POSITION PAPER: THE EU ARTIFICIAL INTELLIGENCE LIABILITY DIRECTIVE

Making EU liability rules fit for the AI era

May 2023

In September 2022, the European Commission presented its proposal for a Directive on adapting non-contractual civil liability rules to artificial intelligence (AI), commonly referred to as the AI Liability Directive (AILD).[1]

The aim of the proposed Directive is to improve the functioning of the EU single market by harmonising certain aspects of non-contractual civil liability for damage caused with the involvement of AI systems.

As the European Parliament and the Council are currently in the process of developing their positions, CCIA Europe offers the following recommendations to further improve the AILD.

I. Create a coherent and sustainable legal framework

Given that the proposed AILD will impact and interact with various European and national rules, it needs to be consistent and aligned with other relevant EU legislation.

Recommendations:

1. Ensure consistency between definitions and substantive requirements across both EU and national rules
2. Align the time-related scope of the AILD with the EU's AI Act and Product Liability Directive (PLD)
3. Clarify the meaning of key legal concepts, including "relevant evidence" and "proportionate attempts"

II. Introduce fair and proportionate requirements

In order for AI to truly thrive in Europe, the AILD needs to introduce fair and proportionate requirements, while simultaneously addressing liability for potential damage caused with the involvement of AI systems.

Recommendations:

4. Increase the thresholds for potential claimants to request evidence disclosure and preservation orders
5. Strengthen confidentiality requirements by aligning the AILD with the EU Trade Secrets Directive
6. Apply stricter conditions to non-compliance and causation presumptions

[1] European Commission, Proposal for a Directive on adapting non-contractual civil liability rules to artificial intelligence, 28 September 2022, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0496.

Introduction

The Computer & Communications Industry Association (CCIA Europe) agrees that adapting certain aspects of non-contractual civil liability rules to artificial intelligence (AI) can help promote trust in AI by addressing potential liability-related challenges that may occur.

CCIA Europe's Members have a long-standing experience in developing and deploying new innovative technologies, including in the field of AI. In doing so, they always put the safety of consumers and the prevention of potential damage at the core of their decision making.

Together with the proposed revision of the Product Liability Directive (PLD)[2], the AILD aims to adapt Europe's liability rules to the digital age, circular economy, and global value chains. While the PLD harmonises no-fault based (strict) liability regimes for damage claims for the defectiveness of a product, the AILD sets out uniform requirements for non-contractual civil liability for damage caused with the involvement of AI systems, based on fault.

Although CCIA commends the European Commission's AILD approach, especially the rejection of a strict liability regime, the proposed text requires further improvements in order to achieve its main objective of enhancing legal certainty for all relevant actors.

The AILD heavily relies on the definitions and concepts of the proposal for an AI Act[3], which is still under legislative review. The exact scope and concrete impact of the AILD is therefore difficult, if not impossible, to assess. However, it is already clear that the AILD would apply to claims made by any natural or legal person against any person, for fault that influenced the AI system that caused damage. It is therefore expected to have very broad effects on innovation and the uptake of AI in Europe.

As the European Parliament and the Council are currently in the process of developing their positions, CCIA Europe offers the following recommendations to further improve the AILD:

- Create a coherent and sustainable legal framework
  - Ensure consistency between definitions and substantive requirements across both EU and national rules
  - Align the time-related scope of the AILD with the EU's AI Act and PLD
  - Clarify the meaning of key legal concepts, including "relevant evidence" and "proportionate attempts"
- Introduce fair and proportionate requirements
  - Increase the thresholds for potential claimants to request evidence disclosure and preservation orders
  - Strengthen confidentiality requirements by aligning the AILD with the Trade Secrets Directive
  - Apply stricter conditions to non-compliance and causation presumptions

[2] European Commission, Proposal for a Directive on liability for defective products, 28 September 2022, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0495.
[3] European Commission, Proposal for a Regulation laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, 21 April 2021, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0206.

I. Create a coherent and sustainable legal framework

Given that the proposed AILD will impact and interact with various European and national rules, it needs to be consistent and aligned with other relevant EU legislation.

1. Ensure consistency between definitions and substantive requirements across both EU and national rules

The AILD's functioning and structure heavily relies on the concepts and definitions of the AI Act, which is still being negotiated and has already undergone substantial changes by the co-legislators.

Article 1 on the subject matter and scope of the AILD makes references to "high-risk artificial intelligence (AI) systems" and "AI systems," which are at the very core of the Directive, but it refrains from defining these crucial concepts in Article 2. Indeed, key concepts of the AILD defined in Article 2, including "AI system," "high-risk AI system," "provider," and "user" explicitly refer to the relevant provisions of the AI Act.

What is true for these definitions is also true for the substantive requirements of the two initiatives. For example, in order to benefit from the rebuttable presumption of causality under Article 4(2) AILD, the claimant must demonstrate the AI system provider's non-compliance with the requirements of the AI Act. While this aims to ensure consistency with the horizontal framework of the AI Act, and is therefore commendable, it also means it is currently impossible to assess the concrete scope and impact of the AILD.

In its Impact Assessment on the AILD, the Commission acknowledges that the Directive shares that same general objective as the AI Act, namely the creation of conditions for the development and use of trustworthy artificial intelligence in the EU. The Commission concludes that "the AI Act is a relevant component of the baseline scenario, because it plays an essential role in creating an ecosystem of trust for AI."[4] In fact, the AI Act proposal already largely contributes to the objectives of the AILD.

The AI Act sets requirements specific to certain AI systems and obligations on all value-chain participants in order to ensure that certain AI systems are prohibited, that high-risk AI systems are safe and respect EU fundamental rights, and that certain AI systems that directly interact with citizens are subject to transparency obligations. While the specific question of liability is not directly addressed by the AI Act, its requirements are designed to considerably reduce and mitigate safety and fundamental rights risks.

The extent to which the provisions of the AILD are necessary to complement the AI Act, by facilitating compensation for liability claims in case AI systems produce harm to victims, must be assessed against the final provisions of the AI Act. The coherence, sustainability, and proportionality of the rules laid down by the AILD depend on the final legislative outcome of the AI Act. We commend the co-legislators for their current focus on the AI Act

[4] European Commission, Impact assessment report on the proposal for a Directive on adapting non-contractual civil liability rules to artificial intelligence, 28 September 2022, p. 148, available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52022SC0319.

and that is why we also encourage them to only further examine the AILD proposal once a final agreement on the AI Act is reached.

Moreover, the AILD closely interacts with the proposal for a revised PLD, which seeks to extend the definition of "product" to include AI-enabled products and AI systems.[5] Indeed, the Impact Assessment of the revised PLD proposal indicates that the revised Directive will adapt rules for AI-enabled products and ensure that people injured by defective software, including AI software, can obtain compensation from software producers.[6]

The product scope of the AILD and the revised PLD proposals therefore largely overlap. While the two initiatives apply in different legal situations, the interplay between the two must be taken into account to avoid overburdening AI developers and users with requirements that are too stringent. Against this background, we call on the EU co-legislators to carefully balance the provisions of the AILD with the provisions of the revised PLD proposal.[7]

Finally, the AILD is a so-called minimum harmonisation Directive, which means that Member States can, as provided for in Article 1(4), adopt or maintain rules that are more favourable to substantiate claims for damages caused by an AI system. The proposed AILD already introduces extensive requirements to the detriment of AI developers and users. It should therefore, at the very least, provide maximum harmonisation for claims for damages caused by AI systems. Otherwise, the AILD will only create additional complexity and legal uncertainty due to the persistent risk of fragmentation of the EU single market.

The wide-ranging obligations of the AI Act, combined with the broad extension of the revised PLD's strict liability regime, as well as the changes to national fault-based liability regimes proposed by the AILD, risk having detrimental effects on innovation and the uptake of AI in Europe. At the very least, the EU institutions should ensure consistency between definitions and substantive requirements across both EU and national rules.

2. Align the time-related scope of the AILD with the EU's AI Act and PLD

As explained above, the AILD is closely linked to the AI Act and the revised PLD proposal, both in terms of definitions and substantive requirements. In this context, it is crucial that the time-related scope of application of the three initiatives is closely aligned. Unfortunately this is not the case yet.

Article 1(2) AILD provides that the Directive applies to non-contractual fault-based claims for damages, in cases where the damage caused by an AI system occurs after the end of the transposition period foreseen in Article 7(1) – i.e. two years after its entry into force. However, Article 2(1) of the revised PLD foresees that it should apply to products placed on the market or put into service 12 months after its entry into force. There clearly is a discrepancy between the time-related scope of application of the two initiatives. Because

[5] European Commission, Impact assessment report on the proposal for a Directive on liability of defective products, 28 September 2022, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022SC0316&qid=1664549163753.
[6] Ibid., p. 9.
[7] CCIA Europe, Position paper on the revision of the Product Liability Directive, December 2022, available at: https://ccianet.org/library/ccia-europe-position-paper-pld-revision/.

the AILD focuses on the date of the damage caused by an AI system, while the PLD focuses on the date of the placement on the market or putting into service of said system.

Manufacturers of AI systems also need an appropriate amount of time to prepare for the new liability regime introduced by the AILD and to improve relevant documentation, record keeping, and information procedures required under the AI Act. Hence, close alignment between the AILD and the PLD, together with a reasonable implementation period, is absolutely necessary. With this in mind, we strongly recommend the EU institutions to closely align the time-related scope of application of the AILD with that of the PLD.

In order to take due account of the circumstances under which an AI system, already placed on the market before the entry of application of the AI Act, becomes subject to the Act's requirements because it meets the criteria of Article 83 AI Act, additional language could be added to clarify that the AILD applies to such systems at the same date as the date from which they are subject to the AI Act under Article 83 thereof.

In all other circumstances, the AILD should apply to AI systems placed on the market or put into service as from two years after the entry into force of the Directive or entry into force of the AI Act, whichever of the two is later.

3. Clarify the meaning of key legal concepts, including "relevant evidence" and "proportionate attempts"

The AILD relies on broad legal concepts, such as "relevant evidence" in Article 3(1) and "proportionate attempts" in Article 3(2), that would greatly benefit from further clarification, especially with a view to increasing legal certainty.

Article 3(1) enables a claimant or potential claimant to request a national court to order an AI provider or user to disclose or preserve "relevant evidence" at its disposal about a specific high-risk AI system that is suspected of having caused damage, but was refused. It follows the European Commission's Explanatory Memorandum on the AILD, which states that the burden-of-proof measures introduced by the Directive are "designed to incentivise compliance with existing duties of care set at Union or national level" and "balance the interests of claimants and defendants".[8] The Memorandum further clarifies that the proposal has chosen the least interventionist tool in order "to avoid exposing providers, operators and users of AI systems to higher liability risks, which may hamper innovation and reduce the uptake of AI-enabled products and services".[9]

As a result, it appears that the spirit of this requirement is not to impose an additional burden on all actors in the AI value chain, but rather to make available to the claimant or potential claimant documentation that must already be prepared and kept under EU law, in particular the AI Act, anyway. This includes for example, relevant datasets, logs, and information from technical documentation, as provided for under the AI Act. This reading of Article 3(1) AILD is supported by Recital (18) AILD, which explicitly states that the limitation of disclosure of relevant evidence to high-risk AI systems is to ensure consistency with the AI Act and warrant "the necessary proportionality by avoiding that operators of AI

[8] Proposal for a Directive on adapting non-contractual civil liability rules to artificial intelligence, op. cit.
[9] Ibid.

systems posing lower or no risk would be expected to document information to a level similar to that required for high-risk AI systems".

With respect to the above, it must be underlined that the concept of "relevant evidence," if not further specified, would run against the very intention behind the requirements of Article 3(1), as it risks being interpreted in a much broader way than intended by the Commission.

Indeed, the Court of Justice of the European Union (CJEU) found in its judgement in case C-163/21 PACCAR and Others that "relevant evidence [...] also covers those documents which the party to whom the request to disclose evidence is addressed must create ex novo by compiling or classifying information, knowledge or data in its possession".[10] In other words, the CJEU interpreted the concept of "relevant evidence" in a broad way and held that an obligation to disclose such evidence may even require the creation of new documentation, knowledge, or data in the relevant party's possession.

As a consequence, the concept of "relevant evidence" should be clearly defined in the AILD in order to avoid that Article 3(1) is unintentionally interpreted in a way that goes far beyond the very intention of the Commission and the pursued objective to not impose a disproportionate burden on the entire AI value chain. We recommend the EU co-legislators to clarify – either with an additional definition in Article 2 AILD or in a recital – that "relevant evidence" only covers documentation, information, and logging requirements, as required under the AI Act or relevant Union harmonisation legislation.

Moreover, Article 3(2) AILD provides that a national court can only order the disclosure of evidence if the claimant has undertaken "all proportionate attempts" at gathering the relevant evidence from the defendant. Also this concept would benefit from greater clarity, as it leaves a broad margin of interpretation to national courts, which could set a low threshold for the claimant to meet this requirement. That is why we recommend clarifying this concept by adding relevant language in a recital. For example, "all proportionate attempts" could mean that the claimant has, at the very least, reasonably tried to gather evidence that is publicly available or readily accessible by a third party.

II. Introduce fair and proportionate requirements

In order for AI to truly thrive in Europe, the AILD needs to introduce fair and proportionate requirements, while simultaneously addressing liability for potential damage caused with the involvement of AI systems.

4. Increase the thresholds for potential claimants to request evidence disclosure and preservation orders

Article 3(1) AILD empowers national courts to order a provider or user of an AI system to disclose relevant evidence at its disposal at the request of a potential claimant, if the latter

[10] Court of Justice of the European Union, Judgment of 10 November 2022, Case C-163/21, AS and Others v PACCAR Inc, DAF Trucks NV, DAF Trucks Deutschland GmbH, available at: https://curia.europa.eu/juris/document/document.jsf?docid=267931&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=1624651.

presents facts and evidence sufficient to support the "plausibility" of the claim. However, allowing potential claimants to request evidence on the basis of the mere "plausibility" of a claim sets a particularly low threshold and could severely impact the entire European AI ecosystem.

Indeed, setting such a dangerously low threshold not only risks leading to numerous potential fishing expeditions (i.e. non-specific calls for all documents related to a claim), but also risks flooding national courts with a significant amount of unjustified litigation procedures. The inclusion of such a low standard would undermine the overall objective of this provision, which should, according to Recital (17) AILD, "[lead] to a reduction of unnecessary litigation and avoid costs for the possible litigants caused by claims which are unjustified or likely to be unsuccessful".

With regard to the above, the threshold for potential claimants to request the disclosure of evidence should be increased above the mere plausibility threshold, by requesting potential claimants to demonstrate the "real possibility" of a claim.

5. Strengthen confidentiality requirements by aligning the AILD with the EU Trade Secrets Directive

Article 3(4) AILD obliges national courts to limit the disclosure of evidence to the extent necessary and proportionate to support a potential claim. Yet it remains vague as regards the protection of confidentiality and trade secrets, by only requesting national courts "to take specific measures necessary to preserve confidentiality". In order to avoid the dissemination of valuable and protected trade secrets or confidential information, the specific measures to preserve confidentiality need to be enhanced and specified in more detail.

In line with Article 9(2) of the Trade Secrets Directive[11], Article 3(4) AILD should specify that the requirements for the confidentiality of information must, at the very least, include the possibility:

1. Of restricting access to any document containing trade secrets or alleged trade secrets submitted by the parties or third parties in whole or in part, to a limited number of persons;
2. Of restricting access to hearings, when trade secrets or alleged trade secrets may be disclosed, and the corresponding record or transcript of those hearings to a limited number of persons;
3. Of making available to any person other than those comprised in the limited number of persons referred in points 1 and 2 above a non-confidential version of any judicial decision, in which the passages containing trade secrets have been removed or redacted.

Moreover, Article 3(4) AILD should, in line with Article 9(2) of the Trade Secrets Directive, clarify that the number of persons mentioned in points 1 and 2 shall not be greater than

[11] Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L0943.

necessary in order to ensure compliance with the right of the parties to the legal proceedings to an effective remedy to a fair trial, and should include, at the very least, one natural person from each party and the respective lawyers or other representatives of those parties to the legal proceedings.

Article 3(4) AILD should also specify that any unlawful acquisition, use, and disclosure of trade secrets obtained through the disclosure of evidence pursuant to this article is subject to the provisions of the Trade Secrets Directive. Finally, it is important that Article 3(4) AILD specifies that any processing of personal data under this article must be carried out in accordance with the General Data Protection Regulation (GDPR)[12].

Additional measures to protect the confidentiality of trade secrets, such as a presumption of confidentiality for any material produced under disclosure orders, or mandatory private review by national courts of any material that could constitute an alleged trade secret prior to its production, should also be considered.

6. Apply stricter conditions to non-compliance and causation presumptions

Article 3(5) foresees a presumption of non-compliance in case of failure to comply with an evidence-disclosure or preservation order, in particular in the circumstances referred to in Article 4(2) or (3) AILD, namely in case of non-conformity of an high-risk AI system provider or user with the relevant requirements of the AI Act.

It must be underlined that such a procedure departs from ordinary tort law and risks putting a disproportionate burden on providers and users of high-risk AI systems. In its Explanatory Memorandum on the AILD, the Commission claims that "this proposal does not create or harmonise the duties of care of the liability of various entities whose activity is regulated under those legal acts [including the AI Act] and, therefore, does not create new liability claims or affect the exemption from liability under those other legal acts."[13]

However, Article 3(5), read in conjunction with Article 4(2) and (3), introduces a presumption of fault for failures to comply with the obligations applicable to providers and users of AI systems under the AI Act. This presumption of non-compliance goes far beyond the Directive's scope and objectives, by introducing a de facto obligation of result for high-risk AI system providers and users in order to comply with their obligations under the AI Act. Given its disproportionate nature, this provision should be removed in its entirety.

Instead of introducing a presumption of non-compliance with duty of care obligations, Article 3(5) could provide for a penalty in case of unjustified non-compliance with a disclosure or preservation order. Such a measure would be more appropriate and would provide a sufficient incentive for high-risk AI system providers to comply with national courts' orders, as was the initial objective of this provision. In any case, such an extensive presumption cannot be reasonably envisaged without knowing the final obligations and requirements of the AI Act.

[12] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), available at: https://eur-lex.europa.eu/eli/reg/2016/679/oj.
[13] Proposal for a Directive on adapting non-contractual civil liability rules to artificial intelligence, op. cit.

Similarly, the presumption of causation enshrined in Article 4 is particularly broad and could be further narrowed to enhance legal certainty. For example, Article 4(1)(c) could clarify that the claimant needs to demonstrate that the output (or lack thereof) gave rise to "material harm" to the claimant's health, safety, or fundamental rights.

Conclusion

The proposal for an EU Directive on adapting non-contractual civil liability rules to artificial intelligence is an opportunity to further promote trust in AI by addressing potential challenges that may occur.

In order to achieve the objectives of the Directive, the European Parliament and EU Council should ensure that the EU creates a coherent and sustainable legal framework that introduces fair and proportionate requirements, as they will impact the entire European AI ecosystem.

About CCIA Europe

The Computer & Communications Industry Association (CCIA) is an international, not-for-profit association representing a broad cross section of computer, communications, and Internet industry firms.

As an advocate for a thriving European digital economy, CCIA Europe has been actively contributing to EU policy making since 2009. CCIA's Brussels-based team seeks to improve understanding of our industry and share the tech sector's collective expertise, with a view to fostering balanced and well-informed policy making in Europe.

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