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# Orgalim comments on the Legislative Proposal for a Directive on AI liability


## Executive summary

The Legislative Proposal for a *Directive on adapting non-contractual civil liability rules to artificial intelligence* aims at harmonising EU rules applying to fault-based civil law claims for damages caused by AI systems. Orgalim has the following recommendations for the proposal:

- Although it is welcome that the definitions in the proposal aim to provide alignment with the AI Act, the legislative debate in the European Parliament and Council on the AI Act is not yet finalised. **We urge the co-legislators to postpone substantive discussions on the AI Liability Directive until an agreement is reached on the AI Act.**
- The proposal includes **unprecedented provisions on disclosure of evidence** that do not belong to the civil law tradition of most EU member states. It will be **extremely difficult for any defendant to comply with such far-reaching requirements** and as a result many defendants will be more inclined to settle claims, thereby increasing the likelihood of **speculative and opportunistic claims aimed at obtaining compensation**. The requirements could also expose manufacturers to **serious risks of loss of confidential information and trade secrets**.
- The proposal provides for a ***de facto* reversal of the burden of proof** that will be extremely damaging for manufacturers. National courts will be allowed to presume the causal link between the fault of the defendant and the damage when the claimant faces "excessive difficulties", due to technical complexity, in providing proof. Due to the indeterministic nature of AI systems, we are concerned that **this would allow courts to easily presume the causal link**, while it would be ***de facto* impossible for manufacturers to rebut such a presumption**.
- In order to restore a balance in the allocation of the burden of proof, Orgalim calls on the co-legislators to include a new provision in the AILD clarifying that **if a provider of an AI system or a high-risk AI system proves its compliance with a duty of care, then they are automatically presumed not to be at fault**.

# 1. Introduction

Orgalim takes note of the publication of the Legislative Proposal for a *Directive on adapting non-contractual civil liability rules to artificial intelligence* (AI Liability Directive - hereinafter "AILD"). The AILD proposal was presented by the European Commission on 28 September 2022, alongside the parallel proposal for a revision of the Product Liability Directive (PLD)[1]. While the legislative proposal for a revised PLD modernises EU rules on liability for defective products ("strict liability"), the AILD deals with a different liability regime (fault-based liability) and is sector-specific, as it applies only to fault-based claims for damages caused by AI systems.

# 2. Detailed comments on the proposal

## 2.1. Definitions (Article 2)

Orgalim welcomes the fact that the definitions in the AILD aim to provide full alignment with the AI Act. On the other hand, we are concerned that at the time of the publication of the AILD, the AI Act is still under discussion in the European Parliament and Council and the definitions in the AI Act are subject to change. Some of the definitions of the AI Act that are currently under discussion include, for example, the definitions of "AI system" and "high-risk AI system" themselves, which clearly have major implications for the overall impact and significance of the AI Act.

If the AILD and the AI Act are discussed in parallel, any change in the AI Act definitions could have further unforeseen implications in terms of liability for AI systems providers and users, as it would automatically modify the definitions in the AILD. We are therefore convinced that discussions on the AILD in the Parliament and Council should start only after the AI Act has been finalised.

**Key request:**

- **Postpone discussions on the AILD until the parallel discussions on the AI Act are finalised.**

## 2.2. Disclosure of evidence and rebuttable presumption of non-compliance (Article 3)

Article 3 of the AILD is highly problematic as it would bring into effect in Europe discovery principles originating in other jurisdictions, (e.g. the UK and the United States) that are unfit for application in Member States. Such principles have evolved from history and are based on the specific features of common law legal systems. Therefore, they cannot be introduced in European civil law systems in isolation without serious consequences for defendants.

It should be noted that all but one Member State in the EU already have rules in place according to which courts can order the disclosure of specific documents to support claims for damages. Also, almost all Member States have rules in place on the appointment of technical experts in the context of court proceedings that can investigate product defects on behalf of the claimants. These provisions are already helping to overcome information asymmetries between claimants and defendants in all Member States. However, Article 3(1) of the AILD will enable courts to order a provider, a person subject to the obligations of a provider, or a user to disclose "relevant evidence at its disposal" about a specific high-risk AI system. This is a much broader and far-reaching requirement than anything currently existing in European civil law legal systems.

The introduction of such discovery principles will have significant consequences and represent a considerable burden for European manufacturers (as well as any defendant under the AILD), which will be subject to a huge number of requests to disclose relevant evidence at their disposal to support claims for damages. Their position as defendants will be weakened

[1] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (Link)

from the very beginning and result in longer and more expensive proceedings, which will ultimately damage the competitiveness of European manufacturers.

It will prove extremely difficult for any manufacturer, large or small, to comply with disclosure of evidence (DOE) requirements. Claims are very often vague and general and it is difficult for a manufacturer to determine which documents are to be disclosed to support a claim for damages. Given the way the article is currently formulated, "relevant evidence" is extremely broad and manufacturers could be expected not only to disclose existing documents, but also to produce new documents based on evidence at their disposal.

As a result of this burden, manufacturers will often find it more convenient to pay out or settle the claim rather than comply with DOE requirements. Opportunistic claimants will be incentivised to seek compensation on a speculative basis, using the threat and cost of DOE as a means to force manufacturers to settle.

Also, pursuant to Article 3(5), when a manufacturer fails to comply with DOE requirements under Article 3(1) and (2), national courts shall presume the non-compliance of the defendant with a duty of care. While this provision is intended to alleviate the burden of proof for claimants, it will be extremely damaging for manufacturers. They could easily lose cases only because they did not comply with DOE requests that are inherently difficult to comply with. Therefore, Orgalim considers it disproportionate to use this as a basis to presume the defendant's non-compliance with a duty of care.

The AILD also states that it will be the sole responsibility of national courts to limit the disclosure to what is "necessary and proportionate" to support a claim for damages (Article 3(4)). In many cases, manufacturers can be requested to disclose information on an entire product or system when the damage is likely to have been caused by a single component of such a product/system. This in turn exposes manufacturers to the risk of leaks of confidential information, potentially ending up in the hands of competitors.

**Key requests:**

- **Delete Article 3**

## 2.3. Rebuttable presumption of causal link in case of fault (Article 4)

Orgalim is concerned about the far-reaching implications of Article 4 of the AILD, which significantly increases risks for providers (as well as persons subject to the obligations of a provider) of AI systems. In case of non-compliance with key provisions of the AI Act, companies will not only face large penalties pursuant to the AI Act itself, but they will be more easily found liable by national courts thanks to the presumption of causal link between the fault of the defendant and the output produced by the AI system which led to the damage.

Because of the intrinsically indeterministic nature of AI systems, it is always *de facto* impossible to prove a causality link between the fault of the provider and the output of the AI system (or the failure to produce an output). As a result, the provisions of Article 4(4) and 4(5), which are intended to limit the extent to which national courts are allowed to presume the causality link, are irrelevant in practice. For the same reason, it will be extremely difficult for providers to rebut the causality presumption pursuant to Article 4(7). This leads to a situation where, provided that a fault is established or presumed pursuant to Article 3(5), it will virtually always be possible for courts to presume a causality link between the fault and the damage and impossible for manufacturers to rebut such a presumption. The provisions of Article 4 will therefore disproportionally favour claimants, leaving no effective means to manufacturers to rebut the causality presumption.

There is an inherent risk in AI technology that should not be borne by manufacturers alone. We are convinced that if a provider of an AI system or high-risk AI system (or a "person subject to the obligations of a provider") proves its compliance with a duty of care (as defined in Article 2(9)), i.e. the relevant safety requirements laid out in EU legislation (specifically the AI Act), then they should automatically not be considered at fault by national courts. We call on the co-legislators to include an additional provision in the AILD to this effect, in order to ensure a balanced liability regime that protects the rights of both claimants and defendants.

**Key request:**

- **Introduce a new provision stating that if a provider of an AI system or a high-risk AI system proves its compliance with a duty of care, then they are automatically presumed not to be at fault.**

## 2.4. Evaluation and targeted review (Article 5)

Pursuant to Article 5 (2), the Commission should evaluate the need for insurance coverage as part of a targeted review of the AILD to be carried out within five years after the end of the transposition period. Orgalim believes that the evaluation of the need for insurance coverage should be left to companies, who are best placed to carry out a comprehensive risk assessment.

**Key request:**

- **Amend Article 5(2) so as to exclude the need for insurance coverage from the scope of the foreseen targeted review of the AILD.**



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