

POSITION PAPER



ESBG response to the European Commission's call for feedback on the Artificial Intelligence Liability Directive

ESBG (European Savings and Retail Banking Group)

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1. GENERAL INFORMATION

On 28 September 2022, the Commission [published](#) its proposal for an [Artificial Intelligence Liability Directive \(AILD\)](#), for the first-time introducing specific rules to damages caused by AI systems. The purpose of the AILD is to lay down uniform rules for access to information to ease the burden of proof concerning damages caused by AI systems. Furthermore, it also establishes stronger protection for victims (be it individuals or businesses) and aims to foster the application of AI by increasing guarantees and clarity.

The AILD uses the same definitions as the AI Act, keeps the distinction between high-risk/non-high-risk AI, recognises the documentation and transparency requirements of the AI Act by making them operational for liability through the right to disclosure of information, and incentivises providers/users of AI-systems to comply with their obligations under the AI Act. The AILD will apply to damage caused by AI systems, irrespective if they are high-risk or not according to the AI Act.

The AILD attempts to strike a balance between protecting consumers whilst simultaneously fostering innovation. It does this by removing additional barriers for victims to access compensation, while laying down guarantees for the AI sector by introducing, for instance, the right to contest a liability claim based on a presumption of causality. The AILD simplifies the legal process for victims and the process of obtaining compensation in case of discrimination in AI-applications, for instance, in a recruitment process by introducing two main features:

- firstly, the so-called 'presumption of causality', where a relevant fault has been established and a causal link to the performance of the AI-application seems reasonably likely. The AILD will address the difficulties experienced by victims when explaining what damages were caused by a specific fault or omission by an AI system(s).
- secondly, through the introducing a right of access where companies and suppliers need to provide information concerning their AI-application to ensure that victims will have a broader toolbox to seek legal remedy - especially in cases where high-risk AI was used.

It is proposed that five years after the entry into force of the AI Liability Directive, the Commission will assess the need for no-fault liability rules for AI-related claims if necessary.

On 3 October 2022, the European Commission opened a possibility to provide feedback on the proposed AI Liability Directive for a minimum period of 8 weeks until 11 December 2022 (midnight Brussels time). All feedback received will be summarised by the European Commission and presented to the European Parliament and Council with the aim of feeding into the legislative debate. Feedback received will be published on the consultation website of the European Commission and therefore must adhere to the [feedback rules](#).



2. FEEDBACK

The European Savings and Retail Banking Group (ESBG) supports the protection of consumers as well as adapting liability rules to the digital age, thereby setting out a framework for excellence and trust in Artificial Intelligence. However, we understand from the proposed Directive that the presumption of a causal link in the case of fault is mainly a matter of "non-compliance of due diligence duties".

For the presumption of a causal link between a breach of due diligence by the provider or user of the AI system and the result produced by the AI system, three requirements (all of them) must be met:

- The fault must be attributable to the behavior of a person, for the breach of a duty of care that is intended to protect the client against damages.
- It must be reasonably likely that the failure has influenced the result produced by the AI system that has caused the damage.
- 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.

In this context, we believe that it should be clarified what could be considered a "non-compliance with a duty of care laid down in Union or national law directly intended to protect against the damage that occurred", and also when it is "reasonably likely" that the failure has influenced the result produced by the AI system that has caused the damage. We wonder whether the presence of bias or discrimination could be considered a noncompliance of due diligence duties. In addition, what are the tools that providers and users of AI systems have to refute the causal link?

Furthermore, as the AILD is a directive, it is important to take the cultural and legal differences between member states into account when implementing. For instance, level of public openness can vary amongst member states which in turn can lead to proprietary information concerning the specific application of AI unintentionally becoming public. The same challenge i.e., different application across member states, can also open for regulatory arbitrage where firms choose where they are domiciled according to the member states legislative application. It is therefore also important that the directive is aligned with the Rome I Regulation (No 593/2008) and the Rome II Regulation (No 864/2007) regarding the conflict of laws on the law applicable to non-contractual obligations.



About ESBG (European Savings and Retail Banking Group)

ESBG is an association that represents the locally focused European banking sector, helping savings and retail banks in 16 European countries strengthen their unique approach that focuses on providing service to local communities and boosting SMEs. An advocate for a proportionate approach to banking rules, ESBG unites at EU level some 885 banks, which together employ 656,000 people driven to innovate at 48,900 outlets. ESBG members have total assets of €5.3 trillion, provide €1 trillion billion in corporate loans, including SMEs, and serve 163 million Europeans seeking retail banking services. ESBG members commit to further unleash the promise of sustainable, responsible 21st century banking. Learn more at www.wsbi-esbg.org.



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