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Deres referanse

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Innspill fra Datatilsynet til EU-kommisjonens forslag til regulering av kunstig intelligens

Vi viser til invitasjon på vegne av KMD 26. mai om å gi innspill til en nasjonal posisjon til EU-kommisjonens forslag til regulering av kunstig intelligens. Etter avtale med fagdirektør Christine Hafskjold, gir vi vårt innspill på engelsk nedenfor.

Introduction

The Norwegian Data Protection Authority (*Datatilsynet*) welcomes the European Commission's initiative to create a level playing field for the use of artificial intelligence systems (AI systems), through the proposal for a regulation on artificial intelligence (2021/0106 (COD), hereinafter referred to as AIR or the Proposal). The development and use of AI heavily relies on data, including personal data. In consequence, the Commission's proposal has important data protection implications and significant overlap with the existing data protection framework (the GDPR¹ and the Law Enforcement Directive² in particular).

Ensuring clarity of the relationship of the Proposal to existing data protection framework is of utmost importance. The explanatory memorandum states in point 1.2 that the proposal is without prejudice and complements the GDPR and the LED. While the recitals of the proposal clarify that the use of AI systems should still comply with data protection law, Datatilsynet recommends clarifying in Article 1 of the Proposal that the Union's legislation for the protection of personal data, in particular the GDPR, and the LED, shall apply to any processing of personal data falling within the scope of the Proposal.

¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

² Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework.

Governance and AI Board

Governance

AIR article 59 establishes that national competent authorities shall be established or designated by the Member States. As a starting point, one national supervisory authority shall be designated as National supervisory authority, according to Article 59 section 2.

Datatilsynet would like to point to the fact that data protection authorities (DPAs) are already enforcing the GDPR on AI systems involving personal data in order to ensure the protection of fundamental rights and more specifically the right to data protection. Therefore, DPAs already have an understanding of artificial intelligence technologies, data and data computing, fundamental rights, as required in the Proposal for the national supervisory authorities. Furthermore, the DPAs have an expertise in assessing risks to fundamental rights posed by new technologies. In addition, when AI systems are based on the processing of personal data or process personal data, provisions of the Proposal are directly intertwined with the data protection legal framework, which will be the case for most of the AI systems in the scope of the regulation. As a result, there will be interconnections of competencies between supervisory authorities under the AIR and DPAs.

Therefore, the designation of DPAs as the national supervisory authorities would ensure a more harmonized regulatory approach, contribute to the consistent interpretation of data processing provisions, and avoid contradictions in its enforcement within the European Economic Area. It would also benefit all stakeholders of the AI chain of value to have a single contact point for all personal data processing operations falling within the scope the Proposal and limit the interactions between two different regulatory bodies for processing that are concerned by AIR and GDPR.

In Datatilsynet's view, DPAs should be designated as the national supervisory authorities pursuant to Article 59 of the Proposal.

The European AI Board

The proposal establishes a "European Artificial Intelligence Board" (EAIB). Datatilsynet recognizes the need for a consistent and harmonized application of the proposed framework, as well as the involvement of independent experts in the development of the EU policy on AI. At the same time, the Proposal foresees to give a predominant role to the Commission. This contrasts with the need for an AI European body independent from any political influence. In Datatilsynet's view, the AIR should give more autonomy to the EAIB. Autonomy will give the EAIB a better possibility to ensure the consistent application of the regulation across the single market.

Datatilsynet also notes that no power is conferred to the Board regarding the enforcement of the proposed regulation. Yet, considering the spread of AI systems across the single market

and the likelihood of cross-border cases, there is a crucial need for a harmonized enforcement and a proper allocation of competence between national supervisory authorities. We therefore recommend that the cooperation mechanisms between national supervisory authorities be specified in the forthcoming regulation.

Regulatory sandbox

Datatilsynet strongly supports an inclusion of a regulatory sandbox in the proposed regulation. Thanks to major support from a group of Norwegian ministries, Datatilsynet was able to establish a regulatory sandbox for AI that makes use of personal data in the latter half of 2020.

The goal is to promote the development of innovative artificial intelligence solutions that, from a data protection perspective, are both ethical and responsible. This regulatory sandbox provides free guidance to a handful of carefully selected organizations, of varying types and sizes, across different sectors. The sandbox guides individual organizations on how to comply with GDPR in the development or use of AI solutions. We use examples and insights arising from sandbox projects to develop guidelines relevant for organizations implementing artificial intelligence and to further develop our own competence in this area.

In this relatively short time span, we have already seen the outlines of how innovation and data protection can be promoted through a sandbox. Especially for small and medium enterprises with limited resources, operating in a regulatory sandbox may yield quicker insights and hence foster innovation.

Based on our experience, please find some concrete inputs to the proposal:

From the wording of Article 53, it is not quite clear what a regulatory sandbox will encompass. The question arises whether the proposed regulatory sandbox includes an IT infrastructure in each member state, with some additional legal grounds for further processing, or whether it merely organizes access to regulatory expertise and guidance. Based on experience from Norway, to require the authority to provide IT infrastructure will be raising the bar for establishing sandboxes, due to the technical expertise and costs that this would entail.

Article 53, section 3 states that the sandbox does not affect supervisory and corrective powers. This is a useful clarification, but there is also need for some direction or guidance on how to strike a good balance between being a supervisory authority on the one hand and giving detailed guidance through a sandbox on the other. By way of an example, the Proposal could specify that the sandbox does not provide a stamp of approval and that the organization/controller is still the one who is accountable.

Article 53, section 6 describes that the modalities and conditions of the operation of the sandboxes shall be set out in implementing acts. It is important that specific guidelines be produced in order to ensure some consistence and help in the establishment and operation of sandboxes. However, binding implementing acts could limit each Member State's ability to customise the sandbox according to their needs the needs of organisations, in general and

SMEs in particular, of their country, as well as local culture. Therefore, Datatilsynet recommends that the EAIB should provide guidelines for sandboxes, instead.

Article 54 of the AIR seeks to provide a legal basis for further processing of personal data for developing certain AI systems in the public interest in the AI regulatory sandbox. The relationship of Article 54(1) AIR to Article 54(2) and recital 41 AIR and thus also to existing data protection law remains unclear.

Datatilsynet notes the Commission's statement in the Explanatory Memorandum that consistency is ensured with the EU Charter of Fundamental Rights. In our view, such wide access to further processing of personal data requires a thorough analysis of the compatibility with EU primary law and the Charter of fundamental rights Article 8. Enabling further processing also sets higher requirements for the sandbox itself (e.g. to make sure that the participants follow the safeguards listed in section 1b).

Some additional considerations regarding the further processing of data in Article 54 is that operating a sandbox is resource intensive, and it is realistic to estimate that only a small number of businesses would get the chance to participate. There is therefore a risk that participating in the sandbox could constitute a competitive advantage for participants that are able to further processing of data for new purposes.

Therefore, the opportunity for further processing, as envisaged in Article 54 would require careful consideration of how to select participants. Lastly, could the ability for further processing skew the motivation for participation in the sandbox from wanting to develop AI in an ethical and responsible way to wanting to access the opportunity for further processing of data?

Med vennlig hilsen

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