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New AI Liability Rules

What You Need to Know

- In April 2021, the European Commission proposed an EU regulatory framework on artificial intelligence, the AI Act. The Act is the first regional attempt to horizontally regulate AI and shows the EU's intention to be at the forefront in this area.

- In conjunction with the AI Act, the Commission also proposed an AI Liability Directive. As the name indicates, this Directive sets out rules for claims for damages resulting from AI systems.

- The objective of the AI Liability Directive is to make it easier for a consumer or business to sue the providers or users of an AI system for damages caused by that system.

> Our insights into the thinking behind the AI Act and the AI Liability Directive, and our deep EU technology regulatory expertise, means that we are well placed to help clients navigate the emerging and highly complex AI regulatory landscape.

Why Covington?

Covington represents many technology companies, including several that develop AI systems or plan to use them, and for which we closely follow AI regulatory developments.

Combining our technology regulatory, privacy and dispute resolution capabilities, our cross-disciplinary team is advising on the impact of the EU's AI regulations, helping our clients to navigate this new regulatory landscape.

For more information, please reach out to Kristof Van Quathem, Anna Sophia Oberschelp de Meneses, or another member of our team.

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Why Does It Matter?

The EU identified two problems regarding the liability of AI systems that it is trying to resolve, which will impact manufacturers and providers of AI systems.

- The first problem is whether AI systems are in scope of the current EU liability laws, such as the EU Directive on Liability of Defective Products. Under this Directive, manufacturers of "products" are liable for no-fault liability for defective "products". Because it is currently unclear whether software, such as an AI system, is a "product", the Directive is being revised to clarify that it also applies to software. The AI Liability Directive is closely linked to this other Directive, but it covers liability claims relating specifically to AI systems mainly based on the fault of their providers.

- The second problem relates to the issue of evidence. Because of the way AI systems work, consumers or businesses may find it difficult to understand whether or not the damage resulted from the AI system, and to gather enough evidence to start redress proceedings.

- To address this, the draft Directive gives courts the power to order providers or users of high-risk AI systems to disclose and/or preserve information about their systems to persons who seek this information to initiate, or decide whether to initiate, redress proceedings against the provider or user. Importantly, this applies to high-risk AI systems, such as AI in medical devices, consumer credit rating systems, employee or applicant assessment systems, and biometric identification systems.

- If the provider or user does not comply with the court's order to disclose information, the court shall apply a rebuttable presumption that the provider or user failed to comply with a duty of care pursuant to the EU AI Act or pursuant to other rules set at Member State or EU level.

- In addition, regarding high-risk and non-high risk AI systems, the draft Directive sets out a number of circumstances in which a court shall presume a causal link between the fault of the provider of the AI system and the output produced by the AI system or its failure to produce an output, subject to certain exceptions and restrictions that apply to high-risk AI systems.

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