European Commission's proposal for an Artificial Intelligence Liability Directive (AILD)

Eurochambres welcomes the European Commission´s endeavour to introduce a degree of harmonisation in non-contractual liability rules to artificial intelligence (AI). We call for balanced and clear liability rules that grant businesses legal certainty and a high level of protection against damages, while at the same time avoiding placing disproportionate burdens on developers of AI systems. Further, we raise concern over the potential repercussions of the proposed changes to national civil procedure and liability frameworks.

1. Introductory remarks

The success of emerging technologies does not merely depend on their technological merits but is linked to their acceptance by society and an adequate regulatory framework that provides businesses with a maximum of certainty over the parameters of their deployment. Only with such legal certainty can businesses flourish.

Trust in the safety and quality of Artificial Intelligence (AI) systems is moreover crucial for their acceptance. The Commission therefore rightly spelled out the "development of an ecosystem of trust" to be among the main objectives of the AI Act proposal.

An ecosystem of trust, however, is incomplete without an ascription of responsibility for situations, when things go wrong: The AI Liability Directive (AILD) proposal in combination with the AI Act and Directive on liability for defective products proposals, aims to provide a comprehensive EU framework for emerging technologies, and forms a legislative package to support the roll out of AI.

Eurochambres expressly welcomes the Commission`s strife for consistency between these various legislative proposals while opting for a standalone legislative initiative for AI liability, in the form of a directive. This should, in principle, correspond to a careful, minimally invasive approach, leaving room for future readjustments.

As ever, legislators should take utmost care not to disproportionately impact European SMEs and start-ups, thus risking a chilling effect on innovation and digitalisation.

While the objective to modernise and adapt liability rules to the digital age is undisputed, key terms and processes **need further clarification**. Crucially though, some of the proposed changes need very careful consideration since they could constitute a serious interference with most national European **civil procedure** frameworks by introducing **changes** that are **systemically alien** to them. We call on legislators to clarify, specify and limit the relevant provisions.

Due to the AILD proposal containing numerous cross-references to other legislative proposals that are still being negotiated, we reserve the right to adapt our position in reaction to future legislative developments.

2. Why the chamber network considers the Artificial Intelligence Liability Directive (AILD) relevant

The facilitations that AILD would offer claimants seeking compensation for non-contractual damage caused by an AI system would equally be available to businesses – which stands in contrast to the provisions of the Product Liability Directive (PLD). Therefore, it makes sense to have separate legislative initiatives for AI liability on the one hand and liability for defective products on the other hand. From the business perspective, it is crucial that the newly created regulatory framework **provides balanced and clear liability rules** that grant businesses legal certainty and a high level of protection against damages, while at the same time **avoiding placing disproportionate burdens** on developers of AI systems, thus stifling investment in innovation.

The AILD proposal further contains provisions that we believe could constitute a serious **interventions in** most **national civil procedure frameworks**. We believe any such changes should be considered very carefully and call for **utmost caution** in this regard.

3. Summary of Eurochambres main messages

Legal certainty is a prerequisite for a flourishing business environment. When it comes to new legislation, businesses should ideally be able to gauge its effects right from the outset, without needing to wait for years until courts have ironed out the most blatant uncertainties over the meaning of certain provisions. As the AILD proposal contains multiple references to other legislative proposals – mainly the AI Act – its repercussions will largely depend on the agreement that will eventually be reached on the definitions of AI system, high-risk, provider or user in the AI Act. There are multiple formulations in the AILD proposal itself that leave **too much uncertainty and room for excessively expansive interpretation**: How far does "relevant" go when it comes to the disclosure of evidence? When is a claim for damages "plausible"? What evidence is "necessary" and "proportionate" for assessing a (potential) claim for damages? How much effort is reasonable for the user or provider in connection with the disclosure of evidence?

We consider Article 3(1) problematic on several levels and deem some aspects of it to be overly intrusive. Firstly, it seems to assume the existence of a prelitigation phase by allowing potential claimants to demand disclosure. It is our understanding that such a **prelitigation phase** is unknown to the vast majority of national European civil procedure frameworks and would thus necessitate a **significant intervention** therein. Any such intervention must be specified comprehensively and clearly limited in scope. Secondly, providers and users should be given **more clarity when a disclosure request is deemed** to have been **refused**. It would be an option to at least specify a certain time period for compliance with a disclosure request before a (potential) claimant can ask courts to intervene. Thirdly, we invite legislators to consider whether the order of disclosure should not be limited to the defendant rather than include a large pool of third parties. As it stands, the provision may be **vulnerable to abuse** and risks becoming a bottomless pit.

Article 3(4) includes some safeguards for trade secrets. Unfortunately, the provision is excessively vague considering the importance of the issue. We believe that the protection of trade secrets might warrant a separate article where safeguards are enshrined in much greater detail and with much greater stringency. We also consider that the protection against the disclosure of evidence and information should explicitly go beyond trade secrets and

include other sensitive information such as security and access control mechanisms.
The conditions for a presumption of a causal link pursuant to Article 4 lack clarity, bearing in mind that many national civil liability regimes firmly distinguish between illegality and fault when assessing the validity of liability claims. The proposal does not sufficiently reflect on this differentiation; here too, more clarity is needed.

4. Detailed comments on the proposal

The explanatory memorandum attached to the AILD proposal expressly states the issue it is meant to address: "The specific characteristics of AI, including complexity, autonomy and opacity (the so-called 'black box' effect), may make it difficult or prohibitively expensive for victims to identify the liable person and prove the requirements for a successful liability claim."[1] Such victims may in many cases be businesses. The AILD would provide businesses claiming compensation for damage with facilitations otherwise unavailable to them – as the PLD is limited to natural persons. We welcome these new possibilities granted to businesses as they increasingly engage with and are exposed to AI systems, on condition that the newly created regulatory framework remains balanced and brings legal certainty.

More clarity and harmonisation of the liability rules applicable to AI would not only benefit businesses using or being otherwise exposed to AI but – as they would alleviate the risk of fragmented national AI specific regulations – also those developing these systems.

Legislators must, however, beware of an unintended tightening of liability rules. The AILD proposal extends liability to violations of a vast array of fundamental rights. This seriously jeopardises the ability of businesses to predict risks. The explanatory memorandum refers to the protection of fundamental rights as a core concern of the AILD proposal.[2] Liability shall extend to immaterial damages according to the drafters. In many cases the threshold for a violation of a fundamental right remains unclear. Along with the problematic surrounding the definitions of key terms such as "high-risk", this refers back to the provisions that will find their way in the final version of the AI Act.

One of the most flagrant set of issues arises from Article 3 of the AILD proposal that seeks to introduce a disclosure of evidence request available to (potential) claimants. Such a prelitigation phase is unknown to the vast majority of European civil procedure frameworks and could constitute a systemic breach upon transposition: For the consequences of such an interference to remain foreseeable and manageable, we call on legislators to further clarify, specify and limit this provision. Further, Article 3 does not include sufficient safeguards for sensitive information and trade secrets as both the personal and material scope of disclosure of evidence requests are exuberant.

Building on our reservations towards Article 3, a broader point merits to be made on the chosen legal basis for the adoption of the AILD: We question whether Article 114 TFEU is, in fact, an appropriate legal basis. Article 114 TFEU allows for the approximation of laws which have as their object the establishment and functioning of the internal market, but while it represents a broad competence basis, it is not without limits and the principle of conferral applies. We call on legislators to carefully consider whether its limits have not been breached in light of the magnitude of interference with some national civil procedure frameworks (see our detailed comments on Article 3 below).

[1] COM (2022) 496 final, 2022/0303 (COD), p. 1.
[2] Ibid., p. 9f.

In principle, Eurochambres welcomes the choice of a minimally interventionist tool. It will however remain to be seen in how far the chosen approach will be effective in significantly reducing transaction costs associated with regulatory fragmentation. Article 5 therefore rightly provides for a mechanism to review and reassess the need for more stringent and harmonised regulation in the future.

- Article 1 – Subject matter and scope

The subject matter is clearly defined as concerning non-contractual fault-based civil law claims for damages caused by an AI system. The primary target for disclosure are high-risk AI systems. While this is also true for the burden of proof, Article 4(5) introduces an important caveat which deserves to be elaborated in more detail and clarity. See the corresponding comments to Article 4. Both subject matter and scope depend, however, on how the key terms are defined.

- Article 2 – Definitions

The core definitions of Article 2(1)-(4) refer to the AI Act. Due to the fact that negotiations on the Parliament's position on the AI Act are still ongoing at the time of writing, any assessment of the AILD as a whole can be but **provisional**.

It is worth underlining that the qualification as a "potential claimant", introduced by Article 2(7), will be unknown to many national civil procedure frameworks. What can be further noted is that the definition of a "potential claimant" as someone who is "considering but has not yet brought a claim for damages" is rather broad and can include a wide scope of actors thus creating legal uncertainty with regards to the admissibility of requests for disclosure of evidence, pursuant to Article 3. Opening the possibility to request the disclosure of evidence on an AI system to a wide range of actors will inevitably lead to abusive requests, incurring unnecessary costs for businesses. To that end, we consider that, if maintained, this notion should be significantly **narrowed down** to persons demonstrating a concrete and clearly identifiable interest in requesting the disclosure of evidence on an AI system, in order to be **interpreted strictly** by national courts.

Although this issue will be discussed in greater detail under comments to Article 3, we note that the definition of a "potential defendant" is missing. This absence is in line with the vast scope of persons to whom a disclosure of evidence request can be directed – a fact we regret and recommend fixing.

- Article 3 – Disclosure of evidence

Article 3 is one of the two central provisions of the AILD proposal and arguably the most controversial.

  - Ad Article 3(1)

According to the explanatory memorandum, Article 3(1) "provides that a court may order the disclosure of relevant evidence about specific high-risk AI systems that are suspected of having caused damage"[3]. While the aim to tackle the difficulties (potential) claimants may face when collecting evidence to support their claim is legitimate and businesses seeking

[3] Ibid., p. 12.

redress will certainly be among its beneficiaries, we have serious doubts about what the proposed provisions would mean in practice. We consider Article 3(1) problematic on several levels and deem some aspects of it overly intrusive.

First, it seems to assume the existence of a **prelitigation phase** by allowing potential claimants to ask for disclosure. It is our understanding that such a prelitigation phase is **unknown to the vast majority of national European civil procedure frameworks** and would thus necessitate a significant intervention therein. Oftentimes it could constitute a systemic breach.

Second, the provision might well lend itself to abusive requests incurring unnecessary costs for companies. To that end, the definition of "potential claimant" as someone who is "considering but has not yet brought a claim for damages" is highly problematic and, if maintained, should be clearly defined and significantly narrowed down. The requirements for a (potential) claimant to file a disclosure of evidence request must be strict in order to only allow those demonstrating a concrete and clearly identifiable interest to request the disclosure of evidence. In any case, a careful balancing between the claimed damage and the damage that a provider or user might suffer from the disclosure of trade secrets and other sensitive information should be mandated.

Third, providers, persons subject to the obligations of a provider pursuant to Article 24 or Article 28(1) of the AI Act as well as users should be given more **clarity when** a disclosure **request is deemed to have been refused**. It would be an option to at least specify a certain, reasonable time period for compliance with a disclosure request before a (potential) claimant can ask courts to intervene. Such a time period could be extended if duly justified by the complexity and the nature of the demand. This is particularly important in view of the technical nature of such evidence, the collection and presentation of which might in some cases be a lengthy process. Similarly, it should be clarified that any potential claimant must concretely demonstrate that they have contacted the potential holder of evidence before seeking remedy through courts. This also impacts on the presumption of non-compliance with a duty of care as stipulated in Article 3(5).

Fourth, we invite legislators to consider whether the **order of disclosure should** not be **limited to the defendant** rather than a large pool of third parties. As it stands, the provision risks becoming a bottomless pit.

Fifth, it should be specified that evidence is only to be provided on the "specific high-risk AI system that is suspected of having caused" the particular damage for which compensation is being sought.

Finally, Article 3(1), second subparagraph, makes a potential claimant´s entitlement to a disclosure request dependent on the "plausibility" of a claim for damages: We believe that a(n actual) claimant should equally have to present sufficient "facts and evidence to support" their claim and warrant a disclosure of evidence order. The **notion of "plausibility"** of a claim for damages can, however, itself be subject to various interpretations. Not only is the term vague, but also nowhere does the AILD proposal include specifications on the degree of plausibility required. The same holds true for when evidence shall be deemed **"relevant"** as it is **equally unclear whose obligation it is to specify what evidence should be disclosed**. Such vagueness lays the ground for a large variety of national implementations and applications which **may not only lead to a high degree of legal uncertainty but also to exuberant and potentially abusive disclosure requests**.

To avoid unintended fragmentation, we urge the legislators to further clarify, specify and limit this provision.

- Ad Article 3(4)

When it comes to ambiguity, Article 3(4) displays similar pitfalls: Wordings such as "necessary and proportionate to support a potential claim" or "legitimate interests" leave a lot of room for interpretation and different implementations in Member States.

With regards to the limits to the disclosure of evidence and information, we consider that Article 3(4) should also include safeguards for other types of sensitive information: Besides **trade secrets**, as defined in Article 2(1) of Directive (EU) 2016/943, security and access control mechanisms should as well be considered as sensitive information and be protected accordingly.

It is absolutely crucial that businesses in fact have "appropriate procedural remedies" in response to disclosure orders – as mentioned in Article 3(4), fourth subparagraph. This provision calls for greater detail as to the possibility and modalities of (suspensive) appeals and warrants a separate, stand-alone article.

- Ad Article 3(5)

Clarification is needed as to how the presumption can be rebutted. Rebuttal should be possible (i) if the defendant proves that he was compliant with the relevant duty of care but equally (ii) if the defendant proves that the damage did not occur as a result of non-compliance with the relevant duty of care (i.e., if this type of damage cannot occur as a result of a violation of the relevant duty of care).

- Article 4 – Rebuttable presumption of a causal link in the case of fault

Article 4 contains the second central provision of the AILD proposal, namely the presumption of causality when it is "reasonably likely" that fault has "influenced the output produced by the AI system or the failure of the AI system to produce an output that gave rise to the damage" (Recital 25).

As a general note, we are calling for utmost caution regarding all interferences with the burden of proof in national civil procedure frameworks. The conditions for the presumption of a causal link pursuant to Article 4 lack clarity. In addition, many national civil liability regimes firmly distinguish between illegality and fault when assessing the validity of liability claims. As the proposal does not sufficiently reflect on this differentiation it may lead to a – perhaps unintended – massive intensification of liability when transposed into the relevant national frameworks.

We urge legislators to clearly state at which level the rules or presumptions apply (illegality or fault). Article 3(5) seems to address the level of illegality. However, Article 4(1), point (a), uses the term "fault" when referring to the presumption of Article 3(5). This choice of words in Article 4 extends the presumption in Article 3(5) to the level of "fault". This is an example of a hopefully unintentional tightening of liability rules. Instead of using the term "fault", an alternative would be for Article 4(1), point (a), to stay closer to the wording of Article 3(5) in connection with the description of the presumption: "The claimant has

demonstrated, or the court has presumed pursuant to Article 3(5) the defendant's non-compliance with a relevant duty of care directly intended to protect against the damage that occurred".

- Ad Article 4(1)

According to Article 4(1) of the AILD proposal, it is the provider or user of an AI system that has not previously complied with one of the "duties of care" listed in the AI Act proposal, which should be sued by the victim. Identifying the provider is however not an easy task, especially since in many cases the victims are in contact with the final user of the AI system instead of the provider. Furthermore, to take the example of Article 28(1) of the AI Act proposal, a "provider" could be any party that modifies "the intended purpose of a high-risk AI system already placed on the market or put into service". As there can be multiple providers the allocation of responsibility along the AI value chain should also be clarified to ensure that responsibility for compliance and liability is assigned to those best able to mitigate harm and risk. In that regard, we advocate for the AILD proposal to include an effective mechanism that will allow the precise and targeted determination of the right defendant at an early stage of claims for damages. Here again, the manifold interlinkages with the provisions to be included in the final version of the AI Act become apparent as well as the need for appropriate adjustment between the two proposals.

- Ad Article 4(3)

The way that the presumption of a causal link between non-compliance with a relevant duty of care and/or fault and an output produced by an AI system is applied to a user of an AI system lacks accuracy (see Article 4(3), point (b)). The fact that a user has exposed the AI system to input data "that is not relevant in view of its intended purpose" is not a violation of a duty of care that should necessarily lead to the presumption of causality in the context of a claim for damages. It is more specifically the insertion of incorrect/biased data that is susceptible to have contributed to an output that is contested by the victim that should be considered a violation of the duty of care by a user, rather than the introduction of non-relevant data as such. As a result, it is proposed to further nuance this point.

- Ad Article 4(5)

We appreciate the relative clarity throughout the AILD proposal that its provisions shall primarily apply to high-risk AI systems. Article 4(5), however, caveats this limitation and opens a way for the presumption of a causal link to be applied in the case of AI systems that are not high-risk within the meaning of the AI Act. We are sceptical about extending the presumption of a causal link in case of non-compliance with a relevant duty of care and/or fault to systems that are not classified as high risk (and thus, in principle, do not create a risk for safety and fundamental rights of individuals). This extension of the scope should, in any event, only occur in exceptional circumstances.

Specification is further important because the AILD proposal does not intend to prescribe documentation obligations and other requirements that are not already regulated in other legal acts (e.g., the AI Act). Additional obligations should not be introduced through the back door. In particular, Article 4(2) and (3) of the AILD proposal should not be applied (by analogy) to an AI system that is not a high-risk AI system. If under certain, clearly defined and duly justified circumstances drafters and legislators want to open the presumption of a causal link to AI systems that are not high-risk, they must also include references to the

corresponding provisions of the AI Act applicable to those systems.

The particular modalities of the application of the presumption of a causal link to AI systems that are not high-risk surely warrant to be specified in (at least) a dedicated recital and/or preferably in a separate, stand-alone article.

- Article 5 – Evaluation and targeted review

As stated above, Eurochambres, in principle, welcomes the choice of a minimally interventionist tool. In light of the legal uncertainty associated with national implementations of a directive in general, and the AILD in particular, it is currently unclear whether transaction costs associated with regulatory fragmentation will be reduced effectively. Article 5 therefore rightly provides for a mechanism to review and reassess the need for more stringent and harmonised regulation in the future.

- Article 6 – Amendment to Directive (EU) 2020/1828

We consider that it is premature to propose an amendment to Annex I of Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers, in order to include AI Liability within its scope.

Directive (EU) 2020/1828 has not been implemented yet and it is difficult, at this point in time, to grasp the risks and practical challenges it may entail. It is currently also a challenge to draw safe conclusions on the compatibility of the mechanisms established by the AILD, such as, for example, the procedure for the disclosure of evidence in Article 3, with the provisions of Directive (EU) 2020/1828. What should further be determined in that regard is which type of damages caused by AI systems may give rise to collective and not individual claims, since only the first fall into the scope of Directive 2020/1828.

As highlighted previously, several key notions of the AILD are still under discussion in the context of the legislative procedure of the AI Act. The scope of the AILD thus remains unclear and may be subject to further specifications.

On top of all that, it should be noted that Directive (EU) 2020/1828 provides for collective actions to be brought by consumer representative bodies against businesses, whereas, in the context of the AILD, facilitations in the context of claims for non-contractual damage caused by an AI system would equally be available to businesses.

For all the aforementioned reasons, as a measure of prudence, we consider that Article 6 of the AILD should be struck out.

Eurochambres, the Association of European Chambers of Commerce and Industry represents over 20 million businesses in Europe through 45 members (43 national associations of chambers of commerce and industry and two transnational chamber organisations) and a European network of 1700 regional and local chambers. More than 93% of these businesses are small and medium sized enterprises (SMEs).

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