

Exploiting the potential of artificial intelligence for economy and society

Position paper on the European AI Act
Economic Forum of the SPD e.V.

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I. Actively shaping the digital structural change

The 2020s will be marked by the greatest transformation of industrial society since its inception. On the one hand, this concerns the decarbonisation of our national economy and, to the same extent, the necessary digitalisation of the economy, state and society. Digitalisation will determine the current and future competitiveness of the German and European economies. This must be decisively promoted, as it is the prerequisite for productivity, efficiency, new business models, new employment opportunities and qualifications to emerge and thus to advance the global structural change of the economy.

In order for Germany and Europe to become digitally competitive, a regulatory framework is needed that is practical and innovation-friendly, from competition law and the regulation of platforms to data sharing and data use issues. Any legislative projects must be measured against the question of whether they achieve the stated goal in a meaningful way and what unintended side effects could arise.

Basically, European digital policy is focusing too much on “preventing” rather than “enabling”. A practical and innovation-friendly design that aims to enable should be encouraged. Regulation must be based on the principles of “enabling” and “enabling” and not define prohibitions and limit topics in the first place.

The mandate to policymakers is clear: harmonise wherever possible, create central unification where it makes sense, overcome fragmentation, create clear legal certainty, provide incentives and thereby enable companies to use digital technologies while ensuring that there is fair competition, and that individual and fundamental rights and data sovereignty are safeguarded.

II. AI is an essential element and tool in a modern data economy

Artificial intelligence will play a key role in digitalisation. Data and the use of data are drivers and innovation engines. The economy of the future will be based on data, a data economy will establish itself. However, data in and of itself does not create added value. Only the analysis, the identification of patterns and structures create the prerequisite for using data in a targeted manner and thus enabling connectivity, increasing productivity and efficiency, and thus launching innovations. Anyone who talks about digitalisation cannot remain silent about AI.

Artificial intelligence already plays an important role today. It is used extensively, for example in voice assistants, in diagnostics, in predictive maintenance and also in the control and maintenance of production plants. AI is responsible for a significant part of value creation, with a strong upward trend. A study by the Internet Industry Association forecasts a contribution of up to €150 billion in revenue potential in Germany for 2025¹. Research spending worldwide is also growing. Global investments by companies in AI technologies amounted to more than 160 billion US dollars in 2021². However, according to a study by the European Investment Bank, the EU accounts for only 7 % of global spending on AI, while China and the USA are responsible for a total of 80 % of global spending³.

At the same time, AI is not the solution for everything. It can pose considerable challenges to business and society in terms of data security and data sovereignty, personal and fundamental rights, and consumer protection, but especially in terms of potential military use.

Therefore, it is necessary to create a framework to mobilise innovation potentials through data use and AI and at the same time not to expose fundamental rights and data security. Such a regulatory framework that includes both elements is a great opportunity for the European Union because it can succeed in establishing a standard for responsible and trustworthy AI use. This must be the goal of the respective legislation.

¹ <https://www.eco.de/kuenstliche-intelligenz-potenzial-und-nachhaltige-veraenderung-der-wirtschaft-in-deutschland/#download>

² <https://ourworldindata.org/grapher/corporate-investment-in-artificial-intelligence?country=Merger%2Facquisition~Private+investment~Minority+stake~Public+offering>

³ https://www.eib.org/attachments/thematic/artificial_intelligence_blockchain_and_the_future_of_europe_report_en.pdf

III. The Commission's AI Act requires intensive discussion with the aim of innovation-oriented and legally secure regulations

In April 2021, the European Commission presented a proposal for a “Regulation laying down harmonised rules for Artificial Intelligence” (hereinafter AI Act or AI Regulation). This makes the European Union the first actor worldwide to discuss a concrete regulatory proposal to create a framework specifically for the use of artificial intelligence (AI). Similar to the topics of data protection or data portability, the EU is taking the first step.

However, the legislation must take into account that the EU and its companies are in an intensifying global competition in the use and development of AI systems. Key drivers for the use and development of AI are countries such as the US and China. The EU must not miss the opportunity to catch up on international developments. It must be able to ensure the technological know-how and competence and the business-driven development of AI in Europe. No new dependencies must be created. Resilience must also be a central guiding parameter in this field. The regulation of AI must enable and encourage companies (European and non-European) to advance the further development and use of AI in Europe.

The present draft builds on a year-long discussion process, in particular on the results of the European Commission's High-Level Expert Group on AI and the 2020 White Paper.

In principle, it is to be welcomed that the draft regulation provides for a risk-based approach. The risk-based approach, i.e. the classification of an AI product into different risk categories and thus into different requirements, allows for a differentiated assessment and can thus adapt the bureaucratic burden to the risk.

In doing so, it must be ensured that the AI Act takes place in accordance with the New Legislative Framework (NLF) and that the already existing structures and regulations are integrated. With the NLF, there is already a proven system for the market introduction of electrotechnical devices. By linking to the NLF system, the approval procedure can be kept efficient and duplicate structures can be avoided.

However, it should not be overlooked that AI is not only contained in products that are subject to the NLF. AI elements are also often contained in software solutions, for example in the digitalisation of work processes. The NLF perspective cannot be applied one-to-one in these cases. This can be seen, for example, in the requirements for human supervision and control in Article 14. These may be appropriate for supervision of machines, for example, but not for software. Furthermore, questions arise in this context about the protection of intellectual property. These remain unanswe-

red so far. It is to be feared that the planned measures are diametrically opposed to the goal of “not wanting to stand in the way of innovation”.

In many places, the draft regulation does not live up to the claim of wanting to create a secure legal framework for consumers, the state, the economy and to strengthen innovation. Despite the qualitative gradations within the framework of the risk-based approach, the horizontal regulation creates generalisations that hardly allow for differentiation for the various economic cases of application. In addition, the rules are often unclearly formulated, which creates extensive room for interpretation for the national supervisory authorities. As can already be observed with the General Data Protection Regulation (GDPR), this leads to further fragmentation of the law in the internal market rather than to its unification. It also creates legal uncertainty, which prevents innovation. If in doubt, those who have to fear that they might do something wrong would rather abstain from deploying AI. This is all the more true when considerable fines are involved. The goal of creating a legal framework that promotes innovation is not achieved in this way.

The transfer of B2C elements to the B2B ecosystem is also systematically and systematically problematic and leads to undesirable developments in the legal design. Numerous use cases of AI systems can be found in the industrial economy and in the context of smart and networked production. A uniform regulatory approach for B2C and B2B creates legal ambiguity and increases overregulation, which is detrimental to industrial applications. The use of AI in B2B ecosystems is a key lever for increasing productivity, leveraging innovation potential, and developing smart production structures. This is an essential prerequisite for strengthening competitiveness.

Likewise, the immense importance of open-source applications and libraries for the development and training of AI models remains completely unconsidered. Without these, however, the development of innovative solutions is not possible. Open-source projects are often international, many of them based in the USA. These will not comply with the obligations envisaged in the AI Act. If Europe is not to be cut off from the use of these important resources, the AI Act must find appropriate answers.

Overall, the draft regulation needs clarification, more precise definition, and limitation in numerous places. In the following, 12 points are singled out:

1. Ensure targeted regulation and an applicable and practical definition of AI:

The definition of AI and its use in the draft regulation is blurred, casuistic and thus creates legal and application ambiguities that can lead to considerable hurdles in the use of AI. For example, the proposed definition (Art. 3 Sentence 1 in conjunction with Annex I) would also include numerous regular software applications that cannot be considered AI in the narrower sense. An overly broad definition, which effectively includes numerous regular software applications and is technically and scientifically untenable and impracticable, would lead to a misaligned incentive structure and have negative effects on the use of AI systems.

The definition of artificial intelligence systems should therefore be sharpened. A definition along the lines of the OECD guidelines would be a good idea, as this would also provide a better link to other important actors (such as the USA and the UK) as well as to the usual industry standards. Annex I should be deleted, in line with the proposal of the Czech Council Presidency.

In addition, the definition of “substantial modifications” (Art. 17 para. 1) is not practical and application-oriented. It is not possible to deduce from which modifications are required to arrive at a reassessment of potential risks.

2. Avoid unnecessary regulation – delete the “general purpose AI” clause:

The same applies to the so-called “general purpose AI” clause. Here, too, it is not recognisable from the present draft regulation (of the Council) what exactly a general purpose AI is supposed to encompass in practice. This, too, produces only legal and application problems and may lead to AI attentisme in specific areas. A general purpose AI clause would also counteract the risk-based approach. Therefore, this regulatory approach should be removed from the regulation. Alternatively, we propose to define general purpose AI and clarify that actors who modify a general purpose system in such a way that it becomes a high risk system should assume the responsibility of a provider under the AI Act. The provider who modifies the system for use in a high-risk application is best placed to identify the risks associated with its specific use case, data and application and to implement effective risk controls. In particular, the obligations in Articles 10-15 would be impossible, or very difficult, for providers of general purpose AI systems to meet.

3. Clearly define and limit the use cases of the “high risk” category:

The areas and applications that fall under the category of “high risk” (Art. 6 in conjunction with Annex III) should be defined more precisely and concretised: for example, not everything that is used in critical infrastructure needs to be classified here across the board. The place of use of a technology alone does not constitute sufficient justification for its risk potential.

In addition, the “High Risk” classification under the AI Act should be a meaningful complement to other classification systems. For example, other sector-specific regulations such as the Medical Devices Regulation or the Regulation on in vitro diagnostic medical devices also provide for risk-based classification systems. What is correctly not considered a high-risk use in the latter does not have to be classified as “high risk” under the AI Regulation either.

Finally, there should also be sufficient differentiation as to whether AI systems make “final decisions” or whether they are merely interposed as a supporting element in a process and decision chain.

4. Take greater account of the intended use of AI:

In order to adequately assess the risk of an AI system, the ‘place of use’ alone should not be considered, for example, in Critical Infrastructure as named above, or even the technology as such, such as biometric identification. Instead, a meaningful and appropriate risk assessment of a technology deployment must take into account the intended use. Here, the draft regulation must be improved and the categorisation of the risk assessment must be expanded to include a qualitative characteristic of the concrete purpose of use.

5. Maintain proportionality of requirements:

The requirements within the framework of the approval procedure for AI systems and their subsequent use should be strict and meet the specifications of trustworthy and secure AI. However, the proportionality of the requirements must be maintained. Here, too, specifications and regulations must be found that are suitable in terms of law and application. For example, the requirements regarding the defectiveness of training data (Art. 10) must not be so narrowly defined that training is de facto impossible, because there are hardly any large data sets that are completely error-free or free of bias. On the output side, however, strict specifications are necessary and sensible.

6. Draw on existing quality management systems:

There are already several established quality management systems in use today that have proven their reliability. These systems should be linked to wherever possible, while ensuring a high standard. In this way, new and associated duplicate structures can be avoided. The existing NLF system should therefore be used as far as possible and taken into account in the forthcoming legislation.

Other sectors not covered by the NLF are also already strictly regulated. This applies, for example, to the energy sector, telecommunications, banking and insurance. This sector-specific regulation must be taken into account comprehensively in order to avoid double or contradictory regulation.

7. Create clearer demarcation and attribution of responsibility for providers of AI systems in the B2B sector:

The definition of a provider or manufacturer requires clear and practicable regulation. Existing structures and divisions of labour within and between companies must be taken into account, such as the practice in business of involving several and different actors in the development of an AI system.

In addition, there should be a clearer delineation of responsibility between the manufacturer or provider of an AI system who sells his product to companies and this corporate customer who uses the product at the end user.

8. Prevent bureaucratic and certification excesses – do not introduce excessive documentation requirements and third-party conformity assessments:

The documentation and reporting obligations named in the draft regulation are not appropriate and represent an unnecessary bureaucratic burden in this form. In addition, it must be avoided that there is an overlap to existing EU legislation, which also entails documentation and reporting obligations, in particular the GDPR, NIS-2, eIDAS, DSA, DORA and others.

At the same time, the approach taken from the NLF that third party certification is only required in exceptional cases (Article 43 1 b) should be retained. Here it is important to note that third-party conformity assessment does not make a product or service safer per se. Much more important in this respect are the content of the conformity assessment requirements and effective market surveillance, both strengths of the NLF. New third-party certification obligations would therefore represent an unnecessary bureaucratic burden.

9. Ensure consistency of EU digital legislation also with regard to AI Act - competing legislation must be avoided:

AI systems do not move and are already not in a legal vacuum. The AI Regulation must therefore avoid regulatory overlap with other digital and data protection legislation. In particular, there must be a comparison with the regulations under the GDPR. There must be no different, non-coordinated legislation in the AI Act and the GDPR. This is the only way to create legal clarity and legal certainty. Competing legislation must be avoided at all costs. Examples include the regulation of algorithmic recommendation systems in the Digital Services Act or the provisions on “algorithmic decision making” in the GDPR (Art. 22).

10. Regulate and enforce uniform implementation across Europe:

It must be clearly defined which national authorities are responsible for enforcement (Art. 30). Here, a fragmentation of the application into nationally different authority practices must be avoided. The mistakes from the GDPR must not be repeated in the AI Act. It must also be ensured that there is a uniform approach in the implementation and application of the provisions of the AI Act in all member states. This is an important step for a necessary digital single market.

11. Design governance and technical regulation in a practical way:

The AI Act proposes the establishment of an AI Board at European level (Art. 56). Its tasks must be clearly defined, and it must be ensured that economic and practical expertise is included. With and through the AI Board, a continuous monitoring process of the AI Act should be established in order to repeatedly review and initiate adjustments and practical regulations and procedures.

In addition, it should be avoided that there is an overhang of technical follow-up regulation through delegated legislation without economic expertise and practical experience values being adequately taken into account in the process of the comitology procedure.

But the AI Act itself should also make its requirement for the obligations of providers and users practical. Many requirements would lead to excessive bureaucracy and thus immense delays in development. This applies in particular to the requirements for development documentation in Annex IV Number 2. Some others - such as completeness and freedom from errors of data records - are simply not technically presentable. In addition, the extensive logging and storage obligations would lead to an immense

demand for storage capacities - and thus consumption of rare earths - as well as immense electricity consumption for the operation of the necessary servers. Pragmatic, sustainable and energy-saving solutions should be found here. The black boxes in aeroplanes, for example, whose records are also overwritten at close intervals without any disadvantages for the intended documentation purpose, could serve as a model.

In view of the rapidly advancing technological development in the field of artificial intelligence, the regulation should be continuously evaluated after its entry into force. So far, the EU Commission has only scheduled the first review after three years. However, this period is far too long and should be reduced to one year so that the EU does not lose out in international competition.

12. Create more space for real labs (“regulatory sandboxes”):

SMEs, start-ups and innovative projects must be given the freedom to try things out and shape them. What is needed here is clarity and legal certainty in the design of real laboratories (“regulatory sandboxes”). The implementing acts necessary for the establishment of these real laboratories (Art. 53(6)) must take place promptly after the Regulation enters into force, they must leave the necessary room for manoeuvre, and they should take place in close consultation with practitioners.

Real laboratories in the form of specific test environments open up regulatory scope for testing and evaluating new technologies, products and services under real conditions. This promotes innovation and competition. At the same time, such narrowly limited freedom must not, by implication, justify a fundamental tightening of the general legal and regulatory framework.

IV. Only competitiveness secures opportunities to shape the future

Uniform European legislation on the application and use of AI is the right approach. However, such a legal framework requires a balance. Innovations must be possible; the practicability of the regulations must be ensured and at the same time necessary safety requirements must be defined. At the same time, it must be ensured that the regulations adopted are practice-oriented and suitable for use and enable legal clarity and clarity of application. This has not yet been sufficiently fulfilled in the current draft regulation. Therefore, an intensive debate is now needed on how this can be ensured in the further procedure. This is necessary so that investments in research, development, application, and use of AI are not blocked or even the migration and relocation of research activities to countries outside the European Union takes place. AI must be part of a European resilience and sovereignty strategy.

In the global technological competition, the European Union can succeed in setting standards for this technology and establishing them in accordance with the European set of values. Only those who are and remain technologically competitive are able to do so.



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