimes apply AI systems to control, spy on, monitor and rank their citizens; believes that any form of unrestricted normative citizen scoring on a large scale by public authorities, especially within the field of law enforcement and the judiciary, leads to the loss of autonomy and is not in line with European values; highlights past cases of EU companies having sold biometric systems which would be illegal to use within the EU to authoritarian regimes in non-EU countries*"

Report Item #65. "*Notes that dominant tech platforms nowadays not only have significant control over access to information and its distribution, but they also use AI technologies to obtain more information on a person's identity and knowledge of decisional history than is possessed by public authorities or close personal advisors such as doctors, lawyers or bankers;*

---

[12] UNESCO Recommendation on the Ethics of AI (2021).

stresses that this development challenges the sovereignty of our nation states, the foundations of our democratic systems and the safeguarding of our fundamental rights" –

CAIDP recommends that prohibition on social scoring applies to both public and private entities. The AI Proposal characterizes social scoring as a single score, issued by governments, as piloted in China – with no further definition. There is now a global consensus against the use of AI techniques for social scoring, and recognition that such systems have been deployed in countries outside of China as well. With the adoption of the UNESCO Recommendation on AI Ethics, China itself agrees that social scoring should be banned.[13]

However, all kinds of scores impacting opportunities can be generated behind a blackbox and veneer of objectivity to deny access to healthcare, credit, employment, housing, migration, education – every domain that gives humans dignity and safety. Human dignity relates to the recognition of the intrinsic and equal worth of each individual human being or a normative judgement of one group over another about what is good behavior. Human dignity requires that no system segregates or objectifies[14] or categorizes especially when the criteria are based on political concepts, physical traits, expressed opinions or spurious correlations. Those who have the power to define social and political constructs (such as race or gender) now embed these designations in opaque systems. Biased risk or trustworthiness scores, coupled with biased datasets and huge power imbalances will amplify inequality[15] – deepening the structural imbalances we are trying to solve. Humans should be treated as moral subjects, and not as objects to be algorithmically scored or manipulated.[16] Slovakia, Austria and Bulgaria have also indicated that private companies should abide by a ban on "social scoring," the practice of using AI to evaluate people's trustworthiness that is prohibited for public authorities in the current AI Proposal.

Report Item #69. *"Raises the question of whether certain biases can be resolved by using more diverse datasets, given the structural biases present in our society; specifies in this regard that algorithms learn to be as discriminatory as the society they observe and then suggest decisions that are inherently discriminatory, which again contributes to exacerbating discrimination within society; concludes that there is therefore no such thing as a completely impartial and objective algorithm."*

---

[13] Melissa Heikkila, *China backs UN pledge to ban (its own) social scoring,* Politico (Nov. 23, 2021), https://www.politico.eu/article/china-artificial-intelligence-ai-ban-social-scoring-united-nations-unesco-ethical-ai/

[14] UNESCO Recommendations on AI Ethics (2021), https://unesdoc.unesco.org/ark:/48223/pf0000377897

[15] Oscar Gandy, *Coming to Terms with Chance: Engaging Rational Discrimination and Cumulative Disadvantage* (1st ed.) (Routledge 2009). https://doi.org/10.4324/9781315572758

[16] The Alan Turing Institute, *Human Rights, Democracy, and the Rule of Law Assurance Framework for AI Systems: A proposal prepared for the Council of Europe's Ad hoc Committee on Artificial Intelligence* (2021), https://rm.coe.int/huderaf-coe-final-1-2752-6741-5300-v-1/1680a3f688

Report Item #114. *"Is convinced that efforts to completely 'de-bias' AI algorithms are frequently misguided, because this strategy wrongly suggests that bias-free data sets exist; notes that in this regard the requirement that data used to train AI systems is 'complete and free of errors' needs to be revisited; stresses, however, that the EU should at the same time cooperate very closely with AI developers to counterbalance structural biases in our societies and daily life."*

CAIDP agrees that bias cannot be solved simply by the use of more diverse data sets. This should also make clear that AI system developers and users cannot avoid accountability and liability simply through changes in system design. This underscores the need for an AI Regulation that establishes a fairer and more just society.

CAIDP further recommends that examination of bias in model design and selection of performance metrics should systematically be considered and that AI system decision error rates across protected categories should be transparent, made publicly available, along with a statement from Provider as to why that error rate was acceptable level for the AI system to be put into market. CAIDP strongly recommends the adoption of a justifiability obligation to ensure trustworthiness.

6) **The EU Should Remain a Leader in AI, Shaping the Global Regulatory Environment as with the GDPR**

According to the Rapporteur's Draft Report:

Report Item #101. *"Concludes that the EU is currently on the losing side, far from fulfilling its aspiration of becoming a global leader in AI; maintains that there is still a small window of opportunity to change this situation, even though it will close very soon; states that the special committee therefore proposes to swiftly implement the following EU Roadmap for AI"*

Report Item #157 *"Highlights further that the EU, with its regulatory and market powers, has the potential to shape the international debate on AI and to push for common standards for the ethics-driven, sustainable and trustworthy development and use of this technology, fully in line with European principles and values; highlights, however, that the window of opportunity for consolidating such a distinctive European approach to AI on the international stage is closing fast."*

CAIDP observes that the EU will continue to be a leader in the AI field, as it shapes the global regulatory environment for AI, much as the GDPR has defined the global regulatory environment for data processing and data protection. The GDPR experience has also demonstrated that a forward-looking, technologically neutral regulation can foster innovation and progress and encourage the development and deployment of trustworthy systems. Although important questions remain about the effective enforcement of GDPR, the GDPR example stands

as an existence proof of successful EU regulation and the "Brussels Effect."[17]Moreover, EU
leadership in this field will specifically help to strengthen alliances among democratic nations
and underscore such values as "Human rights, and pluralism, inclusion and the protection of
privacy."

7) Effective Enforcement Mechanisms are Required

Report Item #104. *"Calls for the creation of an adequately resourced mechanism to supervise
the uniform, EU-wide implementation and enforcement of the upcoming AI laws"* and **Report
Item #121**. *"Points out that, due to the characteristics of AI systems, such as their autonomy and
opacity, there could also be cases where neither an updated Product Liability Directive nor
national fault-based liability regimes apply and where persons who suffer harm or whose
property is damaged would end up without compensation; suggests, therefore, the introduction
of a limited new liability mechanism for legal claims against the operator, who controls the risks
associated with the AI system"*

CAIDP recommends that to aid implementation and enforcement of AI legislation, the
EU should ensure to individuals and collective groups an effective complaint and remedy
mechanism to challenge against discrimination and biased algorithmic determination.[18] This
mechanism should at least be in the form of lawsuits or starting a complaint with the national
Market Supervision Authority.

8) Emotion Analysis and Predictive Policing should be Banned

From the Rapporteur's Report:

Report Item #105. *"Highlights that the underlying objective of the EU's digital strategy, as well
as that of the AI strategy is to create a 'European Way' in a digitalised world; clarifies that this
approach should be human-centred, value-oriented and based on the concept of the social
market economy; underlines that the individual, with their respective dignity and individual
freedoms, should always remain at the centre of all political considerations"* –

CAIDP agrees that the dignity and freedom of the individual should always remain at the
centre of all political considerations. **CAIDP therefore recommends that the Biometric
Categorization of individuals, Emotion Analysis systems, and Prediction of Future Crime
are included in the Prohibited category.** Manual forms of these practices have been used
throughout history to justify practices of slavery, eugenics, hierarchies of humankind and

---

[17] Anu Bradford, ***The Brussels Effect: How the European Union Rules the World*** (Oxford 2020).
[18] UNESCO Recommendation on the Ethics of AI (2021). *See also* Advocate General's Opinion in Case
C-319/20, Facebook Ireland (2 Dec. 2021) ("According to Advocate General Richard de la Tour, the
Member States may allow consumer protection associations to bring representative actions against
infringements of the protection of personal data."),
https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-12/cp210216en.pdf.

imposition of power and oppression of whole groups. None of these applications have any scientific basis or validity. Currently spurious correlations and questionable science is used to make inferences about personality, character, political and religious beliefs – again to deny a person their humanity, dignity, identity.

Human dignity centers aspirations and personal development of each individual without being defined by every single past behavior, network of affiliations, or biased datasets reflective of discriminatory practices. Every person deserves presumption of innocence, right to fair trial, due process, judicial independence, effective remedy and impartiality. CAIDP also recommends that asylum seekers and refugee rights be protected on an equal basis and that these populations not become test beds or experimentation for emerging technologies, as has been the case with border control systems requiring biometric identifiers, such as fingerprints and facial images, in recent years.

9) Independent, Third-Party Auditing is Necessary for Effective Conformity Assessments and Risk Assessments

According to the Rapporteur's Draft Report:

Report Item #117. *"Elaborates that obligatory ex ante risk self-assessments, comparable with CE markings or data protection impact assessments, combined with market surveillance based on clear rules and standards, and complemented with ex post enforcement for high-risk AI systems, seem to be a sufficiently robust governance approach for AI; warns that overly burdensome conformity assessment obligations could create significant burdens that make the business models of AI developers and companies economically unviable"*

CAIDP agrees as to the need for ex ante risk assessments and ex post enforcement for high risk AI, but warns that these are necessary but not sufficient elements for the governance of AI. Effective assessments require third party auditing and investigation. This is clearly demonstrated by the repeated failure of hi-tech companies to effectively police themselves. Citizens and consumers should not be left dependent on the providers to admit that their system might harm people; dependent on them to categorize their system as high-risk; and then to actually comply with legal requirements where there is not any mechanism for individuals or collective groups to file complaints or sue them if they are not compliant.

CAIDP recommends conformity assessments for high-risk systems be conducted by certified independent third parties who shall not have any conflict of interest.

10) Audit Logs and Kill Switches are Key Requirements for High-risk AI Systems

Report Item #118. *"Notes that in order to increase product safety and improve the identification of faults, the developers of high-risk AI should at least be obliged to ensure that*

accessible logs of algorithmic activity are maintained securely; considers that developers should also design high-risk AI systems with embedded mechanisms – 'kill switches' – for human intervention to immediately halt automated activities at any moment" and **Report Item #115**. *"Elaborates that transparency or explainability obligations for AI systems, while helpful in certain cases, may not be possible to implement in every instance; notes that both concepts also need to be balanced against other factors, including the interests of businesses in maintaining trade secrets or the potential value of exposed data to potential competitors; stresses, however, that a mandatory self-identification of AI systems or accessible machine logs seem to be very useful for many AI use cases that interfere with the fundamental rights of individuals or affect consumers"*

      CAIDP agrees that audit logs and kill switches should be a key design element in any high-risk AI system, **and recommends** that EU AI system database be fully accessible to the public to extend the governance mechanism to external stakeholders where corporations can benefit from input and activity from a range of stakeholders and governance can be improved so as to better advance the public interest.[19] Appropriate oversight, impact assessment, audit and due diligence mechanisms, including whistle-blowers' protection, should be developed to ensure accountability for AI systems and their impact throughout their lifecycle.[20]

      11) Sustainability, Children's Rights, and Disability Rights Should also be Considered

Report Item #134. *"Urges the EU to take the lead in making green digital infrastructure climate neutral and energy efficient by 2030; calls for coordinated global multilateral action to use AI in the fight against climate change and environmental degradation"*

      CAIDP agrees but also recommends that further risks to the society should be addressed - such as **Sustainability**[21] (requiring AI system providers to document impact of large AI systems (especially training systems) on the environment, emission, and waste); **Group discrimination** (Collective impact of discrimination and stigmatization on groups); **Children's rights** (Protection / exclusion of children from surveillance, recognition, and data collection systems all together); and **Disability rights** (Requiring universal accessibility from all AI systems, so as not to treat people with disabilities as errors, outliers or edge cases in the development of these systems).

      12) National AI Strategies Should Reflect Democratic Values

Report Item #123. *"Calls on the Member States to review their national AI strategies that they developed in accordance with the 'coordinated plan on AI', as the vast majority of them remain*

---

[19] Cihon, Peter, Jonas Schuett, and Seth D. Baum 2021. "Corporate Governance of Artificial Intelligence in the Public Interest" *Information* 12, no. 7: 275. https://doi.org/10.3390/info12070275
[20] UNESCO Recommendation on the Ethics of AI (2021).
[21] UNESCO Recommendation on the Ethics of AI (2021).

vague and lack clear goals; recommends that they formulate more concrete, quantifiable and specific actions, while trying to create synergies between them" and **Report Item #163**. *"Concludes that in order to build trust in AI among citizens, public services and their administrative structures need to lead by example; stresses that the EU needs to accelerate the uptake of AI in eGovernance in order to facilitate the secure use of AI in public administrations and to strengthen democratic structures as well as the EU's core ethical principles"*

CAIDP analyzes national AI strategies and endorsement of OECD AI Principles & Universal Declaration for Human Rights against each country's implementation. In 2020 we published *Artificial Intelligence and Democratic Values*,[22] a comprehensive annual report of the AI policies and practices in 30 countries. As set forth in this report, we recommend that countries:

- Establish national policies for AI that implement democratic values;
- Ensure public participation in AI policymaking and create robust mechanisms for independent oversight of AI systems;
- Guarantee fairness, accountability, and transparency in all AI systems;
- Commit to these principles in the development, procurement, and implementation of AI systems for public services; and
- Halt the use of facial recognition for mass surveillance.

The promotion of democratic values for AI remains central to our work.

Thank you for your consideration of our views. We would welcome the opportunity to speak with you further about these recommendations.

Sincerely.

Merve Hickok
CAIDP Research Director

Marc Rotenberg
CAIDP President

Karine Caunes, PhD
CAIDP Global Program Director

Lorraine Kisselburgh, PhD
CAIDP Board Member

---

[22] *Artificial Intelligence and Democratic Values* (CAIDP 2020), https://www.caidp.org/reports/aidv-2020/