

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

## **AI LIABILITY**

cepPolicyBrief No. 1/2024

### **LONG VERSION**

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## A. Key elements of the EU proposal

### 1 Background and scope

- ▶ The AI Liability Directive ("AILD") applies to claims for damages if the damage [Art. 1 (2)]
  - was caused by an AI system and is also
  - non-contractual,
  - fault-based,
  - governed by civil law and
  - was caused after the end of the transposition period of the Directive.
- ▶ An AI system is a piece of software [Art. 2 (1) in conjunction with Art. 3 (1), Annex I AI Act Proposal; see [cepPolicyBrief No. 27/2021](#)],
  - which can generate outputs for human-defined objectives - such as content, predictions, recommendations or decisions - and thereby influences their environment, and
  - has been developed using at least one of the following techniques and concepts:
    - machine learning approaches;
    - logic- and knowledge-based approaches, e.g. knowledge representation, inductive programming or inference and deductive engines;
    - statistical approaches, Bayesian estimation, search and optimization methods.
- ▶ Due to its dependence on fault, the AILD differs from product liability (see [cepPolicyBrief No. 2/2023](#)), which, as so-called strict liability, is independent of fault.
- ▶ The AILD does not apply to liability claims in which an AI system has merely provided information as a basis for decision-making [Recital 15].
- ▶ Member States may adopt or maintain provisions that are more favourable to the claimant than those of the AILD [Art. 1 (4)].
- ▶ The AILD does not harmonise general aspects of liability, such as the definition of fault and causality, the types of damage giving rise to claims and the calculation of damages [Recital 10].

### 2 Disclosure of evidence

- ▶ At the request of a potential claimant, a national court may order the following persons to disclose relevant evidence in their possession relating to a specific high-risk AI system (for a definition, see Art. 6 AI Act Proposal and [cepPolicyBrief No. 27/2021](#)) that is suspected of having caused harm. [Art. 3(1)]:
  - a provider of an AI system; this is a person who develops an AI system or has it developed in order to place it on the market or put it into service under its own name or trademark ("provider") [Art. 3 (2) AI Law Proposal],
  - a person subject to the obligations of a provider of an AI system [Art. 24 or Art. 28 (1) AI Act Proposal], e.g. distributors and importers who place a high-risk AI system on the market or put it into service under their name or trademark ("person with provider obligations"), or
  - a commercial or public authority user of an AI system ("user") [Art. 3 (4) AI Law Proposal].
 A potential claimant is a natural or legal person ("person") who is considering making a claim for damages but has not yet done so [Art. 2 (7)].  
 The prerequisite for disclosure is that the potential claimant
  - has previously requested these persons to provide disclosure without success and
  - sufficiently proves the plausibility of its claim for damages by presenting facts and evidence.
- ▶ The purpose of ordering disclosure is to avoid unnecessary litigation and costs for the respective litigants caused by claims that are unjustified or likely to be unsuccessful [Recital 17].
- ▶ At the request of a claimant, the court will order disclosure of the evidence by the provider, person with provider obligations or user only if the claimant has undertaken all proportionate attempts at gathering the relevant evidence from the defendant [Art. 3 (2)].
- ▶ A claimant is a person who
  - brings a claim for damages and [Art. 2 (6)]
  - has been injured by an output of an AI system or by the failure of such a system to produce an output where such an output should have been produced,
  - has succeeded to the rights of the injured party, or
  - is acting on behalf of one or more injured persons.

- ▶ The national court [Art. 3(4)]
  - limits disclosure to what is necessary and proportionate to support a claim for damages by a claimant or potential claimant; and
  - takes account of the legitimate interests of all parties involved, in particular the protection of trade secrets belonging to the defendant or third parties, and takes measures to protect these secrets.
- ▶ Courts should only require providers, persons with provider obligations or users to effect disclosure where the evidence cannot be obtained from the defendant [Recital 20].
- ▶ If a defendant fails to comply with the disclosure order, there is a rebuttable presumption that it has breached its relevant duty of care [Art. 3 (5)].
  - The duty of care is the legal standard of conduct that must be observed in order to avoid damage to recognised legal interests such as life, physical integrity and property [Art. 2 (9)].

### 3 Presumption of causality

- ▶ There is a rebuttable presumption of a causal link between the fault of the defendant and the output, or failure of an output, of the AI system if [Art. 4 (1), (7)]
  - the claimant has proven or the court presumes, due to non-disclosure of evidence, that the defendant or a person for whose behaviour the defendant is responsible has breached a duty of care,
  - the purpose of the breached duty of care is to prevent the damage that has occurred,
  - given the circumstances of the case, the fault can reasonably be considered to have influenced the output or non-output of the AI system; and
  - the claimant has proven that the output or non-output of the AI system led to the damage.
- ▶ A breach of the duty of care has occurred
  - in the case of a claim for damages against a user of a high-risk AI system, if the claimant proves that the user
    - has failed to comply with its obligations under the AI Act to use or monitor the AI system or, where applicable, to suspend or interrupt its use, or
    - has applied input data under its control to the AI system that is not relevant for the intended purpose of the system [Art. 4 (3)], and
  - in the case of a claim for damages against a provider of a high-risk AI system or a person with provider obligations of a high-risk AI system, if the claimant proves a breach of one of the following obligations under the AI Act [Art. 4 (2)]:
    - the quality criteria for the training, validation and testing of data sets,
    - the transparency requirements,
    - the possibility of effective oversight by natural persons,
    - the obligation to achieve an appropriate level of accuracy, robustness and cybersecurity, and
    - the obligation to immediately take the necessary actions to bring the AI system into conformity with the requirements of the AI Act or, if necessary, to withdraw or recall it.
- ▶ The presumption of causality does not apply in the case of
  - high-risk AI systems if the defendant demonstrates that the claimant has reasonable access to sufficient evidence and expertise to prove the causal link [Art. 4 (4)],
  - non-high-risk AI systems unless it is excessively difficult for the claimant to prove the causal link [Art. 4 (5)].

The presumption of causation applies to claims for damages against defendants who use the AI system in the course of a personal non-professional activity if the defendant [Art. 4 (6)]

  - has materially interfered with the operating conditions of the AI system or
  - has failed to determine the operating conditions of the AI system, even though it was able and required to do so.

### 4 Evaluation

- ▶ The Commission must review the application of the AILD within five years of the transposition deadline. In particular, it should evaluate whether strict liability and mandatory liability insurance should be introduced [Art. 5 (1), (2)].

## B. Legal and political context

### 1 Legislative Procedure

28 September 2022	Adoption by the Commission
25 January 2023	Opinion of the European Economic and Social Affairs Committee
Open	Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

### 2 Options for Influencing the Political Process

Directorates General:	DG Justice and Consumers
Committees of the European Parliament:	Legal Affairs (leading), Rapporteur: Axel Voss (EPP Group, DE); Internal Market; Civil Liberties, Justice and Home Affairs
Federal Ministries:	Justice (leading)
Committees of the German Bundestag:	Law (leading), Economy, Education, Digital, EU
Decision-making mode in the Council:	Qualified majority (acceptance by 55% of Member States which make up 65% of the EU population)

### 3 Formalities

Legal competence:	Art. 114 TFEU (Internal Market)
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Procedure:	Art. 294 TFEU (ordinary legislative procedure)

## C. Assessment

### 1 Economic Impact Assessment

One of the ways in which AI systems differ from other products is their complexity and lack of transparency. These characteristics mean that it is difficult for those potentially harmed by an AI system to identify the person responsible for the alleged harm and to prove that this person has acted unlawfully. This could include providers, users or retailers of an AI system. The Foundation Model Transparency Index from Stanford University shows just how little transparency there is in AI systems.<sup>1</sup> The most transparent foundation model - Llama 2 - received just 54 out of a possible 100 points. The authors of the index complain that the transparency of foundation models continues to decline. This is not the only reason why it is appropriate for the EU Commission to propose measures to facilitate the enforcement of claims for damages by AI systems. Facilitating the enforcement of claims for damages also increases the incentive for providers of AI systems (or persons subject to provider obligations) and for users of such systems to fulfil the obligations imposed on them by the AI Act (see [cepPolicyBrief No. 27/2021](#)).

The fact that the Directive refers to the definitions used in the AI Act enables a coherent application of both pieces of legislation. This should be maintained throughout the legislative process. However, care must also be taken to ensure consistency with other sector-specific AI rules, such as the legislation on medical devices and in-vitro diagnostics.<sup>2</sup>

The fact that the Directive does not apply to liability claims in which an AI system has merely provided information as a basis for decision-making is, on the one hand, appropriate because in these cases, people can be held liable for damages and the AI-specific difficulties in enforcing claims for damages can be avoided. The legislation also promotes the use of AI, as it facilitates the use of AI that does not yet work perfectly and is still

<sup>1</sup> The Foundation Model Transparency Index, online at: <https://hai.stanford.edu/news/introducing-foundation-model-transparency-index>, accessed on 29 November 2023.

<sup>2</sup> See statement of the German Bundesrat, online at: <https://dserver.bundestag.de/brd/2022/0486-1-22.pdf>, accessed on 12/01/202024.

being improved, for example through user feedback. Furthermore, it does not discharge people from the responsibility to make their own decisions. On the other hand, studies show that people sometimes tend to trust AI recommendations too much.<sup>3</sup> In such cases, the distinction between an AI that only provides information and an AI that actually makes decisions would be a semantic one. The difficulty of distinguishing whether the information provided is merely a basis for a decision or already determines the decision was recently considered by the European Court of Justice.<sup>4</sup> The case concerned the permissibility of scoring by private credit agencies such as SCHUFA (see [cepAdhoc No.7/2023](#)). The General Data Protection Regulation protects natural persons from legally unfavourable decisions based solely on the automated processing of their data. This includes profiling and - as a sub-form - scoring, in which a person's data is used to assess personal aspects in order to predict their future behaviour (e.g. their creditworthiness). According to the European Court of Justice (ECJ), the automatic creation of scores by private credit agencies does not merely constitute preparation for the bank's final decision, for example on the granting of a loan, but is itself to be regarded as automated individual decision-making due to the key role of this score for the bank's decision. Applied to AI systems, this would mean that providers of AI systems (or persons subject to provider obligations) cannot simply escape the scope of the Directive by obliging users to use the output of the AI system only as information. Instead it depends on what actually happens in practice. Like SCHUFA, whose scoring is so good that lenders rely on it, providers of AI systems could thus become victims of their own success. Ultimately, courts will need to decide on a case-by-case basis to determine whether providers of an AI system merely provide information as a basis for decision-making or whether the information from the AI system plays a "determining role"<sup>5</sup>.

The provisions on the disclosure of evidence fulfil two purposes: Firstly, they help a potentially injured party to identify the person responsible for the damage. This is necessary because it is not always immediately clear to the potentially injured party whether the provider, retailer or user is responsible for the damage. Secondly, the potentially aggrieved party can better assess its chances of success through the disclosure obligation before legal proceedings are initiated. This not only reduces the likelihood of claims with little chance of success being brought to court. It also increases the likelihood that parties who have actually suffered harm will claim their damages in court. The latter incentivises providers of high-risk AI systems (and persons subject to such provider obligations) and users to actually comply with their obligations. The legislation therefore contributes to making high-risk AI systems safer. Against this background, it worth considering whether the provision on the disclosure of evidence should be applied to all AI systems because the difficulties of obtaining evidence apply likewise to non-high-risk AI systems.<sup>6</sup>

Given the complexity and lack of transparency of AI systems, it is appropriate to presume a causal link between a breach of the duty of care and the output or lack of an output produced by the AI system. The conditions for application of the presumption are appropriate in order, on the one hand, to provide procedural equality and, on the other, to prevent frivolous claims. The fact that the presumption can only be applied in the case of a claim for damages against a provider of a non-high-risk AI system if it is "excessively" difficult for the claimant to prove the causal link, creates legal uncertainty. The Directive should specify what constitutes excessive difficulties.

## 2 Legal Assessment

### 2.1 Legislative Competence

The AILD is based on Art. 114 TFEU (Harmonisation of the internal market). This provision allows measures to approximate laws of the Member States' relating to the establishment and functioning of the internal market. According to CJEU case law, harmonisation measures are possible under certain conditions even if the Member States have not yet adopted any relevant laws ("preventive approximation of laws"<sup>7</sup>). All that needs to be shown is that new barriers to trade are likely to emerge due to a heterogeneous development of national legislation

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<sup>3</sup> See Ullrich, D. / Butz A. and Diefenbach S. (2021): The Development of Overtrust: An Empirical Simulation and Psychological Analysis in the Context of Human–Robot Interaction, online at: <https://www.frontiersin.org/articles/10.3389/frobt.2021.554578/full>, retrieved on 27.11.2023.

<sup>4</sup> CJEU Judgement of 7 December 2023, Case C-634/21, ECLI:EU:C:2023:957, available at <https://curia.europa.eu/juris/document/document.jsf?jsessionid=047D3173EA8909FD28F987CFF5BCF487?text=&docid=280426&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3508361>, retrieved on 18.12.2023.

<sup>5</sup> CJEU, Judgement SCHUFA Holding (Scoring), loc. cit., para. 50.

<sup>6</sup> See Section C.2.2 "Subsidiarity and proportionality vis-à-vis the Member States" on this and other points of criticism regarding the disclosure obligation.

<sup>7</sup> On this concept see e.g. Schröder, M., in: Streinz, R. (Ed.), TEU/TFEU, 3rd edition (2018), Art. 114 TFEU para. 42 f.).

and that the rules to be adopted are aimed at avoiding them.<sup>8</sup> As the Commission points out in its impact assessment, proposals of this sort exist in some Member States.<sup>9</sup> The fact that the AILD only provides for harmonisation measures with regard to disclosure obligations and distribution of the burden of proof is of no consequence because the approximation of laws also covers merely partial harmonisation.<sup>10</sup> However, as with fully harmonising measures, the harmonisation must have a positive effect on the internal market.<sup>11</sup> Whether an obligation to disclose evidence and rules on the burden of proof, in AI liability claims, will actually have a positive effect on the internal market is doubtful. The question here is whether the legislation based on Art. 114 TFEU contributes either to the removal of obstacles to the free movement of goods and services or the removal of distortions of competition.<sup>12</sup> However, on the one hand, civil procedural rules applicable to compensation proceedings have no effect on the marketability of AI products, so there is no obstacle to the fundamental freedoms.<sup>13</sup> On the other hand, it cannot be said that the standardisation of such procedural rules contributes to the elimination of noticeable distortions of competition.<sup>14</sup> According to CJEU case law, a significant distortion of competition can be assumed if the different provisions in the Member States lead to different production costs, but not if they affect profits in a different way.<sup>15</sup> Procedural rules such as those on the distribution of the burden of proof can certainly have an impact on the profits of the companies involved, but do not affect the production costs.

## 2.2 Subsidiarity and Proportionality with Respect to Member States

It is to be welcomed that the Commission is seeking regulation in the form of a directive and that the AILD is limited to regulating the burden of proof and disclosure of evidence and leaves other issues such as the type of damages eligible for compensation or the definition of causality to the Member States.

Equally welcome is the fact that - in contrast to the proposal for the new Product Liability Directive - it only provides for minimum harmonisation and does not prohibit Member States from introducing more far-reaching provisions.

Nevertheless, the proposed provisions on the disclosure of evidence and the distribution of the burden of proof interfere considerably with national civil procedural law. In particular, some authors regard the proposed disclosure obligation as similar to so-called "pre-trial discovery" under US law.<sup>16</sup> Disclosure obligations are nothing new, however. Apart from the proposed new Product Liability Directive [[COM\(2022\) 495](#); see [cepPolicyBrief No. 2/2023](#)], similar disclosure obligations already exist in the Directive on representative actions [[Directive \(EU\) 2020/1828](#); see [cepPolicyBrief No. 28/2018](#)]<sup>17</sup>, the Directive on the enforcement of intellectual property rights [so-called Enforcement Directive ([Directive 2004/48/EC](#))]<sup>18</sup> and the Damages Directive [[Directive 2014/104/EU](#); see [cepPolicyBrief No. 45/2013](#)]<sup>19</sup>. In this respect, disclosure obligations are not inconsistent with the legal system. Like the Damages Directive in particular - but unlike the proposed Product Liability Directive - the AILD leaves Member States a certain amount of leeway when it comes to implementation. Member States

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<sup>8</sup> CJEU, Case C-376/98 (Germany v Parliament and Council), [ECLI:EU:C:2000:544](#), para. 86.

<sup>9</sup> EU Commission (2022), Commission Staff Working Document SWD(2022) 319 of 28 September 2022, Impact Assessment Report Accompanying the document Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence [Impact Assessment], p. 19.

<sup>10</sup> See Tietje, C. (2016), in: Grabitz, E. / Hilf, M. / Nettesheim, M. (Eds.), *Das Recht der Europäischen Union*, 59th Update, Art. 114 TFEU, para. 38 ff.

<sup>11</sup> Cf. Korte, S. in: Calliess, C. / Ruffert, M. (Eds.), *EUV/AEUV-Kommentar*, 6th Edn. 2022, Art. 114, para. 50 ff.

<sup>12</sup> ECJ, Case C-491/01, [British American Tobacco (Investments) and Imperial Tobacco], [ECLI:EU:C:2002:741](#), para. 60.

<sup>13</sup> Cf. Korte, S. in: Calliess, C. / Ruffert, M. (Eds.), *EUV/AEUV-Kommentar*, 6th Edn. 2022, Art. 114, para. 41.

<sup>14</sup> See CJEU, Case C-376/98 (Germany v Parliament and Council), [ECLI:EU:C:2000:544](#), para. 106 f.

<sup>15</sup> CJEU, Case C-376/98 (Germany v Parliament and Council), [ECLI:EU:C:2000:544](#), para. 109; Tietje, C. (2016), in: Grabitz, E. / Hilf, M. / Nettesheim, M. (Eds.), *Das Recht der Europäischen Union*, 59th Update, Art. 114 TFEU, para. 104.

<sup>16</sup> E.g. Borges, G. (2023), *Haftungsrisiken durch KI-Gesetzgebung*, Audit Committee Quarterly II/2023, pp. 1-4.

<sup>17</sup> According to Art. 18 of the Directive on representative actions, a court or administrative authority may, at the request of a so-called qualified entity, order the defendant or third parties to disclose evidence under their control. The prerequisite is that the qualified body has submitted all reasonably available evidence that is sufficient to support a representative action and has indicated that additional evidence is in the control of the defendant or a third party. Conversely, the defendant may also request the disclosure of evidence by the qualified entity or third parties.

<sup>18</sup> Art. 8 of the Enforcement Directive provides that, under certain circumstances, courts may require the defendant or other persons to provide information on the origin and distribution channels of goods or services that infringe intellectual property.

<sup>19</sup> According to Art. 5 of the Cartel Damages Directive, courts can oblige defendants and third parties to disclose relevant evidence that is in their control. The prerequisite is that the claimant requests this disclosure with reasoned justification containing facts and evidence that sufficiently support the plausibility of the claim for damages.



are free to adopt or keep provisions that are more generous to claimants than those of the AILD ("minimum harmonisation"). With regard to the disclosure obligation, they can leave it at regulating disclosure in the context of damages proceedings, but can also introduce a more far-reaching substantive disclosure requirement, as Germany has done in the implementation of the Damages Directive.<sup>20</sup> This openness is to be welcomed.

A new development, however, is that the AILD also provides for the disclosure of evidence to potential claimants. Such an order may help to avoid futile claims because a potential claimant will gain a better insight into the evidence before filing a claim and is thus potentially deterred from doing so. In addition, in the case of potential claimants, as opposed to ordinary claimants, there is no provision that requires national courts to order the disclosure of evidence if the requirements are met. Instead, they need only be authorised to do so. Nevertheless, these provisions are a disproportionate encroachment on the sovereign rights of the Member States. Removing the relevant provisions does not mean that Member States cannot impose a disclosure obligation prior to bringing an action since the AILD is aiming for minimum harmonisation. But Member States should not be obliged to do this. A right to the disclosure of evidence before an action for damages is not completely new to German law. Section 33g of the German Competition Act, Germany's implementation of the disclosure obligation under the Damages Directive, contains an independent substantive right to disclosure of evidence, which can be asserted independently of - i.e. also before - an action for damages. However, in stark contrast to the AILD, the Damages Directive does not make this a requirement as it would also be satisfied by a right to disclosure as part of the compensation proceedings.<sup>21</sup> Nor can implementation take place by way of an action by stages (Section 254 German Code of Civil Procedure - ZPO). As explained above, the purpose of disclosure, at least at the stage before a claim is filed, is to prevent the filing of futile claims by improving the availability of information. In contrast, the Federal Court of Justice (BGH) has stated - in the context of Section 33g German Competition Act - that "the action by stages is generally not available for rights to information which do not serve to determine the claim for performance but are intended to provide the claimant with general information about his legal action and thus improve his procedural equality of opportunity or his position under the law of evidence".<sup>22</sup>

In addition, a broader scope of application of the disclosure obligation increases the risk that individual players will misuse the disclosure obligation, e.g. to obtain information about a competitor's product. This is made all the more true by the fact that there is no definition of when a claim is "plausible" and a request for disclosure does not entail the same risk of incurring costs as legal proceedings do.

Similarly, the Directive should also refrain from providing for the legal consequences of non-disclosure. Instead, Member States should merely be obliged to provide for effective, proportionate and dissuasive sanctions - which may well include a presumption of causality such as the one proposed - as is the case, for example, in Art. 8 of the Damages Directive and Art. 19 of the Directive on representative actions. Providing for the legal consequences in the Directive is too far-reaching an encroachment on national procedural law because procedural law varies greatly from one Member State to another. Rules of evidence such as those envisaged only leave Member States that do not yet have such rules the choice of either introducing a special procedural law for certain damages proceedings or changing their entire procedural law.

### 2.3 Compatibility with EU Law in other respects

#### AI Act

It is to be welcomed that the AILD is designed to be very much in unison with the proposed AI Act [[COM\(2021\) 206](#)]. The proposal refers in numerous places to the definition of terms used in the AI Act, specifically the core term "AI system", so that standardised terminology is guaranteed. However, this makes the proposal dependent on the AI Act. It assumes that certain elements of the Commission's proposal, such as the distinction between high-risk AI-systems and other AI-systems, as well as the relevant due diligence obligations of the provider or a person subject to the obligations of a provider, are retained. In any case, the proposal can only be meaningfully

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<sup>20</sup> Section 33g GWB.

<sup>21</sup> On all this, see Preuß, N. (2017), Chapter 10. Kartellschadensersatz: Beweismittel, in: Kersting, C. / Podszun, R. (Hrsg.), Die 9. GWB-Novelle, p. 245-290; Podszun, R. / Kreifels, S., Kommt der Ausforschungsanspruch? – Anmerkungen zum geplanten § 33g GWB, Gesellschafts- und Wirtschaftsrecht 2017, p. 67-72; Klöppner, C. / Preuß, A., Informationsasymmetrie zu Lasten der Kartellanten – Auskunfts- und Herausgabeansprüche nach § 33g Abs. 2 GWB bei Sammelklagen, Neue Zeitschrift für Kartellrecht 2022, p. 494-499.

<sup>22</sup> BGH, Judgement of 4 April 2023, KZR 20/21, para. 16.

addressed in the legislative process once the content of the references to the AI Act has been finalised. This is also the approach being taken by the European Parliament.<sup>23</sup>

### **Product Liability Directive new**

The AILD and the proposal for a new product liability directive are similar in some respects. As described, they provide for similar disclosure obligations and a reversal of the burden of proof as a legal consequence in the event of non-compliance. This is to be welcomed, as a fragmentation of procedural law - i.e. fundamentally different disclosure obligations depending on the subject matter of the proceedings - complicates the application of the law. However, there is a fundamental difference between AILD and the Product Liability Directive - both the existing one and the proposal for a new one: The AILD provides for a regime of fault-based liability, while the product liability regime is based on strict liability. That means: The claim for damages under the AILD is linked to the fact that the defendant acted in breach of a duty of care and is therefore at fault regarding the claimant's damage. In contrast, product liability only requires that the product in question was defective and as a result caused damage to the claimant. Whether or not the defendant is at fault for this product defect is irrelevant. In view of this significant difference in the scope of application, differences, such as disclosure being made even to potential claimants, are also acceptable.

### **Lack of precision**

The Commission proposal lacks precision in various areas. The disclosure obligation requires the potential claimant to present facts and evidence sufficient to support the plausibility of their claim. As in the corresponding provision on the disclosure obligation in the proposal for a new product liability directive [[COM\(2022\) 495](#), see [cepPolicyBrief No. 2/2023](#)], the Commission proposal does not contain any indications as to how the term "plausibility" is to be understood. Very similarly, the Damages Directive requires the claimant to have "presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages". In Section 33g (1) German Competition Act, the German implementing legislation requires the claimant to "credibly demonstrate" that they have a claim for damages in order to assert a claim for disclosure of evidence. The German Federal Court of Justice has interpreted this to mean that "it is sufficient if there is a certain probability, based on concrete evidence, that the claimant is the holder of a claim for damages under antitrust law; an overwhelming probability is not required."<sup>24</sup> The latter is the standard of proof required to demonstrate a prima facie case pursuant to Section 294 ZPO. If the German legislator adopts the wording of Section 33 German Competition Law, there will be an inconsistency with Section 294 ZPO. The case law of the Federal Court of Justice referred to would however facilitate an interpretation.

Even less clear is the question of when evidence and expertise are sufficient for a claimant to prove causation and what conditions are reasonable for this, as well as when it would be deemed excessively difficult to prove the causal link. A certain level of abstraction is necessary, as the legislator cannot regulate every conceivable (individual) case. In addition, national implementation may also be more precise than the AILD. Nevertheless, the European legislator is already required to provide guidance on the interpretation of the terms, for example through examples in the recitals, such as those provided to explain the phrase that "it can be considered reasonably likely, based on the circumstances of the case" that the fault has influenced the output or lack of an output by the AI system.

### **Procedural rights**

In the interests of procedural equality of arms, which is part of the right to a fair trial pursuant to Art. 47 (2) CFR,<sup>25</sup> the AILD should also provide that a court may order the claimant to disclose evidence at the request of the defendant. This is the case for the disclosure obligation in the Damages Directive and the Directive on representative actions. By only giving a right of application to the claimant, the Commission proposal gives the claimant more procedural options than the defendant, which is contrary to the principle of equality of arms. Certainly, AI presents the claimant with particular difficulties in proving his claim. In some cases, however, it may be the defendant who needs evidence that only the claimant has access to. This is even quite normal where the

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<sup>23</sup> Table.Media (2023), Europe.Table of 6 September 2023.

<sup>24</sup> BGH, Judgement of 4 April 2023, KZR 20/21.

<sup>25</sup> Blanke, H.-J. (2022), in: Calliess, C. / Ruffert, M. (Eds.), EUV/AEUV, 6th Edn., Art. 47 CFR, para. 16; Jarass, H. (2021), Charta der Grundrechte der EU, 4th Edn., Art. 47, para. 49; Eser, A. / Kubiciel, M. (2019), in: Meyer, J. / Hölscheidt, S. (Eds.), Charta der Grundrechte der Europäischen Union, 5th Edn., Art. 47, para. 37.



defendant has to prove that the claimant has access to sufficient evidence and expertise to prove causality. It is not therefore appropriate to completely exclude a disclosure obligation for the claimant.

It is not generally appropriate to place the burden of proof on the defendant to determine which evidence and expertise the claimant can access and under what conditions. It is naturally much easier for the claimant to prove what he himself has access to than the defendant.

## D. Conclusion

People wanting to claim in court that they have been harmed by artificial intelligence face particular difficulties in obtaining evidence. 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 roll-out of AI. Specifically, the Commission proposes the introduction of disclosure obligations and burden of proof requirements. It bases this on Art. 114 TFEU (competence for internal market harmonisation). It is however 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 standardisation contribute to the elimination of any noticeable distortions of competition. In contrast, 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.

The disclosure obligations relate to potential damage caused by high-risk AI systems. Specifically, 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 its 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. The disclosure obligation may help to prevent futile claims. However, it interferes disproportionately 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.

The provisions on the burden of proof contained in the Directive allow for the presumption that fault on the part of the defendant 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. This 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 frivolous claims, on the other.

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