Product Risk Radar

AI Liability Directive

Last updated: 24 August 2023

On 28 September 2022, the European Commission (**EC**) proposed an AI Liability Directive ("**AILD**") on adapting non-contractual civil liability rules to artificial intelligence (**AI**). This seeks to address challenges faced by victims of AI-related damage to make claims and receive compensation, and will interact with Member States' fault-based liability regimes. The AILD is intended to complement the EU's AI Act, which is also still being debated by the European Parliament, Commission and Council, with the aim of being finalised and voted in at the start of 2024.

What are the key takeaways?

The AILD provides victims routes to compensation for harms caused by AI systems, by facilitating access to information and alleviating the often difficult burden of proof under many national fault-based liability regimes. These steps are considered necessary due to the special characteristics of AI systems, such as opacity (i.e. the black-box effect), autonomy and complexity, which may make it more difficult for the claimant to meet the necessary burden of proof.

In particular, the AILD:

- provides that a court may order the disclosure of relevant evidence about specific high-risk AI systems by those who have it at their disposal, for the purposes of establishing liability where the potential claimant has presented facts and evidence sufficient to support the plausibility of a claim.

- introduces a rebuttable presumption of causality where:

  1. it has been shown (either by the claimant, or as a result of the presumption that will apply in cases of document destruction or non-disclosure) that the defendant breached a relevant duty of care. However, in the case of:

     - **high-risk AI systems:** the defendant may rebut this presumption by showing that sufficient evidence is accessible for the claimant to prove the causal link

     - **non high-risk AI systems:** the presumption will only apply where the court considers it excessively difficult for the claimant to prove the causal link;

  2. it can be considered reasonably likely that the fault has influenced the output produced by the AI system or the failure of the AI system to produce an output; or

3. the claimant has demonstrated that the output produced by the AI system or the failure of the AI system to produce an output gave rise to the damage.

Why is this development important for businesses?

It is clear that the stated objectives of the AILD, which are to make it easier for AI injured claimants to establish liability, will lead to an increase in claims brought against AI providers. However, the presumption of causality is a particularly concerning development for businesses, as it could be difficult to rebut. Businesses may also be exposed to wider disclosure obligations, considering that any "provider" (someone that *"develops an AI system or that has an AI system developed with a view to placing it on the market or putting it into service under its own name or trademark, whether for payment or free of charge"*) can be called on to provide evidence.

What comes next?

The Directive is now under consideration by the European Parliament and Council, who will review, potentially amend, and adopt the proposal. Nevertheless, there is strong support within the EU for the AILD and once it is finalised at EU level, Member States will then have twenty four months to implement its provisions nationally.

Contacts

Kate Corby
Partner
London

+44 20 7919 1966
kate.corby
@bakermckenzie.com

Graham Stuart
Partner
London

+44 20 7919 1977
graham.stuart
@bakermckenzie.com

Joanne Redmond
Senior Associate
London

+44 20 7919 1067
joanne.redmond
@bakermckenzie.com

Rachel MacLeod
Senior Associate
London

+44 20 7919 1364
rachel.macleod
@bakermckenzie.com

Lauren Gest
Associate
London

+44 20 7919 1388
lauren.gest
@bakermckenzie.com

Phoebe Bruce
Associate
London

+44 20 7919 1117
phoebe.bruce
@bakermckenzie.com