THE NEW AI LIABILITY DIRECTIVE

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Adopted on 28 September

Directive, i.e. to be transposed into national laws

Aims at consistency with related Union policies regarding e.g. AI regulation and product safety

Actual ‘substance’ enshrined in articles 1-4
AI LIABILITY DIRECTIVE – SCOPE OF APPLICATION

• Recital 15, Article 1:
  ➢ applies to non-contractual fault-based civil law claims for damage caused by an AI system’s output/failure to produce output following faulty behaviour of a human actor.
  ➢ Does not apply to cases where the damage is caused by a human assessment followed by a human act or omission, while the AI system only provided information or advice which was taken into account by the relevant human actor.
  ➢ Does not apply to criminal liability.

• The Directive does not affect
  ➢ liability claims in the field of transport (e.g. autonomous vehicles)
  ➢ product liability claims
  ➢ the liability exemption under the DSA
AI LIABILITY DIRECTIVE – MAIN ASPECTS

• Article 2 – Definitions
  ➢ For the essential definitions regarding AI, article 2 refers to the AI Act, which ensures consistency
  ➢ 2020 EP Resolution on civil liability for AI had its own – different – definitions

• Article 3 – Disclosure of evidence
  ➢ Refers to evidence to be provided before and during litigation (when requested by the claimant and the potential claimant)
  ➢ Reminiscent of pre-trial discovery in US law
  ➢ So far not common in EU courts
• Article 3 – disclosure of evidence
  ➢ Member State Courts may order providers, persons subject to the obligations of a provider pursuant to [Article 24 or Article 28(1) of the AI Act] or users to disclose relevant evidence at their disposal about a specific high-risk AI system suspected of having caused damage, upon request by the claimant or the potential claimant

• Article 3 – rebuttable presumption of non-compliance
  ➢ If the defendant fails to comply with an order to disclose or to preserve evidence, there is a rebuttable presumption that they did not live up to a relevant duty of care
Article 4 – rebuttable presumption of causation between the defendant’s fault and the AI system’s output/failure to produce an output

- Claimant demonstrated or court presumed the defendant’s fault or the fault of a person the defendant is responsible for
- (fault in this case is the non-compliance with a duty of care laid down in Union or national law directly intended to protect against the damage that occurred)
- it can be considered reasonably likely, that the fault has influenced the output produced by the AI system or the failure of the AI system to produce an output
- the claimant demonstrated that the output produced by the AI system or the failure of the AI system to produce an output gave rise to the damage.
Article 4 – rebuttable presumption of causation between the defendant’s fault and the AI system’s output/failure to produce an output

➢ In case of a damages claim against the provider of a high-risk system or a person subject to the obligations of a provider, the conditions set out in paragraph 1 (a) are met only when the claimant demonstrates that the defendant fails to comply with the specific obligations established related to high-risk systems.

➢ In case of a claim for damages against a user of a high-risk AI system the condition of paragraph 1 (a) is met where the claimant proves that:

➢ the user did not comply with their obligations to use or monitor the AI system in accordance with the accompanying instructions of use or suspend or interrupt its use or

➢ exposed the AI system to input data under its control which is not relevant in view of the system’s intended purpose.
AI LIABILITY DIRECTIVE – OBSERVATIONS

- Drastic change compared to the previous EP Resolution on AI liability
- 2020 EP Resolution strongly recommended a Regulation
- Established actual liability rules
- Proposed Directive does not establish any basis of a damages claim, but refers to national laws
- Commission gave up the approach of establishing the liability of the operator
- Aims at establishing measures that are as little invasive as possible
- Proposed directive only refers to fault-based liability – no further distinction according to the risk classification of an AI system in this regard
Risk-based approach is reflected with regard to the disclosure of evidence, which privileges claimants suffering damage caused by a high-risk system.

The Directive does not mention prohibited AI systems.

Sensible approach to establish all relevant definitions in the AI Act.

The proposed Directive leaves the crucial questions regarding liability to the national laws and courts.

EU institutions envision a level playing field with regard to AI regulation – it remains to be seen whether the proposal in its current form can contribute to achieving this.
THANK YOU!