

DECISIONS

COUNCIL DECISION (EU) 2022/2349

of 21 November 2022

authorising the opening of negotiations on behalf of the European Union for a Council of Europe convention on artificial intelligence, human rights, democracy and the rule of law

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114, in conjunction with Article 218(3) and (4) thereof,

Having regard to the recommendation from the European Commission,

Whereas:

- (1) In 2021, the Council of Europe Committee of Ministers established a Committee on Artificial Intelligence (CAI) for the period 2022-2024, with the task of establishing an international negotiation process to develop a legal framework on the development, design and application of artificial intelligence (AI), based on the Council of Europe's standards on human rights, democracy and the rule of law, and conducive to innovation.
- (2) On 30 June 2022, the Council of Europe Committee of Ministers instructed the CAI to speedily proceed with the elaboration of a legally binding instrument of a transversal nature, either a convention or a framework convention, on AI, based on the Council of Europe's standards on human rights, democracy and the rule of law, in line with its terms of reference, focused on general common principles, conducive to innovation, and open to participation by non-member States, while taking into account other relevant existing international legal frameworks or those under development.
- (3) Subsequently, the Chair of the CAI proposed a zero draft of a Council of Europe convention or framework convention on artificial intelligence, human rights, democracy and the rule of law (the 'convention'). That zero draft includes provisions on purpose and object, scope, definitions, fundamental principles, including procedural safeguards and rights applicable to all AI systems irrespective of their level of risk, additional measures for AI systems in the public sector and for AI systems posing 'unacceptable' and 'significant' levels of risk, a follow-up and cooperation mechanism, final provisions, including a possibility for the Union to accede to such a convention, and an appendix, under development, on a methodology for risk and impact assessment of AI systems.

- (4) The Union has adopted common rules that will be affected by the elements considered with regard to the convention. Those elements include in particular a comprehensive set of rules in the area of the single market for products ⁽¹⁾ and services ⁽²⁾ for which AI systems can be used, as well as secondary Union legislation ⁽³⁾ implementing the EU Charter of Fundamental Rights ⁽⁴⁾, considering that those rights are likely to be adversely affected in certain circumstances by the development and use of certain AI systems.
- (5) Moreover, on 21 April 2021 the Commission submitted a legislative proposal for a regulation laying down harmonised rules for AI, which is currently being negotiated by the European Parliament and the Council. The convention overlaps to a large extent with that legislative proposal in its scope, since both instruments aim to lay down rules applicable to the design, development and application of AI systems, provided and used by either public or private entities.
- (6) Therefore, the conclusion of the convention may affect existing and foreseeable future common Union rules or alter their scope within the meaning of Article 3(2) of the Treaty on the Functioning of the European Union (TFEU).
- (7) Negotiations should be opened with a view to concluding the convention as regards matters falling within the exclusive competence of the Union, in order to protect the integrity of Union law and to ensure that the rules of international law and Union law remain consistent.
- (8) It is possible that the convention will set high international standards concerning the regulation of AI impacting human rights, the functioning of democracy and the observance of the rule of law, in particular in light of the work already carried out by the Council of Europe in that field.

⁽¹⁾ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ L 210, 7.8.1985, p. 29); Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety (OJ L 11, 15.1.2002, p. 4); Directive 2006/42/EC of the European Parliament and of the Council of 17 May 2006 on machinery, and amending Directive 95/16/EC (OJ L 157, 9.6.2006, p. 24); Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys (OJ L 170, 30.6.2009, p. 1); Directive 2014/53/EU of the European Parliament and of the Council of 16 April 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment and repealing Directive 1999/5/EC (OJ L 153, 22.5.2014, p. 62); Regulation (EU) 2017/745 of the European Parliament and of the Council of 5 April 2017 on medical devices, amending Directive 2001/83/EC, Regulation (EC) No 178/2002 and Regulation (EC) No 1223/2009 and repealing Council Directives 90/385/EEC and 93/42/EEC (OJ L 117, 5.5.2017, p. 1); Regulation (EU) 2019/2144 of the European Parliament and of the Council of 27 November 2019 on type-approval requirements for motor vehicles and their trailers, and systems, components and separate technical units intended for such vehicles, as regards their general safety and the protection of vehicle occupants and vulnerable road users, amending Regulation (EU) 2018/858 of the European Parliament and of the Council and repealing Regulations (EC) No 78/2009, (EC) No 79/2009 and (EC) No 661/2009 of the European Parliament and of the Council and Commission Regulations (EC) No 631/2009, (EU) No 406/2010, (EU) No 672/2010, (EU) No 1003/2010, (EU) No 1005/2010, (EU) No 1008/2010, (EU) No 1009/2010, (EU) No 19/2011, (EU) No 109/2011, (EU) No 458/2011, (EU) No 65/2012, (EU) No 130/2012, (EU) No 347/2012, (EU) No 351/2012, (EU) No 1230/2012 and (EU) 2015/166 (OJ L 325, 16.12.2019, p. 1).

⁽²⁾ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ L 178, 17.7.2000, p. 1); Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market on services in the internal market (OJ L 376, 27.12.2006, p. 36); Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ L 133, 22.5.2008, p. 66).

⁽³⁾ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180, 19.7.2000, p. 22); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2.12.2000, p. 16); Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37); Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1); Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ L 119, 4.5.2016, p. 89).

⁽⁴⁾ Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, p. 391).

- (9) This Decision should be without prejudice to the participation of Member States in negotiations for the convention and to any subsequent Member State decision to conclude, sign or ratify the convention, or to the participation of Member States in negotiations for the Union to accede to the convention.
- (10) National security remains the sole responsibility of each Member State in accordance with Article 4(2) of the Treaty on European Union (TEU). In the implementation of the convention, it is for the Member States to define, in accordance with Article 216(2) TFEU, their essential security interests and to adopt appropriate measures to ensure their internal and external security while not rendering Union law inapplicable or exempting them from their obligation to comply with Union law.
- (11) All Member States are also Members of the Council of Europe. In view of that special situation, Member States present at the negotiations for the convention should, in accordance with the principle of sincere cooperation referred to in Article 4(3) TEU, in full mutual respect, support the Union negotiator in carrying out tasks which flow from the Treaties.
- (12) The European Data Protection Supervisor was consulted in accordance with Article 42(1) of Regulation (EU) 2018/1725 of the European Parliament and of the Council ⁽⁵⁾ and delivered an opinion on 13 October 2022 ⁽⁶⁾,

HAS ADOPTED THIS DECISION:

Article 1

1. The Commission is hereby authorised to open negotiations, on behalf of the Union, as regards matters falling within the exclusive competence of the Union, for a Council of Europe convention on artificial intelligence, human rights, democracy and the rule of law.
2. The negotiations shall be conducted on the basis of the negotiating directives of the Council set out in the addendum to this Decision, which may be revised and further developed as appropriate depending on the evolution of the negotiations.

Article 2

The negotiations referred to in Article 1 shall be conducted in consultation with the Working Party on Telecommunications and Information Society, which is hereby designated as the special committee within the meaning of Article 218(4) TFEU.

The Commission shall regularly report to the special committee referred to in the first subparagraph on the steps undertaken pursuant to this Decision and consult it on a regular basis.

Whenever so requested by the Council, the Commission shall report to it on the conduct and the outcome of the negotiations, including in writing.

To the extent that the subject matter of the negotiations falls partially within the competence of the Union and partially within the competence of its Member States, the Commission and the Member States shall cooperate closely during the negotiating process, with a view to ensuring unity in the external representation of the Union.

⁽⁵⁾ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39).

⁽⁶⁾ Opinion 20/2022 of the European Data Protection Supervisor on the Recommendation for a Council Decision authorising the opening of negotiations on behalf of the European Union for a Council of Europe convention on artificial intelligence, human rights, democracy and the rule of law (not yet published in the Official Journal).

Article 3

This Decision is addressed to the Commission.

Done at Brussels, 21 November 2022.

For the Council
The President
Z. NEKULA
