Future proofing the risk-based approach of the Artificial Intelligence Act

Issues with the risk-based approach taken by the Artificial Intelligence Act

The European Commission's draft Artificial Intelligence Act (AI Act) takes a risk-based approach to regulating the use of AI systems. The intention is to introduce appropriate safeguards and obligations on providers (developers) and users (deployers) of AI systems that pose a risk to "the health and safety or fundamental rights of persons." For such measures to be effective, the risk-based approach itself must be objective and adaptable to the fast-moving pace of AI technology.

The AI Act delineates four levels of risk: **unacceptable risk** (Title II), **high risk** (Title III), **limited risk** (a.k.a. systems that pose a risk of manipulation) (Title IV), and **all other Artificial Intelligence (AI) systems**. This approach of *ex ant*e designating AI systems to different risk categories does not consider that the level of risk also depends on the context in which a system is deployed and cannot necessarily be fully determined in advance.

Because of this difficulty of assessing risk *ex ante*, as well as the fast-moving nature of AI development, the risk-based approach taken by the AI Act needs to be flexible and easily updatable so that it can adapt to new applications that pose a risk to the health and safety or fundamental rights of persons. Unfortunately, this is not the case.

While the AI Act includes a mechanism by which the list of 'high-risk' AI systems in Annex III can be updated, it provides no scope for updating 'unacceptable' risk (Art 5) and limited risk (Art 52) lists.

In addition, although Annex III can be updated to add new systems to the list of high-risk AI systems, systems can only be added within the scope of the existing eight area headings. Those headings cannot currently be modified within the framework of the Act.

These rigid aspects of the framework undermine the lasting relevance of the AI Act, and in particular its capacity to respond to future developments and emerging risks for fundamental rights.

Amendments to the AI Act's risk-based approach

To make the AI Act's risk-based approach future proof and capable of dealing with emerging threats to fundamental rights, we propose the following changes.

This paper was drafted by Access Now with the support of AlgorithmWatch, Bits of Freedom, European Centre for Non-Profit Law (ECNL), European Digital Rights (EDRi), European Disability Forum (EDF), Panoptykon Foundation and the Platform for International Cooperation on Undocumented Migrants (PICUM). It follows the Joint Civil Society Statement An EU Artificial Intelligence Act for Fundamental Rights, signed by 123 organisations in November 2021.

Firstly, we propose **amending Article 7 to expand the scope of delegated acts** such that they can modify existing area headings in Annex III or add new ones.

Secondly, we propose adding a new Article 5a with **provisions to allow for the list of prohibited AI practices in Article 5 to be updated via delegated acts**. This is an essential measure to ensure that those AI systems that pose the greatest threat to fundamental rights can be prohibited.

Thirdly, Article 52 proposes a number of transparency measures for certain AI systems. As with the other lists of AI systems in the AI Act, **this needs to be easily updatable via delegated acts to ensure that the AI Act is future proof and able to react to developments in an agile manner**.

Fourthly, modifications must also be made to Article 73 to maintain consistency with the changes proposed above.

Finally, amendments must be made to Article 84 to specify the timeframe for periodic assessment of the lists in Articles 5 and 52, as well as to **improve stakeholder, and particularly civil society, involvement in the process for updating these lists**.

For more information on these proposed amendments, please contact Daniel Leufer, Senior Policy Analyst at Access Now (daniel.leufer@accessnow.org).

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