Brussels, 28 November 2022
FINAL

EACB Position Paper on a proposal for a Directive on adapting non-contractual civil liability rules to artificial intelligence (The AI Liability Directive)

The **European Association of Co-operative Banks** (EACB) represents, promotes and defends the common interests of its 27 member institutions and of cooperative banks, with regard to banking as well as to co-operative legislation. Founded in 1970, today the EACB is a leading professional lobbying association in the European banking industry. Co-operative banks play a major role in the financial and economic system. They contribute widely to stability thanks to their anti-cyclical behaviour, they are driver of local and social growth with 2.700 locally operating banks and 52,000 outlets, they serve 223 million customers, mainly consumers, SMEs and communities. Europe's co-operative banks represent 87 million members and 705,000 employees and have an average market share in Europe of about 20%.

For further details, please visit www.eacb.coop

EACB AISBL – Secretariat • Rue de l'Industrie 26-38 • B-1040 Brussels
Tel: (+32 2) 230 11 24 • Fax (+32 2) 230 06 49 • Enterprise 0896.081.149 • lobbying register 4172526951-19
www.eacb.coop • e-mail : secretariat@eacb.coop

Introduction

The European Association of Co-operative Banks (EACB) welcomes the possibility to contribute to the discussion on the proposal for a Directive on adapting non-contractual civil liability rules to artificial intelligence (the AI Liability Directive).

General remarks

The EACB appreciates the Commission's proposal as it aims to create a minimum harmonisation approach, designed to help consumers raise damages claims when something goes wrong with the operation of an AI system and to reduce legal uncertainty for businesses developing or using AI regarding their possible exposure.

We fully understand the aim to build consumers' trust and willingness to take up AI-enabled products and services. We believe this will be possible on one hand by having rules (i.e., the AI Act) that ensure that AI systems placed on the Union market are safe and compliant with existing law, and on the other by having rules specifying who is liable for which damage. We believe the latter is what the AI Liability Directive intends to achieve by laying down minimum uniform requirements (on the disclosure of evidence on high-risk AI systems and on the rebuttable presumption of a causal link in the case of fault) in order not to create frictions with existing and significantly diverse Member State liability frameworks.

However, it must be considered that introducing a non-contractual liability framework will have profound repercussions on costs, including insurance, and innovation in the development of AI systems which we believe are disproportionate to the current advancement of the technology.

In this position, we address a few aspects we believe would need attention from policy makers to improve the proposal. In particular, in the following sections, we address the topics:

- Relation between output of AI system and suffered damages by claimant.
- Scope of the 'relevant evidence' to be disclosed.
- Non-compliance with non-high-risk AI systems.
- Relationship with the AI Act and sanctions.
- Mandatory insurance for the targeted review of the AI Liability Directive.

EACB's specific comments

Direct relation between output of AI system and suffered damages by claimant

Recital 15 describes a carve-out of the AI Liability Directive for cases where damages are caused by a human assessment followed by a human act or omission, while the AI system only provided information or advice which was taken into account by the relevant human actor. This seems to be explained as human-in-the-loop carve-out. In the proposed language of the Directive the difference between a direct end-user-facing AI-system and the aforementioned human-in-the-loop is not entirely clear.

Limiting the scope of the 'relevant evidence' to be disclosed

Art. 3(1) states: *"Member States shall ensure that national courts are empowered, either upon the request of a potential claimant who has previously asked a provider, a person subject to the obligations of a provider pursuant to [Article 24 or Article 28(1) of the AI Act] or a user* ***to disclose relevant evidence*** *at its disposal about a specific high-risk AI system that is suspected of having caused damage, but was refused, or a claimant, to order the* ***disclosure of such evidence*** *from those persons".*

We strongly believe that the 'relevant evidence' to be disclosed should be clarified and limited to some information about the specific high-risk AI system. The AI Liability Directive proposal says nothing about the type of information that the 'relevant evidence' includes, implying that all information from Arts 9–15 and Arts 17–29 of the AI Act could be accessed.
Disclosing information consisting of training, validation or testing datasets pursuant to Art. 10 AI Act would not only be challenging from a practical point of view (i.e., due to data size and its readability) but also from a competition point of view. Information relating to datasets, risk management systems (Art. 9 AI Act), quality management systems (Art. 17 AI Act) etc. would be too sensitive to be disclosed due to a variety of reasons such as IPR, trade secret, banking and insurance secret, privacy and fraud detection. For instance, with regard to the latter, banks should not disclose to any third party how fraudsters (money laundering and financing of terrorism) are detected, with the risk of fraudsters using this information.

Linked to the issue of the type of 'relevant evidence' to be disclosed, we see two additional issues:

1) **Art. 3(4) second subparagraph on confidential information**: We acknowledge that the second and third subparagraphs of Art. 3(4) aim to strike a balance between the claimant's rights and the need to ensure that such disclosure would be subject to safeguards to protect the legitimate interests of all parties concerned, such as trade secrets or confidential information. However, we are not comfortable with the language used in the second subparagraph where it appears to limit confidential information to '*information related to public or national security*'. These confidentiality arrangements are not clear and too vague, especially as such AI systems are considered high-risk as they could cut access to essential private services.

2) **Addition of sufficient time to disclose information, Art. 3(4) 1a new**: We believe that sufficient time to disclose information is of vital importance considering the consequences of not delivering the 'relevant evidence', i.e., presumption of non-compliance with a relevant duty of care information (Recital 21 and Art. 3(5)).

We suggest limiting the 'relevant evidence' to the following information:

- Information from the technical documentation pursuant to Art. 11 AI Act.
- Information from logs set up pursuant to Art. 12 AI Act.
- Information concerning Art. 13 on 'transparency and provisions of information to users' of the AI Act.

Concerning our remarks on Art. 3(4) second subparagraph, we suggest rewording the sentence as follows (new parts in bold):

'In determining whether an order for the disclosure or preservation of evidence is proportionate, national courts shall consider the legitimate interests of all parties, including third parties concerned, in particular in relation to the protection of trade secrets within the meaning of Article 2(1) of Directive (EU) 2016/943 and of confidential information, such as information related to public or national security **or as relevant to fight fraud or detect criminal activity'**.

Regarding our comments to the need of sufficient time to disclose information, we suggest adding the following new paragraph after Art. 3(4) first paragraph:

'**National courts shall ensure that the defendant have sufficient time to comply with the order for the disclosure of evidence'.**

Non-compliance with non-high-risk AI systems

Though closely connected with the AI Act, the AI Liability Directive also covers non-high-risk AI systems.

Art. 3 on the disclosure of evidence specifically refers to 'specific high-risk AI systems suspected of having caused damage', whereas Art. 4 on the rebuttable presumption of a causal link in the case of fault refers to cases of a claim for damages against a provider of high-risk AI systems and cases for damages concerning an AI system that is not a high-risk AI system.

Concerning high-risk AI systems, non-compliance with AI requirements is laid down in the AI Act. The same does not apply to non-high-risk AI systems. For the latter, the Commission and Member States should encourage and facilitate the drawing up of codes of conduct to foster the voluntary application to non-high risk AI systems of the requirements for high-risk AI systems. Absent this, extending the same obligations to systems not covered by legal obligations lacks a proper legal basis.

We suggest deleting Recital 28 and Art. 4(5) referring to non-high-risk AI systems.

Relationship with the AI Act and sanctions

Providers and users would take a huge risk by investing into high-risk AI systems (as per Art. 6 AI Act) because they risk receiving very high sanctions pursuant to the AI Act and potentially having to pay damages to consumers affected by the AI system under the AI Liability Directive. Therefore, and especially because the requirements of the AI Act are so strict, we would suggest adding an article to the AI Liability Directive determining the relationship between these two Acts.

Although the AI Liability Directive does not deal with sanctions, we would like to use the occasion of this position paper to stress that the AI liability proposal should be taken into account to reconsider the maximum sanctions of the AI Act (Art. 71), which should be lowered in light of the damages companies will incur under the AI Liability Directive.

It should also be considered that in line with other legislation, for example financial regulation, it cannot be assumed that non-compliance with legal obligations will automatically result in civil liability exposure.

Concerns about the possible inclusion of mandatory insurance at a second stage (Recital 31 and Art. 5 review)

We acknowledge that that AI Liability Directive is based on a staged approach. At a first stage, the objectives are achieved with a minimally invasive approach and at a second stage, the Commission will re-assess the need to harmonise other elements, including with the need for mandatory insurance.

We are concerned about the inclusion of possible mandatory insurance coverage in the AI Liability Directive.

We believe that mandatory insurance is not a preferable policy option because requiring insurance companies to offer AI insurance would severely affect the risk management and pricing of AI insurance products. We don't believe such insurance would increase innovation in the EU. On the contrary, it will undermine the uptake of AI.

The EACB is convinced that it should remain in the discretion of insurance companies to decide whether they want to offer AI insurance, and on what conditions and pricing. It ought to be considered that insurance companies would be interested in offering AI insurance without it being mandatory.

It is important to note that when evaluating the need for mandatory insurance, the following factors should be considered:

1. Protection needed for potential claimants.
2. Clearly defined group of defendants.
3. How non-insured entities are covered.
4. What are the sanctions for companies that haven't taken insurance.
5. Competition law issues.

We suggest deleting references to mandatory insurance throughout the AI Liability Directive (i.e., Recital 31, Art. 5.2).

Contact:

The EACB trusts that its comments will be taken into account.

For further information or questions on this paper, please contact:

- Ms Marieke van Berkel, Head of Department Retail Banking, Payments, Financial Markets (marieke.vanberkel@eacb.coop)
- Ms Chiara Dell'Oro, Senior Adviser for Digital Policies (chiara.delloro@eacb.coop)