

The latest on the EU Artificial Intelligence Act



Executive Summary

- The draft AI Regulation aims at establishing harmonised artificial intelligence regulation across the EU is currently in the advanced stages of the legislative process.
- The AI Regulation with its risk-based approach is expected to enter into force in 2024.
- The regulation's classification of general-purpose AI is particularly controversial and highly relevant for small and medium-sized enterprises (SMEs), as this will in many cases form the basis for their own applications.
- It is hoped that the needs of SMEs in terms of their digital transformation will be taken into account and reflected in the final version of the regulation

1. Introduction

Artificial intelligence (AI) is no longer a distant dream, but is instead fast becoming one of the essential digital technologies of the future that will be crucial for any company wanting to remain competitive. ChatGPT is one example

that impressively demonstrates the possibilities of this new technology. While the AI system enables users to

create content or texts on any topic without any prior knowledge, some initial problems have already emerged in connection with such tools. For example, the AI tool often confidently states facts that are entirely made up or reaffirm existing prejudices. At the same time, the opportunities and possibilities it presents appear to have no limits. Autonomous driving, effectively organising huge amounts of information or optimising production processes are just some examples of tasks that can be sped up or made possible in the first place with AI.

The reactions to the EU's draft AI Regulation presented by the European Commission in 2021 generally lie somewhere between these two extremes.

2. Content of the draft AI Regulation

The draft contains a rather broad definition of AI systems as software developed with special techniques that generates certain outputs (such as digital content, predictions, recommendations or decisions) for previously human-defined objectives that influence real or digital environments.

The aim of the regulation and its risk-based approach is primarily to regulate high-risk systems while at the same time sparing risk-free systems from regulation. AI solutions that come with "unacceptable" risks are to be



completely prohibited. This includes systems intended for the purpose of “social scoring”, i.e. the evaluation or manipulation of human behaviour.

“High-risk” systems are systems that pose a threat to the health and safety of natural persons if they malfunction. This particularly concerns applications in the area of critical infrastructure management, including autonomous driving, as well as AI-based decision-making systems that grant or deny access to education or vocational training. The use of such “high-risk” systems entails extensive documentation obligations as well considerable demands on security, both with regard to making decisions and the data used to train the AI.

In contrast, AI systems used in customer service, for example, are primarily subject to transparency requirements, i.e. they must make it clear to customers or users that they are not human. Other systems, such as those used to optimise production processes or detect spam, are not regulated.

3. Reactions

In line with the European Commission’s intention to create a comprehensive regulation, it is unsurprising that even its definition of AI is already being criticised. To make a point, its admittedly very broad definition could – with a little creativity – even be applied to pocket calculators.

While there is agreement on the regulatory goal of creating trustworthy and, above all, European artificial intelligence, some of the specific requirements imposed on high-risk AI have been criticised because, though they make sense in view of the fields of application (critical infrastructure or the administration of justice), they are likely to prove to be a hindrance to innovation. In particular, the requirements for risk management systems or ensuring the quality of the – necessarily extensive – training data can pose considerable challenges especially for small and medium-sized enterprises.

This is all the more true as there are discussions about further expanding the categories of high-risk AI systems. Given the success of ChatGPT and the often deceptively “human” results of such generative systems, there are

some who would like to subject these systems to the same requirements as, say, a city’s traffic control system.

Even though this is unlikely to be implemented in such an absolute way, it points to a larger conflict. This conflict centres around what is known as “general purpose” AI. Similar to a “dual-use” product, this type of AI can – depending on the underlying training data – come up with new jokes, correct homework or decide whether to extend a visa or residence permit. The large US providers in particular are investing in lobbying to prevent a blanket classification of this type of AI as high-risk. While this may seem logical for providers (How can the providers fulfil the requirements for high-risk AI when the product’s field of application is not yet known?), such a classification would be equally problematic for companies that do not have their own AI.

This is because most AI models can be used free of charge, which makes them highly attractive for companies that do not want to or cannot invest in their own systems. There are concerns that such companies using free AI will then be responsible for meeting the regulatory requirements on their own. This would make the use of artificial intelligence less attractive and hard to assess, especially for SMEs, even if the advantages outweigh any drawbacks.

However, it looks like the Council of the EU may offer some relief in this regard. While its position paper on the AI Regulation proposes subjecting “general purpose” AI systems for the most part to the requirements for high-risk systems if they can be used as such, the Council has also decided to exempt SMEs from this obligation, so this does not restrict their development. The Council also clarified certain obligations related to the use of high-risk AI systems and reduced documentation requirements specifically for SMEs.

The position paper also introduced the possibility of the European Commission reducing the list of application areas that determine whether an AI system is classified as high-risk. This is most likely due to the rapid development made apparent by ChatGPT and other similar tools.



Further Council proposals concern, among other things, extending the ban on social scoring systems to include private players and forcing providers of emotion recognition systems to inform the user when such systems are being used.

4. AI regulatory sandboxes and LEAM study

In addition to regulating AI, legislators also want to actively support European providers. To this end, the draft provides for the establishment of AI regulatory sandboxes. These are test environments controlled by the competent authorities where AI systems can be developed and trained. Within these sandboxes, companies are allowed to process personal data more extensively and receive support regarding regulatory requirements. As per the draft, no fines will be imposed for violations of the law as long as companies follow the guidance of the authorities. In addition, authorities are to exercise their discretion “flexibly” during this test phase. The Council’s proposal goes even further, allowing the “controlled” testing of AI systems outside such environments.

The establishment of such sandboxes – and even more so the opportunity to test out AI systems in the “real” world – is very welcome. However, it remains to be seen whether the authorities will make use of the discretionary powers expressly granted to them by the regulation and be as flexible as it proposes. It should also be recognised that, in this case as well, SMEs are to be given preferential access, including with respect to the relevant fees.

The German AI association, the KI Bundesverband e.V., has called for actual foundations for economically successful AI systems to be laid in Europe alongside the emerging legal regulation. To this end, the association is calling for the establishment of a high-performance computing centre and has launched the LEAM (Large European AI Models) initiative. The computing centre should have sufficient computing capacity to create and train (European) AI systems. The LEAM study funded by the German Ministry for Economic Affairs estimates the costs for this at 350 to 400 million euros. Since a large proportion of AI systems are non-European, such an initiative would be very welcome.

5. Outlook

Currently, the AI Regulation is being discussed in the European Parliament and will then be negotiated in the “trilogue” procedure between the European Parliament, the European Commission and the Council of the European Union. It seems likely that the regulation will enter into force in 2024.

Significant changes may still be made during the legislative process, e.g. regarding the scope of the high-risk classification. However, the regulation’s risk-based approach is likely to remain in place. Once the regulation is in force, there will be a transition period of 24 months to allow for the extensive regulatory requirements to be implemented.

It is hoped that the AI Regulation will soon establish technical standards in the EU that create legal certainty but which do not hinder much needed innovations and the application of AI.

Ideally, the advocates of a more restrained regulation will prevail in the legislative process, preventing stricter requirements in areas such as general-purpose AI. This would be especially important for SMEs. The legal barrier of entry to creating and using AI solutions should not be so high that SMEs risk being cut off from this key technology of the future.



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