

PROPOSAL FOR A DIRECTIVE IN EU LIABILITY RULES FOR ARTIFICIAL INTELLIGENCE: HELP, MY AUTOMATED DRIVING CAR RAN INTO MY NEIGHBOR’S HOUSE – WHO PAYS?

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Abstract

Imagine an Artificial Intelligence (“AI”) based robot assists doctors during a surgery and AI makes the wrong decision. As a result, the surgery goes wrong and the patient would claim damages or compensation for pain and suffering. Another example: An autonomously driving car decides to increase the speed and injures people on the street in course of diverting. Also in this case, the incurred damage should be compensated. The main question which rises here is: who is liable here and to what extent? The doctor and the driver who use artificial intelligence for their own purposes or maybe the manufacturer?

Keywords: Artificial intelligence, Artificial Intelligence System, Artificial Intelligence Liability Directive, EU Commission

Introduction

The European Commission (“EU Commission”) released on 28.09.2022 a Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive) , in which the European Commission wants to clarify fundamental questions about liability in the event of damage when using AI and to ensure that injured parties can claim damages. The definition of the term “Artificial Intelligence” is determined in Article 3 of the Artificial Intelligence Act (“AI Act”): “Artificial intelligence system’ (AI system) means software that is developed with one or more of the techniques and approaches listed in Annex I and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with”.

But couldn’t the injured party claim damages of this kind so far?

At the moment, there apply the national product liability acts which are based on the Product Liability Directive 85/374/EEC since 1985. According to this Directive, a manufacturer is liable regardless of fault if a product placed on the market by him has a defect that kills a person, injures his body or health or damages another object intended for private use. Defects that give rise to liability include design, manufacturing and instruction errors.

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The problem:

On the one hand, the specific characteristics of AI, including autonomy and opacity (the so-called “black box” effect), make it difficult or prohibitively expensive to identify the liable person and prove the requirements for a successful liability claim. On the other hand, the basis of the European liability system is always the misconduct that leads to damage. However, not everyone can engage in misconduct that is legally punishable. Under German law for instance, liability can only be imposed on those who have legal personality by law. However, this is not yet the case with robots and machines. They cannot be qualified as “legal personality”. It is moreover the humans, i.e., legal entities, which can be held liable for the misconduct of the artificial intelligence at this moment. However, can these person/legal entities be accused of any misconduct at all, if the AI-based machine makes decisions on its own?

The solution of the EU Commission and analysis:

Against this background, the European Commission facilitates and harmonizes and facilitates this legal area. With the new proposal for a directive on AI Liability, the EU Commission aims to ensure that the same right to compensation applies in the case of accidents involving artificial intelligence as it has been the case with other technologies. Hence, the new AI Liability Directive applies to claims against any person for fault that influenced the AI system which caused the damage. This Directive, however, refers to any type of damage covered under national law coming only from high-risk AI systems. In this respect, the AI Liability Directive envisages the enforcement of the requirements for high-risk AI systems imposed by the AI Act, because the failure to comply with those requirements constitutes an important element triggering the alleviations of the burden of proof. It establishes for those seeking compensation for damage a possibility to obtain information on high-risk AI systems to be recorded/documented pursuant to the AI Act.

What are “high-risk AI systems”?

According to the AI Intelligence Act, the following AI systems which are used in the below listed areas deemed as high-risk:

- Biometric identification and categorization of natural persons,
- the management and operation of critical infrastructure,
- education and vocational training,
- employment, human resource management, and access to self-employment,
- access to and use of essential private and public services and benefits,
- law enforcement,
- migration, asylum, and border control; and
- administration of justice and democratic processes.

In the light of the AI Act, the new proposal on AI Liability Directive covers any damage including resulting from discrimination or breach of fundamental rights like privacy (example: data loss or in course of recruiting, i.e., hiring process, a HR automatized system discriminates a potential candidate on behalf of nationality, religion etc.) and claims made by any natural or legal person. In the light of the AI Act, the new liability rules of the AI Liability Directive would also apply when government agencies use AI. It should be noted, that explicitly unaffected by the AI Liability Directive are the European liability regulations for the transport sector and those set by the Digital Services Act.

In contrast to the current Product Liability Directive, where only natural persons could bring up a claim in front of court, the AI Liability Directive expands the scope: also legal entities can rise a claim as damaged party. The AI Product Liability Directive will enable the damaged party to raise claim also against producers/ manufacturers outside of EU: if the damaged party is harmed by unsafe products imported from outside the EU, the damaged party can turn to the importer or the manufacturer's EU representative for compensation.

The key elements of the AI Liability Directive:

Two key elements in the new directive are intended to remedy this situation and simplify the procedure for victims.

a) Presumption of causality

First, the AI Liability Directive stipulates a so-called “presumption of causality”. By this, the victims (damaged party) will be relieved from the burden of proof, meaning: the person who suffers harm now only has to prove that someone failed to fulfill its duties and that this was probably caused due to the performance of an AI. Showing this “probability”, will be sufficient for the admissibility of an action before the court.

In turn, the defendant can rebut this presumption by proving, for example, that some other cause led to the harm.

The AI Liability Directive, however, leaves the elements like the determination of fault and causality to the existing national laws.

b) Disclosure requirements

According to Art. 3(1) of the AI Liability Directive, Member States shall ensure that damaged parties can demand disclosure of information from the provider or user of high-risk AI in order to identify the “culprit”. Corresponding claims also can be brought against distributors or other third parties who are bound by the AI Regulation. Training and validation data, information from the technical documentation and the recording obligations as well as information on quality management system and on corrective measures taken can be demanded by the damaged party during the court proceedings. The data may only be disclosed if it is necessary and appropriate to pursue the claim.

Conclusion

The EU Commission's proposal on AI Liability Directive has to be adopted now by the European Parliament and the Council.

The consequences for the provider and manufacturer using AI will be huge after the AI Liability Directive enters into force, thus, especially from the litigation point of view. The new Directive will oblige manufacturers of products with digital elements to be transparent about components used and vulnerabilities. The companies using AI will have to disclose information and, will have to prove that a different cause provoked the damage.

References

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