30 May 2022

POSITION PAPER

on the EU Commission Proposal for a Regulation laying down harmonised rules on Artificial Intelligence (AI)

INTRODUCTION

AmCham Romania welcomes the fact that the European Commission carried out an extensive public consultation process before the publication of the *Proposal for a Regulation laying down harmonised rules on artificial intelligence*[1] (the AI Act or the Regulation). The AI Act constitutes a core part of the EU digital single market strategy with the stated purpose to improve the functioning of the internal market.

We believe that continuous feedback during the legislative procedure from all stakeholders is an essential part in laying down, to the extent possible, a new sound piece of legislation. Therefore, we want to provide the following observations that might be useful for the EU institutions in shaping and improving the Regulation during the legislative procedure.

CLEAR AND PRECISE DEFINITION OF AI SYSTEMS

The definition of AI systems gives the Regulation a very broad scope and could potentially cover a significant amount of software which are not traditionally considered as AI technology. A clear and precise definition should constitute an essential aim, to avoid legal uncertainty, over-regulation and facilitate the application and enforcement of the new piece of legislation at hand.

A broad definition may excessively encompass general purpose tools that are used for the development of AI systems (software serving as building blocks) or may over-regulate, given the variety of tools we use in modern society, a great number of software which are not normally considered AI (for example, GPS systems). Such aspects could impact or hinder the benefits that artificial intelligence may offer.

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[1] https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1623335154975&uri=CELEX%3A52021PC0206

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Also, the mentioned aspects herein have been a constant desideratum of the stakeholders involved in the consultative process, as the European Commission highlighted in the Explanatory Memorandum which accompanies the Regulation[2].

PROHIBITED AI PRACTICES

Given that certain types of AI systems raise risks that are so truly unique that existing EU laws might not address them, AmCham Romania welcomes the regulation of prohibited AI practices outlined in Article 5 (facial recognition for mass surveilance, deployment of subliminal techniques to distort a person's behaviour, exploitation of vulnerabilities of a specific group of persons, etc).

HIGH-RISK AI SYSTEMS

AmCham Romania commends the risk-based approach in drafting the AI Act and, therefore, the regulation of the high-risk use cases of AI, not the AI technology itself. The concept of high-risk AI system is important given that regulated actors must interpret and apply it in determining whether they are subject to mandatory regulatory provisions. However, the list-based approach may consider some AI systems as being high-risk, irrespective of their specific use and of the fact that such use may not pose in all cases a risk to the health and safety or to fundamental rights.

For example, classification of all HR applications as high-risk does not recognize the need to differentiate between applications in the area of HR according to actual risks they pose.

In determining if an AI system is high-risk, it might be more appropriate for the users to assess the risks following a case by case basis analysis and take industry-specific mitigation techniques. In carrying out this assessment, it should be taken into account both the severity of potential harm and the likelihood that this harm will occur. On the other hand, the concept of risk should also consider the benefits of the AI system and the losses that could arise from not adopting the AI system.

REQUIREMENTS FOR HIGH-RISK AI SYSTEMS AND STATE-OF-THE-ART STANDARD

While the AI Act contains certainly high-level goals, it is not clear that imposing substantive or outcomes-based compliance requirements is the best approach.

Specifically, some requirements for high-risk AI systems, such as the ones referred to in Article 10.3 seem rather generic ("*data sets must be relevant, representative [...] and complete*") or impossible to comply with ("*data must be free of errors*"). Also, the

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[2] 3.1. Stakeholder consultation: [...] "*Stakeholders mostly requested a narrow, clear and precise definition for AI.*"

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requirement to put in place human oversight that enables the user to "*fully understand the capacities and limitations of the AI system*" in Article 14.4.(a) is not possible to achieve in practice, since a developer cannot guarantee what a user will understand.

Also, it is not clear how accuracy would be evaluated, or what the benchmark would be. Although those points are critical, it is equally important to recognize that there is no single, "correct" level of accuracy (accuracy levels for an AI system used to decide when to apply the brakes on an autonomous vehicle would be meaningfully different than that used to predict whether a consumer would prefer a green or blue blouse).

If the idea is indeed, as it seems from the text of the AI Act, that compliance with the requirements must be done with state-of-the-art levels in mind, as in "*consistent with industry standards*", then we believe the Regulation could be amended to further clarify this point.

OBLIGATIONS OF PROVIDERS AND USERS

Given the the complexity of the AI marketplace, especially the diversity of roles and responsibilities, the methodology for identification of the party holding "provider" or "user" responsibilities should be clarified with a complex, evolving AI ecosystem in mind, in order to avoid legal uncertainty.

The allocation of compliance responsibilities is particularly relevant when it comes to general purpose tools used for the development and training of AI systems. Therefore, we consider that the text of the Regulation must be more explicit in this regard.

We recommend to classify as providers users or other third-parties that train or otherwise modify a general purpose tool in such way that it becomes a high-risk AI system. Also, the parties mentioned in Recital (60) that are urged to cooperate with providers and users should not be considered, by adding an express wording, providers for the purposes of the AI Act.

To be effective, the Regulation should leave no uncertainty about which requirements apply to which actors and should ensure that responsibilities always fall on the actor that can most efficiently and effectively comply with them.

SKILLS

Developing and nurturing competences and digital skills (both basic and specialized) among EU citizens will be crucial for stimulating the development of AI systems, promoting the uptake among both public and private sectors (especially SMEs), and boosting the Digital Economy and Society Index.

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Also, as lifelong learning becomes a necessity, mechanisms for assessing and validating the outcomes of non-formal education and informal learning will also be fundamental in supporting citizens in their career paths, while ensuring stability within the EU labour market.

ENCOURAGING INNOVATION

When regulating the use of AI, it is important to keep in mind that the cost of regulation should not become so high that it prevents safer and better products and services from reaching the market. In many cases, the use of AI—even in high-risk scenarios—may actually make products and services safer, better, or more accurate than their non-AI counterparts. Therefore, the EU needs to find the right balance in order to encourage development and deployment of AI within the single market.