

**Response to Public Consultation on Proposed Advisory Guidelines on Use of
Personal Data in AI Recommendation and Decision Systems**

Comments by Winston Wong (Flint & Battery LLC)

Contact Person:

WINSTON WONG (AAS Number: 155/2000)

Position: Director, Flint & Battery LLC (UEN 201119936G)

Tel: +65 6438 4330 / +65 9009 1081

Email: winstonwong@flintbattery.com

Address: 300 Breach Road, The Concourse, #32-07, Singapore 199555

INTRODUCTION

The Personal Data Protection Commission Singapore (“**PDPC**”) had just circulated a set of proposed guidelines titled “Proposed Advisory Guidelines on Use of Personal Data in AI Recommendation and Decision Systems”¹ (“**Guidelines**”), which seeks to clarify how the Singapore Personal Data Protection Act 2012 (“**PDPA**”) and related subsidiary legislation applies to the collection and use of personal data to develop and deploy computer programmes or technologies with machine learning models (“**AI Systems**”) used to make decisions, recommendations, or predictions. The following are Flint & Battery LLC’s response setting out its views on the Guidelines (“**Response**”).

SUMMARY OF MAJOR POINTS

While the Guidelines provide suggestions assisting businesses that deploy AI Systems in complying with their obligations in the PDPA, it should cover in addition the area of the responsibility of operators, programmers, and designers of AI Systems.

This is particularly essential due to the increasing attitude of operators, programmers, and designers of algorithms or AI Systems to shift the liability ordinarily attributed to them onto such algorithms or AI Systems.

COMMENTS

Definition

The use of the term “responsibility” in this Response does not equate to and is contrasted with the term “accountability” and the accountability obligation set out in the PDPA². The concept of “accountability” as provided in the PDPA and Guidelines stipulates, *inter alia*, that an organisation must develop and implement policies and practices that are necessary to meet obligations under the PDPA with the objective of achieving, *inter alia*, fairness and transparency of AI outputs³.

The use of the term “responsibility” is also contrasted with the design framework proposed in the Model Artificial Intelligence Governance Framework Second Edition (“**Model Framework**”) that recommends a probability-severity of harm matrix approach to determine the level of human involvement required in an AI-augmented decision making⁴.

The term “responsibility” in this Response refers to a party being ascribed the consequence of causing a breach of any obligation in the PDPA. This consequence may include being liable to a fine, civil penalty as directly provided for in the PDPA, or an injunction, civil liability or other liability, arising under general law.

B2C2 v Quoine

In the reported case *B2C2 Ltd v Quoine Pte Ltd*⁵ of the Singapore High Court, algorithms were deployed in the context of trading of cryptocurrencies. Although the algorithms were deterministic and not AI Systems in nature, we find the case to be relevant to this Response.

In the case, contention was had as to whether the contract was void or voidable due to a unilateral or common mistake, either at common law or in equity, after Quoine’s algorithm had caused the exchange of extremely undervalued Bitcoins for overpriced Ethereum with B2C2⁶. In assessing if the mistake was “sufficiently important or fundamental...in the sense that the offeror did not intend the

¹ Access at: <https://www.pdpc.gov.sg/-/media/Files/PDPC/PDF-Files/Legislation-and-Guidelines/Public-Consult-on-Proposed-AG-on-Use-of-PD-in-AI-Recommendation-and-Systems-2023-07-18-Draft-Advisory-Guidelines.pdf>

² Refer to Section 12 of the PDPA and Paragraph 10.6 of the Guidelines.

³ *Ibid.*

⁴ Personal Data Protection Commission Singapore (PDPC) (2020). Model Artificial Intelligence Governance Framework (2nd Edn). Available at: <https://www.pdpc.gov.sg/-/media/Files/PDPC/PDF-Files/Resource-for-Organisation/AI/SGModelAIGovFramework2.pdf> (Accessed on: 25th July 2023)

⁵ [2019] SGHC(I) 03, Suit No 7 of 2017

⁶ *Ibid.*, [183]

terms of the offer”⁷, Quoine’s representatives submitted to the Court that it should “consider what the parties are likely to have known and intended if, hypothetically, they had met on the ‘floor of the exchange’”⁸. In our view, this submission is equivalent to ascribing or attributing to the algorithm the independence of an individual human being and in effect trying to hold the algorithm, rather than a human, responsible.

The judge rejected the above, and concluded instead that “[w]here it is relevant to determine what the intention or knowledge underlying the mode of operation of a particular machine [is], it is logical to have regard to the knowledge or intention of the operator or controller of the machine... The knowledge or intention cannot be that of the person who turns it on, it must be that of the person who is responsible for causing it to work in the way it did, in other words, the programmer.”⁹ The judge also described Quoine’s contention as “hypothetical” and “artificial”¹⁰.

Further, the judge also commented that the algorithms in “[this] present case are deterministic, they do and only do what they have been programmed to do. They have no mind of their own. They operate when called upon to do so in the pre-ordained manner.”¹¹.

Responsibility of operators, programmers, and designers of AI Systems

This case is an illustration of what we believe an increasing attitude that the operators, programmers, or designers of algorithms or AI Systems will attempt to avoid their own responsibility by instead shifting the blame onto an algorithm or AI System. Our opinion is that the above principle set out is applicable to the decisions, actions, and outputs of AI Systems.

Although the state of law in the world on this topic is far from settled, it is nonetheless our opinion that the PDPC should specify in an additional section in the Guidelines its position on the programmer or designer of a computer programme taking responsibility for such computer programme’s impact, at least in the personal data context. This statement should go further to clarify that such responsibility remains even if the AI System does something unexpected, e.g. bugs, rogue code, via hacking.

On a further note, AI Systems, as contrasted with deterministic algorithms, are more likely to operate in ways that their programmer may not anticipate. It seems to us that the likelihood for AIs to breach personal data obligations may then be far higher than in the case of algorithms that are not AI in nature.

CONCLUSION

PDPC should specifically include in an additional section in the Guidelines that, as a general rule, any organisation that collects, uses, and discloses personal data, whether such personal data is collected, used, or disclosed by its deployment of a AI System, is fully responsible for the decisions, actions, and outputs of such AI System. This statement should go further to clarify that such responsibility remains even if the AI System does something unexpected, e.g. bugs, rogue code, via hacking.

⁷ *Ibid.*, [188]

⁸ *Ibid.*, [200]

⁹ *Ibid.*, [210]

¹⁰ *Ibid.*, [204]

¹¹ *Ibid.*, [208]