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# Joint Non-Paper on the AI Act. France, Germany and Italy reach consensus.

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# 1 Joint non-paper

The European Union has been discussing the adoption of a legislative act regulating Artificial Intelligence (AI) since 2021. This year, 2023, has been especially busy for all stakeholders involved in the trilogue meetings, which envisage the adoption of the first-ever EU Regulation on AI in 2024. Europe has been marking a more rigorous approach compared to the position of the United States, which advocates for a more permissive regulation. Although the G7 has agreed on a voluntary code of conduct<sup>1</sup> for AI companies, the European Union continues to work on stricter legislation, classifying AI systems into four levels with different restrictions based on their capabilities. The European Commission initial draft of the AI Act includes a ban on systems which pose unacceptable risks for users and contravene EU values such as social scoring by governments, use of remote biometric identification in publicly accessible spaces for law enforcement purposes, with some exceptions, and systems that deploy harmful manipulative 'subliminal techniques'.

Nevertheless, the advances made until the end of 2023 have been put at stake by a recently leaked intergovernmental document<sup>2</sup>. On 20 November 2023, information was made public of a joint non-paper<sup>3</sup> proposed by France, Germany and Italy, which reveals the three major European countries' position on the regulation of AI. The document has quickly made the news due to the proposed shift towards a **less restrictive approach for foundation models**.

## 2 What is in the non-paper?

France, Germany and Italy are concerned about competitiveness. They believe that the EU should ensure “a balanced and innovation-friendly and a coherent risk-based approach ... reducing unnecessary administrative burdens on Companies that would hinder Europe’s ability to innovate, that will foster contestability, openness and competition on digital markets”. This is reason why the three major EU players reiterate that the AI Act should regulate the use of AI and its application rather than the technology itself<sup>4</sup>. They also insist on the distinction “between models and general-purpose AI systems that can be available for specific applications”.

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<sup>1</sup> ‘Hiroshima Process International Code of Conduct for Organizations Developing Advanced AI Systems’. Accessible at <https://www.mofa.go.jp/files/100573473.pdf>

<sup>2</sup> G. Volpicelli, ‘Power grab by France, Germany and Italy threatens to kill EU’s AI bill’ (November 2023).

<sup>3</sup> ‘An innovation-friendly approach based on European values for the AI Act - Joint Non-paper by IT, FR and DE’ (2023). Accessible at [https://media.licdn.com/dms/document/media/D4D1FAQFDheK57wCHMQ/feedshare-document-pdf-analyzed/0/1700488709678?e=1701302400&v=beta&t=nJGKBgj6zSw4oz4T\\_XEJcEiPy\\_vEquVYEohQeugcklg](https://media.licdn.com/dms/document/media/D4D1FAQFDheK57wCHMQ/feedshare-document-pdf-analyzed/0/1700488709678?e=1701302400&v=beta&t=nJGKBgj6zSw4oz4T_XEJcEiPy_vEquVYEohQeugcklg)

<sup>4</sup> “We believe that regulation on general purpose AI systems seems more in line with the risk-based approach. The inherent risks lie in the application of AI systems rather than in the technology itself. European standards can support this approach following the new legislative framework.” ‘An innovation-friendly approach based on European values for the AI Act - Joint Non-paper by IT, FR and DE’.

The European Parliament proposal<sup>5</sup> imposed requirements on developers of foundation models, regardless of their intended use such as mandatory testing by third-party experts. Certain requirements would exclusively affect models supported by higher computing capacities, resulting in a two-tier rule system<sup>6</sup>. The joint non-paper explicitly criticizes this approach and clearly distances from it. Instead, the authors of the non-paper favour the adoption of a “... mandatory self-regulation through codes of conduct. They could follow principles defined at the G7 level through the Hiroshima process and the approach of Article 69 of the draft AI Act and would ensure the necessary transparency and flow of information in the value chain as well as the security of the foundation models against abuse.”<sup>7</sup>

Furthermore, France, Germany and Italy push for the **implementation of model cards, used to provide information about a concrete model**, as a “mandatory element of this self-regulation”<sup>8</sup> hoping<sup>9</sup> as well as information of the architecture and functioning of the model. A competent authority should guide and ensure the application of this strategy.

Finally, the joint document frees developers of foundation models from any sanctions. After an undefined period and only after “breaches of the codes of conduct concerning transparency requirements are repeatedly observed and reported without being corrected by the model developers, a sanction system could then be set up following a proper analysis and impact assessment of the identified failures and how to best address them.”<sup>10</sup>

### 3 Is the proposed AI Act dead?

Less than a year before the European general elections in 2024, EU lawmakers try to find the necessary compromise in order to pass successfully the Act before the Commission’s renewal. One of the building blocks of the proposed AI Act is the control over foundation models. From the non-paper, it is evident that France, Germany, and Italy oppose strict regulations on foundation models, leading potentially to a deadlock situation, which may cut the adoption of the AI Act short or even postpone it indefinitely.

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<sup>5</sup> Art. 28, European Parliament, *Amendments adopted by the European Parliament on 14 June 2023 on the 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)0206 – C9-0146/2021 – 2021/0106(COD))*.

<sup>6</sup> Volpicelli, ‘Power grab by France, Germany and Italy threatens to kill EU’s AI bill’.

<sup>7</sup> ‘An innovation-friendly approach based on European values for the AI Act - Joint Non-paper by IT, FR and DE’.

<sup>8</sup> ‘An innovation-friendly approach based on European values for the AI Act - Joint Non-paper by IT, FR and DE’.

<sup>9</sup> ‘An innovation-friendly approach based on European values for the AI Act - Joint Non-paper by IT, FR and DE’.

<sup>10</sup> ‘An innovation-friendly approach based on European values for the AI Act - Joint Non-paper by IT, FR and DE’.

The European Parliament's original intention has been to impose binding code of conduct only for major AI deployers. The three EU countries consider that smaller European AI providers could lose customers' trust due to their competitive advantage compared to their larger counterparts, predominantly from the US. Therefore, the rules should be equal for all. While more than 100 scholars have signed an open letter<sup>11</sup> urging Brussels to include mandatory Fundamental Right Impact Assessments in order to ensure clarity, transparency and participatory oversight for public and private actor, France, Germany and Italy seem to prefer a less committing mechanism. They call it "mandatory self-regulation through codes of conduct" without delving into its signification or particular inner workings.

However, regulating high impact foundation models is an important legislative innovation because it will protect all European AI companies, which would otherwise bear the same compliance costs and requirements as large multinationals. The initial framework proposed by the European Parliament places the compliance responsibility on large providers thereby reducing the administrative burden of small and medium enterprises, which more closely corresponds to the idea of supporting European competitiveness. The reasons why European companies lag behind in the global AI race are multifaceted, ranging from lack of access to prime resources to insufficient investment. Digital regulation, however, is not among those causes. In addition, EU competition rules intend to support small and medium sized companies, and hamper those with significant market power. The Franco-German-Italian proposal goes in the opposite direction by introducing the same level of compliance for all. Therefore, it could be expected that mainly large tech companies would have the resources to meet the EU standards. If adopted, the strategy envisaged in the joint non-paper may turn not only the AI Act toothless, but also EU companies' competitiveness.

## 4 References

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'Hiroshima Process International Code of Conduct for Organizations Developing Advanced AI Systems',

'The Brussels Privacy Hub launches an appeal to approve a fundamental rights impact assessment in the EU law on artificial intelligence. The appeal has surpassed 110 signatures among distinguished academics who have signed up', September 2023,

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<sup>11</sup> 'The Brussels Privacy Hub launches an appeal to approve a fundamental rights impact assessment in the EU law on artificial intelligence. The appeal has surpassed 110 signatures among distinguished academics who have signed up' (September 2023).

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