AI Liability Directive – first impressions

JUDr. MICHAL TOMAN

P. J. Šafárik University in Košice, Law Faculty, External PhD. candidate

Introduction

With great delight we are observing how the European authorities have been addressing the challenges of the Digital Single Market at a record-breaking speed. In the past two years we have seen several important acts of legislation, including the drafts of the AI Act,[1] the Data Governance Act,[2] the Digital Markets Act,[3] and the Digital Services Act.[4] Many other have reached advanced positions within the legislative process, like draft Machinery Regulation[5] and

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[1]   Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts. Available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0206.

[2]   Proposal for a Regulation of the European Parliament and of the Council on European data governance (Data Governance Act). Available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52020PC0767.

[3]   Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act). Available here: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A842%3AFIN.

[4]   Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC. Available here: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=COM:2020:825:FIN.

[5]   Proposal for a Regulation of the European Parliament and of the Council on Machinery products. Available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0202.

the draft Data Act.[6] The reasons are obvious, however one to mention at the beginning (and later described in more detail) is the reason that if there is a significant AI Brussels Effect, this could lead to stricter global AI regulation. Details of the EU AI regulation could also influence how "trustworthy AI" is perceived around the business world. Eventually the side effect could also the shaping of research agendas aimed at ensuring the safety and fairness of AI and other autonomous systems. Ultimately, the likelihood of a Brussels Effect increases the importance of helping shape the EU AI environment: ensuring that the regulation is "right" could become a subject of global leadership.

Liability "package" for EU digital economy

On the 28th September 2022 the European Commission (hereinafter as "the Commission") released two proposals to address liability issues of the digital economy and the circular economy and the. It proposes to modernise the current rules on the strict liability of manufacturers for defective products (ranging from smart devices to pharmaceutical industry). The revised rules shall give businesses legal certainty for their investments in new and innovative solutions and aim to ensure that victims can obtain their fair compensation if defective products, including digital and refurbished products, cause them harm. It is for the first time ever that the Commission proposes a targeted harmonisation of national liability rules for AI, making it easier for victims of AI-related damage to get their compensation. As stated in the AI White Paper[7] and with the Commission's 2021 AI Act proposal, setting out a framework for excellence and trust in AI by introducing new rules will ensure that victims benefit from the same standards of protection when harmed by AI products or services, as they would if harm was caused under any other circumstances.[8] The two proposals

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[6]   Proposal for a Regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act). Available here: https://eur-lex.europa.eu/legal--content/EN/TXT/?uri=COM%3A2022%3A68%3AFIN.

[7]   COM(2020) 65 final. WHITE PAPER on Artificial Intelligence – A European approach to excellence and trust. Available here: https://ec.europa.eu/info/sites/default/files/commission-white-paper--artificial-intelligence-feb2020_en.pdf.

[8]   European Commission. Press release: New liability rules on products and AI to protect consumers and foster innovation. Brussels, 28 September 2022. Available here: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5807.

published on 28th September 2022 were the Product Liability Directive[9] (hereinafter as "PLD") and the proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (hereinafter as the "AI Liability Directive").[10] These two initiatives are closely related and form a kind of "package", as claims falling within their scope deal with different types of liability.

The existing product liability framework imposed strict liability on manufacturers for defective products that cause physical harm to consumers for a long time. Its scope where AI is involved has been, however, very unclear because of the blurring of lines between products and services and the fact that AI systems generally involve a complicated (sometimes obscure) ecosystem with players intervening at different stages of the AI lifecycle. The Commission therefore held a public discussion between the 18th October 2021 and 10th January 2022. The open public consultation confirmed the known problems. In the opinion of the public, the „black-box" effect can make it difficult, if not impossible for the victims to prove fault and causality and on top of that there may be uncertainty as to how the courts will interpret and apply existing national liability rules in cases involving AI. In addition, it showed an important public concern as to how legislative actions on adapting liability rules initiated by individual Member States, and the resulting fragmentation, would affect the costs for companies, mainly SMEs.

Presumption of causality

Under the proposed AI Liability Directive, the presumption of causality will apply only if victims can satisfy three base conditions: i) that the fault of an AI system provider or user has been demonstrated, or at least presumed to have been so by a court; ii), that it can be considered reasonably likely, based on the circumstances of the case, that the fault has influenced the output produced

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[9]   COM(2022) 495 final. Proposal for a Directive of the European Parliament and of the Council on liability for defective products. Brussels, 28. September 2022. Available here: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022PC0495&from=EN.

[10] COM(2022) 496 final. 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). Brussels, 28. September 2022. Available here: https://ec.europa.eu/info/sites/default/files/1_1_197605_prop_dir_ai_en.pdf.

by the AI system or the failure of the AI system to produce an output; and iii) that 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. It can be difficult for victims to establish a causal link between this non-compliance and the output produced by the AI system or the failure of the AI system to produce an output that gives rise to the relevant damage. A targeted rebuttable presumption of causality has therefore been laid down in Article 4 (1) of the AI Liability Directive regarding this causal link. We agree that such a presumption is the least burdensome measure to address the need for fair compensation of the claimant.

Because the AI technologies present unknown challenges also to existing legal frameworks, the existing frameworks are fragmented and incompetent, and there is a dependency on the national liability regimes of EU Member States, which undermines the common goal of establishing a level playing field for all businesses across the EU Digital Single Market. It may therefore come to us as a little surprise that it took so long to the Commission to adopt concrete actions by proposing new rules for AI liability. Regulating AI liability is, however, little bit more complicated than regulating the issues addressed by the AI Act and other forms of digital regulation, exactly because Member States already have very sophisticated and longstanding liability regimes, so it may not be obvious to the audience from the outset that action by the EU institutions is required. This way comes the legal regime that under the PLD proposal, the AI technologies and AI-enabled goods would be classed as "products" and will fall subject to the PLD liability regime. This brings chances of available compensation when defective AI causes some damage, without the harmed individual having to prove the manufacturer's fault, just like for any other regular product.

New AI liability regime

We can conclude that the new AI liability regime is advantageous, and the academic public[11] has already found the main, five clear reasons for the European legislator to act on AI liability:

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[11] Wendehorst, Ch. AI liability in Europe: anticipating the EU AI Liability Directive. University of Vienna, 2022. ISBN: 978-1-7397950-8-5. Available here: https://www.adalovelaceinstitute.org/wp-content/uploads/2022/09/Ada-Lovelace-Institute-Expert-Explainer-AI-liability-in-Europe.pdf.

Avoiding under-compensation for injured parties

This should not be understood that there is a unanimous agreement on the correct level of compensation. Professionals have been struggling for decades with the answer to whom losses should be attributed. The main argument here for adapting liability rules to AI, or introducing new liability regimes, is that it would help prevent under-compensation of harmed parties where the damage was inflicted by AI systems. Under-compensation may be a result of the absence of an appropriate legal reply or from the legal process of seeking compensation for AI-related harms becoming overly burdensome or expensive.

Enhancing enforcement of the AI Act and similar legislation

A list of essential requirements is included in the proposal of the AI Act, which certain high-risk AI systems must meet to be placed on the EU market, from data governance to human supervision, transparency, and robustness. It also contains several obligations for AI providers and other persons in the supply chain, including the deployer (normally a business or a public authority).[12] What it does not include, however, is the individual rights on the part of those harmed by the use of AI (e.g. citizens, consumers, …), such as the right to claim damages where injury has been caused. There is no private enforcement in the proposal of the AI Act itself. And that is the task of the current proposal of the AI Liability Directive.

Increasing the public trust in new technologies

The EU legislators must ensure that the AI tech brought to Digital Single Market are safe and trustworthy, but the general public also expects more important "safety net" in the form of liability for instances where damage nevertheless occurs.

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[12] Edwards, L. Regulating AI in Europe: four problems and four solutions. Ada Lovelace Institute, 2022. Available here: https://www.adalovelaceinstitute.org/report/regulating-ai-in-europe/.

Ensuring a level playing field and innovation-friendly climate for businesses

The proposal of the AI Liability Directive seeks to continue to ensure the functioning of the internal market, free movement of goods and undistorted competition between market operators, and to continue to ensure a high level of protection of consumers' health and property. In addition, it calls for a new regime of AI liability which is primarily driven not by concerns about innovation and the regulatory environment for businesses, but rather by concerns about injured parties and their right to compensation.

The "Brussels effect"

We have hinted in the beginning that this is probably the most important factors of all. The European Union is very likely to introduce among the first, if not the first, the most stringent, and most comprehensive AI regulatory regimes of the world's major jurisdictions. This upcoming regulation for AI will eventually spread around globally, giving rise to a so-called "Brussels Effect". A de facto effect is particularly likely to arise in large US tech companies with AI systems that the AI Act terms "high-risk". We think that the upcoming regulation might be particularly important in offering the first and most influential operationalisation of what it means to develop and deploy trustworthy or human-centred AI. If the EU regime is likely to see significant diffusion, ensuring it is well--designed becomes a matter of global importance.[13]

Conclusion

Discussing the Commission's proposal of the AI Liability Directive, we believe that the civil liability claims for AI-related damage would be assessed based on the legal notions of "disclosure of evidence" and "rebuttable presumptions". This would mean that the burden of proof will be alleviated from claimants. The claimants will therefore have the possibility to request access from the defendant to the data and evidence for the presumed AI-related damage. It can

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[13]   Siegmann, Ch., Anderljung, M. The Brussels Effect and Artificial Intelligence: How EU regulation will impact the global AI market. Centre for The Governance of AI. 2022. Available here: https://arxiv.org/pdf/2208.12645.pdf.

help support the plausibility of a claim for damage. If the commercial entities do not voluntarily provide access to such evidence, the harmed person may upon a reasoned request get a national court to order the disclosure of such information. If the entity still refuses to disclose the relevant information, the national court may presume its non-compliance with rules regarding duty of care. The court will therefore assume causality between the fault of the defendant and the output produced by an AI system or the failure of an AI system to produce the intended output. This presumption is a novel example, and we believe that the entire AI legislation ion the EU level is worth further close scrutiny.

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Abstract

The content of this article is the Commission's proposal of the AI Liability Directive. The text analyzes the procedural aspects of liability for damage related to artificial intelligence and the related concepts "disclosure of evidence" and "rebuttable presumptions". And it further presents Presumption of causality and New AI liability regime. In the new regime the burden of proof will be alleviated from claimants. If the commercial entities do not voluntarily provide access to such evidence, the harmed person may upon a reasoned request get a national court to order the disclosure of such information. If the entity still refuses to disclose the relevant information the court will therefore assume causality between the fault of the defendant and the output produced by an AI system or the failure of an AI system to produce the intended output.