Addressing Open Source Software (OSS) in the EU's AI Act (AIA)

OSS provides critical benefits to society. While it can be used in ways that contribute to risks covered by the AI Act, the creation of OSS itself should be treated distinctly from the offering of ongoing services, including commercial services. Otherwise, the AI Act risks stifling development of OSS in ways that will harm European innovation, competition as well as fairness and safety. We call on EU policymakers to consider this in the context of article 28 AIA.

Open Source Software (OSS) provides critical benefits to Europe.

- OSS is critical to software development – a 2022 study in 2022 found that up to 98% of codebases contain at least some OSS, and provide fundamental, if often less visible, functions. OSS thrives because users can not only run the software but also copy, study, modify, improve, and redistribute it. As such, it can be rapidly improved and built upon, driving innovation forward and releasing creativity.
- Europe, as a leader in this area, has gained significant economic benefits. The European Commission conducted research demonstrating OSS contributes between 65-95€ bn to EU GDP and provides significant economic growth opportunities. Similarly, a study of France’s procurement policies point to an increase in tech start-ups and jobs.

OSS can help ensure that the marketplace is more competitive, fairer, and safer.

- As AI becomes ever more important to online services, OSS tool development is crucial to increase competition, fairness and safety. OSS ensures that the power to deploy AI is not merely concentrated in a few large, commercial actors but decentralized and interoperable for the benefit of all users large or small, commercial or not-for-profit, and ultimately society at large.
- Openness can facilitate safety through transparency – allowing people to understand on what basis AI models were trained and how they operate, shedding light on AI’s “black box.”

Developers who simply create and collaborate on open source projects are distinct from entities that make software available as part of an ongoing service, including commercial operations, and the AIA should recognize these distinctions.

- OSS providers should not be covered by the AI Act, unless their software is made available as part of an ongoing commercial service or when a provider puts it into service as part of a high-risk or banned use under the Act, as well as uses facing enhanced transparency requirements under Title IV. In other words, the obligations under the AI Act should not apply to entities that merely develop and upload OSS packages.
- Some policymakers have expressed concern that this approach will allow companies to evade the requirements of the AI Act - we do not share this assessment. If a company puts an open source package into a service they are offering to users that is regulated by the Act, then that company would still come under the AI Act’s scope. We should not conflate OSS with the services, uses or purposes to which OSS is put.