



Statement by the German AI Association on the current debate about Foundation Model regulation in the EU AI Act

Berlin, 30 November 2023

The German AI Association welcomes the ongoing efforts to find a way forward between divergent views on regulating Foundation Models (FMs) in the EU AI Act, as expressed in particular by the joint position of the governments of Germany, France and Italy, which advocates "mandatory self-regulation" for FM developers¹, and the position of the European Parliament, which favours horizontal obligations for all FM developers. These positions are currently being reconciled, most recently in a compromise proposal put forward by the European Commission.

The current discussions undoubtedly reflect the fact that the rapid advances particularly in the field of generative AI have fundamentally changed the policy and regulatory environment since the European Commission's proposal in April 2021. Nonetheless, we remain convinced that this is an important piece of legislation overall, given the need for regulatory alignment and clarity across Member States on a common framework for the development, deployment and use of AI, and we are confident that it is in the interests of all parties to reach agreement at the final political trilogue on 6 December.

We remind negotiators of the importance of not negatively impacting the commercial value and success of FMs "made in Europe" by imposing obligations that put their developers at a competitive disadvantage with non-European developers due to prohibitive costs or the risk of disclosing trade secrets and proprietary information. As we have emphasised in [previous statements](#), we are convinced that even in the face of, and indeed because of, the continuing rapid pace of technological progress, negotiators should adhere as closely as possible to a technology-neutral and risk-based approach and to the primary scope of the AI Act as a product safety and market regulation, as set out by the Commission in its original proposal.

In this respect, we agree with the position of the German, French and Italian governments. Indeed, [we have voiced specific concerns](#) about the impracticality and inflexibility of a

¹ For the purposes of this statement, we use the term "foundation model developers" to distinguish actors who develop FMs that are in turn used by actors further along the value chain, either for further development (e.g. fine-tuning) or for integration into applications used internally or provided to end users. We also use the terms "general purpose AI models" and "foundation models" synonymously.



multi-tiered regulatory approach that relies on a classification of (high) capability based on the computational cost and complexity of a model (FLOPs). We are also aware of the concerns of our member FM developers, particularly with regard to the potential inclusion of specific copyright provisions, and share the view that this, as well as numerous other issues in the current debate, can be adequately addressed by existing technical regulation (in the case of copyright: Article 4 of Directive 2019/790/EU).

At the same time, we note the concerns of downstream actors, particularly of those that deploy FMs for purposes that would be classified as high-risk. The burden of complying with baseline standards to ensure fair, transparent and responsible development, deployment and use of FMs needs to be shared along the value chain, especially given that deployers are not only in the numerical majority, but are often SMEs with disproportionately limited resources to meet compliance demands.

The issue of liability is particularly critical in highly regulated, high-risk applications: In the absence of sufficient documentation of model capabilities, downstream deployers, if at all able to, not only have to implement costly compliance solutions to meet safety and ethical standards, but also face a liability risk that they cannot adequately manage. The result will likely be a reduction in the adoption of this technology and high barriers to market entry. Conversely, on the side of European developers of FMs, this could contribute not only to a reduction in their customer base, but also to a potential further entrenchment of market power in favour of those developers with sufficient resources to offer indemnity plans to their API and enterprise customers, protecting them from legal liability arising from the use of unvetted FM output.

With a view to the current debate and attempts at compromise, the German AI Association considers the following to be of vital importance:

1) Provide much needed clarity on key terminology and definitions

The various positions and proposals put forward by the negotiating parties during the trilogue are characterised by a persistent lack of agreed terminology for key concepts in the debate, be it "foundation models" and "general purpose AI", "developers" and "providers", or "models" and "systems". This ambiguity, undoubtedly fuelled by the desire to reach a political agreement under considerable time pressure, is hardly conducive to substantive debate and the search for common ground.

We have strong concerns about this ambiguity and urge negotiators to address this lack of clarity on critical terminology as soon as possible. While we maintain that it is in the interest of all parties to reach a political agreement by the end of this year, the cost of such an agreement cannot be a text that creates legal uncertainty for the European AI ecosystem.



2) Maintain focus on application level instead of model level

We are of the firm opinion that the focus of the AI Act in general should not be at the model level, but on specific high-risk applications, and thus on those deployers who seek to adapt and use FMs for purposes designated as high-risk. However, it is important that these downstream deployers of FMs are provided with sufficient assurance by FM developers by way of documentation and transparency to meet compliance obligations and manage liability risk. In the absence of qualitative or quantitative criteria that are sufficiently unambiguous and future-proof, we remain critical of a tiered approach that seeks to classify a subset of FMs that inherently pose “systemic risk” and warrant additional regulatory scrutiny.

We do, however, support the spirit of the current compromise proposal to the extent that there are obligations for "providers of general purpose AI models" towards "downstream providers that integrate the model into their AI system"; we are in favour of a regulatory regime for FMs around a clearly specified and defined list of minimum requirements applicable to a clearly specified and defined set of FM developers.

3) Avoid overlaps with existing legislation

The AI Act should not seek to regulate areas that are already addressed by existing sectoral legislation, in particular copyright, but also, for example, the regulation of medical devices, where the current legal framework is sufficiently and indeed better able to address concerns around the use of AI systems in general and the development and deployment of FMs in particular. Failure to adhere to this principle risks duplication of regulatory requirements, inconsistent enforcement and, ultimately, costly compliance in high-risk use cases.

We maintain that negotiators should seek to avoid all instances of potential overlap, limit the scope of the AI Act to areas that are not and cannot be adequately addressed by existing legislation, and make use of the existing legal framework wherever possible. In particular, copyright-related provisions should be limited to demonstrating compliance with existing legislation.

While recognising the arguments made on both sides of the debate, our position is ultimately motivated by our desire to provide the best possible conditions for the still nascent ecosystem of FM developers in Europe, while protecting against misuse, and at the same time taking into account the interests of the many potential deployers of this technology, many of whom are SMEs and make up a significant proportion of our membership. We call on the negotiators to do the same.



About the German AI Association

The German AI Association (Bundesverband der Unternehmen der Künstlichen Intelligenz in Deutschland 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

Press: presse@ki-verband.de

Policy: politik@ki-verband.de