



KI BUNDESVERBAND

Position Paper on the EU AI Act

Remaining Issues and Current Discussions
in the European Parliament

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Executive Summary

In its current form, the European Artificial Intelligence Act (EU AI Act) will have a significant negative impact on the European AI ecosystem and potentially lead to a competitive disadvantage, especially against US and Chinese competitors. With this position paper, the German AI Association aims to highlight the existing shortcomings of the AI Act and propose amendments that address these issues. An exclusion of General Purpose AI (GPAI) and Large Language Models (LLMs) or at least from a categorical classification of such models as high-risk is necessary. We also call for a re-evaluation of the current requirements that classify AI systems as high-risk, measures to protect and promote European investments in LLMs and large multimodal AI models, and clarification of vague or missing definitions. The German AI Association urges the members of the European Parliament to create a regulatory framework that removes these legal uncertainties and bureaucratic hurdles for SMEs and start-ups and that helps to foster an innovative, future-proof environment for the European AI ecosystem.

Note:

The following position paper is based on and assesses information from internal discussion papers and compromise texts of the European Parliament. The analysis therefore refers to parts of the EU AI legislation that are not yet publicly available. However, all the information in this position paper can be cross-checked with public news articles.

Introduction

There is no doubt that the diverse and highly innovative European AI ecosystem has the potential to become a major player in the global market. The introduction of a regulatory framework, not only in the field of AI development but also in the field of AI liability, will help foster further innovation and strengthen "AI Made in Europe", especially for European SMEs and start-ups. However, over-regulation and too many bureaucratic requirements create an administrative burden and risk hindering and slowing down AI development and innovation. We acknowledge that the currently circulated drafts of the AI Act contain significant improvements compared to the original proposal presented by the European Commission on 21 April 2021. However, despite the aforementioned positive changes, we still identify parts of the AI Act that, in their current form, will have a significant negative impact on the European AI ecosystem, which will very likely lead to a competitive disadvantage compared to its global counterparts outside the European Union, notably the US and China. Furthermore, recent developments such as the launch of ChatGPT, GPT-4 and Bard reflect the speed at which new (generative) AI systems are being developed. It is, therefore, of utmost importance that the AI Act takes into account the speed at which these developments are taking place and that the European Union ensures the adoption of a future-proof and innovative regulatory framework.

The German AI Association believes that the members of the European Parliament now have the opportunity to create a regulatory framework that clarifies the legal uncertainties and removes the bureaucratic hurdles for SMEs and start-ups laid down in the General Approach of the Council of the European Union. With this paper, we aim to highlight the most pressing issues in the current draft of the AI Act, provide MEPs with possible scenarios and present possible amendments.

Issue 1: General Purpose AI Systems

The introduction of General Purpose AI Systems (GPAIS) into the AI Act by the French presidency of the Council of the EU has inevitably broadened the scope of the regulatory framework. This could have serious consequences for the European AI ecosystem. A recent survey¹ shows that almost half of the start-ups surveyed

1) appliedAI Initiative GmbH, DTU Skylab, Agoranov, UnternehmerTUM GmbH, KI-Bundesverband e.V., NL AI Coalitie, Hub France IA, AI Austria, AI Poland, & AI Sweden. (2022). *AI Act Impact Survey: Exploring the Impact of the AI Act on Startups in Europe*. <https://ki-verband.de/wp-content/uploads/2022/12/AI-Act-Survey-2022.pdf>



Potential Scenario:

A small German start-up specialising in B2B AI products integrates ChatGPT into its product. They do not modify the software but introduce their own design for the user interface. This could amount to a substantial modification under the new Article 28(1). If Article 28(1) is indeed interpreted in this way, the start-up would not only be responsible for the output generated by the ChatGPT integration, but would also be responsible for the integration's compliance with the AI Act and, even more seriously, potentially face civil liability for the specific application.

By integrating ChatGPT into its product, the German start-up in question may thus be faced with extensive obligations, as it is now the new GPAIS provider according to the updated Article 28. Combined with the proposed liability framework, the start-up faces significant additional costs that may significantly limit the viability of its business model.

classify their AI systems as GPAIS. As such, they would also have to comply with the proposed regulation, as they would de facto be automatically classified as high-risk AI. For GPAIS or LLMs, compliance with the regulation for high-risk use cases set out in the AI Act is unlikely to be possible due to the nature of the AI systems in question. There could therefore be a real risk of a de facto ban on GPAIS.

Against this background, we strongly urge the Members of the European Parliament not to categorise GPAIS and LLMs as high-risk across the board. Our main concern is that the impact of such a change was never explored in the Commission's initial impact assessments. Nevertheless, we do not question that LLMs or GPAIS could be used in a context where they should be classified as high-risk use cases. We, therefore, support the regulation of such AI systems if, and only if, they meet the criteria of high-risk in specific applications. However, blanket de facto high-risk regulation of an entire emerging technology should be avoided.

We, therefore, acknowledge the amendments introduced with the latest compromise text of 16 March 2023. Contrary to the proposal of the Council of the European Union, the co-rapporteurs proposal is structured differently and, in theory, only partially considers GPAIS as a high-risk use case. However, their proposal contains numerous general obligations that would otherwise only apply to high-risk AI. Thus, the new compromise still classifies almost any GPAIS product as a high-risk use case. Furthermore, we have reasonable doubts about the workability of the new Article 28. First of all, we urge the co-rapporteurs and the

European Parliament to clarify and define the term “*substantial modification*” in Article 28(1b). In its current form, we believe this term will lead to more legal uncertainty rather than contribute to an innovative and future-proof regulatory framework. Secondly, we argue that the far-reaching effects of Article 28 will disproportionately harm SMEs and start-ups. We are particularly concerned about start-ups that base their business models on generative AI systems. We seriously question whether they will be able to bear the additional costs generated by the proposed obligations for GPAIS providers in Article 28(b).

Our Recommendation:

The German AI Association urges the Members of the European Parliament to reconsider the inclusion of GPAIS in the AI Act. We propose to exclude these AI systems from the AI Act, at least until a proper impact assessment has been carried out. We also call for the introduction of a clear threshold for the term “*substantial modification*”. As currently drafted, it is unclear whether such a term applies only to changes to the software or potentially also to changes to the design, e.g. the addition of a different company logo. In our view, this proposal significantly changes the liability issues to the detriment of SMEs and start-ups. We, therefore, recommend that additional measures be taken to protect small businesses and start-ups.

Issue 2: High-Risk AI (ANNEX III)

The risk of over-regulation of AI systems that pose little or no risk to society and individuals can potentially lead to a loss of competitiveness and innovation, thus undermining the goal of “*AI made in Europe*”. While the European Commission estimates that five to fifteen percent of all AI systems are classified as high-risk AI², a recent survey of start-ups shows that the figure could be as high as fifty percent.³ The consequences would be particularly severe for start-ups, as many of them will not be able to bear the additional costs introduced by the new obligations. We are also concerned about the introduction of the new use case category in ANNEX III Point 5a. In its current form and wording, Point 5a will significantly broaden the

2) According to ANNEX III of the EU AI Act.

3) appliedAI Initiative GmbH, DTU Skylab, Agoranov, UnternehmerTUM GmbH, KI-Bundesverband e.V., NL AI Coalitie, Hub France IA, AI Austria, AI Poland, & AI Sweden. (2022). *AI Act Impact Survey: Exploring the Impact of the AI Act on Startups in Europe*. <https://ki-verband.de/wp-content/uploads/2022/12/AI-Act-Survey-2022.pdf>

scope of the legislation and introduce even more legal uncertainty instead of providing for clearly defined use cases. In addition, the German AI Association has concerns about the wording of Points 4b and 5bb of ANNEX III. For example, it could be argued that AI systems that assist in decision-making should not be considered high-risk use cases, as humans will ultimately make the final and legally binding decision. While we understand the introduction of this part (assisting in decision-making), we strongly believe that further clarifications are needed.

Our Recommendation:

- We call for a re-evaluation of the requirements that classify AI systems as high-risk use cases under ANNEX III. We suggest focusing on specific AI systems that pose significant risks to individuals, rather than including more general use cases.
- We strongly disagree with the addition of Point 5a to ANNEX III. We, therefore, support either a substantial rewording or deletion of Point 5a from ANNEX III by the European Parliament.
- We ask for clarification of the term "assisting" in Point 4b of ANNEX III. As with other recommendations in this paper, we urge MEPs to introduce clear thresholds to avoid legal uncertainty.

Issue 3: Unclear Definitions

We welcome the clarifications made so far in Article 3 of the AI Act, in particular the current efforts to adopt the OECD definition for Article 3(1). Nevertheless, the vagueness of some terms still leaves the risk of legal uncertainty and different interpretations by the parties concerned. In our view, the following terms, in particular, require clarification:

- "*Significant risk*" (Article 6): The lack of a clear threshold and precise definition will require providers to commission further and additional assessments, leading to increased development costs.
- "*With an intended purpose*" (Article 6): In our view, the previously deleted phrase in Article 6(2) should be reintroduced to ensure a clear definition of the scope of the AI Act with regard to high-risk use cases. Furthermore, we have doubts as to whether the deletion of the relevant phrase would not create new uncertainties with regard to liability.

- *“Relevant stakeholders”* (Article 6(2)): As an association representing more than 400 members of the German AI ecosystem, we have doubts about the current design of the Commission's consultation on guidelines on significant risk and harm. As these guidelines will represent some of the most important aspects of the regulatory framework, we believe that a public consultation is necessary to ensure a fair and transparent assessment by the Commission. Unfortunately, we have not been able to find any details on who will be classified as a relevant stakeholder, or which EU body will decide on such criteria.

Our Recommendation:

- We recommend further specification of the definition of “significant” or even suggest a different wording, possibly “harm” instead of “risk”. Apart from the language, either option needs to be accompanied by a clear threshold.
- Concerning Article 6(2) on the topic of “relevant stakeholders”, we recommend changing the wording from “relevant stakeholders” to “public consultation” to ensure the right of all stakeholders to be consulted and a balanced and complete assessment by the Commission.

Issue 4: Measures to Protect and Promote European Investments

Since the European Commission presented its first proposal for the EU AI Act, numerous AI foundation models such as ChatGPT, Prometheus, LaMDA or LLaMA have been launched. While such systems demonstrate the potential of AI systems, they also show that the most advanced developments in the field of AI foundation models are currently being made by companies in the United States. However, this does not mean that the European AI ecosystem is inevitably lagging behind. Years before the release of ChatGPT, the Large European Language Models (LEAM) initiative by the German AI Association set out to lay the foundations for the independent development of internationally competitive LLMs in Germany. It also aims to incorporate European values and standards into the development of GPAIS. With a feasibility study⁴ commissioned by the German Federal Ministry of Economic

4) Akademie für künstliche Intelligenz AKI gGmbH. (2023). Große KI-Modelle für Deutschland. Machbarkeitsstudie. https://leam.ai/wp-content/uploads/2023/01/LEAM-MBS_KIBV_webversion_mitAnhang_V2_2023.pdf

Affairs and Climate Action, the initiative was able to clearly demonstrate the economic demand for LLMs "*Made in Germany and Europe*". In addition, there are already European players whose AI systems perform at the same level or even better than their US counterparts. One such example is Aleph Alpha⁵, a start-up based in Germany and a member of the German AI Association.

Our Recommendation:

We are convinced that current political decisions will set the course and determine whether Europe will be irrevocably left behind in the development of AI and whether its digital sovereignty will be at risk. We therefore respectfully recommend that the members of the European Parliament take into account the European investments made and include measures in the AI Act that will not only protect the investments already made in GPAIS "*Made in Europe*", but also promote future developments.

Conclusion

We recognise and appreciate the changes proposed by the European Parliament to the EU AI Act. We believe that the current draft represents a much more balanced version of protection and regulation and the promotion of "*AI made in Europe*". Despite the progress made, we are following the current discussions in the European Parliament with concern. In particular, we doubt that the approach presented with the compromise text of 14 March 2023 on GPAIS can be implemented in practice. The lack of definitions of critical elements in the obligations will lead to more legal uncertainties for the European AI ecosystem and significantly change questions of liability, unfortunately to the detriment of SMEs and start-ups. Nevertheless, the German AI Association strongly believes that the AI Act can still be turned into a future-proof, unbureaucratic and innovative regulatory framework and, therefore, urges the members of the European Parliament to take into account the future innovative strength of the European AI ecosystem.

5) Aleph Alpha. (2023, February 20). *Luminous: European AI closes gap to world leaders*. Retrieved March 22, 2023, from <https://www.aleph-alpha.com/luminous-european-ai-closes-gap-to-world-leaders>



Authors

Jörg Bienert

President, German AI Association

Daniel Abbou

Managing Director, German AI Association

Vanessa Cann

Managing Director, German AI Association

Phillip Handy

Communications and Public Affairs, German AI Association

Alessandro Blank

Public Affairs, German AI Association

About the German AI Association

The German AI Association (KI Bundesverband e.V.) is Germany's largest industry association for Artificial Intelligence (AI) and represents more than 400 innovative SMEs, start-ups and entrepreneurs focusing on the development and application of AI. We support AI entrepreneurs by representing their interests in politics, business and the media. Our goal is an active, successful and sustainable AI ecosystem in Germany and Europe. After all, we can only compete globally if the brightest minds and visionaries decide to set up businesses, conduct research and teach in the European Union. Our members are committed to ensuring that AI technology is applied in accordance with European and democratic values and that Europe achieves digital sovereignty. To achieve this, the European Union must become an attractive place for entrepreneurs to do business, where their willingness to take risks is valued and their innovative spirit is met with the best conditions.



Contact:

KI Bundesverband e.V.
Im Haus der Bundespressekonferenz
Schiffbauerdamm 40
DE-10117 Berlin
Germany

Email: politik@ki-verband.de
Website: <https://ki-verband.de/>