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NOTE

From:	Presidency
To:	Permanent Representatives Committee/Council
No. Cion doc.:	8115/20
Subject:	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
	- Progress report

I.   INTRODUCTION

1.   The <u>Commission</u> adopted the proposal for a Regulation laying down harmonised rules on artificial intelligence (Artificial Intelligence Act, AIA) on 21 April 2021[1].

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[1]   doc. 8115/21.

2. The objectives of the Commission proposal, which is based on Articles 16 and 114 TFEU, are to ensure that AI systems placed on the Union market and used in the Union are safe and respect existing law on fundamental rights and Union values, to ensure legal certainty in view of facilitating investment and innovation in AI, to enhance governance and effective enforcement of existing law on fundamental rights and safety, and to facilitate the development of a single market for lawful, safe and trustworthy AI applications, while preventing market fragmentation.

3. The European Parliament, has announced referral of the file to the Committee on Internal Market and Consumer Protection (IMCO). IMCO nominated the rapporteur for the file Brando BENIFEI (S&D, Italy). The final decision of the attribution of the file among the EP Committees is pending.

4. The European Economic and Social Committee and the European Committee of the Regions were both consulted on the proposal, with formal requests for opinions sent to both institutions on 15 June 2021 and 24 June 2021, respectively. The European Economic and Social Committee delivered its opinion on the proposal on 22 September 2021[2], while the opinion of the European Committee of the Regions is still pending.

5. The European Central Bank was requested to provide its opinion on certain aspects of the proposal, which fall within its field of competence or within its responsibilities. The formal request was sent by the Council on 3 November 2021, and the opinion is still pending.

6. On 18 June 2021 the European Data Protection Board (EDPB) and the European Data Protection Supervisor (EDPS) issued a joint opinion on the proposal[3].

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[2] EESC opinion on the 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.

[3] EDPB-EDPS Joint Opinion 05/2021.

II.   WORK WITHIN THE COUNCIL

7.   In the Council, the examination of the proposal has been carried out in the Working Party on Telecommunications and Information Society (hereinafter: WP TELECOM). The WP TELECOM started discussing the proposal under the PT Presidency during several meetings held between April and June 2021. In addition to this, on 8 June 2021 the PT Presidency organized a dedicated workshop aiming to present and discuss with the Member States some key regulatory choices and building blocks of the proposed AIA.

8.   The analysis of the proposal was continued in the WP TELECOM under the SI Presidency during the meetings held on 6 July, 7 and 21 September, 5, 12 and 26 October, and 9 and 16 November. During these meetings the entire text of the proposed regulation was presented in detail by the Commission and preliminarily discussed by the delegations. Additionally, the SI Presidency organised in parallel five online workshops on 15 July, 31 August, 20 and 27 September, and 7 October. The workshops were open to participation by experts from the capitals and their agendas mirrored the agendas of the preceding meetings of WP TELECOM devoted to the AIA, with a view to providing additional opportunities for more detailed in-depth discussions and Q&A sessions on topics covered during the presentations in WP TELECOM.

9.   Apart from the analysis conducted by members of WP TELECOM, on 30 September a dedicated online workshop was held to examine in more detail the implications of the proposal in the area of justice and home affairs. The workshop was a follow-up to the discussions on the AIA proposal which were held by interior and justice ministers during their informal meeting on 17-18 July 2021, and it was open to participation by experts from both JHA and TELECOM communities. These discussions focused on the definition of an AI system, on the actual impact of the proposal on the justice and home affairs area in terms of procedures, costs and availability of products and services especially in, but not limited to, the high-risk categories, and on the approach to the use of AI systems for law enforcement purposes, in particular with regard to the use of real-time remote biometric identification in public spaces.

10. On 15 October 2021, the SI Presidency organised a half a day informal Council of telecom ministers devoted exclusively to the AIA proposal. The meeting was held in a VTC format and its main objective was to provide a political steer for the ongoing discussions at the technical level. The ministers confirmed their support for the horizontal and human-centric approach to regulating AI and stressed that with this regulation the EU can take the global lead for setting standards in this area. However, they also pointed to a number of issues that require further work, in particular as regards the scope, the definitions, setting precise and technically feasible requirements for high-risk AI applications, and ensuring that the new regime does not create excessive administrative burden, in particular for SMEs and start-ups, as well as takes due account of sectorial specificities.

11. On 5 October 2021, the SI Presidency requested the delegations in WP TELECOM to provide written comments and drafting suggestions on the first 29 articles of the proposed regulation, with a view to start working on the first, partial compromise text of the proposal. Following this request, 18 Member States provided their written contributions.

12. Based on the written submissions from the delegations, as well as taking into account the input from the discussions held within the Council, the SI Presidency drafted the first, partial compromise proposal and [*presented it to the delegations during the meeting of WP TELECOM on 30 November 2021*]. The main areas addressed by the SI Presidency in the partial compromise are described herein:

a) **Scope**

13. The scope of the proposal has been clarified, with the main change consisting of the addition of an explicit reference to the exclusion of national security from the scope of the proposed regulation. This is in accordance with Article 4(2) of TFEU, which provides that national security remains the sole responsibility of each Member State.

14. Similarly, it has been clarified that the AIA should not apply to AI systems and their outputs used for the sole purpose of research and development.

b)   Definitions

15. A number of definitions have been fine-tuned in the compromise proposal and new ones have been added. Notably, the definition of an AI system has circumscribed to ensure more legal clarity and to better reflect what should be understood by an AI system for the purposes of the AIA, with an explicit reference indicating that any such system should be capable of determining how to achieve a given set of human defined objectives by learning, reasoning or modelling. This change is also intended to prevent the inclusion in the scope of the proposed regulation of more traditional software systems that are normally not considered as artificial intelligence. In relation to this modification, the list of techniques and approaches in Annex I has also been refined to ensure more clarity on which systems are covered by this definition.

16. Furthermore, some definitions of various regulated actors have been improved (e.g. provider, user, authorised representative) or added (e.g. manufacturer), in order to better explain their roles and obligations within the AI value chain. Also, the definitions relating to biometrics have been fine-tuned in line with the changes introduced in the corresponding provisions.

c)   Prohibited AI practices

17. As regards prohibited AI practices, the compromise text contains the extension of the prohibition of using artificial intelligence for social scoring also to private actors, in order not limit this practice only to the public sector.

18. Concerning the use of 'real-time' remote biometric identification systems in publicly accessible spaces by law enforcement authorities, it has been clarified that such systems could also be used by other actors, acting on behalf of law enforcement authorities. Also, the objectives for which law enforcement should be allowed to use 'real-time' remote biometric identification, as well the related authorisation process, have been extended.

19. Furthermore, the provision prohibiting the use of AI systems that exploit the vulnerabilities of specific group of persons has been modified and it now also covers persons who are vulnerable due to their social or economic situation.

d)   **Classification of high risk AI systems**

20. The provisions defining the rules for classification of high risk AI systems have been thoroughly revised to ensure better legal clarity and readability of the text. Furthermore, the list of areas and use cases of high risk AI systems in Annex III has been revised and extended to include digital infrastructure and the protection of environment. As regards high risk use cases in the area of law enforcement, crime analytics has been removed from the list, and the range of systems for detection of deep fakes falling under the high risk category has been narrowed down.

21. Moreover, a new title has been added to account for situations where AI systems can be used for many different purposes (general purpose AI), and where there may be circumstances where general purpose AI technology gets integrated into another system, without the provider of the general purpose AI system having any or only limited influence over the compliance with obligations of the regulation.. The proposed new article clarifies that any operator specifying an intended purpose of a general-use AI systems and placing it on the market or putting it into service for such a purpose should be considered as a provider.

22. In relation to the conditions for the amendments to Annex III as in Article 7, further updates have been made to the criteria for such amendments to ensure more legal clarity.

e)   **Exercise of delegation**

23. The provisions regarding possibility of updating the list of artificial intelligence techniques and approaches as defined in Annex I and also the provisions concerning the updates of the list of high risk AI systems in Annex III through delegated acts have been significantly clarified, whereby the Commission will present a report on the assessment of the need for such changes to both the European Parliament and the Council on a regular basis.

III. MAIN OUTSTANDING ISSUES

24. Apart from the questions directly addressed in the compromise proposal and outlined above, the following points have been identified by the SI Presidency as additional, potentially more complex issues that will require further analysis during subsequent discussions on the proposal:

a) Requirements for high-risk AI systems

25. Many delegations have indicated that the requirements for high-risk AI systems, as provided in Chapter 2 of Title III of the proposal, are sometimes slightly vague and should be better defined. To make it less burdensome for businesses to comply, some practical guidance on how to meet them would need to be provided, for instance as regards quality and suitability in the context of the requirements concerning data, and an appropriate type and degree of transparency in the context of information to users. The interplay between the requirements for high-risk AI systems as set out in the proposal and the future relevant standards was also raised as a topic that would require further discussions. It is also important to note that some of the requirements set out in Chapter 2 are considered to be too stringent. For example, the requirement that training, validation and testing data sets should be free of errors and complete appears to be almost impossible to meet in most scenarios. A number of delegations stressed that while this should be the case to the greatest extent possible, it should not be an absolute requirement.

b) Responsibilities of various actors in the AI value chain

26. Several Member Stated noted that AI system providers will carry most obligations and requirements set out in the AIA Act. However, in view of the fact that AI systems are developed and distributed through complex value chains, where boundaries between different actors are not always clearly delineated, it may be relevant to re-evaluate the allocation of responsibilities and roles, in order to better reflect the reality of designing an AI system, putting in on the market or operating it.

c) **Compliance and enforcement**

27. Some concerns were also raised that the proposed AIA sets out an overly complex compliance framework, which will create significant administrative burden and costs for businesses. While large companies may be able to absorb such costs, smaller businesses developing AI systems may not always have the capacity or resources to deal with the high compliance burden resulting from the provisions of the proposed regulation. In this context, several Member States indicated that a simplification and clarification of the overall compliance framework would be needed, as well as additional support measures, in particular for SMEs and start-ups, in order to ensure that they remain competitive. Similarly, discussions on the enforcement measures revealed that the penalties as currently proposed in the AIA may be excessive for SMEs and start-ups, putting them at a disadvantage in relation to large companies which would more easily absorb such financial impacts.

d) **Relationship with other legislation**

28. Many delegations stressed that more work will be needed to ensure consistency and synergies of the proposed AIA with the overall EU legislative framework. The proposal should identify and build upon existing requirements set by the General Data Protection Regulation, the Law Enforcement Directive, the New Legislative Framework and other specific sectoral legislation, such as the General Product Safety Regulation, with which existing AI systems already need to comply. Member States expressed concern that failing to do so would entail a risk for different actors in the AI value chain who could be subject to conflicting obligations. It will be necessary to eliminate any potential legal discrepancies in order to minimise risks of non-compliance and facilitate enforcement efforts.

IV. CONCLUSION

29. The COREPER is invited to agree to forward this progress report to the Council.

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