



European Tech Alliance Position on the European Commission's Artificial Intelligence Act proposal

November 2021

“Foreword

As outlined in our [initial reaction to the Commission's Artificial Intelligence Act \(AIA\) proposal](#), we welcome the Commission's risk-based approach to the future of AI regulation, and we believe that a focus on high-risk AI applications strikes the right balance between safety and innovation.

As the EUTA represents a great variety of sectors, our AI applications are equally diverse and would fall under the low risk application category in the vast majority of cases. These applications include amongst others: fraud detection, instant translation, customer assistance, bespoke product and content recommendations, e-commerce parcel bundling, or automated classification of thousands of products onto a marketplace. As European tech champions operating across borders, we support a consistent set of AI rules, applicable in all EU markets.

With this in mind, we have set out a series of five recommendations with detailed

amendments for the Parliament and Council to consider as negotiations for the AIA unfold:

- 1. Issuing guidelines and clear definitions of prohibited AI practices.**
- 2. Clarifying high-risk AI practices to avoid any knock-on effects on sectors driving jobs and growth in Europe.**
- 3. Maintaining the EU competitiveness vis-a-vis third country competitors by ensuring AI technologies developed outside the EU are covered under the proposed AIA.**
- 4. Ensuring that conformity assessments and testing processes for AI data sets are fair and balanced.**
- 5. Ensuring legal certainty and predictability regarding sanctions while also promoting a harmonised implementation across the EU.**

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Issuing guidelines and clear definitions of prohibited AI practices (Art.3 and Art.5)

EUTA shares the Commission's concerns regarding AI practices that are incompatible with fundamental rights, such as social rating (Art.5.1(c)), or surveillance of the population by biometric identification (Art.5.1(d)) conducted by public authorities. We would support a ban on any AI systems that create physical or psychological harm by distorting behaviour through use of subliminal techniques (Art.5.1(a)) or the exploitation of vulnerabilities (Art.5.1(b)), provided that these practices and concepts are properly defined in order to avoid fragmented interpretation at national level.

To help clarify the scope of prohibitions, we would encourage the inclusion of materiality qualifiers. The AIA has the potential to incur high financial penalties which might differ from one Member State to the other due to diverse interpretations of tort law. We fear that these various interpretations undermine legal certainty and materiality qualifiers would help harmonize and assist in compliance.

In addition, it will be paramount to clarify the following definitions, which could also serve as materiality qualifiers:

- **1.1 “AI systems” (Art.3.1):** It will be essential to clearly define AI systems to ensure that trivial automation processes are not associated with AI. This may be facilitated by deletion of points (b) and (c) set out in Annex I. We are concerned that the inclusion of logic-based systems, statistical approaches, as well as search and optimisation approaches as laid out in points (b) and (c) would capture any software application, including simple statistical systems that do not lead to issuing automatic decisions affecting the fundamental rights of EU users. As these systems present less risk to the end user

we suggest these should fall outside of the scope of the proposed AIA. The AI solutions (e.g. machine learning) referred to in Annex I (a) are sufficiently broad to capture the majority of AI systems.

- **1.2 “Psychological harm” (Recital 16, Art.5.1(a) and Art.5.1(b)):** The role of the proposed AIA is to reach a balance between fundamental rights and AI innovation. As a result, the AIA should only ban the deployment of malicious AI systems which purposely seek to cause physical or psychological harm to a specific individual or category of population. Otherwise, the AIA could unintentionally create legal uncertainty for all AI providers of low risk applications, and if the legislation remains too vague, it could be very difficult to apply in practice. This should be reflected by amendments to the Commission’s text clearly mentioning under Art. 5.1 (a) that *“any AI system that deploys subliminal techniques beyond a person’s consciousness in order to materially distort a person’s behaviour **with the intention in a manner that causes or is likely** to cause that person or another person physical or psychological harm”* should be prohibited.
- Similarly, under Art. 5.1 (b), we would suggest an amendment to prevent *“the placing on the market, putting into service or*



use of an AI system that exploits any of the vulnerabilities of a specific group of persons due to their age, physical or mental disability, in order to materially distort the behaviour of a person pertaining to that group **with the intention ~~in a manner that causes or is likely~~** to cause that person or another person physical or psychological harm”. As per the changes proposed to Art. 5, Recital 15 should also reflect the idea that an AI system should be banned whenever there is a proven intention to cause psychological harm to the end user.

- **1.3 “Distorting behaviour” (Recital 16):** From the Commission’s wording, we propose an addition to recital 16 setting out that a distorting behaviour in the case of the AIA should be understood as *“requiring intent, targeting physical or psychological vulnerabilities of an unsuspecting user that results in the distorting of human behaviour”*.
- **1.4 “Bias” (Art. 10.2(f)):** We would like to put forward an addition to Art. 10.2F clarifying that a *“bias”* should be defined as a *“discrimination understood as a statistical error or a top-down introduction of assumptions harmful to an individual”*
- **1.6 “CE marking of conformity” (Art. 3.24):** We propose the following addition to Art 3.24 on CE markings of conformity to ensure trivial AI systems are not hampered in their development: *‘CE marking of conformity’ (CE marking) means a marking by which a provider indicates that an AI system **applicable***

only to a physical product is in conformity with the requirements set out in Title III, Chapter 2 of this Regulation and other applicable Union legislation harmonising the conditions for the marketing of products (‘Union harmonisation legislation’) providing for its affixing’.

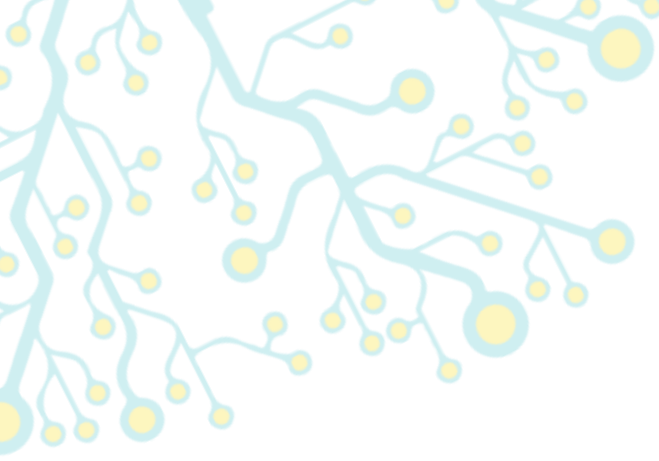
Beyond the proposed changes, the adoption of the AIA must be accompanied by:

- The publication of guidelines to help businesses interpret some of the key concepts covered by the Regulation, such as prohibited or high-risk AI cases;
- After the entry into force of the Regulation, the precise means and implementation rules of the Regulation by national competent authorities.

Clarifying high-risk AI practices to avoid any knock-on effects on sectors driving jobs and growth in Europe (Annex III)

Given that the AIA proposal follows a risk-based approach, it will be essential to clearly define and explain the scope of systems that would be considered “high-risk”, as “high-risk” systems would have to follow the strictest obligations. Therefore, the EUTA believes that some of the areas and their related risks listed in Annex III should be more clearly specified to avoid any knock-on effects on low-risk business activities. EU co-legislators should adopt a more nuanced approach concerning the high-risk categorisation of specific AI applications.





EUTA members fully supported the European Commission’s cumulative approach to high-risk AI categorisation initially outlined in its AI White Paper. However, this cumulative approach¹ has not been reflected in the proposed AI Regulation and Annex III currently fails to consider specific use-cases in favour of a blanket categorisation of high-risk AI applications. As a consequence, the EUTA is concerned that not fully taking into account both the sector and the intended use to define high-risk **AI applications would ultimately apply to a plethora of low-risk AI systems that do not have the potential for harmful impact on the health, safety and fundamental rights of persons.** This would impose significant obligations on various industry stakeholders and considerably restrict the ability of European companies to innovate and compete on a global market, in particular for smaller players. Therefore, we strongly share the European Commission’s concerns “that broad sectors are not really helpful to identify specific high risk use cases”, as pointed out in the Impact Assessment. However, this problem is not sufficiently addressed in the AIA proposal as it ultimately does maintain very broad sectors in Annex III that would disproportionately be considered “high-risk”.

In line with that, it is essential to clarify the criteria used to define high-risk AI practices listed under Annex III of the proposed AI Act, and the use case to which they correspond:

Examples

2.1 High-risk AI applications falling into the employment category:

- AI applications in the field of employment which are mentioned in Annex III cover a wide range of systems, including employment advertising campaigns. This could lead to prohibiting: 1) all types of online advertising on employment websites which need to monetise their websites to remain accessible for free, along with 2) advertising related to vacancies, which should not be treated as a high-risk practice as it does not pose a risk for job seekers. As a result, we would suggest the following deletion amendment to high-risk AI systems pursuant to Article 6(2) under Annex III paragraph 4: “AI systems intended to be used for recruitment or selection of natural persons, ~~notably for advertising – vacancies~~ screening or filtering applications, evaluating candidates in the course of interviews or tests.”
- At the same time, we are very concerned about the broad inclusion of systems for task allocation in paragraph 4(b) in Annex III, which is disproportionate considering the aim of the proposal and the criteria it uses. Systems for task allocation do not produce legal or similarly significant effects for the rights of an individual or a company and neither present a risk to fundamental rights, health or safety (the criteria used

¹ More specifically, an AI application should be considered high-risk where it meets the following two cumulative criteria: First, the AI application is employed in a sector where, given the characteristics of the activities typically undertaken, significant risks can be expected to occur...Second, the AI application in the sector in question is, in addition, used in such a manner that significant risks are likely to arise. Commission [White Paper](#) on AI pg 17.



by the EC to define "high-risk"), as primarily non-sensitive data is used for such systems. In addition, systems for task allocation are usually deployed after the establishment of work-related contractual relationships and do not directly affect those relationships. Task allocation systems can in fact be essential for an efficient organisation of work, thereby benefiting workers as well as European companies. Therefore, we suggest deleting "for task allocation" in paragraph 4(b) in Annex III.


- In this context, the EUTA would like to underline that while some overall areas can not be considered "high-risk", there could naturally be individual applications that would indeed present certain risks. However, a cumulative approach with a clear methodology (including clear criteria for a risk assessment) taking into account the specific use cases would be able to clearly identify those systems and introduce obligations accordingly.

2.2 High-risk AI applications falling into the road traffic category:

- Similarly, the definition of "management and operation of road traffic" (Annex III. 2 (a)) is too vague and it is unclear what type of entity is targeted here. Road authorities and road operators are the main actors responsible for the 'management and operation of road traffic' (i.e. the operation of traffic management centres) but their use of AI is currently limited. Traffic information, navigation and mapping providers are suppliers in the traffic management domain but it is unclear if they would fall under scope. The EUTA calls for clarity on the types of stakeholders that would fall under this domain.

2.3 High-risk AI applications falling into the creditworthiness category:

- AI systems with the main purpose of evaluating a natural person's creditworthiness or establishing their credit score can potentially have a serious impact on an individual's fundamental rights. For instance, they can have severe consequences on an individual's access to housing credit or certain professional opportunities. We believe that there is room for a more nuanced assessment on the different levels of risks attached to these systems. For instance, in the e-commerce sector, machine learning-based payment risk management tools are used to assess the likelihood of fraudulent transactions. Also, small loans that do not have a significant impact on an individual's access to essential goods would be within the scope. In this context, we believe that the definition of 'essential private services' under Annex III.5 is key. Unfortunately, the proposal provides no guidance on what this definition entails in practice and seems to list AI applications that should not be perceived as "essential private services" in all cases. We would therefore suggest adding a severity threshold to Annex III.5 (b) whereby only AI systems that either have



a ‘severe impact on economic, educational or professional opportunities’ as described in the Commission’s Impact assessment are considered to be high-risk AI systems in the creditworthiness context. That way the proposal would focus exclusively on AI systems that pose a significant potential harm, without becoming an unnecessary burden to companies that offer services beneficial to consumers.

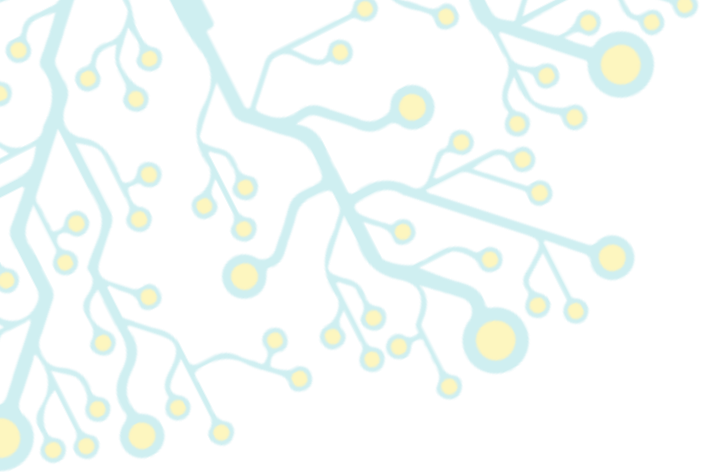
Maintaining the EU competitiveness vis-a-vis third country competitors while also ensuring AI technologies developed outside the EU are covered under the proposed regulation (Art. 2.1(c))

We are concerned an overly rigid regulatory framework could lead to a loss of competitiveness vis-à-vis American and Asian competitors. Though third country AI developers are subject to the same obligations as their European counterparts (Art. 2.1(c)), the current text does not specify how the EU Commission could effectively regulate high-risk AI applications developed outside of the EU. While third country competitors could design and test high-performance AI models without constraints for rapid deployment in Europe, European players could be slowed down from the design phase. In order to ensure there aren’t any unfair competitive advantages, it is essential that the enforcement of rules applicable to players operating outside of

the EU is robust and sufficiently transparent. We would therefore suggest that as part of the European database proposed under the Regulation, the stages of development of AI insights outside of the EU becomes a mandatory transparency requirement under Art. 52. Furthermore, We would suggest that in the same way that the European Commission has the power to determine whether a country outside the EU offers an adequate level of data protection through so-called adequacy decisions under the GDPR, a similar adequacy mechanism is put in place for AI datasets trained abroad whereby third-party conformity assessment must be assessed by a notified body and cannot benefit from informal conformity assessment procedures as per Article 43.

Ensuring that conformity assessments and testing processes for AI data sets are fair and balanced (Art. 10)

We are concerned that setting a legal obligation to ensure that ‘training, validation and testing data sets shall be relevant, representative, free of errors and complete’ (Art.10(3)) is unrealistic. For instance, most representative data has a historical bias, so it is not clear how to ensure that data sets can be both representative and not biased. Moreover, it is unclear, and likely subjective, in many instances what it would mean for a data set to be ‘complete’. To avoid any knock-on effects on AI developers, the obligation to ensure that data sets are



Ensuring legal certainty and predictability regarding sanctions and promoting harmonised implementation (Art. 71.8)

relevant, representative, free of errors and complete should be an obligation of means.

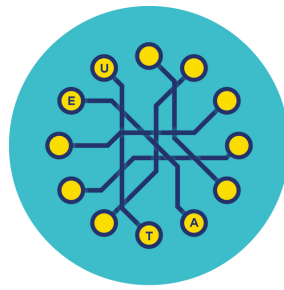
- **4.1** From the Commission's wording, we would like to suggest the following amendments to Art. 10(3): **"AI system developers should make their best efforts to ensure that training, validation and testing data sets are ~~shall be~~ relevant, representative, free of errors and complete. They shall have the appropriate statistical properties, including, where applicable, as regards the persons or groups of persons on which the high-risk AI system is intended to be used. These characteristics of the data sets may be met at the level of individual data sets or a combination thereof"**.
- **4.2** We also believe AI system providers should only register high risk AI systems on the EU database (Art. 51 & Art. 60) in the event where an internal AI audit concludes that risks cannot be mitigated alone. Once registration on the EU database is complete, a given AI application should be placed on the market until the official approval is granted, to avoid administrative delays impacting innovation and marketing timelines.

Financial penalties are important factors in business risk assessments, so to foster innovative AI solutions we need to be certain what eventual penalties may occur. When creating a business strategy it is crucial to see a clear catalogue of prerequisites with enumerated infringements. We would welcome the same approach to the AIA, in that a clear catalogue of penalties be provided in order to prevent forum-shopping and promote general harmonisation.

“Final say

Finally, we stress the need to avoid a fragmented approach across Europe: As per the enforcement powers, we note the Commission proposes that national competent authorities should conduct checks and assessments on an ex-post basis. As many of our business models can be regulated by various market authorities when we operate across markets, it will be essential to clarify which surveillance authority will be granted AI oversight over a specific sector.





European Tech Alliance

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