



09 December 2024

The European AI Office 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

The Futures Industry Association (FIA)¹ and The European Principal Traders Association (FIA EPTA)² (herein ‘The Associations’) welcomes the opportunity to respond to the European AI Office’s multi-stakeholder consultation.

The Associations hope that our response provides valuable input as the European Commission (‘Commssion’) develops guidelines on the practical implementation of the AI Act, *inter alia*, on the prohibited AI practices referred to in Article 5 of the AI Act and the application of the definition of an AI system as set out in Article 3(1).

As previously noted in our response to the Commission’s Targeted Consultation on Artificial Intelligence in the Financial Sector in September 2024, innovation has long been a catalyst for growth and opportunity in derivative markets. New technologies have fostered new business opportunities, new products and enhanced the accessibility and transparency of markets for existing and new participants. Furthermore, the evolution of technology has underpinned the global reach of our markets, breaking down geographic barriers and enabling global markets to compete and thrive while safeguarding customers and investors.

Technological advancement is not new to the futures industry. Many of our members have been working with AI for many years and manage any associated risks accordingly, including via well-established 3 Lines of Defence operating models. Furthermore, the banking sector is already subject to strong sectoral regulation and supervision, which promotes consumers and investors protection, risk management, financial stability and well-functioning markets. This regulatory framework ensures that companies have robust governance arrangements in place for the use of technology, including AI, and that risks are appropriately managed.

¹ FIA is the leading global trade organization for the futures, options and centrally cleared derivatives markets, with offices in Brussels, London, Singapore and Washington, DC. Our membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from about 50 countries as well as technology vendors, law firms and other professional service providers.

² The European Principal Traders Association (FIA EPTA) represents the leading Principal Trading Firms in the EU and UK. Our members are independent market makers and providers of liquidity and risk transfer for markets and end-investors across Europe, providing liquidity in all centrally cleared asset classes including shares, bonds, derivatives and ETFs. FIA EPTA works constructively with policymakers, regulators and other market stakeholders to ensure efficient, resilient and trusted financial markets in Europe. More information about FIA EPTA and independent market makers is available on: www.fia.org/epta and www.wearemarketmakers.com



Today, AI is used in areas such as risk management, fraud detection and customer service with the potential to improve decision-making and increase efficiencies. It is with this in mind that we set out our response to the AI Office's consultation.

At this time, we recognise that many policymakers are examining current and future uses of AI technology in the financial sector. Regulatory coordination and a globally harmonised approach to regulation is essential to avoid regulatory divergence and overlap which will create unnecessary complexities whilst also acting as a barrier to AI entry and adoption. The Associations urge policymakers to avoid stifling innovation via excess regulation.

The Associations caution against overly prescriptive guidance beyond that already provided within the various Articles and Recitals of the AI Act. Furthermore, policymakers and regulatory authorities are encouraged to give sufficient time to allow the AI Act to embed within market practice before publishing prescriptive guidelines.

With that being said, the Associations understand that the Commission is obliged to develop guidelines on the practical implementation of the AI Act and, as such, appreciate the opportunity to share input on areas where guidelines would benefit our members.

At this time, questions that have arisen regarding the implementation of the AI Act are horizontal in nature and not specific to financial services. Hence, high-level, principles-based, non-sector-specific guidance would be welcomed.

This guidance would ensure that the same requirements and supervisory expectations will exist across sectors, ensuring uniform application of the Act.

In addition to guidelines on the practical implementation of the AI Act relating to the prohibited AI practices and the application of the definition of an AI system, cross-sectorial guidelines on the following topics would be well received

- Conformity Assessment;
- Fundamental Rights Impact assessment;
- Registration process for high-risk AI systems;
- Guidance on obligations for ethics, transparency and explainability.

Question 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?

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?

FIA/FIA EPTA response:

Recital 12 implies that inference is the key element of the definition that distinguishes “basic data processing” from a model enabling “learning, reasoning or modelling”. In order to accurately assess whether a system satisfies this condition, clarification is necessary to understand how the Commission differentiates between "basic data processing" and "a model that infers".

The Associations are concerned that the existing definition of an AI system may have unwanted consequences by capturing systems/programmes beyond those originally intended rather than regulating the actual risk associated with such systems/programmes.

It does not appear to be the intention of the Act to capture simpler statistical models as the Recital seeks to scope out “basic data processing”. However, the Act does not provide any suggestion as to what these techniques could be. We ask that the Commission provide clarity on what “basic data processing” means and the distinction from AI systems. For example, on a broader, and in our view, inaccurate interpretation, traditional thematic models within a financial institution’s risk department may fall within the scope of AI system definition.

Such models include basic statistical techniques, such as linear and logistic regressions. These techniques lack complexity and learning capabilities. In other words, such models do not exhibit adaptiveness. These models also display high levels of transparency and explainability and are generally based on well understood mathematical principles and/or human defined rules or assumptions. Furthermore, these models also have a high level of human control over the choice of data and modelling assumptions.

These characteristics and the simplicity of linear and logistic regression models ensures that they do not present the same risks that may be associated with more complex AI systems. Consequently, the use of these techniques does not necessitate the rigorous oversight and control measures intended for AI systems.

The outcome of the use of basic data processing techniques are already subject to regulation. Where these techniques are used to process personal data, for example, GDPR regulates these systems, providing individuals with a set of rights enabling accountability over the data used and the ability to contest a decision or outcome generated by automated means thus preventing harm to individuals.

It is our view that Recital 12 should explicitly de-scope techniques that display the above characteristics.

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 explain why the elements selected above require further clarification and what needs to be further clarified in the Commission guidelines?

FIA/FIA EPTA response:

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 Associations welcome further clarification from the Commission on a number of key terms within the provisions of the AI Act, particularly in relation to *manipulation* and *deception*. These are strong words and in our view they should be interpreted narrowly to encapsulate behaviour with a particular and egregious effect, together with a level of mental element on the part of the firm developing or supplying the AI.

In order to comprehend the practices targetted within Article 5, we welcome guidance on whether the Commission is of that view that material distortion occurs in the event where a person or group of persons are influenced to make a decision they would not have otherwise made, and, consequently, such decision is reasonably likely to cause them harm?

When reviewing 5(1)(a) and 5(1)(b) together, we welcome clarification as to whether some element of deception must arise as implied within 5(a)(1) or not as the latter implies.

As noted by the Commission, ‘significant harm’ 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.

On ‘*deploying subliminal, purposefully manipulative or deceptive techniques*’, the Associations welcome clarification on the responsibilities between AI provider and AI deployer. We welcome guidance from the Commission in order to understand who is liable for a breach in the event that a deployer puts into use an AI that is developed by a company that has used “subliminal techniques” which the deployer is not able to detect or is not aware. How does the Commission differentiate between the deployer’s duty of care in comparison to the responsibility of the provider? One solution may be through the creation of a certification regime for AI providers that attests to such techniques not being used.

Furthermore, with respect to ‘*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*’; in order to avoid unintended consequences beyond the scope of the AI Act, there should be clear delineation between what constitutes the widely-used concept of advertisement versus AI that effects the behaviour of humans. Advertisement is inherently manipulative. Furthermore, where sector-specific regulations exist on promotions or advertisement, these should also apply to the use of AI systems.

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 explain why the elements selected above require further clarification and what needs to be further clarified in the Commission guidelines?

FIA/FIA EPTA response:

In the context of financial services, it is challenging to identify with accuracy and consistency instances and scenarios when Article 5(1)(b) may occur.

With that in mind, we welcome further clarification from the Commission on the concept of ‘*materially distorting*’. To enable consistent implementation and compliance, we encourage the Commission to present examples within the Guidelines in order to contextualise this provision. Again, this is a strong word which in our view should be interpreted narrowly to encapsulate behaviour with a particular and egregious effect, together with a level of mental element on the part of the firm developing or supplying the AI.

Furthermore, the Associations welcome further clarification, and suggest that the Commission provide examples, on the scope of the term “*vulnerabilities*” under the Prohibition.

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 explain why the elements selected above require further clarification and what needs to be further clarified in the Commission guidelines?

FIA/FIA EPTA response:

We assume this question is supposed to refer to the prohibition in relation to individual crime risk assessment and prediction and as such we provide the following comments

The Associations welcome further clarification on how the Commission defines the term ‘*characteristic*’. It is our understanding that Recital 42 provides a non-exhaustive list, whereas we believe that a more granular definition would be beneficial for common interpretation.

Furthermore, the Commission should make clear as part of Recital 42 that all activities within the scope of financial crime risk management processes are carved out of this prohibition.

Currently, the carve out at the end of recital 42 only refers to ‘financial fraud’ but not all financial crime is specifically related to fraud; financial institutions have legal obligations to detect and report where they have reasonable suspicion that any funds or other assets they handle may be proceeds of criminal activity, whether related to fraud or otherwise – for example, in relation to anti-money laundering, counter-terrorist financing and market abuse (which is a civil matter). Sanctions screening (for which AI has been used by banks for several years, as noted in the response to the EC AI in FS consultation) also falls into this category.

The Associations welcome clarity that all financial crime and misconduct-related risk management activity is deemed to be out of scope for this provision.

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?

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

FIA/FIA EPTA response:

As noted in our response to Q12 above, it is clear from the Recital that fraud prevention and detection is out of scope, but not other financial crime management processes.

With respect to concrete examples, AI systems categorised as “basic data processing” (see Q1) should not be within scope of the Act. This includes AML/KYC-related control systems which have been in use for many years by financial institutions and do not exhibit the aspects of true AI systems that would seem to be the aim of the legislation (i.e. the techniques used would be characterised as “basic data processing”). These systems can take various forms depending on the nature and scale of the financial institution, such as:

- Tools to evaluate financial characteristics of new clients to classify their AML risk rating;
- Systems to monitor and flag potentially suspicious transactions for further review;
- Fraud monitoring systems that detect potential misuse of products and services by malicious third parties.

As these are longstanding processes that are prescribed in AML rules and guidance, and for which financial institutions are subject to regular supervision and review, we do not believe it would be appropriate to include them within the scope of AI oversight.

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 explain why the elements selected above require further clarification and what needs to be further clarified in the Commission guidelines?

FIA/FIA EPTA response:

Recital 44 clarifies that this applies to AI systems used for emotion recognition on the basis of their biometric data. The Article however does not specify the use of biometric data. Further guidance would be helpful for the Article itself to confirm that it is only biometric data-based emotion recognition systems in scope.



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 explain why the elements selected above require further clarification and what needs to be further clarified in the Commission guidelines?

FIA/FIA EPTA response:

The Associations believe there should be delineation between prohibited biometric categorisation based on sensitive personal data under Article 5(1)(g) and biometric identification / categorisation and emotion recognition considered as high-risk under Article 6(2) / Annex III, (1).