Individual Rights in the AI Act
The Rights to Lodge a Complaint and to Explanation of the Decision-Making Process in Individual Cases

by **Gerrit Hornung and Hendrik Link** *

Abstract: While the Commission's draft AI Act virtually ignored the legal positions of individuals, the adopted text contains a much stronger focus on this aspect and introduces two new individual rights, namely the right to lodge a complaint (Article 85 AI Act) and the right to explanation (Article 86(1) AI Act). Given the relevance of many AI systems to fundamental rights, this is to be welcomed; however, its concrete implementation raises new questions both within the internal system of the AI Act and in relation to the GDPR.

Keywords: AI and Fundamental Rights, Transparency, Explainability, Relationship between AI Act and GDPR

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A. Background

1 The AI Act,[2] which was adopted by the European Parliament at first reading on 13 March 2024 and by the Council at third reading on 21 May 2024[3], is described by the European Commission as the world's first comprehensive regulation for the design and use of AI systems[4] and will significantly impact

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2 Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) [2024] OJ L2024/1689.

3 Procedure 2021/0106/COD; resolution PE-CONS 24/24 of 14 May 2024.

4 The accuracy of this assertion is contingent upon the precise definition of what constitutes a 'comprehensive legal framework', given that other jurisdictions had already enacted sector-specific regulations, such as China's Provisions on the Management of Algorithmic Recommendations in Internet Information Services (2022); the Provisions on the Administration of Deep Synthesis Internet Information Services (2022); or the Interim Measures for the Management of Generative Artificial Intelligence Services (2023). With the Canadian Artificial Intelligence and Data Act, another comprehensive legal framework is in progress: See also In-

the use of AI systems once the transitional periods[5] have expired. On the proposal of the Commission, it follows a risk-based approach[6] and differentiates – depending on the risk – between legal consequences that can go as far as a complete prohibition[7] (Article 5 AI Act).

2 Several points were highly controversial during the legislative process, especially the requirements for so-called "general-purpose AI model[s]" (Article 3 No. 63 AI Act). These do not lend themselves to specific risk assessments, so a compromise had to be reached in controversial discussions (see now in particular Articles 51-56 and Articles 88-94 AI Act).[8]

3 The issue of general-purpose AI models only became the focus of discussion during the legislative process, specifically following the launch of ChatGPT in November 2022, more than a year and a half after publication of the Commission's draft on 21 April 2021.[9] In contrast, two further limitations were already apparent at the time of that publication. Firstly, the draft did not adequately address the particular challenges of using AI systems for the democracy-relevant processes of social communication and political decision-making.[10] Secondly, the Commission paid little attention to the perspective of citizens in relation to fundamental rights infringements. In the impact assessment of its AI Act proposal, the Commission took the risks to safety and security of citizens into account, but did not consider new rights necessary in order to avoid and mitigate those risks.[11] Instead the requirements of the proposal, especially for high-risk AI, were intended to ensure risk mitigation through a "minimum degree of algorithmic transparency and accountability".[12] According to this logic, consumer protection, for example, was only mentioned in very general terms in the draft.[13] Consumers were only referred to as individuals in the financial statement, and even here only with the terse sentence that they "should benefit by reducing the risk of violations of their safety or fundamental rights".[14]

4 However, violations of fundamental rights must not only be curbed by the European legislator but should also lead to individual legal protection options

novation, Science and Economic Development Canada, 'Artificial Intelligence and Data Act (AIDA) Companion Document' <https://ised-isde.canada.ca/site/innovation-better-canada/en/artificial-intelligence-and-data-act-aida-companion-document#s4> accessed 10 October 2025.

5 The applicability of the respective Articles begins in a staggered system 6, 12 and 24 months after entry into force, see Article 113 AI Act; Article 111 AI Act applies to systems and models already placed on the market.

6 See Christian Geminn, 'Die Regulierung Künstlicher Intelligenz' [2021] ZD 354, 355ff; Gerald Spindler, 'Der Vorschlag der EU-Kommission für eine Verordnung zur Regulierung der Künstlichen Intelligenz (KI-VO-E)' [2021] CR 361, 362; Matthias Valta and Johann J. Vasel, 'Kommissionsvorschlag für eine Verordnung über Künstliche Intelligenz' [2021] ZRP 142, 142ff; Andreas Ebert and Indra Spiecker gen. Döhmann, 'Die EU als Trendsetter weltweiter KI-Regulierung: Der Kommissionsentwurf für eine KI-Verordnung der EU' [2021] NVwZ 1188, 1189ff; David Bomhard and Marieke Merkle, 'Regulation of Artificial Intelligence' [2021] EuCML 276, 279ff; Frauke Rostalski and Erik Weiss, 'Der KI-Verordnungsentwurf der Europäischen Kommission' [2021] ZfDR 329, 337ff. Generally, on data protection risk criteria for AI see also Martin Rost, 'Künstliche Intelligenz' [2018] DuD 558, 561ff; German Data Ethics Commission, *Opinion of the Data Ethics Commission* (2019) 173ff. <https://www.bfdi.bund.de/SharedDocs/Downloads/EN/Datenschutz/Data-Ethics-Commission_Opinion.pdf?__blob=publicationFile&v=1.> accessed 10 October 2025.

7 Article 5 AI Act provides for several prohibitions, but also contains various qualifications and exceptions. For example, the use of AI systems to infer emotions of a natural person in the areas of workplace and education institutions is prohibited in principle, except where the use of the AI system is intended to be put in place or into the market for medical or safety reasons (Article 5(1)(f) AI Act).

8 On the problem, see eg Pegah Mahaman and Sabrina Küspert, 'Governing General Purpose AI: A Comprehensive Map of Unreliability, Misuse and Systemic Risks' (Stiftung Neue Verantwortung, July 2023) <https://www.interface-eu.org/storage/archive/files/snv_governing_general_purpose_ai_pdf.pdf> accessed 10 October 2025.

9 Commission, 'Proposal for a Regulation of the European Parliament and of the Council laying down harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union legislative Acts' COM (2021) 206 final; for different analyses of the draft, see n 6.

10 See the brief mentions in Recitals 15 and 40 of the Commission draft. Although Annex III No 8 was entitled "Administration of justice and democratic processes", it only contained one entry for the judiciary. This was expanded in the trilogue, see No 8 lit b. On the challenges of AI for democracy, see the different chapters in Sebastian Unger and Antje von Ungern-Sternberg (eds), *Demokratie und künstliche Intelligenz* (Mohr Siebeck 2019) and Marc Rotenberg, 'Artificial Intelligence and Democratic Values: The Role of Data Protection' [2021] EDPL 496. See also the report of the German Data Ethics Commission (n 6) 159ff.

11 Commission, 'Impact Assessment Accompanying the Proposal for a Regulation of the European Parliament and of the Council laying down harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union legislative Acts', SWD(2021) 84 final 13ff, 54.

12 Commission (n 11) 54.

13 COM (2021) 206 final, 4, 13, 15, Recital 28; on this point, see Gerrit Hornung, 'Trainingsdaten und die Rechte von betroffenen Personen' in BMUV and Frauke Rostalski (eds), *Künstliche Intelligenz: Wie gelingt eine vertrauenswürdige Verwendung in Deutschland und Europa?* (Mohr Siebeck 2022) 91, 118.

14 COM (2021) 206 final, 93.

under secondary legislation.[15] While existing legal frameworks, for instance the GDPR[16] or the Product Liability Directive,[17] offer some remedies for issues related to AI systems, particularly regarding training data handling, a more **comprehensive** regulation appears necessary, and it seems appropriate that an exhaustive regulation like the AI Act should also include individual rights. The trilogue followed this approach and included what now became Articles 85-87 AI Act. These articles collectively protect individual rights, enhance transparency and accountability, and set up mechanisms for reporting and addressing infringements within the regulatory framework governing AI systems.[18] At the same time, it was clarified in Recital 9 AI Act that rights and remedies from other sectors – explicitly mentioned are data protection, consumer protection, fundamental rights, employment, protection of workers and product safety – remain "unaffected and fully applicable".

B. Legislative Procedure

5 In its resolution on amendments to the legislative proposal of 14 June 2023,[19] the European Parliament called for three individual rights.[20] These were amended in the trilogue to varying degrees.

I. Parliamentary Position

6 According to Article 68a of the Parliament's position, every natural person or group of natural persons should have the right to lodge a complaint with a national supervisory authority if they consider that the "AI system relating to him or her infringes this Regulation", without prejudice to any other administrative or judicial remedy. According to Article 68e, the provisions of the Whistleblower Directive (EU) 2019/1937 should apply to the reporting of breaches of the Regulation.

7 Article 68b of the parliamentary position contained a right of any natural or legal person to an effective judicial remedy against a legally binding decision of a national supervisory authority concerning them. It also allowed for legal action in cases of failure to act with regard to the right of appeal under Article 68a.

8 In Article 68c of its proposal, Parliament introduced a right to explanation of individual decision-making. According to Article 68c(1), this right should require:

- A decision has been made by the deployer on the basis of the output from a high-risk AI system,
- The person is subject to the decision,
- The decision produces a legal effect or similarly significantly affects the person in health, safety, fundamental rights, socio-economic well-being or other rights deriving from the obligations set out in the AI Act.
- Where these elements are present, the affected persons shall have a right to request a "clear and meaningful explanation pursuant to Article 13(1)[21] on the role of the AI system in the decision-making procedure, the main parameters of the decision

15 The lack of individual rights was also criticised by Martin Ebers and others, 'Der Entwurf für eine EU-KI-Verordnung: Richtige Richtung mit Optimierungsbedarf' [2021] RDi 528, 537; Melanie Fink, 'The EU Artificial Intelligence Act and Access to Justice' (*EU Law Live*, 10 May 2021) <https://eulawlive.com/op-ed-the-eu-artificial-intelligence-act-and-access-to-justice-by-melanie-fink/> accessed 10 October 2025; Costanza Alferi, Francesca Caroccia and Paola Inverardi, 'AI Act and Individual Rights: A Juridical and Technical Perspective' [2022] 3221 CEUR-WS 4ff <https://ceur-ws.org/Vol-3221/IAIL_paper4.pdf> accessed 10 October 2025; Mona Winau, 'Gewährleistung effektiven Grundrechtsschutzes auf Grundlage des Kommissionsentwurfs für eine KI-Verordnung?' [2023] ZdiW 14, 19.; See also Gerrit Hornung, 'Individualrechte in der KI-Verordnung' [2022] DuD 561, 565.

16 Regulation (EU) 2016/679 of the European Parliament and of the Council 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) [2016] OJ L 119/1, ; especially the remedies laid down in Articles 13–22 GDPR are particularly relevant in the context of AI Systems.

17 Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products and repealing Council Directive 85/374/EEC [2024] OJ L 2024/2853; the revised Product Liability Directive explicitly applies to software (Article 4(1)), which includes AI systems, as clarified in Recital 13 of the Directive.

18 Junaid S Butt, 'Analytical Study of the World's First EU Artificial Intelligence (AI) Act, 2024' [2024] IJRPR 7343, 7356.

19 European Parliament, 'Amendments adopted by the European Parliament on 14 June 2023 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))' P9_TA(2023)0236.

20 The awareness was raised by Tambiama Madiega, 'Artificial intelligence act' [2024] PE 698.792 EPRS, 9 <https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698792/EPRS_BRI(2021)698792_EN.pdf> accessed 10 October 2025, who referred to the paper by Ebers and others (n 15) 528.

21 This is also in the final text of Article 13 (1) AI Act. However, Parliament had proposed stronger transparency obligations in this provision.

taken and the related input data".

9 Article 68c(2) and (3) of the parliamentary position contained two exceptions. According to Article 68c(2), the right under Article 68a(1) should not apply if Union or national law contains exceptions or restrictions, provided they "respect the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society." Article 68c(3) stipulated that (1) should apply without prejudice to the data protection provisions in Articles 13, 14, 15 and 22 GDPR (information obligations, right of access and automated decision-making in individual cases).

II. Trilogue

10 The Parliament's proposals were significantly amended in the trilogue.[22]

11 Instead of Article 68a of the parliamentary draft, Article 85 AI Act essentially incorporates the provision that the Council had proposed as a supplement in its Article 63(7d).[23] Accordingly, there is no right of appeal for groups, but there is one for legal entities. In addition, the nature of the provision has changed: it is not necessary, as proposed by Parliament, that the AI system "relates" to the complainant.[24] Instead, a complaint to the market surveillance authority is generally possible if a person has "grounds to consider that there has been an infringement of the provisions of this Regulation".

12 Consequently, Article 85(2) AI Act (also as in the Council proposal) stipulates that complaints are taken into account for the purposes of conducting market surveillance activities in accordance with Regulation 2019/1020 and are handled in line with the dedicated procedures established by the market surveillance authorities. The obligation of the authority to inform the complainant of the progress and the outcome of the complaint, as provided for in Article 68a(2) of the parliamentary draft, has been omitted. In contrast, the reference to the Whistleblower Directive has been adopted (now Article 87 AI Act).

13 Instead of the judicial remedy against decisions by national authorities provided for in Article 68b of the parliamentary draft, a new paragraph was added elsewhere at the suggestion of the Council. The provision now adopted as Article 99(10) AI Act stipulates – albeit only for sanctions – that the exercise of supervisory powers must be subject to appropriate procedural safeguards in accordance with Union and national law, including effective judicial remedies and due process.

14 The right to explanation of individual decision-making was essentially adopted in the trilogue from Article 68c of the parliamentary position as Article 86 AI Act, albeit with the following amendments:

- The right to explanation does not apply to all high-risk AI systems, but only to high-risk AI systems listed in Annex III.
- The right is further excluded for systems listed in Annex III No. 2, i.e. critical infrastructures (safety components).[25]
- In the case of de facto effects, impairments of socio-economic well-being and/or other rights deriving from the obligations set down in the AI Act are not sufficient.
- The reference to Article 13(1) has been deleted.
- In terms of legal consequences, the obligation to provide a clear and meaningful explanation of the role of the AI system in the decision-making process remains. However, the explanation of the "main parameters" has now been replaced by an explanation of the "main elements" of the decision made; the obligation to explain the related input data has been deleted.[26]
- In the provision on exceptions and restrictions in other regulations (Article 86(2) AI Act), the

22 For a comparison of the different positions, see Daniel Feuerstack, Daniel Becker and Nora Hertz, 'Die Entwürfe des EU-Parlaments und der EU-Kommission für eine KI-Verordnung im Vergleich' [2023] ZfDR 421.

23 See the comparison at 'Proposal for a Regulation of the European Parliament and of the Council laying down harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union legislative Acts 2021/0106(COD)' <https://www.patrick-breyer.de/wp-content/uploads/2024/01/AIAct_final_four-column21012024.pdf> accessed 10 October 2025.

24 Article 85 thus establishes a general reporting right without requiring personal affectedness and primarily serves market surveillance purposes, while Article 86 creates subjective individual rights of affected persons to explanations of individual decisions. With regard to this difference, see Sarah Hartmann, 'KI-VO Artikel 85' in Mario Martini and Christiane Wendehorst (eds), *KI-VO: Verordnung über künstliche Intelligenz* (CHBeck 2024) para 2.

25 Specifically, No 2 mentions AI systems that are intended to be used as safety components in the management and operation of critical digital infrastructure, road traffic, or in the supply of water, gas, heating or electricity.

26 Insofar as the input data is personal data within the meaning of Article 4 No 1 GDPR, this is at least partially compensated for by the right of access pursuant to Article 15 GDPR.

fundamental rights requirements have been deleted.

- The reference in Article 68c of the Parliament's position to the applicability of the GDPR has been omitted. However, the broader reference also proposed by Parliament was included in Recital 10 AI Act.

- Article 86(3) AI Act now contains a subsidiarity clause: the article only applies insofar as the right referred to in paragraph 1 is not otherwise provided for under Union law.

C. Evaluation and Open Questions

15 The adopted provisions differ significantly in both their practical relevance and the challenges of their interpretation. In both respects, the right to explanation of individual decision-making stands out.

I. Right to "lodge a complaint" (Article 85 AI Act)

16 Recital 170 AI Act justifies the decision against a specific legal remedy that would be directed against individual impairments caused by the use of an AI system with the already existing availability of effective legal remedies under Union and national law.

17 This is correct in so far as a violation of rights and freedoms through the use of AI systems will generally trigger legal claims, depending on the legal relationships of the parties involved (e.g. contractual and statutory civil law claims, state liability and other public law remedies).[27] Nevertheless, it remains unclear what the European legislator's assessment is based on. After all, even the multitude of legal remedies is no guarantee that the legal protection system it creates will cover all relevant cases – and even less guarantee that it will operationalise the new requirements of the AI Act in an adequate manner at an individual procedural level.

18 As the European legislator has refrained from opening up the provisions of the AI Act as a whole to individual complaints to the market surveillance authority it must be determined for each provision of the Regulation whether it conveys individual legal positions and whether these positions are enforceable through an official or judicial remedy. This applies, for example, to the data protection provisions in Article 10(5) and Article 59 AI Act, which allow the processing of personal data for the purposes of ensuring bias detection and correction as well as within AI regulatory sandboxes.[28] Since the AI Act contains requirements for products, it stands to reason that its provisions will have an impact on the subjective and objective requirements for sales items and other market expectations. However, whether this applies to all requirements of the Regulation still needs to be clarified.

19 If the respective requirement of the AI Act cannot be subjectively asserted in this way, the possibility of a complaint under Article 85 AI Act remains. The same applies if a natural or legal person reports an infringement that does not affect them.

20 However, the terminology of the provision is unfortunate for these cases: The term "complaint" was adopted from the parliamentary position, which, however, contained an individual reference ("AI system relating to him or her infringes this Regulation"). As a result of the change in the trilogue, the provision has the character of a reporting mechanism. This terminology – which is also used in Article 87 AI Act for the applicability of the Whistleblower Directive ("reporting of infringements") – should also have been used in Article 85 AI Act.

II. No Specific Legal Remedy against Market Surveillance Authorities Decisions

21 The question of legal protection against market surveillance authorities' action, which is now addressed in Article 99(10) AI Act, is significantly less complex. If such action results in a legally binding decision that is addressed to a natural or legal person, the applicable law of the Union and the Member States will practically always provide for suitable legal remedies; moreover, procedural safeguards at the level of fundamental rights level also apply. Both Article 68b of the parliamentary draft and the adopted Article 99(10) AI Act are

27 On liability for the use of AI systems, see eg Meik Thöne, *Autonome Systeme und deliktische Haftung* (Mohr Siebeck 2020); on state liability David Roth-Isigkeit, 'Staatshaftungsrechtliche Aspekte des Einsatzes automatisierter Entscheidungssysteme in der öffentlichen Verwaltung' [2020] AöR 321; Mario Martini, Hannah Ruschemeier and Jonathan Hain, 'Staatshaftung für automatisierte Verwaltungsentscheidungen – Künstliche Intelligenz als Herausforderung für das Recht der staatlichen Ersatzleistungen' [2021] VerwArch 1.

28 See (still on the basis of the Commission draft) Hornung, 'Trainingsdaten und die Rechte von betroffenen Personen' (n 13) 102ff; Regarding regulatory sandboxes in the AI Act, see Jan-Philipp Muttach and Hendrik Link, 'Verarbeitung personenbezogener Daten in KI-Reallaboren nach dem KI-VO-E' [2023] CR 725.

therefore likely to be declaratory.

III. Right to Explanation of Individual Decision-Making

1. Scope of Application

22 Article 86(1) AI Act grants "affected persons"[29] the right to explanation of individual decision-making. Unlike Article 85 AI Act, this is not qualified by "natural or legal persons", raising the question of whether only natural persons are entitled to it.[30] This could be supported by the fact that the impairment of health is only possible for them. On the other hand, neither the provision itself nor Recital 171 sentence 1 AI Act (both relating to "affected persons") exclude legal persons explicitly. Moreover, legal persons may not be affected in their health, but rather in their security and their fundamental rights. Finally, the telos of the transparency rules (in particular legal protection through administrative and judicial procedures, see section C. III. 3 below) is also applicable. It therefore stands to reason that the provision should also apply to legal persons.[31]

23 The right to explanation only applies if the output is generated by a high-risk AI system listed in Annex III. This narrower scope excludes those AI systems classified as high-risk under Article 6(1) AI Act when they constitute safety components. This important change in the scope of application remains unexplained. Similarly, the exclusion of the right to explanation for critical infrastructure safety components (Annex III No. 2) included in Article 86(1) AI Act has also not been justified by the legislator. Given the description and examples in Recital 55 AI Act, such AI systems will generally not produce any output for decisions within the meaning of Article 86(1) AI Act. However, if this is the case, it is difficult to explain why the right under this article should not apply.[32] At least with regard to the safety components of critical infrastructure, a plausible explanation is that the legislator considered the interest in confidentiality to be overriding.[33] Additionally, this change from the Parliament's approach raises the question of whether Article 86 AI Act merely refers to the scope of Annex III or to Article 6 AI Act more broadly, in particular taking into account the exception in Article 6(3) AI Act.[34] De lege lata, however, this must be accepted.

24 Overall, the restriction of the right to explanation to high-risk AI systems can also be criticised as such. As a specific impairment is required at the factual level (see section C. III. 2), it is difficult to justify from the perspective of those affected, why it should also depend on whether the system is (abstractly) classified as high-risk and therefore falls under Article 6 AI Act. Other AI systems may also lead to specific risks, which would justify the application of individual rights in those specific cases. The restriction to high-risk AI systems is, on the other hand, in line with the legislator's general regulatory strategy.[35]

2. Legal Requirements

25 The requirements for exercising the right to explanation are not fully harmonised between the article and its Recitals. However, the linguistic difference between a decision that is based upon the output (Recital 171 sentence 1 AI Act) and one that is "taken by the deployer on the basis" of the output (Article 86(1) AI Act) is unlikely to affect the interpretation.

26 By contrast, it is problematic that Recital 171 sentence 1 AI Act additionally requires the deployer's decision[36] to be "mainly" based upon the output of the high-risk AI system. Article 86 (1) AI Act does not contain this restriction. This conflict is to be decided according to general rules; in this respect,

29 Margot Kaminski and Gianclaudio Malgieri, 'The Right to Explanation in the AI Act' [2025] U of Colorado Law Legal Studies 1, 4 define "affected persons" as any natural person significantly impacted by a decision based on high-risk AI systems.

30 Andreas Häuselmann, 'Déjà vu? An Analysis of Explanations Concerning Decision-Making Under the GDPR and the AI Act' [2025] AIRe 37, concludes that, based on the wording of Article 86 AI Act, it is only applicable to natural persons.

31 For a contrary opinion, see Sarah Hartmann, 'KI-VO Artikel 86' in Mario Martini and Christiane Wendehorst (eds), *KI-VO: Verordnung über künstliche Intelligenz* (CH Beck 2024) para 12.

32 Uchenna Nnawuchi and Carlisle George 'A Grand Entrance Without a Blueprint' [2024] AIRe 402, 411 also criticize the exception of Annex III in regard of Article 86 AI Act.

33 Christian Djeffal, 'KI-VO Artikel 86' in Jens Schefzig and Robert Kilian (eds), *BeckOK KI-Recht* (CH Beck 2025) para 13.

34 Djeffal (n 33) para 14 argues that, although the wording of Article 86 AI Act does not explicitly include the exceptions in Article 6(3) AI Act, these are constitutive for the definition of high-risk AI systems and must therefore be taken into account when determining its scope.

35 Suggesting self-regulation for non-high-risk AI via codes of conduct, see Fabian Lütz, 'The AI Act, gender equality and non-discrimination: what role for the AI office?' [2024] ERA Forum 79ff.

36 The term "decision" corresponds to the meaning in Article 22 GDPR and refers to any action that at least may similarly affect the rights of the affected person as a legal act would, see Djeffal (n 33) para 16ff.

Article 86 (1) AI Act prevails over the non-normative Recital.[37] It will suffice if the output of the high-risk AI system were relevant for the decision, i.e. played a not merely insignificant role.

27 It is important to note that Article 86 AI Act does not require the high-risk AI system to make the decision itself.[38] This marks a key difference from Articles 13(2)(f), 14(2)(g) and 15(1)(h) GDPR, which are linked to Article 22 GDPR[39] and therefore require a decision based solely on automated processing.[40] In contrast, the right to explanation pursuant to Article 86(1) AI Act also applies if the output data of the high-risk AI system forms the basis for a (fully) human decision. Compared to Articles 13(2)(f),14 (2)(g) and 15(1)(h) GDPR, this represents a considerable extension of the transparency obligations, which is of particular importance in view of the significance of "hybrid intelligence" systems,[41] in which humans and AI systems interact in a complex manner.

28 Furthermore, Article 86(1) AI Act contains general clauses and undefined legal terms regarding both the requirements and the legal consequences.[42] This should be manageable for the requirements because the impairment of health, safety and fundamental rights can be linked to relevant case law and supervisory authority practice and the regulation emphasises the perspective of the affected persons with the wording "they consider to have an adverse impact on", thus not setting high requirements.

3. Legal Consequences: Unclear Obligations of Deployers

29 In contrast, the obligations of the deployer appear largely unclear. What exactly constitutes "clear and meaningful explanations", what information is required to describe the "role of the AI system in the decision-making procedure" and what parameters must characterise the "main elements" of the decision remains vague.[43] The right to explanation in Article 86(1) AI Act does not prescribe specific technologies, such as those promoted in the discipline of explainable AI (XAI).[44] This aligns with other provisions of the AI Act, which generally do not impose particular technologies. On the other

37 Recitals are not legally binding and cannot be used to deviate from the wording of a provision of the legal act, see Case C-162/97 *Criminal proceedings v Nilsson and Others* [1998] ECR I-7477, para 54; Case C-136/04 *Deutsches Milch-Kontor GmbH v Hauptzollamt Hamburg-Jonas* [2005] ECR I-10095, para 32; Case C-345/13 *Karen Millen Fashions Ltd v Dunnes Stores and Dunnes Stores (Limerick) Ltd* [2014] EuZW 703, para 31.

38 Häuselmann (n 30) 41; Hartmann, 'KI-VO Artikel 86' (n 24) para 10; Djeffal (n 33) para 21.

39 See Claudio Sarra, 'Artificial Intelligence in Decision-making: A Test of Consistency between the "EU AI Act" and the "General Data Protection Regulation"' [2024] Athens Journal of Law 45, 52–55, arguing that the AI Act's mandatory human oversight requirements under Article 14 may paradoxically render Article 22 GDPR inapplicable, thereby eliminating its comprehensive individual rights (including contestation and human intervention) in favour of the more limited transparency-focused approach of Article 86 AI Act.

40 Although the CJEU interprets the scope of application of Article 22 GDPR broadly (see Case C-634/21 *SCHUFA Holding (Scoring)* [2024] DuD 55), even in this interpretation the scope of application remains significantly narrower than that of Article 86 AI Act; Although there are various constellations of AI systems falling under the scope of Article 22 GDPR due to the CJEU judgement, see Tristan Radtke, 'Das Recht auf Erklärung unter der DSGVO und der KI-VO' in Max Dregelies, Hannes Henke and Lea Katharina Kumkar (eds), *Artificial Intelligence* (Nomos 2025) 54. Radtke summarises that the scope of Article 86(1) AI Act and Article 22 GDPR are equal in this regard.

41 For this term and the technical design perspective, see Dominik Dellermann and others, 'Hybrid intelligence' [2018] Business & Information Systems Engineering 637.

42 On this issue, see Marieke Merkle, 'Transparenz nach der KI-Verordnung – von der Blackbox zum Open-Book?' [2024] RDi 414, 419.

43 See eg (still based on the parliamentary position) Feuerstack, Becker and Hertz (n 22) 421, 430ff; Hartmann, 'KI-VO Artikel 86' (n 24) para 15; According to Djeffal (n 33) para 30, this means "both abstract elements of the decision-making process and the actual decision taken". On the definition of "main elements", also see Kaminski and Malgieri (n 29) 1, 18ff.

44 See from various perspectives Kieron O'Hara, 'Explainable AI and the philosophy and practice of explanation' [2020] CLSR 39, 105474 <https://doi.org/10.1016/j.clsr.2020.105474> accessed 10 October 2025; Katharina Rohlfing and others, 'Explanation as a Social Practice: Toward a Conceptual Framework for the Social Design of AI Systems' [2021] IEEE Transactions on Cognitive and Developmental Systems 717-728; on implementation options, eg Bernhard Waltl and Roland Vogl, 'Increasing Transparency in Algorithmic- Decision-Making with Explainable AI' [2018] DuD 613; Lisa Käde and Stephanie v Maltzan, 'Die Erklärbarkeit von Künstlicher Intelligenz (KI)' [2020] CR 66, 69ff; Sven Körner, 'Nachvollziehbarkeit von KI-basierten Entscheidungen' in Markus Kaulartz and Tom Braegelmann (eds), *Rechtshandbuch Artificial Intelligence und Machine Learning* (CH Beck 2020) ch 2.4; Philipp Hacker and others, 'Explainable AI under Contract and Tort Law: Legal Incentives and Technical Challenges' [2020] Artificial Intelligence and Law 415; Adrien Bibal and others, 'Legal requirements on explainability in machine learning' [2021] 29 AI and Law 149. For an overview of technical measures to enhance AI explainability and the general relevance of transparency in AI with respect to the AI Act, see Cecilia Panigutti and others, 'The role of explainable AI in the context of the AI Act' in *FAccT '23: Proceedings of the 2023 ACM Conference on Fairness, Accountability, and Transparency* (Association for Computing Machinery 2023) 1139ff.

hand, Article 86(1) AI Act will likely not encompass a comprehensive elucidation of the AI system's inner workings[45] without further specification by the legislator.

30 Article 86(1) AI Act shares these uncertainties with Articles 13(2)(f), 14(2)(g) and 15(1)(h) GDPR, which require "meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject" for decisions under Article 22 GDPR. There is a lack of both relevant case law and regulatory guidance from the supervisory authorities regarding the scope of the information and disclosure obligations. Scientific literature often rightly emphasises that the GDPR increased the transparency obligations compared to the legal situation under the former Data Protection Directive[46] in this regard.[47] However, no consensus has yet emerged as to what exactly the "logic involved" entails.[48] The same holds true as regards the possibility of restricting the GDPR rights to protect trade secrets, as Recital 63 GDPR provides. Interestingly, neither the articles nor the recitals of the AI Act mention the protection of trade secrets in this respect. However, it remains unclear whether this will lead to lower protection under the AI Act.

31 An important element of the teleological interpretation of Article 86(1) AI Act must be the general function of transparency about decision-making processes that it has for the addressees of the decision.[49] If they wish to challenge such a decision - or initially decide whether they wish to take legal action - they must at least be able to assess the key steps and factors influencing the decision-making process.[50] The CJEU has identified this aspect as a fundamental problem of AI with regard to the right to an effective remedy and to a fair trial under Article 47 CFR.[51] It is therefore rightly taken up in Recital 171 sentence 2 AI Act, which explains that the explanation required under Article 86(1) AI Act should "provide a basis on which the affected persons are able to exercise their rights".[52]

32 However, even taking this maxim of interpretation into account, the specific scope of duties of the norm remains difficult to determine. What exactly is required so that the explanation is able to form the "basis" of subsequent legal remedies can only be assessed in relation to the respective high-risk AI system, its functionality and the significance of the decision made on the basis of the system's output for the individual. The more significant the legal implications or the more serious the expected impairment of health, safety and fundamental rights, the higher the requirements for clear and meaningful explanation. In order for the deployers to be able to provide the relevant information, they are dependent on providers equipping their high-risk AI systems with appropriate self-explanatory mechanisms (XAI).[53]

33 An early preliminary ruling request concerning the AI Act seeks an interpretation of Article 86 AI Act.[54]

45 Philipp Hacker, 'Comments on the Final Trilogue Version of the AI Act' (SSRN, 13 April 2024) 11ff <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4757603> accessed 10 October 2025.

46 The German Federal Court of Justice (Bundesgerichtshof) has taken a restrictive approach on a national level, as evidenced by its decision in BGHZ 200, 38.

47 See eg Alexander Dix, 'GDPR Article 13' in Indra Spiecker gen Döhmann and others (eds), *General Data Protection Regulation* (Nomos 2023) para 10; Radim Polčák, 'Article 12 Transparent information, communication and modalities for the exercise of the rights of the data subject' in Christopher Kuner and others (eds), *The EU General Data Protection Regulation (GDPR): A Commentary* (Oxford University Press 2020) ch 3, 406.

48 In favour of a subjective "right to explanation" under the GDPR, see Radtke (n 40) 60ff; also Paul Vogel, *Künstliche Intelligenz und Datenschutz* (Nomos 2022) 172ff; proposal for a comprehensive "reviewability" in Jennifer Cobbe and Jatinder Singh, 'Reviewable Automated Decision-Making' [2020] CLSR 39, 105475 <https://doi.org/10.1016/j.clsr.2020.105475> accessed 10 October 2025; See also the considerations in Christoph Busch, 'Algorithmic Accountability' (ABIDA, 2018) 56ff <http://www.abida.de/sites/default/files/ABIDA%20Gutachten%20Algorithmic%20Accountability.pdf> accessed 10 October 2025; Mario Martini, *Blackbox Algorithmus* (Springer 2019) 176ff (proposals de lege ferenda ibid 340ff); Andreas Sesing, 'Grenzen systemischer Transparenz bei automatisierter Datenverarbeitung' [2021] MMR 288ff.

49 On the transparency problems of AI, see eg Andreas Sudmann, 'On the Media-political Dimension of Artificial Intelligence' [2018] Digital Culture & Society 181; Thomas Wischmeyer, 'Regulierung intelligenter Systeme' [2018] AöR 1, 42ff; Thomas Wischmeyer, 'Artificial Intelligence and Transparency: Opening the Black Box' in Thomas Wischmeyer and Timo Rademacher (eds), *Regulating Artificial Intelligence* (Springer International Publishing 2019) 75ff; Gianclaudio Malgieri, 'Automated decision-making in the EU Member States: The right to explanation and other "suitable safeguards" in the national legislations' [2019] CLSR 35, 105327 <https://doi.org/10.1016/j.clsr.2019.05.002> accessed 10 October 2025; Käde and v Maltzan (n 44) 66ff; Martini (n 48) 28ff; Annette Guckelberger, *Öffentliche Verwaltung im Zeitalter der Digitalisierung* (Nomos 2019) 520ff.

50 Very similar Häuselmann (n 30) 43, who links Article 86 AI Act to Article 13(3)(b) AI Act; Kaminski and Malgieri (n 29) 11ff deduce from the "clear and meaningful" requirement that there must be no oversimplification.

51 Case C-817/19 *Ligue des droits humains v Conseil des ministres* ECLI:EU:C:2022:491, para 194.

52 Similar Kaminski and Malgieri (n 29) 1, 15.

53 See n 44.

54 Case C-806/24 *Yettel Bulgaria EAD v FB* (request for a pre-

This may provide some clarity as to the precise scope of the provider's obligations pursuant to Article 86(1) AI Act.[55] However, it is doubtful whether the CJEU will interpret Article 86(1) AI Act, since the provision is not yet in force.[56] Moreover, it is questionable whether the system at issue qualifies as an AI system at all,[57] let alone a high-risk AI system.

4. Relationship to other Legal Norms

34 The provisions in Article 86(2) and (3) AI Act differ considerably in their legal effect: some parts are declaratory, others too far-reaching, and yet others create considerable legal uncertainty.

35 Article 86(2) AI Act establishes the precedence of exceptions and limitations to the obligation under Article 86(1) AI Act that are contained in other legal acts. This is declaratory for Union law regulations, as such precedence would already follow from the principle of speciality. The Union legislator is only bound by primary law, in particular fundamental rights, in the case of future exemptions.

36 The limits under primary law also apply to the Member States, as they are implementing Union law within the meaning of Article 51(1) CFR when adopting derogations; Article 68c(2) of the Parliament`s position was declaratory in this respect. However, it is still remarkable that the legislator has dispensed with any requirements for Member State derogations from Article 86(1) AI Act. The lack of such requirements is difficult to justify from the point of view of both the protection of fundamental rights and the rationale of the internal market. The Regulation only imposes a general obligation on the Member States to comply with Union law (Article 86(2) AI Act), but Union law does not contain any secondary law requirements for exemptions from Article 86(1) AI Act, neither in the Regulation nor in other secondary law. The only limits are the aforementioned transparency obligations of the GDPR,[58] which cannot be overridden by way of an exception to Article 86(1) AI Act.[59] It is to be hoped that the Member States will not make extensive use of this blanket authorisation.

37 Article 86(3) AI Act stipulates that the provision only applies insofar as the right pursuant to Article 86(1) AI Act is not otherwise provided for under Union law. The function of para 3 is unclear. According to the wording, it appears to cover cases in which other rights have both the same legal requirements and the same legal consequences as Article 86(1) AI Act. However, it then remains unclear which problem Article 86(3) AI Act is intended to address, because the normative duplication does not lead to any difficulties in the relationship between the affected claimant and the defendant. At most, effects may arise at the enforcement level, because the inapplicability of Article 86 AI Act means that, for example, Member State provisions on enforcement measures under Article 99(1) AI Act also do not apply.

38 In any case, given the unclear interpretation of both Article 86(1) AI Act and Articles 13(2)(f), 14(2)(g) and 15(1)(h) GDPR, it is also unclear whether the subsidiarity clause in Article 86(3) AI Act is intended to cover the latter. The applicability regarding this group of data protection provisions could be supported by the fact that both types of claims have a very similar objective, as they are aimed at the transparency of decision-making for the data subject or other individuals. On the other hand, there are considerable linguistic differences which, until clarified by the CJEU, will remain unclear as to whether they also affect the content. In any case, the provisions of the GDPR can only partially supersede Article 86(1) AI Act, as the latter does not require a decision based solely on automated processing (see above).[60] In relation to Articles 13(2)(f), 14(2)(g) and 15(1)(h) GDPR, a scope of application of Article 86(1) AI Act will therefore in any case remain.

liminary ruling lodged 2024, pending).

55 Case C-806/24 *Yettel Bulgaria EAD v FB* para 1 (request for a preliminary ruling lodged 2024, pending).

56 See n 5.

57 The case concerns an algorithm which calculates the internet-roaming within a cellphone contract. See Niklas Kruse, 'Bulgarien: Vorabentscheidungsersuchen des Bezirksgerichts Sofia – Recht auf Erläuterung nach Art. 86 Abs. 1 KI-VO' [2025] ZD-Aktuell 01375.

58 Noting that both legal acts (AI Act and GDPR) stand as equal and parallel instruments but with different protective orientations, see Axel Halfmeier and Nils Lilienthal, 'Verbandsklagen gegen die rechtswidrige Verwendung Künstlicher Intelligenz' [2025] VuR 123, 123; Nnawuchi and George (n 32) 407 state, the AI Act "was not proposed or framed to enable individuals to seek redress for violations", whereas other scholars have argued the AI Act was intended to top up the GDPR.

59 Exceptions from Articles 13(2)(f), 14(2)(g) and 15(1)(h) GDPR in national laws would need to meet the requirements in Article 23 GDPR.

60 A different distinction is made by Radtke (n 40) 67ff, who sees the core difference in the explanation of the "role of the AI system", which needs to be provided under Article 86(1) AI Act; for a different opinion see Nnawuchi and George (n 32) 407 who argue the GDPR does not contain a "right to explanation" and therefore the AI Act addresses this need for algorithmic transparency in AI systems.

IV. Practical Impact of the Individual Rights

39 The individual rights in Articles 85, 86 AI Act are of extraordinary relevance as a preparation for remedies against unlawful AI systems. They constitute a milestone in the emerging corpus of adjudication on AI and function as procedural rights, structuring how individuals can contest or understand AI-supported decision-making.

1. Article 85 AI Act as a Procedural Safeguard

40 Enforcement of digital laws is likely to suffer from structural deficits. Within the "A Europe fit for the digital age" strategy, the EU has adopted several major legislative frameworks, including the AI Act.[61] Monitoring their compliance poses challenges for national authorities both in quantitative and qualitative terms: quantitatively, because multiple legislative acts must be enforced simultaneously; qualitatively, because authorities require highly specialised expertise to supervise complex digital products such as AI systems. Market surveillance authorities can enforce the AI Act more effectively when they rely on consumer complaints as concrete indications of infringements, rather than monitoring without concrete leads. The practical benefit of Article 85 AI Act depends however largely on the complaint-handling capacity of national market surveillance authorities.[62]

41 Yet the first barrier is consumers' knowledge: to have "grounds to consider that there has been an infringement of this Regulation", individuals must be aware of its provisions. Given that these are often described as vague and unclear in the literature,[63] many individuals will require professional legal advice to understand the meaning of the respective requirements. At the same time, similar to Article 77 GDPR, Article 85 AI Act provides a procedural advantage: consumers may lodge complaints on the basis of suspected infringements without costly legal assistance, thereby lowering access barriers.

2. Article 86(1) AI Act as the First Procedural Step to Legal Remedy

42 For affected persons it is particularly challenging to contest decisions made by AI, due to the asymmetry of information between providers and those subject to the decision. Affected persons often cannot trace how such systems function or how specific decisions are reached. As a result, identifying errors or non-compliance with the AI Act is extremely difficult. Explanations of AI-based decisions are therefore crucial to enable affected persons to pursue subsequent legal remedies. The legislator recognized this issue and seeks to address it through the proposed AI Liability Directive and the revision of the Product Liability Directive. In essence, both frameworks rely on disclosure-of-evidence mechanisms.[64] It would be unreasonable, however, to expect affected persons to initiate court proceedings merely to obtain the evidence necessary for their claims. Without further safeguards, they would essentially be gambling on whether the AI system complied with the law. Article 86 AI Act addresses this imbalance by granting a right to explanation, which provides both a first procedural safeguard and a remedial function once a decision based on a high-risk AI system has been made.

43 This aligns with Recital 171 sentence 2 AI Act, which clarifies – as mentioned above – that the explanation under Article 86(1) AI Act should provide a basis on which affected persons are able to exercise their rights. The purpose of strengthening individual rights is to support affected persons in challenging AI-based decisions, not to establish a mandatory precondition for bringing an action before a court.[65]

61 Commission, 'A Europe fit for the digital age' <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age_en> accessed 10 October 2025.

62 Data Protection Authorities find themselves underfunded and understaffed, so they need to prioritize the extremely large and growing number of individual complaints being submitted over other regulatory tasks, see FRA, 'GDPR in practice – Experiences of data protection authorities' <https://fra.europa.eu/en/publication/2024/gdpr-experiences-data-protection-authorities?> accessed 10 October 2025.

63 Michael Veale und Frederik Zuiderveen Borgesius, 'Demystifying the Draft EU Artificial Intelligence Act' [2021] CRi 97, 100; On the vague definition of AI systems see European Law Institution, 'Commission Guidelines on the Application of the Definition of an AI System and the Prohibited AI Practices Established in the AI Act' 7 <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Response_on_the_definition_of_an_AI_System.pdf> accessed 10 October 2025; In regard of general-purpose AI see Oskar J Gstrein, Noman Haleem and Andrej Zwitter, 'General-purpose AI regulation and the European Union AI Act' [2024] Internet Policy Review 13(3) 1, 3.

64 Philipp Hacker, 'The European AI liability directives – Critique of a half-hearted approach and lessons for the future' [2023] CLSR 51, 105871 <https://doi.org/10.1016/j.clsr.2023.105871> accessed 10 October 2025.

65 A mandatory precondition would only be permissible if it

The sooner the open questions explained in section C. III. are clarified, the stronger the impact of Article 86(1) AI Act as a tool for affected persons to exercise their rights could be.

D. Conclusion

44 The outcome of the trilogue is to be welcomed, as it gives significantly greater consideration to the addressees of AI-based legal decisions and to those actually affected by AI systems. The provisions embody a hybrid nature between preventive procedural safeguards and remedial guarantees, a duality that is characteristic of rights in the digital due process discourse.[66]

45 Although Article 85 AI Act is poorly formulated with the terminology of "complaint", the provision nevertheless includes sensible elements of AI governance: it enables the reporting of breaches and obliges the market surveillance authority to take such reports into account. The same applies to the application of the Whistleblower Directive for corresponding reports (Article 87 AI Act).

46 By contrast, Article 86 AI Act raises a large number of new legal questions. The legislator can hardly be blamed for this: in view of the enormous dynamics of AI development, specific transparency rules can only be established with regard to individual technologies (see e.g. Article 50 AI Act), but not expressed in the form of overarching rules applicable to all AI systems. In this respect, regulation by means of general clauses cannot be avoided at the statutory level. However, it is all the more important to provide practical guidance, for example in the form of codes of practice from the AI Office (Article 56 AI Act), recommendations from the AI Board (Article 66(e)(l) AI Act) or guidelines from the Commission (Article 96 AI Act) and to update such instruments in line with technical developments. Interpretations of Article 86 AI Act by the CJEU will also be awaited.[67]

47 This is particularly the case considering the broad scope of application of Article 86 AI Act, which also extends to human decisions based on the output of a high-risk AI system. If Article 86 AI Act can be brought to life in this way the transparency provision could become a key tool for effectively addressing the legal disputes concerning the conformity of AI systems and the liability issues that are likely to emerge in the future.

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does not amount to "a disproportionate and intolerable interference of fundamental rights which infringes upon the very substance of the rights guaranteed", see CJEU, Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, *Alassini* [2010] para 63.

66 Regarding the expression "digital due process", see Frederick Mostert, 'Digital due process: a need for online justice' [2020] JIPLP 15(5) 378 <https://doi.org/10.1093/jiplp/jpaa024> accessed 10 October 2025.

67 The questions referred to the Court in the first case on the AI Act (C-806/24 *Yettel Bulgaria EAD v FB*) could provide guidance, but the admissibility is doubtful, cf section C. III. 3.