POSITION PAPER ON AI LIABILITY

Position paper of the Verbraucherzentrale Bundesverband (vzbv) on the European Commission's proposal for a directive on AI liability (COM (2022) 496)

28. November 2022

Legal information

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CONTENT

I. SUMMARY

From a consumer perspective, the European Commission proposal for a Liability Directive specifically on AI, presented on 28 September 2022, is a welcome development. We endorse the analysis of the European Commission that the current rules are not appropriate to adequately measure harm caused by AI. However, the present proposal cannot achieve the objectives of facilitating liability litigation and making it affordable, especially for consumers. In summary, the Federation of German Consumer Organisations (Verbraucherzentrale Bundesverband – vzbv) believes the following adjustments are required and should be considered in the course of the further legislative process:

- The rules for fault-based liability for the use of artificial intelligence (AI) provided for in the AI Liability Directive[1] are unsuitable for consumers: the burden of proof in the AI Liability Directive is so high that in practice it will be almost impossible for consumers to obtain compensation.
- The European Commission's minimally invasive approach of fault-based liability should be opposed. Rather, in line with the new Product Liability Directive proposed by the European Commission, **strict liability (no-fault liability)** should also be introduced for AI systems.
- The numerous requirements that have to be fulfilled render the pre-trial proceedings of a potential claimant overly complex and thus unsuitable for consumers (Art. 3 AI Liability Directive). This creates cost implications for consumers that are difficult to assess and therefore discouraging.
- The requirements for consumers to provide evidence regarding the fault of the defendant are unrealistically high. Moreover, it is almost impossible in practice for consumers to prove that the fault affected the result produced by the AI system (Art. 4(1)(a) and (b) AI Liability Directive).

In addition to the necessary adjustments, the draft also contains positive aspects that vzbv wishes to see retained:

- We welcome the fact that the AI Liability Directive covers both material and immaterial damage. The AI Liability Directive thus complements the European Commission's narrower proposal for a Product Liability Directive[2] and thus closes liability gaps in the Product Liability Directive.
- We are also pleased that the Directive is to be included in Annex I of the European Directive on representative actions for the protection of the collective interests of consumers ((EU) 2020/1828). We strongly urge that this be maintained (Art. 6 AI Liability Directive).

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[1] European Commission: 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) COM/2022/496 2022.

[2] European Commission: Proposal for a Directive of the European Parliament and of the Council on liability for defective products COM (2022)495 final

II. INTRODUCTION

If consumers are harmed by algorithmic decision-making systems[3], compensation for the damage must be ensured by appropriate liability of those responsible. This is also a prerequisite for functioning markets. A central challenge is algorithmic systems' lack of transparency and the resulting difficulty consumers face when providing evidence. This high threshold for obtaining compensation often means that consumers do not (or cannot) claim compensation for damage suffered. Consequently, suppliers whose products cause damage do not provide compensation for this and thus gain a competitive advantage over more careful/trustworthy competitors. This undermines trust in the providers in a market and jeopardises the functioning of the market itself, even to the point of market failure.[4]

The AI Liability Directive presented by the European Commission does not succeed in overcoming this systematic disadvantage facing consumers in the liability regime. The main reason for this is clear: the AI Liability Directive does not provide for strict liability (no-fault liability).

Furthermore, the proposed regulation is not designed for use by consumers. The hurdles of providing evidence/evidence thresholds in Art. 3 AI Liability Directive and Art. 4 AI Liability Directive are set too high for this. Apparently, the Commission primarily had companies in mind as claimants. Consequently, the AI Liability Directive creates a highly complex expert law. The assumption, if it was ever realistic, that consumers could get a tool with which to enforce claims easily and thus actually enjoy the highest standards of protection, is in any case not fulfilled.[5]

[3] Hereafter ADM systems

[4] Akerlof, George A.: The Market for “Lemons”: Quality Uncertainty and the Market Mechanism* 84 (1970), in: The Quarterly Journal of Economics, H. 3, p. 488–500.

[5] According to the EU Commission, the aim of the AI Liability Directive is "to ensure that EU consumers benefit from the highest standards of protection, even in the digital age". Cf. European Commission: Questions & Answers: AI Liability Directive (2022), URL: https://ec.europa.eu/commission/presscorner/detail/en/QANDA_22_5793 [last verified: 25/11/2022]. Furthermore, according to the explanatory memorandum, the aim of the AI Liability Directive is "ensuring victims of damage caused by AI obtain equivalent protection to victims of damage caused by products in general". This implies that the evidence threshold of the AI Liability Directive would have to be similarly low as in the Product Liability Directive. This is not the case, because the Product Liability Directive, unlike the AI Liability Directive, contains strict liability. Cf. European Commission (s. FN. 1) p.2.

III. APPROPRIATE LIABILITY REGULATION

1. THE EUROPEAN COMMISSION'S PROPOSAL IGNORES THE REALITY OF CONSUMERS' LIVES

The hurdles to obtaining compensation for consumers must be low. The hurdles to providing evidence envisioned in the AI Liability Directive are so high that consumers have to assume they will not be able to obtain compensation through the AI Liability Directive if they suffer any damage.

In order for a liability regime to fulfil its compensatory and deterrent function in the market, the hurdles for this must be sufficiently low. If the evidence threshold is set too high, consumers have to assume they will not be able to obtain compensation. The liability regime will then become ineffective as a result of the prohibitively high litigation and cost risks: the high costs of litigation are disproportionate to the low expected return, and compensation proceedings are not even pursued. Unfortunately, this is also the case in the AI Liability Directive.

In most cases, it will be almost impossible for consumers who have suffered harm to prove before a court of law that the user of an AI system is also responsible for the damage, as the AI Liability Directive requires. The problem for consumers is that they have to prove that breaches of the operator's duty of care or, in the case of high-risk AI, non-compliance with certain requirements of the Artificial Intelligence Act (AI Act) resulted in harm such as covert discrimination and unfair treatment of consumers. "Ordinary" affected persons generally cannot conclusively demonstrate this causal chain.

2. STRICT LIABILITY URGENTLY NEEDED

Harmed parties are usually not able to recognise the exact technical processes and the steps of how an AI system works.[6] It is therefore vital to pay special attention to the burden of proof in the case of liability. What appears to be urgently needed here is a liability for AI systems that is independent of a fault, in the sense of a strict liability in the case of intended consumer use. For the liability of the provider or the professional user, it should be sufficient if an AI system, when used as intended, causes damage that is typically to be expected when using the respective AI system. This strict liability was, for example, developed for owners of motor vehicles and animals, which in any case have a certain inherent "operational risk".[7]
In particular, self-learning AI systems can develop a "life of their own" that is reminiscent of the autonomous actions of animals, which humans only control to a limited extent. That is why there should be no defence of liability based on "development risk" for all AI systems. This allows suppliers to evade liability because they had no knowledge of defects at the time the product was placed on the market. They argue that due to the continued development of the (learning) system, the defects only manifested themselves after the system appeared on the market.

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[6] See also Martini, Mario: FUNDAMENTALS OF A REGULATORY SYSTEM FOR ALGORITHM-BASED PROCESSES. Expert opinion prepared on behalf of the Federation of German Consumer Organisations (2018) p. 35f.

[7] This means that when exercising human judgement when operating a motor vehicle or walking a dog, there is always a certain risk from the motor vehicle/dog that cannot be fully contained. Whoever keeps such an "object" must be responsible for it if the typical damage (accident, bite) occurs.

For instance, the risks of using a nursing robot (errors that can result in injury or death) or facial recognition (errors in recognition and thus violation of personal rights, but also data leaks and complete surveillance) are evident and even precautionary measures cannot completely eliminate them.
In view of the comprehensive surveillance and control possibilities that AI systems offer, the full extent of which is only just beginning to emerge, it may not only be a matter of danger to life and limb. The self-determination of the individual and the right not to live under total surveillance is a legal interest that carries sufficient weight for strict liability to apply. It is therefore the only appropriate remedy here. Such a distribution of the burden of proof would thus correspond to the respective spheres of risk. The provider would then be liable in principle, without its specific fault being relevant.

VZBV RECOMMENDS THE FOLLOWING:
the introduction of **strict liability** for (especially **high-risk**) **AI use cases**, coupled with **mandatory insurance**, as a requirement in the AI Liability Directive.

This is also in line with the European Parliament's proposal of 20 October 2020 for a regulation on liability for the operation of artificial intelligence systems.[8] In contrast, the European Commission itself states in the explanatory memorandum that it limited itself to a minimally invasive approach and, of all the means available to facilitate proof, considered the rebuttable presumption as the least intrusive instrument to be sufficient.[9] This statement exemplifies a proposal that, on the whole, lacks ambition. The European Commission admits that during consultations all respondents (with the exception of non-SMEs) were in favour of a strict liability regime. Yet the European Commission rejects this. The main reason given was that consideration had to be given to the still-developing market for AI applications.[10] However, AI as a new technology can only develop on the market if users trust it. If politicians and manufacturers already trust this new technology so little that they set the requirements for liability lower than for all other products, society cannot be expected to place more trust in the technology. From a consumer perspective, the one-sided consideration of manufacturers' interests is therefore incomprehensible and unacceptable.

[8] European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence(2020/2014(INL)) https://www.europarl.europa.eu/doceo/document/TA-9-2020-0276_EN.html

[9] European Commission (s. FN. 1) p. 7

[10] Ibid. p. 17

IV. REGULATORY PROPOSAL OF THE COMMISSION

1. MINIMUM HARMONISATION LEADS TO PATCHWORK AND LEGAL UNCERTAINTY.

The AI Liability Directive aims in particular to address problems related to legal uncertainty and legal fragmentation. However, the AI Liability Directive in its current form continues to pose the risk of a patchwork of liability laws. As the AI Liability Directive only follows a minimum harmonisation approach, member states could enact laws providing for a reversal of the burden of proof or strict liability rules.

It would be better to establish a higher uniform level of protection from the outset, as was also proposed by the European Parliament.[11] This would be preferable precisely for reasons of legal certainty within the EU.

In view of the AI Liability Directive's overall too low level of protection, minimum harmonisation is nevertheless preferable from a consumer point of view. It would at least create the possibility for adequate consumer protection on a national level.

2. INTERACTION BETWEEN PRODUCT LIABILITY DIRECTIVE AND AI LIABILITY DIRECTIVE

In contrast to the Product Liability Directive, the AI Liability Directive only applies to fault-based liability. However, the liability of the Product Liability Directive is limited to certain legal interests. The AI Liability Directive could thus close liability gaps in the Product Liability Directive because of its wider scope of application.

The AI Liability Directive also covers legal interests that do not fall under the protection of property, such as immaterial damage like discrimination or equal treatment (cf. Rec. 2 AI Liability Directive).

The reason is that the AI Liability Directive is limited only to supplementary rules to existing member state rules for fault-based liability bases, so that national liability rules covering, for example, discrimination or equal treatment can be applied.

Moreover, unlike the Product Liability Directive, the circle of injured parties in the AI Liability Directive is not limited to consumers.

3. DEFINITION OF DAMAGE AND INJURED PARTIES

The AI Liability Directive does not establish any new claims for damages. Rather, it is intended to supplement the liability provisions already laid down in national law. Art. 2(5) AI Liability Directive refers to "damage" in general terms without limiting it to specific types of damage or injured parties (individuals or groups); therefore, the AI Liability Directive includes both tangible and intangible damage (to the extent that these are regulated, for example, in national liability legislation).[12] This includes, for example, damage caused by systematic, unjustified discrimination, such as discrimination

[11] Cf. on this under III.2.

[12] European Commission (s. FN. 1) Recital (10).

against certain groups of people. Since, from a consumer perspective, immaterial damage can also occur, especially with AI applications, vzbv welcomes the fact that a potential liability gap is closed here in contrast to the Product Liability Directive.

VZBV RECOMMENDS THE FOLLOWING:

the AI Liability Directive should cover **both material and immaterial damage**, as provided for in the current proposal. The AI Liability Directive thus complements the more narrowly defined Product Liability Directive and thereby closes liability gaps in the Product Liability Directive.

4. LACK OF TRANSPARENCY ABOUT THE USE OF AI SYSTEMS

In order to obtain compensation under the AI Liability Directive, the potential claimant must first be aware that an AI system caused the damage. In many cases, affected consumers cannot know whether the system that caused the damage is an AI system in the sense of Art. 3(1) AIA or another algorithmic system.

It is questionable to what extent the CE marking according to Art. 49 AIA or marking according to Art. 52 AIA can provide effective transparency for consumers when it is not a matter of physical products but of services. This is especially so when these AI systems run as processes "in the background" and do not interact directly with humans.

In the case of AI systems that do not have to be labelled in accordance with Art. 49 AIA and Art. 52 AIA, it must be assumed that consumers cannot know whether an AI system was involved in causing the damage in the first place.

This asymmetry of information is the first of many hurdles that make it de facto impossible for consumers to receive compensation for damage under the AI Liability Directive in practice.

5. DISCLOSURE OF EVIDENCE

One of the supposed advantages compared to the simultaneously negotiated Product Liability Directive is the disclosure of evidence even *before* a complaint has been filed. The AI Liability Directive thus allows potential claimants to view evidence in advance of a considered and thus potential lawsuit, so that they can better assess whether to file a possibly (more) expensive lawsuit. However, on closer inspection, the procedure turns out to be very complex for consumers:

Art. 3(1) AI Liability Directive restricts the intended disclosure of evidence only to cases in which a *high-risk* AI system within the meaning of the AI Act is suspected of having caused damage. In the case of non-high-risk AI systems, the claimant cannot demand disclosure.

Endeavour towards voluntary disclosure

First of all, the potential claimant must have unsuccessfully requested disclosure.[13] In practice, this will probably turn out to be an unnecessary formality which, in case of doubt, prolongs the procedure. This is because the provider's refusal to respond to the disclosure request in advance has no consequences for the provider:

[13] The addressees of the disclosure request are providers of high-risk AI (Art. 3(2) AIA), or product manufacturers (under Art. 24 AIA) or traders, importers, users under Art. 28 AIA.

Rec. (17) The refusal of the provider, the person subject to the obligations of a provider or the user prior to the request to the court to disclose evidence should not trigger the presumption of non-compliance with relevant duties of care by the person who refuses such disclosure.

Presentation of the plausibility of the claim for damages

Secondly, if the defendant does not disclose the evidence, the potential claimant must adequately prove the plausibility of his or her claim for damages to a court by presenting facts and evidence (Art. 3(1.2) AI Liability Directive). Only then could the court order the disclosure of the evidence.

This proof of plausibility may still have to be provided in obvious cases, such as in the event of physical damage caused by a clear malfunction of a robot.[14] In the case of non-material damage, it can be extremely difficult or even impossible for consumers to prove their claims, for example in possible discrimination cases: when facial and emotional analysis systems used by insurance companies to detect insurance fraud[15] are less good at recognising emotions in dark-skinned people than in light-skinned people. Similar problems are conceivable with personality analyses of job applicants. There is a high risk that in such cases consumers would regularly fall at this first hurdle. Thus the advantage of a particularly broad liability regulation in comparison to the Product Liability Directive is lost: especially in cases where the regulatory scope of the AI Liability Directive could go beyond the Product Liability Directive (immaterial damage), the AI Liability Directive would de facto hardly be applied in practice.

Restriction on disclosure of evidence: proportionality and trade secrets

Thirdly, according to Art. 3(4) AI Liability Directive, the courts must still consider whether the disclosure of the evidence is proportionate. In this context, the legitimate interests, such as trade secrets, of the providers must be examined. From the perspective of the potential defendant company, this restriction may seem necessary, especially as the AI Liability Directive (unlike the Product Liability Directive) is not limited to consumers. This makes it easier to argue for the protection of trade secrets, especially in the face of lawsuits from other companies. From a consumer perspective, however, this is another hurdle. This also shows that the AI Liability Directive did not have consumers in mind as potential claimants.

It is therefore very questionable whether the advantage of a cost-saving preliminary assessment of the chances of a lawsuit's success (Rec. 17 AI Liability Directive) can be realised in practice for consumers at all. But even if the three aforementioned conditions were met and a disclosure order would thus[16] theoretically be successful, further obstacles remain:

for one, the disclosure order unfortunately does not ensure that the evidence obtained actually has practical value, i.e. that it can be used meaningfully in the proceedings.[17]

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[14] European Commission: Impact Assessment Report - SWD(2022)319 (2022), URL: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13601-Liability-rules-for-Artificial-Intelligence-The-Artificial-Intelligence-Liability-Directive-AILD-_en [last verified: 18/11/2022] Annex 13, p. 233ff.

[15] Quach, Katyanna: Insurance startup backtracks on running videos of claimants through AI lie detector (2021), URL: https://www.theregister.com/2021/05/26/ai_insurance_lemonade/ [last verified: 23/07/2021].

[16] European Commission (see FN. 14).

[17] At least the AI Liability Directive speaks of "relevant" evidence that must be disclosed, cf. Art. 3(1) sentence 1 AI Liability Directive.

This is because usually only specialists are capable of meaningfully analysing the evidence obtained.

Lack of transparency as to whether high-risk system caused the damage

On the other hand, it must not be forgotten that the potential claimant must have shown in advance that it was indeed a *high-risk* AI system, as the disclosure requirement only applies to these systems (cf. Art. 3(1) sentence 1 AI Liability Directive).

This restriction of the disclosure obligation to high-risk systems further complicates the application of Art. 3 AI Liability Directive in practice for consumers. In many cases, it will not be clear to consumers who have suffered damage whether the damage was caused by a high-risk AI system.

Art. 49 AIA obliges providers of high-risk AI systems to provide them with CE marking of conformity. To what extent this will actually ensure transparency in practice is questionable. In particular, in the case of non-physical AI systems, i.e. applications and services, Art. 49(1) AIA provides that the CE conformity marking may be affixed in the "accompanying documentation". Negative experiences with the design of data protection agreements and general terms and conditions show that this form of information provision does not necessarily ensure transparency, but often serves to obfuscate the issue.

Furthermore, it is unclear to what extent CE marking or labelling according to Art. 52 AIA can ensure effective transparency towards consumers when a high-risk system runs "in the background" and does not interact directly with people. For instance, when employers use AI systems to screen out job applicants based on their application documents.

Conclusion on Art. 3 AI Liability Directive

Ultimately, the preliminary proceedings of a potential claimant for disclosure of evidence, although less expensive than a lawsuit, are nevertheless associated with potential costs that are difficult to assess and therefore discouraging for consumers. This is because the proof of plausibility must first of all be supported by corresponding facts and evidence in order to be considered "sufficient" (cf. Art. 3(1.2) AI Liability Directive).

> **VZBV RECOMMENDS THE FOLLOWING:**
>
> due to the very ambiguous wording of Art. 3 AI Liability Directive, it is unclear how the required evidence is to be provided in practice. The costs resulting from the pre-litigation disclosure procedure are difficult to estimate and therefore a deterrent for consumers. In order to keep these costs transparent, the disclosure of evidence would have to be made more practice-oriented. However, it would be better to rely on strict liability from the outset.

6. ART. 4 AI LIABILITY DIRECTIVE - REBUTTABLE PRESUMPTION OF A CAUSAL LINK

Art. 4 AI Liability Directive establishes a rebuttable presumption of a causal link between the fault of the operator of an AI system and the output of the AI system. However, the hurdles and risks for furnishing the evidence that a claimant must provide under Art. 4 AI Liability Directive in order to obtain damages are set so high that consumers cannot provide such evidence in practice.

In order to obtain damages, consumers would first have to prove the defendant’s fault in accordance with Art. 4(1)(a) AI Liability Directive. This means that there are not only

potential legal costs, but also that technical or data experts would have to be commissioned to prepare expert opinions. Yet in all of this it is completely unclear whether they will ultimately prevail with their arguments in court (cf. comments on Art. 3 AI Liability Directive). The evidence threshold for consumers therefore entails prohibitively high financial and litigation risks.

This makes it clear that Art. 4 AI Liability Directive is tailored to institutional claimants, such as companies. The fault-based liability regulation under Art. 4 AI Liability Directive should therefore only be retained for use by companies.

For consumers to have a realistic chance of providing the evidence required for damages, however, Art. 4 AI Liability Directive needs to be supplemented by a provision with simplified rules for consumers so as to counteract the imbalance regarding information. This should be based on strict liability, so that they have a realistic chance of actually being able to provide the evidence required for damages.

By way of illustration: consumers cannot provide the evidence required from the plaintiff pursuant to Art. 4(1) and (2) AI Liability Directive without an external expert.

The European Commission also assumes in the Impact Assessment that external experts will provide this evidence.[18] Involving external technical expertise entails high financial risks for consumers, but is necessary in order to provide the evidence required in Art. 1(a) and Art. 4(2) AI Liability Directive: the breach of due diligence or AIA requirements whose immediate purpose is to prevent the damage that has occurred. This will usually require a review of the evidence the defendant has disclosed (such as analysing and interpreting log data, audit statistics, etc.).

In the next step, Art. 4(1)(b) AI Liability Directive requires that "it can be considered reasonably likely, based on the circumstances of the case, that the fault has influenced the output produced by the AI system". This would have to be assessed on the basis of the overall circumstances of the case. Again, it is questionable how the evidence would have to be provided in practice. If, for example, the claimant had to substantiate this with corresponding technical expert opinions, this would hardly be possible for consumers.

> **VZBV RECOMMENDS THE FOLLOWING:**
> introducing strict liability in favour of consumers so that consumers have a realistic chance of obtaining compensation.

7. ART. 5 AI LIABILITY DIRECTIVE - EVALUATION

The directive is to be evaluated after five years at the latest. Attention should be paid to the settlement of claims and further consideration should be given to the appropriateness of strict liability provisions. vzbv would like to see strict liability introduced now. Of course, an evaluation should still be carried out.

8. ART. 6 AI LIABILITY DIRECTIVE - ENSURING COLLECTIVE REDRESS

Consumers benefit considerably when consumer protection organisations enforce their rights in court, in addition to the enforcement of rights by competent authorities and

[18] European Commission (see FN. 14)., Annex 13, p. 233ff.

public bodies.[19] vzbv therefore welcomes the fact that the legislator wants to add the AI Liability Directive to Annex I of the European Directive on representative actions for the protection of the collective interests of consumers ((EU) 2020/1828).[20]

VZBV RECOMMENDS THE FOLLOWING:

it is essential to retain Art. 6 AI Liability Directive on the inclusion of the AI Liability Directive in Annex I of the European Directive on representative actions for the protection of the collective interests of consumers ((EU) 2020/1828).

[19] Verbraucherzentrale Bundesverband: Mehr Sammelklage wagen - Kurzpapier des vzbv (2021, in German), URL: https://www.vzbv.de/pressemitteilungen/mehr-sammelklage-wagen [last verified: 21/07(2021]; Verbraucherzentrale Bundesverband: vzbv-Klage gegen VW führt zu Deutschlands größtem Massenvergleich (2020, in German), URL: https://www.vzbv.de/urteile/vzbv-klage-gegen-vw-fuehrt-zu-deutschlands-groesstem-massenvergleich [last verified: 21/07(2021].

[20] European Parliament: Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (2020), URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32020L1828 [last verified: 21/07/2021].