



Giving Agency to the EU AI Act

**Comparing Options
for Enforcement**

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Key takeaways:

- We evaluate four different institutional models for enforcing the AI Act at the EU level. These models are compared based on their potential effectiveness, efficiency, coherence, and legitimacy, in relation to the roles suggested for an EU-level body by policymakers.
- Our evaluation suggests that **an AI Agency with dedicated staff and legal personhood would on balance be more suitable than an AI Board**. This is even more so the case if larger regulated entities are required, per the AI Act, to establish an internal ‘compliance function.’
- We provide preliminary recommendations for mechanisms that could enhance an AI Agency’s legitimacy at the member-state level, including hearings in national parliaments, transparency measures and consultation with national – as opposed to only EU-level – stakeholders.

Background

Since the introduction of an “European AI Board” in the draft EU AI Act of April 2021 [1], there have been numerous calls to “strengthen” it through the provision of additional responsibilities and functions [2]–[5]. Several policymakers and stakeholders have even called for turning the Board into an Office or a fully-fledged Agency [6]–[9].¹ The question of whether the EU AI Act should be enforced with an EU-level agency remains contentious. Those in favour of an agency have argued that having a dedicated body serving as a central point of contact for all stakeholders would concentrate the necessary expertise and resources to effectively and consistently enforce the new regulation across all member states and foreign regulated entities. Opponents of the proposition, on the other hand, have expressed concern that such a body may impinge upon member states’ legitimacy and sovereignty. Fundamentally, the debate has questioned how to vest the power of action – i.e. the needed

¹ In policy discussions in the European Parliament, the term “Board” has often been used to describe a nimble but *de facto* “Office”, while “Agency” has been used to describe a stronger form of an “Office”. To avoid confusion, we use the two distinct terms of “Board” and “Agency” to represent either end of the EU-level-strength spectrum.

sense of agency – over the rules set in the AI Act, in order to govern AI industry players in a cost-effective manner. Other legislations, notably the Digital Services Act (DSA) [10], the General Data Protection Regulation (GDPR) [11], Seveso-III Directive [12], and Markets in Financial Instruments Directive 2014 (commonly referred to as “MiFID II”) [13], have to varying extents addressed similar concerns by requiring regulated entities to establish an internal ‘compliance function’ – i.e. one or more on-site staff that develop and enforce relevant internal policies – another contentious issue in the AI Act debate.

In this memo, we compare several potential institutional models based on their ability to ensure that the AI Act is meaningfully enforced. In the [Functions](#) section, we provide a brief overview of the functions expected of an EU-level body. In the [Options](#) section, we outline four potential models for such an EU-level body: a Board versus an Agency, with and without the addition of a required compliance function for regulated entities. In the [Evaluation](#) section, we evaluate the benefits and drawbacks of each option using the criteria of effectiveness, efficiency, coherence and legitimacy. In considering these options, we take into account the wide range of tasks suggested for the EU-level body to carry out in various amendments (listed in the [Appendix](#)) and draw upon models provided by other regulations, such as the GDPR and the DSA. In the [Discussion and Recommendations](#) section, we explain how our evaluations suggest that the AI Agency is a more viable option compared to an AI Board, and even more so when the most relevant regulated entities develop their own compliance function internally. We conclude by making preliminary recommendations for mechanisms that could enhance an AI Office’s legitimacy and independence.

It should be noted that although drawing comparisons between the AI Act and other regulations such as the GDPR and DSA can provide valuable insights, there are inherent differences between these regulations that may impact their implementation and enforcement. Furthermore, this exercise requires us to make a number of assumptions regarding how these institutional arrangements would function in practice. We strive to present the most plausible and fair rendering of each option. “Plausible” and “fair”, of course, beget judgement and uncertainty; through review from external experts, we hope to have sufficiently mitigated individual bias.

Functions

Throughout AI Act deliberations, policymakers have considered various enforcement functions that could be carried out at the EU level by a body such as a Board or an Agency. These functions are overall wide-ranging, from monitoring for consistent application of the law to taking on an extended advisory and convening role.² Some tasks, such as developing guidance on risk assessment or forecasting R&D trends, require a significant level of specialisation. Other tasks, such as evaluating enforcement in various member states or promoting the AI Act internationally, require a certain amount of autonomy to be performed effectively.

² Per suggestions by all three co-legislators: the Commission's original proposal, the Council's compromised text, and the Parliament's suggested amendments; see the [Appendix](#).

In brief, an AI Board would be composed of member states' national supervisory authorities and serve, for the most part, as a harmonisation mechanism, whereas an AI Agency would be empowered with additional functions and tasks, have dedicated staff (independent of member states), legal personhood (separate from the Commission or member states governments) and carry out a more prominent executive and representative role. Note that these are not absolutely binary options: a strong version of the AI Board (i.e. heavily resourced with clearly delineated subgroups, external expertise and agile decision-making mechanisms) could, in practice, function similarly to a 'light' AI Agency (i.e. limited financial and human resources, narrow mandate and constrained independence). The [Appendix](#) provides a more thorough listing of the functions outlined in the European Commission's original proposal of April 21, 2021 [1], the Council of the European Union's common position of December 6, 2022 (discussed and dated November 25, 2022) [2], and from the European Parliament's IMCO-LIBE compilation of amendments of June 14 2022 [14].³

We should caveat that regardless of whether this institution takes the form of a Board or Agency, its duties should not include those of the national market surveillance authorities, as those responsibilities should remain with the designated authorities in each member state. Indeed, the debate about the EU-level body is relevant when considering the regulated entities that fall beyond the "traditional" market surveillance work carried out by national authorities already. Specifically, while most expect national authorities to be able to enforce rules on systems referred to in Annex II of the Commission proposal, the contention arises when it comes to the governance of general-purpose AI systems, foundation models, and other AI systems affecting multiple member states or a large number of users, as well as elements and characteristics of some models (such as training runs or open source distribution). We therefore limit the scope of the argument to these likely-transnational aspects.

Options

Our analysis compares four institutional models that have arisen through deliberations on the AI Act and are in effect combinations of two distinct choices: whether to establish an EU-level body that is – based upon its mandate – closer to a board or an agency, and whether or not to require regulated entities to establish compliance functions. For clarity, the four options are presented in the 2x2 matrix on [Table 1: Option Matrix](#).

³ These are not exhaustive of all of the functions that have been proposed by stakeholders. Other tasks proposed by various stakeholders have included the coordination of AI benchmarking activities and special mandates for specific fundamental rights or topics (e.g. children's rights and immigration).

Table 1: Option Matrix

	AI Board	AI Agency
Without compliance function	<u>Option 1</u> An AI Board	<u>Option 2</u> An AI Agency with dedicated staff and legal personhood
With compliance function	<u>Option 3</u> An AI Board (as in Option 1) in conjunction with a compliance function required by regulated entities	<u>Option 4</u> An AI Agency (as in Option 2) in conjunction with a compliance function required by regulated entities

AI Board versus AI Agency (Options 1 and 2)

Options 1 and 2 consider whether the functions described above would be more suitably institutionalised by an AI Board, as provisioned in the original draft of the proposed EU AI Act, or an AI Agency – a more centralised and autonomous EU-level body with legal personhood.

Option 1: AI Board

Option 1 considers the establishment of a European AI Board, as described in the proposed EU AI Act. Per the draft legislation, the AI Board would be composed of national supervisory authorities and the European Data Protection Supervisor [1, Art. 57]. The Board would, in essence, be more decentralised, and fulfil a relatively reactive “harmonising” role, aiding in the coordination and cooperation between the European Commission and national supervisory authorities, and between the national supervisory authorities themselves. More specifically, the Board would be responsible for coordinating and contributing to guidance and analysis by the Commission and the national supervisory authorities (and other competent authorities) on emerging issues across the internal market, and assisting the national supervisory authorities and the Commission in ensuring the consistent application of the law [1, Art. 56.2]. In the context of providing advice and assistance to the Commission, the Board would collect and share expertise and best practices among member states, contribute to uniform administrative practices in the member states (including for the functioning of regulatory sandboxes), and issue opinions, recommendations or written contributions on matters related to the implementation of this Regulation [1, Art. 58]. It should be noted that, overall, the structure and mandate of the AI Board, as initially proposed, are similar to that of the European Data Protection Board laid out by the General Data Protection Regulation [11, Arts. 68–76].

In its Compromise Proposal of Dec. 6 2022, the Council suggested strengthening the Board in order to improve its ability to support member states for enforcement. The Council’s modified provisions included the creation of three subgroups: one for facilitating consultation with a wide range of stakeholders, one for national notifying authorities (i.e. authorities that designate which organisations can carry out third-party conformity assessment) and one for national market surveillance authorities. The modified provisions also called for mandating testing facilities to provide independent technical or scientific advice to the Board or member

states authorities, creating a centralised pool and independent experts to support enforcement upon request, and mandating the European Commission to provide guidance on the application of the AI Act [2].

Option 2: AI Agency

Option 2 involves the establishment of an EU-level AI Agency. While the particulars of the Agency remain in discussion, characteristically, an Agency-based structure would be a legal entity distinct from the European Commission with its own secretariat and accountability mechanisms. While the details are still under negotiation, agencies generally speaking have a more proactive role and are less dependent on national authorities than boards.

Notably, versions of the AI Agencies put forward in the European Parliament negotiations suggest assigning the body with the mission and the means to ensure proper enforcement and future-proofing of the AI Act and provide support for innovation, functionally independent from but acting in coordination with member states. Its structure would include a management board (composed of representatives of member states), an executive director, an advisory forum, and other advisory bodies, as appropriate. It would be staffed and funded appropriately to discharge its mandate, which includes: consultations with stakeholders; biannual horizon scanning and regulatory assessments; forecasting, guidance and analysis on emerging issues; contributions to standardisation, benchmarking, and codes of conduct; cooperation with relevant authorities abroad and international organisations; arbitration in disputes between member states; and establishing permanent sub-groups on general-purpose AI systems' governance and governance of R&D of AI technologies [14].

Requirement of a compliance function (Options 3 and 4)

In addition to discussing whether to establish a Board or an Agency, the Commission is considering whether to require regulated entities to establish a compliance function.

Requiring a compliance function would involve mandating regulated entities (or some subset of them) to establish specific policies, roles, responsibilities, and/or a team in charge of developing and enforcing the processes to comply with some aspects of the legislation. These are generally asymmetrical – limited to entities causing the most concerns to society (e.g. very large online platforms and search engines within the DSA; producers handling hazardous substances within the Seveso-III Directive; large scale, governmental or sensitive data processors within the GDPR; and those that are considered infrastructural for a productive economy and society, such as investment services within MiFID II).

Existing laws and directives contain a broad range of “compliance function”-type requirements. For example, the compliance function in the DSA arose as a way to arbitrate between tradeoffs similar to those in the AI Act: ensuring that regulated entities whose services concern large numbers of users take proportionate internal risk mitigation measures while safeguarding the development of start-ups and smaller enterprises [15]. From the EU's standpoint, it is also important to ensure that larger regulated entities do not systematically exceed enforcement authorities in terms of expertise while keeping the costs incurred by the

public law. To address this, the DSA requires providers of very large online platforms (VLOPs) or search engines (VLOSEs) to establish a compliance function, consisting of one or more compliance officers, with sufficient authority, stature, and resources. Compliance officers and management bodies of providers perform complementary roles to execute the compliance function. Compliance officers are responsible for ensuring risk-mitigation measures are taken, monitoring compliance with the regulation and overseeing independent audits. The head of the compliance function must be an independent senior manager with distinct responsibility for the compliance function, who may raise concerns about risks or non-compliance to the management body directly. The management body is responsible for defining, overseeing, and implementing the compliance function, and ensuring its independence by allocating sufficient resources for risk management, as well as periodically reviewing strategies and policies for risk management.

The GDPR also established a compliance function via the designation of data protection officers (DPOs). Under the GDPR, data controllers and processors must designate a DPO if data processing is carried out by a public authority or body, or if the core activities of the controller or processor consist of large-scale processing of special categories of data or regular and systematic monitoring of data subjects on a large scale. The regulation stipulates that the DPO should have expert knowledge of data protection law and practices, and that they should be involved in all issues related to the protection of personal data. Their tasks include informing and advising the controller or processor and employees on data protection obligations, monitoring compliance with GDPR, providing advice on data protection impact assessments, cooperating with the supervisory authority, and acting as a contact point for the supervisory authority on issues relating to processing [11, Arts. 37–39].

Even outside of the realm of digital governance, various forms of compliance functions have been mandated, for instance in fields concerning hazardous materials and infrastructural services. The Seveso-III Directive is characterised by a light-touch approach to a compliance function, mandating the drawing of a specific internal policy (Major Accident Prevention Policy) and a safety management system detailing roles and responsibilities for implementing that policy [12]. With regards to financial oversight, Markets in Financial Instruments Directive 2014 (commonly referred to as “MiFID II”) also imposes a compliance function, with tasks involving risk assessment and monitoring [16]. The express purpose of this is to establish “consistent, efficient and effective” supervision as well as to “ensure the common, uniform and consistent application” of the regulation.

While we do not exhaustively cover all variations of compliance functions in this memo, the examples above showcase the EU’s collective interest and precedence in the implementation of compliance function requirements.

In the context of the AI Act, a compliance function would, in essence, modify AI system providers’ obligations. In the style of the DSA and GDPR, it could require providers of AI systems to appoint a specific officer(s) – internal staff or external contractors – responsible for monitoring the provider’s compliance with the Act. It could also mandate that organisations

adopt internal policies and assign responsibilities for implementing internal policies across the organisation, as in the Seveso-III Directive.

Furthermore, it may be appropriate to follow the logic set forth by the DSA and the GDPR by putting in place asymmetrical requirements – proportionate to the nature of the products and services concerned and to the number of users affected. Concretely, more stringent requirements would be applied to providers of AI models with particularly large impact (e.g. foundation models, “general purpose AI models”) or those affecting, through their implementation, more than 45 million EU citizens. If such a threshold were applied, these requirements would in fact be limited to only a few dozen companies worldwide [17].

Option 3. AI Board + Compliance function

Option 3 lays out a governance regime involving the establishment of an AI Board and the requirement of compliance officers responsible for interacting with national competent authorities and, occasionally, the AI Board and the Commission. The elements described in Option 1 above remain; below, we only describe features promulgated through the addition of a compliance function.

Under this regime, the main counterpart to each compliance officer would be the national competent authority located where the company’s authorised EU representative is located; though accountable to authorities of all member states where the provider’s AI system is deployed. The Board and/or the National authorities would monitor these providers' efforts as facilitated by the compliance function. The Board and national authorities would, therefore, gain a significant amount of information about the industry and experience working with these counterparts. These working relationships would attend to desires expressed by policymakers in AI Act deliberations regarding measures to ensure sharing of experience, information and best practices amongst national authorities – facilitated by the Board – as well as having member states assist each other when an issue affects multiple member states.

Option 4. AI Agency + Compliance function

Option 4 proposes a governance regime involving the establishment of an AI Agency and a compliance function, in which compliance officers interact with an EU-wide counterpart. The features described in Option 2 above remain, and we only describe here the features promulgated through the addition of a compliance function.

The exact structure of this agency is yet to be finalised. However, based on current discussions and suggested amendments, such an agency would have the resources and authority to independently oversee the establishment of the compliance function with providers of AI systems, particularly in cases involving more than one member state [14]. Some amendments suggest the national authorities would be involved – or at least have the right to be involved – in these interactions, but that they would not be the main counterpart of the limited set of providers. The AI Agency would also serve to concentrate expertise and specialisation, through centralised engagement with regulated entities’ compliance officers,

which can then be imparted to national authorities, as opposed to having compliance officers interact directly with national authorities.

Criteria

To evaluate which arrangement of institutions would be most suitable to carry out enforcement, we use as a basis the criteria utilised by the European Court of Auditors (ECA) – *effectiveness*, *efficiency*, and *coherence* [18]. We choose to also include *legitimacy*, a criterion that stakeholders have highlighted as pertinent to the decision. We provide operational definitions as follows:

- **Effectiveness: The ability of an institution to achieve its goals and objectives.** This includes its ability to adapt to changing circumstances, its capacity to allocate resources effectively, and its ability to produce measurable results that contribute to the achievement of direct regulatory objectives as well as broader policy objectives, such as compliance abroad (also known as the “Brussels effect” [19], [20]). It also includes the competence of the teams and individuals in performing their delegated tasks.
- **Efficiency: The ability of an institution to discharge its mandate while minimizing the costs incurred by the general public.** This includes factors such as the institution's ability to allocate resources effectively, minimise waste, and optimise processes to reduce costs and increase productivity. This also refers to the overall lifetime value and sustainability of the institutional model, demonstrated by, for instance, its ability to make appropriate investments, e.g. in tooling, to accumulate and preserve assets (such as expertise and credibility) over time, and to reduce operational costs through systematisation.
- **Coherence: The extent to which an institution's tasks and activities are logically consistent with the tasks and activities of other institutions within a broader policy or geographic area, as well as how consistently the regulation is applied over time.** This includes factors such as avoiding duplication of effort or conflicting mandates with other institutions, avoiding fragmentation, promoting collaboration and coordination among different actors within the policy area, as well as consistent enforcement across the member states. This also refers to the effect (or lack thereof) of political, economic or budgetary cycles on the performance of the institution, as well as on the perception of coherence by stakeholders (regulated entities, international partners, etc.).
- **Legitimacy: The extent to which an institution is perceived as having the right to exercise authority or make decisions within a given policy area or context.** This includes: input legitimacy, i.e. the building blocks, such as its mandate, budget and staff, are aligned with citizens' preferences; output legitimacy, i.e. the outcomes achieved are aligned with citizens' preferences; and throughput legitimacy, i.e. the conversion of input into output, for example, through standard operating procedures, arbitration in face of tradeoffs, and culture are aligned with citizens' preferences [21]. This also includes factors such as accountability of the institution's decision-makers, transparency and inclusiveness of decision-making processes, opportunities to

provide input and feedback, and the perception of the institution as a legitimate body – by other EU institutions, member states, and citizens – for discharging its mandate. An overarching theme of relevance to this criterion in the EU is respect for sovereignty. Note that the legitimacy of a particular institution is not the same for all tasks and functions. For example, due to the treaties and history of the EU, EU-level enforcement is perceived as more or less legitimate depending on which aspect of the AI Act (e.g. product safety or fundamental rights protection) is under consideration.

In the following section, we use these four criteria to compare the four options described in the previous section.

Evaluation

In [Table 2: Evaluation Summaries](#), we consider to what extent each institutional arrangement would meet the requirements set by the AI Act effectively, efficiently, coherently and legitimately, based on conversations and policy analysis carried out researching the AI Act over the past two years.

Table 2: Evaluation Summaries

	Option 1 AI Board	Option 2 AI Agency	Option 3 AI Board & compliance function	Option 4 AI Agency & compliance function
Effectiveness	<ul style="list-style-type: none"> + Information availability on domestic cases is often greater at the national level [22]–[25] (and the national level is where much of the enforcement would be kept with this option) + With appropriate mechanism for sharing workload across member states, this model avoids GDPR's pitfalls (e.g. no 'one-stop-shop' mechanism⁴) - Limited resources for digital governance on the national level for many member states can make it difficult to have too many functions at the national level - Despite the country-of-destination principle, this model encourages forum shopping for EU-wide system providers by relying heavily on duration of dispute settlement mechanisms and heterogeneity in interpretation - Difficulty in providing a united EU stance in international negotiations in the regulatory context 	<ul style="list-style-type: none"> + Greater ability to capture talent with expertise and experience commensurate with that of the private sector⁵ + More robust structure (staff, funds, processes) to carry out the many functions suggested/expected at the EU-level + Better suited to carry out governing responsibilities over general-purpose technologies with EU-wide horizontal implications + Can accelerate international negotiations, functioning as a centralised counterpart to other AI governance superpowers + Resolves the coordination problem of member states delaying lawsuits in order to “free ride” on anticipated lawsuits in other member states - Limited resources for digital governance on the EU-level [28] (especially in the current MFF [29] or DIGITAL budget [30]) 	<p>In addition to those listed for Option 1:</p> <ul style="list-style-type: none"> + Facilitates the Brussels effect by having company-level requirements (which, however, require credible enforcement) - Creates knowledge-based power asymmetries as compliance function requires greater levels of expertise in its public EU counterpart - National authorities are at a greater risk of relying on compliance officers in their own jurisdiction for advisory, through mere exposure and costly communication/coordination with other authorities 	<p>In addition to those listed for Option 2:</p> <ul style="list-style-type: none"> + The compliance function is matched by a commensurate level of expertise and, due to centralised exposure and experience, is more likely to result in symmetrical interactions consistent with the rule of law + Facilitates the Brussels effect by having credibly enforced company-level requirements + Increasing the range of mechanisms to ensure compliance thereby increases the probability of compliance⁶ + A stronger culture of information sharing from compliance officers, sanity-checked by an Agency's independent expertise, leads to better-coordinated and flexible national-level responses

⁴ The 'one-stop-shop' mechanism means that if a provider offers their product or services in multiple member states, the country where they are based or where they have their representative within the EU becomes the lead supervisory authority [26].

⁵ For example, the European Center for Algorithmic Transparency has secured the assistance of the former Twitter director for ethics, transparency and accountability, who was also Accenture Responsible AI Lead [27]. Working for this European level, her work can benefit all member states. A similar position on the member state level would have difficulties attracting such talent and even if a member state could do so, the expert's attention would only benefit the particular member states that they work for. With a shortage of suitable experts, many member states likely could not attract sufficient specialists.

⁶ Stacking layers of enforcement decreases the probability that enforcement fails, especially if these layers are independent in their weaknesses. This is analogous to the “Swiss cheese” model for accident prevention [31].

<p>Efficiency</p>	<ul style="list-style-type: none"> + Reliance on existing institutional infrastructure and organisations at national levels - Inefficiencies in coordination efforts - Arriving at agreements can be a lengthy process if/when member states challenge each other's decisions [32] - System-wide inefficient allocation of resources due to a disconnect at the national level between workload and budgets - Dissemination and accessibility of knowledge is not systematic and requires the intermediation of the Board; risks loss of contextual knowledge [33], [34] 	<ul style="list-style-type: none"> + Centrality can improve consistency in information systems, lower maintenance costs and increase the system's stability [34], thereby improving the efficiency of cooperation and coordination⁷ and the quality and capacity for enforcement [35] + Pools resources from national levels, benefiting from economies of scale + For EU-wide AI systems, a single point of contact in the regulatory environment is better suited to facilitate ongoing dialogues + Could provide capacity-building support to national or sectoral teams more efficiently (e.g. joint procurement of consultants for greater collective volume as opposed to national procurement) + Systematic utilisation, centralization, dissemination and accessibility of knowledge where it is needed most [36] - Likely slower to establish as it necessitates the allocation of additional resources, personnel, and infrastructure⁸ 	<p>In addition to those listed for Option 1:</p> <ul style="list-style-type: none"> + Significant increase in availability of expertise and talent through the creation of a larger labour market for AI compliance + On-site compliance function creates literal on-the-ground, permanent pressure and incentive to comply (e.g. Seveso-III Directive [12]) + Reduces the costs of interacting with regulated entities, reduces regulated entities' need for pedagogy/training by regulators + The most concerning regulated entities bear some of the costs of enforcement - Lack of subject-matter expertise and capacity at the EU-level slows dialogue with the most concerning regulated entities' compliance functions [38] - Risks of implicitly outsourcing regulatory checks to compliance function due to lower expertise relative to regulated entities, potentially reducing the quality of the defence of citizens' interests - Loses public sector incentive to find the most efficient balance between required checks and added value (as some costs are outsourced) [39] - Reduces EU-level staff's ability to build know-how and stay up-to-date on technological developments 	<p>In addition to those listed for Option 2:</p> <ul style="list-style-type: none"> + Significant increase in the availability of expertise and talent through the creation of a labour market for AI compliance + The ability to interact with most concerning regulated entities' compliance officers promotes transfer learning + Helps EU-level staff build know-how and stay up-to-date on technological developments + On-site compliance function creates literal on-the-ground, permanent pressure and incentive to comply (e.g. Seveso-III Directive [12]) + Reduces the costs of interacting with regulated entities, reduces the need for pedagogy amongst most concerning regulated entities + The most concerning regulated entities bear some of the costs of enforcement
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⁷ For example, when an infringement takes place in multiple member states, sharing knowledge and other resources can support the enforcement process [26].

⁸ For instance, the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA) was formed in 2011, but only began its activities in December of the following year [37]. However, as there will be some time between the passage of the AI Act and the time at which it comes into force, this downside might be relatively insignificant.

	Option 1 AI Board	Option 2 AI Agency	Option 3 AI Board & compliance function	Option 4 AI Agency & compliance function
Coherence	<ul style="list-style-type: none"> - Decentralised enforcement risks uneven implementation (as in GDPR) [40] - Potential difficulties of finding a suitable national agency⁹ The AI Act might be assigned to the mandate of various sectoral authorities (e.g. market surveillance in one member state, DPA in another, etc.) resulting in patchwork of practices with limited interoperability, - Enforcement is subject to national <i>and</i> EU-level budgetary, economic and political cycles 	<ul style="list-style-type: none"> + More centralised enforcement enables consistency of implementation + Helps ensure consistency with other EU-level directives and regulations + Enforcement is not subject national budgetary, economic and political cycles (only those of the EU) + Seen as a single EU-wide counterpart to other AI superpowers on the international regulatory scene, therefore helping on coherent enforcement abroad. 	<p>In addition to those listed for Option 1:</p> <ul style="list-style-type: none"> + Internalises compliance responsibility resulting in not only top-down but also bottom-up enforcement responsibility¹⁰ + Harmonizes compliance processes at regulated entities with other regulations and standards + Hedges national and European political cycles by providing some minimum continuity of enforcement (even if authorities are not immediately effective) + Promotes coherence internationally through bidirectional transfer learning mediated by the compliance function of multinationals 	<p>In addition to those listed for Option 2:</p> <ul style="list-style-type: none"> + The existence of dedicated and experienced private sector compliance officers' community might further increase the value of a single EU-wide point of contact, as compliance practitioners coalesce in a single EU-wide interest group preserving the coherence of the system + Internalises compliance responsibility resulting in not only top-down but also bottom-up enforcement responsibility¹¹ + Harmonizes compliance processes at regulated entities with other regulations and standards + Hedges national and European political cycles by providing some minimum continuity of enforcement (even if authorities are not immediately effective) + Promotes coherence internationally through bidirectional transfer learning mediated by the compliance function of multinationals - A risk of an AI agency and the compliance function partially duplicating efforts (therefore, responsibilities would need to be clearly defined)

⁹ Under the DSA, for instance, Germany faced difficulties in finding a suitable national agency [41]. If the relevant aspects of the two regulations and fields are similar enough, this issue might also arise in the case of the AI Act.

¹⁰ This internalisation of responsibility is similar to the "active ownership" that McKinsey recommends for banks [42].

¹¹ Ibid.

	Option 1 AI Board	Option 2 AI Agency	Option 3 AI Board & compliance function	Option 4 AI Agency & compliance function
Legitimacy	<ul style="list-style-type: none"> + Better at addressing local needs and therefore perceived as more legitimate locally by citizens. + Tighter feedback loops between national authority's outcomes and national checks and balances in society (national parliament, media, national NGOs) than EU-level authority. + Preservation of national sovereignty [26] - Due to dispute resolution duration, less legitimacy in the eyes of one member state's citizens affected by another member state's past decision setting precedent for others without other member states' needs taken into account. 	<ul style="list-style-type: none"> + Could combine the benefits of having a strong-enough mandate overseen directly by member states and not overburdening the Commission with too many tasks¹² + Public support for horizontal agencies dedicated to AI, and public concerns about national government abilities to regulate AI, even in bigger member states¹³ + Subject to EU institutions' uniform oversight and control without geopolitical tension/self-protection + One single agency with one management board held accountable and in the limelight of all national actors' scrutiny could be perceived as more legitimate than a constellation of 27 enforcement systems + Better at addressing EU-wide and transnational needs - Distance from local stakeholders - Risk of opacity, bureaucratisation and of remaining outside of the control of national parliaments and scrutiny of national media 	<p>In addition to those listed for Option 1:</p> <ul style="list-style-type: none"> + DSA legislators, in their overhaul of the enforcement mechanism from the GDPR, strengthened the compliance function from only officers to a full-fledged function [45], indicating its value and legitimacy to legislators + Increases public trust in the provider, supporting responsible uptake of AI¹⁴ + Fosters innovation by incentivising those with suitable expertise to find the most cost-effective ways of demonstrating compliance - Risks losing some oversight as the provider polices and reports on itself, somewhat analogous to internal auditing [39] - Increased costs and administrative burden for providers (especially for SMEs)¹⁵ - Due to a near-monopoly in expertise in industry, risks enabling industry players to shape compliance practice and interpretation of the law (standard operating procedures, regulatory guidance materials, etc.) 	<p>In addition to those listed for Option 2:</p> <ul style="list-style-type: none"> + DSA legislators, in their overhaul of the enforcement mechanism from the GDPR, strengthened the compliance function from only officers to a full-fledged function [45], indicating its value and legitimacy to legislators - Increased costs and administrative burden for providers (especially for SMEs)¹⁶

¹² In this, the EU AI Act could learn from the DSA, where the Board's role is restricted to advisory and the Commission's role may turn out to be too extensive [26]

¹³ 62% of Britons surveyed are in favour of an horizontal AI agency indicative of public support even in countries with strong civil services [43] and over 70% of Germans have low confidence in their government's ability to regulate AI [44].

¹⁴ There are many benefits even for SMEs to introduce a compliance function [46].

¹⁵ The burden for SMEs could be mitigated by only requiring a compliance function for providers whose outputs affect a large number of people like in the DSA for VLOPs and VLOSEs, or in the case of the AI Act for general-purpose AI.

¹⁶ Ibid.

Discussion & Recommendations

We do not attempt to quantify or weigh the criteria or arguments as this would be a misleading representation of the complexity of the issue and solutions at stake. While the validity of each argument is contingent upon the specifics of operationalisation, we attempt to draw some recommendations based on the evidence compiled in the previous section. We recognise the limitations of such an analysis and welcome feedback. Our findings are summarised in the table below.

Table 3: High-level Evaluation

	<u>Option 1</u> AI Board	<u>Option 2</u> AI Agency	<u>Option 3</u> AI Board & compliance function	<u>Option 4</u> AI Agency & compliance function
Effectiveness	Limited	Good	Worst	Best
Efficiency	Worst	Best (tied)	Limited	Best
Coherence	Worst	Best	Good	Best (tied)
Legitimacy	Best	Worst	Good	Limited

- **Effectiveness:** we conclude that Option 4 would be the most effective, followed by Option 2. Option 3 seems much less effective than Options 1 and 2, though only slightly behind Option 1.
- **Efficiency:** we conclude that Options 2 and 4 would be the most efficient. Option 3 provides limited advantages, while Option 1 lags behind.
- **Coherence:** we conclude that Options 2 and 4 would be the most coherent. Option 3 offers moderate advantages. Option 1 falls far behind.
- **Legitimacy:** we conclude that Option 1 would be the most legitimate followed by 3, 4 and 2, in that decreasing order.

Overall, although an AI Agency would appear to perform worse relative to an AI Board on the legitimacy criterion, we argue its increased efficiency, effectiveness and coherence offset this drawback. Our evaluation furthermore suggests that introducing a compliance function would strengthen its overall performance on effectiveness and legitimacy.

Our main recommendation, therefore, is to create an EU AI Agency for the enforcement of the AI Act. Furthermore, this EU AI Agency should be accompanied by the establishment of a compliance function within relevant regulated entities. While this solution might have drawbacks, our evaluation indicates that this might be the best institutional model when it comes to trading off effectiveness, efficiency, coherence and legitimacy.

Legitimacy is the weakest point of the institutional model we recommend (both with and without a compliance function). In order to improve an Agency's legitimacy, we recommend that there are mechanisms to ensure its accountability at the member state level, in addition to the EU level, through, for example, national parliamentary hearings, the establishment of advisory groups made up of national interest groups and civil society actors (as opposed to solely EU-level ones), more significant transparency measures, the empowerment of national enforcement teams through capacity-building efforts, and the elicitation of input from a wide diversity of national experts. Finally, the requirements for a compliance function should be applied asymmetrically, with more stringent requirements imposed on the most relevant regulated entities, to avoid unfairly burdening micro-enterprises and SMEs. Several amendments on the Parliament's table, such as the EU-level body's accountability to both the Council and the European Parliament, already provide a strong basis to make progress on this front.

As mentioned throughout this memo, the ultimate performance of an Agency toward the stated objectives, and in particular legitimacy, heavily depends on the final organisational design and operationalisation of the body. We believe that further research is now needed to design an AI Agency with the requisite design features to meet these objectives.

This evaluation was limited to four different institutional models, as these four are currently the ones that are most hotly debated amongst EU policymakers. However, other formats to consider include:

- **Asymmetric EU-level pooling of enforcement capabilities:** Member states with the resources to develop an effective and efficient national AI Agency do so while others rally around an EU AI Agency. Such an asymmetric model would require a strong coordination mechanism to avoid a divisive “multi-speed” Europe but could resolve some of the tensions observed in policy discussions about effectiveness and efficiency on one hand, and legitimacy on the other hand.
- **An international AI regulatory agency:** Given increased international calls for governance over some aspects covered by the AI Act [47]–[49], a supranational agency, akin to the International Civil Aviation Organisations could both resolve international coordination problems on some aspects of the AI Act and facilitate a multilateralism-based Brussels effect. As mentioned in our evaluation, a single, decisive EU voice is required to make the most of a truly multilateral model, bolstering effectiveness and efficiency and preventing the EU from ending up “on the menu” rather than “at the table”. Rather than an Agency or Board, this may require a model involving a global forum of national regulators.
- **An EU Digital Single Market supervision body:** One of the criticisms of both the AI Agency and the AI Board option is the duplication of efforts vis a vis other regulatory bodies. Additionally, a flurry of digital regulations over the past decade has created a vast ecosystem of institutions (be they rules or bodies), becoming as complex as the EU financial sector regulations. A harmonised system might require an agency tasked with horizontal coherence and benefiting from pooling expertise e.g. on platform and cybersecurity governance together.

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Appendix: List of Functions

European Commission Proposal

The following text summarises the functions required of the “AI Board” as laid out in the European Commission’s April 21, 2021 “Proposal for a Regulation Of The European Parliament And Of The Council Laying Down Harmonised Rules On Artificial Intelligence (Artificial Intelligence Act) And Amending Certain Union Legislative Acts” [1] (emphasis our own).

1. The Board should be responsible for a number of **advisory tasks**,
 - a. including issuing opinions, recommendations, advice or guidance on matters related to the implementation of this Regulation, including on technical specifications or existing standards regarding the requirements established in this Regulation and providing advice to and assisting the Commission on specific questions related to artificial intelligence.
2. The Board shall **provide advice and assistance to the Commission**
 - a. **collect and share expertise and best practices** among member states;
 - b. **contribute to uniform administrative practices** in the member states, including for the functioning of regulatory sandboxes referred to in Article 53;
 - c. **issue opinions, recommendations** or written contributions on matters related to the implementation of this Regulation, in particular
 - i. on **technical specifications or existing standards** regarding the requirements set out in Title III, Chapter 2,
 - ii. on the use of **harmonised standards or common specifications** referred to in Articles 40 and 41,
 - iii. on the preparation of guidance documents, including the guidelines concerning the setting of administrative fines referred to in Article 71.
3. The Commission and the Board shall **encourage and facilitate the drawing up of codes of conduct** intended to foster the voluntary application to AI systems of requirements related for example to environmental sustainability, accessibility for persons with a disability, stakeholders participation in the design and development of the AI systems and diversity of development teams on the basis of clear objectives and key performance indicators to measure the achievement of those objectives.
(keep SMEs interests in mind here)

Council of the European Union's Common Approach (Compromise Text)

The following summarises the functions required of the “AI Board” as laid out in the Council of the European Union’s common approach, discussed on November 25, 2022 and adopted on December 6, 2022 [2] (emphasis our own).

1. The Board shall be **organised and operated so as to safeguard the objectivity and impartiality** of its activities.

2. The Board shall make publicly available a summary of all good practices, lessons learnt and recommendations [on regulatory sandboxes, from the annual reports submitted to it by national authorities].
3. The Board **may establish other** standing or temporary **sub-groups** as appropriate for the purpose of examining specific issues.
4. The Council has suggested strengthening the Board in its Compromise proposal of December 6 2022 to improve its abilities to support member states for enforcement,
 - a. notably by suggesting the creation of 3 subgroups: one of consultation with a wide range of stakeholders, one for national notifying authorities (i.e. authorities that designate which organisations can carry out third-party conformity assessment) and one for national market surveillance authorities.
 - b. Also by mandating testing facilities to provide independent technical or scientific advice to the Board or member states authorities.
 - c. Also by mandating the creation of a central pool and independent experts to support enforcement upon request.
 - d. Also by mandating the European Commission to provide guidance on the application of the AI Act.
5. The Board shall **advise and assist** the Commission and the member states in order to facilitate the **consistent and effective application** of this Regulation.
 - i. (Basically the same as the Commission's proposal:)
 1. collect and share technical and regulatory expertise and best practices among member states;
 2. contribute to the harmonisation of administrative practices in the member states, including in relation to the derogation from the conformity assessment procedures referred to in Article 47, the functioning of regulatory sandboxes and testing in real world conditions referred to in Article 53, 54 and 54a;
 3. upon the request of the Commission or on its own initiative, issue recommendations and written opinions on any relevant matters related to the implementation of this Regulation and to its consistent and effective application, including:
 - a. on technical specifications or existing standards regarding the requirements set out in Title III, Chapter 2,
 - b. on the use of harmonised standards or common specifications referred to in Articles 40 and 41,
 - c. on the preparation of guidance documents, including the guidelines concerning the setting of administrative fines referred to in Article 71;
 - ii. advise the Commission on the potential need for **amendment of Annex III** in accordance with Articles 4 and 7, taking into account relevant available evidence and the latest developments in technology;
 - iii. advise the Commission during the preparation of **delegated or implementing act** pursuant to this Regulation;
 - iv. **cooperate**, as appropriate, with relevant EU bodies, experts groups and networks in particular in the fields of product safety, cybersecurity,

- competition, digital and media services, financial services, cryptocurrencies, consumer protection, data and fundamental rights protection;
- v. assist the work of **market surveillance authorities** and, in cooperation and subject to agreement of the concerned market surveillance authorities, promote and support cross-border market surveillance investigations, including with respect to the emergence of risks of systemic nature that may stem from AI systems;
 - vi. contribute to the assessment of training needs for staff of member states involved in implementing this Regulation;
 - vii. advise the Commission in relation to **international matters** on artificial intelligence.
6. The Board can request the Commission to issue guidelines on the implementation of the Regulation.

European Parliament's Amendments

The following text summarises the functions required of the “AI Board” as laid out in European Parliament’s IMCO-LIBE compilation of amendments of June 14, 2022 [14] (emphasis our own).

1. The Board should be able to settle **disputes** between member states
 - a. The Board should also be able to adopt binding decisions for the settlement of cases involving two or more member states in which the national supervisory authorities are in disagreement or when it is not clear who the lead national supervisory authority is.
 - b. The Board should also be able to adopt a binding decision in those cases when a national supervisory authority of a member state finds that although an AI system is in compliance with this Regulation, it presents a risk to the compliance with obligations under Union or national law intended to protect fundamental rights, the principles of Article 4a, the values as enshrined in Article 2 TEU, the environment, or to other aspects of public interest protection.
2. The Board should be the **supervisory authority** for 'community dimension'
 - a. The Board should be the supervisory authority for undertakings that meet the criteria of 'community dimension' as defined in Article 1(3) of Regulation 139/200 (Merger Regulation). The Board should have a secretariat with sufficient resources and expertise to be able to fulfil its role.
3. **Structure**
 - a. An AI **advisory council** ('the Advisory Council') should be established as a sub-group of the Board consisting of relevant representatives from industry, research, academia, civil society, standardisation organisations, relevant common European data spaces, and other relevant stakeholders, including social partners, where appropriate depending on the subject matter discussed, representing all member states to maintain geographical balance. The Advisory Council should support the work of the Board by providing advice

relating to the tasks of the Board. The Advisory Council should nominate a representative to attend meetings of the Board

- b. Have a secretariat
 - c. Have a management board
 - d. Have a **legal personality** and be independent
 - i. A 'European Artificial Intelligence Board' (the 'Board') is established as an independent body with its own legal personality. The Board shall have a Secretariat, a strong mandate as well as sufficient resources and skilled personnel at its disposal for the assistance in the performance of its tasks laid down in Article 58.
 - ii. The Board shall be organised and operated so as to safeguard the independence, objectivity and impartiality of their activities. The Board shall document and implement a structure and procedures to safeguard impartiality and to promote and apply the principles of impartiality throughout its activities.
 - e. Have sufficient competent personnel
 - i. The Board shall have a sufficient number of competent personnel at their disposal for assistance in the proper performance of their tasks.
4. The Board shall support/monitor/ensure **enforcement**
- a. establishment of an independent 'European Artificial Intelligence Board' and its activities **supporting the enforcement** of this Regulation.
 - b. The Board shall **monitor and ensure the effective and consistent application**, and **contribute to the effective and consistent enforcement**, of this Regulation throughout the Union
 - c. The Board shall **ensure the consistent application** of this Regulation and shall the competent supervisory authority to enforce this Regulation where one of the following criteria is met [...]
 - d. **monitor and ensure** the correct application of Title III
 - e. enter into consultation with the relevant member state and operator or operators and **shall evaluate the national measure**. On the basis of the results of that evaluation, the Board shall **decide whether the national measure is justified or not** within 9 months from notification
5. The Board should **issue Guidance** (to Commission & National Supervisory Authorities):
- a. On reducing **energy/use/waste throughout lifecycle**
 - i. It is appropriate to design and develop in particular high-risk AI systems with methods and capabilities that measure, record, and reduce resource use and waste production, as well as energy use, and that increase their overall efficiency throughout their entire lifecycle. The Commission, the member states and the European AI Board should contribute to these efforts by issuing guidelines and providing support to providers and deployers.
 - b. On **benchmarking**
 - i. The European Artificial Intelligence Board should **bring together national metrology and benchmarking authorities** and provide

- guidance to address the technical aspects of how to measure the appropriate levels of accuracy and robustness
- c. On **common specifications** versus using harmonised standards
 - i. When deciding to draft and adopt common specifications, the Commission shall consult the Board, the European standardisation organisations as well as the relevant stakeholders, and duly justify why it decided not to use harmonised standards.
 - d. On **delegated acts**
 - i. After consulting the AI Board referred to in Article 56 and after providing substantial evidence, followed by thorough consultation and the involvement of the affected stakeholders, the Commission is empowered to adopt delegated acts
 - e. The European Artificial Intelligence Board shall **develop guidance for the risk assessment**.
 - f. On **application of the AI Act**
 - i. draw up guidelines for supervisory authorities concerning the application of this Regulation;
 - g. On **administrative fines**
 - i. draw up guidelines for supervisory authorities concerning the setting of administrative fines pursuant to Article 72;
 - h. On **development and use** of AI
 - i. advise the Commission on any issue related to the development and use of artificial intelligence in the Union, including on any proposed amendment of this Regulation;
 - i. On information sharing and technical documentation
 - j. When providing advice and assistance to the Commission in the context of Article 56(2), the Board shall in particular:
 - i. issue opinions, recommendations or written contributions on matters related to the implementation of this Regulation, in particular on
 - (i) technical specifications or existing standards regarding the requirements set out in Title III, Chapter 2,
 - (ii) the use of harmonised standards or common specifications referred to in Articles 40 and 41,
 - (iii) the preparation of guidance documents, including the guidelines concerning the setting of administrative fines referred to in Article 71,
 - (iii a) amendments to the Annexes I and III.
 - k. The Board shall provide statutory guidance in relation to children's rights, applicable law and minimum standards for the evaluation of automated decision- making systems.
 - l. check on national supervisory authorities & potentially issue binding decisions
 - i. In case the Board, after being notified by another national supervisory authority, finds that the lead national supervisory authority did not use its investigative, corrective or authorisation power despite being notified by another national supervisory authority or came to a decision that is clearly incompatible with provisions of this Regulation, other

national supervisory authorities may address the case on their own, taking into account the procedure described in paragraph 3 or request that the Board issue a binding decision.

- m. the market surveillance authority shall notify the Board which shall **issue within 7 days a non-binding opinion** on the request for the Commission to intervene.
- n. The Board shall adopt guidelines to help national competent authorities to **identify and rectify**, where necessary, **similar problems arising** in other AI systems.

6. Request

- a. Commission to reassess an AI system
 - i. The Board, notified bodies and other actors may request the Commission to reassess an AI system. The AI system shall then be reviewed for reassessment and may be re-categorized.
- b. the Providers to provide all the information and documentation necessary to demonstrate the conformity of high-risk AI system

7. Oversee

- a. 'Navigator Programme for General purpose AI systems'
 - i. A 'Navigator Programme for General purpose AI systems' (the 'Navigator Programme') is established and reports to the European AI Board referred to in Article 56.
- b. Regulatory Sandboxes
 - i. The supervising authority shall inform the European Artificial Intelligence Board of the provision of regulatory sandboxes.
 - ii. Decisions to suspend or ban providers from participating in regulatory sandboxes shall be submitted without delay to the European Artificial Intelligence Board.

8. Collaborate/Cooperate/Convene

- a. regularly invite **external experts** to ensure accountability and independence
 - i. The board shall regularly invite external experts, in particular from organisations representing the interests of the providers and users of AI systems, SMEs and start-ups, civil society organisations, representatives of affected persons, researchers, standardisation organisations, testing and experimentation facilities, to attend its meetings in order to ensure accountability and appropriate participation of external actors. The Commission may facilitate exchanges between the Board and other Union bodies, offices, agencies and advisory groups.
- b. The Board shall cooperate with **Union institutions, bodies, offices, agencies and advisory groups** and shall make the results of that cooperation publicly available.
- c. promote common **training programmes and facilitate personnel exchanges** between the supervisory authorities and, where appropriate, with the supervisory authorities of third countries or with international organisations

- d. promote the **exchange of knowledge and documentation** on relevant legislation and practice with supervisory authorities whose scope includes artificial intelligence worldwide;
 - e. **collect and share expertise and best practices** among member states;
 - f. contribute to uniform administrative practices in the member states (incl. Regulatory Sandboxes)
 - g. consultations with stakeholders
 - i. The Board shall organise consultations with stakeholders twice a year. Such stakeholders shall include representatives from industry, start-ups and SMEs, organisations from the civil society organisations such as NGOs, consumer associations, the social partners and academia, to assess the evolution of trends in technology, issues related to the implementation and the effectiveness of this Regulation, regulatory gaps or loopholes observed in practice.
9. **Transparency: maintain a publicly accessible electronic register of decisions** taken by supervisory authorities and courts on issues handled pursuant to Chapter 3 of Title VIII.
10. **On privacy & cybersecurity**
- a. **ensure the confidentiality of information and data** obtained in carrying out their tasks and activities
 - b. shall put in place **adequate cybersecurity and organisational measures** to protect the security and confidentiality of the information and data obtained in carrying out their tasks and activities.
11. **On regular Assessment & Code of Conduct for ‘Societally Significant AI systems’:**
- a. The European AI Board and the Commission shall **regularly assess** the relational map to facilitate **incident response** and to **identify AI systems (‘Societally Significant AI systems’)** whose output is used as input into many downstream digital and AI systems.
 - b. The European AI Board and the Commission shall **develop a Code of Conduct for Societally Significant AI Systems**.
12. **Develop Methodology for Risk Level Evaluation**
- a. The Board shall undertake to **develop an objective and participative methodology for the evaluation of risk level** based on the criteria outlined in the relevant articles and the inclusion of new systems in various risk categories.

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