Proposed AI Act

Ibec priorities for EU Co-legislators in Trilogues on the proposed AI Act

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Introduction

Ibec has engaged in EU and national consultative processes on Artificial Intelligence (AI) policy and governance. We support the European Commission's intended goal to establish a "*balanced and proportionate horizontal regulatory approach to AI that is limited to the minimum necessary requirements to address the risks and problems linked to AI, without unduly constraining or hindering technological development or otherwise disproportionately increasing the cost of placing AI solutions on the market.*"[1] We have been consistent, both directly and in joint statements, in our **support of a proportionate, human-centric[2] and risk based approach to proposed AI governance and regulation**[3].

This paper builds on previous work and highlights Ibec priorities for the EU co-legislators engaged in Trilogues on the proposed 'AI Act'[4] The paper harnesses elements of a 'Council 4 column working paper'[5], to support comments on Co-Legislators' proposals and is not intended as an exhaustive list.

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[1] Section 1.1, European Commission explanatory memorandum on proposed AI Act, COM(2021) 206 final

[2] Principled approach outlined by the European Commission's High-Level Expert Group on AI ('AI HLEG') and OECD that encourages beneficial outcomes from AI for both humans and the planet that sustains them. This approach encourages a respect for law, human rights, and democratic values as well as a consideration for the natural environment and sustainability.

[3] See Ibec's Priorities for a national AI strategy, Response to the European Commission White Paper on AI, and Priorities on proposed AI Act and several joint statements with BusinessEurope and the B9+ Group in relation to the proposed AI Act.

[4] Proposed Regulation of the European Parliament and the Council laying down harmonised rules on Artificial Intelligence (AI Act) and amending certain Union legislative Acts (2021/0106(COD)).

[5] Council of the EU Working Party on Telecommunications and Information Society 4 column working paper dated 29 June (Reference: WK 8800/2023 INIT).

Recommendations to the Co-legislators

In the context of the European Commission's intended goal and the work to date by the European Council and Parliament, Ibec encourage the EU co-legislators to:

Safeguard a proportionate, human-centred approach

1) **Safeguard a proportionate, human-centred approach to the governance and regulation of trusted AI development and adoption, based on evidence and risk**. Incentivise the development of AI with positive benefits and respect for fundamental rights Avoid unwanted consequences that could discourage investment in the development and deployment of trusted AI systems that undermine Europe's twinned digital and green ambitions and consequently its competitiveness and resilience.

Ensure a focussed approach

2) **Ensure a focussed scope. Focus on where the most widespread and significant societal damage are likely to arise**, particularly in proposals around the definition of AI systems, the allocation of responsibilities between different actors in the AI value chain, criteria for determining prohibited practices and the classification and regulation of high-risk uses.

   a) **Focus the proposed definition of AI** concentrating on AI systems that display intelligent behaviour and emulate human intelligence by taking actions with some degree of autonomy. Align with international standards such as NIST and OECD[6]. To ensure legal certainty and promote global trade, cooperation and innovation, definitions should be aligned with international definitions and not be overly broad.
   i) Safeguard both the Parliament's effort to align with the OECD[7] and the Council's effort to distinguish AI from just any advanced software systems[8].
   ii) Distinguish general purpose tools and APIs. We support Parliament Recital 60(g), since general purpose tools and APIs serve as components of AI systems but are not AI systems per se. It is equally important to differentiate simple multi-purpose AI systems from foundation models, especially public-facing foundation models.

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[6] Currently under review.

[7] Both Parliament and Council reflect the idea of 'system' and 'autonomy' which are positive and align towards OECD.

[8] The original definition Article 3(1) and list of techniques in Annex is too broad and likely to include most contemporary software and applications that use pure statistical and knowledge-based approaches for conventional data analysis that have little impact on individuals, such as AI methods for internal modelling needs, for corporate scoring or for industrial issues.

iii) Tighten the definition of generative AI to more accurately reflect the types of AI the legislator is aiming to capture, namely systems that are intended to generate "complex content" for "direct consumption by natural persons".

iv) Safeguard AI developed solely for research and development (R&D) purposes[9].

- Integrate Council wording of Recital 12b in Article 2, '"*As regards product-oriented research activity by providers, the provisions of this Regulation should also not apply*". The sharing of AI models for non-commercial purposes – whether as open-source or with licences that prevent certain uses, such as military applications – is an important means of advancing AI research and capabilities. Open source has enabled positive advances and beneficial applications in protein design, quantum physics and translation etc.

- We agree with the Parliament[10] that this exemption should apply to open-source for research too, when not part of prohibited or high-risk systems. This follows a risk-based approach. However, a similar exemption should also apply to foundation models[11]. We support a technology-neutral, risk-based approach:
  - ✓ The infrastructure of the internet, web-browsers, and many of the apps we use run on open-source code. Many Large Language Models (LLMs) have already been open-sourced e.g., Falcon-40B and MPT-30B.
  - ✓ Open source used for foundational models should not be singled out if we want to be technologically neutral.
  - ✓ Disincentivizing open-source software and AI development, access, and adoption in Europe would be inconsistent with stated EU ambitions on digital leadership by 2030.
  - ✓ Appropriate safeguards could be encouraged when necessary, such as restricting access to legitimate institutions and researchers. But it is important that the AI Act enables knowledge-sharing and innovation in AI, including for foundational models and general-purpose AI. This exemption will help ensure that the AI Act fulfils its objective of fostering trusted AI innovation.

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[9] In Article 2 (5d and 5e) AI research activities should not be in scope unless placed on the single market or put in a high-risk use. Otherwise, it goes against the Commission's original intention and risks double regulation of a system (i.e., at R&D and placing on market stages).

[10] Parliament mandate: Article 2(5e) new (line 125h in WK 8800/2023 INIT, dated 29 June).

[11] The Parliament have not proposed this exemption.

Safeguard a proportionate, technology neutral and risk-based approach

3) **Target regulation on high-risk AI applications in areas where a clear regulatory gap has been demonstrated**. Co-legislators should refine the Commission's proposed classification rules for high-risk AI to ensure consistency with sectoral legislation in Annex II, as well as to limit Annex III categories to use cases posing significant risk[12] to health, safety, and fundamental rights. Ensure an alignment on a single definition of risk throughout drafting[13].

   a) **Ibec acknowledges a requirement to ban AI practices proven harmful or against EU values. A blanket ban on biometric categorisation and identification proposed by the European Parliament is overly broad and may risk outlawing beneficial and legally required use cases, with robust safeguards**, such as safety and content moderation. The initial Commission proposal and the Council's position better delimit the ban's scope to capture practices which carry unacceptable risk and consequently are more proportionate.

   b) **Products covered by New Legislative Framework (NLF) legislation must follow safety requirements already. Ensure alignment and avoid unnecessary duplication in the AI Act**. In certain applications an AI component does not automatically make an industrial product unsafe, it may be there to mitigate a risk (e.g., shield an operator) or in certain cases the component might not be relevant to the safety of the product at all. Clarify if Annex II products that are AI integrated that undergo conformity assessment (which could be for unrelated AI issues) are scoped in[14].

   c) **Enable the flexibility for providers who believe their system is not high-risk to justify this position to the supervisory authorities**. We also support a clear process and adequate resources for supervisory authorities to enable such a provision[15].

   d) **Ensure requests on reassessment and recategorization of systems are risk and evidence based and technical**; not political in nature[16].

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[12] The definition of high-risk is important to enabling trustworthy AI. We support a focused definition and a risk-based approach. We welcome the Parliament position that the focus is on significant risk of harm 1st para of Art 6(2).

[13] Issues arise in definitions as legally unclear tiers of 'risk' are emerging, perhaps due to differing iterations in drafting. E.g., Art 3 'risk' Art 3 'serious risk' Art 65 'risk' and Art 67 'serious risk' – these should be aligned or clarified. The Parliament appears to introduce a different definition in line 619 to that found in line 128b. One definition appears to trigger high-risk obligations and another triggers emergency regulatory action. The Council use of 'purely accessory' and the term of 'significant risk' will need to be clarified (Article 6(2) line 203 in WK 8800/2023 INIT, dated 29 June.

[14] Council mandate: Article 6(i) (line 200 in WK 8800/2023 INIT, dated 29 June).

[15] Parliament mandate: Article 6(2a new) (line 203c in WK 8800/2023 INIT, dated 29 June)

[16] Parliament mandate: Article 7 (2b new) line 218f in WK 8800/2023 INIT, dated 29 June

e) **Take a proportionate, risk-based approach to regulation[17] of General Purpose AI (GP-AI) [18] and Foundation Models[19].** Ensure the most burdensome obligations in the Act are only applicable to high-risk applications. Allow for exemptions for GP-AI/ foundation model providers when deployed in low-risk applications as per the Council general approach. This would be the most proportionate approach and aligned with the risk-based framework of the wider AI Act. It would be disproportionate to effectively treat all GP-AI and Foundational Models as high-risk. Context is important[20]. In addition, no impact assessment has been undertaken on proposed regulatory treatment of GP-AI and foundation models.

   i) It is understood that the Council proposal[21] is that GP-AI be regulated only if it could be deployed in high-risk AI applications. This is positive. However, the Council propose that detailed requirements would be clarified in a later implementing act. The concern with this approach is one of *uncertainty*:

   - scope would be too broad and apply to established GP-AI understood not to present particular risks; and

   - would extend uncertainty in the GP-AI ecosystem.

   ii) On the other hand, it is understood that the Parliament proposal is to impose substantive high-level requirements only on foundation models regardless of specific application. The concern with this approach is one of *proportionality*:

   - risk of overregulating foundation models that are only ever deployed in low-risk contexts (like one used to power an email spam filter) or sold to a third parties on the contractual condition that it cannot be deployed for high-risk applications.

   - much of the proposed Article 28b may not be feasible in practice or overly burdensome on foundation model providers.

   iii) There is a need to safeguard certainty and proportionality in finalising the Regulation. We propose a proportionate, technology neutral, risk-based approach in line with the Commission's stated intention.

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[17] Section 1.1, COM(2021) 206 final
[18] AI systems that can be used to perform different tasks in different contexts. The Council and Parliament definitions while different are similar in spirit.
[19] Parliament used this term 'foundation model', which they defined as "*an AI system model that is trained on broad data at scale, is designed for generality of output, and can be adapted to a wide range of distinctive tasks*". Parliament have specified that 'generative AI' is "foundation models used in AI systems specifically intended to generate, with varying levels of autonomy, content such as complex text, images, audio, or video." See Article 3.
[20] Council mandate: Articles 4a and 4b.
[21] Article 4(b) (line 177p in WK 8800/2023 INIT, dated 29 June).

Ensure clear and proportionate allocation of compliance responsibilities across AI value chain. Assist compliance.

4) **Ensure a clear and proportionate allocation of compliance responsibilities across different actors in the AI value chain**. Ensure licensors of General Purpose AI and Foundational Models provide sufficient information to licensees as is necessary to adequately assess the functionality and test the likely outcomes of deploying technology. Allow space for reasonable contractual arrangements to assist compliance by licensors and licensees and for communication between parties in the supply chain and between parties deploying AI technology and their customers to assist compliance.

   a) The proposed compliance framework should be proportionate with a risk-based approach. Support Parliament suggestions on Art. 13 (1).

   b) Support fairness. A legal services check is required to ensure alignment/coherence of proposed Article 28(a) with Data Act Article 13. Consider market position not just company size in proposed protection.

   c) AI systems which fall within the high-risk categorisation, as defined by Article 6, should follow requirements proportionate to the risk level of the specific use case. Physical (CE) marking[22] may not be possible in all instances. There should be an option for digital marking.

   d) The mandatory labelling of AI-generated content should remain limited to the very specific category of deep fakes, as envisaged in Art 52(3)[23]. Labelling should exclude any artistic, creative and similar works as envisaged in the Council's General Approach. Otherwise, there is a real risk of 'labelling fatigue'. In addition, legislators should not pre-empt sector-specific self-regulation where targeted approaches to labelling may be under development. Creators of AI-generated content determine what they will publish and so have a responsibility for applying appropriate deep-fake labels. Generative AI (or potentially foundation model) providers may be able to play a supporting role where relevant and technically feasible (e.g., through tags or watermarks for AI-generated content). It is currently impossible, however, for providers to ensure that such measures remain in place in the final format. Watermarks in imagery can be cropped or edited out.

   e) The Spanish EU Presidency proposal on FRIA is positive. We understand that in this proposal, FRIA would only be for public sector use-cases of high-risk AI system and would only need to be done for areas not covered by other legal obligations (Data Protection Impact Assessment, DPIA, etc). The six-week consultation period obligation would be removed or just made voluntary. We don't see an issue with a FRIA being a voluntary obligation.

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[22] Article 49
[23] Transparency obligations for certain AI systems

Avoid unnecessary regulatory duplication and conflicts

5) **Avoid unnecessary duplication and conflicts** between the proposed AI Act provisions and the Treaty (TFEU) and other EU Regulation (e.g., DSA[24] [25], [26] Copyright Directive[27], Corporate Due Diligence Directive, CRA and GDPR). Ensure the stated purpose of AI Act[28] is met and avoid unnecessary duplication or legal uncertainties.

   a) **Requirements should reflect technical feasibility, best/state of art practices, and the context of intended use**. Encourage the most tailored and effective risk mitigation. Key principles in Articles 8-15 in Chapter 2[29], should be to provide clarity and flexibility for compliance. Keep Council/Commission wording in Article 10(5). The ability to use special categories of personal data to mitigate bias needs to be addressed.

   b) **Support adoption of AI**. We have concerns with the proposed provision, in Article 29(5)[30]:

      i) There are concerns that this proposed obligation would create significant delays for employers given the potential for suspensive effect of deploying AI in a workplace and would ultimately be harmful to deploying an AI system in the workplace, including AI which benefits workers. This is particularly the case in circumstances where the "high-risk" employment use cases have a potentially very broad scope as set out in Annex III.

      ii) This obligation may create discrepancies for employers across Member States depending on how they have transposed the Directive 2002 on Information and Consultation. There is still a high risk of differing interpretations among the Member States. This is therefore creating an additional layer of Member State transposition to consider that will hinder uniform uptake of AI solutions in the workplace.

      iii) There is no legal basis in Article 114 of the TFEU to underpin the introduction of provisions on consultation with workers regarding the use of high-risk AI in the workplace. In fact, Article 114(2) explicitly excludes provisions relating to the rights and interests of employed

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[24] Annex III paragraph 8, point aa. See Parliament proposal line 837a in relation to AI systems intended to be used for influencing the outcome of an election or the voting behaviour. However, the Digital Services Act (DSA), includes the specific obligation for Very Large Online Platforms (VLOPs) to manage systemic risks relating to "any actual or foreseeable negative effects on civic discourse and electoral processes" for addressing such content concerns.

[25] See Parliament proposed line 837b. However, recommender systems are already regulated under the DSA.

[26] Article 35 already requires platforms to mitigate risks around disinformation.

[27] See proposed Article 28b(4)(b&c) in AIA

[28] COM (2021) 206 final Ibid.

[29] Compliance with requirements

[30] Parliament mandate: Article 29(5), second subparagraph (line 387a in WK 8800/2023 INIT, dated 29 June), '…with a view to reaching an agreement...'

persons. For the AI Act to include provisions on the information and consultation of workers, this would need to be based on Article 153(1e) and include the prior consultation of the social partners. As currently drafted the proposed Art 29.5.A bypasses this provision and fails to respect the autonomy of social partners.

c) **Support and enable efficient co-operation between relevant regulators at the national and EU level**. The legislation should support regulators and avoid fragmentation in the internal market by using sandboxes schemes[31], with well-established criteria to ensure an effective access to businesses, particularly SMEs. It should also support controlled experimentation by our innovators and regulators to assess (yet unforeseeable) risks, locate potential legal barriers and inconsistencies and develop solutions. Regulators should be adequately resourced to enable the development, deployment, and success of sandboxes. Avoid potential bottlenecks to sandboxes and other related provisions, due to a lack of regulatory competencies, resources, or cooperation between relevant regulators. There are several areas where the Commission and AI Office/Board may be required to guidelines or draft secondary legislation (e.g., Parliament proposals for Article 82). These guidelines must be resourced or streamlined to reduce administrative burden and enhance certainty.

   i) We are supportive of AI regulatory sandboxes. Regulatory sandboxes offer an opportunity for capacity building within regulators as much as enabling desired trustworthy digital innovation.

   - Regulators and sandbox participants point to several benefits in using regulatory sandboxes, including greater knowledge sharing and consequently enhanced decision making by both parties; enhanced ability of innovators to attract finance; and enhanced delivery of innovative services and products coming to market (Attrey et al., 2020). ICO, 2020 add that regulatory sandboxes can increase confidence in compliance, enhance accountability and consumer trust and contribute to broader policy aims in supporting public value projects.

   - Incentives that encourage participation would be positive. Recent industry research with AI startups and companies on aspects of the proposed AI Act, including Article 53 found:

     ✓ Almost all the survey participants remarked that a sandbox environment could contribute to more responsible AI innovation and expressed their willingness to participate in a regulatory sandbox.

     ✓ The ability to test their AI systems in a real-life setting or a close to real-life setting and, in this way, foster innovation, was the most important reason to participate in a sandboxing exercise.

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[31] Article 53

✓ Another reason that was mentioned was the possibility to collaborate with regulators, ensure compliance and contribute to the operationalization of technical requirements.

✓ Participants listed the following crucial elements they felt that a sandbox must contain to foster innovation: i) collaboration; ii) transparency; iii) guidance and legal certainty; iv) protection from enforcement.