verbraucherzentrale
Bundesverband

A EUROPEAN LEGAL ACT LAYING DOWN REQUIREMENTS FOR ARTIFICIAL INTELLIGENCE

Response of Federation of German Consumer Organisations (vzbv) to the public consultation on the inception impact assessment for the “Proposal for a legal act of the European Parliament and the Council laying down requirements for Artificial Intelligence”

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Impressum

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I. SUMMARY

The Federation of German Consumer Organisations (Verbraucherzentrale Bundesverband - vzbv) welcomes the European Commission's initiative for a legal act laying down requirements for Artificial Intelligence (AI).

A recent **survey**[1] shows that European **consumers do not trust AI**. Consumers think that current **legislation cannot** effectively **regulate AI activities**. Most people think companies use **AI** to **manipulate consumer** decisions. German consumers do not think that soft law, like voluntary codes of conduct, is fit to address the risks posed by AI-based discrimination and the **majority prefers stronger regulation** to address these problems.

Of the options proposed in the Inception Impact Assessment, **vzbv recommends** to follow **option 3 (c)**, an **EU legislative act covering all AI applications**, and urges the European Commission to move in this direction:

- In order to **inspire consumers' trust** and encourage uptake and dissemination of AI, the European regulatory framework on AI must regulate AI in a comprehensive manner through **strong** and **effective horizontal legislation** to ensure that AI adheres to EU laws.
- AI-systems making/preparing relevant decisions on consumers must adhere to **high quality standards**. They must be highly **transparent for consumers** and enable consumers to exercise their legal rights (including a right to explanation in case of sensitive/critical systems and the publication of a **risk assessment**).
- **Risk** and regulatory **requirements** should be **assigned gradually** according to the **risk level** of an application. Some **basic obligations** (e.g. regarding transparency) should be **applicable to all AI systems**.
- **A precautionary approach**: Consumers must be able to trust that technologies that can pose significant harms for individuals and society are independently **audited/tested before** they are **deployed** in the market.
- Competent **authorities** must be endowed with financial, technical, and human **resources** and **legal powers**, to effectively audit and scrutinise AI systems at all times.

[1] BEUC, 2020, Artificial Intelligence: what consumers say: Findings and policy recommendations of a multi-country survey on AI, https://www.beuc.eu/publications/beuc-x-2020-078_artificial_intelligence_what_consumers_say_report.pdf [download 08.09.2020]

II. INTRODUCTION

This statement provides the Federation of German Consumer Organisations' (Verbraucherzentrale Bundesverband - vzbv) feedback to the European Commission's Inception Impact Assessment for the upcoming proposal for a legal act laying down requirements for Artificial Intelligence (AI).

vzbv welcomes the opportunity to comment on the European Commission's Inception Impact Assessment as algorithm-based decision making (ADM) and AI increasingly determine the way in which consumer markets and our societies function.

AI and ADM systems increasingly make or predetermine human decisions on consumers. Although they have a growing impact on the daily lives of consumers they often operate within a worrying **regulatory vacuum**. Consequently, it is not surprising that many consumers – rightly – distrust AI, largely due to the obscure nature through which decisions are made or prepared. This level of **consumer distrust hampers** the **adoption and demand for AI in the European Union** (EU).

If the European Commission wants to inspire consumers trust in AI and encourage uptake and dissemination of the technology, it must enact a European regulatory framework on AI that **ensures** that **AI adheres to European laws and values**. Therefore vzbv stresses the need to regulate AI in a comprehensive manner through strong and **effective horizontal legislation**.

The legislative framework on AI must ensure that relevant systems that affect people's lives can be **independently controlled**, that AI-systems making/preparing decisions on consumers adhere to high **quality standards**, are highly **transparent for consumers** and that it enables consumers to exercise their rights. This must include mandatory requirements for providers and deployers of AI systems including transparency requirements vis-à-vis consumers that allow consumers to understand how AI systems work and why a specific result in an individual case came about.

For this reason, vzbv repeatedly stressed the importance and urgency of a legal act laying down comprehensive obligatory requirements to fill this regulatory gap, and welcomes that the European Commission is envisaging a legislative proposal. vzbv made detailed proposals for a regulation in its response to the public consultation on the European Commission 's White Paper on AI (see attachment to this inception impact assessment).

III. LOW CONSUMER TRUST IN AI AND CURRENT REGULATION

The line of argument for a strong, effective regulation is confirmed and reflected in various empirical studies, like the BEUC[2] consumer survey on perceptions on AI in 8 EU Member States (September 2020): The results show that, although consumers are generally in favour of AI development, they have serious concerns in relation to AI and ADM systems:

- While consumers see benefits of AI, they have **low trust in AI** and its **added value**. This is displayed in concerns ranging from the lack of transparency, unintended consequences or the abuse of personal data. A **majority** of consumers strongly agree that **companies use AI to manipulate consumer** decisions (e.g. 64 % in Belgium, Italy, Portugal and Spain).
- Most consumers think that **current rules** are **not adequate** to effectively **regulate AI**-based activities (50% in Sweden and 55% in Portugal). Around 56% of all EU consumers have low trust in authorities to exert effective control over AI.

[2] BEUC, 2020, 'Artificial Intelligence: what consumers say: Findings and policy recommendations of a multi-country survey on AI,' https://www.beuc.eu/publications/beuc-x-2020-078_artificial_intelligence_what_consumers_say_report.pdf [download 08.09.2020]

IV. POLICY OPTIONS

With regards to the policy options proposed in the Inception Impact Assessment, it can be safely said that **Option 0** (no regulation) should be **discarded right away**.

Given the complex and obscure nature of AI-based systems **Option 1 and Option 2** are **bound** to **fail** the **policy objectives** of this initiative: Policy Option 1, the non-legislative **"soft law"** approach (for example based on ethical codes, like those developed by industry actors) and Option 2, a **voluntary labelling** scheme will **not create consumers' trust**. Also, they are **unlikely** to **guarantee** that all **AI**-systems that significantly impact consumers' lives will **adhere to European laws and values**. Such voluntary commitments have all too often disappointed in the past and there is no reason to assume that they will be effective in the realm of obscure AI-systems.

This is illustrated by the BEUC study mentioned above and another recent survey on discrimination and AI[3]: It shows that German consumers consider voluntary code of conducts as much less effective to tackle discrimination caused by AI as compared to stronger regulation and mandatory certification schemes. When asked to prioritize the instruments that could be employed to **tackle AI-based discrimination, 55% prefer stronger regulation**, 47 % prefer mandatory certification schemes while merely **7 %** prefer **voluntary code of conducts**.

1. HORIZONAL APPROACH COVERING ALL AI APPLICATIONS

vzbv considers **option 3 (c**), an EU **legislative act** covering **all AI applications**, to be **viable** and urges the European Commission to move in this direction. The reasons for this preference can be summarised as follows:

Option (3a) is **not suited**, as it limits an EU legislative instrument establishing mandatory requirements to specific categories of AI applications only (like remote biometric identification systems). This instrument is too narrow in scope and many other **applications** that can cause **serious harm** will fall **out of scope**. Applications in any sector must be subject to legal requirements if they pose a high risk/can cause significant damage (e.g. insurance, discrimination in e-commerce or smart digital assistants).

Option (3b) is **not suited** for similar reasons. First the White Paper's[4] binary (high risk/low risk) and cumulative (two criteria to be defined a high risk) approach to determine high-risk applications should be discarded. It imposes obligatory requirements only for high-risk applications in predefined high-risk sectors. Second, the EU legislative act should cover all AI applications, as potentially any AI system could pose a harm for individual consumers, groups of consumers or society at large. Therefore, **all AI applications should be subject to at least "light" obligations** such as transparency requirements.

The EU legislative instrument should follow the following principles:

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[3] Meinungsmonitor Künstliche Intelligenz, 2020 ‚Künstliche Intelligenz und Diskriminierung'. Factsheet Nr. 2 des Meinungsmonitor Künstliche Intelligenz. https://www.cais.nrw/wp-94fa4-content/uploads/2020/08/Factsheet-2-KI-und-Diskriminierung.pdf [download 07.09.2020]

[4] European Commission, 2020, 'White Paper on Artificial Intelligence - A European approach to excellence and trust', COM(2020) 65 final, https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf [download 07.06.2020]

1.1 Gradual Risk-based obligations covering all AI applications

Risk and **regulatory requirements** should be **assigned gradually** according the **risk levels** into which AI applications fall[5]. Some **basic obligations** (e.g. regarding transparency) should be **applicable to all AI** systems. Applications posing a higher risk should be subject to stricter, more demanding mandatory requirements. The granular approach ensures that all risky applications across all sectors are subject to adequate, application-specific mandatory requirements, thereby reducing the regulatory burden and increasing legal certainty for all stakeholders.

The assessment of the risk level of AI applications must not only consider potential **damages to** individual entities (**physical** persons or legal entities) but include the impact on members of specific **social groups** and **society** at large.

1.2 Precautionary policy approach protecting Consumes

The European Commission should adopt a **precautionary approach** to the regulation of AI and ADM. Consumers must be able to trust that technologies that can pose significant harm for individuals and society are independently audited/**tested before they** are **deployed in the market**. Also, as an ultima ratio measure, it should be possible for the authorities to ban the use of certain AI/ADM systems if the risk they pose is not tolerable. For example, the operation of remote **biometric identification** systems should be **prohibited** in **public places** until the associated risks and consequences for individuals and society have been adequately researched.

1.3 Transparency for Consumers

The mandatory rules for **transparency vis-a-vis consumers** must go beyond merely labelling high-risk AI so that users know that they interact with an AI system. Consumers need to know about the risks, data base etc. Developers and operators of AI must ensure traceability (and accountability) of their systems. Data subjects must be provided with all the information necessary to exercise their rights when necessary, e.g. providers of **high-risk AI** applications must be mandated to **explain** consumers the result **of the individual case** in a comprehensible, relevant and concrete manner.

1.4 Transparency for the Public

The EU legislative instrument should include the obligation for deployers of AI to publish a **risk assessment**. This must not contain business secrets but information that the public needs to conduct an informed debate.

1.5 Effective enforcement and governance structure

The legal act should establish a coherent and efficient compliance and enforcement system. It must ensure that businesses employ effective internal control mechanism ensuring that the development and use of AI and ADM systems complies withEU rules. The governance structure must guarantee the active cooperation among the relevant enforcement authorities, as well as between public and private enforcement bodies, including consumer organisations. Competent authorities must be endowed with the financial, technical, and human resources as well as legal powers, to effectively audit and scrutinise AI systems at all times.

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[5] Such an approach has been proposed by the German Data Ethics Commission: Data Ethics Commission, ‘Opinion of the Data Ethics Commission’, 2019 https://www.bmjv.de/DE/Themen/FokusThemen/Datenethikkommission/Datenethikkommission_EN_node.html [06.06.2020].

The European Commission should work towards a governance structure or agency that supports the sector-specific national and EU competent authorities directly in supervising AI systems with methodological and technical expertise. This could be particularly helpful for competent authorities in smaller Member States who might find it difficult to build up such technical and methodological competence themselves.