DeutscherAnwaltVerein

Position Paper

of the German Bar Association prepared by the Committee on IT Law

on the multi-Stakeholder Consultation for Commission Guidelines on the Application of the Definition of an AI System and the Prohibited AI Practices Established in the AI Act

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Multi-Stakeholder Consultation For Commission Guidelines On The Application Of The Definition Of An Ai System And The Prohibited Ai Practices Established In The Ai Act

Questionnaire

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 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':

'a machine based system':

Only values between 1 and 10 are allowed

1

'designed to operate with varying levels of autonomy':

Only values between 1 and 10 are allowed

10

'may exhibit adaptiveness after deployment':

Only values between 1 and 10 are allowed

2

'for explicit or implicit objectives':

Only values between 1 and 10 are allowed

2

'infers, from the input it receives, how to generate outputs':

Only values between 1 and 10 are allowed

2

'predictions, content, recommendations, or decisions':

Only values between 1 and 10 are allowed

2

'can influence physical or virtual environments':

Only values between 1 and 10 are allowed

7

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

The ability to act autonomously is the decisive criterion for distinguishing AI systems from conventional software that merely executes predefined processes without making independent decisions. Such conventional software shall explicitly not be covered.

Possibility of influencing the physical or virtual environment through the results: The original term ‘real’ was replaced by ‘physical’ environment in the underlying OECD definition to take into account that virtual environments can provide real-world actions and inputs to the AI system. Acc. to literature it is to be broadly understood and also captures indirect effects such as the emotional influence on a person (Borges: CR 2023, 706, Rn. 28, 74). The characteristic is not very selective because any software application can influence its environment (Bomhard/Siglmüller, RDi 2024, 45.).

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.

Please provide examples of software systems or programming approaches that **do 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

Software that merely executes predefined processes without independent decision-making should not be covered (cf. Rec. 12 s. 2 AI Act), such as:

- A Platform that automates repetitive tasks by executing actions based on predefined rules and conditions (e.g. ‘If This Then That’, Zapier)
- Spam filters in email services based on predefined rules and patterns

- Simple algorithms for data organisation, such as Bubble Sort or Quick Sort, which follow predefined steps
- Vacuum robots that follow predefined rules

Manually curated recommendations: Recommendations based on predefined categories or human-curated lists shall not fall under the definition because AI systems are designed to operate with varying degrees of autonomy, i.e. they act - to a certain extent - independently of human intervention and are capable of operating without human intervention (cf. Rec. 12 s. 11 AI Act). The same applies to systems that provide recommendations based on simple filters and preferences without using complex algorithms for pattern recognition.

It can also be difficult to determine which parts of a product in embedded AI systems are part of the AI system and where 'the rest of the product' begins. In particular, it is unclear which software components are included, e.g. if sensors (microphones/ cameras) and analysis modules fall under the definition and whether the overall system (consisting of hardware and software components) is considered an AI system or only, e.g. the LLM component.

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

Article 5 AI Act prohibits the placing on the EU market, putting into service, or the use of certain AI systems that can be misused and provide novel and powerful tools for manipulative, exploitative, social control and/or surveillance practices.

The Commission guidelines are expected to include an introductory section explaining the general interplay of the prohibitions with other Union legal acts, the high-risk category and general-purpose AI systems as well as relevant specifications of some horizontal concepts such as provider and deployer of AI systems, 'placement on the market', 'putting into service' and 'use' and relevant exceptions and exclusions from the scope of the AI Act (e.g. research, testing and development; military, defense and national security, personal nonprofessional activity).

Pursuant to Article 5(1) AI Act, the following practices are prohibited in relation to AI systems:

Article 5(1)(a) – Harmful subliminal, manipulative and deceptive techniques
Article 5(1)(b) – Harmful exploitation of vulnerabilities
Article 5(1)(c) – Unacceptable social scoring
Article 5(1)(d) – Individual crime risk assessment and prediction (with some exceptions)
Article 5(1)(e) – Untargeted scraping of internet or CCTV material to develop or expand facial recognition databases
Article 5(1)(f) – Emotion recognition in the areas of workplace and education (with some exceptions)
Article 5(1)(g) – Biometric categorisation to infer certain sensitive categories (with some exceptions)
Article 5(1)(h) – Real-time remote biometric identification (RBI) in publicly accessible spaces for law enforcement purposes (with some exceptions)

This section includes questions on each of the aforementioned prohibitions separately and one final question pertaining to all prohibitions alike and the interplay with other acts of Union law.

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

The prohibition under Article 5(1)(a) AI Act targets AI systems that deploy subliminal techniques, purposefully manipulative or deceptive techniques that materially influence behaviour of people or aim to do so in significantly harmful ways. The underlying rationale of this prohibition is to protect individual autonomy and well-being from manipulative, deceptive and exploitative AI practices that can subvert and impair individuals' autonomy, decision-making, and free choice.

Proposed structure of the guidelines

It is proposed that the Commission guidelines would cover the following aspects regarding Article 5(1)(a) AI Act:

- *Rationale and objectives of the prohibition*
- *Main elements of the prohibition*
    - *AI systems deploying subliminal, purposefully manipulative and deceptive techniques with the objective or the effect of materially distorting behaviour*
    - *in a manner (reasonably likely to) cause significant harm*
- *AI systems out of scope of the prohibition*
- *Interplay with other Union law (e.g. data protection, consumer protection, digital services regulation, criminal law)*

Main elements of the prohibition

*Several **cumulative elements must be in place** at the same time for the prohibition in Article 5(1)(a) AI Act to apply:*

*1) The activity must constitute **'placing on the market'** (Article 3(9) AI Act), **'putting into service'** (Article 3(11) AI Act), or **'use'** of an AI system (Article 3(1) AI Act). The prohibition applies to both providers and deployers of AI systems, each within their own responsibilities.*

*2) The AI system must 'deploy **subliminal techniques** beyond a person's consciousness (e.g. deploying imperceptible images or audio sounds), **purpose fully manipulative** (e.g. exploiting cognitive biases, emotional or other manipulative techniques) or **deceptive techniques**' (e.g. presenting false and misleading information to deceive individuals and influence their decisions in a manner that undermines their free choices). These techniques are alternative, but they can also apply in combination.*

*3) The techniques deployed by the AI system should have the **objective or the effect of materially distorting the behaviour of a person or a group of persons**. The distortion must **appreciably impair their ability to make an informed decision, resulting in a decision that the person or the group of persons would not have otherwise made.** This requires a substantial impact whereby the technique deployed*

by the AI system does not merely influence a person's (or group of persons) decision, but should be capable of effectively undermining their individual autonomy and ability to make an informed and independent free choice. This suggests that 'material distortion' involves a degree of coercion, manipulation or deception that goes beyond lawful persuasion that falls outside the ban.

4) The distorted behaviour must ***cause or be reasonably likely to cause significant harm*** *to that person, another person, or a group of persons. In this context, important concepts that will be examined in the guidelines are the types of harms covered, the threshold of significance of the harm and its reasonable likelihood from the perspective of the provider and/or the deployer. 'Significant harms' implies sufficiently important adverse impacts on physical, psychological health or financial interests of persons and groups of persons that can be compound with broader group and societal harms. The determination of 'significant harm' is fact and context specific, necessitating careful consideration of each case's individual circumstances.*
For the prohibition to apply, all elements must be in place and there must be a causal link between the techniques deployed, the material distortion of the behaviour of the person and the significant harm that has resulted or is reasonably likely to result from that behaviour.

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

- o *placement on the market, putting into service or use of an AI system*
- X deploying subliminal, purposefully manipulative or deceptive techniques
- X 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
- o *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

Question 4: Do you have or know concrete examples of AI systems that in your opinion fulfil all elements of the prohibition described above?

- o Yes
- X 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

Only the examples given in recital 29 of the AI Act: Influence through machine-brain interfaces or virtual reality. However, not in real life.

Question 5: 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
- o 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

1. AI that recognises the emotional state of a person (e.g. analysis of the voice, facial expression, etc.). Ex: AI that recognises if the user is depressed or feels lonely and makes use of this for marketing or a political campaign. It remains unclear whether such methods were previously considered permissible and should therefore not be considered unlawful in accordance with Recital 29 AI Act.

2. Deep fakes: On the one hand, the manipulated content is consciously perceived with the senses and only false conclusions are drawn as to the authenticity of the content. On the other hand, acc. to recital 29 s. 3 AI Act other types of manipulative or deceptive influence that undermine the free choice of the persons concerned are prohibited as well. This may be the case with a deep fake, because the decisive aspect - the falseness - remains unconscious. Moreover, it is unclear if AI systems generating deep fakes exert sufficient pressure to force the addressees into decisions that undermine their freedom of decision (significant manipulation). It is also questionable whether the use case can lead to significant harm, in particular to sufficiently large adverse effects on the physical and mental health or financial interests.

B. Questions in relation to harmful exploitation of vulnerabilities

The prohibition under Article 5(1)(b) AI Act targets AI systems that exploit vulnerabilities of certain persons or groups of persons that materially influence behaviour of people or aim to do so in a significantly harmful way. The underlying rationale of the prohibition is to protect individual autonomy and wellbeing from exploitative AI practices that can subvert and impair individuals' autonomy, decision-making, and free choice similar. This prohibition in particular aims to protect those that are most vulnerable and susceptible to manipulation and exploitation because of their specific characteristics that make them particularly vulnerable due to their age, disability and or specific socio-economic situation.

Proposed structure of the guidelines

It is proposed that the Commission guidelines would cover the following aspects regarding Article 5(1)(b) AI Act:

- *Rationale and objectives of the prohibition*
- *Main elements of the prohibition*
    - *AI system exploiting vulnerabilities due to age, disability or specific socio-economic situation*
    - *with the objective or the effect of materially distorting behaviour*

    - *in a manner (reasonably likely to) cause significant harm*
- *Interplay between the prohibitions in Article 5(1)(a) and (b) AI Act, with the latter acting as lex specialis in case of overlap*
- *AI systems out of scope of the prohibition*
- *Interplay with other Union law (e.g. data protection, non-discrimination law, digital services regulation, criminal law)*

Main elements of the prohibition

*Several **cumulative elements must be in place** at the same time for the prohibition in Article 5(1)(b) AI Act to apply:*

*1) The activity must constitute **'placing on the market'** (Article 3(9) AI Act), **'putting into service'** (Article 3(11) AI Act), or **'use'** of an AI system (Article 3(1) AI Act). The prohibition applies to both providers and deployers of AI systems, each within their own responsibilities.*

*2) The AI system must exploit **vulnerabilities due to age** (covering both children as well as elderly), **disability** (as defined in EU equality law encompassing a wide range of physical, mental, intellectual and sensory impairments that hinder full participation of individuals in the society), or **specific socio-economic situations** (e.g. persons living in extreme poverty, ethnic or religious minorities). Vulnerabilities of these persons should be understood to encompass a broad spectrum of categories, including cognitive, emotional, physical and other forms of susceptibility that can affect the ability of an individual or a group of persons pertaining to those groups to make informed decisions or otherwise influence their behaviour. 'Exploitation' should be understood as objectively making use of such vulnerabilities in a manner which is harmful for the exploited vulnerable (groups of) persons and/or other persons.*

*3. The techniques deployed by the AI system should have the **objective or the effect of materially distorting the behaviour** of a person or a group of persons. Article 5(1)(a) and (b) AI Act make use of the same concept and should therefore be interpreted in the same way to the extent they overlap.*

*4. The distorted behaviour must **cause or be reasonably likely to cause significant harm** to that person, another person, or a group of persons. Article 5 (1)(a) and (b) AI Act make use of the same concept and should therefore be interpreted in the same way, while taking into account that the harms that can be suffered by vulnerable groups can be particularly severe and multifaceted due to their heightened susceptibility to exploitation.*

For the prohibition to apply, all elements must be in place and there must be a causal link between the vulnerability exploitation by the AI system, the material distortion of the behaviour of the person and the significant harm that has resulted or is reasonably likely to result from that behaviour.

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

- o *placement on the market, putting into service or use of an AI system*
- X exploiting vulnerabilities due to age, disability or specific socio-economic situation
- X 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
- o *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

It needs to be further clarified when a vulnerability can be supposed, e.g. age threshold or income threshold or acc. to the individual case ; at what threshold ‘significant damage’ is inflicted or is sufficiently likely to be inflicted, which is a prerequisite for the offence and is particularly difficult to assess in the case of immaterial damage.

Determining the amount of immaterial damage (non-pecuniary damage) is associated with considerable legal uncertainty.

Question 7: Do you have or know concrete examples of AI systems that in your opinion fulfil all elements of the prohibition described above?

- X Yes
- o 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

An AI chatbot (e.g. as an assistant with an AI-generated voice) is developed to contact/support older people or people with disabilities who suffer from social isolation and by creating and exploiting the emotional connection, ultimately persuades them to disclose personal or financial information or subtly advertise certain offers.
Covered if the behaviour is significantly changed or significant harm is caused.

Use of AI to design offers for children and young people in such a way that mechanisms individually tailored to user behaviour promote addictive behaviour, e.g. so-called dopamine loops or exploitation of a lack of impulse control to sell paid extra packages for faster progress in video games or advertising in apps. Significant harm could be given if customers become over-indebted through the in-app purchases.

An AI chatbot in an online shop aimed at vulnerable groups (as minors or elderly people in need of care) uses unfair commercial practices such as false information, concealment of important information, bait offers or fake consumer reviews to persuade customers to make purchases. Already prohibited as an unfair commercial practice.

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

Significant harm: E.g. an AI chatbot specifically helps people in need of care to plan and book holidays, which can involve considerable financial outlay. The same question arises concerning in app purchases in online games: It remains unclear when the limit to significant harm is reached. A significant harm or damage might accumulate over time (multiple purchases lead to excessive debt) and should be prohibited.

Targeting of children/young people: E.g., a voice assistance system in a car navigation system analyses the voice and speech patterns of vehicle occupants, recognises children/young people and provides tailored recommendations (e.g. for nearby sights or restaurants). Article 28 (2) DSA prohibits profiling of minors, but it remains unclear if this use case falls within the scope of the prohibition.

C. Questions in relation to unacceptable social scoring practices
The prohibition under Article 5(1)(c) AI Act aims to prevent 'social scoring' practices that evaluate persons over a certain period of time based on their social behaviour or personal characteristics leading to detrimental and unfair outcomes for certain individuals and groups. The prohibition applies in principle to both the public and the private sector. The underlying rationale of this prohibition is to prevent such unacceptable 'social scoring' practices that may lead to discriminatory and unfair outcomes for certain individuals and groups, including their exclusion from society. The prohibition of 'social scoring' aims to protect in particular the right to human dignity and other fundamental rights, including the right to non-discrimination and equality, to data protection and to private and family life. It also aims to safeguard and promote the European values of democracy, equality and justice.

Proposed structure of the guidelines

It is proposed that the Commission guidelines would cover the following aspects regarding Article 5(1)(c) AI Act:

- *Rationale and objectives of the prohibition*
- *Main elements of the prohibition*
    - *'Social scoring': evaluation or classification based on social behaviour or personal or personality characteristics over a certain period of time*
    - *Whether provided or used by public or private entities*
    - *Leading to detrimental or unfavourable treatment in unrelated social contexts and/or unjustified or disproportionate treatment*
- *AI systems out of scope of the prohibition*
- *Interplay with other Union law (e.g. data protection, non-discrimination)*

Main elements of the prohibition

*Several **cumulative elements must be in place** at the same time for the prohibition in Article 5(1)(c) AI Act to apply:*

*1) The activity must constitute **'placing on the market'** (Article 3(9) AI Act), **'putting into service'** (Article 3(11) AI Act), or **'use'** of an AI system (Article 3(1) AI Act). The prohibition applies to both providers and deployers of AI systems, each within their own responsibilities.*

*2) The AI systems must be intended or used for the **evaluation or classification** of natural persons or groups of persons over a certain period of time based on:*
*(i) their **social behaviour**; or*
*(ii) known, inferred or predicted personal or personality **characteristics**;*

*3) The social score created with the assistance of the AI system must lead to the **detrimental or unfavourable treatment** in one or more of the following scenarios:*

(i) in social contexts unrelated to those in which the data was originally generated or collected; and/or
(ii) treatment that is unjustified or disproportionate to their social behaviour or its gravity.

The detrimental or unfavourable treatment must be the consequence of the score, and the score the cause of the treatment. It is not necessary for the evaluation performed by the AI system to be 'solely' leading to the detrimental or unfavourable treatment (covering thus AI-enabled scoring practices that may be also subject to or combined with other human assessments). At the same time, the AI output has to play a sufficiently important role in the formation of the social score. For the prohibition to apply all elements described above must be in place at the same time.

Question 9: Taking into account the provisions of the AI Act, what elements of the prohibition of social scoring do you think require further clarification in the Commission guidelines?

Please select all relevant options from the list

- o *placement on the market, putting into service or use of an AI system*
- o *for the evaluation or classification of natural persons or groups of persons over a certain period of time based on their social behaviour, or known, inferred or predicted personal or personality characteristics*
- X with the social score leading to the detrimental or unfavourable treatment of the person or groups of persons
- X in social contexts unrelated to those in which the data was originally generated or collected
- X treatment that is unjustified or disproportionate to their social behaviour or its gravity
- o *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

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

- o Yes
- X 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

Question 11: 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
- o 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

Public authorities use an AI system to process personal data (place of residence, type of housing or the fact that someone was born outside the EU to identify risk cases who may be committing social fraud and further investigating these cases.
It is unclear whether this is detrimental or unfavourable treatment in accordance with art. 5 (1) c of the AI Act, since the consequence is only further investigations of the case. If one affirms unfavourable treatment, it still remains unclear if this is “unrelated to the context in which the data was originally generated or collected” (cf. recital 31 (4) AI Act.). Additionally, it is unclear whether the algorithms for determining a fraud risk are already considered an AI system, e.g. whether autonomy is given.

Use of an AI system by private actors, e.g. to check creditworthiness in order to grant loans. Considerations as for example 1.

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

The prohibition under Article 5(1)(d) AI Act targets AI systems assessing or predicting the risk of a natural person committing a criminal offence solely based on profiling or assessing personality traits and characteristics, without objective and verifiable facts directly linked to criminal activity and a human assessment thereof. The underlying rationale for the ban is to prevent unacceptable law enforcement practices where AI is used to make an individual a suspect solely based on profiling or their personality traits and characteristics rather than as support of human assessment, which is already based on objective and verifiable facts directly linked to a criminal activity. Such predictive crime and policing AI systems pose an 'unacceptable risk' since they infringe fundamental rights and freedoms in a democracy that is based on rule of law and requires a fair, equal and just criminal legal system. They also endanger individual's liberty without the necessary procedural and judicial safeguards and violate the right to be presumed innocent. Other fundamental rights at risk that the ban aims to safeguard are the right to human dignity, non-discrimination, the right to fair trial, the right to defence, effective remedy, privacy and data protection and the rights of the child if these practices affect children.

Proposed structure of the guidelines

It is proposed that the Commission guidelines would cover the following aspects regarding Article 5(1)(d) AI Act:

- *Rationale and objectives of the prohibition*
- *Main elements of the prohibition*
    - *Individual crime prediction of a natural person committing a criminal offence*
    - *solely based on profiling or the assessment of personality traits and characteristics*
    - *without verifiable facts directly linked to criminal activity and human assessment thereof*
- *Interplay with other Union law (e.g. data protection)*

- *AI systems that are out of the scope of the prohibition (e.g. support of the human assessment)*

Main elements of the prohibition

*Several **cumulative elements must be in place** at the same time for the prohibition in Article 5(1)(d) AI Act to apply:*

*1) The activity must constitute **'placing on the market'** (Article 3(9) AI Act), **'putting into service for this specific purpose'** (Article 3(11) AI Act), or **'use'** of an AI system (Article 3(1) AI Act). The prohibition applies to both providers and deployers of AI systems, each within their own responsibilities.*

*2) The AI system must be intended or used for the specific purpose **of making a risk assessment or prediction of a natural person or persons committing a criminal offence**. The individual crime predictions can be made at any stage of the law enforcement activities such as prevention and detection of crimes, but also investigation, prosecution and execution of criminal penalties. Excluded from the scope are therefore location- and event-based predictions and individual predictions of administrative offences since these are not assessing the risk of individuals **committing a criminal offence**.*

*3) The assessment or the prediction must be **solely** based on either or both of the following:*
*(i)**profiling** of a natural person (defined in Article 4(4) of the General Data Protection Regulation as any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person), or*
*(ii)**assessing a person's personality traits and characteristics** (such as nationality, place of birth, place of residence, number of children, level of debt or type of car)*

*4) Excluded are **AI systems used to support human assessment based on objective and verifiable facts directly linked to a criminal activity**. This means that*

predictive AI tools could be used for supporting the human assessment of the involvement of a person in the criminal activity if there are objective and verifiable facts linked to a criminal activity on the basis of which a person can be reasonably suspected of being involved in a criminal activity.

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

- o *placement on the market, putting into service or use of an AI system*
- o *for making risk assessment or prediction of a natural person or persons committing a criminal offence*
- o *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
- o *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

The question arises whether the prohibition can be circumvented by a “human in the loop” (cf. recital 42 (2) AI Act, according to which the prohibition only applies if no human assessment takes place: ‘… on AI-predicted behaviour … without human assessment thereof.” How should it be determined when a human assessment is sufficient to circumvent the prohibition, what margin of discretion for the human is required? Draw parallels to Art. 22 GDPR: The right not to be subject to a decision based solely on automated processing.

Question 13: Do you have or know concrete examples of AI systems that in your opinion fulfil all elements of the prohibition described above?

- Yes
- 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

Question 14: 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

German police uses software for ‘predictive policing’, e.g. Gotham from Palantir. According to the ‘Palantir’ judgement of the German Federal Constitutional Court 16.02.2023, 1 BvR 1547/19, 1 BvR 2634/20), such predictive policing software can create comprehensive predictive profiles of a person (recital 76, 77), in order to direct police investigations. However, the wording of Article 5(1)(d) of the AI Act only prohibits risk assessments that are ‘based solely on the profiling of a natural person or on assessing their personality traits and characteristics’. Furthermore, it remains unclear whether predictive policing is based on objective, verifiable facts. If so, they would not be covered by the prohibited practice pursuant to recital 42 (2). How should the fact that predictive policing software can be used to uncover previously unrecognised connections and thus provide new evidence for investigations be assessed regarding objective verifiability.

Question 15: Do you have or know concrete examples of AI systems that fulfil all necessary criteria for the prohibition to apply, but fall under the exception of systems that support the human assessment of the involvement of a person in a criminal activity, based on objective and verifiable facts linked to a criminal activity?

X Yes

o No

Please specify the concrete AI system, how it is used in practice and which exception would apply and why

1500 character(s) maximum

Please see above, unclear when fulfilled.

E. Questions in relation to untargeted scraping of facial images

Article 5(1)(e) AI Act prohibits AI systems with the specific purpose of creating or expanding facial recognition databases through untargeted scraping of the internet or CCTV footage.

As to the rationale of the prohibition, untargeted scraping of a large number of facial images from the Internet or CCTV material, along with associated metadata and information, without consent of the data subject(s), to create largescale facial databases, violates individuals' rights and individuals lose the possibility to be anonymous. Recital 43 of the AI Act justifies the prohibition of Article 5(1)(e) AI Act based on the 'feeling of mass surveillance' and the risks of 'gross violations of fundamental rights, including the right to privacy'.

Proposed structure of the guidelines

It is proposed that the Commission guidelines would cover the following aspects regarding Article 5(1)(e) AI Act:

- *Rationale and objectives of the prohibition*
- *Main elements of the prohibition*

    - *Facial recognition databases*
    - *through untargeted scraping of facial images*
    - *from the internet or CCTV footage*
- *AI systems out of scope of the prohibition*
- *Interplay with other Union law (e.g. data protection)*

Main elements of the prohibition

*Several **cumulative elements must be in place** at the same time for the prohibition in Article 5(1)(e) AI Act to apply:*

*1) The activity must constitute **'placing on the market'** (Article 3(9) AI Act), **'putting into service for this specific purpose'** (Article 3(11) AI Act), or **'use'** of an AI system (Article 3(1) AI Act). The prohibition applies to both providers and deployers of AI systems, each within their own responsibilities.*

*2) The AI system must be intended or used for the specific purpose of untargeted scraping. The prohibition applies to **scraping AI systems** that are placed on the market or being put into service 'for this specific purpose' of **untargeted scraping of the internet/CCTV** material. This implies that the prohibition does not apply to all scraping tools with which one can build up a database, but only to tools for untargeted scraping.*

*3) The prohibition covers AI system used to **create or expand facial recognition databases**. Database in this context refers to any collection of data, or information, that is specially organized for rapid search and retrieval by a computer. A facial recognition database is a technology that matches a human face from a digital image or video frame against a database of faces, compares it to the database and determines whether there is a match in the database.*

*4) The sources of the images are either the **Internet or CCTV footage**.*

Question 16: Taking into account the provisions of the AI Act, what elements of the prohibition of untargeted scraping of facial images do you think require further clarification in the guidelines?

Please select all relevant options from the list

- o *placement on the market, putting into service or use of an AI system*
- o *for creating or expanding facial recognition databases*
- o *through untargeted scraping of facial images*
- o *from the internet or CCTV footage*
- X none of the above

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

Please see above.

Question 17: Do you have or know concrete examples of AI systems that in your opinion fulfil all elements of the prohibition described above?

- X Yes
- o 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

Clearview AI

Question 18: 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
- o 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

Use cases that go beyond the putting into service/marketing or use of such databases (e.g. the use of such databases to train an AI model for facial recognition or other downstream use cases) are not covered by the wording.

The description in recital 43 of the AI Regulation relating to Art. 5(1)(e) is also only aimed at this narrow use case of placing on the market or putting into service of such databases. Is their use for AI training, for example, still permitted?

F. Questions in relation to emotion recognition

Article 5(1)(f) AI Act prohibits AI systems to infer emotions in the areas of workplace and education institutions except for medical or safety reasons.

As to the rationale of the prohibition, emotion recognition technology is quickly evolving and comprises different technologies and processing operations to detect, collect, analyse, categorise, re- and interact and learn emotions from persons. Emotion recognition can be used in multiple areas and domains for a wide range of applications, such as for analysing customer behaviour, targeted advertising, in the entertainment industry, in medicine and healthcare, in education, employment, wellbeing, or for law enforcement and public safety.

Emotion recognition can lead to 'discriminatory outcomes and can be intrusive to the rights and freedoms of the concerned persons', in particular the right to privacy. It is therefore in principle prohibited in asymmetric relationships in the context of workplace and education institutions, where both workers and students are in particularly vulnerable positions. The AI Act states in Recital 44 that there are 'serious concerns about the scientific basis of AI systems aiming to identify or infer emotions, particularly as expression of emotions vary considerably across cultures and situations, and even within a single individual. Among the key shortcomings of such systems are the limited reliability, the lack of specificity and the limited generalisability.' At the same time,

emotion recognition in specific use contexts, such as for safety and medical care (e.g. health treatment and diagnosis) has benefits and is therefore not prohibited. In such cases, emotion recognition is classified as a high-risk AI system and subjected to requirements aimed to ensure accuracy, reliability and safety.

Proposed structure of the guidelines

It is proposed that the Commission guidelines would cover the following aspects regarding Article 5(1)(f) AI Act:

- *Rationale and objectives of the prohibition*
- *Main elements of the prohibition*
    - *AI systems to infer emotions*
    - *Identification and inference of emotions*
    - *Emotions*
    - *On the basis of their biometric data*
- *Limitation of the prohibition to workplace and educational institutions*
    - *Workplace*
    - *Educational institutions*
- *Exceptions for medical and safety reasons*
- *More favourable Member State law*
- *AI systems out of scope of the prohibition*
- *Interplay with other Union law (e.g. data protection)*

Main elements of the prohibition

*Several **cumulative elements must be in place** at the same time for the prohibition in Article 5(1)(f) AI Act to apply:*

*1) The activity must constitute **'placing on the market'** (Article 3(9) AI Act), **'putting into service for this specific purpose'** (Article 3(11) AI Act), or **'use'** of an AI system (Article 3(1) AI Act). The prohibition applies to both providers and deployers of AI systems, each within their own responsibilities.*

2) AI systems to infer emotions, as defined in the light of Article 3(39) AI Act, are systems for ***identifying or inferring emotions or intentions of natural persons on the basis of their biometric data****. 'Identification' occurs when the processing of the biometric data (for example, of the voice or a facial expression) allows to directly compare and identify with an emotion that has been previously programmed in the emotion recognition system. 'Inferring' is done by deducing information generated by analytical and other processes by the system itself. In this case, the information about the emotion is not solely based on data collected on the natural person, but it is concluded from other data, including machine learning approaches that learn from data how to detect emotions. Emotions have to be defined in a broad sense, but do not include physical states such as pain or fatigue and readily apparent expressions such as smiles.*

*3) The prohibition in Article 5(1)(f) AI Act is limited to emotion recognition systems in the '****areas of workplace and educational institutions****', because there is a power imbalance, an asymmetric relation and a risk of continuous surveillance.*

4) The prohibition contains an explicit exception for emotion recognition systems used in the areas of the workplace and educational institutions ***for medical or safety reasons****, such as systems for therapeutical use.*

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

- o *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
- o *except for medical and safety reasons*
- o *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

The term ‘emotion’ might be too narrow. It includes states such as happiness, sadness, anger, surprise, disgust, embarrassment, excitement, shame, contempt, satisfaction and pleasure, but not physical states such as pain or fatigue (recital 18). If chronic states such as depression and burnout were to be identified, could these be categorised as a state of pathological sadness?

The wording ‘in the workplace or educational institution” might be too narrow. It remains unclear whether the establishment of an employment relationship or an admission to a university falls under the scope. The imbalance of power in the workplace is a reason for the prohibition being applicable. The imbalance of power in the workplace is a reason for the prohibition being applicable.

Question 20: Do you have or know concrete examples of AI systems that in your opinion fulfil all elements of the prohibition described above?

- X Yes
- o 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

Monitoring of customer service/call centre employees to determine whether they sound cheerful and friendly enough when talking to customers by evaluating the pitch of their voice.

Question 21: 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
- o 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

- Platform for video interviews and assessments that uses AI to analyse character traits or emotional intelligence of candidates. The wording ‘in the workplace and educational institutions’ is ambiguous (see explanation under question 19). Does it include the use of AI before employing/accepting a candidate?
- AI analysis of satisfaction surveys (answers in text form) of employees, pupils or students. The definition in art. 5 (1) f does not use the term ‘emotion recognition system’ (art. 3 no. 39 AI Act) and does not stipulate that biometric data must be analysed for emotion recognition in the workplace. However, recital 44 s. 3 refers only to AI systems that ‘recognise or infer the emotions or intentions of persons on the basis of their biometric data.’ Also recital 18 sentence 5 demands direct physical signs of emotions.
- AI-supported analysis of biometric data (voice, etc.) is used to monitor surgeons while operating to monitor if they show signs of stress during the operation. Prohibited? Stress is not an emotion. However, there may be difficult questions in practice, especially as emotions can trigger stress. Furthermore, if it was an emotion, the use case may not be prohibited, because it protects the life of patients, even though it is unclear whether such use should fall under ‘safety reasons’ or ‘medical reasons’.

Question 22: Do you have or know concrete examples of AI systems that fulfil all necessary criteria for the prohibition to apply, but fall under the exception of medical and safety reasons?

X Yes

o No

Please specify the concrete AI system, how it is used in practice and which exception would apply and why

1500 character(s) maximum

The monitoring of employees, e.g. customer service/call centre employees to see if they show signs of depression by evaluating their voice and offer them help if this is the case. However, the question here is whether listening in on customer conversations is compliant with data protection requirements, in particular as it concerns data within the meaning of article 9 GDPR (Art. 3 No. 37 AI Act) and the data usage may also be profiling.

G. Questions in relation to biometric categorisation

Article 5(1)(g) AI Act prohibits biometric categorisation systems (as defined in Article 3(40) AI Act) that categorise individually natural persons based on their biometric data to deduce or infer their race, political opinions, trade union membership, religious or philosophical beliefs, sex life or sexual orientation. This prohibition does not cover the lawful labelling, filtering or categorisation of biometric data sets acquired in line with Union or national law according to biometric data, which can for example be used in the area of law enforcement (Recital 30 AI Act).

As to the rationale of the prohibition, AI-based biometric categorisation systems for the purpose of assigning natural persons to specific groups or categories relating to aspects such as sexual or political orientation or race violate human dignity and pose significant risks to other fundamental rights such as privacy and discrimination.
A wide variety of information, including 'sensitive' information can be extracted, deduced or inferred from biometric information, even without the individuals knowing it, to categorise them. This can lead to unfair and discriminatory treatment, for example when a service is denied because somebody is considered to be of a certain race.

Proposed structure of the guidelines

It is proposed that the Commission guidelines would cover the following aspects regarding Article 5(1)(g) AI Act:

- *Rationale and objectives of the prohibition*
- *Main elements of the prohibition:*
    - *Biometric categorisation system*

    - *Persons are individually categorised based on their biometric data*
    - *To deduce or infer their race, political opinions, trade union membership, religious or philosophical beliefs, sex life or sexual orientation*
    - *On the basis of their biometric data*
- *AI systems out of scope of the prohibition*
    - *Labelling and filtering based on biometric data*
- *Interplay with other Union law (e.g. data protection)*

Main elements of the prohibition

*Several **cumulative elements must be in place** at the same time for the prohibition in Article 5(1)(g) AI Act to apply:*

*1) The activity must constitute **'placing on the market'** (Article 3(9) AI Act), **'putting into service for this specific purpose'** (Article 3(11) AI Act), or **'use'** of an AI system (Article 3(1) AI Act). The prohibition applies to both providers and deployers of AI systems, each within their own responsibilities.*

*2) The AI system must be a **biometric categorisation system** for the purpose of assigning natural persons to specific categories on the basis of their biometric data, unless it is ancillary to another commercial service and strictly necessary for objective technical reasons (Article 3(40) AI Act).*

*3) **Individual persons** are categorised,*

*4) Based on their **biometric data** (Article 3(34) AI Act),*

*5) Article 5(1)(g) AI Act prohibits only biometric categorisation systems which have as objective **to deduce or infer a limited number of sensitive characteristics: race, political opinions, trade union membership, religious or philosophical beliefs, sex life or sexual orientation**.*

*The prohibition does not **cover labelling or filtering of lawfully acquired biometric datasets**, including in the field of law enforcement.*

Question 23: Taking into account the provisions of the AI Act, what elements of the prohibition of biometric categorisation to infer certain sensitive characteristics do you think require further clarification in the Commission guidelines?

Please select all relevant options from the list

- o *placement on the market, putting into service or use of an AI system*
- X that is a biometric categorisation system individually categorising natural
- X persons based on their biometric data
- o *to deduce or infer their race, political opinions, trade union membership, religious or philosophical beliefs, sex life or sexual orientation*
- X excluded are labelling or filtering of lawfully acquired biometric datasets, including in the field of law enforcement
- o *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

Unlike high-risk applications pursuant to Art. 6 in conjunction with Annex 3 No. 1 of the AI Act, the ban on biometric categorisation only covers cases in which individual, natural persons are categorised biometrically. What are the different use cases of collective and individual categorisation?

What about AI systems that could in principle record protected characteristics such as age, gender, etc., but are primarily used for other purposes? For example, AI-supported video surveillance that supports bouncers and detects dangerous objects, but also makes a selection based on characteristics such as gender, age, ethnicity and attractiveness possible.

What are examples of lawfully acquired biometric data sets, apart from the explicitly mentioned area of law enforcement?

Question 24: Do you have or know concrete examples of AI systems that in your opinion fulfil all elements of the prohibition described above?

- o Yes
- X 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

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
- o 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

AI-supported video surveillance that acts as a bouncer and grants access based on characteristics such as gender, age, ethnicity or physical characteristics such as height and facial analysis. This use case might be partially covered because it is based on physical, physiological characteristics of natural persons (cf. definition of biometric data pursuant to Art. 3 No. 34 AI Act). However, according to Art. 5 (1) g, only the use of the system to draw conclusions about ethnicity or sexual orientation would be prohibited, so that further clarification is required.

AI-supported evaluation of video surveillance to detect suspicious movements in the vicinity of a building in order to detect burglaries and at the same time avoid false alarms such as those caused by simple motion detectors. It is questionable whether such a system is based on biometric features or rather only movements.

Question 26: Do you have or know concrete examples of AI systems that fulfil all necessary criteria for the prohibition to apply, but fall under the exception of labelling or filtering of lawfully acquired biometric datasets?

- o Yes
- X No

Please specify the concrete AI system, how it is used in practice and which exception would apply and why

1500 character(s) maximum

H. Questions in relation to real-time remote biometric identification

Article 5(1)(h) AI Act contains a prohibition on real-time use of remote biometric identification systems (Article 3(41) and (42) AI Act) in publicly accessible spaces for law enforcement purposes subject to limited exceptions exhaustively and narrowly defined in the AI Act.

Recital 32 AI Act acknowledges 'the intrusive nature of remote biometric identification systems (RBIS) to the rights and freedoms of the concerned persons, to the extent that it may affect the private life of a large part of the population, evoke a feeling of constant surveillance and indirectly dissuade the exercise of the freedom of assembly and other fundamental rights. Technical inaccuracies of AI systems intended for the remote biometric identification of natural persons can lead to biased results and entail discriminatory effects. Such possible biased results and discriminatory effects are particularly relevant with regard to age, ethnicity, race, sex or disabilities. In addition, the immediacy of the impact and the limited opportunities for further checks or corrections in relation to the use of such systems operating in real-time carry heightened risks for the rights and freedoms of the persons concerned in the context of, or impacted by, law enforcement activities.'

At European level, RBIS are already regulated by EU data protection rules, as they process personal and biometric data for their functioning.

Due to the serious interferences that real-time RBI use for the purpose of law enforcement poses to fundamental rights, its deployment is, in principle, prohibited under the AI Act. However, as most of these fundamental rights are not absolute, objectives of general interest, such as public security, can justify restrictions on exercising these rights as provided by Article 52(1) of the Charter. Any limitation must comply with the requirements of legality, necessity, proportionality and respect for the essence of fundamental rights. Therefore, when the use is strictly necessary to achieve a substantial public interest and when the exceptions are exhaustively listed and narrowly defined, their use outweighs the risks to fundamental rights (Recital 33 AI Act). To ensure that these systems are used in a 'responsible and proportionate manner', their use can only be made if they fall under one of the explicit exceptions defined in Article 5(1)(i) to (iii) AI Act and subject to safeguards and specific obligations and requirements, which are detailed in Article 5(2)-(7) AI Act. When the use falls under one or more of the exceptions, the remote biometric identification system is classified as a high-risk AI system and subject to requirements aimed to ensure accuracy, reliability and safety.

Proposed structure of the guidelines

It is proposed that the Commission guidelines would cover the following aspects regarding Article 5(1)(h) AI Act:

- *Rationale and objectives of the prohibition*
- *Definition of*
    - *remote biometric identification*
    - *'real-time'*
    - *publicly accessible spaces*
    - *law enforcement purposes*
- *AI systems out of scope of the prohibition*
- *Interplay with other Union law*
- *Conditions and safeguards for exceptions*

Main elements of the prohibition

*Several **cumulative elements must be in place** at the same time for the prohibition in Article 5(1)(h) AI Act to apply:*

*1) The activity must constitute **the 'use' of an AI system** (Article 3(1) AI Act), so, contrary to the previously mentioned prohibitions, this prohibition applies only to deployers of AI systems.*

*2) The AI system must be a **remote biometric identification system** (Article 3 (41) AI Act), i.e. an AI system for the purpose of identifying natural persons, **without their active involvement**, typically at a distance through the comparison of a person's biometric data with the biometric data contained in a reference database. This **excludes systems for verification or authentication of persons**.*

*3) The system is used in '**real-time**' (Article 3(42) AI Act), i.e. the biometric systems capture and further process biometric data 'instantaneously, near-instantaneously or in any event without any significant delay.*

*4) The AI system is used in **publicly accessible spaces**, i.e. 'any publicly or privately owned physical space accessible to an undetermined number of natural persons, regardless of whether certain conditions for access may apply, and regardless of the potential capacity restrictions'. This excludes online spaces, border control points and prisons.*

*5) The prohibition of Article 5(1)(h) AI Act applies to **law enforcement purposes**, irrespective of the entity, authority, or body carrying out the activities. Law enforcement is defined in Article 3(46) AI Act as the 'activities carried out by law enforcement authorities or on their behalf for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including safeguarding against and preventing threats to public security.' These activities are also those that constitute the subject matters in Article 1 of the Law Enforcement Directive.*

Question 27: Taking into account the provisions of the AI Act, what elements of the prohibition of real-time remote biometric identification for law enforcement purposes do you think require further clarification in the Commission guidelines?

Please select all relevant options from the list

- o *use of an AI system*
- o *that is a remote biometric identification system*
- X used 'real-time'
- X for law enforcement purposes
- X in publicly accessible spaces
- o *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

It is unclear when the threshold of real-time monitoring is exceeded. The AI Act does not contain a specific definition of when the time limit for real-time remote identification is reached. It merely states that identification should take place immediately or in any case without significant delay (see Art. 3 No. 42 and Rec. 17).

Presumably, the addressees of the prohibition shall only be public authorities in the context of criminal prosecution (rec. 33 of the AI Act, similarly, the references in rec. 39 p. 2 of the AI Act states that the regulation on RBI in the AI Act is lex specialis to art. 10 of Directive (EU) 2016/680). In addition, the use of RBI for purposes other than law enforcement is expressly excluded pursuant to Rec. 38 p. 5 AI Act: ‘However, the use of real-time remote biometric identification systems in publicly accessible spaces for purposes other than law enforcement, including by competent authorities, should not be covered by the specific framework regarding such use for the purpose of law enforcement set by this Regulation’. In addition, according to Rec. 39 p. 2 AI Act, for purposes other than law enforcement, the Art. 9 (1) GDPR prohibition already applies. Moreover, technical inaccuracies of AI systems lead to discriminatory effects (Rec. 32 p.2) with regard to ethnicity, race, gender or disabilities (p. 3) and are the reason for the

prohibition being linked only to governmental prosecution. Thus rec. 32 p. 4 states: “increased risks to the rights and freedoms of the persons concerned in the context of criminal prosecution measures”.

Question 28: 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
- o 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

The wording requires the use of RBI in publicly accessible areas for law enforcement purposes. Does it also apply if private individuals carry out surveillance in order to prosecute those concerned, e.g.: In order to prevent people from buying a day ski pass, only skiing for a few hours themselves and then passing the ski pass on to someone else or selling it, the ski lift operator installs video surveillance that captures the skier's face when the ski pass is scanned. This photo is compared with a photo taken when the ski pass was purchased. This is intended to prevent day passes from being resold.

Article 5(1)(h)(i) to (iii) AI Act provides for three exceptions to the prohibition for:

*(1) The **targeted search** of victims of abduction, trafficking in human beings or sexual exploitation of human beings, as well as the search for missing persons, i.e. persons whose existence has become uncertain, because he or she has disappeared.*

*(2) The prevention of a **specific, substantial and imminent threat** to the life or physical safety of natural persons or a genuine and present or genuine and foreseeable threat of a terrorist attack. A terrorist attack can include a threat to life, whereas a threat to life does not necessarily qualify as a terrorist attack.*

*(3) The **localisation and identification of a person suspected of having committed a criminal offence**, for the purpose of conducting a **criminal investigation or prosecution or executing a criminal penalty for offences referred to in Annex II** and punishable in the Member States concerned by a custodial sentence or a detention order for a maximum period of at least four years. Annex II of the AI Act provides an exhaustive list of serious crimes for which the real-time use of RBI can be authorised.*

The exceptions have to be authorised by national legislation and comply with certain conditions and safeguards (Article 5(2) to (7) AI Act). These include – among others – temporal, geographic and personal limitations, a duty to perform a fundamental rights impact assessment and to register the system in the EU database (Article 49 AI Act), a need for prior authorisation by a judicial or independent administrative authority, and a notification to the relevant market surveillance authorities and data protection authorities.

Question 29: Do you have or know concrete examples of AI systems that fulfil all necessary criteria for the prohibition to apply, but which could fall under one or more of the exceptions of Article 5(1)(h)(i) to (iii) AI Act?

- o Yes
- X No

Please specify the concrete AI system, how it is used in practice and which exception would apply and why
1500 character(s) maximum

Question 30: Do you need further clarification regarding one or more of the exceptions of Article 5(1)(h)(i) to (iii) AI Act or the conditions or safeguards under Article 5(2) to (7) AI Act?

- o Yes
- X No

Please specify the concrete condition or safeguard and the issues for you need further clarification; please provide concrete examples

1500 character(s) maximum

According to Art. 5 para. 1 lit. h of the AI Act the use of RBI must be absolutely necessary, for example in the search for missing persons or the identification of suspects in connection with serious criminal offences. How is “absolute necessity” defined? What means must have been tried beforehand?

I. Question in relation to interplay with other Union legislation

The prohibitions under the AI Act are without prejudice to prohibitions and specific rules provided for in other Union legislation such as data protection, consumer protection, digital services regulation, etc. As explained above, each section of the Commission guidelines are expected to explain relevant interplay of the prohibitions in relation to other Union law.

Question 31: Do you have or know concrete examples of AI systems where you need further clarification regarding the application of one or more of the prohibitions under the AI Act in relation to other Union legislation?

- X Yes
- o No

Please specify the concrete AI system and the prohibition under the AI Act, the relevant provision of a specific Union legislation and where further clarification is needed
1500 character(s) maximum

Employed lawyers are monitored using an emotion recognition system in order to recognise at an early stage whether they are showing signs of overload (burn-out) and to offer preventive measures.
This might be a case of emotions recognition. Chronic conditions such as depression and burnout can potentially be recognised as a state of pathological sadness, hence an emotion. A distinction should be made between what is only a recognition of exhaustion and what is already a recognition of emotion.

According to Art. 5 para. 1 lit. f of the AI Act, the use of AI to recognise emotions in the workplace would not be prohibited per se if the AI system is to be introduced for medical reasons. However, it is questionable whether such a system can be designed in a way that is permissible under data protection and labour law, even if it serves the purpose of occupational health and safety.

Social scoring (Art. 5 para. 1 lit. c AI Act): Evaluation practices that are carried out for a specific purpose in accordance with Union and national law should not be impaired (see recital 31 sentence 6 of the AI Regulation). The decisive factor should therefore be whether the valuation practices are already unlawful under applicable law. (see ECJ, 07.12.2023 - C-634/21). How does the prohibition of social scoring, but also, for example, the exploitation of protection worthiness, relate to the regulations on the permissibility of profiling pursuant to Art. 22 para. 2 GDPR?

Mailing List

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- Directorate-General Communication Networks, Content and Technology

European Parliament

- Committee on Internal Market and Consumer Protection
- Committee on Legal Affairs

Council of the European Union

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