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DIRECTORATE-GENERAL FOR TRADE

Directorate B - Asia (I), Services and Digital Trade, Investment and Intellectual Property
Services and Digital trade

Brussels
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FOR THE ATTENTION OF Ms LUCILLA SIOLI, DG CNECT

**Subject: DG TRADE reply to ISC/2021/02775 (AI Regulation Proposal)
Positive opinion subject to comments being taken into account**

We thank DG CNECT for consulting DG Trade on the proposed AI Regulation and for the previous constructive exchanges which have accommodated already a number of points raised in our informal comments sent on 24 February 2021.

We have the following main comments as regards the proposal, which need to be taken into account (see most of them also reflected in the attached draft texts).

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3. Source code commitments: Annex VII, point 4.5, last sentence – alignment with Article 52(10) needed and Article 58 on confidentiality

We thank DG CNECT for having amended Annex IV on the technical documentation in relation to the disclosure requirements for programming/source codes, to bring this in line with the Union’s commitments in the EU-UK TCA with the UK, notably Article 12 DIGIT and its exception in paragraph 2.

That said, we note that **Annex VII, point 4.5** needs to be aligned with the wording in Article 52(10) which reads:

“10. When necessary to assess the conformity of the high-risk AI system with the requirements set out in Title III, Chapter 2 and upon a reasoned request, the market surveillance authorities shall be granted access to the source code of the AI system.”

Point 4.5 of Annex VII in its last sentence shortens this and simply states: “*When necessary* and upon a reasoned request, the notified body (...)” It is not clear what this “when necessary” means and request that it is added: “*When necessary to assess the conformity of the high-risk AI system with the requirements set out in Title III, Chapter 2 and*”. Only with this addition would it be clarified that a disclosure needs to be necessary to examine whether the safety requirements and the requirements to safeguard the fundamental rights are fulfilled.

Secondly, to ensure that the remaining ad-hoc disclosure obligation of the source code in Article 52(10) indeed fulfils the requirements of the exception included in Article 12(3)(b) DIGIT in the TCA with EU-UK¹, we suggest that in the confidentiality provision, an explicit reference to “source codes” is inserted in Article 58 (1)(b): commercially confidential information and trade secrets of a

¹ Article DIGIT.12: Transfer of or access to source code

1. A Party shall not require the transfer of, or access to, the source code of software owned by a natural or legal person of the other Party.
2. For greater certainty:
 - (a) the general exceptions, security exceptions and prudential carve-out referred to in Article DIGIT.4 [Exceptions] apply to measures of a Party adopted or maintained in the context of a certification procedure; (...)
3. Nothing in this Article shall affect:
 - (a) (...)
 - (b) a requirement by a regulatory body pursuant to a Party’s laws or regulations related to the protection of public safety with regard to users online, **subject to safeguards against unauthorised disclosure;**

natural or legal person, including *source codes and* intellectual property rights;
(...)

With these changes, we are more confident that indeed the requirements of the exception from the general prohibition of access to source codes laid down in Article 12 (2) DIGIT of the EU-UK TCA are fulfilled.

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c.c.:

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