European Commission Consultations on Artificial intelligence – ethical and legal requirements

The Union of Entrepreneurs and Employers hereby presents its contribution to the European Commission Consultation on Artificial Intelligence ('AI').

Scope of application

In the first place, we would like to highlight the risks arising from the extension of the scope of future AI Regulation to automated decision making. Such inclusion would stand in opposition to the fundamental ideas laid out on the White Paper on Artificial Intelligence, which proposed to adopt a risk-based approach and focus on high-risk IA-based applications. Moreover, an extension of the definition of AI to automatic decision making would lead to an unproportionate regulatory burden for various market operators. This in turn would hinder the development and implementation of IA technology as well as automated decision systems. Here it is also important to note that contrary to certain IA-based applications, automated decision systems do not pose high risks or significant threats.

Secondly, the Union of Entrepreneurs and Employers expresses its concern over the potential introduction of a new category of harm, meaning immaterial harm. Instead of creating new categories of damage, we would suggest the Commission to thoroughly examine existing legal framework and utilize concepts, which are already in use. One alternative solution would be to refer to severe restrictions on the enjoyment of fundamental rights.

Objectives and policy options

In the inception impact assessment, the European Commission outlines three basic policy options for further development of the IA regulation on the European level. The Union of Entrepreneurs and Employers presents its views on each of them below.

Option "0"

The baseline scenario, or option "0", assumes that there would be no EU policy change. In our view, even in the absence of AI-specific European regulation, the Commission should propose to adapt the existing legislative framework to the challenges raised by the development of new technologies, including AI. Here, it is also important to note that AI solutions do not operate in a legal vacuum, and are subject to an existing regulatory framework such as GDPR or medical device regulations.

Option 1

This scenario assumes the creation of soft-law measures, which would be voluntary in nature. Such a soft last instrument could build on existing initiatives and consist of monitoring and reporting on voluntary compliance. The Union of Entrepreneurs and Employers supports all measures, which engage the industry in setting regulatory norms. Further, we support initiatives, which incentivize market players to share their hands-on experience and best practices. Therefore, we would suggest that the Commission takes into consideration the possibility of implementation of such a scheme regardless of the policy option, which would be eventually chosen.

Option 2

Within the framework of option 2, the Commission proposes to set up a voluntary labelling scheme. Companies could choose to obtain such labels, however, to do so they would need to fulfil certain mandatory requirements. The labels would in turn signify that given products are trustworthy and safe for the consumers. Notwithstanding the benefits arising from increasing Europeans' trust in AI-based technologies, we are concerned about the potentially distortive effects that such a voluntary scheme can have on the market. Large companies usually possess compliance departments and sufficient human resources to adapt their conduct to almost any administrative requirement. Therefore, such labelling scheme in the longer term could become a standard for large companies. However, compliance with such a scheme for SMEs could prove to be a significant regulatory burden, effectively deteriorating their position in the market. Keeping in mind the negative effects of the competition, we consider that the costs of such a voluntary scheme could outweigh its potential benefits.

Option 3

The last scenario assumes the implementation of a binding EU legislative instrument. Such a measure would establish mandatory requirements for all or certain types of AI applications. The European Commission distinguishes three possible sub-options:

- Sub-option 1: It assumes that the EU regulation could be limited to a specific category of AI applications only, for instance, biometric identification systems. In our opinion, remote biometric identification systems are a good example of high-risk AI, which should be regulated by mandatory law.
- Sub-option 2: In this case, the EU legislative instrument could be limited to high-risk AI applications. As mentioned above, we support the risk-based approach, which was initially outlined in the White Paper on Artificial Intelligence. Sectoral regulation limited only to high-risk AI applications would not hinder innovation and technological development, while safeguarding respect for fundamental rights. We would encourage the Commission to base its' work on the proposal presented in the White Paper. Such a solution would not only increase the effectiveness of the process but also minimize uncertainty and ensure a smooth transition.
- Sub-option 3: The last sub-option proposes to regulate all AI-based applications. The Union of Entrepreneurs and Employers strongly advices not to adopt this solution. As mentioned above, various AI-based applications pose different levels of risk. In our opinion, such an approach would lead to over-regulation and result in various costs (administrative burdens, additional costs, hindrance of economic development). Moreover, a one-size-fits-all approach also means that IA-based applications, which pose high risks, could be under-regulated. Consequently, it could lead to the creation of a gap, where some of the negative effects of such high-risk applications could not be easily fit into the legal framework. Effectively, making documentation and obtaining damages for harm could become more difficult.

Enforcement

In principle, we support ex post enforcement with the exception of sectors where ex ante regulation is a well-established practice. We believe that regulation of any problems is more appropriate ex post and that ex ante regulation can have a chilling effect on innovation and competition. The Commission should work towards a proportionate and transparent mechanism. In case ex ante regulation is deemed necessary, we would like to draw the attention of the Commission to the fact that administrators might not possess adequate digital skills to perform an assessment of emerging technologies. Therefore, we would recommend the Commission to work with the industry representatives in order to develop transparent and precise risk-assessment guidelines as well as implement a due diligence system.