European Tech Alliance

Position Paper on the Artificial Intelligence Act Ahead of Trilogue Negotiations

June 2023

The European Tech Alliance (EUTA) fully supports the Artificial Intelligence Act's (AIA) objective of promoting artificial intelligence (AI) innovation while mitigating the negative impact of "high risk AI". EU tech companies should be encouraged to develop and use innovative AI models to compete with global players and foster EU competitiveness. Adopting a risk-based approach to regulating AI is crucial in striking this balance between innovation and users' protection. To avoid hindering European innovation, AI regulation should not focus on the technology *per se*, but only on outcomes and use cases which could pose a significant risk.

As the Council of the EU and the European Parliament have considered the European Commission's proposal and adopted their positions, the EUTA would like to share its views on the respective texts ahead of the trilogue negotiations.

EXECUTIVE SUMMARY - KEY EUTA RECOMMENDATIONS

1. Clarify scope and definitions: In order to bring legal certainty and foster innovation, it is important that the AI Act:

a) Embraces a widely accepted AI definition that aligns with the OECD's definition.
b) Limits the scope of prohibited AI practices by excluding lawful practices, such as personalisation and marketing activities.
c) Specifies that legitimate and lawful marketing and advertising practices are not considered "deep fakes" and maintain a clear exemption for artistic content.

2. Retain the risk-based approach to AI regulation: The AI Act must retain its targeted and risk-based approach tailored at regulating only the highest risk use cases. In order to do so, it is critical that the Act:

a) Does not impose that all covered operators comply with vague general principles.
b) Includes a pre-approval process for high-risk AI applications, focusing on few use cases.
c) Limits Annex III to actual high-risk AI use cases, removing references to employment to advertising vacancies or targeted advertisements (4(a)), task allocation (4(b)), creditworthiness evaluation (5(b)), and recommender systems (8(ad)).
d) Subject foundation models to high-risk AI obligations only if they are intended for use in specific high-risk areas defined by the AIA.
e) Clarifies the obligations regarding foundation models and transparency in the use of copyright-protected data to ensure practical implementation, effectivity and safeguards for all parties involved.

3. Foster innovation in Europe: The AI Act must remain a business and innovation enabler. To do so, it must:

a) Include a research exemption.
b) Exempt AI components offered under free and open-source licences from the AIA, including foundation models.
c) Establish clear cooperation requirements for providers of general purpose AI to provide all necessary information to users.
d) Enable the testing of high-risk AI systems in real-world environments beyond the boundaries of AI regulatory sandboxes.

4. Ensure effective enforcement: In line with its objective to reach a pragmatic balance between innovation and protection of EU fundamental values, the AI Act must:

a) Provide oversight authorities with adequate resources.
b) Establish a realistic 36-month timeframe for enforcement.
c) Ensure consistent enforcement with the EU data protection laws (e.g. GDPR) when AI systems involve the processing of personal data.

The European Tech Alliance urges the co-legislators to endorse an innovation-friendly AIA based on a risk-based and proportionate approach. We hope you will consider our concerns and that we can collaborate to ensure that the AI Act supports entrepreneurship and technological advancements in Europe, while fully respecting EU values.

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1. Adopt a clear scope and definitions

a) Take up a widely accepted AI definition - *Parliament's Proposal Preferred*

To ensure that the AI Act does not encompass unrelated technologies and to acknowledge the global nature of AI, the Act should adopt a widely recognised definition of AI that aligns with the OECD's definition. This will provide legal certainty for companies, users and research labs and foster innovation, as well as enable a shared understanding of AI among like-minded nations that will facilitate future international discussions and partnerships.

Therefore, we recommend adopting the AI definition of the European Parliament (AM 165):

> Article 3.1.(1) "artificial intelligence system' (AI system) means ~~software~~ **a machine-based system** 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~~ **designed to operate with varying levels of autonomy and that can, for explicit or implicit** objectives, generate outputs such as ~~content,~~ predictions, recommendations, or decisions ~~influencing the~~**, that influence physical or virtual** environments ~~they interact with~~;

b) Narrow the scope of prohibited AI practices - *Parliament's Proposal Preferred with clarification*

The EUTA shares the co-legislators' concerns regarding AI practices that violate European fundamental rights, such as social rating or biometric mass surveillance conducted by public authorities. However, it is important to ensure that any ex-ante prohibition of AI remains exceptional and should take into account the EU principle of proportionality. Prohibited AI should be narrowly and clearly defined to avoid undermining innovation due to potential uncertainties regarding the boundaries of permissible AI use.

Consequently, the broad definition of social scoring proposed by the Parliament, as well as the potential extensive interpretation of "social behaviour" and "personal characteristics", may inadvertently encompass many lawful activities, such as personalisation and marketing carried out by the industry. Therefore, we recommend excluding these activities from the scope of the prohibited AI and follow AM 38 with the modification highlighted in yellow:

> Recital (16) The placing on the market, putting into service or use of certain AI systems **with the objective to or the effect of materially distorting** ~~intended to distort~~ human behaviour, whereby physical or psychological harms are likely to occur, should be forbidden. [...] **The prohibitions for such AI practices is complementary to the provisions contained in Directive 2005/29/EC, according to which unfair commercial practices are prohibited, irrespective of whether they carried out having recourse to AI systems or otherwise. In such setting, lawful commercial practices, for example in the field of advertising and personalisation, that are in compliance with Union law should not in themselves be regarded as violating prohibition.** [...]

c) Clarify the definition of "deep fakes" and retain a clear exemption for artistic content - *Council's Proposal Preferred with clarification*

EUTA supports the need to provide adequate information and transparency on content that has been modified to deceive and manipulate individuals. It is important, however, that the definition of deep fakes does not extend to commercial practices in the field of marketing and advertising that comply with existing law. Advertising content may be created with AI techniques to make the product more attractive by displaying it in a particular setting. The DSA already provides, for instance, that each advertisement must clearly state and through prominent markings that the content presented to an individual is an advertisement. Applying additional information that the advertisement has been artificially generated would impose additional burdens while not adding value for individuals.

Furthermore, the creation of AI-generated content for artistic purposes should be clearly exempted from these obligations, as proposed both by the Council and the Parliament. In this respect, the qualification of "deep fakes" as those for which the impersonated individual has not given consent, proposed by the Parliament, should be retained.

In this context EUTA would support the Council's version with the modification highlighted in yellow:

> Article 52 (3) - Users of an AI system that generates or manipulates image, audio or video content that appreciably resembles existing persons, objects, places or other entities or events and would falsely appear to a person to be authentic or truthful, ***without their consent*** ('deep fake'), shall disclose that the content has been artificially generated or manipulated. ***Lawful marketing and advertising practices do not fall under the category of deep fakes.***

2. Maintain the risk-based approach to regulating AI

a) Provide legal certainty for all AI operators systems - *Council's Proposal Preferred*

Article 4a of the European Parliament's text introduces a set of general principles applicable to all operators covered by this Regulation, including providers, deployers, authorised representatives, importers and distributors.

The EUTA believes that this provision has a broad scope, potentially encompassing all actors, which contradicts the AIA's original risk-based approach intended to focus solely on the most high-risk AI use cases as defined in Article 6, Annex II, and Annex III.

Adopting such an approach could lead to the imposition of extensive obligations on all participants involved in the AI supply chain, regardless of whether they pose high risks or not. The article appears redundant since it assumes that operators adhere to it by fulfilling the obligations outlined in the Act. This would give rise to significant legal ambiguity.

It would also commit companies' resources which could be used for more relevant compliance purposes, even in cases where the AI system has minimal impact on health, safety, or fundamental rights. Additionally, it could lead to confusion regarding the responsibilities of different actors and result in lengthy commercial and contractual negotiations that may delay innovative projects.

Therefore, we recommend following the Council's approach and not adopting Article 4.a of the Parliament in the final text of the Act (AM 213).

b) Tailor the pre-approval of high risk AI Applications - *Parliament's Proposal Preferred with clarification*

Article 6.2.a of the Parliament's text imposes an obligation on AI providers operating within the critical areas and use cases listed in Annex III to obtain confirmation from the national authority that their AI system does not present a significant risk of harm to the health, safety, or fundamental rights of individuals. The national authority would have three months to respond to the AI provider. This provision has the potential to cause unnecessary delays in introducing new AI systems to the EU Single Market, and could discourage innovation by European tech leaders. This is especially concerning when considered alongside the threat of fines outlined in Article 6.4. Additionally, this approach contradicts the risk-based approach of the AIA by presuming high risk based on sectors rather than specific use cases. Consequently, many harmless AI systems would be subject to a burdensome clearance procedure before they can be utilised or safely brought to the market.

Therefore, we recommend adopting the European Parliament AM 235 with the modification highlighted in yellow and a limited Annex III:

> Article 6.2.(a): **Where providers falling under one or more of ~~the critical areas and~~ use cases referred to in Annex III consider that their AI system does not pose a significant risk as described in paragraph 2, they shall submit a reasoned notification to the national supervisory authority that they are not subject to the requirements of Title III Chapter 2 of this Regulation. Where the AI system is intended to be used in two or more Member States, that notification shall be addressed to the AI Office. Without prejudice to Article 65, the national supervisory authority shall review and reply to the notification, directly or via the AI Office, within three months if they deem the AI system to be misclassified.**

Alternatively, this article could be revised to enable AI providers to collaborate with national authorities in order to ascertain that an AI system does not fall within the "high-risk AI" classification, which would foster legal certainty.

c) Focus Annex III to actual high risk AI use cases - *Council's Proposal Preferred*

The EUTA strongly believes that certain amendments proposed in Annex III by the Parliament have an excessively broad scope, and undermine the risk-based approach of the AIA. This could jeopardise the development of a dynamic AI ecosystem in Europe by introducing broad categories and extensive lists of high-risk AI applications without adequately considering the actual risks posed by these use cases.

Considering the new constraints that the AIA would impose on companies, this would result in significant administrative burdens on innovative businesses, including SMEs, across a wide range of AI applications. This goes against the original risk-based approach of the AIA aimed to enable organisations to allocate resources where the risks are most significant. Adopting a broad definition of high-risk AI would also require substantial regulatory resources to enforce the law across a much larger number of instances. The resulting compliance burden would disproportionately affect mid-sized EU companies over global giants with more legal and engineering resources.

The EUTA believes that the AIA should focus on a selected number of highly problematic use cases that have already harmed or have a high potential to seriously harm individuals.
Consequently, we oppose extending the list of high risk AI to:

- Employment to advertising vacancies or targeted advertisements (4(a)): Such an inclusion would enlarge the scope of Annex III, in an unjustified manner, to innocuous cases that do not meet the AI Act's high threshold for high risk AI.

- Task allocation (4(b)): Task allocation is an essential part of digital labour platforms relying on AI systems to match tasks with workers. The current proposed Platform Work Directive (PWD) already has an entire chapter on algorithmic management, including the obligation to maintain technical documentation. Subjecting task allocation to the risk management obligation of high risk AI would create an overlap and potential conflict with the PWD.

- Creditworthiness evaluation (5(b)): The provision is overly broad, including lower-value consumer credits. We recommend including an exemption for low-value consumer credits or (as a last resort) having the Commission consider this matter in its guidelines for implementation and enforcement.

- Recommender systems for user-generated content (UGC) (8(ad)): As the terms "recommender systems" and "user-generated content" are not defined in the AI Act, it is unclear exactly which systems and UGC are likely to fall under Annex III. More fundamentally, there is no economic or technical argument (supported by an impact assessment) justifying the general inclusion of recommender systems in the high-risk AI category. Further, the DSA already creates requirements regarding recommender systems for VLOPs and online platforms. Adding an extra layer of regulation, with completely different regulatory authorities and enforcement processes is both unnecessarily burdensome and disproportionate. This would introduce overlapping obligations which would increase legal uncertainty for European tech companies that risk hampering innovation.

d) Apply the risk-based approach to foundation models - *Parliament's Proposal Preferred with clarification*

The EUTA supports the Parliament's clarification that foundation models should be treated equally to other AI systems and should adhere to the risk-based approach outlined in the AI Act. Consequently, foundation models should only be subject to the obligations designated for high-risk AI if they are intended for use in the specific high-risk areas defined by the Act. Imposing extensive obligations on these models, even when they are intended for harmless purposes outside the Act's scope, would be burdensome and unnecessary. Such a scenario could discourage the development and utilisation of foundation models by European players and hinder AI innovation within the EU. Additionally, it would create an unfair competition dynamic between the few major AI players who possess the resources to independently

develop and reuse these models for their own services, and the majority of AI ecosystems that would have to rely on heavily regulated third-party foundation models, regardless of their intended usage.

Therefore, we recommend adopting the European Parliament AM 399 with the modification highlighted in yellow:

> Article 28 b (new). **A provider of a foundation model that is specifically intended to be used as part of a high-risk AI system shall, prior to making it available on the market or putting it into service, ensure that it is compliant with the requirements set out in this Article, regardless of whether it is provided as a standalone model or embedded in an AI system or a product, or provided under free and open source licences, as a service, as well as other distribution channels. The provisions of this Article shall not apply if the provider of the foundation model has excluded high risk uses from the instruction of use.**

e) Clarify obligations related to foundation models and transparency on use of copyright-protected data - *Parliament's proposal to be clarified*

The EUTA supports the principle according to which the training of foundation models and generative AI should be compliant with applicable copyright rules. When it comes to transparency, the provision requires further clarification to ensure it will fulfil the political ambition and is implementable. In its current form, the wording is excessively broad and lacks clarity. An impact assessment would also be welcomed.

Under Article 28b, paragraph 4, the Parliament proposes that providers of foundation models "*make publicly available a sufficiently detailed summary of the use of training data*". It is essential to clarify that this provision does not impact the trade secrets of providers and rights holders, while also serving as a deterrent for providers to refrain from infringing upon intellectual property rights. In this context, it is not clear to whom the information needs to be disclosed, what "specialisation of the foundation model" means and what a "sufficiently detailed summary of the use of training data" is. We therefore call for this provision to be clarified.

3. Strengthen innovation in Europe

a) Include a research exemption - *Council's Proposal Preferred*

The vibrant AI ecosystem in Europe requires a comprehensive and unambiguous research exemption provision to unlock the full potential of innovative resources. Introducing restrictions or implementing a complex framework that applies to AI research and development activities would put the EU AI ecosystem at a competitive disadvantage compared to its international rivals.

Therefore, we endorse the Council's proposal for a clear and wide research exemption. This provision would provide the necessary leeway to foster and encourage AI innovation. We recommend adopting the Council's language:

> Recital (12b) (new) **This Regulation should not undermine research and development activity and should respect freedom of science. It is therefore necessary to exclude from its scope AI systems specifically developed and put into service for the sole purpose of scientific research and development and to ensure that the Regulation does not otherwise affect scientific research and development activity on AI**

systems. As regards product oriented research activity by providers, the provisions of this Regulation should also not apply. This is without prejudice to the obligation to comply with this Regulation when an AI system falling into the scope of this Regulation is placed on the market or put into service as a result of such research and development activity and to the application of provisions on regulatory sandboxes and testing in real world conditions. Furthermore, without prejudice to the foregoing regarding AI systems specifically developed and put into service for the sole purpose of scientific research and development, any other AI system that may be used for the conduct of any research and development activity should remain subject to the provisions of this Regulation. Under all circumstances, any research and development activity should be carried out in accordance with recognised ethical and professional standards for scientific research.

Article 2.6. (new) **This Regulation shall not apply to AI systems, including their output, specifically developed and put into service for the sole purpose of scientific research and development.**

Article 2.7. (new) **This Regulation shall not apply to any research and development activity regarding AI systems.**

b) Exempt free and open-sources AI components - *Parliament's Proposal Preferred with clarification*

The EUTA welcomes the Parliament's provisions that exempt AI components offered under free and open-source licences from the AIA. Many European companies heavily depend on these components to advance their own AI systems, particularly in the case of foundation models that can be further customised and play a vital role in the development of innovative AI products and services by EU companies. Hence, it is crucial that this framework aligns with the regulation of other AI components provided under free and open-source licences, ensuring that they are subject to regulation only when used in high-risk scenarios.

Therefore, EUTA recommends adopting the European Parliament AM 164 with the modification highlighted in yellow:

Article 2.5.e (new) - **This Regulation shall not apply to AI components provided under free and open-source licences except to the extent they are placed on the market or put into service by a provider as part of a high-risk AI system or of an AI system that falls under Title II or IV. ~~*This exemption shall not apply to foundation models as defined in Art 3*~~**

c) Obligations of cooperation of general purpose AI and foundation models providers - *Parliament"s Proposal Preferred with clarification*

EU companies will extensively utilise general-purpose AI and foundation models, integrating them into their cutting-edge AI systems, products, and services. This will enable home-grown EU companies to compete on a global scale and deliver high quality services to EU citizens. It is of utmost importance for the AIA to establish unambiguous cooperation obligations for the providers of general-purpose AI, particularly when EU companies' use cases fall within those listed in Annex III. Providers should be required to furnish users with all necessary information; without this assurance, EU companies may hesitate to invest and innovate using AI due to uncertainty regarding their ability to meet regulatory obligations under the AIA.

Therefore, EUTA recommends adopting the European Parliament AM 395:

> Article 28.2. Where the circumstances referred to in paragraph 1, point ~~(b) or (c)~~ **(a) to (ba)** occur, the provider that initially placed the ~~high-risk~~ AI system on the market or put it into service shall no longer be considered a provider **of that specific AI system** for the purposes of this Regulation. **This former provider shall provide the new provider with the technical documentation and all other relevant and reasonably expected information capabilities of the AI system, technical access or other assistance based on the generally acknowledged state of the art that are required for the fulfilment of the obligations set out in this Regulation. This paragraph shall also apply to providers of foundation models as defined in Article 3 when the foundation model is directly integrated in an high-risk AI system.**

d) Enable the testing of high-risk AI systems in real world environments beyond the confines of AI regulatory sandboxes - *Council's Proposal Preferred*

AI is a developing technology that relies on experimentation and testing. The EUTA endorses the Council's provisions that allow for the testing of AI systems under real-world circumstances, alongside testing in regulatory sandboxes. This testing will enable EU companies to gather pertinent data on the functioning of their AI systems, ensuring compliance with the AIA, and expediting the introduction of high-risk AI systems to the market.

Therefore, we support the Council's Article 54a.1.:

> Article 54a (new) **1. Testing of AI systems in real world conditions outside AI regulatory sandboxes may be conducted by providers or prospective providers of high-risk AI systems listed in Annex III, in accordance with the provisions of this Article and the real-world testing plan referred to in this Article.**
> **The detailed elements of the real-world testing plan shall be specified in implementing acts adopted by the Commission in accordance with the examination procedure referred to in Article 74(2).**

4. Ensure successful enforcement

a) Equip the oversight authorities with the right resources - *Council's Proposal Preferred*

Proper enforcement is key to the success of the AI Act. The national authorities responsible for enforcing the Act must have the right resources, staff and expertise as well as experience in promoting innovation and understanding market dynamics to ensure the AI Act's risk-based approach and innovation objectives are effective. As a consequence, we have concerns about appointing Data Protection Authorities (DPAs) as national authorities due to their potential risk-averse approach.

The EUTA would support the Council's Article 59 that would not require member states to appoint one single national authority but would provide leeway to entrust the implementation of the AIA in the most effective and pragmatic manner. Therefore, we support the following language

> Article 59 - Designation of national competent authorities
> ~~1. National competent authorities shall be established or designated by each Member State for the purpose of ensuring the application and implementation of this Regulation. National competent authorities shall be organised so as to safeguard the objectivity and impartiality of their activities and tasks~~

2. Each Member State shall **establish or** designate ~~a national supervisory authority, and~~ **at least one notifying authority and at least one market surveillance authority for the purpose of this Regulation as** ~~among the~~ national competent authorities. **These national competent authorities shall be organised so as to safeguard the principles of objectivity and impartiality of their activities and tasks. Provided that those principles are respected, such activities and tasks may be performed by one or several designated authorities, in accordance with the organisational needs of the Member State.** ~~The national supervisory authority shall act as notifying authority and market surveillance authority unless a Member State has organisational and administrative reasons to designate more than one authority.~~

b) Set a realistic timeframe for enforcement - *Council's Proposal Preferred*

The EUTA strongly supports a timeframe for the application of the rules which take into account the important amount of compliance resources which EU companies should devote to enforcing the rules. Accordingly, the 36 months time frame proposed by the Council is more reasonable than the Parliament's text and the original Commission proposal (24 months).

Article 85.2. This Regulation shall apply from [~~24~~ **36** months following the entering into force of the Regulation].

c) Keep EU's consistency between the AIA and the GDPR

While the AIA acknowledges that it should not override data protection laws, the recent suspension by the the Italian Data Protection Authority (DPA) of Open AI's ChatGPT highlights potential conflicts between the AI Act and the GDPR.

The EUTA agrees that the processing of personal data in the development, deployment, or use of an AI system is subject to the provisions of the GDPR. However, if DPAs have the authority to somehow suspend any AI system, including those that do not fall under the list of prohibited AI or high-risk AI, it could impede innovation due to uncertainties and concerns about GDPR compliance, even if the AI system itself is not subject to the AI Act.

The European Tech Alliance urges the co-legislators to endorse an innovation-friendly AIA based on a risk-based and proportionate approach. We hope you will consider our concerns and that we can collaborate to ensure that the AI Act supports entrepreneurship and technological advancements in Europe, while fully respecting EU values.

About the EUTA

The EUTA gathers major European digital champions and scaleups successfully built across Europe, with a total of 30 companies from 14 European countries.

Our Mission is to create a better future for Europe through technology, based on our shared EU values. We aim to contribute to our local European economies and build a sustainable, green, innovative and inclusive Europe for future generations.

Our Vision is to develop smart policies promoting European tech innovation, investments and competitiveness. We believe it is important to create the right regulatory conditions which both enable European tech champions to grow and empower consumers in the EU.

Visit us at www.eutechalliance.eu.