Government assessment of White Paper on Artificial Intelligence

Introduction

On 19 February 2020, the European Commission published its digital strategy for 2020-2025. In the White Paper on Artificial Intelligence (AI), the newly seated Commission outlined its vision for the key policy measures and investments in the field of AI. According to the Commission, Europe could become a world leader in AI.

The Commission emphasises that its vision is closely related to the communications 'Shaping Europe's Digital Future',[1] the European data strategy[2] and the European industrial strategy. AI is a fundamental innovation taking place around the world that has a wide-ranging impact (making it key technology) and affects all companies, sectors and business models. The main challenge for Europe is to respond rapidly and take a distinctive role. Artificial intelligence has huge potential. Because AI can be used to perform certain human functions and tasks, involves low marginal costs and is very easy to scale up, existing processes can be made much more efficient and doors can be opened to new products. Ground-breaking AI innovations could make a substantial contribution to the economy over time and play a key role in tackling societal challenges. Areas in which AI can make a difference include automated and semi-automated healthcare diagnostics, traffic safety and traffic congestion solutions through self-driving vehicles, more sustainable agriculture through smart livestock housing and automated farm machinery, and increased security through better law enforcement and a more efficient judicial process.

In the white paper, the Commission presents an approach to regulation and investment that promotes the implementation of artificial intelligence, but also addresses the risks associated with this emerging technology. Along this line, the Commission proposes two 'building blocks':
1) An ecosystem of excellence to support the development and acceptance of AI in the European Union. This includes an agenda for research, education and investment.
2) An ecosystem of trust with a regulatory framework for trustworthy AI that protects citizens and contributes to a strong European data economy.

Although it can be useful to work on the basis of distinctive 'ecosystems', the Netherlands is operating on the guiding principle that these systems are in fact very closely interconnected, and could not exist independently; in actual fact, they reinforce each other. The ecosystem of excellence creates the conditions for a growing single market with economic opportunities and prosperity that can benefit all citizens and companies. The ecosystem of trust creates the parameters within which the single market can also grow in ways that include AI-based applications. The three government letters on AI (Strategic Action Plan for Artificial Intelligence: SAPAI,[3] Safeguards against risks associated with data analytics by the government[4] and AI, public values and human rights[5]) constitute the basis of the Dutch position. Important building blocks for these letters included the previously published Commission communications[6] and the work of the external High-Level Expert Group on Artificial Intelligence (AI HLEG).[7] A guiding principle here is that the EU should utilise the societal and economic opportunities offered by digitalisation and AI by defining the appropriate human-centric frameworks based on fundamental rights, with a focus on legal certainty for citizens and companies. In doing so it should invest in safeguards and economic security where possible, thus promoting trust in the application of established and emerging technologies.

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[1] COM(2020)67.
[2] COM(2020)66..
[3] Parliamentary Papers, House of Representatives 2019-2020, 26 643 and 32 761, no. 640.
[4] Parliamentary Papers, House of Representatives 2019-2020, 26 643 and 32 761, no. 641.
[5] Parliamentary Papers, House of Representatives 2019-2020, 26 643 and 32 761, no. 642.
[6] Artificial Intelligence for Europe, COM(2018) 237, Coordinated Plan on Artificial Intelligence, COM(2018) 795 and Building Trust in Human-Centric Artificial Intelligence COM(2019) 168.
[7] Reports by High-Level Expert Group on Artificial Intelligence (AI HLEG) in 2018 and 2019 https://ec.europa.eu/digital-single-market/en/news/ethics-guidelines-trustworthy-ai and https://ec.europa.eu/digital-single-market/en/news/policy-and-investment-recommendations-trustworthy-artificial-intelligence.

1.1 General assessment of the ecosystem of excellence
Digital technologies such as artificial intelligence increasingly play a role in the day-to-day lives of citizens and companies. European cooperation on digitalisation, data and AI is vitally important, offering added value for such sectors as healthcare. This added value becomes particularly visible in times of crisis, for example in controlling outbreaks of infectious diseases such as the current COVID-19 pandemic. The use of healthcare data, other data sources and AI can contribute to efforts to track patterns of new infections across national borders and to develop new treatment strategies. We see that requests are now coming in from all over Europe to provide access to data (including for AI) to combat COVID-19 as efficiently as possible. The Netherlands welcomes the Commission's commitment, which follows on from and gives further substance to the Commission's previous communications.[8] Thanks to a strong position in research, infrastructure, practical applications and the large volumes of public-access and industrial data available, there is a solid foundation in the Netherlands and in Europe for achieving an ecosystem of excellence across a sector's entire value chain.

As indicated in the BNC file on 'Building Trust in Human-Centric AI', the Netherlands views establishing and connecting leading AI centres and knowledge institutions as a key aspect of the EU action plan.[9] The government supports European initiatives that were submitted as part of the EU call 'ICT-48-2020: Towards a vibrant European network of AI excellence centres', aimed at reducing fragmentation in the landscape of knowledge institutions and centres in the field of AI and working together to build a strong European network of research centres. The following considerations should also be taken into account. In order to create an ecosystem of excellence, the Netherlands emphasises the use of a 'learning approach'. AI developments in the EU can be analysed, including on an ex ante basis, through research, experiments and pilot projects within the framework of established legislation to determine whether and where problems arise in development and acceptance of AI. A learning approach also includes promoting transparency: how do the algorithms work and learn, and what are the public values on which we base our monitoring of the applications. This is in line with the approach of the external High-Level Expert Group on AI, which has developed Ethics Guidelines for Trustworthy AI.

Finally, further details are needed on the envisioned definition and financial consequences of the approach to regulation and investment that promotes the implementation of artificial intelligence, but also addresses the risks associated with this emerging technology.

If there are budgetary consequences for the Netherlands, these costs would be incorporated into the budget of the ministries with policy responsibility, in accordance with the rules on budgetary discipline. To secure extra funding to promote AI knowledge and innovation, options are being explored for a government-announced growth fund, still in development.

As far as EU funds are concerned, it is the government's opinion that such funding should be found within the financial framework of the EU budget for 2014-2020, as agreed by the Council, and that this should be in keeping with a prudent approach to the development of the annual budget. The government objectives for the next multiannual financial framework (MFF) will be a guiding factor in a comprehensive assessment of funds for the period after 2020. The government does not want to prematurely anticipate the decision-making process for the next MFF.

1.2. General assessment of the ecosystem of trust
The Netherlands wants to promote the development and application of artificial intelligence, acknowledging that AI offers opportunities for all kinds of societal goals. The policy and approach should be focused on utilising the full potential of AI, with due consideration for an ethical, human-centric approach and sufficient safeguards.

The Netherlands believes that legal safeguards regarding AI applications should be focused on the risk posed by an AI application. This currently seems to be in line with the Commission's intent to create a legal instrument that applies primarily to the deployment of AI in high-risk areas, as described in the ecosystem of trust. For that reason, the Netherlands supports the idea of a risk-

[8] See footnote 6.
[9] Coordinated Plan on Artificial Intelligence, COM(2018) 795.

based approach as chosen by the Commission. In recent letters to parliament on artificial intelligence, the government emphasised the importance of differentiating between low-risk and high-risk AI applications. From that perspective, the Commission's method for identifying high-risk areas and its approach to distinguishing between high-risk and low-risk seems positive for now. This should be supplemented by a commitment to build trust among citizens, trust in the AI applications themselves, and trust in the use of AI by the public and private sectors. Social acceptance of AI stems from the confidence among citizens that the development and application of AI is surrounded by the right frameworks and safeguards.

However, a deeper assessment of the ecosystem of trust requires a more tangible description of the risk-based approach envisioned by the Commission. For example, the criteria that will be used to identify the high-risk sectors and applications are not yet clear. Concrete details of the requirements and an explanation of their practical applicability are also needed.

In this context, the Netherlands believes that the following points should also be taken into account.

First, the Netherlands considers it imperative to safeguard European values and standards. If the option of creating an additional legal instrument is being considered in order to protect these values and standards, it is an absolute priority to ensure consistency with established legal frameworks, both European and international, and to clarify how these frameworks will interact, while respecting national competences as they apply to matters of national security.

Alignment with established (legal) frameworks – international, European and national – is vitally important, in part with a view to (i) taking into account the fact that the issue here is not the standards themselves, which are safeguarded by legislation, but rather their potential effectiveness, and (ii) limiting the regulatory burden. The Netherlands considers it essential to ensure that any additional standards supplement the established framework. For that reason, the Netherlands wants to focus on a number of specific obligations that would supplement the existing standards. This includes alignment with established supervisory and governance structures, such as the data protection impact assessment based on the General Data Protection Act (GDPR). The same applies to the established frameworks for law enforcement.

When developing policy and possible legislation in the field of artificial intelligence, the Netherlands advocates a 'learning approach' in which we use research, experiments and pilot projects to assess whether and where there are problems with regard to AI applications, training data and its quality, and processes surrounding these applications. It should then be considered how these problems can be resolved using established (legal) instruments, including legislation. If it becomes apparent from this learning approach that new legislation is needed, the question is whether this should be 'generic' – i.e. applicable to the entire AI domain – or specific to a single AI application. In this context, it is important for the results of the learning approach to be made available quickly, allowing for prompt investment in generic legal safeguards where necessary and possible, partly from a legal certainty perspective. From this perspective, the Commission's method for identifying high-risk areas and its approach to distinguishing between high-risk and low-risk seems positive for now. The Netherlands also welcomes the fact that the Commission has incorporated the results to date of the experiments with the ethics guidelines into the white paper under review. In principle, the Netherlands is opting to maintain this 'learning approach' in the process of seeking proportional risk mitigation.

Second, the Netherlands advocates use of an instrument with a narrow and clearly defined scope, with due consideration of further standards based on the risks of the AI application in question. It is vitally important for the Netherlands to make targeted and informed adjustments to the existing array of instruments, including the legal framework, in relation to AI. The Netherlands is therefore pleased that the Commission is pursuing the same approach. By adopting this approach, it should be possible to prevent over-regulation of AI applications. In that context, the Netherlands will ensure that effective supervision and low-threshold access to complaint and objection procedures remain possible.

Third, in fleshing out this approach there should be an explicit focus on the importance of critical infrastructure, national security, cybersecurity and the special position of law enforcement. For example, it is important to ensure the continued applicability of the specific data protection regime for implementation of the enforcement and investigative tasks of law enforcement, public prosecution services and other investigative authorities, and the statutory tasks of the intelligence and security services, and to select a similarly aligned system for any additional legislative instrument for AI applications.

Fourth, the Netherlands would like to propose that the Commission take the lead, where necessary, in adapting international legislation or bilateral agreements between the EU and third countries in which AI plays a role. This element is not covered in the white paper, but it is relevant, since AI applications will frequently enter the EU from third countries, and AI applications or data destined for AI will be exported from the EU.

Fifth, the Netherlands considers it advisable, in the further development of the legal instrument, to build on the AI lifecycle, as described for example by the OECD Expert Group on AI (AIGO).[10] Among other things, this means that the requirements and supervisory activities with regard to AI are determined for the separate phases in which AI is used. This includes being able to reconstruct actions when AI has been used. This is a very important aspect, which affects trust in AI use and has a legal basis in accountability when used by government authorities. This goes beyond storing algorithms, and extends to the ability to reconstruct algorithm use in context. This will provide all those involved with more clarity about which rules are applicable in the various stages of AI.

Sixth, the Netherlands believes that it is important to consider the long-term effects on democracy and the rule of law, the labour market and the economy. It is essential that frameworks are sufficiently future-proof and that they safeguard these values and interests in the long term.

Finally, the Netherlands would like to note that if there is a need to build trust and serve private citizens, then local and regional authorities could also have a role to play here

2. Capitalising on strengths in industrial and professional markets

The Commission refers to the opportunities for Europe from the perspective of industry, the research sector, a strong computing infrastructure and the large quantities of industrial data available. A European approach avoids fragmentation of the internal market and could promote innovation capacity in the field of AI. At the same time, the development and application of ethical and trustworthy AI could support the whole EU economy and reduce risks from certain applications of AI.

The Netherlands and Europe are approaching this digital transition from a unique starting point by building on their strengths. For the Netherlands, it is important that AI always serves the people and is a positive force for the achievement of fundamental rights in society. For an extensive response to/about the opportunities for Europe seen from an industrial perspective, please see the BNC file on a new industrial strategy for Europe.[11]

3. Seizing the opportunities ahead: the next data wave

The Netherlands supports the Commission's analysis of the upcoming data wave. Data is, after all, an important raw material for artificial intelligence. That is why making better use of data opportunities is also one of the priorities in the Dutch Digitalisation Strategy.[12] Although there is a great deal of European potential, it remains underutilised, while global competitors with their own vision on data access and data use are setting the tone worldwide. For that reason, the

[10] See the report on Artificial Intelligence in Society published by the OECD Expert Group on AI (AIGO): https://www.oecd-ilibrary.org/sites/eedfee77-en/index.html?itemId=/content/publication/eedfee77-en -ilibrary.org/sites/eedfee77-en/index.html?itemId=/content/publication/eedfee77-en.
[11] 'A New Industrial Strategy for Europe'. Published on 10 March 2020, COM(2020) 102.
[12] Parliamentary Papers, House of Representatives 2017-2018, 26 643, no. 541.

Netherlands appreciates the ambition of the European data strategy presented at the same time as the white paper on AI, and believes that it is generally well aligned with the existing policies of this government. For an extensive response, please see the BNC file on European data strategy.[13]

4. An ecosystem of excellence

4A. Working with member states

Due to the rapid global developments and billion-dollar investments in AI from the United States and Asia, it is necessary to intensify European investment through a coordinated European approach, raising it to €20 billion a year. The Netherlands endorses the urgency of a joint European investment agenda and welcomes the Commission's efforts to work on a revision of the 2018 coordinated action plan on AI, which is in line with and elaborates on the communications referred to in the introduction and the national AI strategy of this country (SAPAI).

4B. Focusing the efforts of the research and innovation community

In terms of research, the Commission will facilitate the creation of centres of excellence and testing centres that can combine European, national and regional investments. The Netherlands considers it important to establish and connect leading AI centres and knowledge institutions. The government supports European initiatives that were submitted as part of the EU call 'ICT-48-2020: Towards a vibrant European network of AI excellence centres', aimed at reducing fragmentation in the landscape of knowledge institutions and knowledge centres in the field of AI and working together to build a strong European network of research centres. For the Netherlands, it is important that the Commission's actions are aligned with the wide-ranging AI Research Agenda (AIREA-NL) published in November 2019 by the Netherlands Organisation for Scientific Research (NWO), which aims to initiate new research programmes and tools and achieve national and international synergy.[14]

4C. Skills

One of the measures mentioned by the Commission in this white paper is to establish and support networks of knowledge institutions, through the advanced skills pillar of the Digital Europe Programme. In this regard, the government indicated previously that public-private partnerships between the education sector and the business community do indeed offer opportunities to adapt educational courses and programmes more quickly and effectively to the preferences of the labour market. The Commission also refers to the proposals still to be presented for a Stronger Skills Agenda and an update of the Digital Education Action Plan (2018). The Netherlands welcomes these initiatives and will assess them on their own merits in due course; with regard to the action plan, such an assessment will also be based on insights gained in education and AI in a UNESCO context. More specifically, the Commission not only mentions that a 'lighthouse centre' would attract talent, but also describes an initiative aimed at developing a curriculum for AI software developers based on the ethics guidelines, as a reference resource for training institutions. The government can support this, in so far as it does not infringe on the responsibilities of educational institutions. Again, please note the measures that the government mentioned in the SAPAI, specifically regarding skills, and the government assessment in relation to skills in the BNC file on the digitalisation strategy and the data strategy.

It should be noted that the Netherlands agrees with the Commission that additional efforts should be made to increase the number of women being educated and currently employed in the field of AI. The Netherlands chairs a European Commission working group, which adopted the opinion on AI and Gender on 17 March 2020.[15] In addition, knowledge and acceptance of AI is being increased in the Netherlands through a 'national AI course' that is accessible to everyone free of charge. A special course for children has also been launched. With regard to digital skills and inclusion, it is important to ensure that the strategy does not widen the digital divide between different groups even further, but rather always aims to achieve digital inclusion.

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[13] COM(2020)66. The accompanying BNC file is being submitted to the House in parallel with this assessment.
[14] https://www.nwo.nl/en/news-and-events/news/2019/11/first-national-research-agenda-for-artificial-intelligence.html.
[15] Advisory Committee on Equal Opportunities for Women and Men, Opinion on Artificial Intelligence – opportunities and challenges for gender equality, 18 March 2020.

4D. Focus on SMEs

The Commission wants to promote access and use of AI by SMEs and to ensure that all digital innovation hubs help SMEs to understand and adopt AI. One digital innovation hub per member state should have a high degree of specialisation in AI. The Netherlands supports the Commission, but considers it important for this to align with the national actions and the current and future national and regional innovation hubs. In the Netherlands, AI entrepreneurship is already being promoted for and by SMEs through the Smart Industry programme. Five regional Smart Industry hubs and centres of expertise are mobilising companies, particularly innovative SMEs, by means of tools and training modules for responsible use of AI and data. The Smart Industry hubs organise workshops for SMEs, issue feasibility vouchers, and work with living labs and field labs, including efforts to develop digital skills. As part of the SME Digitalisation programme, workshops have also been set up where smaller companies, such as local bakeries, for example, can experiment with data. This is vital in order to ensure that SMEs are included in the digital transition.

4E. Partnership with the private sector

In the context of Horizon Europe, the Commission will set up a new public-private partnership for AI. For the Netherlands, it is important that this complements the established public-private partnerships in the member states. In the Netherlands, this takes place via the aforementioned Smart Industry hubs and via the overarching nationwide AI Coalition. Over 300 parties from the private sector, the research sector and public organisations are now working on concrete actions focused on AI (e.g. from SAPAI) in the fields of research and innovation, human capital and social acceptance, but above all they are also working to ensure that AI is applied more frequently in sectors and that platforms are created. There is also the Kickstart AI initiative launched by KLM, ING, Ahold Delhaize, Philips and the Dutch Railways (NS) to boost AI, in part by engaging in worldwide AI super challenges. Twenty-five new positions will be created for professors as well as and other academic appointments at academic institutions in the Netherlands. Local and regional authorities can also play an important role in establishing partnerships with the private sector. The local level is ideally suited to establishing living labs and field labs for experimenting with the use of AI, particularly for societal purposes.

4F. Promoting the adoption of AI by the public sector

The Commission considers it important for government organisations to capitalise on the opportunities that AI offers for such sectors as healthcare, energy, and transport and mobility,[16] while simultaneously having government authorities address the risks of deploying this technology. The Commission wants to draw up an action plan for developing, experimenting with and scaling up AI solutions in the areas of healthcare, agricultural administration (inspection) and public services. An 'Adopt AI programme' will be developed that supports the use of AI systems to help tackle the challenges facing society.

The Commission mentions a number of sectors in which Europe is well positioned to benefit from the potential of AI. In this context, the Netherlands emphasises the importance of including the security sector too. Security in the Netherlands and Europe is under pressure, including in the digital domain. As described in the National Cybersecurity Agenda (NCSA), there is a growing threat from professional criminals, and there are state actors focusing on digital economic and political espionage, as well as digital sabotage. The deployment of AI offers major opportunities when it comes to strengthening our security in the criminal justice system and in the financial and defence chains. The Netherlands appreciates the importance that the Commission assigns to developing, experimenting with and scaling up AI in the public sector. In this respect the Netherlands wishes to emphasise that before deploying AI, a decision will have to be made as to whether AI is a proportionate means in the context and for the purpose in question. The Netherlands also considers it advisable to look beyond the boundaries of sectors and to pursue public-private partnerships where possible. Systems for reaching agreements, such as Standard Business Reporting,[17] could be used for this purpose. Obviously, the Netherlands wants to apply models that are actually useful in addressing social issues. In view of the impact on the public

[16] Examples from the Ministry of Infrastructure and Water Management include land asset management and AI, and smart and timely maintenance of roads, bridges and tunnels using AI.

[17] www.sbr-nl.nl.

sector, it is vitally important to ensure that local and regional authorities are closely involved in the design and implementation of proposals and envisioned legislation.

The Netherlands welcomes the more frequent use of instruments (including those for public procurement) that promote innovation and the provision of accurate information about the options available. AI solutions for use within central government are often not developed by the government itself, but rather by private parties commissioned by the government. It is particularly important to appropriately assign responsibilities, for compliance with public values and fundamental rights in the design and development process, for example. In the case of self-learning algorithms, these responsibilities also need to be established clearly in operations and in the management process. This enables government authorities that procure AI solutions from private parties to hold companies accountable when those solutions are applied in practice. It also enables citizens to hold governments accountable for their responsibilities in society if the AI solution is applied to private citizens. This subject must be addressed in the tender itself and in the associated procurement conditions. Finally, in view of the impact on the public sector, it is important to ensure that local and regional authorities are also closely involved in the design and implementation of proposals and envisioned legislation.

4G. Securing access to data and computing infrastructures

The Netherlands endorses the importance of improving access to data and investments in computing infrastructure. This is explained in more detail in the aforementioned European data strategy.[18] The government appreciates the efforts to use the framework for the European data spaces to secure data control and to create more coherence between data from and for the public sector, the private sector and the research sector. It is precisely that cross-sector and cross-border component that deserves attention here, in the government's opinion. The aim of achieving this as much as possible according to the FAIR principles[19] is also in line with current Dutch data policy. The use of open standards for data exchange, standardised data and data definitions should also be considered, in order to increase opportunities for the use of AI by, for example, startups and SMEs.

4H. International aspects

The Netherlands considers it important that, in the review of the European Commission's coordinated plan, attention continues to be paid to international cooperation, since Europe is well positioned to promote human-centric AI worldwide.

The Netherlands proposes that the Commission take the lead, where necessary, in adapting international regulations or bilateral agreements between the EU and third countries in which AI plays a role. This is relevant, since AI applications will frequently enter the EU from third countries, and AI applications or data destined for AI will be exported from the EU.

In Europe and in international networks the Netherlands is pressing for fundamental rights to be safeguarded in technological developments. For example, the Netherlands is an active participant in two committees within the Council of Europe that deal with digitalisation and human rights: the Steering Committee on Media and Information Society (CDMSI) and the Ad hoc Committee on Artificial Intelligence (CAHAI). The Ad hoc Committee on Artificial Intelligence is currently exploring the feasibility of an international legal framework for AI, while the Steering Committee on Media and Information Society is preparing a recommendation that calls on states parties to address the human rights impact of algorithms in a timely and appropriate manner.

Possible changes to international regulations as a result of AI are being discussed in various forums that, in addition to EU member states, include like-minded non-EU countries as well as non-EU countries with very different views on AI. Such forums include the World Trade Organization (WTO), the International Telecommunication Union (ITU) and the Organisation for Economic Co-operation and Development (OECD). With a clear agenda and proactive submission of proposals in these forums, the European Commission can have a greater impact in discussions

[18] See footnote 2.

[19] FAIR https://www.go-fair.org/fair-principles: findability, accessibility, interoperability, and reuse of digital assets.

and negotiations. In that context, the Commission's strategy is determined by a wide range of relevant European regulations and policy choices that are used as a starting point. In response to the COVID-19 crisis, the government has also called on the European Commission to create the right conditions for AI, referring in this case, for example, to creating conditions for companies, products or services in order to protect European standards and values.[20] Finally, I refer you to the conclusions of the Telecommunications Council of June 2020, which set similar targets.

5. Ecosystem of trust: regulatory framework for AI

5A. Problem definition

In the white paper the Commission states that the use of AI by the government and by the business community may involve risks, particularly in relation to the protection of personal data, fundamental rights, and safety and security (e.g. liability issues). The Commission asserts that the specific nature of AI-based applications can lead to uncertainty about the effectiveness of compliance with and enforcement of fundamental rights. Various rights, such as the right to non-discrimination, the right to freedom of expression and the right to protection of private life, may be affected by AI.

The Netherlands recognises the risks to the application of, compliance with and enforcement of fundamental rights as formulated by the Commission in the white paper, and sees a need to take decisive action to mitigate these risks. In addition, the Dutch government sees that AI offers opportunities to strengthen fundamental rights. This view is shared by the Netherlands Institute for Human Rights. It is precisely on this point that the Netherlands sees an important competitive advantage for companies operating in the European market.

In that context, the Netherlands sees added value for action at EU level, especially since the protection of fundamental rights is guaranteed in all EU member states. First, the Netherlands wants to prevent fragmentation between member states, thus promoting a level playing field. Second, given the cross-border nature of AI, it would not be an obvious choice to regulate this field at national level. Third, the Netherlands sees that any national regulation may potentially lead to conflict with the principle of the free movement of data (for AI applications involving personal data)[21] or for applications involving non-personal data.[22]

5B. Possible adjustments to existing EU legislative framework relating to AI

The Netherlands shares the Commission's analysis that AI applications are regulated by a broad framework of EU legislation. Important examples include legislation on product safety and liability, fundamental rights, anti-discrimination, data protection and competition law.

However, the Commission also notes that there are gaps in the current framework. The Commission's view, which is shared by the Netherlands, is that the current legal framework can be improved even further by addressing some of these gaps. The Commission specifically mentions effective application and enforcement, limitations of scope of existing frameworks, and safety-related issues. In addition, the Netherlands acknowledges that the guarantees provided by the GDPR may be lacking when using AI applications that do not process any personal data, even though such applications may in fact entail risks for citizens or for public interests and values. Even when an AI application does process personal data, the Netherlands sees that there could be a need for further regulation, since it would be possible to provide better coverage for the specific risks related to AI. Moreover, there are specific characteristics and risks in the compliance with, enforcement of and application of fundamental rights in AI applications, and the GDPR and other legislation are not sufficiently tailored to address those risks.

For example, particularly with regard to non-discrimination, the Netherlands sees that the application of the current equal treatment framework sometimes leads to ambiguities, and that bias in AI systems or unconscious prejudices and stereotypes on the part of various actors involved in the development of AI applications could translate into discrimination. This could lead to unintentional mechanisms that exclude people and groups. In order to address discriminatory

[20] Dutch non-paper digitalisation in the EU recovery strategy for COVID-19.
[21] See footnote 4.
[22] Regulation (EU) 2018/1807 on a framework for the free flow of non-personal data.

applications caused by bias in AI at an early stage, the Netherlands is developing AI system principles for this specific issue that can help system designers to implement non-discrimination by design AI. The aspects considered here go beyond technology, also looking at awareness, process, effect, design and implementation of AI.

The Netherlands therefore shares the Commission's view that an additional legal instrument could have potential added value, as long as it builds on the existing frameworks and adds a number of specific supplementary details. This may also apply to the protection of other fundamental rights affected by AI. The legal instrument envisioned by the Commission will be described in more detail and discussed in the sections below.

5C. Scope of a future EU regulatory framework

In order to strike a balance between providing effective protection and reducing the regulatory burden, the Commission proposes a risk-based approach, which would impose certain rules on high-risk applications that would not be mandatory for lower-risk AI applications. The guiding principle here is that a regulatory framework for AI would apply to products and services that use AI.

According to the European Commission, an AI application is considered 'high risk' if two cumulative criteria are met:

1. The AI application is employed in a sector where, given the nature of the activities, significant risks may occur. There should be a specific and exhaustive list of sectors to be periodically reviewed in the context of developments in practice;
2. Moreover, AI applications in one of the listed sectors are used in such a manner that significant risks are likely to arise. The assessment of the level of risk could be based on the impact on the affected parties.

An application will only be considered high risk if it meets both criteria. Exceptions include specific situations where, due to the risks at stake, an AI application would as such be qualified as high risk by law.

The Netherlands supports the underlying idea that legal safeguards regarding AI applications should focus on the risk posed by an application. The Netherlands agrees that there should be differentiation between applications based on these risks. The risk-based approach will, in the Netherlands' opinion, need to be accompanied by a learning approach in which the specific risks of AI applications and the human factor in those contexts are constantly mapped and ways to mitigate those risks are identified.

The Netherlands supports the Commission's intention to create a specific scope for the instrument using cumulative criteria. Nevertheless, the Netherlands has doubts about the sector-based approach. It is very difficult to define the boundaries between different sectors, especially for AI applications in different stages of the AI lifecycle. Another issue is the major difference that could arise between the legal regimes for, on the one hand, AI applications that fall within a high-risk sector and similar applications and, on the other hand, different AI applications that fall outside that definition, but still pose inherent risks in another sector.

Defining such boundaries is also difficult due to the increasing cooperation between different sectors and government domains. In such circumstances, the different rules lead to ambiguity, uncertainty and the circumvention of rules. It must be about protecting European values, regardless of the sector in which the AI application is used. It is also necessary to take into account calculating behaviour by companies with regard to categorisation, which may possibly increase legal uncertainty. In the proposed risk-based approach, it will therefore be very important to correctly categorise sectors and applications.

With the above in mind, the Netherlands is reflecting on the best way to further specify the risk approach and looks forward to presenting more details soon. The Netherlands is currently considering a risk approach with a set of generic legal requirements that can be applied to all high-risk applications, possibly supplemented by additional requirements for each high-risk sector that are appropriate to the high-risk applications within that sector. When developing this in more

detail, account will need to be taken of, for example, the AI lifecycle, types of data, the human factor and forms of AI. The learning approach is at the heart of this, as it makes it possible to examine whether the intended risk approach will be sufficient and effective.

5D. Types of requirements

The Commission proposes requirements for AI applications, which fall under both cumulative criteria, in the areas of training data, transparency through compulsory data and record-keeping, robustness and accuracy, human oversight and biometric systems. These requirements are based in part on the experience gained with the Ethics Guidelines for Trustworthy AI. The requirements will apply in addition to pre-existing legal obligations. As the Commission also emphasises, investing in the development of safeguards that mitigate the risks of AI applications will contribute to trust in these applications. The Netherlands is therefore generally positive about the concrete requirements proposed, since they are aimed at increasing the transparency, quality and reliability of AI.

The Netherlands also considers it positive that the new regulatory framework complements and does not detract from established legal obligations, such as the GDPR or the Product Liability Directive. At the same time, the Netherlands welcomes additional rules that are more precisely focused on the effectiveness of established legislation and on the specific characteristics and associated risks of AI applications. The Netherlands has itself initiated such rules in the guidelines it has published for government authorities to mitigate the risks of data analytics and the subsequent decision-making processes and intervention.[23]

With regard to the specific requirements, the Netherlands would like to offer a number of relevant side notes. It is particularly important to elaborate on the requirements in further detail, focusing in particular on concrete requirements in the separate stages of AI or in specific situations in which AI is used. For example, the Netherlands would advocate permitting the processing of personal data (including 'sensitive personal data') during the development phase of AI, to the extent necessary to counteract discriminatory effects. The Netherlands would also like clarification of what should happen in situations where an AI application has been trained with data that was obtained illegally. The implications for the deployment of such AI applications need to be clear.

With regard to biometric identification, the Commission states that this is always considered a high-risk use, defining it as 'intrusive surveillance technology'. The Netherlands shares the Commission's view that biometric identification by means of AI (including facial recognition) may entail risks. It is important to first determine which applications present such a high risk. Partly for this reason, the Netherlands supports the Commission's call for a broad public debate on biometric identification in the public domain. In that context, the Netherlands calls for a debate on the definition used by the Commission and the scope of biometric identification. Such a debate should include consideration of the design and development phase of AI in these systems for processing sensitive personal data, in so far as such processing is necessary to counter discriminatory effects, in particular with regard to specific vulnerable groups.

5E. Addressees

The Commission proposes that in each case the requirements be addressed to the correct actor(s). Various actors are involved in the lifecycle of an AI system: from developers to users and producers. The obligations should be addressed to the actor(s) who, in view of the stage at which the AI system is at (design, pilot, test, implementation and post-implementation), is/are in the best position to deal with the relevant risk. Moreover, the requirements would apply to all AI applications on the European market, regardless of whether the producer is located outside the European Union.

The Netherlands endorses this principle. After all, depending on the lifecycle stage, these actors have a different involvement in the AI system and are, to a greater or lesser extent, able to address the risks involved. In that context, the Netherlands advocates building on the AI lifecycle,

[23] See footnote 4.

so that it is clear to all actors involved (the addressees) which rules they are subject to at the various stages of AI. The Netherlands also supports the Commission's intention to bring all AI applications on the European market within the scope of the instrument, in conformity with the approach adopted in the GDPR.

As far as liability is concerned, the Netherlands endorses the learning approach. There are guidelines that cover this, in terms of consumer damage arising from contracts as well as damage in tort. Nevertheless, it can be considered whether certain situations, problems or interests may in practice warrant amendments to legislation where AI is concerned. However, this should not lead to a loss of legislative flexibility. The current – technology-neutral – formulations, for example in the Product Liability Directive, ensure that the directive can be applied flexibly, and is therefore future-proof.

The government is aware of the significant opportunities to be had, but also recognises the risks that consumers may be exposed to by online algorithms. An uneven playing field has emerged between online and offline consumer protection measures. For that reason, the government is working to strengthen the position of digital consumers by putting the consumer first in the development and regulation of B2C applications of online algorithms. Government considerations include transparency obligations, the right to explanation, greater consumer control of algorithms that offer products and services, the right of objection, and the right to rectification. The government is also exploring how to define responsibility for misuse of consumer data, for example by large online platforms.

5F. Compliance and enforcement

The Commission asserts that a prior conformity assessment would make it possible to determine whether high-risk AI applications meet the set requirements. The Commission notes that this assessment should take into account the burden on SMEs, and that there should be an effective legal remedy for the various actors. An ex-ante conformity assessment, as mentioned by the Commission, will ensure that organisations reflect in advance on the quality and impact of the AI applications they use. This is also helpful in terms of monitoring the stated requirements. It is preferable to rely on instruments that already exist, such as the data protection impact assessment under the GDPR, rather than to develop a new instrument. This is because it is important for all actors and for the supervisory authorities to continue being able to implement the conformity requirements. In that context, the Commission should first carefully consider how it will affect the capacity of European companies to innovate and compete; self-regulation may also be an option. The regulatory burden of such a measure should also be clarified.

5G. Voluntary labelling for no-high risk AI apllications

According to the Commission, for AI applications that do not qualify as 'high-risk', an option would be to establish a voluntary labelling scheme, in addition to applicable legislation. The Netherlands is favourably disposed towards the Commission's proposal regarding the self-labelling of low-risk applications by producers. This is in line with the aforementioned learning approach and is part of a varied set of instruments where, with a view to legal certainty and equality before the law, the development of both legislation and other instruments such as standardisation or certification is also an option.

5H. Governance

The Commission believes that a governance structure involving cooperation between competent national authorities is indispensable in order to avoid fragmentation of responsibilities and to increase capacity in the member states. The Commission also believes that this is important for developing new instruments at EU level. According to the Commission, the establishment of such a structure at EU level should respect the established structures at national level.

The Netherlands supports the envisioned strengthening of governance at EU level in order to reinforce national structures. Research in the Netherlands has shown that supervisory authorities do not currently perceive any legal gaps; there is integrated supervision of algorithm use in AI

applications deployed by the government.[24] Since supervisory authorities should already be capable of performing the conformity assessment proposed by the Commission, the Netherlands does not currently advocate establishing a separate supervisory authority, based on the principle that such tasks should be aligned with existing frameworks and structures wherever possible.

Finally, it is important for the Netherlands that low-threshold complaint and objection procedures are in place when deploying AI applications, in order to quickly identify unintended effects, resolve them, and use the resulting data to improve the applications. To achieve human-centric AI, citizens and consumers must feel that they are being treated humanely.

[24] V. Frissen, M. van Eck, T. Drouwen, 'Toezicht op het gebruik van algoritmen door de overheid' (Supervising Governmental Use of Algorithms), report (25 November 2019).