Workday Comments on the European Commission Inception Impact Assessment for a

"Proposal for a legal act of the European Parliament and the Council laying down requirements for Artificial Intelligence"

September 10, 2020

Introduction

Workday is pleased to submit comments on the Inception Impact Assessment (IIA) for a "Proposal for a legal act of the European Parliament and the Council laying down requirements for Artificial Intelligence".

Workday is a leading provider of enterprise cloud applications for finance and human resources, helping customers adapt and thrive in a changing world. Workday applications for financial management, human resources, planning, spend management, and analytics have been adopted by thousands of organizations around the world and across industries—from medium-sized businesses to more than 60 percent of the *Fortune 50*. Headquartered in Pleasanton, California, Workday has more than 12,300 employees worldwide and 21 offices across Europe. Workday's European-based customers include Airbus, BlablaCar, Deutsche Bank, Primark, Siemens, Sanofi, and ThyssenKrupp.

Within its applications, Workday incorporates machine learning technologies that enable its customers to make more informed decisions and accelerate operations, as well as assist workers with data-driven predictions that lead to better outcomes. Workday believes these technologies have the potential to impact enterprises in the near term by making operations more efficient. In the longer term, enterprises will be able to reorganize operations around machine learning's unique possibilities. Promoting the thoughtful and responsible adoption of machine learning is a fundamental component of Workday's public policy agenda.

We have contributed actively and constructively to the Commission's preparatory work in this area. We provided comments to the Consultation on the Artificial Intelligence White Paper, and piloted the Trustworthy AI Assessment List developed by the High-Level Expert Group on Artificial Intelligence, mapping its questions against our machine learning ethics controls. In addition, we contributed to national initiatives, including the UK ICO Guidance on AI and data protection, to ensure emerging AI governance schemes appropriately account for existing law.

Comments

Building on the material we have already contributed, we would like to offer the following observations for the Inception Impact Assessment. Workday supports the European Commission's stated objective: "…to foster the development and uptake of safe and lawful AI that respects fundamental rights across the Single Market by both private and public actors while ensuring inclusive societal outcomes."

1. Legislation is likely to be warranted for high-risk applications/use scenarios

Workday recognizes that maintaining the status quo (baseline / option "0") is unlikely to bring about the legal certainty and trust necessary to ensure the development and uptake of lawful and trustworthy AI. We also consider that certain use scenarios and AI applications can entail risks to fundamental rights that should be addressed by legislation. Among the issues at stake are risks of unfair or illegal discrimination. At the same time it is important to acknowledge that AI applications, properly developed and deployed, have immense potential to improve and augment human decision-making, and to detect and help address problems with bias that already exist. Further, it should be noted that existing legal protections of fundamental rights apply fully to any organization, whether or not it uses AI applications. It is essential that any new legislation does not duplicate current rules, and this will require careful mapping of the legislative environment before proceeding.

2. Risk assessment requires a two-pronged approach

A legislative instrument should be carefully and narrowly targeted at high-risk applications. It would be extremely important to define the concept of 'high risk' in a way that provides clarity, predictability and legal certainty both for developers (organizations that develop and provide applications that embed AI), deployers (organizations that purchase and use applications that embed AI), and the public. Careful risk assessment is fundamentally important because of the large number of types of AI applications and the many different ways they can be used. We agree with the two-pronged approach set out in the White Paper on AI: that regulation should be focused on those applications that are deployed in high-risk sectors, and in a way that involves high-risk use. However, it would be a mistake to attempt to designate classes of applications as high risk per se. This would fail to encompass the particular context in which an application is deployed and used. The results of an overly broad risk assessment would be imposition of regulatory burdens on applications that carry little or no risk, and less effective oversight of those that do carry high risk.

It is also important to recognise that most AI applications are designed to aid, not replace, human judgment and decision-making. AI applications can provide valuable predictions and recommendations for human decision makers to act on. The regulatory requirements for such applications should be different than those that would be suitable for AI applications that generate and execute decisions with limited human involvement.

3. Prescriptive, pre-market assessment of conformity should be avoided

Workday would caution against introducing prior conformity assessments; such an approach would represent a significant departure from the EU's past treatment of standalone software. Workday urges the Commission not to pursue a regulatory framework that is based on prescriptive pre-market conformity assessments for high-risk AI, which could result in barriers to market entry and chill innovation. Particularly in the case of software, which is updated frequently (on a weekly basis in our case), prior conformity assessments would slow the pace of updated features. As an alternative, we think that impact assessments akin to the Data Protection Impact Assessments required under GDPR and which would be available to regulators to review would protect individuals while being less likely to create a lag to market or unduly burden smaller enterprises.

4. Labelling systems would not add value

The option of setting up a mandatory European labelling system for AI applications that fall outside the high-risk determination does not seem to be a viable way forward. There are such a broad range of applications and use scenarios that it would be difficult to design a single labelling scheme which would provide meaningful guidance to users about the trustworthiness of the many diverse applications. Such a labelling system would inevitably have to be extremely complex as would the governance mechanisms necessary to oversee it. The associated costs and complexity would most likely outweigh the benefits: Per definition, the applications to be covered would pose little or no risk to users' fundamental rights. Rather, voluntary labelling and certification schemes, tailored to the area of AI deployment, represent the best path forward. This has worked well in the privacy space, where a variety of codes of conducts and certifications are available for different data uses.

5. The current liability regime should be maintained

Liability rules should be technology neutral, and products should not be subject to additional or different liability rules simply because they integrate AI and machine learning. This would hamper innovation and slow deployment of AI, depriving society of its numerous benefits. Furthermore, given the vast array of AI use cases, "one-size-fits-all" liability rules would be unworkable. Any changes to the EU's liability regime must be driven by a clear and demonstrated need. The current EU product liability regime as set out in the Product Liability Directive sets out clear and time-tested rules that apply across a vast range of products, including those with embedded software, and give consumers the possibility to obtain compensation for possible harms caused by products or services that embed AI. Any change in liability rules without an assessment of the current regime and a demonstrated need risks chilling innovation, with little benefit for consumers. It would be premature to amend the liability rules until a regulatory framework for AI (e.g. to require data quality, transparency, and robustness) has been established.

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Workday appreciates the opportunity to provide input on the European Commission's Inception Impact Assessment on artificial intelligence. If you have any questions or if we can provide further information, please do not hesitate to contact Jens-Henrik Jeppesen, Director of Public Policy, EMEA, at jens.jeppesen@workday.com.