Position Paper

of the German Insurance Association

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on the Proposal of the European Commission for a Regulation laying down harmonised rules on artificial intelligence

(Artificial Intelligence Act)

Introduction

The insurance industry welcomes the proposed Regulation of the EU Commission on “artificial intelligence”. The EU Commission’s objective to increase people’s trust in AI is to be supported. Only when people trust in the use of AI, will artificial intelligence be able to realise its innovation potential. The risk-based approach chosen by the EU Commission is the right approach in this context.

The objective must be to create a legal framework in which trustworthy and human-centric AI will contribute to prosperity, innovation, and economic growth within Europe. It is therefore of utmost importance to strike the right balance between the mitigation of risks on the one hand and the encouragement of technological innovation on the other hand.

An innovation-friendly single market for AI will enable European companies to be globally competitive, and thus will make a significant contribution to growth and employment in the European economy. AI can be designed

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such that it complies with European standards so that both goals, consumer protection and innovation and societal progress, can be reconciled.

Striking the right balance in regulating AI is indeed something of a balancing act: unacceptable risks associated with the use of AI need to be prevented while desirable innovation must not be stifled by the regulation. The future Regulation should therefore follow the principle of **"as much as necessary but as little as possible"**. Any regulation of non-high-risk AI applications, disproportionate requirements for AI applications and the consequential overregulation would result in a weakening of research and innovation in the EU, and thus in a weakening of European growth potential and international competitiveness of European companies. The consequences would be significant given that the draft Regulation is intended to apply across all economic and industrial sectors.

In detail:

- Risk-based approach is welcomed

The insurance industry welcomes the risk-based approach. Differentiation according to the risk potential of the AI application is the right strategy. Taking account of the potential for harm makes sure that only applications for which the existing regulations do not provide sufficient protection will be subject to additional regulation.

This approach, however, is not adequately reflected in the actual wording of the provisions. As a result, several non-high-risk AI applications would be classified as high-risk systems. This applies to applications in the area of *"employment, workers management and access to self-employment"* (Annex III, No. 4), for instance. Insurance companies are also among those using AI systems for the purpose of task allocation (Annex III, No. 4(b)), which do not pose any risk of harm at all. They solely serve to increase the efficiency of procedures and to reduce costs and, as a result, to enhance customer satisfaction. With regard to the interplay of the broad definition and the list of high-risk AI applications, in particular, this can lead to a significant extension of the scope of application of the Regulation. For instance, according to the current definition, companies' own job portals would also be classified as high-risk AI systems even though they only have a notification function on vacant positions which comply with the criteria previously set by the individual user (location, job description, seniority level, etc.).

For the Commission to achieve its declared and desirable objective *"to create a legal framework that is innovation-friendly, future-proof and resilient to disruption (…) without unduly constraining or hindering technological development or otherwise disproportionately increasing the cost of placing AI solutions on the market",* not only the general area of a system's application should be considered, but also on an individual level its specific purpose. For this the criteria of Article 7 (2) should be applied. Furthermore, it should be stated clearly that the AI applications already referred to in Annex III also need to fulfil the conditions set out in Article 7(1) to be classified as high risk. In addition to the requirement that the application is used in one of the areas specified in Article 7(1)(a), it is required that the respective application represents one of the risks mentioned in Article 7(1)(b). Only then is it a high-risk AI application. In terms of substance, this also already follows from the reference made in recital 32.

Before new provisions are being adopted, it should be noted that a comprehensive legal framework which regulates the business of insurance companies and also provides for adequate consumer protection when AI is being used does already apply. This includes, amongst others, the Solvency II Framework Directive, the Insurance Distribution Directive, the GDPR, the Product Liability Directive, anti-discrimination directives, and the Unfair Commercial Practices Directive as well as numerous laws adopted by the EU Member States. The Act against Unfair Competition *(UWG, Gesetz gegen den unlauteren Wettbewerb)* and the General Act on Equal Treatment *(AGG, Allgemeines Gleichbehandlungsgesetz)*, for instance, provide for the protection of consumers against discrimination in Germany. Consumers' right to information is ensured by the EU General Data Protection Regulation (GDPR). For instance, pursuant to Article 13(2)(f) GDPR, consumers shall be informed about the use of fully automated decision-making, including meaningful information about the logic involved, as well as the significance and consequences of such processing. The principles of data minimisation and purpose limitation together with accountability make sure that only demonstrably required data can be processed for legitimate purposes. Article 22(3) GDPR provides protection against possible discrimination in the event of automated individual decision-making. Moreover, Article 5(1)(d) GDPR prohibits the use of inaccurate data.

With regard to an additional regulation of AI, an evidence-based approach is required which helps to carefully review the existing regulation and identify potential shortcomings in the use of AI and the related risks. Only where risks for individual persons or the society are not sufficiently covered by existing legislation, should it be supplemented by a risk-based legal framework.

- List of high-risk applications

According to the proposed Regulation, certain AI systems (so-called “stand-alone AI systems”) are, based on their risk potential, classified as high-risk applications and are listed in Annex III. The specific requirements for high-risk applications should apply to these AI applications. This shall mean AI applications which, in the light of their intended purpose, pose a high risk to the health and safety or the fundamental rights of persons. Both the severity of the possible harm and its probability of occurrence as well as the area in which the AI applications are used should be taken into account in this context. Future changes to the list can also be made based on these criteria.

This objective method is welcomed. Specified and verifiable criteria provide legal certainty to both consumers and companies. The principle of proportionality, which takes potential impacts as well as the probability of risks into account, is explicitly welcomed. It is essential that these standards are being complied with when extending the list in the future.

The Proposal provides for an extension of the list of high-risk applications through delegated acts adopted by the EU Commission. This is to be viewed critically, in particular with regard to the broad AI definition. Even though the power to make amendments through delegated acts is limited to the Annexes to the Regulation, the provisions provided therein are essential.

Furthermore, in the current regulatory Proposal, different time intervals are being provided with regard to the review of the list pursuant to Article 84(1) and the review of the Regulation itself pursuant to Article 84(2). As a result, a dynamic emerges where it is possible that amendments are made to the applicable Regulation at least once a year. In addition, there are the effects of Level 2 and Level 3 legislation as well as the work of the European Board for AI. This comprehensive and dynamic regulation might lead to legal uncertainty. Small and medium-sized companies, in particular, may incur high consulting fees if the necessary expertise in dealing with the AI Regulation needs to be brought in from outside. In order to counteract these effects, to provide companies with the necessary certainty to make plans and not to undermine incentives for investments in AI, the review of the list pursuant to Article 84(1) should therefore be integrated into the review of the Regulation pursuant to Article 84(2) and take place every four years only.

- Proportionate requirements tailored to the respective high-risk AI application

To make sure that desirable innovation will not be impeded, the requirements should also be proportionate with regard to high-risk AI applications. The provision stipulated under Article 8(2), which provides for taking into account the intended purpose of the high-risk AI system as well as the risk management system, goes into the right direction in this context. The requirements cannot be the same for every AI application, but should instead take account of the specificities and the needs for protection.

- AI definition only for types of machine learning

The definition of AI is crucial for the scope of application of future regulations. Algorithms which do not include any type of machine learning or self-optimisation should, by definition, not be subject to AI regulations. Linear models, supporting methods from the area of explainable AI and established statistical methods should not be subject to the scope of application either. Otherwise, there is the risk that the Regulation will take the form of a general software regulation, which would clearly not be in line with the declared purpose and the recitals. Therefore, in order to make sure that the Regulation meets the intended purpose, paragraphs (b) and (c) in Annex I should be deleted since they do not describe any techniques or approaches of artificial intelligence.

Similarly to the list of high-risk AI applications, which the EU Commission can extend by means of adopting delegated acts, the list of techniques and approaches of artificial intelligence can also be amended. Accordingly, there is also no legal certainty for companies with regard to the definition of AI. Since the Commission can subsequently add to both the list of AI techniques and concepts in Annex I and the list of high-risk AI applications in Annex III, there is a risk that the scope of the regulation will be disproportionately expanded. This would be contrary to the right approach to only make high-risk AI applications subject to additional high requirements. It would therefore be desirable for the EU Commission to exercise its power to supplement the lists with restraint.

- Liability insurance for notified bodies

Article 33(8) proposes a requirement for notified bodies to take out appropriate liability insurance for their conformity assessment activities. It is our understanding that entities acting as notified bodies under the proposed Regulation and in a corresponding capacity foreseen by other EU

legislation, for instance the Medical Devices Regulation (2017/745), will continue to be able to cover all of their conformity assessment activities under a single contract of liability insurance. Further, it is our understanding that such insurance will be written on the basis of standard market terms and conditions in accordance with applicable insurance contract law.

- Encouragement of voluntary codes of conduct is welcomed

The EU Commission's approach to rely on soft law solutions such as self-regulation with regard to non-high-risk AI applications is welcomed. Voluntary codes of conduct represent a reasonable supplement to existing laws, which make sure that essential safety standards are being fulfilled.

The proposed tool of voluntary codes of conduct can tell potential users – such as citizens, companies as well as public authorities – which applications meet particularly high standards.

This would create incentives for companies to go beyond the existing requirements and develop particularly trustworthy solutions. It would benefit not only consumers but also companies which can use this tool to distinguish themselves from competition. Such an approach can give European companies a first-mover advantage in AI in the global competition. As a result, European companies can set themselves apart from global competitors as the trustworthy alternative.

However, the Regulation provides that the requirements for high-risk AI systems referred to in Title III, Chapter 2 shall also be completely fulfilled within the scope of voluntary codes of conduct for non-high-risk AI systems. Calling for the same requirements for non-high-risk AI systems would go too far, which is why the requirements for these AI systems within the scope of voluntary codes of conduct should be adequately reduced or the companies should be given more leeway in developing these codes of conduct.

- Taking adequate account of the risks arising from supervisory access to training, validation and testing data

In the course of increasing digitalisation it is understandable that the supervisory authorities are considering new methods and procedures to carry out their mandate. One of these innovations concerns the data transfer between supervisory authority and company by means of application programming interfaces (APIs) or other technical solutions. In the AI Regulation, APIs are provided for the access to training, validation and testing data.

However, for these data, in particular, using APIs poses some risks that need to be adequately considered. Attacks or manipulation attempts regarding AI applications through so-called “adversarial examples” show how important it is to protect training, validation and testing data as well as the source code of the AI application. Knowledge of the data or the source code makes it possible to deliberately manipulate the predictions or decisions of AI applications. Against this background, each transfer of such data and every interface which enables direct access to these data pose an additional safety risk. Furthermore, implementation and maintenance efforts will be required with regard to the demanded application programming interfaces, which would place a heavy burden on small and medium-sized companies, in particular.

- No weakening of the level playing field in regulatory sandboxes

In order to ensure innovation-friendly framework conditions and to encourage innovation it is fundamental to prevent overregulation of AI applications and legal uncertainty. In addition, measures to encourage innovation may also play an important role. Numerous countries within the EU have already established innovation hubs or regulatory sandboxes such as the “European Forum for Innovation Facilitators” as a platform to share information and coordinate efforts at European level to facilitate innovation in the financial sector. The supervisory infrastructure and expertise built in this context should also be used to encourage innovation in the area of AI applications.

With regard to measures to encourage innovation it is crucial that a level playing field continues to be ensured for all providers, following the principle of “same business, same risk, same rules”. This is the only way to allow for fair competition in innovation between different types of market participants (e. g. traditional providers and start-ups). Providing small and medium-sized companies with priority access to regulatory sandboxes, as proposed by the EU Commission under Article 55, would mean an unreasonable discrimination against large-scale companies and is therefore to be rejected.

- Preventing duplication in the design of governance structures

The possible use of existing supervisory structures, where available, and the consideration of national distributions of competences are welcomed. As a result, well-functioning structures will be preserved and a duplication of supervisory activities will be prevented. For industries which are already subject to regulation and comprehensive oversight, such as the insurance industry, additional regulation and additional supervision would not seem justified, considering the efforts to be required and the benefits to be gained.

There would be a high risk that, as a result of the bureaucratic requirements, many innovations benefitting customers and the society might be stifled and that European insurers, for instance, would be placed at a competitive disadvantage to foreign providers.

Furthermore, it is crucial for the design of the supervisory structures that harmonised law enforcement is being ensured within the EU. The AI Regulation operates with numerous uncertain legal terms which must be interpreted in a harmonised way across Europe. This is particularly challenging with regard to cross-border matters. In addition to the national supervisory authorities, the “Artificial Intelligence Board” will play a major role in this respect. The establishment and structure of the Board, as provided for in the Regulation by the EU Commission, is welcomed. In its function as guardian of the Treaties, the EU Commission pursues the fundamental objective of harmonized Union law enforcement. It is therefore only logical that essential tasks of AI regulation are in the Commission’s hands and that the Commission is being assisted and advised by the Board in carrying out these tasks. From the point of view of the insurance industry, it is therefore the right approach that the Board is not given any power to issue guidelines or monitor them. The supporting and advisory role of the Board is evident from the fact that it is authorised to issue opinions, recommendations or written contributions on matters related to the implementation of the Regulation.

It is crucial in this context that the “Artificial Intelligence Board” does not follow the blueprint of the European Data Protection Board (EDPD). According to recital 139 GDPR, the European Data Protection Board should also “contribute to the consistent application of this Regulation throughout the Union (…) and promoting cooperation of the supervisory authorities throughout the Union”. Pursuant to Article 70 GDPR, the Board can issue a whole series of “guidelines, recommendations, and best practices” for this purpose. While the decisions by the EU Commission are directly subject to judicial control, the powers of the EDPB have a quasi-binding effect. However, they are not subject to direct judicial review. Furthermore, the Board interprets the GDPR very broadly, sometimes contrary to the text of the law and without taking account of what is relevant in practice, and to the detriment of controllers.

The governance structure of the Board provided in the Regulation is therefore appreciated. Due to the fact that the EU Commission chairs the Board, it is ensured that the results of the Board are based on common decision-making. The governing function of the EU Commission is also reflected by the fact that the Board’s rules of procedure require the Commission’s approval. This way it is being prevented that the Board becomes independent,

which could lead to decisions that are not in line with the Commission's and thus to a hardly justiciable "secondary legislation".

- Legal basis for the processing of personal data to prevent discrimination

The introduction of a legal basis under Article 10(5) for the processing of special categories of personal data to the extent that it is strictly necessary for the purpose of preventing discrimination is appreciated. Preventing discrimination through AI applications is crucial for the creation of a trustworthy AI landscape, and the processing of special categories of personal data thus is a matter of substantial public interest. In contrast to the general provisions stipulated in the GDPR, Article 10(5) provides a clear legal basis for AI training in this respect. In practice, however, the training of AI for the purpose of eliminating or preventing discrimination cannot be separated from training for other specific purposes. In addition to the objective to treat different populations in a non-discriminatory manner, AI also needs to optimise the accuracy of the prediction during the training (Article 15). This also applies to the objective that AI systems should be resilient as regards inconsistencies and errors. Article 10(5) should therefore be extended to data processing for these purposes as well.

Furthermore, is seems worth considering that legal bases for data processing for the purpose of improving AI systems should not be limited to high-risk applications only. The objectives pursued with the training are also relevant for AI applications that have a lower risk.

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