Public consultation of the Autorité de la concurrence as part of the decision to start inquiries ex officio and issue an opinion on the generative artificial intelligence sector

Comments and Responses by Selbstregulierung Informationswirtschaft

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Table of Contents

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1 Introduction

We highly appreciate the opportunity to submit our views in regards of generative AI and its impact on market dynamics. Representing an entire European ecosystem in establishing self- and coregulatory measures, such as codes of conduct pursuant Art. 40 GDPR, with particular focus on the cloud infrastructure sector, our submission will have such distinct focus and angle. We acknowledge that the Autorité de Concurrence may not have foreseen this specific dimension in its request for consultation. However, we consider this dimension crucial in effectuating a framework facilitating entry into the market of companies active further down the generative AI value chain.

This position paper focuses on our observations and recommendations concerning the development of generative AI and its competitive functioning. It underscores - mainly under the perspective of the AI Act and the Data Act - the points where clear guidance and support from the European Commission, the AI Office, the European Artificial Intelligence Board (the '**Board'**) as well as the competent national and European supervisory authorities are needed. It advocates for the development of a framework ensuring a level playing field for all market participants particularly in a phase of innovation reflecting a nuanced understanding of operational practicalities, business reality and legal clarity, where the role of codes of conduct is encouraged.

2 Disclaimer

This position paper is based on the draft AI Act dated January 22, 2024. While we have endeavoured to incorporate changes from the final version adopted on March 13, 2024, readers should be aware that certain points discussed herein may not align perfectly, as the AI Act was adopted during the preparation of this paper.

3 About the authors

Selbstregulierung Informationswirtschaft e.V. (SRIW)[1] is a non-profit association with European focus. Ever since its establishment in 2011 and as the primary of a pan-European ecosystem, SRIW assembled first-hand experiences in the establishment of trusted self- and co-regulatory instruments in the information economy. Additionally, the association benefits from its independent subsidiaries across Europe and its diverse and constantly growing membership. The everyday business of the association centres on harmonising industry practices with social demands and political requirements. The mechanism considered fit for purpose is balanced and monitored self- and co-regulatory frameworks facilitating effective data and consumer protection. SRIW strives to collect and amplify valuable experiences to improve the necessary and independent structures required for the development, approval and monitoring of codes of conduct. By actively connecting experts and bringing together interested stakeholders, SRIW serves as a forum for exchange and discussions, providing the impetus for kicking-off frontrunner initiatives. The ecosystem includes SCOPE Europe srl[2], most probably Europe's leading independent Monitoring Body. SRIW's subsidiary became known in supporting the first officially approved transnational (European-wide) code of conduct, i.e. the EU Data Protection code of conduct for Cloud Service Providers and becoming the first ever accredited transnational Monitoring Body as well as the first Monitoring Body which was accredited by more than one data protection supervisory authority and for more than one code of conduct.[3] Since 2021 SRIW is participating as partner in a research consortium related to the project "Cognitive Economy Intelligence Platform for the Resilience of Economic Ecosystems" (CoyPu)[4] funded by the Federal Ministry for Economic Affairs and Climate Protection of Germany. The project addresses the complex (economic) challenges in crisis situations. SRIW's research is related to the legal challenges, including those relating to the lawful development and integration of generative AI into bigger AI-systems. Researchers of the publicly funded project – CoyPu – contributed to this consultation.

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[1] https://sriw.de
[2] https://scope-europe.eu
[3] https://www.dataprotectionauthority.be/publications/decision-n05-2021-of-20-may-2021.pdf; https://edpb.europa.eu/system/files/2023-03/document_4_data_pro_code_nl_sa.pdf
[4] https://coypu.org

4 What impact will the forthcoming European AI Act have on competition in the sector?

We welcome the adopted AI Act as a generally positive regulation vehicle. However, we would like to stress some challenges when it comes to its practical application. The objective of the regulation to spur innovation and competition is welcomed. However, currently single provisions could potentially hinder the emergence of new AI players. Ambiguities identified in the AI Act, restricted or discriminatory access to large data sets as well as high compliance costs regarding requirements, such as transparency, accountability, and data protection standards could favour larger, more established AI companies that have the resources to comply with complex regulatory frameworks. This might lead to further consolidation in the AI market, reducing competition.

4.1 Ambiguities in the AI Act

Identified challenges in the AI Act mainly pertain to the following:

- We welcome the introduction of obligations for providers of general-purpose AI models to comply with Union law on copyright and related rights when training generative AI in article 53 (1c) AI Act. However, it remains unclear how it can be practically ensured that such obligations take due account of the size of the provider and allow simplified ways of compliance for micro, small, and medium-sized enterprises ('**MSMEs**') including start-ups, that should not represent an excessive cost and not discourage the use of such models. We recommend the Commission developing a framework allowing for codes of practice pursuant article 56 AI Act to specify and set clear instructions. This should allow for elements regarding the obligations imposed on providers of general-purpose AI models to put in place a policy to comply with Union copyright law and make publicly available a summary of the content used for the training of the AI system. Thereby the specificities of different sectors and the oftentimes restricted resources available on the side of SMEs will be considered. This will foster a level playing field among providers of general-purpose AI models where no provider should be able to gain a competitive advantage in the Union market by applying lower copyright standards.
- We recommend action to be taken - to ensure that the risk regarding obligations of providers of general-purpose AI models introduced under Title V is distributed fairly among market players. Given the practical implications and the necessity of reflecting such real-life implementation, we suggest such actions shall be of co-regulative nature. In this realm, the effects of codes of conduct under AI Act shall be extended, incentives of developing and adhering to codes of conduct under AI Act shall be created, either by the Commission or subsequent authorities and legislation.

- With regards to AI regulatory sandboxes (article 57 AI Act), we would like to draw attention to the need of establishing a bullet proof regulatory framework for MSMEs minimising to the extent possible the risk of being misused in terms of liability protection and data protection rules. We recommend the Commission considering modifying the relevant GDPR provisions (e.g. purpose limitation) to avoid any inconsistency and possible conflicts with the GDPR, upholding the beneficial processing and developing of AI under the AI Act. Where GDPR will not be adapted co-regulative measures such as cross-regulatory measures, including those pursuant Art. 40 GDPR, could provide a clarifying framework. Further, co-regulative measures could provide sandbox standardisation in terms of the interplay between local and European sandboxes by setting a framework of cooperation.
- A procedure for the classification of a general-purpose AI model with systemic risks as set out in the AI Act should be allowed for by means of codes of conduct under the AI Act. An industry-driven, multi-stakeholder approach suits best for implementing requirements of distinct AI services / sectors, whilst upholding the principles determined by the AI Act.
- It is imperative to confirm that exemptions provided to open-source AI systems regarding transparency-related obligations imposed on general-purpose AI models (unless those are considered to present a systemic risk) truly incentivize businesses and not merely shift compliance burdens to the development phase. This consideration is crucial, as exemptions cease to apply once systems are constrained through commercial contracts and proprietary licenses.

4.2 Request for Cross-Regulatory Alignment

We strongly recommend clarifying in the public perception the potential of codes of conduct under Art. 40 GDPR allowing for a cross-regulatory compliance when it comes to severe elements of contention between the AI Act and the GDPR. Clarifying these points is essential to ensure coherence and effectiveness in data protection practices within the evolving landscape of AI regulation. The inherent interaction between the two regulations introduces a layer of uncertainty concerning several fundamental aspects of data protection. This uncertainty pertains to principles such as data minimization and purpose limitation, as well as the implementation of data protection through technology design. Additionally, questions arise regarding the delineation of joint controllership, transparency requirements, and information obligations under both regulations. The compatibility of legal bases for data processing, as well as the exercise of data subject rights such as the right to information and the right to erasure, is also subject to ambiguity. Furthermore, the application of Article 22 of the GDPR, which pertains to automated decision-making, and the requirement for Data Protection Impact Assessments (DPIA) as outlined in Article 35 of the GDPR, are areas where uncertainty persists due to the complex interplay between the AI Act and the GDPR.

4.3 Codes of Conduct as a Blueprint

Codes of conduct are an extremely valuable solution for the aspects above implementing AI Act's key element – harmonization – across the Europe Union and securing a level playing field in the market. Codes of conduct inherently involve different stakeholders and experts and strive for a fair balance of interests. In cases of transnational (European-wide) codes of conduct, they promote cross-European harmonization. They provide enhanced support, clarification, and harmonization in the application of the AI Act provisions, aiming to achieve a balanced and effective protection framework that is adaptable to the evolving technological and societal landscape. In this context they must be interpreted as the opportunity for the industry to implement the AI Act closest to operational practice, eventually satisfying the authorities, the industry as well as AI operators and users.

4.4 Clarifying codes of practice and codes of conduct under the AI Act

The AI Act fails to promote the co-regulative tool of codes of conduct with effective incentives for market participants. This is mainly because of the ambiguous and conflicting provisions it entails in respect to codes of conduct. The AI Act differentiates between codes of practice and codes of conduct.

4.4.1 Codes of Practice

Codes of practice, introduced in Article 56, serve as pivotal instruments aiding compliance with general purpose AI obligations. However, uncertainties loom over the efficacy of codes of practice as a self-regulatory mechanism within the framework set in article 56. Notably, the lack of provisions for positive incentives in the AI Act raises pertinent concerns regarding their effectiveness due to a lack of adoption. As of today, industry faces a negative incentive, saying, they cover the burden and resources to develop codes of conduct and the AI Act only foresees additional respective increased sanctions in case of non-compliance (Article 101 AI Act).

Finally, we would welcome guidance and clarification from the Commission regarding the legal effects of general validity in the specific context of codes of practice pursuant article 56 (6) AI Act. In our experience in establishing trusted self- and co-regulatory instruments we have observed that the legal effects of general validity in the specific context of codes of conduct pursuant article 40 GDPR remain generally unclear. The requirements of concluding an implementing act, alongside the administrative burdens, should result into a proportionate added value.

4.4.2 Codes of Conduct

Article 95 AI Act introduces codes of conduct with regards to non-high-risk AI systems as compliance proof with some or all of the requirements set out in Chapter III, Section 2 and invites market participants to commit to them on a voluntary basis. As such the draft AI Act takes a self-regulatory approach, since it does not require approval by a regulator, but instead relies on private actors to develop

these tools. Respectively it remains unclear how a voluntary adherence, the absence of a monitoring body (power rests with AI Office) and ultimately of a sanction mechanism in case of breach could incentive market participants to make use of Article 95. Today the AI Act requires industry to invest significantly in self-regulatory frameworks, with a potentially limited added value. Yet, it cannot be foreseen that conformity with an AI code of conduct will result in positive effects on a stakeholder's market positioning, especially as the coregulatory elements are missing. Thus, current incentives remain in limiting risks for future claims of non-compliance or limiting required efforts in administrative burdens to uphold compliance. It is recommended that authorities, as it remains within their powers, publish their own guidelines incorporating (legal) incentives for those adhering to codes of conduct.

We see potential for codes of conduct of the above nature to provide value also for high-risk AI systems as they can provide guidance and harmonize risk mitigation for MSMEs with regards to risk management systems, data governance, record-keeping, transparency provisions of information to users, human oversight, accuracy, robustness and cybersecurity.

4.5 Increasing Incentives for codes of practice and codes of conduct pursuant AI Act

Regardless of the above ambiguities, we consider codes of practice pursuant article 56 AI Act to remain a suitable solution. Likewise, codes of conduct under the AI Act provide positive effects. Both might be offering enhanced benefits in the following scenarios:

- As a tool providing further specifications or implementation details regarding further rulemaking by the Commission (delegated acts).
- As an effective alternative and/or specification to guidelines issued by the Commission regarding e.g. practical implementation of transparency obligations: "when deemed necessary.", or the relationship of the AI Act and its enforcement with other EU law: "when deemed necessary." In the latter codes of practice/codes of conduct could act as a cross-regulatory compliance tool for overlap of data protection and AI compliance cases. Conditions under which the "data protection impact assessment" and "compliance assessment" will take place, as well as procedures to avoid cumulative fines for the same violations in case an event triggers both a GDPR and an AI law penalty, are just some of the topics that we suggest addressing in a code of practice/code of conduct.

4.6 Lessons learned from the GDPR

Finally, we recommend acting proactively based on insights gleaned from the implementation of the GDPR:

- Ensuring a fully harmonized application of the AI Act across Europe is paramount. Discrepancies in the interpretation of rules by national supervisory authorities, as observed with the GDPR, can

lead to unfair competition dynamics. Therefore, efforts should be made to minimize such discrepancies and promote consistency in enforcement such as promoting transnational (European-wide) codes of practice under the AI Act.

- Competent authorities are highly welcomed to proactively publish guidelines and principles for the formulation of codes of practice under the AI Act well in advance. Delays in this regard, as observed with Art. 40 of the GDPR, can impede the establishment of clear regulatory frameworks and hinder compliance efforts.

5 Do you think the European Digital Market Act (DMA) or the European Data Act will have an impact on the sector's competitive dynamics?

The implementation of the Data Act carries profound implications for the landscape of generative AI and its competitive dynamics. By aiming to establish a structured framework for governing data sharing and access, this regulation stands to influence the availability and quality of datasets essential for training generative AI models. Such influence could significantly shape the trajectory of innovation and advancement within AI systems, given the pivotal role diverse and high-quality datasets play in their functionality.

5.1 Ambiguities in the Data Act

We acknowledge that the Data Act's stipulations concerning data interoperability and portability have the potential to alter companies' capacity to utilize proprietary datasets for training generative AI models as this shift could foster a more equitable environment in terms of data access, thereby potentially stimulating competition among AI developers.

Nevertheless, we would like to bring to the attention of the Autorité certain ambiguities under the Data Act, that may introduce additional complexities in accessing and employing certain datasets crucial for training generative AI models resulting in unequal dynamics among market participants and therefore in a potential decrease of innovation and competition – contrary to the objectives pursued by the Data Act. These pertain mainly to the unclarity as to whether the definitions of the various roles under the Data Act align with the numerous definitions of roles in the AI Act (provider /deployer / distributor / operator) and respectively as to which party bares which obligations.

Further clarification is sought with regards to the interplay between the Data Act and the GDPR on the following points:

- Given the cumulative applicability of both regulations as foreseen in article 1 (4) and recital 7 of the Data Act guidance in ensuring practically the avoidance of conflict would be welcomed.

- Given the somewhat conflicting language with regards to automated decision making in the GDPR and the Data Act (while the GDPR clearly restricts the possibilities to base a decision on profiling - article 22 (1) GDPR, the Data Act legitimates the usage of data for profiling of natural persons if it is necessary to provide the service requested by the user - article 6 (2) b Data Act) we suggest emphasising the potential of codes of conduct by the competent authorities as (i) a tool to determine situations where profiling is necessary for service provision and (ii) practical resolution of conflicts arising from these laws.

The aforementioned legal uncertainties seem to place a disproportionate operational burden on MSMEs as they provide for few resources to implement compliance mechanisms with their legal obligations as well as limited monetary capacities to put up with imminent legal consequences in case of non-compliance, such as fines.

5.2 Considering Codes of Conduct

In this context we would like to emphasise the function of codes of conducts as effective co-regulatory mechanisms to address legal uncertainties and provide for guidance. The Data Act would have benefited from explicitly introducing codes of conduct as a compliance facilitator incentivising market participants.

We advocate for the creation of a framework similar to codes of conduct Article 40 GDPR. Such framework would serve as a cross-regulatory compliance mechanism, particularly in cases falling under the scope of the Data Act and involving the processing of personal data. This proposal may entail amendments to Article 40 GDPR to accommodate its application in this context.

Finally, we recommend the European Commission to facilitate the development of codes of conduct specifically addressing MSMEs. In specific industry sectors, codes of conduct could actively support MSMEs to comply with the Data Act regulations. As codes of conduct will be drafted by regulatory experts, they will help MSMEs by several means, e.g., understanding how to best implement requirements. This will provide enhanced clarity and have a positive effect on MSMEs by ensuring transparency and stability. Overcoming ambiguities and receiving pragmatic guidance by means of codes of conduct will benefit MSMEs economically, allowing them to focus on their main business activity.

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