

Per Email only:

Subject: EIOPA letter to co-legislators on the Artificial Intelligence Act

Dear Mr Breton,
Dear Mr Benifei,
Dear Mr Tudorache,
Dear Mr Stanjura,

EIOPA welcomes the publication of the Artificial Intelligence Act (AI Act) and supports the objectives and principles of the European Commission's legislative proposal to promote an ethical and trustworthy use of AI. Data analysis is a fundamental part of insurance business, feeding actuarial science, risk pricing, underwriting and claims management and as such the insurance sector has used data and mathematical models for decades. The risks arising from the use of data and analytical models have been and are being identified and addressed by undertakings and supervisors of the insurance sector.

The use of AI, which should be defined as AI systems that have distinctive features from traditional mathematical models, such as their capacity to learn from data and experience without or with limited human intervention, raises new risks and supervisory concerns that EIOPA and National Competent Authorities (NCAs) have been monitoring and addressing in recent years. Following EIOPA's 2019 thematic review on the use of Big Data Analytics in motor and health insurance, which showed that 31% of the participating European insurance undertakings were already using AI systems, EIOPA published in June 2021 a report from its consultative expert group on digital ethics in insurance setting out AI governance principles for an ethical and trustworthy AI in the European insurance sector. The principles underlying the Report are aligned with the principles put forward by the AI Act, and EIOPA stands ready to provide guidance to the sector.

In order to address the specific challenges arising from AI, it is crucial to ensure a trustful and well-functioning insurance market with good supervision. To achieve this, it is essential to consider any further regulatory steps concerning the use of AI in insurance within the context of existing sectorial legislation. Moreover, national and European sectorial authorities that are currently responsible for supervising the use of AI in insurance business, should remain responsible for the development and

implementation of further regulation and supervision of the use of AI in the sector. As any risks from the use of AI will translate into prudential and conduct of business risks, sectorial authorities are well equipped to address them.

Cooperation and exchange of experiences is also identified as a key area in the field of digital finance and as such the participation of the ESAs in the upcoming European Artificial Intelligence Board would allow to bridge between the financial sector and other sectors using AI. Indeed, it is of outmost importance to ensure good cooperation within the different authorities dealing with AI so as to avoid inefficiencies and uncertainty when it comes to supervision and monitoring of the use of AI.

EIOPA believes that, at this stage, insurance specific use cases should not be included in the list of high-risk AI use cases of the AI Act; the AI Act should identify the relevance of the use of AI in the financial sector, and in particular in the insurance sector, but leave further specification of the AI framework to sectorial legislation, building on the already existing sectorial governance, risk management, conduct of business and product oversight and governance requirements.

At a later stage, a comprehensive impact assessment would need to be developed to consider whether any insurance AI use cases should be included in the list of high-risk AI applications of the AI Act, taking into account proportionality considerations, the existing regulatory framework, as well as the specificities of the insurance sector and the need of insurance specific knowledge for such a technical area. Such approach would avoid unnecessary overlaps, inconsistencies and complexity of the supervisory and regulatory architecture.

Furthermore, the need for supervisors with a new set of skills and knowledge is already identified as one of the emergent needs of insurance National Competent Authorities. EIOPA welcomes that Artificial Intelligence is one of the topics identified in the Flagship COM Programme of the upcoming Digital Finance Academy that aims to strengthen supervisory capacity in the area of digital finance.

To conclude, we would like to re-emphasise that EIOPA supports the objectives and principles of the AI Act and aims to achieve its objectives in an effective manner while considering the specificities of the insurance sector.

To take forward our position some details are included in the Annex and EIOPA remain at your disposal to provide any clarification and to discuss the issues in detail.

Yours sincerely,

Petra Hielkema

[signed]

ANNEX I – Detailed comments on the proposed Artificial Intelligence Act

Insurance legislation and European and National Supervisory Authorities should continue to be competent in the supervision and regulation of the use of Artificial Intelligence in the insurance sector

EIOPA welcomes that sectorial insurance legislation and the European and national supervisory authorities as defined in Directive 2009/138/EC and Directive (EU) 2016/97 of the European Parliament and of the Council will continue to be competent in the supervision and regulation of AI related matters in the financial services sector while respecting the framework of the AI Act. EIOPA strongly supports this approach given the regulatory competences and specific insurance expertise.

For example, actuaries and other key function holders in insurance undertakings play an important human oversight role of certain AI systems used for pricing and underwriting which does not exist in other sectors. In addition, certain datasets (e.g. customer's age or disabilities) not allowed to be used for pricing products in some sectors of the economy are allowed to be used for insurance underwriting purposes. Such examples highlight that the use of AI for such use cases should be addressed under sectorial legislation.

It is important to ensure cooperation between the European Supervisory Authorities and the European Artificial Intelligence Board

The interaction and mutual involvement between the European Supervisory Authorities (ESAs) and the European Artificial Intelligence Board (EAIB) will be crucial in order to ensure that the respective work is well coordinated. This would ensure that, if in the future insurance AI use cases are included in the list of high-risk AI use cases of the AI Act, the general cross-sectorial requirements of the AI Act could be adapted to the specificities of concrete AI use cases in insurance. This cooperation with the EAIB would be particularly important if the AI Act would establish new requirements for the use of AI in insurance business that go beyond the requirements included in the insurance legislation.

To ensure this interaction, the AI Act should specify that the ESAs become permanent observers in meetings of the EAIB. This involvement could be further envisaged and specified in a procedural document or another arrangement/agreement (e.g. Memorandum of Understanding). The EAIB and EIOPA's (ESAs) staff should also maintain regular contacts. Furthermore, the AI Act should recognise a stronger role for the ESAs and NCAs to define the criteria to identify high-risk applications and to assess relevant use cases in the financial services sector after the AI Act is finalised.

Ensuring regulatory consistency and avoiding unnecessary regulatory overlaps and complexities

The Solvency II Directive already require insurance undertakings to have in place effective risk management and systems of governance. As to insurance intermediaries and distributors, the Insurance Distribution Directive (IDD) sets conduct of business requirements including requirements for the product governance and transparency. However, EIOPA acknowledges that AI systems were not widely used when these legislations were adopted and therefore the specific features of this

technology were not taken into account. For this purpose, EIOPA created a stakeholder group on digital ethics in insurance, which in 2021 developed an AI governance principles report providing non-binding guidance to ensure an ethical and trustworthy use in the insurance sector, including guidance on concrete AI use cases in insurance.

Indeed, it is important to provide guidance to clarify supervisory expectations with regard to the obligations in relation to internal governance when using AI systems. However, such guidance should be delivered at sectorial level, i.e. through EIOPA Guidelines, to ensure that insurance undertakings and intermediaries integrate the detailed risk management and governance requirements similar to the ones included in the AI Act into those already existing under Solvency II Directive and the IDD.

In case insurance AI uses were to be included in the list of high-risk AI applications, some governance measures under the AI Act would overlap with the provisions on Solvency II. This is for example the case with regards to the requirement for providers of AI use cases to put in place a quality management system. Such unnecessary burden and potential inconsistencies should be avoided. In this regard it would be convenient to include cross-references to insurance legislation in the same manner that it is currently done for the banking sector.

The principle of proportionality should be at the core of the supervision and regulation of AI

As previously mentioned, EIOPA strongly supports that the regulation and supervision of AI in insurance is done at sectorial level. EIOPA believes that it is of utmost importance to consider certain proportionality considerations:

- The definition of Artificial Intelligence included in Article 3, point 1 and Annex 1 of the AI Act is too broad and captures mathematical models such as Generalised Linear Models (GLMs) that have traditionally been used and regulated in the insurance sector. In our view, the definition of AI should be narrower and focus on AI systems that have distinctive features from traditional mathematical models, such as their capacity to learn from data and experience without being specifically programmed to do that by a human programmer. This would notably be the case of Machine learning approaches, including supervised, unsupervised and reinforcement learning, using a wide variety of methods including deep learning.
- Not all insurance lines of business have the same relevance for consumers; from a proportionality perspective only those lines of business that are relevant from a fundamental rights perspective should be subject to specific requirements. In this sense, AI systems affecting corporate clients are also less relevant and therefore the focus on AI use cases should be on those affecting a large number of natural persons.
- Specifically concerning claims management (including fraud detection), given that there are several different AI use cases developed for this part of the insurance value chain, there is a need to further specify and narrowly define the concept of claims management taking into consideration the impact on fundamental rights and the AI use cases captured therein.
- The impact of the AI Act on SME's / start-ups should be better adapted to the nature, scale and complexity of their business models. From a level playing field perspective, insurance SME's / start-ups should have the same treatment across sectors, including those of the banking sector (same risk, same rules).