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WORKING PAPER

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CONTRIBUTION

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

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
Recital (6)	“A system that uses rules defined solely by natural persons to automatically execute operations should not be considered an AI system.”		<i>Comment:</i> Decision Trees are AI algorithms whose output can be encoded as rules by natural persons. This class of algorithms is often used to produce an initial set of ‘business rules’, then reviewed/modified/tweaked by an expert before being deployed. Although the word ‘solely’ may exclude, in principle, Decision Trees, the legislation could be circumvented.
Recital (8)	“In the case of ‘real-time’ systems, the capturing of the biometric data, the comparison and the identification occur all instantaneously, near-instantaneously or in any event without a significant delay.”		<i>Comment 1:</i> There is a fundamental issue with regards to the meaning of the term ‘real-time’ and the usage in the text of ‘real-time’ biometric and related prohibitions. Certain machine functions could be considered real-time unintentionally. An AI system (as any digital/computer system) can run in ‘real-time’, aka provide an output as soon as an input is provided, irrespective of how/where is deployed. <i>Comment 2:</i> A definition of ‘capturing’ should be provided as there is no definition of ‘capturing biometric data’, aka: is taking a picture defined as ‘capturing biometric data’? Or if the act of ‘capturing’ is related to the processing of the raw material (photo, blood sample, fingerprint) to ‘extract the person identifiers’? Depending on the intent of the word ‘capturing’, off-line/back-office/post-

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			processing activity would be included in the definition of ‘real-time’ system. We must ensure that these processes which are already in place are not interrupted by this regulation.
Recital (19)	“In addition, this Regulation should preserve the ability for law enforcement, <u>border control</u>, migration or asylum authorities to carry out identity checks in the presence of the person that is concerned, in accordance with the conditions set up out in <u>Union and</u> national law for such checks.”	“In addition, this Regulation should preserve the ability for law enforcement, <u>border control</u>, migration or asylum authorities to carry out identity checks in the presence of the person that is concerned, in accordance with the conditions set up out in <u>Union and</u> national law for such checks.”	<i>Comment:</i> The issue is that certain functions already permitted to be carried out which are not “in the presence of the person” would be limited to being the the presence of the person. Example: Certain back office functions such as vetting or certain search and reference functions. The highlighted text should be deleted as rendering impractical real-world back-office operations.
Recital (44a)	“When applying the principles referred to in Article 5(1)(c) of Regulation 2016/679 and Article 4(1)(c) of Regulation 2018/1725, in particular the principle of data minimisation, in regard to training, validation and testing data sets under this Regulation, due regard should be had to the full life cycle of the AI system.”		<i>Comment:</i> It should be stated clearly what the meaning of ‘due regard should be had to the full life cycle of the AI system’ is? This is unclear.
Recital (48)	“Considering the significant consequences for persons in case of incorrect matches by certain biometric identification systems, it is appropriate to provide for an enhanced		<i>Comment:</i> Would this provision also include DNA profiling and identification/matching, or retina/iris/fingerprint/... identification? If so

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	human oversight requirement for those systems so that no action or decision may be taken by the user on the basis of the identification resulting from the system unless this has been separately verified and confirmed by at least two natural persons. Those persons could be from one or more entities and include the person operating or using the system.”		it would provide significant burden to already existing systems which allow for these necessary tasks. End-users are not experts and cannot provide manual/human review of the internals of the system, nor can they perform the matching manually/or by themselves without significant burden. This provision seems to be aimed at human validation of face identification systems, but given the generality of the wording (biometrics), it has very negative consequences across biometrics systems
Recital (66)	“However, changes occurring to the algorithm and the performance of AI systems which continue to ‘learn’ after being placed on the market or put into service (i.e. automatically adapting how functions are carried out) should not constitute a substantial modification, provided that those changes have been pre-determined by the provider and assessed at the moment of the conformity assessment.”		<i>Comment:</i> What happens if the ‘continuously-learning’ AI system is fed with wrong examples by the end-user? This is certainly a situation where the AI system should undergo a new assessment as its bias maybe increased.



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.