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Position Paper on the Commission's Proposal for a Regulation of the European Parliament and of the Council on Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts (COM (2021) 206final)

Berlin, 2 August 2021

Artificial intelligence is at the helm of modern digital politics. The rapid developments in this technology are producing significant advances in different fields of other technology and society. In recent years, the use of artificial intelligence (AI) has seen a pronounced uptake by businesses and governments alike. This rapid development has been accompanied with growing concerns about the proper use of AI and associated ethical boundaries. Regulation of AI has become one of the main goals the European Commission has set itself for its current term. Alongside other papers, a White Paper on AI was published in 2020, with this having set the stage for the debate on further corresponding regulation.

With the now published AI Act, the European Commission has set out rules for the general use of artificial intelligence as well as requirements for certain types of AI. eco – Association of the Internet Industry would like to take this opportunity to provide some remarks and comments on this proposal.

I. General remarks

In its position paper on the White Paper on Artificial Intelligence, eco warned against laying down overly specific rules for the use of AI. From the perspective of the Internet industry, these rules would be too complex to handle within different scenarios and would be prone to getting into conflict with sector–specific regulation. On the other hand, eco set out the point that the field of application – i.e. which AI systems are to be covered by which layer of regulation – needs further clarification in order for companies to have clarity on whether their systems are subject to stricter high-risk regulation or less rigid low-risk regulation. The draft of the AI Act, which has now been presented, has taken up on many of these aspects and added further clarity to them, a development welcomed by eco. While appreciating the fact that one major critique has been addressed in this draft, there are still a few more aspects, which the Internet industry regards as useful to be considered in the further debate.

II. On the regulation in detail

- **On Article 2: Scope**

The scope of application for this regulation is rather broadly set out with, in general,

only minor limitations. Especially when it comes to defining high-risk AI systems, which also implies further and stricter regulation, the scope of the regulation set out in Article 2 only allows for limited insights. eco would recommend a more precise definition of high-risk AI-systems so as to avoid complications from the interpretation of this provision.

- **On Article 5:**

eco by and large agrees with the Commission's proposal for general interdictions for the use of AI systems. However, the Internet industry sees the necessity to further clarify the extent to which a material distortion of a person's behaviour can be identified as such, and how the interconnection of the use of the AI system and the change in behaviour can be properly validated. Recital 16 addresses this complex issue; however, open questions remain as to how a possible interconnection can be proven and how a decommissioning of a corrupt AI system can take place. An additional question in this context also stems from the statement that an AI may cause psychological harm. What is also unclear here is how psychological harm can be properly determined – which would require medical examination of the person in question. In addition, the regulation refers not only to psychological harm or detriment to a person, but also to the likelihood of the AI system to cause such harm. While eco understands the Commission's approach to ex ante elimination of problems arising from the deployment of AI, we would also like to point out that this formulation is unclear and potentially prohibitive for the deployment of AI systems, given that it addresses potential harm emanating from such systems which is impossible to disprove. eco would recommend reviewing the regulation's text, picking up on the general idea of the topic – which the Internet industry fully supports – but clarifying the language. This would be required to actually make it applicable and not fall into an unclear situation, which again would open up the regulation for broad interpretation by different national actors, such as regulators or courts.

eco understands that the Commission has put in place a clear statement on the interdiction of social scoring, i.e. measuring behaviour of citizens and evaluating it for specific governmental purposes, and sees a balanced and well-considered approach in the draft regulation. Interdicting social scoring through governments is an essential matter for preventing discrimination based on machine-made observations, recommendations or decisions, and may help in creating trust in the technology.

This is also the case for the deployment and use of real-time remote biometric identification, e.g. the deployment of AI over observation cameras in order to identify persons present in a certain environment, which is also interdicted according to the Commission's plans. eco acknowledges that this provision is also helpful for creating trust in AI and that the Commission's possibilities are limited in the questions of national security within its Member States. In addition, eco would also like to point out that measures for remote biometric real-time identification should by no means made a requirement for private actors to be used within their own surveillance systems, e.g. in railroad stations.

- **On Article 6: Classification rules for high-risk AI systems**

In contrast to the Commission's positioning in the White Paper from 2020, eco welcomes the Commission's approach to more clearly defining the classification of high-risk AI systems. While generally sound and traceable, eco would like to recommend a further elaboration on the description of the function AI systems play in the respective fields and sectors in which they are to be deployed. While the inclusion of systems in core areas critical for the functioning of the products and services within the respective regulations and directives is understandable, it is in turn questionable as to whether aspects and areas of said products and services which are not critical should be subject to the same level of regulation, e.g. in farming applications. eco recommends a clarification of this paragraph's language – excluding the use of AI systems for non-critical functions – in order to increase uptake of new technologies.

With regard to the more general approach of the fields and systems covered under Article 6.2, respectively Annex III, eco would also like to point out that, while clear and understandable, the proposed fields of application should be further specified and narrowed down respectively so as to avoid an overly broad field for application and legal uncertainty for companies.

- **On Article 9: Risk management system**

eco agrees with the general provision to include a risk management system reflecting on weaknesses and threats emanating from the use of AI systems in their respective environment and for their specific purposes. The prospects set out in Article 9 on deploying and iteratively updating the risk assessment of an AI are flexible enough to allow for an adequate analysis. However, making way for a system, which is too complex and bureaucratic for such an analysis, should be avoided, and a provision should be included that this risk management system should be at a reasonable level for operators and companies deploying these systems.

- **On Article 10: Data and data governance**

eco understands that training data for AI and the governance thereof is an integral part to the functioning of an AI system, and that particular care needs to be taken in high-risk applications. eco further acknowledges that data policies and data politics are already subject to many different legislations and that further regulation of data – including non-personal data – is currently under debate within the European Union. The question therefore still stands as to how far the specific provisions in Article 10 are still necessary. These provisions increase the complexity of development and deployment of AI systems and, in eco's view, are also governed through other regulations, such as the GDPR and legislation soon to be passed, with the latter including, for example, the European Data Governance Act, the European Data Act and the ePrivacy Regulation. In addition, the provisions do not seem to be intended

to resolve liability issues arising from faulty systems, which would prove to be a valid point for inserting them. As such, in conclusion, the data governance provisions in the AI regulation appear to be redundant in relation to other provisions therein and general data governance rules and regulations. eco recommends reviewing this article in light of the aspects previously mentioned.

- **On Article 12: Record-keeping**

In contrast to many other aspects of the regulation, the aspects of record-keeping appear to be very precise and detailed. eco warns against pursuing a regulation which is too detailed and specific, with this creating the risk of being overly cumbersome and unsuitable for the processes and tasks some systems may fulfil. eco appeals for a review of this article, specifically concerning the requirements laid down under Point 4, in order to determine whether their level of detail is necessary.

- **On Article 14: Human oversight**

Human oversight over high-risk AI systems is, in the Commission's view, intended to ensure the proper functioning of the respective system. eco can thus understand why the Commission proposes undertaking steps to integrate human oversight into a regulative framework for AI. However, the way the Commission shapes the requirements for human oversight go far beyond reasonable requirements for the design and functioning of AI systems, including provisions to individually override output from the system or to terminate it altogether. Such drastic interventions – while they may be necessary on occasion – raise a question concerning the circumstances under which they are justified and legitimate. eco recommends reviewing the paragraphs for human oversight so as to make them more readily manageable for operators and developers of AI systems, allowing for larger-scale automated decision-making.

- **On Article 16: Obligations of providers of high-risk AI systems**

eco regards the provisions of Article 16 as being too bureaucratic. Notification requirements as they are set out in Article 16 lit. h would make distribution and deployment of high-risk AI systems cumbersome and complex for developers. These developers would be burdened with the task of communicating the use of the system to several authorities, which would – depending on structure and legislation of the respective Member States – be difficult to navigate. This complex issue would certainly have a greater impact on SMEs than on large IT companies who may already have established liaison in different Members States. eco calls on the Commission to revise this provision and – at least – to reduce it to a one-stop-shop mechanism, which would allow for easier deployment of high-risk AI systems within the Digital Single Market. Additionally, eco calls the necessity for a registration scheme for AI systems into question, especially when it is on top of a notification requirement. The question of whether AI systems should have a CE Marking is also

open. In summary, eco would like to point out that the requirements set up under Article 16 are bureaucratic, dissuasive and do not create added value to oversight or quality management of AI systems. The article should therefore be revised.

- **On Article 17: Quality management system**

The commitment to adding a quality management system to the already existing requirements is questionable. While eco appreciates that quality of AI systems is relevant, especially for high-risk AI systems, we cannot comprehend the decision to introduce a detailed set of rules for the quality management of AI systems. As the security obligations and the risk assessment – as well as the general obligations for operating or delivering high-risk AI Systems – already include conformity assessments, which are to be monitored continually, eco calls the additional requirement of a quality management system for AI into question, and recommends reviewing this article with a view to removing redundancy from the legislation. eco welcomes the Commission's intent for quality management to be proportionate to the size of the organisation, but would like to see the problem that this statement is not very clear compared to other European regulation being addressed. eco also recommends the exclusion of SMEs or a comparable provision, in order to make the legislation at least more accessible.

- **On Article 22: Duty of information**

The duty of information for high-risk AI systems is too bureaucratic and cumbersome for companies to effectively administrate. The requirement to inform all competent authorities of Member States would consume companies' resources and would additionally create different bureaucratic processes for notification. eco would like to recommend a review of this article and the insertion of a one-stop-shop mechanism as an alternative, in order to duly inform the public about errors in its AI systems.

- **On Article 29: Obligations of users of high-risk AI systems**

The obligations for users of high-risk AI systems appear to be unbalanced. According to Article 29.4, users are required to only use the system in the way it is supposed to be utilised. This is likely to interfere with testing expansion of the system, modifying it for better suiting its task. eco thus requests the Commission to rephrase the user obligation for high-risk systems in a way that allows for innovation and improvement.

- **On Article 41: Common specifications**

The Commission's motion to define common specifications by implementing acts derived from the AI Act would directly intervene in the shaping and operation of AI systems. eco does not support this idea, regarding it as counterintuitive and leading to the risk of "state-governed" AI systems. Market forces have in the past

demonstrated that harmonised standards, as foreseen in Article 40, can be achieved by the industry and meet the compliance requirements. Even more so, common specifications may thwart standardisation efforts of the economy. eco thus recommends the deletion of Article 41. In its absence, requirements for protecting exposed personal groups and compliance with fundamental rights would remain unaltered.

- **On Article 43: Conformity assessment**

While eco understands that companies need to be in compliance with regulation and that conformity with requirements should occur, the proposed procedure for assessing conformity appears as too bureaucratic and difficult for many companies to handle. This would divert the development of resources and the enhancement of systems towards reviewing requirements and checking compliance. eco would recommend leaving conformity assessment aside as a more abstract set of requirements against which providers of high-risk AI systems would have to check, and to leave it to these respective providers and notifying bodies to develop corresponding procedures and standards. Especially in the field of already regulated environments like the financial sector, this would ease the burden for AI providers. In addition, the formulation for re-assessing the conformity of a system after it has been substantially modified leaves questions open about how such an assessment could actually take place in a machine-learning environment. eco recommends closely reviewing Article 43 and double-checking on how bureaucracy in this chapter can be minimised.

- **On Article 51: Registration**

eco argues against a requirement for registering high-risk AI systems in addition to declaring their conformity and having them supervised. The provision adds bureaucracy to an already complex process and should be dispensed with.

- **On Article 52: Transparency obligations for certain AI systems**

eco deems the provision to inform exposed persons or users about the fact that they are interacting with an AI as redundant. Given the fact that goodwill actors tend to inform exposed persons about the fact that they are interacting with an AI, and that ill-willed actors on the contrary won't do this, this obligation only creates an additional compliance burden for companies. When it comes to notifying people about the fact that information was created through AI, this obligation must be viewed even more critically, as it could prove harmful to freedom of art and press. eco recommends reviewing this article and removing provisions for actors and companies who are acting in good faith or are able to claim freedom of press or art for themselves.

- **On Article 53: AI regulatory sandboxes**

eco welcomes the adoption of regulatory sandboxes for the development and testing of AI systems. The inclusion of this article is critical for the development, improvement and testing of AI systems. eco supports this motion and would welcome its inclusion in the final regulation.

- **On Article 54: Further processing of personal data for developing certain AI systems in the public interest in the AI regulatory sandbox**

The specific requirement for further processing of personal data is a welcome clarification under the auspices of the general provisions of the General Data Protection Regulation of the EU. eco appreciates this clarification, which will allow companies within AI regulatory sandboxes to enhance quality and functionality of their products. eco would, however, recommend a widening of the field of application for this provision to embrace all services and products developed in a sandbox and to not limit their use and development to a select group of systems. As the legal conformity for the collection of the respective data is fulfilled, this should not be considered a major problem.

- **On Article 55: Measures for small-scale providers and users**

eco welcomes the enhanced inclusion of smaller providers and the clarification that conformity assessments are to be reduced in the light of their economic capacities.

- **On Article 59: Designation of national competent authorities**

eco recommends assigning a single national authority for the oversight of AI system compliance with respective regulation. Distributing the competence for this task among different authorities would increase the risk of conflicting regulative requirements and could lead to legal uncertainty for providers of AI systems. eco recommends removing respective passages from the draft regulation and a clarification that there should be a single authority or, respectively, a single point of contact.

- **On Article 60: EU database for stand-alone high-risk AI systems**

As previously stated, an issue which eco sees as problematic is a database solution for high-risk AI systems, which is based on a reporting mechanism for operators or deployers. The Internet industry would recommend a light-touch approach for establishing such a database – unbeknown to the fact, whether it would be helpful – on the basis of the reporting of notifying authorities so as to avoid bureaucracy for companies.

- **On Article 62: Reporting of serious incidents and of malfunctioning**

The reporting system established under Article 62 appears in eco's view to be overly complex and takes the focus away from companies trying to identify malfunctions or incidents within their systems and to mitigate damage. Companies may have to report to several authorities and would possibly have to comply to different regulations with different reporting mechanisms. eco appeals for an efficient reporting mechanism based on a one-stop-shop reporting system, where information is disseminated through different market surveillance authorities.

- **On Article 64: Access to data and documentation**

The regulation foresees encompassing requirements for access to training data and documentation. This requirement, albeit understandable, is too detailed and specific, requiring companies to provide respective information via an API or a similar appropriate technical measure. This may not only cause conflict with confidentiality of data but also could create additional risks, depending on how and where the API is placed in direct intervention with the system. Additionally, the formulation could serve national authorities in devising local legislation on further defining and devising specific APIs. The latter could be used to access data and documentation of AI systems, but could also serve other broader purposes within Members States' interests, thus compromising the confidentiality of AI systems. eco calls for the rules for accessing data and information to be proportionate and to be clear and understandable for companies and authorities, limiting the possibility of abuse or exploitation of AI systems by supervisory institutions.

- **On Article 71: Penalties**

The framework for penalties seems inappropriately high. Infringements against the AI regulation are to be subject to a fine of up to 30 million Euro or 6 per cent of the annual turnover of a company. Non-compliance is to be penalised with 20 million Euro or 5 per cent of the annual turnover. eco regards these fines as too high, given the fact that other regulations and legislation already exist, which also foresee administrative fines, e.g. the GDPR. It should be clearly stated that fines can only be called upon when other fines will not be invoked. Otherwise the volume of the penalties may in total become an existential threat to companies and their respective employees.

III. Conclusion

The Commission's draft AI Act shows the general right way forward for a functioning and sound regulation of AI, which is necessary to further trust in the use of AI systems and which would still allow for innovation and economic development of AI systems. The risk-based approach the Commission has chosen for regulating AI and the differentiations of certain layers of applications is generally comprehensible and

sets a proper framework for the level-playing field for AI systems.

However, in order to avoid legal or regulatory uncertainty, a few aspects should be further considered, such as the definition of harm for persons and how far an AI system may immediately contribute to harming a person. These topics need further clarification and should be described more precisely to give guidance to companies and deployers of AI systems and supervisory bodies alike. General and abstract terms and definitions may add to legal uncertainty and a diverging application of the AI regulation. In addition, the supervision of AI systems and the reporting system for operators and deployers of AI systems should be given more consideration so as to avoid a bureaucratic system which would mainly impact smaller and medium sized companies. With changes to these general problems at hand, the AI Act can become a regulatory success.

About eco: With over 1,100 member companies, eco is the largest Internet industry association in Europe. Since 1995 eco has been instrumental in shaping the Internet, fostering new technologies, forming framework conditions, and representing the interests of members in politics and international committees. eco's key topics are the reliability and strengthening of digital infrastructure, IT security, and trust, ethics, and self-regulation. That is why eco advocates for a free, technologically-neutral, and high-performance Internet.