

## An Outline of the NIALS “AI Roundtable” – Implications Regarding the Design of AI Regulations –

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The EU’s AI Act, which is the first comprehensive legal AI regulation in the world, was promulgated in July 2024. In Japan, the Cabinet Office’s AI Regime Study Group is moving forward with work on an interim report, which is scheduled for publication this autumn. In light of these circumstances, in May 2024 the Nishimura Institute of Advanced Legal Studies (“NIALS”), which engages in research activities to provide a bridge between leading-edge theories and practices, invited Ms. Sasha Rubel,<sup>1</sup> who previously engaged in AI policy work at the OECD, UNESCO, and elsewhere (and currently is in charge of AI public policies for EMEA at Amazon Web Services), to give a lecture and held an “AI Roundtable” with Japanese researchers working on the front lines in various fields, such as economics, competition, intellectual property, and public administration. Lawyers from Nishimura & Asahi served as moderators for the roundtable.

This newsletter provides an outline of the session.<sup>2</sup>

### 1. Outline of Lecture on AI Regulations (Presentation by Ms. Sasha Rubel)

- The scope of AI regulations needs to be defined in an appropriate, sufficient, and transparent manner. For example, when the AI Act initially was proposed, “AI System” was defined in a manner that could have included any software, including programs like spreadsheets and web meeting systems. As a result, there were discussions about the risk that the new regulation could cause opacity and uncertainty about AI. There also were discussions about the need to ensure the regulation was considerate of innovation, in order to avoid the risk of excessive increases in the compliance costs of small but skilled business operators, which might already occur as a result of other EU digital regulations.
- It cannot be denied that AI involves risks, but introduction of the AI Act does not remove those risks entirely. When designing AI regulations, it is important to bear in mind that the risks of AI usually are linked to current uses, and that the use of generative AI in particular is still in its dawn. Just as it was difficult in 2021 (when the discussion about the AI Act has begun) to predict the current prosperity of generative AI, it remains difficult to forecast technological standards and uses that will exist two years from now, which is the time when the AI Act will fully enter into force. These regulatory limitations need to be factored into the design of AI regulations. Similarly, consideration must be given to the fact that there are advantages to the use of

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<sup>1</sup> <https://oecd.ai/en/community/sasha-rubel>

<sup>2</sup> The participants (in no particular order) were: Professor Daisuke Korenaga, Graduate School of Law, Tohoku University; Professor Sayako Takizawa, Graduate Schools for Law and Politics, the University of Tokyo; Associate Professor Kensuke Kubo, Faculty of Business and Commerce, Keio University; Associate Professor Tomohiko Tatsumi, Graduate Schools for Law and Politics, the University of Tokyo; and Associate Professor Machiko Sakai, Interfaculty Initiative in Information Studies/Graduate School of Interdisciplinary Information Studies, the University of Tokyo. However, the authors of this newsletter are solely responsible for its content.

AI in developing countries, and to existing uses like providing statistical solutions, early detection of cancers, and tailoring education to children's individual characteristics.

- One of the issues to be considered with regard to the establishment of responsible AI is the fairness of AI models. For example, the inclusion of certain data is required to avoid health checkups on females being performed by a model for which only training data from males was used. The meaning of “fairness” needs to be examined in the context of the development and use of AI models to determine the extent of balance required.
- Issues frequently seen at the time of deployment that relate to the safety of AI output include: (i) whether a warning should be displayed for content that is expressly indicated as citation but is defamatory, (ii) how to address content that is expressly indicated as opinion and commentary but is defamatory, and (iii) whether medical, legal, political, or financial questions about specific individuals, or questions about weapons, should be prohibited.
- A risk-based approach refers to a regulatory approach that implies the adoption of different regulatory structures depending on both the degree and the nature of risks. When examining the design of AI regulations, it is necessary to focus on the influence on each specific use: for example, the approaches and protections that should be used are different for AI used to choose recommended music and for AI used to identify tumors on X-ray photographs.
- One EU survey revealed that: (i) 86% of surveyed employees forecast that most organizations will start using AI by 2028, (ii) generative AI will transform the way people work, (iii) acquiring AI skills will lead to increases in employees' salaries and the creation of other career possibilities, (iv) the productivity of a labor force with AI skills will be large, and (v) AI skill gaps may be reduced through enhancement of awareness of training programs.<sup>3</sup>
- In another EU survey, a majority of the EU citizens surveyed replied that AI has a good influence on daily operations, and half replied that AI also has a good influence on safety and security. However, the survey revealed that 35% of the surveyed citizens do not understand decision-making processes performed by AI. The survey implies the need for measures to promote responsible use of AI by citizens and raise public awareness of the benefits and risks of AI through cooperation between governmental agencies and AI business operators. In addition, 21% of European businesses cite compliance and legal uncertainties related to digital technology as a barrier to the impact of digital tech on their business.<sup>4</sup>


## 2. Outline of Discussions

- Among infrastructure cloud computing services that serve as AI training computational resources, the relevant companies already have taken the necessary measures that enable customers to switch between those services (regardless of the implementation of the EU Data Act). U.S., EU, and Chinese infrastructure cloud computing service providers compete with each other, and an accurate understanding of the actual situation is of primary importance to designing regulations.
- Initially, the AI Act classified the risks of AI into four categories. However, due to technological developments, concepts/categories like general-purpose AI systems and systemic risks were added at an

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<sup>3</sup> “ACCELERATING AI SKILLS, PREPARING THE WORKFORCE FOR JOBS OF THE FUTURE”  
<<https://assets.aboutamazon.com/bb/2e/9077b9f44a2898c01fcc7f35440d/aws-ai-europe.pdf>>.

<sup>4</sup> “UNLOCKING EUROPE'S AI POTENTIAL IN THE DIGITAL DECADE”  
<[https://www.unlockingeuropesaipotential.com/files/ugd/c4ce6f\\_ecf071799e4c4eba80113648d2b1090b.pdf](https://www.unlockingeuropesaipotential.com/files/ugd/c4ce6f_ecf071799e4c4eba80113648d2b1090b.pdf)>.



early stage of the legislation process of the AI Act. These additions were not the result of malicious business operators having developed such technologies, but instead were made with the aim of catching up to technological development. This implies that, in a field where innovation and technological development are active, it is difficult to design regulations by predicting how technologies will develop or by only focusing on sanctions. The classification of risks itself does not solve any specific problems, because examination of each individual and specific use or situation is required; for example, it is necessary to examine whether to treat AI as high risk if people try to determine a route for emergency and critical care cases via the use of a device which incorporates a GPS system that uses that AI.

- When designing the regulatory system, it is not necessary to assume that all AI services are accomplished through generative AI. There also are uses that can continue to be addressed by traditional AI, for example, predictive AI and discriminative AI. In addition, not all uses of AI require large cloud computational resources, unlike training for building advanced generative AI models; thus, it is not necessary for service providers to be aware of all uses of cloud computational resources and AI as a part of KYC or environmental measures.
- The scope of extraterritorial application of the AI Act (AI Act, Article 2, paragraph 1) appears to be unclear, similar to or possibly more than the GDPR; thus, we await the establishment of guidelines. For example, it usually is impossible for AI model developers to assert complete control over the jurisdictions in which persons or entities who deploy AI are located or the jurisdictions in which they will provide services using AI models. Thus, at the time of development of AI models, it sometimes is uncertain whether or not the AI Act will apply to the AI systems into which those AI models will be incorporated. Furthermore, examinations will be required on a case by case basis, for each individual, specific use. For example, it will be necessary to examine the circumstances in which, and in what respects, the AI Act is applicable if an EU citizen in Japan is diagnosed using AI medical equipment and thereafter moves to the EU.
- If the AI Act contains a provision that will create a technical export barrier from the perspective of third countries, issues concerning the scope of extraterritorial application of the AI Act also may lead to issues under international agreements (such as the Agreement on Technical Barriers to Trade (TBT Agreement)). As between Europe and America, there are places for discussions of trade-related issues like this, for example, the Trade and Technology Council. In addition, the scope of extraterritorial application (scope of international application) also will be discussed from the perspective of equal footing of competition conditions, which is a little different in nature from the protection of legal interests. This may complicate the discussions.
- The main purpose of imposing an obligation in the AI Act that requires providers of general-purpose AI models to create a sufficiently detailed summary of the content used to train general-purpose AI models, based on a template provided by the AI Office, and to make the summary publicly available (AI Act, Article 53, paragraph 1 (d)) appears to be to contribute to appropriate exercise of the right to opt out of text and data mining under Article 4, paragraph 3 of the EU Copyright Directive (and laws of the EU member states pursuant to that directive), on the assumption that copyright holders have an opt-out right, rather than an attempt to control bias in training data. This template is expected to be prepared in line with protection of trade secrets and industry practices.
- With respect to the concerns over generative AI and self-preferencing, we need to separate measures for generative AI model developers from measures for generative AI model deployers and to discuss them separately. From the viewpoint of generative AI model developers, ensuring the fairness of training models and the elimination of bias (including a relationship between data relating to the goods or services of the developers themselves or business operators that they control and data belonging to other business operators) are important issues. Efforts have been made to publicize the training data used for

development of some models, as well as expected uses and limitations of those models, and other relevant information. From the perspective of use and deployment of generative AI models, it is important that the best model can be selected, in light of countermeasures to address the aforementioned concerns, using support from solutions architects and partners and a model evaluation function, including customization of relevance, accuracy, and other factors, using the deployers' data sets in an environment in which various AI models can be compared and evaluated.

Japan has established the "AI Guidelines for Business," which contain a recommendation for the establishment of AI governance policies; measures to ensure the effectiveness of the guidelines, and AISI's examination of safety assessments, are in progress. At the same time, efforts have been made to take necessary measures (including the possibility of establishment of a new legal system) against AI developers with particularly large influence and those that present particularly significant risks. The perspective provided by the experience under the EU AI Act—for example, (i) clarity on the subject of regulations, (ii) the need for a mechanism to incorporate technological developments and merits in a dynamic manner, (iii) the need for regulations designed to the extent necessary and sufficient based on interactions with other legal interests, such as copyright, privacy, security, and competition,<sup>5</sup> and (iv) the importance of leading the formulation of international rules, including consistency with international agreements and other international initiatives like DFFT as well as international standards—appears to serve as a set of points to which AI business operators in Japan can refer when following up on policy trends relating to these efforts, and when they consider participating in that process.

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<sup>5</sup> The AI Act provides that, as part of their reporting obligations under Article 34(4) of Regulation (EU) 2019/1020, the market surveillance authorities, which have jurisdiction over the safety of products, shall report annually to the Commission and relevant national competition authorities on any information identified in the course of market surveillance activities that may be of potential interest to the application of Union law on competition rules, and they also shall report to the Commission annually about the uses of prohibited practices that occurred during the relevant year and the measures taken (AI Act, Article 74, paragraph 2).