E.ON consultation response: Artificial Intelligence

E.ON welcomes the opportunity to actively participate in the consultation process on the Artificial Intelligence (AI) Act. E.ON generally supports the plans of the European Commission to create a uniform framework for AI with the primary goal to strike a risk-based balance between the fundamental rights of European citizens and enabling competitive AI systems to develop.

In order to ensure effective and fair regulation in this field, E.ON proposes inter alia the following:

Definition, Art. 3 (1) + Annex I (c)

The proposed definition of AI is too broad. In particular, the techniques listed in Annex I (c) to the AI Act include conventional software coding techniques. The definition should therefore include the ability of software to self-learn. As far as the "output" aspect is concerned, at least "content" seems too extensive and will lead to, combined with the techniques set out in Annex I (c), broad ranges of software being considered as AI that are currently considered software only.

The definition should not go beyond the internationally accepted definition of the Organization for Economic Co-operation and Development (OECD) which, too, itself is very broad. The aspect of self-learning ability should be added.

Risk-based approach / *High-Risk,* Art. 6 (2) + Annex III

In principle, we welcome the risk-based approach with regulation focusing on high-risk technologies giving more freedom to make use of harmless technologies. However, it is important to ensure that there is no over-regulation if industries or technologies are identified as high-risk. The individual AI technologies must be understood and not assessed across the board: Regulate the application, not the technology.

Regarding the existence of an abstract high risk of AI, it is decisive in particular whether a decision affecting the environment it is interacting with is autonomously left to the AI itself or not. The latter is not the case if technical safety devices monitoring the output of AI, such as circuit breakers or the like, or human control, stand as a corrective between the AI and a decision/an action and exercise control over the AI, in particular in case of deviation from regular course of operations.

E.ON therefore proposes that AI should not be considered to entail high risk if (i) due to human oversight a natural person remains in charge for decision-making or (ii) safety devices exercise control over an AI system. With these additional measures and controls in place the situation becomes comparable to other technologies, including physical components currently used in the operation of critical infrastructures such as a valve in a gas grid or a switch in an electrical grid. For both cases there are safety precautions in place as standard operating procedures.

Development of AI

The mere development of an AI system should not fall under the AI Act and not be subject to any of its restrictions or requirements. Only once an AI system is placed on the market or put into service, its inherent risks, if any, may materialise. This is not the case where, following the completion of the development of an AI system, such system subsequently is never put in use.

In the definition of "provider" set out in Art. 3 (2), "with a view" should be replaced with "and places it on the market or puts it into service (…)".

Compliance cost & Measures

In particular with regard to high-risk AI, the statutory requirements regarding risk management, other organisational measures, associated implementation and ongoing compliance costs impose too high a hurdle on the introduction of such AI systems.

There should be synergies with other measures already established in other areas such as data protection management systems or cyber security standards established for critical infrastructure. At least, there should be concrete harmonised technical standards recognised officially by the EU prior to the AI Act entering into force. Their fulfilment should lead to compliance with the requirements of the AI Act. Otherwise, not only will there be a risk of legal uncertainty but also of escalating costs for businesses contrary to the goals of Europe's digital decade.

Technical Documentation / Art. 11

It must be ensured that the trade secrets, including AI algorithms, of any company remain confidential and secure from third party access at all times. Against this background, the scope of information to be provided in accordance with Art. 11 is too broad; at least, any information provided must be subject to appropriate technical and organisational security measures in line with state-of-the-art technology to be established by the recipient.

Delegated Acts

The draft AI Act contains numerous authorisations to adopt Delegated and Implementing Acts. Both the number and the regulatory content to be addressed by these legal acts are not appropriate from our perspective and not in line with (1)TFEU scope whereby delegation should be used only to supplement or amend non-essential parts of legislation, for example to define detailed measure. This does not apply in particular to the definition of AI which we believe should be the subject of a full debate among co-legislators.

No retroactive effect

According to Art. 83 (2) of the AI Act, its provisions shall also apply to high-risk AI systems that were placed on the market or put into operation before application of the AI Act if their "design or purpose has been significantly changed thereafter". E.ON rejects a subsequent inclusion of already existing AI systems especially using such subjective criteria (i.e. "significantly changed"). This would entail disproportionately high adaptation efforts for the providers of corresponding AI systems.

What if the potential of AI is not fully used?

E.ON considers that the draft AI Act takes a one-sided approach, i.e. to mitigate potential risks stemming from the use of AI. However, we believe the counterfactuals should be equally considered. Can Europe's targets be achieved if AI is not deployed in due course? The Act should focus as well on leveraging the use of AI to mitigate the risks of climate change.

The German Federal Constitutional Court has just established in its recent verdict on German climate law that failure to achieve the Intergovernmental Panel on Climate Change's climate targets will inevitably lead to restrictions on people's fundamental rights of freedom. There is general agreement that the energy transition requires the use of AI as well as other innovative technologies.

Technology therefore not only has the effect of putting freedom at risk, which seems to be the prevailing view in the debate about AI, but can also have the effect of preserving freedom. E.ON calls for a priority focus on any AI use case with a benefit for climate and the environment.