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FINAL

EACB response

to

DG CONNECT multi-stakeholder consultation for Commission guidelines on the application of the definition of an AI system and on prohibited AI practices

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Section 1. Questions in relation to the definition of an AI system

The definition of an AI system is key to understanding the scope of application of the AI Act. It is a first step in the assessment whether an AI system falls into the scope of the AI Act.

The definition of an 'AI system' as provided in Article 3(1) AI Act is aligned with the OECD definition: 'AI system means a machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments.'

Recital 12 provides further clarifications on the definition of an AI system.

The following seven elements can be extracted from the definition:

1) 'a machine-based system'
2) 'designed to operate with varying levels of autonomy'
3) 'may exhibit adaptiveness after deployment',
4) 'for explicit or implicit objectives',
5) 'infers, from the input it receives, how to generate outputs'
6) 'predictions, content, recommendations, or decisions'
7) 'can influence physical or virtual environments'

Question 1: Elements of the definition of an AI system

The definition of the AI system in Article 3(1) AI Act can be understood to include the above mentioned main elements. The key purpose of the definition of an AI system is to provide characteristics that distinguish AI systems from 'simpler traditional software systems or programming approaches'. A key distinguishing characteristic of an AI system is its capability to infer, from the input

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it receives how to generate outputs. This capability of inference, covers both the process of obtaining output in the post-deployment phase of an AI system as well as the capability of an AI system to derive models or algorithms or both from inputs or data at the pre-deployment phase. Other characteristics of an AI system definition such as the system's level of autonomy, type of objectives, and degree of adaptiveness, help to define main elements of the AI system as well as to provide clarity on the nature of the AI system but are not decisive for distinguishing between AI systems and other type of software systems. In particular, AI systems that are built on one of the AI techniques but remain static after deployment triggered questions related to the scope of the AI Act, understanding of the concept of inference and the interplay between the different characteristics of the AI system definition. The guidelines are expected to provide explanation on the main elements of the AI system definition.

1.1: Based on Article 3(1) and Recital 12 AI Act, what elements of the definition of an AI system, in particular, require further clarification in addition to the guidance already provided in Recital 12? Elements of an AI system - please rate the importance of further clarification from 1 to 10, 10 indicating 'most important':

Elements of an AI system	**Only values between 1 and 10 are allowed, 10 indicating 'most important':**
'a machine based system'	9
'designed to operate with varying levels of autonomy'	10
'may exhibit adaptiveness after deployment'	8
'for explicit or implicit objectives'	6
'infers, from the input it receives, how to generate outputs'	10
'predictions, content, recommendations, or decisions'	4
'can influence physical or virtual environments'	4

Question: ***Explain why one or more of these elements require further clarification and what part of this element needs further practical guidance for application in real world applications?*** *1500 character(s) maximum, it counts spaces*

Machine-based systems: it is unclear whether the presence of AI in any part of a software application classifies the entire application as an AI system or whether only components directly utilising AI models are included. For example, does a mobile banking app with various functionalities (some AI-enhanced, others not) constitute a single AI system, or are its components treated separately?

Autonomy: we need guidance on what constitutes autonomy and the thresholds for a system to be considered autonomous. Is autonomy determined by the system's capability to function independently, or does it also encompass human-permitted decisions? Clarity is needed on whether

systems with significant human oversight or rule-based decision-making are excluded from the definition.

'Infers' requires clearer boundaries. Are all statistical or rule-based calculations considered inference since they produce outcomes based on given inputs? Does this mean that a simple calculator performing arithmetic operations fulfils this quality of an AI system? If not, what differentiates statistical models, like regression, from other non-inferential formulas? If the key factor of inference is whether the implementation is entirely rule-based, does this imply that statistical models, when implemented as rule-based systems, fall outside the definition of AI?

Adaptiveness: Systems updated through human decisions should not be classified as adaptive. This term should explicitly refer to self-adaptive capabilities.

Question 2: Simple software systems out of scope of the definition of an AI system

The AI Act does not apply to all software systems but only to systems defined as 'AI systems' in accordance with Article 3(1) AI Act. According to recital 12, the notion of AI system should be distinguished from 'simpler traditional software systems or programming approaches and should not cover systems that are based on the rules defined solely by natural persons to automatically execute operations'. In particular the use of statistical methods, such as logistic regression, triggered questions related to the conditions under which certain software systems should be considered out of the scope of AI system definition. The Commission guidelines are expected to provide methodology for distinguishing AI systems from simpler traditional software systems or programming approaches and thus would help define systems that are outside the scope of the AI Act.

Question: **Please provide examples of software systems or programming approaches that does not fall under the scope of the AI system definition in Article 3(1) AI Act and explain why, in your opinion, the examples are not covered by one or more of the seven main elements of the definition of an AI system in Article 3(1) AI Act.** *1500 character(s) maximum*

Companies often provide systems for various risk models (e.g., credit scoring, creditworthiness assessments, and health & life insurance models). These are built using statistical techniques such as regression, mathematical first-principles models, or decision trees. The parameters in these models, such as those use in credit scoring, are often set by humans whose decisions may be influenced by the result of statistical analyses.

While statistical techniques may derive model parameters pre-deployment, allowing for inference, the post-deployment model can be a deterministic, rule-based solution. Humans may decide to include or exclude statistically significant parameters or reject certain weights or decision tree branches from the system that implements the model-inspired rules. Thus, the final system is defined by humans but not solely, as statistical analyses may have influenced the humans' definition.

We believe such a machine-based system which creates e.g. credit score recommendations for human credit decision makers, is not an AI system. If a statistical model is implemented as fully deterministic and transparent rules by human developers, it should no longer be considered AI. Same rationale should apply to decision tree models, traditionally statistical but often coded as transparent, human-confirmable rules.

We need clear guidelines excluding statistically derived information to be qualify as AI. Systems implemented as human-decided rules, even if derived from statistical techniques, are not AI systems.

Section 2. Questions in relation to the prohibitions (Article 5 AI Act)

A. Questions in relation to harmful subliminal, manipulative or deceptive practices

Question 3: Taking into account the provisions of the AI Act, what elements of the prohibition of harmful manipulation and deception do you think require further clarification in the Commission guidelines? Please select all relevant options from the list

	Placement on the market, putting into service or use of an AI system
	deploying subliminal, purposefully manipulative or deceptive techniques
	with the objective or the effect of materially distorting behaviour of a person or groups of persons
X	in a manner that causes or is reasonably likely to cause significant harm
	none of the above

Please explain why the elements selected above require further clarification and what needs to be further clarified in the Commission guidelines? 1500 character(s) maximum

We request detailed clarification in the Commission guidelines on what constitutes 'significant harm' to the financial interests of individuals and groups. Clear parameters are essential for companies to assess their AI systems and ensure compliance with the Act.

We also propose the introduction of a clear threshold or criteria for determining financial harm. This would assist in providing a consistent framework for evaluating the impact of AI systems on financial interests, enhancing both clarity and consistency in application.

Such guidance would help stakeholders better identify and mitigate potential risks posed by AI systems, aligning with the AI Act's objectives to protect individual autonomy and well-being.

B. Questions in relation to harmful exploitation of vulnerabilities

Question 6: Taking into account the provisions of the AI Act, what elements of the prohibition of harmful exploitation of vulnerabilities do you think require further clarification in the Commission guidelines? Please select all relevant options from the list

	Placement on the market, putting into service or use of an AI system
	exploiting vulnerabilities due to age, disability or specific socio-economic situation
	with the objective or the effect of materially distorting behaviour of a person or groups of persons
X	in a manner that causes or is reasonably likely to cause significant harm
	none of the above

Please explain why the elements selected above require further clarification and what needs to be further clarified in the Commission guidelines? 1500 character(s) maximum

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We also propose the introduction of a clear threshold or criteria for determining financial harm. This would assist in providing a consistent framework for evaluating the impact of AI systems on financial interests, enhancing both clarity and consistency in application.

Such guidance would help stakeholders better identify and mitigate potential risks posed by AI systems, aligning with the AI Act's objectives to protect individual autonomy and well-being.

Question 8: Do you have or know concrete examples of AI systems where you need further clarification regarding certain elements of this prohibition to determine whether the AI system is in the scope of the prohibition or not?

X	Yes
	No

Please specify the concrete AI system, how it is used in practice as well as the specific elements you would need further clarification in this regard. 1500 character(s) maximum

In reference to Art. 5(1)(b) of the AI Act, which prohibits AI systems that exploit the vulnerabilities of certain individuals or groups, we seek further clarification regarding its application in the financial sector.

We propose that the guidelines explicitly state that AI systems used to fulfil regulatory requirements concerning 'vulnerable clients' in the financial sector are exempt from this prohibition. These systems are designed to protect and support individuals identified as vulnerable due to specific socio-economic circumstances, age, or disabilities, rather than to exploit them.

Explicitly excluding such systems from the prohibition would provide clarity and assurance to financial institutions that responsibly employ AI to meet regulatory standards and enhance client protection.

By offering this clarification, the Commission can ensure that AI systems developed for regulatory compliance and client safeguarding are not unintentionally restricted, thereby enabling their intended purpose of protecting vulnerable populations.

C. Questions in relation to unacceptable social scoring practices

Question 10: Do you have or know concrete examples of AI systems that in your opinion fulfil all elements of the prohibition described above?

X	Yes

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	No

Please specify the concrete AI system, how it is used in practice and how all the necessary elements described above are fulfilled. 1500 character(s) maximum

Banks are required to understand their customers' financial situations accurately. For instance, many banks use transaction data to assess the financial health of their customers, which includes identifying potential risk behaviours such as gambling or frequent use of payday loans. These transaction histories form the basis of payment behaviour scores, which predict a customer's ability to adhere to financing terms.

It could be argued that transaction data is behavioural data, and that it is collected under circumstances unrelated to financing where payment behaviour scores are used, and denial of financing can have detrimental effects on a natural person.

The AI Office should clarify that use of transaction data to establish payment behaviour profiles does not constitute a prohibited AI practice of 'social scoring', as it is necessary for banks to construct payment behaviour scores from diverse sets of data, including from data collected elsewhere than the specific financing application. The AI Office should provide specific examples what is social behaviour prohibited under Art. 5(1)(c).

D. Questions in relation to individual crime risk assessment and prediction

Question 12: Taking into account the provisions of the AI Act, what elements of the prohibition of harmful manipulation and deception do you think require further clarification in the Commission guidelines? Please select all relevant options from the list

	placement on the market, putting into service or use of an AI system
	for making risk assessment or prediction of a natural person or persons committing a criminal offence
	solely based on the profiling of a natural person or their traits and characteristics
X	excluded are AI systems used to support human assessment based on objective and verifiable facts directly linked to a criminal activity
	none of the above

Please explain why the elements selected above require further clarification and what needs to be further clarified in the Commission guidelines? 1500 character(s) maximum

We would like to highlight the need for guidance regarding Art. 5(1)(d), which prohibits AI systems that assess or predict an individual's risk of committing a criminal offense based solely on profiling or personality traits.

It is crucial that the guidelines explicitly confirm that anti-fraud systems and Anti-Money Laundering/Counter-Terrorist Financing (AML/CTF) systems are not classified as prohibited under Art. 5(1)(d).

These systems do not rely solely on profiling or personal characteristics. Instead, they are designed to analyse objective data in compliance with regulatory requirements and to support the legitimate interest of preventing illegal activities.

Providing a clear exemption for such systems in the guidelines will enhance legal clarity and certainty for providers and deployers. This will ensure that essential financial security measures remain operational and compliant with existing legal frameworks.

By providing this clarification, the Commission can help safeguard the integrity of financial systems while ensuring that the AI Act targets only those systems that genuinely pose unacceptable risks to fundamental rights and freedoms.

F. Questions in relation to emotion recognition

Question 19: Taking into account the provisions of the AI Act, what elements of the prohibition of emotion recognition in the areas of workplace and education do you think require further clarification in the Commission guidelines? Please select all relevant options from the list

	placement on the market, putting into service or use of an AI system
X	for identifying or inferring emotions of natural persons
X	in the area of workplace and educational institutions
X	except for medical and safety reasons
	none of the above

Please explain why the elements selected above require further clarification and what needs to be further clarified in the Commission guidelines? 1500 character(s) maximum

'Identifying or inferring emotions of natural persons' based on biometric data: Clarification is needed on whether systems that utilise a speech-to-text process to transcribe conversations (and only conversations), and subsequently analyse this text for emotional inference via keyword detection are considered prohibited. Understanding the boundaries of what is deemed as emotion inference will aid in ensuring that systems designed for non-intrusive analytical purposes are not inadvertently restricted.

'Area of workplace': We suggest narrowing its definition to explicitly include only employees and consultants, both current and potential.

Exception of 'safety reasons': We suggest providing concrete examples of what qualifies under the safety exception. Would an AI system that monitors emotions of natural persons to detect and prevent a fraudulent misconduct (an employee working in a trading room is about to commit an offence such as insider trading) fall under the safety exception (safety of the bank and the market) or be considered prohibited?

Additionally, would an AI system that analyses customer behaviour in a bank branch to help identify security risks, such as detecting unusual behaviours that might indicate a robbery attempt or an act of violence towards customers or employees by processing data from video surveillance and movement tracking, fall under the exception for safety reasons or if it would be prohibited?

G. Questions in relation to biometric categorisation

Question 25: Do you have or know concrete examples of AI systems where you need further clarification regarding certain elements of this prohibition to determine whether the AI system is in the scope of the prohibition or not?

X	Yes
	No

Please specify the concrete AI system, how it is used in practice as well as the specific elements you would need further clarification in this regard. 1500 character(s) maximum

We request guidance on the distinction between biometric categorisation systems that are prohibited and those deemed high-risk under the AI Act.

While it is clear that systems categorising individuals based on biometric data to infer sensitive information such as race, political opinions, trade union membership, religious or philosophical beliefs, sex life, or sexual orientation are prohibited, there is ambiguity regarding systems that categorise other types of biometric data.
Does this mean that all biometric categorisation systems inferring characteristics not explicitly mentioned in Art. 5(1)(g) are automatically classified as high-risk?

Clarifying this distinction is essential for companies to accurately assess and manage the deployment of biometric technologies.

By addressing this ambiguity, the AI Office can provide stakeholders with the clarity needed to responsibly and ethically employ biometric systems, ensuring alignment with the AI Act's objectives.

Contact:

The EACB trusts that its comments will be taken into account. For further information or questions on this paper, please contact:

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