

Position Paper

October 2023

Bitkom Position on the AI Act Trilogue Negotiations on General Purpose AI, Foundation Models & Generative AI

General Remarks

Since the end of last year, a heated debate has been sparked about how to regulate General Purpose AI, foundation models, and generative AI.

Currently, regulatory proposals drafted by the EU Commission (EU COM), the Council European Union (Council) and the European Parliament (EP) are being discussed in trilogue negotiations. Since binding rules are expected to be agreed upon soon, Bitkom once again takes the opportunity to raise concerns and propose practical and proportionate solutions to this highly relevant issue.

Positions by the EU COM, Council, and EP

In the EU COM proposal published in April 2021, GPAI is not mentioned explicitly. Only recital 60 refers to the complexity of the AI value chain and provides for suppliers of pre-trained models to cooperate, as appropriate, with providers and users to enable their compliance with the obligations under the AIA.

In their General Approach of November 2022, the Council obliges providers of **General Purpose AI (GPAI) systems** which may be used in high-risk AI systems to adhere to the provider obligations set out in art. 8-15 AI Act. However, only to an extent laid down by an implementing act which is based on prior consultation and detailed impact assessment. In addition, providers can explicitly exclude all high-risk uses in the instructions of use and, as a result, liberate themselves from adhering to the provider obligations.

The EP has published its amendments in June 2023. In contrast to the Council, the EP focuses on the regulation of **foundation models (FM)**. It sets out obligations for providers of FM, entailing constant analysis, monitoring and reduction of risks to “health, safety, fundamental rights, the environment and democracy and the rule of law”, appropriate data governance measures for the mitigation of possible biases as well as a lifecycle-long evaluation system for ensuring “appropriate levels of performance, predictability, interpretability, corrigibility, safety and cybersecurity”.

Moreover, FM developers must reduce the use of energy and resources, enable the measurement and logging of the consumption of energy and resources, provide technical documentation and instructions for downstream providers, register the model in an EU database, and introduce a quality management system. In addition to that, they must keep the technical documentation at the disposal of the national authorities for a period ending 10 years after their FM have been placed on the market or put into service.

In case the foundation model is designed for or used in generative AI applications, providers must also develop mechanisms that prevent the creation of illegal content and publish a “sufficiently detailed summary” of the copyright-protected training data. Besides that, they must comply with the transparency obligations set out in art. 52 AI Act.

Bitkom Position

In general, the Bitkom position on GPAI, FM, and generative AI is guided by three core principles:

- Fair and logical distribution of responsibilities and cooperation along the value chain between providers and deployers of AI systems.
- Regulation at the level of concrete applications based on use cases, because this is where the risks materialize - abstract models like FM can be used as the underlying technology in a multitude of unpredictable application scenarios which makes their meaningful and appropriate ex ante regulation impossible.
- Clear, specific, and coherent definitions and legal certainty are critical to ensure AI adoption.

Based on these principles, we reject the regulatory approach proposed by the EP. The logic of this approach is based on abstract models rather than concrete applications. Adhering to many of the requirements is disproportionately difficult or simply impossible from a technical perspective for FM providers. Foundation models are - by definition - designed for generality of output and can be adapted to a wide range of distinctive tasks. Art. 28b para. 2 lit. a and b of the EP’s proposal prescribe risk assessment and mitigation. This can only be fulfilled in knowledge of the concrete purpose of use. The risks arising from AI are different for each of these purposes. If the risk assessment is now imposed on the foundation model provider, who does not even know the purpose, a significantly worse result of the risk assessment is accepted for reasons that cannot be explained.¹

Instead, we propose to focus on and modify the GPAI approach. Unlike FM, GPAI refers to systems intended by the provider to perform generally applicable functions such as image and speech recognition, audio and video generation, pattern detection, question

¹ Example: A foundation model can be used to build both a skin cancer detection system and an HR application system. For use as a cancer screening system, the skin colour of the party concerned is of utmost relevance because it has a considerable influence on the risk of skin cancer. For use as an applicant system, the skin colour must not be relevant in any case. One foundation model, two use cases, two diametrically opposed risk assessments relevant to fundamental rights.

answering, translation and others (Art. 3 1b). Hence, the GPAI concept is closer to the level of concrete applications and, therefore, the better basis for regulation.

In this context, we welcome recent developments in the Council, such as the non-paper from France, the Czech Republic, Denmark, Estonia, and Ireland, as well as the German government's statement. Both intend to focus on GPAI and remove FM from the AI Act.

Nevertheless, the GPAI concept as proposed by the Council and currently discussed in the trilogue negotiations requires some specifications so that it does not inhibit innovation, avoids ambiguity, and thereby leads to an AI uptake. Care must be taken not to formulate similar or the same requirements for GPAI as the EP has proposed for FM. More specifically, we make the following proposals:

1. The definition of GPAI in Art. 3 1b needs to be refined so that the term clearly refers to “*a directly usable AI application that - irrespective of how it is placed on the market or put into service, including as open source software - is intended by the provider to perform generally applicable functions*”. This is necessary in order to unambiguously pursue an application-based regulatory approach and avoid regulation at the model level.
2. Whether or not an implementing act will be part of the final GPAI regulation, information sharing and cooperation obligations along the value chain between providers and deployers of GPAI is crucial, and policymakers should clarify roles and responsibilities within this value chain. Requirements must be allocated appropriately to the entity and role who is best suited to control the risks that these requirements seek to address. The provider should enable deployers to comply with the obligations by providing technical documentations and instructions for use.
3. The innovative potential of open-source AI should not be hindered by the regulation of GPAI. Open-source licences contribute to the democratization of AI development and thereby accelerate dynamics in the field of AI. Hence, if providers offer their GPAI under open-source licences, they should be subject to less requirements than commercial providers.
4. Requirements referring to aspects such as copyright, energy consumption, or data protection should not be part of GPAI regulation in the AI Act. Just like in the FM approach, such requirements do not belong in the AI Act, which is primarily concerned with product safety and should therefore not be additionally overloaded with further regulatory areas. Copyright- and data protection-specific solutions should be defined separately from the AI Act, if required. This should consider existing mechanisms on text and data mining included in the EU Copyright Directive and jurisprudence such as on search engines and indexes as well as the General Data Protection Regulation. If adjustments of these directives and regulations should be deemed necessary in the future, such adjustments should be addressed in future legislation, that is then based on experiences gained with this new technology and discussions held among the involved stakeholders.
5. We support article 4c of the Council's proposal according to which providers can explicitly exclude all high-risk uses in the instructions of use and liberate themselves from adhering to the provider obligations. However, there should

also be the possibility for deployers to use the GPAI system on the basis of a contractual arrangement in a high-risk context if they take on the provider's obligations, thus liberating the latter from the obligations. In this case, the GPAI provider should be required to provide all essential and relevant information that is necessary for the deployer to comply with the obligations in question.

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