

MEMBER STATE comments on first part of third compromise proposal on AIA (document 12206/1/22 REV 1; Arts 1-29, Annexes I-IV)

Reference	Third compromise proposal	Drafting suggestion	Comment
Article 6 (3)	<p>AI systems referred to in Annex III shall be considered high-risk <u>if in any of the following cases:</u></p> <p><u>(a) the output of the system is immediately effective with respect to the intended purpose of the system without the need for a human to validate it;</u></p> <p><u>(b) the output of the system consists of information that constitutes the sole basis or is not purely accessory in respect of the relevant action or decision to be taken by the human,</u> and may therefore lead to a significant risk to the health, safety or fundamental rights.</p> <p>In order to ensure uniform conditions for the implementation of this Regulation, the Commission shall, no later than one year after the entry into force of this Regulation, adopt implementing acts to specify</p>	<p><i>AI systems referred to in Annex III shall be considered high-risk unless if the output of the system is not purely accessory in respect of the relevant action or decision to be taken and may therefore lead to a significant risk to the health, safety or fundamental rights.</i></p> <p><i>In order to ensure the uniform conditions for the implementation of this Regulation, the Commission shall, no later than one year after the entry into force of this Regulation, adopt implementing acts to specify further the circumstances where the output of AI systems referred to in Annex III would be purely accessory in respect of the relevant action or decision to be taken nature with regard to the output of the relevant high-risk AI systems referred to in Annex III. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 74, paragraph 2.</i></p>	<p>As a general approach, we support further clarifying the scope of Annex III. Clearly Annex III has its limits – even without any amendments to Article 6(3) it is evident that, for example, section 3(a) in Annex III which includes AI systems that are intended to determine access to educational institutions would not extend to an AI-based tool used for fixing grammar mistakes in the process of drafting the institutions acceptance decision. Thus, it may indeed be useful to elaborate some of the limitations of the scope of Annex III.</p> <p>However, we have two major concerns with the proposal in Article 6(3): Firstly, it is absolutely crucial that decision-support systems, which do not directly make a decision or action referred to in Annex III but which provide decision suggestions or determine certain inputs for making a decision, would not be excluded from the scope of the AIA. As we have elaborated in a previous comment, there is a lot of empirical evidence suggesting that the AI</p>

Reference	Third compromise proposal	Drafting suggestion	Comment
	<p>further the purely accessory nature of the information across the relevant high-risk AI systems referred to in Annex III. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 74, paragraph 2.</p>		<p>systems which lack direct decision-making capacity but provide input for the human decision-maker constitute some of the most problematic cases to date from the fundamental rights perspective. On this note, we strongly support that the proposed Art 6(3)(a) has been removed.</p> <p>The other concern relates to the ‘purely accessory’ concept – it introduces unnecessary ambiguity into the scope of the Regulation. There remains a risk that even if the Commission provides clarifications on what is the nature of ‘purely accessory’, then providers may still have to carry out a subjective assessment on whether its system is accessory or not. This will almost certainly lead to different interpretation of its meaning, diminished compliance, and further difficulties in supervision. Indeed, the four years of applying the GDPR provides important insight that the ambiguities concerning the scope and the consequent differences in interpretation will significantly undermine the compliance and enforcement of a regulation. Thus, any horizontal layer that</p>

Reference	Third compromise proposal	Drafting suggestion	Comment
			<p>impacts the scope of the AIA should be narrow and explicit.</p> <p>There are several elements which amplify concerns with the ‘purely accessory’ standard. Firstly, the proposal seems to ignore the fact that whether something is merely accessory or not is not only a question of how the system is designed by the provider, but also a question of how the AI system is in practice used by specific users. European Parliament research service has recently outlined in its study into new technologies that „One of the important considerations on product safety and new technologies and digital solutions is examining them as part of a system rather than in a vacuum”, meaning that “safety features (and safety concerns) emerge not only within the technology or digital solution itself, but also in their interaction with other components and digital solutions within the product”</p> <p>https://www.europarl.europa.eu/thinktank/en/document/IPOL_ATA(2022)733971). Yet, the current proposal in Article 6(3) seemingly ignores this logic as it is based</p>

Reference	Third compromise proposal	Drafting suggestion	Comment
			<p>on the notion that the provider can <i>ex ante</i> assess the impact of its AI system, without having knowledge of the context within which it is later used. As a result, where the provider and users are not the same, there would be many cases where the provider could not be certain in the system development phase, whether it should comply with the requirements of the AI Act or not. Simultaneously, it also creates significant circumvention risks (e.g. there will likely be a temptation for providers to establish in their contractual terms with users that the high risk AI system should only be used in a way which would be considered as ‘purely accessory’ in order to seemingly escape its obligations even where users would factually use the AI system in a non-accessory manner).</p> <p>Additionally, considering its ambiguity and the fact that the accessory nature is very difficult to assess when the AI solution is used as part of highly complex systems, any supervision of the AIA would be significantly more difficult</p>

Reference	Third compromise proposal	Drafting suggestion	Comment
			<p>compared to the original Commission proposal.</p> <p>Based on the above, we would like to see a more explicit list of horizontal use cases in Article 6(3). One solution might be to establish an explicit list of horizontal use-cases that would not be included in the scope of Annex III (e.g. this list could potentially be included as a separate annex, which the Commission could update in line with Article 7). We would also like to see a mechanism provided for the Member States for procedurally modifying this list, should the need arise.</p> <p>In any case, if the ‘purely accessory’ concept is nonetheless adopted, Article 6 (3) should further explain its limited scope. Our amendments would improve the wording as it would be made clear that this is a limited exception to the classification under Annex III.</p>
7 (2) (i)	<u>(i) the magnitude and likelihood of benefit of the AI use for individuals,</u>	(i) — the magnitude and likelihood of benefit of the AI use for individuals, groups, or society at large.	We propose to delete this addition. The purpose of assigning AI systems as ‘high-risk’ is to minimize the risks these systems

Reference	Third compromise proposal	Drafting suggestion	Comment
	<u>groups, or society at large.</u>		may pose. If an AI system poses a risk of harm to the health and safety or a risk of adverse impact on fundamental rights, then such negative impacts should be tackled regardless of what are simultaneously the benefits of the AI system. Fundamental rights cannot be traded off for the sake of any „benefit“, be it for individuals, groups or society at large. Thus, if the idea of this addition is that in case the system involves significant benefits, then its risk to health, safety or fundamental rights do not have to be mitigated, then that is most likely in violation of Article 52 of the EU Charter of Fundamental Rights.

For specifying the relevant provision, please indicate the relevant Article or Recital in 1st column and copy the relevant sentence or sentences as they are in the current version of the text in 2nd column. For drafting suggestions, please copy the relevant sentence or sentences from a given paragraph or point into the 3rd column and add or remove text. **Please do not use track changes**, but highlight your additions in yellow or use ~~strikethrough~~ to indicate deletions. You do not need to copy entire paragraphs or points to indicate your changes, copying and modifying the relevant sentences is sufficient. For providing an explanation and reasoning behind your proposal, please take use of 4th column.



Council of the European Union
General Secretariat

Brussels, 04 October 2022

WK 13233/2022 INIT

LIMITE

TELECOM

WORKING PAPER

This is a paper intended for a specific community of recipients. Handling and further distribution are under the sole responsibility of community members.

CONTRIBUTION

From:	General Secretariat of the Council
To:	Working Party on Telecommunications and Information Society
Subject:	Artificial Intelligence Act - EE comments on 1st part of 3rd compromise proposal (doc. 12206/1/22 REV 1; Arts 1-29, Annexes I-IV)

Delegations will find in the Annex the EE comments on 1st part of 3rd compromise proposal on Artificial Intelligence Act (doc. 12206/1/22 REV; 1 Arts 1-29, Annexes I-IV).