

*Bohatchuk Daria*  
*PhD in Law (Candidate of Science of Law),*  
*Senior Lecturer of the Faculty of Law of*  
*National University of “Kyiv-Mohyla Academy”*

## Transparency as a legal value in legal regulation on artificial intelligence

### Прозорість як правова цінність у правовому регулюванні штучного інтелекту

Transparency has gained particular importance and legislative attention in the modern era of dynamic development of digital technologies. This is due in particular to the growing importance of information and technology and the need to harmonize new technologies with the objectives of human progress and sustainable development.

Legal studies provide a variety of definitions and different approaches to understanding transparency and its legal essence. Transparency can be considered a legal value, currently in the stage of transformation into a principle of law.

Transparency contributes to ensuring compliance with the purposes of legal regulation. The diversity of purposes in different areas leads to different perceptions of transparency in these areas. This is why it is so difficult to find a universal definition of transparency and why the concept of transparency needs to be understood by answering the question of why we need transparency in a particular area (to achieve which purposes).

Transparency is particularly important in the sphere of artificial intelligence (hereinafter – AI). Transparency contributes to establishing trust to AI and plays a significant role for “Explainable AI”, so-called “XAI”.

The 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)<sup>1</sup>, adopted in the European Union, establishes harmonised transparency rules for AI systems.

The understanding of the provisions of the Artificial Intelligence Act with regard to transparency is complicated by the fact that there is no consensus on the meaning that is attributed to transparency in general<sup>2</sup>. Different understandings of transparency in different fields outside of AI lead to inconsistent use of this term also in relation to AI. Legal research on the application of transparency in relation to AI is rather fragmented<sup>3</sup>.

<sup>1</sup> 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). OJ L, 2024/1689, 12.7.2024. URL: <https://eur-lex.europa.eu/eli/reg/2024/1689/oj>

<sup>2</sup> Bohatchuk D., Früh A. Transparenz im Fokus der Europäischen KI-Verordnung. *Jusletter*. 12 Februar 2024. P. 3–4.

<sup>3</sup> *Ibid.* P. 3.

According to recital 27 of the Artificial Intelligence Act, “[t]ransparency means that AI systems are developed and used in a way that allows appropriate traceability and explainability, while making humans aware that they communicate or interact with an AI system, as well as duly informing deployers of the capabilities and limitations of that AI system and affected persons about their rights”<sup>4</sup>.

Transparency rules are found in particular in Articles 13 and 50 of the Artificial Intelligence Act, which refer directly to transparency and are accompanied by corresponding recitals.

Article 13 of the Artificial Intelligence Act, entitled “Transparency and provision of information to deployers”, refers to high-risk AI systems. According to Article 13(1) of the Artificial Intelligence Act, “High-risk AI systems shall be designed and developed in such a way as to ensure that their operation is sufficiently transparent to enable deployers to *interpret* a system’s output and use it appropriately”<sup>5</sup>. Article 13(2) of the Artificial Intelligence Act also specifies that “High-risk AI systems shall be accompanied by instructions for use in an appropriate digital format or otherwise that include concise, complete, correct and clear information that is relevant, accessible and comprehensible to deployers”<sup>6</sup>. Pursuant to Article 13(3) of the Artificial Intelligence Act, such instructions for use shall contain, in particular, information to enable deployers to *interpret* the output of the high-risk AI system and use it appropriately (this, however, applies “where applicable”)<sup>7</sup>.

Article 50 of the Artificial Intelligence Act, entitled “Transparency obligations for providers and deployers of certain AI systems”, contains (a) the provisions on the obligations of providers of (i) AI systems intended to interact directly with natural persons, and (ii) AI systems, including general-purpose AI systems, generating synthetic audio, image, video or text content, as well as (b) the provisions on the obligations of deployers of (i) emotion recognition systems or biometric categorisation systems, (ii) AI systems that generate or manipulate image, audio or video content constituting a deep fake, and (iii) AI systems that generate or manipulate text which is published with the purpose of informing the public on matters of public interest (with certain exceptions established by the mentioned Article)<sup>8</sup>. The information referred to in paragraphs 1 to 4 of Article 50 of the Artificial Intelligence Act shall be provided to the natural persons concerned in a clear and distinguishable manner at the latest at the time of the first interaction or exposure (Article 50(5))<sup>9</sup>.

Articles 13 and 50 of the Artificial Intelligence Act construct a complex of provisions on transparency obligations in the triangle between providers, deployers and natural persons<sup>10</sup>.

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<sup>4</sup> 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). OJ L, 2024/1689, 12.7.2024. URL: <https://eur-lex.europa.eu/eli/reg/2024/1689/oj>

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Bohatchuk D., Früh A. Transparenz im Fokus der Europäischen KI-Verordnung. *Jusletter*. 12 Februar 2024. P. 8.

In addition to the core of the aforementioned transparency rules set forth in Articles 13 and 50 of the Artificial Intelligence Act, other articles of the Artificial Intelligence Act also contain provisions related to transparency.

Thus, Article 11 of the Artificial Intelligence Act obliges to draw up the technical documentation of a high-risk AI system in such a way as to demonstrate that the high-risk AI system complies with the requirements set out in the Artificial Intelligence Act (in particular, the transparency requirements) and to provide national competent authorities and notified bodies with the necessary information in a clear and comprehensive form to assess the compliance of the AI system with those requirements<sup>11</sup>. Recital 72 of the Artificial Intelligence Act states that “[t]ransparency, including the accompanying instructions for use, should assist deployers in the use of the system and support informed decision making by them”<sup>12</sup>.

Human oversight can also be considered as one of the means to ensure the transparency of the AI Systems<sup>13</sup>. According to Article 14(1) of the Artificial Intelligence Act, “High-risk AI systems shall be designed and developed in such a way, including with appropriate human-machine interface tools, that they can be effectively overseen by natural persons during the period in which they are in use”<sup>14</sup>. Annex IV of the Artificial Intelligence Act provides that the technical documentation accompanying AI Systems shall contain, in particular, assessment of the human oversight measures needed in accordance with Article 14, including an assessment of the technical measures needed to facilitate the interpretation of the outputs of AI systems by the deployers, in accordance with the Artificial Intelligence Act<sup>15</sup>.

Transparency towards the public shall be also increased (recital 131)<sup>16</sup> by registration of the high-risk AI systems specified in the Artificial Intelligence Act in the EU database before they are placed on the market or put into service (Article 49(1))<sup>17</sup>. The mentioned EU database “shall comply with the applicable accessibility requirements” (Article 71(6))<sup>18</sup>.

Article 43 of the Artificial Intelligence Act sets out the provisions for ex ante-conformity assessment, depending on the type of high-risk AI system and certain circumstances (in

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<sup>11</sup> 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). OJ L, 2024/1689, 12.7.2024. URL: <https://eur-lex.europa.eu/eli/reg/2024/1689/oj>

<sup>12</sup> Ibid.

<sup>13</sup> Bohatchuk D., Früh A. Transparenz im Fokus der Europäischen KI-Verordnung. *Jusletter*. 12 Februar 2024. P. 10; Panigutti C., Hamon R., Hupont I., Fernandes Llorca D., Fano Yela D., Junklewitz H., Scalzo S., Mazzini G., Sanchez I., Soler Garrido J., Gomez E. The role of explainable AI in the context of the AI Act. *Proceedings of the 2023 ACM Conference on Fairness, Accountability, and Transparency (FAccT '23)*. Chicago, 2023. P. 1144, 1147. URL: <https://dl.acm.org/doi/pdf/10.1145/3593013.3594069>; Mylly U.M. Transparent AI? Navigating Between Rules on Trade Secrets and Access to Information. *IIC – International Review of Intellectual Property and Competition Law*. 2023. Vol. 54. P. 1039. URL: <https://link.springer.com/article/10.1007/s40319-023-01328-5>

<sup>14</sup> 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). OJ L, 2024/1689, 12.7.2024. URL: <https://eur-lex.europa.eu/eli/reg/2024/1689/oj>

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

particular, whether the provider has applied harmonised standards or common specifications). The Artificial Intelligence Act also requires post-market monitoring measures, which shall also contribute to ensuring transparency<sup>19</sup>.

Article 86 of the Artificial Intelligence Act contains reference to the important “right to explanation of individual decision-making”, according to which any affected person subject to a decision which is taken by the deployer on the basis of the output from a high-risk AI system listed in Annex III of the Artificial Intelligence Act (with certain exceptions), and which produces legal effects or similarly significantly affects that person in a way that they consider to have an adverse impact on their health, safety or fundamental rights shall have the right to obtain from the deployer clear and meaningful explanations of the role of the AI system in the decision-making procedure and the main elements of the decision taken<sup>20</sup>.

The provisions of Article 78 of the Artificial Intelligence Act on the protection of intellectual property rights and confidential business information or trade secrets of a natural or legal person, including source code, may be considered as a limitation of the respective transparency requirements<sup>21</sup>.

The Artificial Intelligence Act reflects that transparency is one of the most important pillars in the regulatory environment of AI<sup>22</sup> and establishes a set of transparency rules and requirements in the field of AI.

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<sup>19</sup> Bohatchuk D., Früh A. Transparenz im Fokus der Europäischen KI-Verordnung. *Jusletter*. 12 Februar 2024. P. 11.

<sup>20</sup> 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). OJ L, 2024/1689, 12.7.2024. URL: <https://eur-lex.europa.eu/eli/reg/2024/1689/oj>

<sup>21</sup> Bohatchuk D., Früh A. Transparenz im Fokus der Europäischen KI-Verordnung. *Jusletter*. 12 Februar 2024. P. 13.

<sup>22</sup> *Ibid.* P. 17.