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NOTE

From:	Presidency
To:	Permanent Representatives Committee/Council
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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

The Commission adopted the proposal for a Regulation laying down harmonised rules on artificial intelligence (Artificial Intelligence Act, AIA) on 21 April 2021¹.

¹ 8115/21.

2. The objectives of the Commission proposal, which is based on Articles 114 and 16 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 with a view to 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 avoiding market fragmentation.
3. In the European Parliament, the Committee on the Internal Market and Consumer Protection (IMCO) and the Committee on Civil Liberties, Justice and Home Affairs (LIBE) were both designated as committees responsible for the subject-matter in accordance with the joint committee procedure under Rule 58. Two co-rapporteurs were appointed: Brando Benifei (S&D, Italy) from IMCO and Dragoş Tudorache (Renew, Romania) from LIBE. In addition to the two above-mentioned committees responsible for the subject-matter, the Committee on Legal Affairs (JURI), the Committee on Industry, Research and Energy (ITRE) and the Committee on Culture and Education (CULT) were designated as associated committees. The co-rapporteurs published their draft report on 20 April 2022.
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 2021², while the European Committee of the Regions delivered its opinion on 2 December 2021³.

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 [European Committee of the Regions: European approach to artificial intelligence –Artificial Intelligence Act \(revised opinion\).](#)

5. On 18 June 2021, the European Data Protection Board (EDPB) and the European Data Protection Supervisor (EDPS) issued a joint opinion on the proposal⁴.
6. The European Central Bank (ECB) was asked to express 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. The ECB delivered its opinion on 29 December 2021 and presented it to the Working Party on Telecommunications and Information Society (hereinafter: WP TELECOM) on 10 February 2022.

II. WORK WITHIN THE COUNCIL

7. In the Council the examination of the proposal was carried out in the WP TELECOM. The WP TELECOM started discussing the proposal under the Portuguese Presidency in several meetings and workshops held between April and June 2021.
8. The analysis of the proposal continued under the Slovenian Presidency in several meetings and workshops held by the WP TELECOM. Following these meetings, the entire text of the proposed regulation was presented in detail by the Commission and preliminarily discussed by the delegations. The Slovenian Presidency also organised a half-day informal meeting of the Council of Telecommunications Ministers devoted exclusively to the AIA proposal, at which ministers confirmed their support for the horizontal and human-centric approach to regulation of AI. Lastly, on the basis of written comments from delegations, the Slovenian Presidency drafted a first partial compromise proposal covering Articles 1 to 7 of and Annexes I to III to the AIA proposal and presented it to delegations at the WP TELECOM meeting on 30 November 2021.

⁴ [EDPB-EDPS Joint Opinion 05/2021](#).

9. The French Presidency started its work with a discussion on the partial compromise prepared by the Slovenian Presidency, which took place at the WP TELECOM meeting on 11 January 2022. Then the French Presidency prepared the following parts of the first compromise proposal, taking into account the written comments and drafting suggestions received from delegations under the Slovenian Presidency (on Articles 8 to 29 and Annex IV) as well as written comments and drafting suggestions on the remainder of the text (Articles 30 to 85 and Annexes V to IX), which had been submitted by most delegations at the end of January 2022. In the course of this work the French Presidency prepared a series of partial compromise texts covering Articles 8 to 85, as well as the annexes and recitals, which were presented and discussed in the WP TELECOM meetings on 18 January 2022, 10 and 22 February 2022, 10 and 22 March 2022, 28 April 2022, and 5, 10 and 17 May 2022. In addition, to address the specific concerns of Justice and Home Affairs experts, the French Presidency reworked certain provisions in this area across the whole draft Regulation. These provisions were then presented and discussed at the WP TELECOM meeting on 7 April 2022, which was organised jointly with the JHA experts. **The French Presidency completed the the process of preparing the first Council compromise proposal on the AIA.**
11. On 24 March 2022, the French Presidency asked the delegations in WP TELECOM to submit their written comments and drafting suggestions on reworked Articles 40 to 55a, with a view to starting work on the second partial compromise text on the proposal. From now until the end of its term in office, the French Presidency intends to carry out a more detailed analysis of the comments concerning Articles 53 to 55a (*Measures in support of innovation*) and to submit the second partial compromise text covering those articles for discussion at one of the last WP TELECOM meetings in June 2022.

12. On the substance, bearing in mind the applicability of other important pieces of legislation relevant for the development and use of AI in the European Union, such as the GDPR and EU consumer protection legislation, etc., the French Presidency revised the text so as to balance the need to protect security and fundamental rights with the need to support growth, competitiveness and innovation, by providing clear and proportionate rules for stakeholders that support the development of ethical and responsible AI in the EU.

More specifically, the main issues addressed by the French Presidency in the section of the first compromise proposal that it reworked (Articles 8 to 85 and Annexes IV to IX) are as follows:

(a) Requirements for high-risk AI systems

13. Many of the requirements applicable to high-risk AI systems, such as those provided for in Chapter 2 of Title III of the proposal, were clarified and adapted to make them less stringent or burdensome for stakeholders, such as those concerning data quality and those referring to the technical documents that SMEs are to produce in order to demonstrate that their high-risk AI systems comply with the requirements.
14. In addition, the French Presidency recognised in the revised text that certain requirements might be incompatible with others, which might lead to a need for compromises during the implementation, for example with regard to accuracy and robustness or protection of privacy (data minimisation) or equity. That recognition is intended to ensure a degree of flexibility for providers of high-risk AI systems when setting up their risk management systems.

The French Presidency also specified which types of risks are covered by the risk management provisions, so as to ensure that providers are required only to address risks linked to the development of AI systems in respect of which they are able to take reasonable and realistic measures.

(b) Responsibilities of various actors in the AI value chain

15. 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 defined, the French Presidency introduced a number of amendments clarifying the allocation of responsibilities and roles, in order to better reflect what it means to design, market or operate an AI system. For example, the revised text contains additional provisions facilitating more effective cooperation between providers and users. The text also aims to clarify the relationship between responsibilities under the proposed AIA and those that already exist under other legislative acts such as the GDPR.
16. The French Presidency also considered it important to have a clearer indication in the text of situations in which other actors in the value chain are required to assume the responsibilities of a provider.

(c) Compliance assessments, enforcement and governance

17. In order to meet concerns regarding the excessive complexity of the compliance framework proposed in the AIA, the French Presidency provided a number of clarifications and simplifications in respect of the provisions on assessment of the compliance to be achieved by each type of high-risk AI system, whilst retaining the main components of the approach proposed by the Commission and using the legislation in the new AIA legislative framework as the basis.
18. The French Presidency also amended the provisions on market surveillance in order to make them more effective and easier to implement, bearing in mind the need for a proportionate approach in this regard.

19. The French Presidency also substantially amended the provisions on the AI Board ('the Board'), with the aim of ensuring greater autonomy and of strengthening its role in the governance architecture of the AIA. The composition of the Board was changed to include representatives of the Member States and independent experts, with the Chair chosen from among the representatives of the Member States. The Board will play a greater role in the uniform application of the AIA, by providing advice and recommendations to the Commission, for example on the need to amend Annexes I and III, and by providing opinions on a whole range of issues related to the application of the AIA. In addition, on the basis of the changes introduced by the French Presidency, the Board will also facilitate cooperation with the relevant EU bodies, expert groups and networks on matters concerning the AIA.
20. More generally, the French Presidency simplified the governance structure by removing the notion of supervisory authority at national level, giving Member States more flexibility in the designation of the entities responsible for the coordination and implementation of the AIA. For the same reasons, the French Presidency also extended the deadlines within which Member States should implement the provisions on putting the governance architecture in place.
21. In view of the new and complex nature of the proposed AIA, and in order to respond to the need to support the implementation of this Regulation, the French Presidency decided to add a new article imposing an obligation on the Commission to develop guidance on the application of the Regulation, focusing on subjects such as the application of the requirements for high-risk AI systems, prohibited AI practices and the practical implementation of the provisions on substantial changes. The text also clarifies that such guidance could be requested by both the Member States and the Board, or could be drawn up on the Commission's initiative.

22. Finally, the penalties for breaches of the provisions of the proposed AIA for SMEs and start-ups have been reduced to reflect their importance in the AI ecosystem and to take account of their specific constraints.

(d) Provisions relating to law enforcement authorities

23. In order to take into account the specificities and particular constraints of law enforcement authorities, the French Presidency made a number of amendments to the provisions on the use of AI systems for law enforcement purposes. In particular, certain definitions, such as ‘biometric categorisation system’, ‘biometric identification system’ and ‘real-time biometric identification system’, were refined in order to clarify which situations would fall under the prohibition in Article 5(1)(d) and which instances of the use of such systems would not. Some amendments were also made to the provisions set out in Articles 5(1)(d) and 5a in order to clarify their scope and align their wording with the terminology used in the relevant EU legislation on justice and law enforcement.
24. In addition, in order to provide more flexibility for law enforcement authorities in cases of particular urgency, a new provision was added to make it possible to request ex post authorisation from those authorities to derogate temporarily from the conformity assessment procedures for high-risk AI systems. The compromise proposal also provides for an exception to the transparency obligations for the use of AI systems for the purpose of emotion recognition, which is allowed by law in the context of criminal investigations.
25. Lastly, the compromise proposal contains a number of minor amendments aimed at ensuring greater flexibility in the use of high-risk AI systems by law enforcement authorities, for example regarding the information concerning their high-risk AI systems that should be recorded in the EU database, or concerning the obligations relating to the confidentiality of the information held by those authorities.

(e) **General purpose AI**

24. The French Presidency revised the provisions on general purpose AI systems in order to better balance the requirements and obligations between the providers of such systems and the providers of high-risk AI systems likely to use them. The conditions for placing such systems on the EU market were brought in line with the overall objective of the AIA proposal, which is to enhance trust in AI and to promote a competitive, responsible and ethical AI market in the EU. These amendments aim to ensure a fair distribution of responsibilities and a level playing field throughout the AI value chain.

(f) **Measures in support of innovation**

25. With the aim of creating a more innovation-friendly and future-proof legal framework, the French Presidency substantially amended the provisions on measures to support innovation. Firstly, it was clarified that the regulatory AI sandboxes, which are intended to create a controlled environment for the development, testing and validation of innovative AI systems under the direct supervision and guidance of the national competent authorities, should also allow innovative AI systems to be tested under real-life conditions. Secondly, new provisions were added to allow unsupervised real-world testing of AI systems under specific conditions. In both cases, the text clarifies how these new rules are to be interpreted in relation to other existing sectoral legislation on regulatory sandboxes. Finally, in order to reduce the administrative burden on small innovative enterprises, the compromise provides for a special derogation whereby micro enterprises (as defined by the EU) will be exempted from the obligation to set up a quality management system, which was identified as one of the main costs for these actors.

III. MAIN OUTSTANDING ISSUES

26. Apart from the main questions addressed in the compromise proposal and outlined above, the French Presidency identified the following points as additional issues that will require further analysis during subsequent discussions on the proposal:

(a) **Definition of an AI system and classification of AI systems as presenting a high risk**

27. Some Member States still consider that the definition of an AI system is ambiguous and too broad and that it does not provide sufficiently clear criteria for distinguishing AI from more traditional software systems. There are also doubts about the classification of AI systems as high-risk on the basis of the general terms of the proposal, raising concerns that such an approach could also encompass harmless AI systems that are not likely to cause serious fundamental rights violations or other significant risks. These issues are important in the overall design of the AIA and will require further discussion.

(b) **Adjusting the governance framework**

28. Some delegations suggested that the governance framework could be adjusted, claiming that application that is too decentralised at national level in cyberspace could have limitations. It might be useful to examine whether the governance framework as currently proposed could be revised, at least partially, in order to address these concerns.

(c) Further clarifications on the provisions on law enforcement authorities

29. Although some delegations had called for a separate legal instrument, or at least a separate chapter in the AIA proposal, which would address the specific needs of certain public authorities in the areas of law enforcement, migration, asylum or financial investigations, it appears that the vast majority of Member States support the current horizontal approach of the AIA proposal. However, although the explicit exclusion of national security from the scope of the proposal has been broadly welcomed, some delegations continue to consider that further clarification of the concept of national security is necessary in order to clarify what is excluded and what is not. Moreover, the various specific provisions on law enforcement that have been partially revised by the French Presidency may require further analysis and fine-tuning, for example those concerning prohibited AI systems and the exceptions in Article 5, where some Member States have requested stricter measures, while others have expressed support for the use of AI by law enforcement authorities to be less limited by prohibition and by classification as high-risk.

(d) Delegation of powers to the Commission

30. The provisions on the possibility of updating the list of artificial intelligence techniques and approaches set out in Annex I and the provisions on updating the list of high-risk AI systems set out in Annex III may require further adjustments. They now require the Commission to submit a regular report to the European Parliament and to the Council evaluating the need for such amendments, but some Member States have indicated that such a broad delegation of powers to the Commission in this respect may need to be further limited.

(e) **Relationships with other instruments**

31. Although the French Presidency has made considerable efforts during the drafting process to ensure the consistency and synergies of the proposed AIA with the general EU legislative framework, in particular with the existing requirements set by the General Data Protection Regulation, the Data Protection Law Enforcement Directive and the New Legislative Framework, the need remains for further analysis of the elimination of possible legal divergences in order to minimise the risks of non-compliance, avoid legal uncertainty and duplication and facilitate enforcement efforts.

IV. CONCLUSIONS

32. Coreper is invited to take note of this Presidency progress report with a view to submitting it to the TTE (Telecommunications) Council at its meeting on 3 June 2022.
