SIENNA submission to the European Commission:

Feedback on the Inception Impact Assessment on the proposal for a legal act for artificial intelligence

10 September 2020

Introduction

This document provides feedback on the European Commission's Inception Impact Assessment on the proposal for a legal act laying down a requirement for artificial intelligence, based on the findings and results of SIENNA, a European Horizon 2020-funded project (2017-2021).[1] This submission reflects only the views of contributors[2] that have prepared this input based on their research in the SIENNA project.

SIENNA (Stakeholder-Informed Ethics for New technologies with high socio-ecoNomic and human rights impAct) is looking into ethical, legal and human rights issues and is developing ethical guidelines for human genomics, human enhancement and AI & robotics. It has received funding under the European Union's H2020 research and innovation programme under grant agreement No 741716.

Recommendations on 'A. Context, Problem definition and Subsidiarity Check'

We welcome the language that puts fundamental rights and societal values first. In particular, we strongly support the statement that the "*ultimate objective is to foster the development and uptake of safe and lawful AI that respects fundamental rights across the Single Market by both private and public actors while ensuring inclusive societal outcomes.*" Unlike the European Commission White Paper on AI where the focus was on building consumers' and businesses' trust in AI to increase uptake of the technology, the Inception Impact Assessment rightly prioritises the protection and safety of individuals and society at large. While we recognize there are many beneficial applications of AI, any deployment must be accompanied by a necessity and proportionality assessment, as well as ensure adequate and sufficient measures are taken to protect the fundamental rights and societal values from potential harms.

In developing this objective further, impacted human rights that must be considered include social, economic, and political rights (e.g., right of self-determination; to work; to the enjoyment of just and favourable conditions of work; to social security; to education; to the enjoyment of the highest attainable standard of physical and mental health; to vote; to equality before the law; to an effective remedy and to a fair trial), as well as related impacts on democratic processes. Additionally, attention

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must be paid to enhancing protection of vulnerable groups and individuals, who might be especially affected by the adverse impacts of AI.[3]

Recommendations on 'B. Objectives and Policy options'

We recommend a combination of Option 2 (EU legislative instrument setting up a voluntary labelling scheme) and Option 3 (EU legislative instrument establishing mandatory requirements). A legislative instrument should go beyond high-level principles and obligations. However, the framework cannot be too specific or detailed, as that risks unintentionally narrowing the scope and impact of the framework. Furthermore, the legislative framework must be agile enough to respond to the rapid development of AI and related technologies. As such, an EU legislative instrument should involve both ex-ante and ex-post enforcement mechanisms.

In regard to the sub-options of Option 3, we believe that Option 3(b) (limiting the scope to high-risk applications) *may* be sufficient *if* the determination of 'high-risk' is well-constructed. However, given this determination will be a crucial element of the whole framework and will have a significant impact on whether the framework will effectively serve its purpose, extreme caution should be taken to set the criteria in a manner that is robust. We do not believe the approach proposed in the European Commission White Paper and reiterated in this document is sufficient. To avoid the danger of leaving some high-risk applications under-regulated, this approach could be supplemented with an open-ended clause, for instance, with a requirement to conduct a human rights impact assessment (HRIA) or other relevant impact assessment. Additionally, those applications deemed high-risk should be subject to rigorous prior conformity assessment.

Regardless of whether the framework is limited to high-risk applications, specific rules will be necessary for specific categories of AI applications, such as biometric identification. In some cases, this should include a ban on some applications, including AI-enabled large-scale scoring of individuals,[4] AI-based racial profiling systems and biometric recognition facilitating mass surveillance (understood as a surveillance that is indiscriminate, not targeted against a specific individual[5]).

Option 2 (EU legislative instrument setting up a voluntary labelling scheme) can be one complementary way to enhance trust and verify compliance with certain rules. However, it is vital that this must not be understood as a *replacement* for legal responsibility. Additionally, voluntary certification labels must not become self-serving or a business-manipulated front for hiding risks and harms.

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[3] Jansen, Philip., et al, 'SIENNA D4.1: State-of-the-art Review: AI and robotics', April 2018, https://www.sienna-project.eu/digitalAssets/787/c_787382-l_1-k_sienna-d4.1-state-of-the-artreview--final-v.04-.pdf.
[4] High-Level Expert Group on Artificial Intelligence, *Policy and Investment Recommendations for Trustworthy Artificial Intelligence*, Brussels, 26.09.2019, p. 20, https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=60343.
[5] EDRi, *Ban Biometric Mass Surveillance A set of fundamental rights demands for the European Commission and EU Member States,* Brussels, 13.05.2020, https://edri.org/wp-content/uploads/2020/05/Paper-Ban-Biometric-Mass-Surveillance.pdf.

We strongly recommend against Option 0 (baseline) or Option 1 (no EU legislative instrument). We believe that the EU should lead in setting baseline standards of protection of fundamental rights and societal values. There are already many soft initiatives in existence, to varying degrees of efficacy, and they have a role to play in protecting and promoting ethical values and fundamental rights. However, the role of the EU should be in establishing a strong legal framework to guarantee the protection and promotion of these rights, including, for example, addressing legal issues of liability and other ensuing harms. Without EU leadership, Member States will continue to act individually, which creates fragmentation and confusion for all stakeholders.

Recommendations on 'C. Preliminary Assessment of Expected Impacts'

We do not agree that there are no direct significant negative social impacts or environmental impacts expected from the proposed measures. Further assessment of expected impacts associated with the proposed regulatory framework for AI is needed, particularly in regard to social and environmental impacts. For example, more understanding is needed on how the various proposed options influence the way individuals and society understand trust and whether certain options might promote a false sense of trustworthiness in AI and algorithmic decision-making. Additionally, as AI is a technology with a significant environmental impact (e.g., energy consumption, resource extraction, disposal), certain proposals that encourage the development and use of AI will lead to more environmental impacts. Furthermore, the impact assessment should evaluate the risks of not acting.