

Estonia's Positions

on the Inception Impact Assessment for the Proposal for a legal act of the European Parliament and the Council laying down requirements for Artificial Intelligence

Estonia strongly supports efforts to increase digitalisation in the EU so that European economies and societies can benefit from the opportunities offered by digital transformation, such as greater competitiveness on international markets and enhanced efficiency in the justice system, including improved access to justice. We are also committed to ensuring that new technologies, including artificial intelligence, are human-centric and meet the requirements for trustworthiness, including full respect for fundamental rights.

In finding ways to meet these requirements, it will be important to find an optimal balance and to avoid over-regulation of this rapidly developing field. Disproportionate regulation might impede innovation without the benefit of an increase in trustworthiness and trust in new technologies that will lead to their greater uptake and acceptance in the long term.

We welcome the review of existing EU law and its application to determine whether the risks and requirements of AI applications are adequately addressed. Should gaps be identified and where possible, we believe that the greatest benefit would be derived from guidelines on how to apply the existing legal framework in the context of AI.

As always, any measures proposed by the Commission must strictly comply with the principle of subsidiarity and the principle of proportionality. Estonia believes that the principle of proportionality would be best served by a risk-based approach, where the criteria for risk determination are unambiguous so as to ensure their uniform interpretation and application. It will also be important to define the scope of any measures clearly to ensure legal certainty. This could include reflection on whether some measures should extend to algorithmic systems that do not involve machine learning or deep learning, i.e. that would not be categorised as artificial intelligence.

We are also looking forward to the results of the piloting of the Trustworthy AI Assessment List as set out in the Ethical Guidelines for Trustworthy AI adopted in April 2019 by the Independent High-Level Group on Artificial Intelligence set up by the European Commission. We are hopeful that the anticipated report and revised Assessment List will provide useful guidance on how to best promote Trustworthy AI.

Liability

In the inception impact assessment, the Commission notes that AI poses new challenges for the liability-related rules enshrined in Union and national law, and thus initiatives to address these challenges are being prepared at European level.

We recognise the value that new technologies bring and therefore the need to ensure a legal framework that will both safeguard the rights of harmed persons and also provide legal certainty for businesses. We also understand that the use of AI and particularly systems that have self-learning capabilities might pose new challenges in relation to the existing legal framework.

However, we have to take into consideration that we are dealing with a field that is still fairly new and is also continuously developing. The fact that the subject matter is technologically complex and there is a lack of legal practice and case law makes it difficult at this stage to identify the extent of possible problems and the need to address the issue at national or EU level.

While it is understandable that there is a certain amount of urgency to solve potential problems that could hamper the uptake of AI, we are not operating in a field that is currently unregulated. At national level, we have general civil law rules in place that are technology neutral and also address damage caused by the use of AI applications. A general framework for these cases is provided for in all Member States. In addition, the liability of producers is harmonised at Union level. It must be kept in mind that the liability rules foreseen in the national laws form a coherent system and that therefore finding a solution that would be suitable for all Member States is a complicated task.

If it is established that there is a lack of legal certainty or gap in the protection of the rights of harmed persons, we would support regulation that is as compatible with our existing liability rules as possible. As mentioned above, these rules are very general in nature and are meant to cover a wide range of situations. This approach should also be followed if new liability rules are proposed, in order to ensure that they will be future proof.

Estonia supports a risk-based approach to liability regulation. There are a wide variety of AI applications, and not all entail risks that need special attention. We believe that a strict liability regime is most appropriate for high-risk AI applications, as strict liability is more favourable for the harmed person.

The classification of high risk and low risk applications is undoubtedly complicated. The approach provided in the Commission Report on safety and liability implications of AI, the Internet of Things and Robotics differs from the solution foreseen in our existing law.

In our law, where high risk is involved, liability for damage caused by a source of greater danger, which does not depend on fault, would apply. The Estonian Law of Obligations Act foresees specific grounds for strict liability for cases which are more frequent (e.g. damage caused by motor vehicles or animals) and a general ground for strict liability for damage caused by a source of greater danger, which can be applied if the prerequisites for the specific grounds are not fulfilled. The general ground for strict liability defines a thing or an activity to be deemed a major source of danger if, due to its nature or to the substances or means used in connection with the thing or activity, major or frequent damage may arise therefrom even if it is handled or performed with due diligence by a specialist.

In the Commission Report on liability, there are two criteria proposed for defining high-risk applications – threat to a certain legal interest (life, health, property) and threat to the general public. The first criterion is in our view clear and justified and is also compatible with Estonian law. The second criterion – threat to the general public – is more problematic in our view. Although we understand that the aim is to apply the strict liability regime to situations where the risk of damage is higher, it fails to cover situations where the number of people affected by an AI specific risk is limited. It is therefore questionable whether adequate protection is guaranteed by this criterion. Therefore, if the need for new rules is identified, the grounds for identifying high-risk applications would need further analysis and development in our view.