Comment

of the German Insurance Association (GDV)

ID-number 6437280268-55

on the Roadmap for

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

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1. General remarks

The German insurance industry welcomes the approach of the EU Commission to make the development and application of artificial intelligence legally secure and trustworthy, thus strengthening its acceptance. AI will only be able to develop its innovative potential and the associated benefits for citizens and the economy if both consumers and companies can trust AI.

For AI, a European approach is needed. Fragmentation, especially in the digital sector, must be avoided.

With that said, we believe that the existing EU-legislation **is fully applicable** to AI-applications. However, it could be reviewed whether the current regulatory framework hinders their beneficial use and thus needs to be adjusted to facilitate AI dissemination. It is commendable that the Commission wishes to create the right incentives for the adoption of AI, but in most cases sufficient business incentives for responsible AI use would already be there.

For the insurance industry in particular, the existing regulations are sufficient. The insurance industry, as part of the financial services sector, is highly regulated. Because legislation is generally technology-neutral, novel technologies or methods such as AI are already captured by the existing regulatory framework and supervisory authorities are continually refining their approaches regarding new technologies.

The German insurance industry is subject to supervision on the European and on the national level (EIOPA and BaFin). Both EIOPA and BaFin have already increased their regulatory efforts in this field, and they have the expertise required for this purpose. Already today the regulations of the analogue world in insurance automatically apply to the digital world as well. Double and/or too specific regulation is not necessary and should be avoided.

For these reasons, potential future regulatory measures concerning AI should be considered with utmost care. As a number of surveys in the past have revealed, many businesses recognize the significant potential of AI and have expressed interest in incorporating such technologies into their business processes in the coming years. However, these declarations have not yet been followed up with actual matching implementations. The introduction of AI applications currently progresses slowly and can still be considered to be in its infancy in many areas. In order to promote the uptake of AI and prevent innovative technologies from being stifled by premature regulation, ethical use of AI should be supported by and rein-

forced through voluntary and/or non-legislative instruments as far as possible. The principles which constitute ethical use of AI as outlined by the HLEG are already subject to existing legislation (e.g. anti-discrimination law and transparency obligations in the GDPR). That is why the EU-Commission should primarily focus on a soft law approach that promotes industry initiatives. Recent years have shown that many organisations and industries are aware of the importance of ethical AI and have thus introduced their own ethical codes that are tailored to the specific characteristics of that sector. Additional industry-specific initiatives are to be expected.

For this reason, **option 1 appears preferable**. In order to enhance consumer confidence, undertakings can also commit themselves to comply with further voluntary requirements.

Voluntary certifications have traditionally proven to be effective means of ensuring high and transparent standards (e.g. in the area of IT security). They enable customers to easily identify trustworthy products and allow the businesses to display the quality of their products and to further promote them. Many companies would likely voluntarily opt for certifying their AI applications to stay ahead of the competition and to ensure compliance with current standards and regulation and ethical principles.

An approach that mainly focusses on voluntary instruments does not necessarily have to exclude all options for legislative instruments containing mandatory requirements for certain AI applications. However, such regulation should be limited to AI applications which possess high risk potential. Furthermore, the following points should be considered in such cases:

- The new regulatory framework for AI should achieve its objectives **effectively and efficiently**. In particular, a disproportionate burden on users of AI - e.g. because of excessively prescriptive provisions – should be avoided.
- A risk based approach is important to help ensure that the regulatory intervention is proportionate. Clear criteria are required to differentiate between the different AI applications, in particular in relation to the question whether or not they are ‘high-risk’. High requirements for each AI application hinder innovation, cause high costs and create a protection that is not necessary in view of the low risk.
- The **scope of future regulations** must be precisely defined. The clarification provided by the HLEG can serve as a good starting point. Algorithms that do not incorporate any form of machine learning or self-improvement should by definition not be subject to AI-regulation. In the same spirit, linear models, statistical methods

and basic facilitation asset aiming to accept and explain more complex algorithms should also stay out of scope.

- For example, including algorithms which determine insurance premiums in the scope should only be considered if their decision rules are self-learned and if the modeling strategy is beyond the traditional generalized linear models (GLM), which have been accepted for decades. The provision of private insurance cover has always required respective providers to analyse respective data and apply the results accordingly by means of mathematical algorithms. Ever since the insurance industry has emerged, insurance undertakings have therefore made extensive use of data and algorithms. These classical algorithms and data analyses are well known and authorities are able to supervise them. There is no need for additional regulation in these areas.
- Any regulatory approach should take into account sectoral characteristics of different industries. A one-fits-all solution is not appropriate for the regulation of AI.

2. Liability and Product Safety

Existing principles of **liability** for damage caused to third parties are fit for purpose (adequate and appropriate) to address the risks posed by AI and other emerging digital technologies. Existing **product safety** legislation should be reviewed as to its fitness in the context of AI and other emerging digital technologies. New legislation should only be undertaken where a clear evidence base demonstrates a need for action, and should be proportionate to the concrete risks posed by the AI application in question.

- The **Product Liability Directive** (PLD) is technology-neutral and therefore applies to AI in the same way as to conventional technology. It constitutes a well-balanced system by providing a high level of protection to injured persons while at the same time taking into account producers' legitimate interests and thereby encouraging technological innovation and promoting economic growth.

  Under the PLD, a product is defective if it does not provide the safety which a person is legitimately entitled to expect. Product safety and product security legislation act as a filter for liability and help to define whether a product does not provide the safety which a person is entitled to expect and is therefore defective under the PLD. Rather than altering the existing product liability system, evaluating current product safety legislation should therefore be prioritised.

Software should be considered a product under the PLD. In case of “embedded software”, potential difficulties in determining whether a product or a service has caused damage will be mitigated by recognizing software as a product.
AI systems are controlled by software. Access to data stored by these systems will be key to establishing fault and thereby allocating responsibility for damage either to the producer (if caused by a product defect) or to the user (if caused by the circumstances of use). In this sense, it may actually be easier for a person damaged by an AI system to establish the responsible party than for a person injured by a traditional system. Questions of data recording, storage and access are therefore crucial, but should be addressed outside of liability legislation (e. g. by product safety and security legislation).

A risk-based approach is highly appropriate for determining product safety and security standards for AI applications as the term encompasses a multitude of uses and devices that will require specific solutions. By contrast, because of the PLD’s technology-neutral nature, an additional risk-based differentiation prescribing more stringent levels of liability within the PLD for certain products deemed especially dangerous is not required.

- At present, existing national liability regimes addressing the liability of a **user or deployer** of AI systems provide adequate means of redress to persons incurring damage from AI-systems, also taking into account that these persons should have access to the same level of compensation as those incurring damage from traditional systems (which is the case under applicable national law).

  Fully autonomous and self-learning AI systems are not at this time market-ready and will not become so for the foreseeable future. Additional harmonised rules on deployer liability should only be introduced on the basis of clear evidence that existing liability regulation fails to address specific risks posed by the operation of such AI systems. Legislating on liability for such highly advanced systems should therefore be deferred until their specific risk potential can be fully understood.

  Legal certainty requires that the coherence of national and EU legislation be preserved, i. e. in respect of AI systems that fall under existing legislation on motor vehicles and aircraft. For all motor vehicles and aircraft, strict liability is already in place at the national level.

Infringements of basic rights (data protection, discrimination, privacy) should continue to be dealt with exclusively in existing dedicated EU legislation such as the GDPR. Basic rights infringements are alien to existing civil liability concepts (to include the PLD) and adding related provisions to liability legislation could only provoke a conflict of statutes. Consistency and coherence between the various legislative instruments at EU level must be preserved.

- Additional compulsory insurance requirements are unnecessary.

  A free voluntary insurance market is best able to provide tailored insurance solutions that are designed to cover the individual insured's risks and liabilities. ‘AI applications’ covers a wide range of different appliances and uses, and effective insurance protection must be geared towards individual risk exposure. Compulsory insurance, on the other hand, of necessity introduces a "one size fits all" approach and only works well where a large pool of identical or sufficiently similar risks exists, allowing insurers to draw on sufficient data to quantify and price these risks.

  Insurance solutions are readily available to cover the liabilities of producers and deployers of all kinds of AI systems. Their liability is covered as a matter of course in corporate liability insurance contracts. Although voluntary, corporate liability insurance, including product liability insurance, is standard for companies of all sizes and from all sectors of the economy.

Berlin, September 2020