Dear members of the Committee on the Internal Market and Consumer Protection (IMCO) and Committee on Civil Liberties, Justice and Home Affairs (LIBE) in the European Parliament

May 12, 2021

RE: The EU’s AI Act Needs to Better Protect People on the Move and Regulate High-Risk Border Technologies

As a group of international migration academics with expertise on the impacts of high-risk technologies on people crossing borders, we are gravely concerned that the proposed Regulation on Artificial Intelligence tabled by the European Commission needs to better regulate high risk technologies employed in the context of border management, migration, and asylum.

In our work, we see time and again how AI systems are developed, tested and deployed on migrants and people on the move in harmful ways, including refugees, asylum seekers, migrants, and others. The AI Act must prevent this.

In the field of migration, asylum, and border management, AI systems such as algorithms, lie detectors, polygraphs and emotion recognition and facial recognition, are increasingly used to make predictions, assessments, and evaluations about people in a wide variety of contexts. We see how AI tools are developed and used within a broader framework of racialised, generalised suspicion against people on the move. Many of these systems are inherently discriminatory, pre-judging people on factors outside of their control. The current draft fails to guarantee people’s fundamental rights.

In order to strengthen human rights protections for people crossing borders and interacting with high-risk technologies, we endorse the recommendations for amendments to the AI Act as set out by EDRi (European Digital Rights), namely that:

The AI act must be updated in three main ways to address AI-related harms in the migration context:

1. **Update the AI act's prohibited AI practices (Article 5) to include 'unacceptable uses' of AI systems in the context of migration, asylum, and border management.**
   This should include prohibitions on: AI systems for individual risk assessments and profiling drawing on sensitive personal data; AI polygraphs in the migration context; predictive analytic systems when used to interdict, curtail and prevent migration; and a full prohibition on remote biometric identification and categorisation in public spaces, including in border and migration control settings.

2. **Include within 'high-risk' use cases AI systems in migration control that require clear oversight and accountability measures, including:** all other AI-based risk
assessments; predictive analytic systems used in migration, asylum, and border management; biometric identification systems; and AI systems used for monitoring and surveillance in border control.

3. **Amend Article 83 to ensure AI as part of large-scale EU IT systems are within the scope of the AI Act** and that the necessary safeguards apply for uses of AI in the context of migration, asylum, and border management.

In particular, we would like to draw your attention to the impacts of Article 83.

As it currently stands, this article excludes all information systems for third-country nationals from the protective scope of the AI Act. The systems which are excluded encompass ETIAS (European Travel Information and Authorization System) and VIS (Visa Information System) which will employ algorithmic profiling through screening rules when examining applications for residence permits, visas, and travel authorisations. Other large scale information systems also envisage the processing of facial images and encompass the use of facial recognition technology. This type of technology enables biometric identification, which has been time and time again recognized as posing high risks to fundamental rights and safety. Moreover, in the migration context, every third-country national with an administrative or criminal law link with the EU will be affected by the exclusion clause, which will impact procedural and fundamental rights of millions of people. Furthermore, the exclusion clause creates an unjustified divide between AI systems employed at the EU level and the national level, effectively signaling that the EU is beyond reproach. The exclusion clause is also an admission that the safeguards of the AI Act cannot be respected in the case of large-scale AI systems. The backstories of ETIAS, Eurodac, VIS and SIS - where the deployment of AI systems was added without impact assessments - are testaments to a systematic differential approach to fundamental rights in the context of migration.

Moreover, this exclusion currently applies unless systems are subject to ‘significant changes’ in design or intended purpose. We would like to draw your attention to the [Joint Opinion of the European Data Protection Supervisor (EDPS) and the European Data Protection Board (EDPB)](https://edpb.europa.eu/edps/docs/edps_opinion_2020_16_en.pdf) which highlights that the threshold for ‘significant changes’ is not clear. Recital 66 of the Proposal specifies a lower threshold for a conformity re-assessment ‘whenever a change occurs which may affect the compliance.’ At minimum, a similar threshold is appropriate for Article 83 for high-risk AI systems such as those used in migration. Furthermore, according to the European Commission’s own report on the opportunities and challenges for the use of AI in border control, migration and security, additional initiatives are already underway, including automated application triaging. These initiatives should be considered a ‘significant change’ to the functioning of the systems, subjecting them to the safeguards of the forthcoming AI Act. Considering that the entry into application is envisaged for 24 months following the entry into force of the future Regulation, exempting AI systems already placed on the market for an even longer period is not appropriate. If several new initiatives are to be adopted and implemented within the next few years, the exclusion clause cannot stand.
Overall, the current draft of the AI Act does not sufficiently recognize the harm perpetuated by high-risk border technologies. As such, we urge the IMCO and LIBE committees to endorse the above amendments to protect the fundamental rights of people crossing borders and take a global leadership role in governing AI type technologies.

Happy to provide further clarification,

Petra Molnar, Associate Director, Refugee Law Lab, York University
pmolnar@yorku.ca +30 694 325 2417

Dr Niovi Vavoula, Lecturer (Assistant Professor) in Migration and Security at Queen Mary University of London
n.vavoula@qmul.ac.uk +44 7955 247400

Letter endorsed by:

Professor E. Tendayi Achiume
Alicia Miñana Professor of Law
UCLA Law School

Dr. Begüm Başdağ
Postdoctoral Researcher
Hertie School; Center for Fundamental Rights

Dr. Ana Beduschi
Associate Professor of Law, University of Exeter Law School

Dr. Gemma Bird
Senior Lecturer in Politics and IR; Department of Politics
University of Liverpool

Professor Nehal Bhuta
Chair of Public International Law
University of Edinburgh Law School

Dr. Evelien Brouwer
Assistant Professor Public Law, Migration and Technology
Faculty of Law, Economics, and Governance, Utrecht University

Dr. Karine Caunes
Global Program Director, Center on AI and Digital Policy at the Michael Dukakis Institute
European University Institute
Editor-in-Chief, European Law Journal
Dr. Simona Demkova  
Postdoctoral researcher  
Faculté de Droit, d’Économie et de Finance  
Université du Luxembourg

Professor Lina Dencik  
Cardiff University

Dr. Mariana Gkliati  
Assistant Professor of International and EU law  
Radboud University

Dr. Gloria González Fuster  
Research Professor Digitalisation & a Europe of Rights and Freedoms  
Co-Director Law, Science, Technology, and Society Research Group  
Vrije Universiteit Brussel

Dr. Heba Gowayed  
Moorman-Simon Assistant Professor of Sociology  
Boston University

Dr. Elspeth Guild  
Professor of Law  
Queen Mary University of London

Merve Hickok  
Founder (AIethicist.org)  
Chair & Research Director, Center for AI and Digital Policy

Professor Julien Jeandesboz  
Department of Political Science  
Université libre de Bruxelles

Dr. Emre Eren Korkmaz  
Departmental Lecturer in Migration and Development  
Department of International Development  
University of Oxford

Dr. Elif Kuskonmaz  
Lecturer, School of Law  
University of Portsmouth

Dr. Valsamis Mitsilegas  
Professor of European Criminal Law and Global Security and Deputy Dean for Global Engagement, Queen Mary University of London
Professor Violeta Moreno-Lax  
Inaugural Director, Centre for the Legal Study of Borders and Migration 
Immigration Law Programme, Queen Mary University of London

Dr. Jan Tobias Muehlberg  
imec-DistriNet, KU Leuven, Belgium

Dr. Derya Ozkul  
Senior Research Fellow  
Refugee Studies Centre; Department of International Development  
University of Oxford

Dr. Teresa Quintel  
Lecturer at the Maastricht European Centre on Privacy and Cybersecurity  
Maastricht University

Marc Rotenberg  
Georgetown Law (Adjunct Professor)  
President, Center for AI and Digital Policy

Francesca Tassinari  
Ph.D Candidate and Research Fellow  
Department of Public International Law and International Relations  
University of Grenada

Dr. Dimitri Van Den Meerssche  
Postdoctoral Research Fellow, University of Edinburgh  
Associate Fellow, Asser Institute, University of Amsterdam

Dr. Keren Weitzberg  
Lecturer (Teaching) Department of History  
Visiting Research Fellow, Institute of Advanced Studies  
University College London