Fundamental Rights Protection in the AI Act

Tracing Institutional Approaches, Divergences and Justifications in the EU Legislative Process

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Centre for Digital Governance Colloquium
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Structure

1. AI, Fundamental Rights and Regulatory Questions

2. Tracing Fundamental Rights in the EU AI Act

3. Preliminary Findings

AI and Fundamental Rights

Source: Amnesty International

AI and Fundamental Rights

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- AI can infringe different rights (not only privacy)
- Opacity as secrecy and complexity
- Lack of remedies for individuals
- Lack of Accountability and Liability Issues
- Adverse effects on workers and environment

AI, Fundamental Rights and Regulation

AI is a threat to fundamental rights which
comes from private parties
(horizontality problem)

Need for AI Regulation

State´s duty to protect FR
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Protection of FR and innovation?
Balancing of FR and other interests?

AI, Fundamental Rights and Regulation

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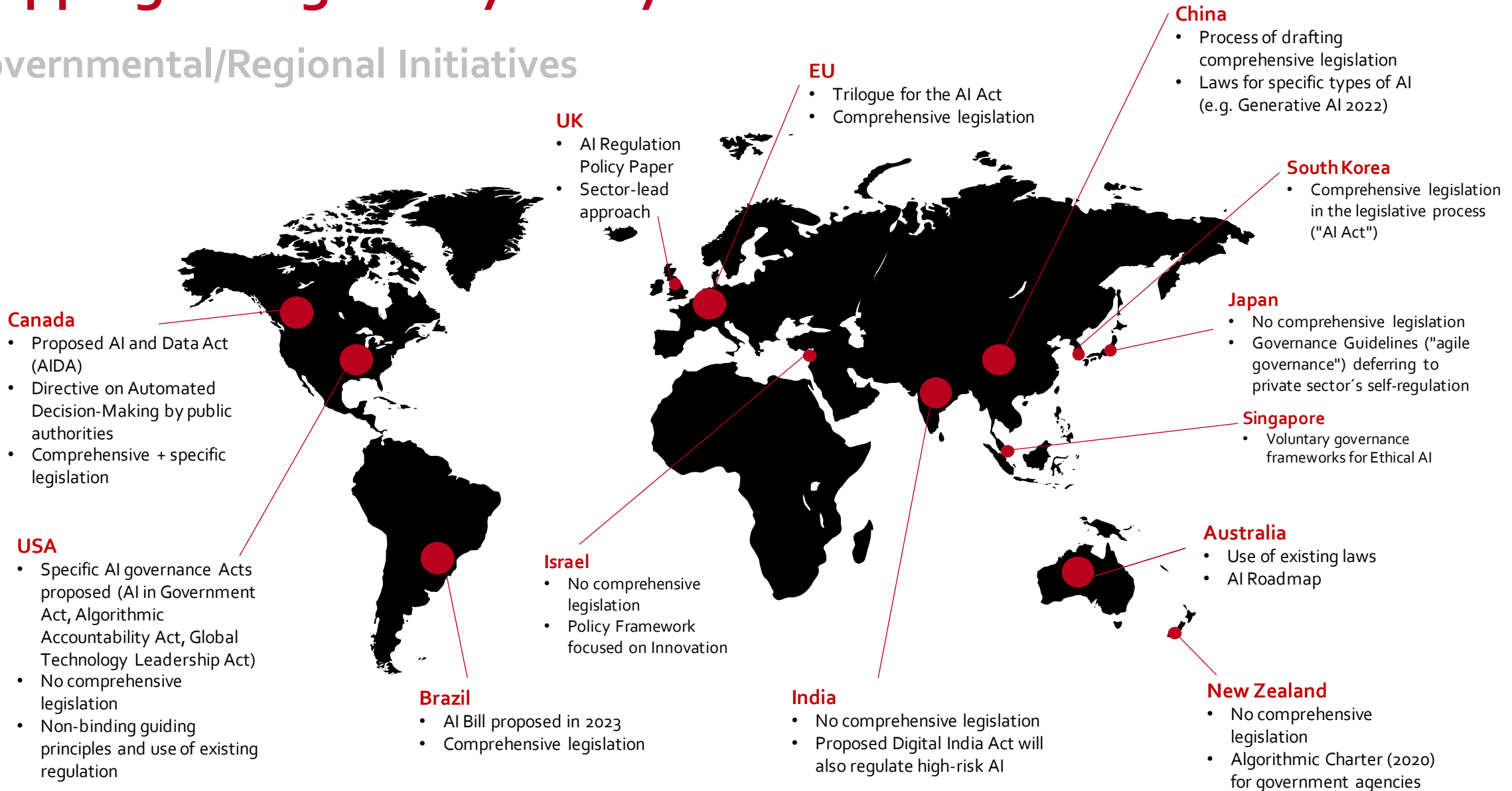State´s duty to protect FR (positive obligations)

Need for AI Regulation

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"The question isn´t whether AI will be regulated, but how" (Benizri et al, 2023 Lawfare)

Mapping AI Regulatory Policy Worldwide

Governmental/Regional Initiatives

China
- Process of drafting comprehensive legislation
- Laws for specific types of AI (e.g. Generative AI 2022)

EU
- Trilogue for the AI Act
- Comprehensive legislation

UK
- AI Regulation Policy Paper
- Sector-lead approach

South Korea
- Comprehensive legislation in the legislative process ("AI Act")

Japan
- No comprehensive legislation
- Governance Guidelines ("agile governance") deferring to private sector´s self-regulation

Canada
- Proposed AI and Data Act (AIDA)
- Directive on Automated Decision-Making by public authorities
- Comprehensive + specific legislation

Singapore
- Voluntary governance frameworks for Ethical AI

USA
- Specific AI governance Acts proposed (AI in Government Act, Algorithmic Accountability Act, Global Technology Leadership Act)
- No comprehensive legislation
- Non-binding guiding principles and use of existing regulation

Israel
- No comprehensive legislation
- Policy Framework focused on Innovation

Australia
- Use of existing laws
- AI Roadmap

Brazil
- AI Bill proposed in 2023
- Comprehensive legislation

India
- No comprehensive legislation
- Proposed Digital India Act will also regulate high-risk AI

New Zealand
- No comprehensive legislation
- Algorithmic Charter (2020) for government agencies

The EU approach: the AI Act

Focus on the EU AI Act
- Relevance: first country to propose a comprehensive regulation
- High content of fundamental rights
- Perfect case to test the EU FR policy-making in the age of AI and the capability of the EU to provide a "Rights-Driven Regulatory Model" for AI (Bradford, 2023)

Proposed in 2021 and currently in the trilogue, while in the meantime:
- Dutch childcare benefit scandal
- ChatGPT
- Campaigns by civil society organisations
- Lobbying by Big Tech Companies

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"Today's proposals aim to strengthen Europe's position as a global hub of excellence in AI from the lab to the market, ensure that AI in Europe respects our values and rules, and harness the potential of AI for industrial use"

T. Breton, EU Commissioner
21 April 2021

"We are writing history. We are shaping the global development of AI in the right direction with humankind and human interests at the very centre"

D. Tudorache, MEP
13 June 2023

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Process Tracing Process tracing methodology is a qualitative research method used to observe causal processes and interactions and draw inferences on their dynamics			
Divergences	Justifications	Compromises	Convergences
Understand how EU institutions conceptualise AI Governance and fundamental rights protection		Analyse how different interests are balanced and how political agreement is reached	

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The paper aims to shed light on the role of FR in the governance of AI and understand how choices about the governance of AI influence the approach to FR protection in the EU

The (Legislative) Process and Actors
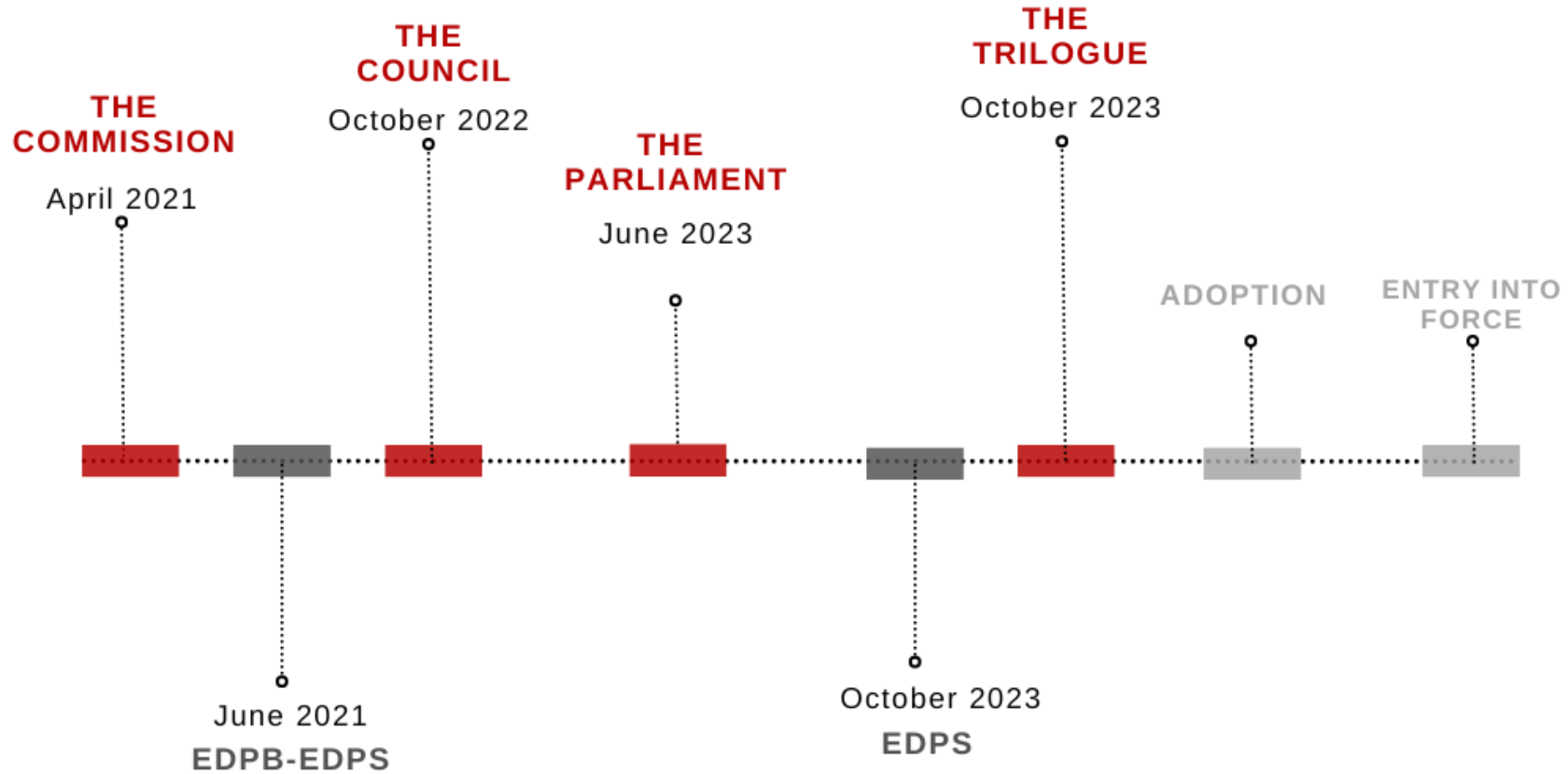
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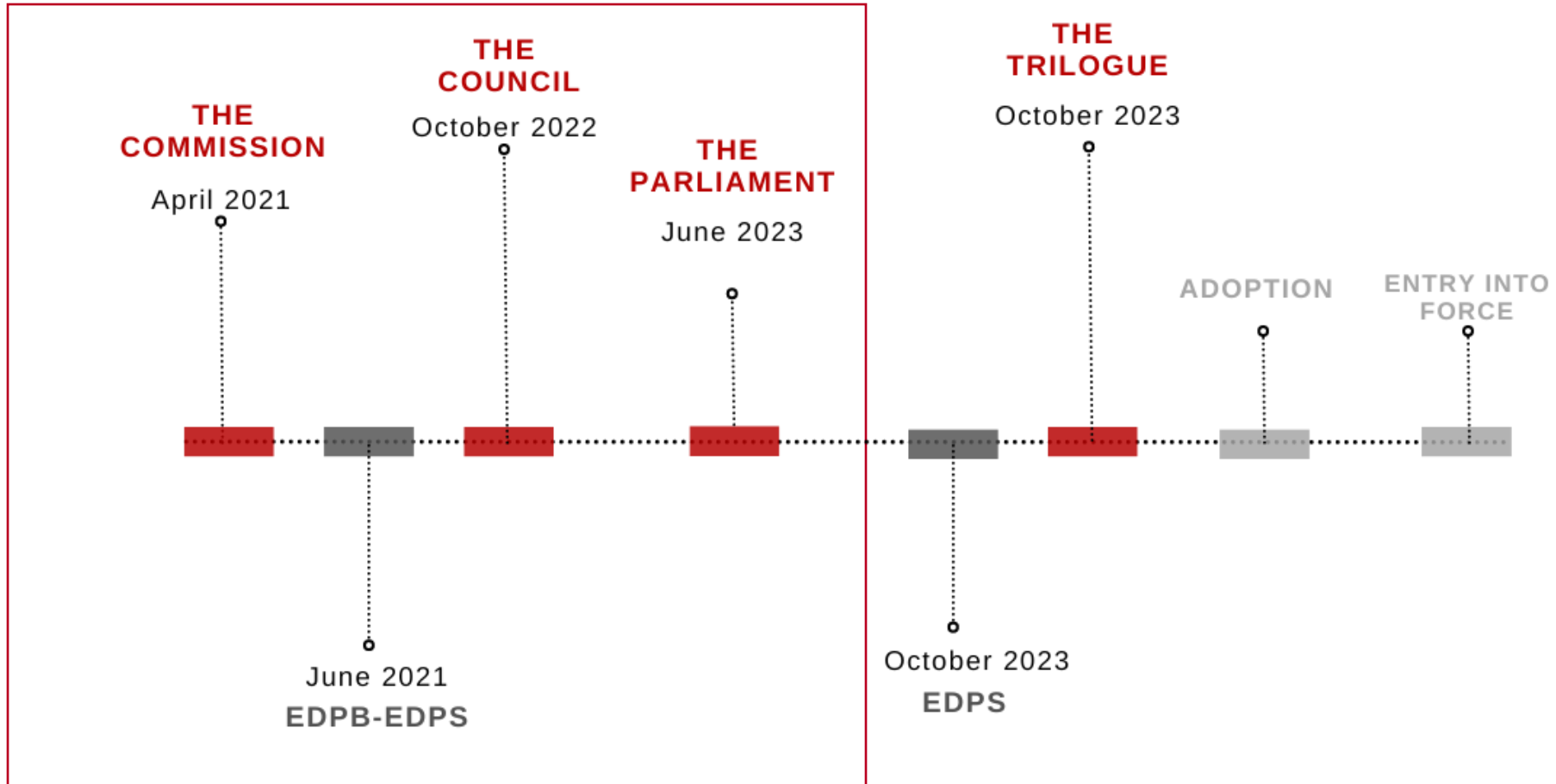
Comparative Framework

Relevant areas for FRP	Provisions analysed
Legal Basis & Purpose	Recital 1; Recital 2; Recital 13; Art. 1
Prohibited Uses of AI	Recital 16a; Article 5(1)ba; Recital 17; Article 5(1)c; Recital 18; Article 5(1)d; Recital 26a; Article 5(1)da; Recital 26b; Article 5(1)db; Recital 26c; Article 5(1)dc; Article 5(1)dd; Article 2ca
Approach to Risk	Recital 27; Recital 28a
High-Risk AI Classification Rules	Recital 32; Article 6(2); Article 7; Recital 37; Recital 38; Recital 39; Recital 40a; Recital 40b; Recital 58a; Article 29a
Role of Individuals and Rights	Article 2(1)8a; Recital 94b; Article 51; Article 52; Article 68c; Recital 69; Article 60; Article 4b
Exceptions to Protection	Recital 12; Article 2(3); Article 51; Article 52; Article 60; Annex VIII; Article 83
Remedies & Enforcement	Recital 64; Article 43; Article 6(2a); Article 63; Recital 84; Article 71; Recital 94a; Article 68a; Article 68b

Key Questions

1) What role do fundamental rights have in the regulation?

2) How are fundamental rights protected, and what exceptions exist to such protection?

3) How is fundamental rights protection enforced?
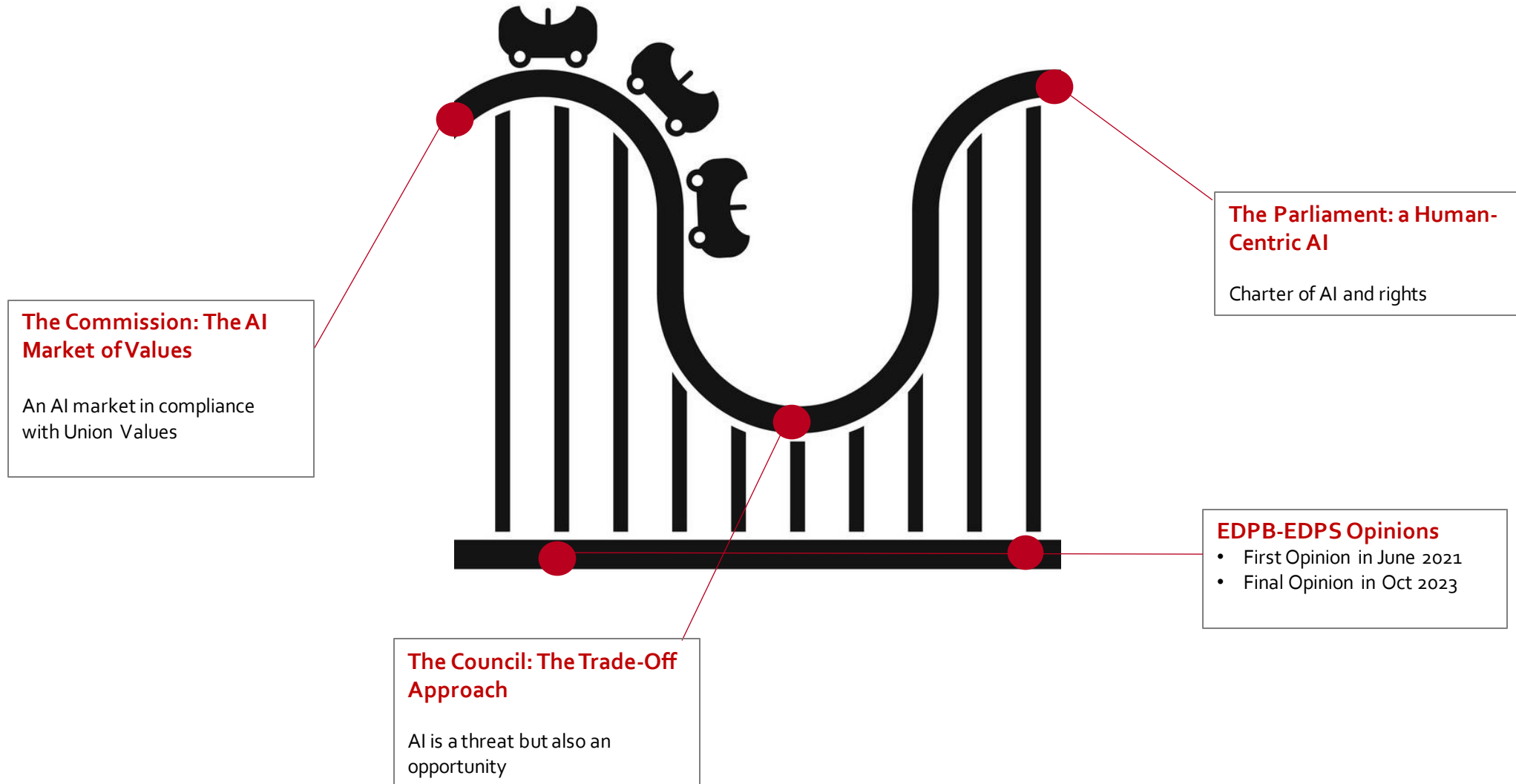
Sources and Data

Public Official Documents

Information Request (Council)

News

Trilogue Tables

Before the Trilogue: The AI Act Roller Coaster

The Commission: The AI Market of Values

An AI market in compliance with Union Values

The Parliament: a Human-Centric AI

Charter of AI and rights

The Council: The Trade-Off Approach

AI is a threat but also an opportunity

EDPB-EDPS Opinions
- First Opinion in June 2021
- Final Opinion in Oct 2023

EU Institutional Approaches to FR Protection

	The Commission	The Council	The Parliament
Nature of the challenge and regulatory response	AI is a product	AI is a risk but also an opportunity	AI is a threat to FR, democracy, RoL and environment
Regulatory objectives	Safe market and legal certainty	Regulate only when strictly necessary	Promoting uptake of Human-centric AI
FR Protection & Exceptions	Prohibited AI uses + Requirements for high-risk AI Limited exceptions in law enforcement and migration	Exclusion of national security Guarantees for law enforcement and migration carved out	More Prohibited AI use + prohibition to export General Principles for all AI systems New rules for GPAI (including FRIA by the deployer)
FR Enforcement	Role of the provider and CAP + market monitoring No role for individuals	Role of the provider and CAP + market monitoring New remedy for individuals	Role of the provider and CAP + market monitoring New rights and remedies for individuals

After the Trilogue?

Key points of discussion

1. Classification of high risk
2. AI in law enforcement
3. General Purpose AI/Foundational Models

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...to be continued

Critical Decisions for the Governance of EU FR

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All EU FR and not just data protection	Internal and External Outreach	From the governance of EU FR... to the EU governance of FR in the age of AI

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Internal Market Legislation	Indirect horizontal effect of FR with rights and remedies

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3. How to balance Fundamental Rights with other public interests?

Double standards of protection for AI in law enforcement and migration	Higher standards of Protection for AI in law enforcement and migration

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4. Who Interprets Fundamental Rights?

Automatic approach to risk classification

FR Risk assessment by providers

Thank you!