

## Product Risk Radar

### AI Liability Directive

**Last updated: 13 December 2024**

On 28 September 2022, the European Commission (**EC**) proposed an AI Liability Directive (“**AILD**”) on adapting non-contractual civil liability rules to artificial intelligence (**AI**), with the aim of helping to promote trust in AI. This seeks to address challenges faced by victims of AI-related damage to make claims and receive compensation. The AILD is intended to complement the EU's AI Act.

The scope of the proposed AILD and the EU Product Liability regime (set out in the current Directive and the revised Directive) is different (and they are intended to complement each other). For example, EU Product Liability regime relates to *strict* liability for certain economic operators for damage caused by defective products, whereas the proposed AILD relates to national *fault-based* liability claims relating to damage caused by AI systems (for our comments on the new Product Liability Directive, see [here](#)).

In July 2024, an updated draft version of the AILD was published (see [here](#)). However, the content of the proposed AILD has not yet been finalised. On 10 December 2024, the Presidency published an update on the current state of play relating to the AILD and other legislative proposals, which effectively confirms that the proposed AILD is still under consideration.

#### What are the key takeaways?

The proposed AILD is intended to make it easier for claimants to obtain compensation for harms caused by AI systems, by facilitating access to information and alleviating the often difficult burden of proof under many national fault-based liability regimes. These steps are considered necessary due to the special characteristics of AI systems, such as opacity (i.e. the black-box effect), autonomy and complexity, which may make it more difficult for the claimant to meet the necessary burden of proof.

In particular, the proposed AILD is intended to ensure that:

- a national court may order the disclosure of relevant evidence about specific [high-risk AI systems](#) by those who have it at their disposal, for the purposes of establishing liability where the potential claimant has presented facts and evidence sufficient to support the plausibility of a claim (this relates to evidence which is necessary and proportionate to support the claim for damages)
- introduces a rebuttable presumption of causality where:

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1. it has been shown (either by the claimant, or as a result of the presumption that may apply in cases of document destruction or non-disclosure) that the defendant breached a relevant duty of care.  
However, in the case of:
  - **high-risk AI systems:** this applies in certain circumstances (e.g. if the AI system was not designed and developed in a way that meets transparency requirements) and the defendant may rebut this presumption by showing that sufficient evidence is reasonably accessible for the claimant to prove the causal link
  - **non high-risk AI systems:** the presumption will only apply where the court considers it excessively difficult for the claimant to prove the causal link;
2. 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; and
3. the claimant has 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.

The proposed AILD is not intended to affect the exemptions from liability and the due diligence obligations laid down in the Digital Services Act (Regulation 2022 / 2065).

## Why is this development important for businesses?

The proposed AILD is intended to make it easier for claimants who suffer damage caused by AI systems to obtain compensation. The AILD could therefore lead to an increase in claims brought against AI providers/ AI deployers. The presumption of causality is a particularly concerning development for businesses, as it could be difficult to rebut, particularly in the context of high-risk AI systems (under the current proposals).

## What comes next?

Negotiations are expected to continue about the content of the proposed AILD. The current proposal includes a 2 year transition period after the AILD is adopted for the proposals to come into force (so the proposed changes would not take effect immediately).

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