

To: DETE (by email) digitaleconomy@enterprise.gov.ie

Date: January 20, 2023

Ref: DETE Consultation on the AI Liability Directive

Dear Colleague,

Thank you for the opportunity to contribute preliminary views in response to the 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 or 'AILD').

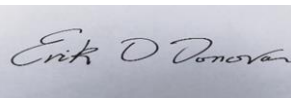
Ibec welcome Ireland's national strategy for AI ('Here for Good') and support a proportionate, human-centered approach to the governance and regulation of AI development and adoption, based on evidence and risk.

In summary, we recommend the EU co-legislators:

1. Strike an appropriate balance between protection; regulatory coherence, legal certainty; and innovation in the proposal.
2. Allocate risk and liability fairly and proportionately.
3. Clarify definitions and ensure regulatory coherence and temporal alignment of the AILD with the Product Liability Directive (PLD) and proposed AI Act (AIA).
4. Clarify disclosable 'relevant evidence' in a fair and proportionate manner.
5. Consider a corresponding requirement on claimants to disclose relevant evidence.
6. Ensure a risk-based approach and further clarify rules on the application of the proposed presumption of causality.

We hope the comments below are constructive to your deliberations on the proposal and stand ready to engage further.

Kind regards,



Head of Digital Economy Policy

1. General comments

- We acknowledge the general approach taken in the proposal and its focus on targeted alleviations of the burden of proof and welcome its rejection of imposing a strict liability regime. Imposing strict liability on all products and services that incorporate AI, irrespective of whether the product or service presents a unique and severe risk of harm, or whether the AI component is a contributing factor to that risk, would impact a shared desire for further beneficial AI innovation across Europe.
- The proposal must enable the shared desire for trust and excellence in AI (Recital 5) by striking an appropriate balance between protections; regulatory coherence, legal certainty; and innovation.
- Allocate risk and liability properly. Ensure a fair and proportionate allocation of responsibilities and distribution of information between the various actors of AI in the AI supply chain in a manner that ensures the purpose¹ of the AI Act can be met.

2. Specific comments

ARTICLE 1: SUBJECT AND SCOPE:

- As a general comment, diverging national implementations should be avoided due to the risk of increased compliance, legal and insurance costs.

PROPOSED DEFINITIONS (ARTICLE 2)

RECOMMENDATIONS:

1. Clarify definitions and ensure regulatory coherence and temporal alignment of the AILD with AIA and PLD.

DISCUSSION:

- It is positive to see a link with terminology in the AI Act. However, the Act is still under negotiation. Any assessment of the AILD at this stage must be considered incomplete. Consequently, co-legislators must ensure regulatory coherence in further adjustments. The AI Liability Directive should be paused and discussed further when the AI Act is in a more final shape.
- The AILD temporal scope of application should be aligned with the Product Liability Directive (PLD) and proposed AI Act (AIA) given their links e.g.,
 - A claimant must demonstrate a violation of the AI Act to benefit from the rebuttable presumption in Article 4(2) AILD.
 - The temporal scope of the AILD should be linked to the date of placing on the market / putting into service of the relevant AI system rather than the date of damage in line with Article 2(1) of the PLD. This, and an adequate implementation period, will allow AI system manufacturers sufficient time to prepare for the new liability regime and improve relevant documentation / explainability procedures, helping stakeholders and preserving equality of arms.
- Some definitions require further clarity:
 - In the definition of 'claim for damages' it is unclear what the term "where such an output should have been produced" is intended to encompass. We suggest the definition be limited to output that the AI system was specifically designed to produce but did not.
 - Under the definition of "potential claimant" there is no limit on who can be a potential claimant (and therefore request 'relevant evidence' from a developer). This leaves open a risk of frivolous or vexatious requests potentially flooding businesses. For example, as currently drafted it appears that competitors could ask for this information to gain an understanding of how competitors are operating. The concept of 'potential claimant' should have a reasonable procedural safeguard, and a reasonably foreseeable connection to the developer should be introduced e.g., a requirement to give evidence of the potential claimant's connection to the developer or its AI systems, such as evidence that they purchased or used the AI system.

¹ The Commission had signalled a "balanced and proportionate horizontal regulatory approach to AI that is limited to the minimum necessary requirements to address the risks and problems linked to AI, without unduly constraining or hindering technological development or otherwise disproportionately increasing the cost of placing AI solutions on the market." Section 1.1, [COM\(2021\) 206 final](#)

PROPOSED DISCLOSURE REQUIREMENTS (ARTICLE 3)

RECOMMENDATIONS

2. Ensure that the Article 3 requirement is interpreted in a proportionate manner and in line with the Commission's intention of not imposing additional burdens on beneficial AI innovation.
 - a. The AILD should clearly specify in Article 3(1) (or in a standalone definition) as well as in Recital (16) that "relevant evidence" is a reference to "*documentation, information and logging requirements required under the AI Act or where integrated into Union harmonisation legislation listed in Section B of Annex II of the AIA Act*".
 - b. Ensure IP and trade secrets are clearly protected from overreaching evidence disclosure request scenarios.
3. Consider a corresponding requirement on claimants to disclose relevant evidence that may support a defence. It may be difficult to prove an alternative explanation for an alleged harm without access to all necessary details relating to that harm.

DISCUSSION:

- The meaning of disclosable 'relevant evidence' (Article 3) is currently unclear.
 - There is a concern that the provision will be interpreted as being applicable to a much broader range of evidence than we understand is intended. This uncertainty is at odds with Article 3(4) requirements on necessity and proportionality.
 - This requirement should not impose additional regulatory burden on beneficial AI innovation but make documentation, that providers/users would be already required to prepare/retain pursuant to the AIA and sectoral EU regulation, available to claimants. This would be consistent with the Commission's exemption of non-high risk AI systems from this requirement and its explanation that these systems are excluded precisely because they are not subject to the documentation obligations under the AI Act (and complying with the evidence disclosure / preservation orders under the AILD would thus impose an additional burden on them).
- Proposed disclosure obligations are not reciprocal. This would be important in any cases involving personal damage.
- Triggers for disclosure orders are low. In terms of proportionality:
 - A probability standard rather than a plausibility standard would be more proportionate.
 - Article 3(2) should require claimants to gather evidence that is publicly available.
- Fault is presumed where a defendant fails to disclose information. However, this may not be due an unwillingness to record data relevant to liability or to comply but may be due to data access issues for the defendant. This should be reconsidered further in the proposal. We respectfully suggest that it should be clarified in addition that failure to provide information when asked by a potential claimant should not be held against the defendant in the event of a subsequent claim or application to a national court under Article 3(1) provided that the producer has reasonable grounds for not providing the information.

PROPOSED PRESUMPTION OF CAUSALITY (ARTICLE 4)

RECOMMENDATION:

4. Ensure a risk-based approach and further clarify rules on the application of the proposed presumption of causality.

DISCUSSION:

- The proposal is a de facto reversal of the burden of proof from claimant to defendant. Where a presumption applies, the defendant is required to “prove a negative” by demonstrating their lack of fault or the lack of a causal link [to a fault].
 - We are concerned that providers, operators, and users of AI systems would be exposed to higher liability risks [and concurrent costs], which may hamper innovation and reduce the uptake of AI-enabled products and services, and consequently limit the desired benefits from AI-enabled innovation. Ensure procedural safeguards against frivolous litigation.
 - i. Stricter conditions in triggering the causation presumption should be considered.
 - Further clarity would be welcome on how reasonable access and sufficient evidence are decided in Article 4(4).
- Further clarify the concepts of ‘influence’ and ‘giving rise to’. We suggest also that it should be clarified whether it is for the claimant to prove ‘influence’ in Article(4)(1)(b), as the Article is currently silent on who must prove this. In this context, we suggest the following clarification:
 - Article 4(1)
Subject to the requirements laid down in this Article, national courts shall presume, for the purposes of applying liability rules to a claim for damages, the causal link between the fault of the defendant and the output produced by the AI system or the failure of the AI system to produce an output **damage alleged in the claim for damages**, where all of the following conditions are met:

(a) the claimant has demonstrated or the court has presumed pursuant to Article 3(5), the fault of the defendant, or of a person for whose behaviour the defendant is responsible, consisting in the non-compliance with a duty of care laid down in Union or national law directly intended to protect against the damage that occurred;

(b) 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 or the failure of the AI system to produce an output;

(c) the claimant has demonstrated that the fault output produced by the AI system or the failure of the AI system to produce an output gave rise to the damage **alleged in the claim for damages**.

PROPOSED EVALUATION AND TARGETED REVIEW (ARTICLE 5)

DISCUSSION:

- Change should be incremental to avoid innovation being unnecessarily restricted. This is an emerging area. The adoption of a staged approach is welcome.