OpenForum Europe

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Input to the Commission Adoption Feedback on the Proposal for a Regulation Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act)

Openness, harmonised standards and clarity as a way forward to European AI innovation and trust

Strong support of the regulatory approach taken

OpenForum Europe (OFE) welcomes the European Commission's draft for the EU Regulation on AI and appreciates the opportunity to provide a response and with it highlight some points and possible issues. With this response we build on previous submissions by OFE, in particular the one provided in relation to the White Paper on Artificial Intelligence in June 2020, but also on the European standardisation strategy. Our input to this consultation is focused on our specific areas of expertise, which include Open Standards and Open Source. We strongly believe that openness can help achieve the twin objective of promoting the uptake of AI and of addressing the risks associated with certain uses of this new technology.

OFE supports the regulatory approach taken by the European Commission with a clear focus on high-risk areas and with proposing processes that are largely modelled on the European New Legislative Framework (NLF). We believe that the focus on high-risk areas provides for clarity in the marketplace, allows for differentiation of application scenarios and for the right focus of regulation of AI technologies. It builds on a risk-based approach which is the foundation for bringing innovative and trusted AI to the market and which is also already addressed in international standardisation activities - such as ISO/IEC JTC 1/SC 42.

Building on standards as the key path for achieving and demonstrating compliance is a highly successful and efficient way for bringing safe and trusted technologies to the single European market. OFE supports this path to address the novel regulatory challenge AI is posing. At the same time we understand that with AI being the subject of such new regulation modelled largely according to the NLF - which deals with physical/tangible products put on the European market - everyone involved enters a new regulatory terrain / learning curve and thus an inclusive and fact-based collaboration is critical. OFE is ready to support this journey based on our organisation's expertise in open processes and our ecosystem which include a number

of the leading global providers of AI technologies as well as pioneering open source software practitioners.

Definition may be misinterpreted and should be clarified

The definition of AI as currently laid down in Article 3 and Annex I may be misinterpreted, both in terms of breadth and depth. OFE understands that misinterpretation of such a definition is not intended by the European Commission. However, we believe that some clarification and improvement to the definition is important to avoid uncertainties in the market place and thus support a seamless implementation of the future regulation.

The current text states that "AI system means software that is developed with one or more of the techniques and approaches listed in Annex I ... "; Annex I (c) lists "Statistical approaches". In this broad combination, even the use of some simple spreadsheet when developing software might qualify the software as an "AI system" in the sense of this definition. Narrowing the definition and listed techniques to exclude software systems that are not commonly understood as AI will provide greater certainty to the software ecosystem.

The current definition can also be misinterpreted in depth: to include AI system sub-components and precursors. In particular, the definition as written could be interpreted to include AI-related software code, including pre-trained models, that are not fully AI systems. Although a pre-trained model is software that is commonly developed with techniques listed in Annex I and can yield an output from an input, if prompted using additional code, it does not constitute an AI system because it cannot interact with its environment unaided.

Below OFE offers a proposal for an amendment to the definition of AI systems - essentially adding two characteristics for AI systems which we believe should make the definition clear.

Text in draft regulation	Amendments proposed by OFE
'artificial intelligence system' (AI system) means software that is developed with one or more of the techniques and approaches listed in Annex I and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they	'artificial intelligence system' (AI system) means software that is developed with one or more of the techniques and approaches listed in Annex I and **(a) Demonstrates intelligence in particular the ability to learn and adapt,**

interact with;	**(b)** For a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions **(c) Must be based on a rule base or model,** **(d)** Influences the environment that it interacts with;

OFE is ready to further discuss and work on improvements. We would like to encourage the European Commission to support some amendments - for instance in the form as proposed by OFE - in the context of the co-regulation process and the discussions with Parliament and Council.

Scope should be clarified for open source developers

Open source developers should be free from provider obligations unless they provide a fully functioning AI system for placing on the EU market. OFE believes that the proposal is not intended to hamper open source developments, communities and open source code hosting platforms in the sphere of AI systems; however, we suggest it be clarified.

When an open source developer collaborates with fellow developers under established OSI/FSF licensing on AI-related code, such developers should be free of obligations under the regulation unless they place a fully functioning AI system on the EU market. Uncertainty of possible obligations and liabilities could have a chilling effect on innovation, particularly among European developers who are collaborating and sharing ideas related to potentially break-through research and collaboration. Insofar as the EU AI Act intends to support EU innovation, the Commission should clarify that sharing open source AI code, proof of concept AI research, or simply experimenting with AI models should be expressly excluded from the regulation. We suggest three changes to clarify this scope:

> First, the proposal's recital 16 demonstrates the intention that the AI Act should not curtail "Research for legitimate purposes" on certain high-risk AI systems "if such research does not amount to use of the AI system in human-machine relations…." However, the definition by reference of "provider"--as a natural person that develops an AI system "with a view to placing it on the market", defined as "first making available" on the market, defined as "supply of an AI system for distribution or use on the Union market in the course of a commercial activity, whether in return for payment or free of charge"--may be

interpreted to include developers who are openly sharing AI-related code. Clarification is warranted to ensure that sharing of AI-related code for research and development purposes is out of scope.

Second, open source gives end-users the freedom to use, inspect, distribute, and modify software. When an AI system is made available under OSI/FSF licenses, end-users are empowered to alter the system for their purposes. In the limited cases where AI systems are available open source, provider-obligations should be placed on the end-user, who is empowered to inspect, retrain, and deploy the system. In effect, this alteration would incentivize the production of open source AI systems in the EU market, conferring a strategic advantage in AI development that aligns with European values.

Third, developers' ability to collaborate openly on a wide range of software-developing and sharing platforms may also be inadvertently impacted by this regulation. If such platforms are understood as "distributors" they would need to ensure that AI systems built openly on their platform are compliant. Similar to the EU Copyright Directive, a carve out from "distributor" obligations for code-hosting platforms could help open source developers, ensuring that their access to source code and ability to share and co-create their AI-related code are preserved.

The principles above are also applicable to other types of tools and platforms. The Commission should clarify the Proposal's scope so as to not inadvertently include software developers in the regulation which is targeted at AI systems deployed in the EU, their providers, and their professional users.

Support for the approach with harmonised standards

OFE strongly supports the approach laid down in Article 40 to rely on harmonised standards for demonstrating compliance and operate under the presumption of conformity. With the draft Regulation thus being modelled according to the processes of the New Legislative Framework it builds on the well established and well proven framework for technical regulation in Europe.

With the CEN-CENELEC JTC 21 the infrastructure for the development of harmonised standards in Europe is available which will allow an early and fast support of the regulatory needs. CEN-CENELEC JTC 21 also establishes close linkages to international standardisation, in particular ISO/IEC JTC 1 SC 42, where a number of highly relevant international standards are developed - some of them already available - on topics that have relevance in the context of the proposed AI regulation. This

includes standardisation on governance of AI systems, transparency, trustworthiness and explainability.

A major strength of the European standardisation system has been its close linkage to international standardisation including the possibility to adopt international standards as European standards and the possibility of co-development. OFE would like to encourage the European Commission to promote a close linkage with international standardisation and the adoption and use of international standards whenever possible.

Regarding the standardisation requests for the development of harmonised standards OFE would like to recommend the following considerations:

1. Standardisation requests should be available early - ideally the first standardisation requests should be issued before adoption of the AI Regulation so that work can start early without undermining the legislative process.

2. Standardisation requests should be developed in close interaction with the ESOs and the experts in the respective technical committees.

3. Avoid standardisation requests that are too prescriptive. The clear strength of the NLF is that the technical realisation of how to meet legal requirements is developed by experts provided by all stakeholders and agreed by consensus. This promotes that European standards reflect the state-of-the-art. It also facilitates the adoption of international standards.

4. Keep a close dialogue between the European Commission and the technical experts throughout the entire development process. This is important to avoid misunderstandings and prevent that standards might not meet the needs and expectations as outlined in the respective standardisation requests.

5. Fast citation of harmonised standards in the Official Journal of the EU (OJEU). This is important to make the standards available for presumption of conformity.

Following these considerations above will also be of high importance for supporting that the harmonised standards can be available in time and that the transition time of 24 months will be sufficient between the coming into force of the Regulation and the moment it applies. As a number of harmonised standards will have to be available, and given the scarcity of actual experts in the field of AI and available for doing the standardisation work 24 months is not much and it will be very important that all actors will work together very collaboratively and in close interaction and exchange.

Clarify that the adoption of common specifications is pursued in exceptional cases only

Article 41, Common Specifications, provides for the European Commission, via implementing acts, to adopt "common specifications" instead of harmonised standards. This situation should, however, be avoided, above all by a close interaction between the respective technical committees and the experts working therein on the one hand and the European Commission on the other hand. Regular and early feedback to technical committees is required if there should be concerns that a harmonised standard meets the expectations and needs as outlined in the respective standardisation requests.

Moreover, OFE proposes a clarification to Article 41.1. It its current version the paragraph may be misunderstood in the following ways:
(i) that if no harmonised standards are available the European Commission may right away - via a delegated act - adopt "common specifications". As harmonised standards always require a standardisation request to be issued first it is, as it were, the rule that they don't exist if no respective standardisation had been issued. Therefore it seems appropriate to add the requirement that for any lack of harmonised standards the first step is the issuing of a standardisation request;
(ii) that for matters of safety or fundamental rights it were generally an option for the European Commission to adopt "common specifications" without requesting the development of respective harmonised standards. It should be clarified that only if a harmonised standard does not meet the requirements and needs may the European Commission take the step to adopt "common specifications".

OFE therefore offers the following amendments as provided in the table below:

Text in draft regulation	Amendments proposed by OFE
'Where harmonised standards referred to in Article 40 do not exist or where the Commission considers that the relevant harmonised standards are insufficient or that there is a need to address specific safety or fundamental right concerns, the Commission may, by means of implementing acts, adopt common specifications in respect of the requirements set out in Chapter 2 of this Title. Those implementing acts shall be adopted in accordance with the examination procedure referred to in	'Where harmonised standards referred to in Article 40 do not exist **the Commission shall issue respective standardisation requests in accordance with Article 10 of Regulation 1025/2012. If** ~~or where~~ the Commission considers that the **resulting** ~~relevant~~ harmonised standards are insufficient **and fail to** ~~or that there is a need to~~ address **the** specific safety or fundamental right concerns **as outlined in the standardisation requests**, the Commission may, by means of

Article 74(2).	implementing acts, adopt common specifications in respect of the requirements set out in Chapter 2 of this Title. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 74(2).

We believe that these amendments add clarity and help to avoid misunderstandings and misreadings of the Regulation. Once again we hope that the European Commission may be able to support the introduction of such amendments during the co-legislative process.

Standards should be preferred over Codes of Conduct

OFE is concerned about Title IX, Codes of Conduct, and the respective Article 69. OFE would like to caution the European Commission and Member States to "encourage and facilitate the drawing up of codes of conduct intended to foster the voluntary application to AI systems other than high-risk AI". We believe that also for AI systems other than high-risk AI the use of standards should be promoted and standards should clearly be preferred over codes of conduct.

The major reasons for this are:

- Standards are developed in open, transparent and inclusive processes and represent the consensus of technical experts. For codes of conduct such clear and open development processes are not defined.
- A large number of relevant standards are already available or under development globally. They can be used already or in the near future, i.e. without much delay. Codes of conduct, however, would have to be initiated and development would take time thus significantly delaying their availability compared to standards.
- The development of codes of conduct encouraged and facilitated by the European Commission or Member States presents a risk of duplicating efforts without providing additional benefits to activities that have already been carried out in standardisation processes.
- Standardisation with its open and well-established processes gives an opportunity for participation to all stakeholders including societal stakeholders and SMEs.
- The draft Regulation rightly provides for further areas to be added as high-risk in the future. Moreover, the evolution of technologies will almost certainly lead to new and updated requirements in the future. In this context it will be

important that standards may evolve into harmonised standards - in other words that stakeholders may build on a broad spectrum of standards when developing harmonised standards. A parallel world of codes of conduct will create barriers for such linkages.

The development of the respective standards may be initiated via the EU Rolling Plan for ICT Standardisation which has proved to be highly successful in other policy areas already. Moreover, the European Commission may also issue standardisation requests for other than harmonised standards.

OFE would, therefore, like to propose the following amendments:

Text in draft regulation	Amendments proposed by OFE
Article 69 Codes of conduct 1. The Commission and the Member States shall encourage and facilitate the drawing up of codes of conduct intended to foster the voluntary application to AI systems other than high-risk AI systems of the requirements set out in Title III, Chapter 2 on the basis of technical specifications and solutions that are appropriate means of ensuring compliance with such requirements in light of the intended purpose of the systems. 2. The Commission and the Board shall encourage and facilitate the drawing up of codes of conduct intended to foster the voluntary application to AI systems of requirements related for example to environmental sustainability, accessibility for persons with a disability, stakeholders participation in the design and development of the AI systems and diversity of development teams on the basis of clear objectives and key performance indicators to measure the achievement of those objectives. 3. Codes of conduct may be drawn up by individual providers of AI systems or by organisations representing them or by	Article 69 ~~Codes of conduc~~t **Standards and technical specifications for AI systems other than high-risk AI** 1. The Commission and the Member States shall encourage and facilitate the drawing up **and use** of **standards and technical specifications** ~~codes of conduct~~ intended to foster the voluntary application to AI systems other than high-risk AI systems of the requirements set out in Title III, Chapter 2 on the basis of technical specifications and solutions that are appropriate means of ensuring compliance with such requirements in light of the intended purpose of the systems. 2. The Commission and the Board shall encourage and facilitate the drawing up **and use** of **standards and technical specifications** ~~codes of conduct~~ intended to foster the voluntary application to AI systems of requirements related for example to environmental sustainability, accessibility for persons with a disability, stakeholders participation in the design and development of the AI systems and diversity of development teams on the basis of clear objectives and key performance indicators to measure the

both, including with the involvement of users and any interested stakeholders and their representative organisations. Codes of conduct may cover one or more AI systems taking into account the similarity of the intended purpose of the relevant systems. 4. The Commission and the Board shall take into account the specific interests and needs of the small-scale providers and start-ups when encouraging and facilitating the drawing up of codes of conduct.	achievement of those objectives. 3. **In order to initiate the development of standards for addressing specific needs the Commission may leverage the EU Rolling Plan for ICT standardisation or may initiate a standardisation request.** ~~3.~~4. **Where standardisation is not an appropriate tool,** codes of conduct may be drawn up by individual providers of AI systems or by organisations representing them or by both, including with the involvement of users and any interested stakeholders and their representative organisations. Codes of conduct may cover one or more AI systems taking into account the similarity of the intended purpose of the relevant systems. ~~4.~~ 5. The Commission and the Board shall take into account the specific interests and needs of the small-scale providers and start-ups when encouraging and facilitating the drawing up of codes of conduct. **Moreover, governance and structures for developing Codes of Conduct should be defined.**

Equip market surveillance authorities with the appropriate access to technology they need

The NLF relies on market surveillance to monitor the market and ensure proper implementation of the Regulation and the functioning of the single market. Article 64 of the draft Regulation makes provisions for market surveillance authorities to get full access to “training, validation and testing datasets used by the provider” (Art. 64.1) as well as “upon a reasoned request” get access to source code (Art 64.2).

OFE would like to propose some further thinking and exchange on the exact parts of an AI system that need to be shared with a relevant market surveillance authority. There are several elements of AI systems that would be helpful to a market surveillance authority such as human-readable goals of a given system, information

about algorithms and several other features that allow the authority to verify compliance with the Regulation.

These discussions may also consider the numerous open source tools currently available for assessing AI systems and the role that market surveillance authorities should play in incentivizing further development of such tools. Finally, these discussions should also consider the precedential and geopolitical implications of any market surveillance requirement on AI systems within the proposal. Finally the statement in Art 64.3 that national public authorities or bodies which supervise or enforce the respect of obligations under Union law protecting fundamental rights in relation to the use of high-risk AI systems referred to in Annex III shall have the power to request and access any documentation, needs further clarification.

Concluding remarks

OFE welcomes and supports the draft Regulation on AI (AI Act). We strongly believe that the approach taken with a risk based approach focussing on high-risk AI only for regulation, with using harmonised standards for demonstrating compliance and with including self-assessment and the presumption of conformity is the right approach - following proven paths of technical regulation in Europe.

The comments we make in this Commission address very specific, but very important aspects where we see a clear need for improvements and clarification. Our proposals aim at increasing certainty and avoid confusion or even negative impacts for innovation.

We thank the European Commission for considering our comments and we hope that the Commission may be ready to propose and support respective comments during the process of co-legislation. OFE shall be available anytime to discuss and exchange further or to provide clarifications to our proposals if required.