Position paper

Bitkom detailed comments for the Artificial Intelligence (AI) Act

04. January 2022

General Remarks

As Bitkom, we put forward our general comments on the Commission's proposal for the AI Act in a first position paper in August 2021[1]. As the discussions on the text are ongoing in Council and Parliament, we want to further elaborate on certain points to provide constructive criticism during this process. In the following, we therefore give a more detailed assessment of certain articles and concepts within the AI Act that also picks up specific wording.

I Definition AI System

> *Article 3*
> *(1) 'artificial intelligence system' (AI system) means software that is developed with one or more of the techniques and approaches listed in Annex I and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with;*

We criticize the Commission's proposal for a definition of AI system as too broad and suggested the deletion of certain techniques from Annex I ("inference and deductive engines" and "statistical approaches"). This recommendation was based on our understanding of what traits are specific to AI. In this context we welcome the Council Presidency compromise text[2] as it in our view better succeeds in capturing what makes AI different from software in general. For our additional amendment suggestions we therefore take the compromise text of the Council as starting point. It explicitly refers to "learning, reasoning or modelling" as activity that a technique must entail additionally to being listed in Annex I. We think this cumulative approach helps to ease the understanding of what potentially is considered as AI by providing the explicit list in Annex I. At the same time, it ensures that not all software falls within the scope of this regulation by also defining specific criteria a listed technique must meet additionally.

> *(1) 'artificial intelligence system' (AI system) means a system that*
> *(i) receives machine and/or human-based data and inputs,*

[1] https://www.bitkom.org/Bitkom/Publikationen/Bitkom-principles-for-the-Artificial-Intelligence-AI-act

[2] Compromise of the first seven articles by the Slovenian Council Presidency from 29.11.2021: https://data.consilium.europa.eu/doc/document/ST-14278-2021-INIT/en/pdf

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(ii) infers how to achieve a given set of human-defined objectives[3] using learning, reasoning or modelling implemented with the techniques and approaches listed in Annex I, and
(iii) generates outputs in the form of content (generative AI systems), predictions, recommendations or decisions, which influence the environments it interacts with;

We are furthermore considering an addition to the definition provided by the Council Presidency compromise text above that is based on the OECD definition of an AI system[4]. It notes that "AI systems are designed to operate with varying levels of autonomy.". Including the notion of autonomy somehow within the AI Act's definition of an AI system could reflect where potential harm arises from an AI system: when it acts autonomous. This is also picked up later in the text with Article 14 on human oversight. As this is explicitly mentioned in the understanding that an AI system acts autonomous to a certain degree, we deem it adequate to also include it into the definition of an AI system.

II High-risk Classification

Besides the definition of an AI system, we deem the high-risk classification equally central to the text. We suggest expressing this in the proposal by providing an explicit definition of "risk", for example as in the following (our proposals in blue):

Article 3
(45) 'risk' means the combination of the probability of occurrence of harm and the severity of that harm;

Furthermore, as the AI Act highlights the work of the White Paper[5] on AI, we would welcome if the AI Act's risk classification would be consistent with the White Paper's proposal. It suggests a cumulative approach where the sector as well as the intended use must involve significant risk. For the AI Act this means, that the in Annex III listed AI systems should not automatically considered to be high-risk but only if their use in particular is also deemed high-risk. Therefore, we propose adding an additional criterion to Article 6(2) which takes up wording from Article 7(1)(b). Furthermore, we suggest making use of already existing legislation and their respective classification of high-risk or equivalents thereof. Therefore, we suggest including 1(b) in Article 6.

[3] We want to highlight that objectives not necessarily need to be defined by humans, but it is also possible to have "machine-defined" objectives. By providing predictions AI systems potentially allow to define a variety of objectives that might serve again as goal for another AI system.
[4] https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449
[5] https://ec.europa.eu/info/sites/default/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf

Article 6

1. Irrespective of whether an AI system is placed on the market or put into service independently from the products referred to in points (a) and (b), that AI system shall be considered high-risk where ~~both~~ all of the following conditions are fulfilled:

(a) the AI system is intended to be used as a safety component of a product, or is itself a product, covered by the Union harmonisation legislation listed in Annex II;

(b) the product whose safety component is the AI system, or the AI system itself as a product, is classified as in a high-risk product or an equivalent thereof by the Union harmonisation legislation listed in Annex II;

(~~b~~c) the product whose safety component is the AI system, or the AI system itself as a product, is required to undergo a third-party conformity assessment with a view to the placing on the market or putting into service of that product pursuant to the Union harmonisation legislation listed in Annex II.

2. In addition to the high-risk AI systems referred to in paragraph 1, AI systems referred to in Annex III that pose a risk of harm to the health and safety, or a risk of adverse impact on fundamental rights shall also be considered high-risk.

III User-Provider-Relationship

An additional point where we see need for clarification is the user-provider-relationship. The relations within the value chain of an AI system are complex and the proposal could in our view better account for the distributed capabilities regarding the fulfilment of the requirements in Articles 9 to 15. The dichotomy of user and provider in our opinion does not fully capture what stakeholders can be involved in the process of putting an AI system into service or placing it on the market. Article 28 already touches upon the fact, that also other actors can come into the role of a provider under certain circumstances. We think it would be beneficial for the proposal to provide further details on the involved roles and their respective obligations. The compromise text of the Council introduces with Article 52a the notion of general purpose AI systems. We welcome the acknowledgement of this specific case but also think that further thoughts on how to best make the regulation match the complex business relationships stakeholders face in the AI system value chain are necessary.

IV Standardisation

We want to emphasise the importance of building on working processes when it comes to the concrete operationalisation of the requirements laid out in the AI Act. The system of

harmonised standards has proven its value over a long period, and we consider it an effective measure to bring together regulatory expectations with industry reality. Thus, we suggest strengthening the role of harmonised standards in the AI Act, as laid out below in our amendment proposal.

Article 41

(1) ~~Where harmonised standards referred to in Article 40 do not exist or where the Commission considers that the relevant harmonised standards are insufficient or that there is a need to address specific safety or fundamental right concerns,~~ The Commission may, by means of implementing acts, adopt common specifications in respect of the requirements set out in Chapter 2 of this Title for the essential requirements where health and safety, the protection of consumers or of the environment, other aspects of public interest, or clarity and practicability so require after consulting the relevant stakeholders and where the following conditions have been fulfilled:

(a) the Commission has concluded, that contrary to Article 10(6) of Regulation (EU) No 1025/2012 a harmonised standard does not satisfy the requirements which it aims to cover and which are set out in the corresponding Union harmonisation and has therefore not published a reference of such harmonised standard in the Official Journal of the European Union in accordance with Regulation (EU) No 1025/2012;

(b) the Commission has requested one or more European standardization organisations to draft a harmonised standard for the essential health and safety requirements and there are undue delays in the standardisation procedure;

(c) the request has, without reason, not been accepted by the European standardization organisations concerned.

2. The Commission, when preparing the common specifications referred to in paragraph 1, shall gather the views of relevant bodies or expert groups established under relevant sectorial Union law.

3. High-risk AI systems which are in conformity with the common specifications referred to in paragraph 1 shall be presumed to be in conformity with the requirements set out in Chapter 2 of this Title, to the extent those common specifications cover those requirements and as long as those requirements are not covered by harmonised standards or parts thereof the references of which have been published in the Official Journal of the European Union in accordance with Regulation (EU) No 1025/2012.

4. Where providers do not comply with the common specifications referred to in paragraph 1, they shall duly justify that they have adopted technical solutions that are at least equivalent thereto.

General Remarks

In the end, we want to highlight that it is crucial for the success of the AI Act that it interacts in harmony with already existing legal frameworks. Ensuring that – if not already covered – the new requirements get integrated into their respective sectorial legislation seems to us the most promising way to enable providers, users and stakeholders in complying with these requirements as they can build on existing knowledge and processes, especially in the sectors already familiar with the NLF. In those that have no experience with the NLF, we see it as crucial task to enable the relevant stakeholders to build up the necessary expertise to effectively define how to implement the requirements of the AI Act.