

Key messages on European Commission's proposal on the AI Liability Directive

Insurance Europe's position in a nutshell

Insurance Europe appreciates the European Commission's intention to make it easier for victims of damage related to artificial intelligence (AI) to get compensation. However, the framework, as currently drafted, would result in legal uncertainty and discourage technological development.

In summary, the insurance industry's concerns are:

- The proposed AI liability framework, if adopted, could create legal uncertainty, rather than increasing consumer protection, because its scope of application and interplay with the revised Product Liability Directive is unclear.
- With the enhanced evidentiary burden placed on AI providers and users, the proposal in its current form would also harm, rather than support, innovation. Indeed, including vague evidentiary thresholds will increase the likelihood of litigation, which will — in addition to disincentivising AI providers and users from innovating — deter insurers from providing cover.
- Contractual freedom should be maintained now and in the future. Mandatory insurance can only work for mature and homogeneous markets. As far as AI liability is concerned, these prerequisites are far from being met. Indeed, rather than fostering the proper development of innovation and trust, the creation of compulsory insurance for AI liability would be a truly counter-productive move. Insurers will only be able to fully play their role in supporting IA innovation within a framework guaranteeing contractual freedom, as this will allow them to understand the nature of the risks inherent in each technology and product that is covered, and to decide accordingly how to insure them.

This paper identifies the areas of the proposal that should be reconsidered to preserve legal certainty and encourage innovation, to the ultimate benefit of European consumers.

Scope

European Commission's proposal

The AI Liability Directive (AILD) harmonises certain national, non-contractual, fault-based liability rules to facilitate compensation in claims for damage caused by an AI system, as defined in the AI Act.

Insurance Europe's assessment

- The scope of application of the Directive is unclear, particularly in cases of malfunctioning, non-high-risk AI systems, where both the revised Product Liability Directive and the AILD could apply. This could give rise to conflicting requirements, which would add complexity and financial costs for producers as well as undermining legal certainty.
- As to the interplay with the AI Act, the scope of the Directive goes beyond what is intended and translates the requirements placed on providers and users of high-risk AI systems under the proposed AI Act into a sort of obligation of result¹, ie, a breach of one of the obligations of the Act will constitute in itself a failure even if there is no "fault" as defined at national level.

¹ In the event of an obligation of result, a party is only bound to achieve the promised result, and failure to achieve this is in itself equivalent to non-performance.

Key messages

- To ensure legal certainty and consistency with other pieces of legislation, the scope of the AILD should be restricted to only high-risk systems and limited to actual failures of such systems.

Disclosure of evidence

European Commission's proposal

The proposal introduces requirements to disclose evidence and a rebuttable presumption of non-compliance in cases of claims for damage caused by high-risk AI systems.

Insurance Europe's assessment

- The threshold triggering the disclosure of the evidence is too vague and could establish, de facto, a discovery approach. This may increase the risk and burden of litigation, which will, in addition to disincentivising AI providers from innovating, deter insurers from providing cover and lead them to have to increase premiums.

Key messages

- The AILD should include a set of specific requirements to limit recourse to this disclosure of evidence tool. Such an approach would enhance legal certainty and discourage unfounded claims.

Rebuttable presumption of a causal link

European Commission's proposal

The proposal sets out a rebuttable presumption of causality to help victims establish the causal link between non-compliance with the duty of care and the output produced by an AI system that gives rise to the relevant damage.

Insurance Europe's assessment

- In its current form, the proposed text would place a significant evidentiary burden on the defendant. This may result in an increased risk of liability and litigation, which is likely to reduce producers' incentives to innovate.
- This provision could also give rise to legal uncertainty, as it is unclear how courts should assess the likelihood of causality. Such uncertainty will further hinder innovation and is likely to lead to costly legal cases.

Key messages

- The proposal should include objective criteria for better assessing the likelihood of the causal link. This, in turn, would ensure legal certainty and reduce the number of unfounded claims, as well as the likelihood of litigation.

Evaluation

European Commission's proposal

The proposal foresees a targeted review to assess whether additional measures are needed, such as introducing a strict liability regime and/or mandatory insurance.

Insurance Europe's assessment

- Strict liability schemes coupled with mandatory insurance only work when the risks to be covered are sufficiently similar and when specific market preconditions are met (availability of sufficient data, adequate competition, insurers interested in providing cover, sufficient reinsurance capacity). This is not the case for AI, which covers a very wide range of different appliances and uses.
- Without these preconditions, making AI liability insurance mandatory at national level would do more harm than good, and doing so at EU level would be even worse. Mandatory insurance could also lead to policyholders taking insufficient prevention measures, as they would expect the insurer to provide compensation in any case. A mandatory scheme could also potentially result in:
 - A lack of underwriting/contractual freedom, stifling innovation in insurance products.
 - An adverse effect on insurance coverage if, depending on the minimum legal requirements, the insurance market were unable to provide sufficient cover for the whole spectrum of affected producers at terms that are economically viable for insurance buyers.
 - Higher premiums.
 - Difficulties in identifying the "operator" of the AI application obliged to take out the insurance. Given that AI operators are likely to be found in various fields of activity, there does not seem to be an obvious source of information (such as vehicle registers for compulsory motor insurance).

Key messages

- The AILD should not introduce mandatory insurance, as the framework covers a wide range of different AI appliances and uses. In fact, by the time the Directive is reviewed, it is highly likely that more AI systems will be available, making it even more complicated for insurers to provide compulsory coverage.