



Council of the European Union
General Secretariat

Brussels, 04 October 2022

WK 13258/2022 INIT

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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 - NL 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 NL 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 58	Given the nature of AI systems and the risks to safety and fundamental rights possibly associated with their use, including as regard the need to ensure proper monitoring of the performance of an AI system in a real-life setting, it is appropriate to set specific responsibilities for users. Users should in particular use high-risk AI systems in accordance with the instructions of use and certain other obligations should be provided for with regard to monitoring of the functioning of the AI systems and with regard to record-keeping, as appropriate. These obligations should not apply where the use is made in the course of a personal non-professional activity.	monitoring of the functioning of the AI systems and with regard to record-keeping, as appropriate. These obligations are without prejudice to other user obligations under Union or national law and should not apply where the use is made in the course of a personal non-professional activity.	In line with the change in article 29, we would like to add the phrase 'are without prejudice to other user obligations under Union or national law'.
Article 3	36. 'remote biometric identification system' means an AI system for the purpose of identifying natural persons , at a distance through the comparison of a person's biometric data with the biometric data contained in a reference database data repository, excluding verification/authentication systems whose sole purpose is to confirm that a specific natural person is the person he or she claims to be or is deemed to be,	data repository, excluding verification/authentication systems whose sole purpose is to confirm that a specific natural person is the person he or she claims to be or is deemed to be, and or systems that are used to confirm the identity of a natural person for the sole purpose of having access to a service, a device or premises, and excluding fingerprint comparison systems; and without prior knowledge of the user of the AI system whether the person will be present and can be identified;	We would like to see fingerprint comparison to be excluded from the definition of biometric identification systems. The definition is meant for facial recognition technology. Fingerprint identification works very different and is in practice 99.9% accurate. Including fingerprints in this definition will cause unnecessary burden.

Reference	Third compromise proposal	Drafting suggestion	Comment
	<p>and or systems that are used to confirm the identity of a natural person for the sole purpose of having access to a service, a device or premises; and without prior knowledge of the user of the AI system whether the person will be present and can be identified;</p>		<p>The same text must then also be added to recitals 8 and 21.</p>
Article 6(3)	<p>AI systems referred to in Annex III shall be considered high-risk if in any of the following cases:</p> <p>(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;</p> <p>(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, and may therefore lead to a significant risk to the health, safety or fundamental rights.</p>	<p>AI systems referred to in Annex III shall be considered high risk if in any of the following cases:</p> <p>(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;</p> <p>(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, and may therefore lead to a significant risk to the health, safety or fundamental rights.</p>	<p>The Netherlands appreciates the effort of the Czech Presidency to capture only those AI-systems that bring high-risk. However, in the Dutch view, the extra 'layer' that is currently added to the classification is unnecessary and creates legal uncertainty. The extra layer is from the perspective of the use of the AI-system. However, it is not always possible for the provider to determine how a user will use the AI-system. The criterium to a priori determine the risk of an AI-system is therefore almost impossible. We therefore prefer to remove paragraph 3 of this article. It is also unnecessary: the context based approach in title III provides clarity enough by limiting it to purposes.</p>
Article 29	<p>1. Users of high-risk AI systems shall use such systems and implement human oversight in accordance with the instructions of use accompanying the systems, pursuant to paragraphs 2 and 5 of this Article.</p>	<p>1. Users of high-risk AI systems shall use such systems and implement human oversight in accordance with the instructions of use accompanying the systems, pursuant to paragraphs 2 and 5 of this Article. The human oversight shall be implemented in accordance with the instructions of use accompanying the systems, pursuant to paragraphs 2 and 5 of this Article.</p>	<p>Our proposal is to slightly change the article to clarify that the use of high-risk AI-systems is without prejudice to other user obligations under Union or national law.</p>

Reference	Third compromise proposal	Drafting suggestion	Comment
Annex III		(b) Biometric categorisation systems (c) Emotion recognition systems	We propose to add biometric categorisation systems and emotion recognition systems as high-risk AI-systems, seeing the impact they can/may have on individuals.

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.