Memorandum by:

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Introduction

1. We welcome the initiative for Artificial intelligence – ethical and legal requirements. Being one of the first initiatives to regulate AI, it is of paramount importance that it will be as comprehensive and limpid as possible. The text leaves certain grey areas, and certain important factors may appear overlooked to the expert and/or public eye.

Risk-based approach

2. A first point of concern is that it may not be entirely clear how the Regulation interacts with other regulatory initiatives, namely the Digital Services Act (DSA). Even though it is expressly stated that the Regulation is consistent with the DSA, it is not elaborated how the AI as presented in the Regulation relates to the algorithms used by intermediary services in the DSA. This brings forward another point to draw attention to, namely the concept of 'High Risk' AI itself. The term 'high risk', as defined in the Regulation and its Annexes, leaves a (intentional?) gap as to what constitutes 'average risk' or 'low risk' AI.

3. On the one hand, the Digital Services Acts deals with services that host or transmit information online, which encompasses primarily social media

platforms. On the other hand, the 'Regulation for a European Approach for Artificial Intelligence' apparently deals with 'high risk' AI used at 'high risk' activities. According to the risk-based approach of the Regulation, AI systems are classified as creating 'unacceptable risk', 'high risk', and 'minimal risk'.[1] The only section of the Regulation that applies to AI systems other than 'high risk' AI is Title IV on the 'Transparency Obligations for Certain AI systems', which is essentially the obligation of AI systems to inform natural persons that they are interacting with an AI system.[2] Other important prerequisites including requirements,[3] obligations of providers and users[4] and conformity assessments[5] only apply to 'high risk' AI.

4. Thus, the effective regulation for AI classified as 'low or minimal risk' AI may appear not sufficiently addressed and/or missing in the expert and/or public eye.[6] Such AI arguably includes smart assistants, such as Google Assistant, Apple's Siri and Amazon's Alexa's, which run on millions of devices daily. By leaving the regulation for the development of non-high-risk AI allegedly and/or primarily to self-regulation or other modes of decentralised governance, it is argued that a huge market of AI is left essentially unclassified. A question that arises from the risk-based approach of the Regulation is the gap between 'high risk' AI and 'low risk' AI, as no 'average risk' AI is created/expressly referred to. Thus, the current Regulation appears to have loopholes, which hardware and software AI manufacturers and/or other actors may use to circumvent certain requirements and maximise business and/or industry practices involving data collection. To the extent that the risk-based approach is the chosen method of regulation, we are therefore calling on the European Commission to take further steps towards the enlargement of the risk-based approach for AI, and to introduce similar/equivalent/proportionate standards for 'average' and 'low or minimal risk' AI in the current Regulation and/or by virtue of a new legal instrument of secondary legislation or otherwise, at the EU level, specifically for

[1] 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 (2021/0106), 12
[2] Ibid, Article 52
[3] Ibid, Chapter 2
[4] Ibid, Chapter 3
[5] Ibid, Chapter 5
[6] Ibid, 12

this type of AI. This would enable the Commission to produce a complete EU AI strategy.

AI and its impact in the field of competition

5. Another point which the Commission could turn its further attention to is the competition rules in the digital sphere. It is well known and documented that certain technology giants have influential power in all aspects of technology. An example on point is the penalty the Commission imposed on Google, for promoting its own services in search results, while reducing the rankings of competing services through its algorithm.[7] Considering the increased use of AI in services, it is evident that AI and algorithms have a far-reaching effect nowadays. As such, they may enable large tech companies to gain unfair competition advantages/dominance over rivals and/or may modify the intellectual property and other business rights landscape in the EU and beyond. This can be done through AI generated creations[8] and search engines using algorithms of their own to prioritise certain results. It is emphasised again that the proposed Regulation scope should be expanded as elaborated in the previous section. The Commission should take steps to discourage and/or further frame such practices and thereby create a pluralistic digital environment for tech companies and consumers alike, while balancing citizens' interests in an inclusive digital world.

Introduction of new rights

6. In the European digital public legal order, the Commission should also consider the introduction of new rights in the Regulation and/or wider regulatory framework, to ensure that *in effect* 'AI is safe, lawful and in line with EU

[7] Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service (European Commission, 27 June 2016) https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784

[8] European Parliament resolution of 20 October 2020 on intellectual property rights for the development of artificial intelligence technologies (2020/2015(INI), 20 October 2020) 14https://www.europarl.europa.eu/doceo/document/TA-9-2020-0277_EN.html

fundamental rights.[9] The new rights proposed derive from the rapid development and global adoption of AI systems, which have been integrated in digital life, and beyond. It is proposed to formulate the digital version of modern rights deriving from more conventional rights such as the rights for the Respect of Private[10] and Family Life and Protection of Personal data,[11] enshrined in the EU Charter of Fundamental Rights, and analogous to the right to be forgotten as implemented in the GDPR.

7. The right not to be manipulated[12] and the right to be neutrally informed online appear very important, as algorithms today handle global flows of information and misinformation. It would constitute an additional safeguard to ensure that the AI in question adheres to the principles of freedom of information. The right to meaningful human contact[13] goes beyond the transparency obligation in the Regulation, or human oversight. That would appear necessary where autonomous AI makes critical decisions, such as in medical contexts, where meaningful human contact plays a crucial role. The Charter of Fundamental Rights should play a more central role in the Regulation, serving as the basis for new rights for the digital age.[14]

Conclusion

8. Although the Regulation is an important step towards regulating AI, it lacks a wider perspective. The correlation of the AI described in the Regulation and the AI enshrined in the DSA should be clarified. What is more, the risk-based

[9] Artificial intelligence – ethical and legal requirements (European Commission https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12527-Artificial-intelligence-ethical-and-legal-requirements_en

[10] Article 7

[11] Article 8

[12] Technological convergence, artificial intelligence and human rights (Parliamentary Assembly, Recommendation 2102 (2017) https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23726&lang=en

[13] Human rights in the robot age: Challenges arising from the use of robotics, artificial intelligence, and virtual and augmented reality (Rathenau Instituut 2017) 44 https://www.rathenau.nl/sites/default/files/2018-02/Human%20Rights%20in%20the%20Robot%20Age-Rathenau%20Instituut-2017.pdf

[14] See 3. A. Andreou, S. Laulhé Shaelou, Doris Schroeder, Current Human Rights Frameworks (Sherpa project of Smart Information Systems, Horizon 2020, 2019) https://doi.org/10.21253/DMU.8181827 and 2. R. Rodriges, A. Panagiotopoulos, B. Lundgren, S. Laulhé Shaelou, A. Grant, Regulatory options for AI and big data (Sherpa project of Smart Information Systems, Horizon 2020, 2020) https://doi.org/10.21253/DMU.11618211

approach followed in the Regulation leaves much room for manoeuvre. Not only ‘low risk’ AI has a much lower threshold of requirements, but it lacks a clear definition. Also, there is a noticeable gap between ‘high risk’ AI and ‘low risk’ AI, as there is no mention of ‘average risk’ AI. This loophole is one that must be addressed before the Regulation is put into force, as it can create legal uncertainty. Certain aspects of AI such as the impact on competition may have been overlooked and, considering the control that big tech companies could have through their AI systems, the Commission should reflect on the wider effects of AI. Finally, the Commission should consider introducing new rights in the Regulation, similar to the right to be forgotten in the GDPR. The rights proposed are the right not to be manipulated, the right to be neutrally informed online and the right to meaningful human contact.