

EU White Paper on AI and Data Strategy – Consultation response

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This submission highlights the potential implications of AI for the absolute right to freedom of thought and the need for an explicit legal framework to make that right real and effective in the European Union.

Fundamental rights and the white paper

The White Paper focuses on building an “ecosystem of excellence” and an “ecosystem of trust” based on European values and the rule of law. The section on “Problem Definition” for an “ecosystem of trust” addresses questions of product liability and safety as well as fundamental rights. The risks to fundamental rights are enumerated, but the list of potential rights implications misses the essential problem of risk to the right to freedom of thought.

The GDPR mentions the right to freedom of thought in its preamble (paragraph 4). And Article 6 on the Lawfulness of Processing provides that Processing necessary for the purposes of the legitimate interests pursued by the controller or by a third party will not be lawful ***“where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.”*** But the GDPR is not explicit about the types of practice that could interfere with the right to freedom of thought, notably personality profiling or AI drawing emotional inferences based on personal data.

Data and AI are increasingly used to get inside people’s minds, whether to make inferences about how people are thinking and feeling, or to influence their thoughts and emotions to produce particular behaviours in a range of contexts as consumers, citizens, patients, or pupils. This consultation provides an opportunity for the EU to reflect on the gaps in the current framework and to ensure that its ecosystem of trust provides robust protections for our inner lives. This requires a careful consideration of the ways in which the right to freedom of thought could be interfered with by AI and how it can be protected.

The absolute right to freedom of thought

The right to freedom of thought, along with the closely related right to freedom of opinion, has been a fundamental European value since the age of Enlightenment and it is enshrined in various international human rights instruments including the UDHR, the ICCPR, the ECHR and the EU Charter. It protects all aspects of our inner lives, whether profound or trivial including emotional states and political opinions. The UN Human Rights Committee confirmed, in its General Comment 22 on Article 18 of the ICCPR, that the right freedom of

thought is absolute and non-derogable insofar as it protects the “*forum internum*”. The absolute nature of the protection in law means that, unlike privacy, data protection, freedom of expression or other rights, there can never be a justification for interfering with the right to freedom of thought.

The right to freedom of thought includes three elements:

- the right to keep your thoughts private;
- the right not to have your thoughts manipulated; and
- the right not to be penalised for your thoughts.

The EU Charter of Fundamental Rights has several provisions that protect the internal aspects of freedom of thought in terms of both dignity and freedom. These include the right to mental integrity (Article 3.1), the right to freedom of thought, conscience and religion (Article 10.1) and the freedom to hold opinions (Article 11.1). EU law must be interpreted in light of the Charter, but there is also a need for more explicit protections in the context of AI. So far, the strength and importance of these rights as they apply to both AI and the use of data in general, have not been reflected in explicit legal frameworks. This consultation is an opportunity to address this gap.

AI and freedom of thought

AI and the use of big data pose a risk to all three elements of the right to freedom of thought. Data is increasingly used to infer emotional or mental states. It is also used to nudge or influence individual's mental states to change behaviours. Inferences are drawn about inner states to predict and penalise potential future behaviours. These practices are intrinsic to the current consumer data driven business model of AI described in detail by the economist Shoshana Zuboff in her book “The Age of Surveillance Capitalism.” But they are not yet explicitly prohibited in EU law although, arguably, a reading of EU law in the light of the Charter would prohibit any practices that interfere with the right to freedom of thought.

The White Paper includes an example of discrimination in the use of AI to predict recidivism, but the issue here is not only the discriminatory impact – if the AI is being used to draw inferences about an individual's inner state (as opposed to analysing their behaviour) with consequences for the way they are treated in the criminal justice sector, this is likely to be a breach of the right to freedom of thought and the prohibition on punishing a person based on their thoughts which is, in itself a violation of European values exacerbated by the discriminatory impact.

In 2017, researchers at Stanford University published research that claimed they could tell a person's sexual orientation from their photograph. This research sparked a serious backlash questioning the ethics and validity of the study, but the researchers said that they had done the research to open up the debate on the dangerous capabilities of AI. Regardless of the validity and ethics of the research, it does highlight the need to create robust regulatory frameworks that prevent the use of AI to infer things about our inner lives from our data. This example is extreme, but AI designed to profile individual emotions or personalities for other reasons is equally problematic from the perspective of freedom of thought. While there may be circumstances in which the rights to privacy or data protection may be limited, this is not the case with the right to freedom of thought which enjoys absolute protection in international law.

Behavioural micro-targeting is another example of practices that may interfere with the right to freedom of thought, using personality profiling to tailor messages and manipulate thoughts, emotions, and behaviours. In the political context, the Cambridge Analytica scandal showed that this type of use of AI is also a threat to democracy. But despite the public outrage, political behavioural micro-targeting is not prohibited in most EU countries and many "Neuropolitics" consultancy firms offering services that claim to access the emotional responses of the public and voters are based in the EU. Freedom of thought is fundamental to the very idea of democracy. The techniques used in the political sphere are, to a large extent, mirrored in commercial marketing practices. There is a need for careful consideration of the permissible boundaries for AI processing of personal data to protect the right to freedom of thought both in the commercial and in the political sphere.

Children's engagement with AI may change the way they think and feel and will mould our future societies. Their minds are uniquely impressionable, and AI designed to drive increased use and addictive behaviour or to monitor their emotional states may also interfere with their right to freedom of thought. Profiling of children that leads to inferences about their personality or emotions may also lead to reduced opportunities in life and stigmatisation. Children's right to freedom of thought requires particular protection.

A new framework to protect freedom of thought

Europe is already at the vanguard of data protection and privacy laws in the world. This consultation gives it the opportunity to think about how it can lead the way in protecting and promoting freedom of thought in the development of AI. Freedom of thought is not only a fundamental right protected in international law, it is also a pre-requisite for technological and scientific innovation. By putting clear legal protections around freedom of thought in Europe, the EU could be a driver for AI innovation in a new direction, replacing the

“surveillance capitalism” model with a new AI landscape, one that promotes humanity rather than exploiting it. Europe was the cradle of the enlightenment, now Europe has the chance to lead the way again in protecting freedom of thought, innovation, and excellence for future generations.

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