CENTER FOR DEMOCRACY & TECHNOLOGY

CDT welcomes the opportunity to provide input to the Commission's choice of regulatory approaches for artificial intelligence. We respectfully offer the following suggestions:

1) **Be more precise**- no single approach to regulating "AI" will make sense in all scenarios. Instead the commission should start by clearly identifying potential or existing harms and work backward to identify the most effective points to apply legislative or regulatory solutions. After identifying and articulating these harms and appropriate points of intervention, the Commission should consider how to measure their likelihood of occurrence for clearly articulated use cases of well-defined types of applications. This assessment will help distinguish and prioritise which use cases should be further addressed through rules and regulations according to their relative urgency.

   Although we support the idea that some applications pose higher risks of harm than others, we urge the Commission to invest further effort in articulating which use cases of which applications it seeks to include if it chooses regulatory approaches targeting "high risk" applications. This additional clarity will help provide greater certainty for potentially impacted entities and will help guide regulators and other stakeholders as they develop and assess concrete regulatory proposals. We are doubtful, even with a narrowly drawn scope for "high risk" applications, that a single legislative instrument could effectively address the range of harms presented by the diverse array of applications and their use cases. As an alternative, we suggest that regulatory approaches might be more effective if they are geared towards preventing common harms, rather than aimed at governing classes of applications. We suggest that, through a harms-based approach, much of the EU's existing law could be brought to bear through clarification rather than through development of new rules.

2) **Clarify where existing law applies, identify gaps**- Many harms have already been addressed through legislation. Clarifying existing law for novel applications should be step one, and we support the Commission's intent to apply current law in its efforts to address risks posed by AI applications. Before pursuing additional legislative instruments, we suggest that the Commission and relevant regulatory bodies should make a coordinated effort to assess which parts of existing law might be used to address risks posed by AI applications.

   For example, in our response to the Commission's AI Whitepaper consultation, we suggest that remote biometric surveillance is likely prohibited in most cases because it cannot be justified under Art. 9 GDPR and conflicts with both the European Convention on Human Rights and the Charter of Fundamental Rights. Similarly, the Employment Equality Directive should apply whether or not employers use algorithmic tools, but the Commission may wish to clarify employers' obligations such as how they can satisfy their burdens of proof when using algorithmic application processing systems.

After mapping existing laws onto the use of AI applications, the Commission can then better identify any gaps in the law or areas for which novel legislative solutions may be necessary. We suggest that this effort should take place before moving forward with a new legislative instrument to help avoid redundancies, confusion, and uncertainty.

3) **Refine existing soft-law approaches-** CDT generally supports a combination of clarifying and enforcing existing law alongside voluntary adherence to principles expressed in soft law documents such as the findings of the High Level Expert Group on AI. As with our suggestions for the clarification and application of existing law, we believe that the principles expressed in various soft law documents would benefit from refinement through their application to concretely defined use cases of applications. Hypothetical examples or assessments of existing technologies according to these principles would help practitioners understand how to think about the development and use of applications through the lens of high-level principles.