

FERMA's Position Paper on Artificial Intelligence

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The Federation of European Risk Management Associations (FERMA) thanks the European Commission for this opportunity to share its thoughts on the Commission's White Paper "on Artificial Intelligence A European approach to excellence and trust".¹ Herein, FERMA shares its thoughts on AI, in part, in direct response to the Commission's questionnaire, and in part to offer its own thoughts based on its recent reflections on the topic.

AI presents organisations with the greatest opportunities in the digital transformation of the European economy. However, the use of AI also comes with the potential for significant risk. President Von der Leyen acknowledges this potential risk and has called for specific legislation on AI to be drafted expeditiously.

FERMA notes from the outset that it is encouraging to see the Commission has incorporated a **risk-based approach** to AI in the White Paper. FERMA also welcomes the efforts of the Commission in other domains, including the AI Ethics Guidelines of the High-Level Expert Group.² FERMA commits itself to work proactively with the European Commission to ensure a robust 'risk-based approach' is enshrined in AI legislation moving forward.

FERMA and its members have a long-standing experience in risk management, which is the identification, evaluation, and prioritisation of risks³, followed by coordinated and economical application of resources to minimize, monitor, and control risk exposure (probability or impact of events), or to maximize the realisation of opportunities through minimizing losses. Risk managers utilise a number of tools and methodologies for measuring risk, particularly Enterprise Risk Management (ERM) and the 'Three Lines of Defense' model.⁴ ERM and the 'Three Lines of Defense' have already been applied in the digital context, such as GDPR and cybersecurity, and have proven to be effective in building organisations' capacity to mitigate and assess risk.

Throughout this paper, FERMA suggests that European institutions consider promoting these already established and successful management structures to build a **holistic AI framework** that accounts for risk inherent to AI without stifling innovation.

¹ https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf

² <https://www.ferma.eu/building-trust-in-ai-first-european-ethics-guidelines/>

³ Defined in ISO 31000 as the effect of uncertainty on objectives

⁴ *Guidance on the 8th EU Company Law Directive*, FERMA, September 2011:

<https://www.ferma.eu/publication/guidance-on-the-8th-eu-company-law-directive/>

<https://www.ferma.eu/app/uploads/2019/02/ferma-perspectives-cyber-risk-governance-09-10-2018.pdf>; ISO 31000 Risk Management: <https://www.iso.org/iso-31000-risk-management.html>

An Ecosystem of Excellence

To build an ecosystem of excellence, the Commission proposes a large set of priorities to support the development of AI across the EU. Such a broad approach should not undermine the effectiveness and efficiency of executing on these priorities. To that end, FERMA encourages the Commission to **prioritise funding** so that priorities are executed to a high-degree. **Funding should be directed primarily towards (i) fostering research and innovation, (ii) developing skills to fill competency shortages, and (iii) ensuring that SMEs can access and use AI.**

Strengthening excellence in research and development can be combined with coordinated action to create synergies across excellence centres. FERMA highlights the fact that Europe already has pre-existing AI excellence centres that should be networked together and improved upon through the European Digital Innovation Hubs (EDIH).

In addition, the Commission may also consider **creating a standing committee focussing on providing overarching strategic direction to research and development in the EU and helping to ensure that AI is developed in line with European values.** In this the committee would monitor and ensure that publicly funded research and development is in line with European fundamental rights enshrined in the Charter of Fundamental European Rights of The European Union and the European Convention on Human Rights. The committee would ideally be staffed on a rotating basis with a combination of academia, industry experts from various verticals, representatives of SMEs, and consumer and civil rights organisations. This will enable AI in the European Union to differentiate itself from the rest of the world and ensure AI is developed in line with European values and helping to secure technology sovereignty. The Coordinated Plan, due for revision at the end of 2020, can also support the goal of developing AI in conformity with European values.

An Ecosystem of trust

The EU should set horizontal regulation applicable to AI across the Internal Market. There is significant potential for market fragmentation between Member States in the absence of European legislation. A key advantage of this approach would be for companies, legal certainty regarding the future development of AI-based solutions, and for consumers it fosters trust in AI solutions, knowing that they meet certain ethical standards.⁵ While for regulators it allows for a control mechanism that does not prevent innovation. Nonetheless, it is important to balance future legislation against the need for innovation and the market development. At the current stage of market maturity, FERMA recommends the EU take a similar direction to Directive 2000/31, applying broad, market-based principles. This will enable the market to develop and gives regulators tools to measure the real-world effects of AI. A combination of ex-ante compliance and ex-post enforcement mechanisms is the best way to ensure that AI is trustworthy, secure and respects European values and rules.

The risk-based approach suggested in the White Paper is the correct approach but calls for close monitoring of the market due to the nature of AI and its ability to learn and adapt overtime with little to no human intervention. To mitigate this risk, FERMA recommends the Commission creates a mix of ex-ante incentives to encourage regulatory compliance⁶ based on good-faith disclosures and

⁵ It may also be relevant for Member States to actively contribute to a definition roadmap so that specific needs are prioritised and addressed.

⁶ Examples of such *ex ante* are listed in the White Paper on pages 20-21 and include: (i) Requirements ensuring that the AI systems are robust and accurate, or at least correctly reflect their level of accuracy, during all life cycle phases; (ii) Requirements ensuring that outcomes are reproducible; (iii) Requirements ensuring that AI systems can adequately deal with

reasonable transparency requirements, combined with a light-touch ex-post enforcement mechanism, bearing in mind always that increasing risks outpace the provision of regulation⁷ Another key aspect to address is how to assess this risk. One option would be for European standards organisations to undertake work on standardised risk assessments.

Mandatory requirements for high-risk AI applications are appropriate. Without prejudice to what those specific mandatory requirements should be, FERMA encourages the Commission to align those requirements to the risks create by AI in the fields of liability and fundamental rights. FERMA recommends combining this with market monitoring by an existing institution or agency at European level.⁸

A voluntary labelling for low-risk AI application would be very useful. Standardisation organisations have already begun some of this work, which the Commission should promote further especially as it is a market-driven solution that adheres to strong principles of consensus and transparency. FERMA cautions though that voluntary labelling schemes can be abused and, thus, the right safeguards will need to be put in place to prevent this. It should also be made clear that a voluntary scheme would have to go beyond any minimum threshold set by legislation.

Whether high-risk or low-risk, a risk assessment should take place as part of an ex ante procedure for new products and subsequent re-assessment where applicable. To do otherwise would open the way for uncontrolled non-compliance within the AI legislative framework as the product evolves and develops.⁹ The assessment procedures may be sector specific or per AI type. In many instances self-assessment may be sufficient and risk management methodologies such as ERM already allow organisations to measure risks associated with AI and put in place the appropriate processes to mitigate them. Regardless of the risk profile, an appropriate risk-based model for AI will ensure that AI capabilities will be neither over- nor under- estimated. To that end, control is key.

Safety and liability implications of AI

AI raises a number of concerns related to liability and therefore requires legal certainty. Principally, FERMA believes that if future AI legislation maintains the fault-based claim principle, consumers having suffered harm will find it more difficult to obtain compensation because it may become difficult, if not impossible, to allocate culpability.¹⁰ To that end, FERMA believes the primary goal should be legal certainty since this will allow risk managers and the insurance industry to adjust their solutions to market needs.

errors or inconsistencies during all life cycle phases; (iv) Requirements ensuring that AI systems are resilient against both overt attacks and more subtle attempts to manipulate data or algorithms themselves, and that mitigating measures are taken.

⁷ Depending on the type of AI, a requirement for ex ante transparency would in effect prohibit the use of that particular technology, even where it may produce a superior result. See: Black, Julia and Murray, Andrew D. (2019) Regulating AI and machine learning: setting the regulatory agenda. *European Journal of Law and Technology*, 10 (3). p. 16, <http://eprints.lse.ac.uk/102953/>

⁸ Examples of existing monitoring include, “[The Observatory of European SMEs](#)” established by the Commission in December 1992 in order to improve the monitoring of the economic performance of small and medium sized enterprises (SMEs) in Europe. Another example is the Centre for Media Pluralism and Media Freedom’s “[Media Pluralism Monitor](#)” co-funded by the European Commission.

¹⁰ Report from the Expert Group on Liability and New Technologies – New Technologies Formation: <https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupMeetingDoc&docid=36608>

The European legislative framework, such as the Product Liability Directive,¹¹ and other sector specific legislation,¹² may need to be examined before creating a new liability regime specific to AI. Where it is determined that legislation is needed, a broad, principle-based AI legislative framework will create the legal certainty sought if implemented correctly and supported by a holistic approach.

Even with legal certainty, AI will always have an inherent risk due to its very nature. To mitigate these inherent risks, FERMA encourages the Commission to adopt a holistic approach to AI that accounts for the full range of risks, since it is often the case that AI is viewed exclusively through the lens of information technology without further consideration of effects further afield such as strategic and environmental risks, business risks, and operational risks.¹³ ERM and the ‘Three Lines of Defence’ are tried and tested risk assessment methodologies that support organisations assess and mitigate risk fostering a culture of robust corporate responsibility.

A holistic approach towards AI will promote a culture shift that supports critical aspects of consumer protection, so that organisations and consumers alike are more digitally literate and understand better the implications of AI, making for better informed consumer decisions. To improve consumer protection further, it should be incumbent on AI producers to clearly and accurately explain their AI system, especially how personal data is used in conjunction with the AI, and the possibility for users to remove their personal data from the system if needed.¹⁴ Consumer protection should also enshrine a human-in-the-loop principle and the ability to opt-out of certain AI decision making processes if requested.¹⁵

The sensitive nature of certain types of data, when combined with AI, such as biometric identification systems understate the need for a careful balancing exercise between a number of rights guaranteed in the Charter of Fundamental Rights of the European Union (Article 7, respect for privacy and family life, Article 8 protection of personal data) and the others public goods such as public safety. As it is questionable whether private entities are best placed to undertake such a balancing exercise, the introduction of a judicial process is indispensable. Nonetheless, it is equally important to highlight the valuable insights which can be drawn from biometric data for the purposes of a more thorough, decisive, and clear response to crises, as recently demonstrated in the Covid-19 crisis.

In that regard, the safety and liability implications of these specific areas, are, to an extent, already accounted for in the European Union’s data protection legislative framework suggesting that there is no need at present to add an additional layer of regulation. Nonetheless, FERMA believes special attention is needed in this area and would not rule out seeing a future need for specific targeted measures to remedy concerns.

¹¹ Directive 85/374/EEC: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31985L0374>

¹² Such as the Medical Devices Regulation. Regulation 2017/745: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0745>

¹³ For a full breakdown of the risks that organisations should account for when implementing AI see: *Artificial Intelligence Applied to Risk Management*. Report published by FERMA. pp. 12-13 available at: <https://www.ferma.eu/publication/artificial-intelligence-ai-applied-to-risk-management/>

¹⁴ Article 7.3 of Regulation 679/2016 already provides the possibility for the data subject who has given their consent to the processing of data to withdraw their consent.

¹⁵ Human-in-the-loop make sure that possible decisions which deal with certain categories of fundamental rights are first verified by a human, or reviewable by a human afterwards. The human-in-the-loop approach means that particularly those high-risk AI, humans maintain a substantive control over the decision-making processes.

Conclusion

FERMA thanks the European Commission for the opportunity to share its thoughts on its AI White Paper. FERMA especially welcomes the risk-based approach to AI adopted and further recommends the promotion and utilization of risk management methodologies such as ERM and the 'Three Lines of Defence' to support this approach. In addition, the Commission may also consider the following

- Building the existing excellences centres into a network supported by the EDIHs and coordinated at European level towards ensuring that AI development in AI fits with European values
- The differentiation between high and low risk AI applications is the correct approach, each entailing measures ranging from mandatory compliance and certification, through to self-assessment and voluntary labelling.
- Ex-ante risk-assessments should take place for new products which would assess compliance proportionate to the context.
- Legal certainty can be achieved through a horizontal regulation that provides broad, market-based principles
- The fault-based claim principle may need further examination with existing European liability legislation to help allocate culpability.
- Supporting a shift in culture so that organisations and consumers are more digitally literate
- Biometric identification systems and other sensitive areas call for a careful approach that balances fundamental rights against the public good that can be achieved to solve social issues and catastrophes like COVID-19

FERMA remains committed to working with the European Commission to build **a holistic AI legislative framework** that accounts for risk inherent to AI without stifling innovation.

About FERMA:

FERMA has been the single recognised voice of European risk managers for over forty years. With a membership of 21 risk management associations spanning 20 European countries, FERMA is the leader of an international network that influences industry, the public sector, finance and other services. FERMA advocates on behalf of nearly 5000 risk management professionals while promoting communication and education across the Federation. 50% of member organisations are listed on the stock exchange, and over 80% have a turnover of more than €50 million, making them notable players in the European economy.

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