



Insurance Flash December 2023

The impact of European AI legislation in insurance

An overview of the European legislation

Artificial Intelligence Act

Last 9th December, the European Council and European Parliament reached an agreement on the proposal for the Artificial Intelligence Act. This proposal was first made by the European Commission in 2021, but still needs to undergo the rest of the legislative process. The idea is to approve it as a European Regulation, being the legislative instrument that is directly applicable to the European Member States and its citizens.

Although the Artificial Intelligence Act is European law, it will be applicable to all providers putting into service AI systems within the Union, irrespective of whether those providers are established in the EU or in a third country, and also to providers and users of AI systems that are located in a third country, where the output produced by the system is used in the Union.

It has a risk-based approach, with four different categories of risks, each with its own regulations.

The first category are the “unacceptable risks”, which will be prohibited according to the AI act. A risk is considered as unacceptable in the following circumstances: (i) it materially manipulates a person’s behaviour or is likely to cause physical or psychological harm; (ii) systems that exploit any of the vulnerabilities of a specific group of persons due to their age, physical or mental disability to materially distort their behaviour or is likely to cause physical or psychological harm (iii) systems used by public authorities for “social scoring” or classification that can lead to detrimental treatment; (iv) the use of ‘real-time’ biometric identification systems in publicly accessible spaces for the purpose of law enforcement, unless strictly necessary for safety purposes (to prevent a terrorist attack for example) if it is considered proportional to the situation at hand and -in principle- with judicial authorisation.

The second category is the “high risk” category and includes those products where the AI systems are the safety component of the product. The most obvious example are autonomous vehicles. Those systems will be required to implement a process of risk assessment to identify and analyse any potential risks and to adopt the suitable measures to minimize those risks. They will also need to be subject to testing procedures before market placing and, where they involve data models, a proper data governance will be required. The technical documentation of the AI system will have to reflect the compliance with these requirements, and the system’s capabilities development will have to be recorded as well. These documents will definitely be important evidence if any legal issues arise. In addition, there is a requirement of transparency in terms of the characteristics of the system and the identity of the provider.

Other AI systems that interact with people, categorised as “limited risks”, will have a transparency obligation to inform about the use of AI. The Act expressly refers to those systems that recognise emotions or those that generate image, audio or video content (to tackle “deep fake” contents).

Finally, those systems that present a “low and minimal risk” will not have any additional obligations, but Member States should elaborate guidelines with indications of good practise.

Apart from this risk based approach, the Act also establishes that every Member State will have to appoint or create their own regulatory body to watch over compliance and to issue conformity certificates.

AI Directive

Apart from the AI Act, the European Commission has also made a proposal for a Directive -to be transposed in every Member State- that regulates liability in tort, in order to tackle the so-called “black box effect” of AI. The black box effect refers to the difficulty to understand the working of AI because it is opaque, complex and autonomous.

This Directive aims to provide persons seeking compensation for damage caused by high-risk AI systems with effective means. Given that the claimant usually has the burden of proof, with an opaque and complex system such as AI, it would be very difficult for any claimant to prove a fault of its working. For this reason, the directive establishes to the AI providers a duty to keep all the technical documentation and a duty of disclosure when the claimant and/or the judge asks for it. The Member States will have to implement adequate measures to give access to the evidence, a measure that may require new appropriate procedural mechanisms.

The most important change of the Directive is an inversion of burden of proof for tort liability, with a presumption of fault of the AI providers if there is breach with the duty of the disclosure or of the obligations under the AI regulation, but also a presumption of the causal link between the fault and the result produced by the AI. Importantly, the Directive makes a distinction between the result produced by the AI and the damage resulting therefrom; the claimant still has to prove the causal link between the result produced by the AI and the damage suffered. This last presumption operates where (i) there is a breach of obligations of AI providers, (ii) it is reasonably likely that the presumed fault of the provider had an influence in the result produced by the AI and (iii) the causal link between the result produced and the damage is already proven.

This is different from the traditional tort liability framework, where we had only three requirements to prove: the fault, the damage and the causal link between both. With this directive, there seems to be five elements; (i) the fault, (ii) the produced result, (iii) the damage, (iv) the causal link between the fault and produced result, and (v) the causal link between the produced result and the damage. And there are legal rebuttable presumptions for (i) and (iv), whereas the other elements still have to be proven by the claimant.

It goes without saying that this new legislation will have an impact on insurance. We already explained in our Insurance Flash of 28 September how the proposed Directive on product liability is also aimed to incorporate AI products, which will have a direct impact on product liability insurance.

And apart from product liability insurance, any modality of liability insurance under which claim in tort is covered because of a damage caused by an AI device, will be regulated differently than it has been the case traditionally, with more protection for the claimant in terms of legal presumptions and a duty of disclosure by the defendant.

PI insurance can be affected in as far as the work is delegated to AI, because the results produced by AI are not always accurate as things stand today. The good news is that with the AI Act, any professional who delegates to AI will be obliged at least to inform the client.

And what about the administrative fines for breach of obligations under the AI Act? Will we have a similar response by the market with respect to fines of the Data Protection Regulator triggering cyber insurance?

In any case, we will be watching this space and will keep you informed.

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