

AI LIABILITY

Proposal COM(2022) 496 of 28 September 2022 for a Directive adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive)

cepPolicyBrief No. 1/2024

SHORT VERSION [[Go to Long Version](#)]

Context | Objective | Interested Parties

Context: People wanting to claim in court that they have been harmed by artificial intelligence (AI) face considerable difficulties in providing evidence.

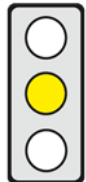
Aim: The Commission wants to solve this problem by way of common minimum standards and thus strengthen society's trust in AI. It also wants to support the use of AI.

Affected parties: Providers of AI systems, users of AI systems, people potentially harmed by AI systems

Brief Assessment

Pro

- ▶ The Directive only harmonises certain aspects of liability law and does not prohibit Member States from introducing more extensive legislation.
- ▶ The obligation to disclose evidence at the request of a potential claimant may help to prevent futile lawsuits.
- ▶ The Directive aligns its terminology with that of the proposed AI Act, which facilitates the application of the law.

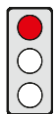


Contra

- ▶ It is doubtful that either the obligation to disclose evidence or the presumption of causal link in the case of fault - which results in a reversal of the burden of proof - contained in the Directive can be based on Art. 114 TFEU, as there is unlikely to be any positive effect on the internal market.
- ▶ The disclosure obligation interferes with the sovereign rights of Member States, since many Member States do not have such obligations. It also violates the principle of equality of arms in court proceedings, since only the defendant can be obliged to disclose evidence.
- ▶ In some cases, the causal link between the defendant's fault and the output produced by the AI system is presumed. The defendant bears a very heavy burden of proof if he wishes to prove that this presumption should not apply.

Competence [Long Version A.2, A.3, B.3]

Commission proposal: Disclosure obligations and burden of proof provisions will be introduced on the basis of Art. 114 TFEU, for damages claims relating to AI liability.



cep-Assessment: It is doubtful that an obligation to disclose evidence and rules on the burden of proof, in AI liability claims, will have a positive effect on the internal market. Such provisions will not affect the marketability of AI products, nor will their harmonization contribute to the elimination of any noticeable distortions of competition.

Scope [Long Version A.1]

Commission proposal: The Commission is proposing a Directive that only involves minimum harmonisation of rules on the burden of proof and disclosure of evidence.



cep-Assessment: It is appropriate that the Directive leaves questions, such as the type of damages eligible for compensation and the definition of causality, to the Member States and does not prohibit them from going further, but merely provides for minimum standards.

Disclosure obligations [Long Version A.2]

Commission proposal: Courts may order certain persons to disclose relevant evidence in their possession relating to a high-risk AI system suspected of having caused damage. For this purpose, the claimant or potential claimant must have submitted facts and evidence that are sufficient to support the plausibility of his claim for damages. If a defendant breaches the disclosure obligation, the national court will presume that the defendant has breached its duty of care with regard to the handling of the AI system.



cep-Assessment: The disclosure obligation may help to prevent futile lawsuits. However, it unduly interferes with the sovereign rights of the Member States, as many Member States have no such obligations. It should be left to the Member States to determine the consequences of a breach of the disclosure obligation and to clarify when a claim is plausible. The disclosure obligation also violates the principle of equality of arms in court proceedings, as only the defendant can be obliged to disclose evidence.

Presumption of causality [Long Version A.3]

Commission proposal: The defendant's fault is presumed to have caused the output produced by the AI system if the defendant breached a duty of care intended to prevent the damage that occurred; the fault is reasonably likely to have influenced the output of the AI system given the circumstances of the case; and the claimant has proven that the output of the AI system gave rise to the damage.



cep-Assessment: The presumption of causality is appropriate given the complexity and lack of transparency of AI systems. The conditions for its application are appropriate in order to provide procedural equality, on the one hand, and to prevent thoughtless claims, on the other.

Exception to the presumption of causality [Long Version A.3]

Commission proposal: The presumption of causality does not apply to high-risk AI systems if, for example, the defendant proves that the claimant has access to sufficient evidence and expertise under reasonably conditions to prove the causal link.



cep-Assessment: Providing this evidence could present the defendant with a very difficult hurdle to overcome. Without at least a right to request the disclosure of evidence, the burden of proof is not properly distributed. It is also completely unclear what constitutes “sufficient” evidence and expertise, and when a claimant can “reasonably” access it.

Consistency with the AI Act [Long Version A.1, A.2, A.3]

Commission proposal: In many places, the Directive refers to definitions used in the proposed AI Act, e.g. the term “AI system”.



cep-Assessment: It is to be welcomed that the Directive is very much in unison with the proposed AI Act. This ensures that the two legal acts use uniform terminology which facilitates the application of the law.