Mr Didier Reynders
European Commissioner for Justice

Sent by e-mail only

Brussels, 22 February 2022
Ref: OUT2022-0009

Dear Commissioner Reynders,

The EDPB very much welcomes the Commission's initiative aiming at adapting liability rules to the digital age and artificial intelligence (AI) and wishes, in this context, to underline some elements that should be considered and could usefully complement the recent public consultation undertaken on this matter.

Building upon the 2018 evaluation of the Product Liability Directive and its main conclusions, the EDPB considers that the revision of this legal framework should ensure consistency with and complement the EU acquis in the field of personal data protection, in particular when it comes to the security of personal data processing and the use of AI systems to comply with this obligation.

While, under the GDPR, only controllers and processors would be liable, e.g., in case of a personal data breach, it is essential to consider the role and potential liability of providers of AI systems developed and made available in order to secure personal data processing. In such case, the EDPB considers relevant to strengthen the liability regime of providers of such AI systems, and ensure that processors and controllers can trustfully rely on those systems.

In their joint opinion 5/2021 on the proposal for a Regulation of the European Parliament and of the Council laying down harmonized rules on artificial intelligence (the AI Act)[1], the EDPB and the EDPS laid down a list of acknowledgements and recommendations. In accordance with this opinion, the EDPB wishes to reiterate some of its recommendations and to underline some points of interest that should be considered when adapting the Product Liability Directive to the new challenges of AI systems.

---

[1] EDPB-EDPS Joint Opinion 5/2021 on the proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act), 18 June 2021, available at: https://edpb.europa.eu/our-work-tools/our-documents/edpbedps-joint-opinion/edpb-edps-joint-opinion-52021-proposal_en

Andrea Jelinek
Chair of the European Data Protection Board
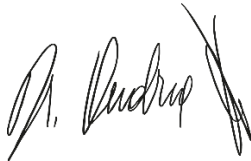
rue Wiertz, 60
1047 Brussels

Firstly, the EDPB wishes to renew a recommendation regarding the clarity of role attribution that was already raised in the joint opinion 5/2021, and that gains further weight with the possible introduction of new attributions under the Product Liability Directive. In order to promote an efficient liability framework for AI systems that are used as security measures for personal data processing, the EDPB wishes to emphasize the importance of the interplay with existing regulation, such as the GDPR, especially when it comes to the attribution of responsibilities. So as to ensure clarity regarding this category of systems, the EDPB considers that the role and responsibilities of the provider of the AI system must be precisely defined to bridge the gap with the existing framework binding data controllers and data processors.

Secondly, the EDPB wishes to draw the Commission's attention to the importance of several aspects of AI that were underlined in the joint opinion 5/2021. Because of the nature of AI, assigning the responsibility to a party in a claim that involves an AI system might be particularly difficult, especially when the burden of proof lies with the individual since the latter could be unaware of the fact that AI is used and, in the majority of cases, would lack the necessary information to prove the liability of the AI system. Hence, the explainability of the system must be foreseen at the step of its conception so that the results of all intended use, foreseeable use and foreseeable misuse that could lead to a potential claim, will be explainable by design. For that purpose, the EDPB wishes to stress the positive effects of including systematic human supervision and transparency for the end user on the use and operation of the AI system and on the deployed methods and algorithms. Limitations and risks on the use of AI systems due to different types of attacks, e.g., cyber-attacks and adversarial attacks, should also be taken into consideration in the responsibility and liability schemes. Providers of AI systems should be responsible for providing users with mitigation tools for known and new types of attacks and for embedding security by design throughout the entire lifecycle of the AI, whereas users of AI systems should be responsible for ensuring the safe operation of the system. The EDPB considers that these measures should be mandatory, in particular when the AI system is used as a security measure for personal data processing but does not process personal data itself. Moreover, the AI system should be accompanied with a thorough and accessible documentation, as this piece of information would be necessary for the data controller to understand the cause of a system failure, especially if it led to a data breach, and to be able to stop the failure in a timely manner. Finally, the EDPB invites the Commission to ensure that the revised directive will allow any affected person to find effective legal remedies after a system failure or a successful attack.

Thirdly, specific liabilities might be triggered by the ineffective application of data protection principles by AI providers and users. Lack of data accuracy, or scarce attention paid to the fairness of algorithmic decisions might translate into impairments to individuals' rights and freedoms as well as damages or economic losses. It is essential that in the forthcoming legal regime on AI liability a primary role is vested by the preliminary assessment of the quality and representativeness of the data used by machine learning algorithms to draw their decisions. Measurability of the degree of fairness and causality of algorithmic decisions in general should be a pillar of the new liability rules in order to create a trustable technological environment and limit the negative effects arising from the occurrence of erroneous decisions.

Andrea Jelinek
Chair of the European Data Protection Board

rue Wiertz, 60
1047 Brussels

Lastly, the EDPB wishes to underline that the proposal should be effective as a standalone legislation and not rely on the obligations laid by the AI Act. As was raised in the joint opinion 5/2021, the obligations laid on AI systems users and providers only apply to restricted categories of high-risk AI systems, whereas it is foreseeable that some AI systems that were not included in these categories could lead to possible claims and thus require a liability framework. While the GDPR and the future AI Act should be consistent with one another, the EDPB wishes to draw the Commission's attention on the possible legal void in which some AI systems could be left when they are neither considered high-risk under the AI Act, nor covered by the GDPR.

Yours sincerely,

Andrea Jelinek