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Subject:	Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive) - Commments from Member States

Delegations will find in the Annex comments from Member States on the above mentioned proposal, as requested by **CM 4365/24**.

Contents

BELGIUM

Belgian comments concerning the proposal for a directive on AI liability and the questions raised by the Hungarian presidency (email 26 September 2024).

Article 3

Question 1. In cases of damage caused by AI, identifying the potential liable person will often prove difficult for a victim. What measures would be available according to your national law to help the victim or which measures would you consider adequate to address this difficulty? If a victim would have to file several lawsuits for damages before identifying the appropriate liable person, could they recover all the legal costs incurred?

It can indeed be difficult to identify the potential liable person. Nevertheless, lawyers (avocat) specialised in this subject are, in general, in the best place to advise their client on the matter. They should be able to identify the best potential liable person for the case. If they decide to launch a liability claim against a potential liable person, it is still possible to force the intervention of a third party, during the procedure, if the victim realises that another person could be held liable.

If several lawsuits are filed, the victims would recover the legal costs for the procedure were they to win (and to a certain extent for their lawyer fees). For other procedures, they might have to bear some moderate costs depending on the situation (discontinuance of procedure; etc…).

Question 2. Do you think the claimant should make attempts, according to Art. 3 (2), to gather relevant evidence from the defendant before the court orders a 'third party' to disclose such evidence? Does your legal system allow to take preliminary evidence before starting legal proceedings?

Preliminary evidence and the concept of a potential claimant do not exist in Belgium. Therefore, Article 3 in its present form would be an issue for Belgium.

Article 4. Currently the proposal introduces a rebuttable presumption concerning part of the causal link. Should the conditions for the presumption be changed? Should the tool of a rebuttable presumption be changed?

General comments:

Fundamentally, the Belgian delegation is of the opinion that this regime of liability should not be based on the category defined by the AI act. Whilst this classification may be relevant for the specific purposes of AI act, we doubt that it is so relevant for a regime whose purpose is to establish procedural rules that could be beneficial to victims. The prohibited AI system under the AI Act could raise some liability problems in practice. But these are not covered by this directive. How could the victims of such systems not benefit from the directive? The classification between high-risk and low-risk Ai system in the AI act does not necessarily mean that in terms of liability, it is easier to demonstrate a causal link for the low-risk system. However, the directive presumes it is the case, as the presumption in case of damage concerning a low risk ai system will only apply if it is excessively difficult for the claimant to prove the causal link (art. 4.5). Why should victims of low risk Ai system be less protected when a damage occurs?

In general The system remains too complicated for victims, relative to the benefits that they might derive. The victim must still prove the fault (breach of duty), the causal link between the output and the damage (4.1;c), the damage. The presumption only applies to a part of the causal link – the causal link between the fault of the defendant and the output of the AI.

In that respect, recital 15 states that the "Directive should only cover claims for damages when the damage is caused by an output or the failure to produce an output by an AI system through the fault of a person, for example the provider or the deployer under [the AI Act]. **There is no need to cover liability claims when the damage is caused by a human assessment followed by a human act or omission, while the AI system only provides information or advice which is taken into account by the relevant human actor. (**example: a car that uses AI to inform drivers on one way or the other).

As mentioned by Philipp Hacker[1], "such wording invites circumvention of the rule by having AI output "rubberstamped" by human actors blindly following machine advice". This limitation significantly reduces the scope of application of the directive because in practice many consequential decisions are passed through human review. Both situations should be covered, namely those in which the Ai system caused the damage and those in which a human caused the damage following the advice of an ai system.

More specific issues :

4.1. a) :

Recital 10 pretends that this Directive should not harmonise general aspects of civil liability which are regulated in different ways by national civil liability rules, such as the definition of fault (…).

Nevertheless, article 1.3. d) mentions that the directive shall not affect national rules determining which party has the burden of proof, which a degree of certainty is required regarding the standard of proof, or how fault is defined**, other than in respect of what is provided for in Articles 3 and 4**.

And indeed, contrary to what recital 10 states, this directive does define the concept of fault : a breach of duty of care. The 'duty of care' defined in article 2 (9) means a required standard of conduct, set by national or Union law, in order to avoid damage to legal interests, recognised at national or Union law level, including life, physical integrity, property and the protection of fundamental rights.

[1] The European AI Liability Directives – Critique of a Half-Hearted Approach and Lessons for the Future, available on line: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4279796

The directive refers to the breach of a duty of care intended to protect against harm("schutznormtheorie" /théorie de la relativité aquilienne). The victim of a wrongful act can bring an action for liability only if the rule that has been violated is specifically intended to protect him or her. A victim would only be entitled to compensation if his or her injured interest falls within the scope of protection of the violated norm. Recital 22 states that "non-compliance with duties of care that were not directly **intended to protect against the damage that occurred** do not lead to the application of the presumption". In Belgium, the violation of a rule of law is, in principle, a fault which in itself, gives rise to civil liability if it causes damage. It is not necessary that the rule protects the interest of the person claiming its violation. In Belgian law, any act by a person that causes damage to another person obliges the person who caused the damage to compensate for it.

4.2 :

The claimant has to prove the fault (consisting in the breach of duty of care). This condition shall be met **only** where the claimant has demonstrated that the provider failed to comply with the requirements mentioned in 4.2. If the claimant proves a fault that is not included in the requirement of 4.2, does it mean that they cannot benefit from the presumption ?

On the other hand, article 4.3 states that in case of a claim against the deployer of a high risk ai system, the same conditions will be met when the claimant proves one of the element included in art 4.3 a), b), c). Does it mean that in that situation other types of fault could trigger the presumption ? In other words, why is there such limitation for the provider and not for the deployer ?

4.3:

In the case of a claim for damages against the deployer of a high-risk AI system, the claimant has demonstrated fault if the deployer did not monitor the operation of the AI system (4.3 c). Normally, the duty to supervise or monitor the system commences after the AI has produced an output. If an AI system is too risky, the duty to monitor includes the duty to suspend or stop the use of the system. This duty of supervision takes place after the output. Any actions that a deployer takes to avoid harm caused by an output that has occurred will have no effect on that particular output. It would be easy for the deployer to rebut the presumption of causality and demonstrate that the output would have occurred even in the absence of the failure to monitor. The presumption between the fault and the output is not very helpful to the victim in this case. It would have been more useful to have a presumption of causality between the output and the damage.

To conclude, the PLD directive offers some examples of presumptions that could be used for AI. The (excessive) complexity of the proposed directive confirms the likelihood that it would have been more efficient to implement a more specific regime for AI within the PLD directive rather than having an additional directive whose scope is partially covered by PLD directive and will be difficult to apply in practice.

CZECH REPUBLIC

Comments of Czechia on the proposal for AI liability Directive

Czechia would like to thank the Hungarian Presidency for the possibility to comment on the text of the proposal and to express its views on the questions posed by the Presidency.

As a general comment, Czechia would like to reiterate that it is difficult to assess whether the proposed rules are appropriate and necessary when we do not yet have any experience with such cases. Czech tort law provides for several special liability regimes which do not require prove of fault and which should provide sufficient protection for the victim – more favourable than general fault-based liability. Additional AI-specific rules on fault-based liability alone may unfortunately work against the aim of this proposal – overshadowing more favourable liability regimes.

Article 3

1. *In cases of damage caused by AI, identifying the potential liable person will often prove difficult for a victim. What measures would be available according to your national law to help the victim or which measures would you consider adequate to address this difficulty? If a victim would have to file several lawsuits for damages before identifying the appropriate liable person, could they recover all the legal costs incurred?*

   As mentioned above, Czech tort law provides for several special liability regimes which do not require prove of fault by the claimant. In the context of AI systems, following liability schemes could be relevant: damage caused by means of transportation, damage caused by objects (things), damage caused by operation of a business unit or similar facility and (of course) damage caused by a defective product. The state is also strictly liable for any damage caused by maladministration. In all these cases, the victim can easily identify the liable person (who then usually has recourse against the person who caused the damage).

   If a situation should arise where multiple persons could be liable, the victim can file one lawsuit against all of them. If it is clarified during the proceedings, that someone is not liable, he can limit the lawsuit or suggest a change of defendant. Generally, in relation to the parties against whom the claimant was not successful (they are not liable at all), he shall bear the legal costs. If the lawsuit is adjusted in time, his costs should not be high. In any case, as mentioned above, under Czech law it should not be difficult to determine who to take legal action against.

   As regards the possibility of pre-trial disclosure under article 3, is there a possibility that even then the injured party will not be clear whom to sue? Who will bear the costs of such a procedure?

2. *Do you think the claimant should make attempts, according to Art. 3 (2), to gather relevant evidence from the defendant before the court orders a 'third party' to disclose such evidence? Does your legal system allow to take preliminary evidence before starting legal proceedings?*

The condition set in article 3 (2) seems reasonable. In practise, much evidence can be collected voluntarily. Our legal system allows pre-trial disclosure only in actions for damages for infringements of the competition law (Directive 2014/104/EU). Evidence may be secured by order of the court before starting legal proceedings only if it is likely that it will not be possible later or only with great difficulty.

3. *Trade secret is one of the essential guardian of the appropriate functioning of the internal market. In which cases does your legal system allow the disclosure of trade secrets?*

The existence of a trade secret is not a reason for withholding testimony or other evidence in court proceedings. Special provisions shall apply in order to preserve the confidentiality of such information.

Article 4

4. *Currently the proposal introduces a rebuttable presumption concerning part of the causal link. Should the conditions for the presumption be changed? Should the tool of a rebuttable presumption be changed?*

As stated above, the use of this presumption would be limited in the context of Czech tort law. It is difficult to assess whether the conditions of the presumption are set correctly when we have no practical experience. In general, however, article 4 should be considerably simplified. Our national law does not regulate similar issues in such detail.

In paragraph 1, it is unclear to us why it is necessary to prove a condition under letter (c) that relates to another part of the causal nexus (output – damage) in order to presume causation between the fault and the output.

In relation to paragraph 2, we are not sure whether it is appropriate to limit the application of the presumption for high-risk AI to breaches of specific obligation in the AI Act. Paragraph 1 does not contain such a restriction for lower risk systems.

Further, we are not sure of the conditions that paragraph 2 imposes. Paragraph 1 requires demonstration of a "*fault ... consisting in the non-compliance with a duty of care*..." whereas paragraph 2 requires demonstration that (someone) "*failed to comply with ... requirements*". Does this mean that fault also must be proven in this second case, or is it just a non-compliance with the regulation?

Finally, regarding protection against discrimination, we would welcome some clarification on how this presumption should work in cases where the burden of proof is already adjusted in accordance with European law (e.g. article 9 of Directive 2004/113/EC). It should also be clarified whether is it fault-based liability or strict liability as the EP's study suggests (and thus out of the scope of this proposal).

DENMARK

Article 3:

1. In cases of damage caused by AI, identifying the potential liable person will often prove difficult for a victim. What measures would be available according to your national law to help the victim or which measures would you consider adequate to address this difficulty? If a victim would have to file several lawsuits for damages before identifying the appropriate liable person, could they recover all the legal costs incurred?

Under Danish civil law there is no measures available to help a victim identify the potential liable person. Furthermore, it is a condition under Danish civil law that the defendant is identified before an action for compensation can be filed. In line with the AI Act, the definitions and responsibilities of deployers, importers, distributors and providers of AI systems are well established, enabling identifying the liable entity in the case of an AI system that leads to damages. The AI Act also entails a right for persons impacted by a high-risk AI-system to file a complaint with the responsible market surveillance authorities and a possibility to raise class actions. The transparency requirements for both AI systems and AI models in the AI Act furthermore facilitates the task of the victim.

Following this, we would reiterate our emphasis that the AILD should only cover high-risk AI systems. This would bring the proposal into accordance with the risk-based approach of the AI Act while also avoiding potential overlaps with the Product Liability Directive to a greater degree than in its current iteration.

2. Do you think the claimant should make attempts, according to Art. 3 (2), to gather relevant evidence from the defendant before the court orders a 'third party' to disclose such evidence? Does your legal system allow to take preliminary evidence before starting legal proceedings?

Yes, under Danish national law a request can under certain circumstances be submitted to a civil court in order to take evidence out of court without a lawsuit being filed. The evidence can then be used during a later court case.

3. Trade secret is one of the essential guardian of the appropriate functioning of the internal market. In which cases does your legal system allow the disclosure of trade secrets?

In Denmark the rules on the protection against the unlawful acquisition, use and disclosure of trade secrets are regulated through the Danish Act on Trade Secrets, in which the Trade Secrets directive (Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure) are implemented.

The law regulates in which cases the acquisition, use or disclosure of trade secrets constitutes a legal or an illegal act, cf. article 3 and 4. Furthermore, the law regulates protection of trade secrets during legal proceedings in accordance with the trade secret directive article 9.

As a general comment, we would encourage alignment with the Trade Secrets directive to avoid regulatory fragmentation regarding the disclosure of trade secrets.

Article 4:

4. Currently the proposal introduces a rebuttable presumption concerning part of the causal link. Should the conditions for the presumption be changed? Should the tool of a rebuttable presumption be changed?

Given the potentially very broad scope of the AI Liability Directive (AILD) going beyond a rebuttable presumption is something, we would advise against. Especially when taking into account the latest reports from the European Parliaments research service, which argues for an extension of the AILD into a "software liability directive".

The change of tool would imply that the AILD is no longer focused on supplementing national liability regimes by providing aid with the burden of proof in specific AI-related cases. Furthermore, it risks undermining the risk-based approach of the AI Act if a separate incentive to live up to the high-risk requirements is imposed by liability regulation.

Covering all AI applications (and potentially software in general) under the rebuttable presumption of art. 4 would place a pressure for even non-high-risk suppliers to bear the costs of implementing the safeguards for high-risk appliances.

FRANCE

Objet : Commentaires et suggestions rédactionnelles des autorités françaises sur la proposition de directive relative à l'adaptation des règles en matière de responsabilité civile extracontractuelle au domaine de l'intelligence artificielle – Note des autorités françaises.

Réf. : COM (2022) 496 final – Proposition de directive du Parlement européen et du Conseil relative à l'adaptation des règles en matière de responsabilité civile extracontractuelle au domaine de l'intelligence artificielle

CM4365/24

Dans le cadre de la reprise des négociations de la proposition de directive relative à l'adaptation des règles en matière de responsabilité civile extracontractuelle au domaine de l'intelligence artificielle, la présidence sollicite les commentaires des délégations sur les articles de la proposition de directive ainsi que des réponses aux questions de la présidence relatives aux articles 3 et 4. Les autorités françaises souhaitent faire valoir les éléments ci-dessous :

Commentaires sur les articles de la proposition :

I. Commentaires préalables

Les autorités françaises remercient la présidence d'avoir pris l'initiative de solliciter les observations des Etats membres sur la proposition de directive relative à la responsabilité civile extracontractuelle pour faute du fait des systèmes d'intelligence artificielle (IA).

Elles rappellent toutefois que, lors du groupe de travail du 17 mai 2024, la majorité des Etats membres, dont la France, avait formulé d'importantes réserves à poursuivre les négociations sur ce texte.

Les autorités françaises souhaitent, à nouveau, indiquer que l'adoption de règles spécifiques à l'intelligence artificielle en matière de responsabilité extracontractuelle pour faute ne semble pas justifiée, au regard notamment des régimes de responsabilité existant dans les Etats membres. Elles soulignent en ce sens que le droit français de la responsabilité civile a su s'adapter à l'émergence des nouvelles technologies et offre ainsi aux personnes ayant subi des dommages causés par un système d'intelligence artificielle la possibilité d'obtenir une indemnisation sur divers fondements juridiques, et notamment sur le fondement de la responsabilité civile pour faute.

Par ailleurs, le droit français connaît des mécanismes facilitant la preuve dont la charge pèse sur les personnes lésées. Les dispositions nationales permettent, par exemple, au juge d'enjoindre à une partie la production de preuves ou encore de présumer de l'existence d'un lien de causalité entre une faute et un dommage.

En outre, la démonstration d'une faute et d'un lien de causalité avec le dommage ne seront pas toujours nécessaires, puisque la personne lésée pourra, le cas échéant, se prévaloir du régime de responsabilité objective, en se fondant, par exemple, sur la nouvelle directive relative à la responsabilité du fait des produits défectueux (les systèmes d'intelligence artificielle entrant à présent dans le champ d'application de cette directive).

Les autorités françaises privilégient donc une approche normative prudente et mesurée, conduisant à limiter les évolutions législatives aux seules difficultés techniques et juridiques clairement identifiées, ce qui ne semble pas être le cas ici.

Enfin, les autorités françaises soulignent que la proposition de directive suggère la mise en place de règles complexes et difficiles à mettre en œuvre, ce qui pourrait être un obstacle à l'objectif d'une juste indemnisation des personnes lésées par des systèmes d'intelligence artificielle. En effet, le texte apparaît extrêmement complexe, multipliant les exceptions (essentiellement sur la présomption de lien de causalité) et de ce fait, est très peu lisible. Elles expriment, dès lors, leurs inquiétudes, quant au risque d'insécurité juridique induit par cette proposition de directive et indiquent que le texte ne semble pas présenter les garanties d'une avancée en termes de protection des utilisateurs ou des personnes agissant en interaction avec des systèmes d'intelligence artificielle.

Dès lors, les autorités françaises maintiennent leur souhait de ne pas reprendre les négociations sur cette proposition de directive.

II. Commentaires détaillés

Les autorités françaises n'ont pas **à ce stade**, d'observation particulière sur les articles 5 à 9. Leurs observations seront centrées sur les articles 1, 2, 3 et 4.

Article Premier – Objet et champ d'application

L'article 1er § 2 indique que la directive a vocation à s'appliquer aux actions civiles fondées sur une faute extracontractuelle.

Les autorités françaises s'interrogent sur l'existence d'une éventuelle contradiction entre le considérant 10, qui exclut de l'harmonisation les contours généraux de la responsabilité civile, tels que la définition de la faute, et le considérant 22, qui donne une définition de la faute comme étant *« une omission ou un acte humain entraînant un manquement à un devoir de vigilance prévu par le droit de l'Union ou par le droit national et qui est directement destiné à protéger contre le dommage survenu »*.

Article 3 – Divulgation d'éléments de preuve et de présomption réfragable de non-respect

L'article 3§1 limite le nombre d'opérateurs à l'encontre desquels la divulgation des éléments de preuve en leur possession peut être ordonnée par un juge. Une telle demande de divulgation ne peut, en effet, être formulée qu'à l'encontre de fournisseurs, de personnes assujetties aux obligations du fournisseur et de déployeurs de systèmes d'IA à haut risque.

Le considérant 18 expose que l'obligation de divulguer des éléments de preuve ne devrait peser que sur les opérateurs qui doivent tenir une documentation en vertu du récent règlement sur l'IA[2], à savoir les fournisseurs et les déployeurs de systèmes d'IA à haut risque.

[2] Règlement (UE) 2024/1689 du Parlement européen et du Conseil du 13 juin 2024 établissant des règles harmonisées concernant l'intelligence artificielle et modifiant les règlements (CE) n° 300/2008, (UE) n° 167/2013, (UE) n° 168/2013, (UE) 2018/858, (UE) 2018/1139 et (UE) 2019/2144 et les directives 2014/90/UE, (UE) 2016/797 et (UE) 2020/1828 (règlement sur l'intelligence artificielle)

Or, les autorités françaises constatent qu'un certain nombre d'autres acteurs de la mise sur le marché des systèmes d'IA à haut risque (comme notamment les importateurs et les organismes notifiés), bien qu'ils ne soient pas soumis à une exigence de documentation spécifique, sont, cependant, soumis à des obligations visant à prévenir tout dommage. Ainsi, ils pourraient être détenteurs d'éléments de preuve susceptibles d'être divulgués. Les autorités françaises s'interrogent donc sur la pertinence de leur exclusion du champ de l'article 3.

Par ailleurs, depuis la publication de la présente proposition de directive en septembre 2022, le texte du règlement sur l'IA a évolué de manière importante et impose désormais des nouvelles et substantielles obligations à de nouveaux acteurs comme les fournisseurs de modèles d'IA à usage général présentant un risque systémique. Dès lors, les autorités françaises s'interrogent sur la pertinence de la proposition de directive qui ne couvre pas notamment ces fournisseurs.

Des observations complémentaires sont développées à la question 2.

Article 4 – Présomption réfragable d'un lien de causalité en cas de faute

L'ensemble des commentaires relatifs à cet article figure ci-dessous dans la réponse à la question 4.

Réponses aux questions de la présidence :

Article 3

1. **In cases of damage caused by AI, identifying the potential liable person will often prove difficult for a victim. What measures would be available according to your national law to help the victim or which measures would you consider adequate to address this difficulty? If a victim would have to file several lawsuits for damages before identifying the appropriate liable person, could they recover all the legal costs incurred?**

   Dans les cas de dommages causés par l'IA, l'identification de la personne potentiellement responsable s'avère souvent difficile pour la personne lésée. Quelles sont les mesures disponibles en vertu de votre droit national pour aider la personne lésée ou quelles sont les mesures que vous considéreriez comme adéquates pour résoudre cette difficulté ? Si une personne lésée doit intenter plusieurs actions en dommages et intérêts avant d'identifier la personne responsable appropriée, peut-elle récupérer tous les frais de justice encourus ?

Le droit civil français fournit une base pour tenir les individus et entreprises responsables des dommages causés par l'IA, même si la complexité des systèmes d'IA pose de nouveaux défis. En l'absence de législation spécifique à l'IA en droit français, ce sont les principes généraux du droit civil qui s'appliquent. Pour obtenir gain de cause en vertu de l'article 1240 du code civil français, qui prévoit un régime de responsabilité fondé sur la faute, le demandeur doit établir (i) une faute de la part du défendeur, (ii) une perte ou un dommage et (iii) un lien de causalité.

1/ D'abord, s'agissant des mesures disponibles, en vertu du droit national, pour aider la personne lésée à identifier l'éventuel responsable :

Le considérant 17 de la présente proposition de directive fait le constat que le *« grand nombre de personnes généralement impliquées dans la conception, le développement, le déploiement et l'exploitation de systèmes d'IA à haut risque fait qu'il est difficile, pour les personnes lésées, d'identifier la personne potentiellement responsable du dommage causé et de prouver que les conditions d'une action en réparation sont réunies ».* Ce même considérant propose d'aider les personnes lésées dans cette difficulté d'identification en leur octroyant *« le droit de demander à une juridiction d'ordonner la divulgation des éléments de preuve pertinents avant l'introduction d'une telle action en réparation ».*

Les autorités françaises soulignent que le droit français connait des mesures permettant la divulgation d'éléments de preuve comme indiqué en réponse à la question suivante.

Par ailleurs, s'agissant de l'identification précise de la personne fautive (dénomination exacte, coordonnées etc…), les autorités françaises relèvent que le règlement sur l'IA apporte un certain nombre de garanties, parmi lesquelles l'obligation pour des fournisseurs et déployeurs de systèmes d'IA à haut risque de s'enregistrer sur une base de données consultable par le public et incluant les noms et les coordonnées des personnes physiques qui sont responsables de l'enregistrement du système et légalement autorisées à représenter le fournisseur ou le déployeur (articles 43 et 71).

Dès lors, des règles tant nationales qu'européennes permettent de pallier les difficultés que peuvent rencontrer les personnes lésées dans l'identification de personnes responsables.

2/ Ensuite, s'agissant de la question de la récupération de tous les frais de justice, lorsqu'une une personne lésée intente plusieurs actions en dommages et intérêts avant d'identifier la personne responsable appropriée :

Les dépenses afférentes aux instances, actes et procédures d'exécution (les dépens) sont en principe mis à la charge de la partie perdant le procès. Néanmoins, le juge peut, par décision motivée, en mettre la totalité ou une fraction à la charge d'une autre partie (article 696 du code de procédure civile).

Par ailleurs, la partie, tenue aux dépens ou qui perd son procès, peut être condamnée à payer à l'autre partie une somme déterminée par le juge au titre des frais exposés et non compris dans les dépens. Néanmoins, le juge doit tenir compte de l'équité ou de la situation économique de la partie condamnée. Il peut, même d'office, et pour des raisons tirées de ces considérations, exclure toute condamnation de la partie perdante à payer des frais non compris dans les dépens (article 700 du code de procédure civile).

Si la personne lésée intente plusieurs actions, elle pourra, en application des règles rappelées ci-dessus, récupérer les frais de justice dans chacune des actions engagées.

2. **Do you think the claimant should make attempts, according to Art. 3 (2), to gather relevant evidence from the defendant before the court orders a 'third party' to disclose such evidence? Does your legal system allow to take preliminary evidence before starting legal proceedings?**

Pensez-vous que le demandeur doit tenter, conformément à l'art. 3 (2), de recueillir des preuves pertinentes auprès du défendeur avant que le tribunal n'ordonne à un "tiers" de divulguer ces preuves ? Votre système juridique permet-il de recueillir des preuves préliminaires avant d'entamer une procédure judiciaire ?

I. Les mesures ordonnées avant tout procès

Les autorités françaises indiquent que dans l'état actuel du droit positif en France (article 145 du code civil), la collecte de preuves avant d'initier une procédure judiciaire est possible grâce aux mesures d'instruction dites « *in futurum* ». Ce mécanisme permet à une partie de conserver ou d'établir des preuves en prévision d'un litige, par exemple dans les cas où les preuves risquent de disparaître ou sont difficiles à obtenir. Le juge peut ordonner toutes les mesures probatoires légalement admissibles dans le cadre d'une procédure non-contradictoire introduite par requête (destinée à obtenir une preuve avant sa disparition éventuelle) ou d'une procédure contradictoire. La partie requérante doit démontrer qu'elle dispose d'un motif légitime pour demander ces mesures, et ces dernières ne doivent concerner que des faits susceptibles d'affecter la résolution d'un litige.

La jurisprudence interprète cette disposition largement comme autorisant **aussi la production d'une pièce** détenue soit par un adversaire soit par un tiers, à condition qu'elle soit indispensable à la manifestation de la vérité et constitue le seul moyen d'en obtenir la production. (Civ 1ère 20 décembre 1996 n°92-12.819, Civ 2ème 15 décembre 2005 n°03-20.081).

Enfin l'article 834 du code de procédure civile prévoit la possibilité pour le président du tribunal judiciaire d'ordonner toutes les mesures propres à résoudre le litige qui lui est soumis que l'existence d'un différend entre les parties justifie ou qui ne se heurte à aucune contestation sérieuse. Dans ces conditions il peut prendre des **mesures conservatoires générales comme la désignation d'un séquestre avec pour mission de conserver provisoirement des éléments de preuve**. Ces ordonnances de référé sont également susceptibles de recours.

II. Les mesures ordonnées pendant le procès

En droit français, le juge peut, **au cours d'une procédure** à la demande d'une partie ordonner, sous astreinte la communication d'une preuve détenue par le **défendeur** ou par un **tiers** :

- L'article 11 du code de procédure civile (CPC) dispose en son deuxième alinéa que « Si une partie détient un élément de preuve, le juge peut, à la requête de l'autre partie, lui enjoindre de le produire, au besoin à peine d'astreinte. Il peut, à la requête de l'une des parties, demander ou ordonner, au besoin sous la même peine, la production de tous documents détenus par des tiers s'il n'existe pas d'empêchement légitime. »

- Aux termes des articles 138, 139, 141 et 142 du CPC, une partie peut demander au juge, **dans le cours d'une instance**, d'ordonner la délivrance d'une expédition ou la production de l'acte ou de la pièce **détenus par un tiers ou une partie**, sans forme, et le juge en ordonne la délivrance ou la production s'il estime cette demande fondée, dans les conditions et sous les garanties qu'il fixe, au besoin à peine d'astreinte. S'agissant d'une pièce détenue par un tiers, le juge peut rétracter ou modifier sa décision en cas d'empêchement légitime. Le tiers peut **interjeter appel** de la nouvelle décision dans les 15 jours de son prononcé. En revanche q**uand la pièce est détenue par une partie, l'injonction n'est pas susceptible d'appel immédiat mais seulement différé, dans le cadre d'un recours formé contre la décision rendue au fond.**

Les dispositions précitées s'appliquent devant toutes les juridictions de l'ordre judiciaire statuant en matière civile.

Il s'agit d'une simple faculté de production forcée laissée à l'appréciation du pouvoir discrétionnaire du juge. (Cass. 1ère civ., 4 décembre 1973, n° 72-13.844**). Il n'appartient qu'au juge de décider des documents qui doivent être produits** (Cass. 2ème civ., 16 juillet 1979, n° 78-12.487).

Ces dispositions ne sont pas applicables lorsque la mesure sollicitée n'a pas pour but la sauvegarde d'un droit légalement reconnu ou judiciairement constaté (Cass. 1ère civ., 6 nov. 1990, n° 89-15.246).

Dès lors, les autorités françaises considèrent que les dispositions de droit commun existantes en droit français permettent d'ores et déjà de satisfaire l'essentiel des exigences de l'article 3 de la proposition de directive et en particulier la possibilité de recueillir des éléments de preuves avant toute procédure au fond. Il ressort en outre de la jurisprudence que le juge ne délivre une injonction de communication de pièces qu'après avoir effectué un contrôle de proportionnalité des intérêts en cause. Il s'agit d'un pouvoir discrétionnaire du juge. Celui-ci ne doit toutefois pas être tenu, à notre sens, d'exiger du demandeur une démarche préalable auprès du défendeur pour obtenir la communication des pièces nécessaires.

Par ailleurs les autorités françaises ne sont pas favorables à la disposition faisant obligation pour les Etats membres de prévoir des voies de recours procédurales appropriées en réponse à une injonction de « divulguer ou de conserver des éléments de preuves ». Cette prescription est à notre sens source d'insécurité juridique en ce qu'elle implique un contrôle *a posteriori* par la Cour de Justice de l'Union Européenne du caractère approprié ou non des voies de recours prévues par le droit interne en matière de production forcée d'éléments de preuve, alors même que cette question relève de l'autonomie procédurale des Etats membres.

3. **Trade secret is one of the essential guardian of the appropriate functioning of the internal market. In which cases does your legal system allow the disclosure of trade secrets?**

   Le secret d'affaires est l'un des garants essentiels du bon fonctionnement du marché intérieur. Dans quels cas votre système juridique autorise-t-il la divulgation de secrets d'affaires ?

La loi n° 2018-670 du 30 juillet 2018 transposant la directive (UE) 2016/943 du 8 juin 2016 sur la protection des savoir-faire et des informations commerciales non divulgués (secrets d'affaires) contre l'obtention, l'utilisation et la divulgation illicites, a institué en droit français le secret des affaires en créant un titre V au sein du livre Ier du code de commerce.

Par cette loi, le secret des affaires est étendu à l'ensemble des procédures civiles et commerciales, à n'importe quel stade de la procédure, et est protégé par des mesures restreignant l'accès aux pièces et limitant la publicité des débats et des décisions.

La section 4 du titre V du code de commerce (les articles L. 151-7 à L. 151-9) prévoient des exceptions à la protection du secret des affaires lorsque :

- la loi (droit de l'Union européenne, traités ou accords internationaux ou droit national) impose ou autorise la révélation du secret, notamment dans le cadre des pouvoirs d'enquête, de contrôle, d'autorisation ou de sanction des autorités publiques (juridictionnelles ou administratives) ; le secret des affaires n'est par exemple pas opposable à l'Autorité de la concurrence, à la direction de la concurrence (DGCCRF) ou encore aux services fiscaux
- cette protection doit s'articuler avec certains droits et libertés fondamentaux expressément mentionnés (conformément à l'article 5 de la directive (UE) 2016/943 du 8 juin 2016).

Ainsi, dans le cadre d'une instance relative à une atteinte au secret des affaires, la divulgation de secrets d'affaires est autorisée dans les cas suivants :

- pour assurer **le droit à la liberté d'expression et de communication**, y compris le respect de la **liberté de la presse, et à la liberté d'information** telle que proclamée dans la Charte des droits fondamentaux de l'Union européenne (article L. 151-8 1° du code de commerce) ;
- pour révéler, dans le but de protéger l'intérêt général et de bonne foi, une activité illégale, une faute ou un comportement répréhensible, y compris dans **l'exercice du droit d'alerte** défini à l'article 6 de la loi n° 2016-1691 du 9 décembre 2016 dans les conditions définies aux articles 6 et 8 de cette loi (article L. 151-8 2° du code de commerce) ;
- pour **protéger un intérêt légitime reconnu par le droit de l'Union européenne ou le droit national** (article L. 151-8 3° du code de commerce) ;

  pour **protéger les droits des travailleurs, s'agissant des relations individuelles et collectives de travail,** dans le cadre de l'exercice du droit à l'information et à la consultation des salariés ou de leurs représentants (article L. 151-9 1° du code de commerce) ou dans le cadre de l'exercice légitime par les représentants des salariés de leurs fonctions, pour autant que cette divulgation ait été nécessaire à cet exercice (article L. 151-9 2° du code de commerce).

Article 4

4. **Currently the proposal introduces a rebuttable presumption concerning part of the causal link. Should the conditions for the presumption be changed? Should the tool of a rebuttable presumption be changed?**
Actuellement, la proposition introduit une présomption réfragable concernant une partie du lien de causalité. Faut-il modifier les conditions de cette présomption ? Faut-il modifier l'outil de la présomption réfragable ?

Observations préalables

En vertu du droit français de la responsabilité civile, une action réussie nécessite la preuve d'une faute, d'une perte ou d'un dommage et d'un lien de causalité. Les autorités françaises considèrent que le libellé actuel de l'article 4 de la directive sur la responsabilité en matière d'IA déplacerait la charge de la preuve du lien de causalité du demandeur vers le défendeur, qui serait tenu d'en établir l'absence.

Les autorités françaises considèrent également qu'en l'état, l'article 4 sur la présomption réfragable de lien de causalité entre la faute et le résultat produit par le système d'IA est trop imprécis et complexe.

Sur l'article 4 §1

L'article 4§1 consacre une présomption de lien de causalité entre la faute et le résultat produit par le système d'IA, lorsque trois conditions cumulatives sont réunies à savoir :

- la caractérisation d'une faute (démontrée ou présumée) consistant dans un manquement à un devoir de vigilance prévu par le droit de l'Union ou le droit national visant directement à protéger contre le dommage survenu,
- il est raisonnablement probable, compte tenu des circonstances de l'espèce, que la faute a influencé le résultat ou l'absence de résultat du système d'IA,
- le demandeur a démontré que le résultat ou l'absence de résultat du système d'IA est à l'origine du dommage.

D'abord, les autorités françaises constatent qu'alors que l'article 3 fixe des règles permettant au juge d'ordonner la divulgation d'éléments de preuve limitées à certains opérateurs de systèmes d'IA à haut risque, l'article 4 pose, quant à lui, les conditions d'une présomption de lien de causalité couvrant les dommages causés par tout type de système d'IA, même lorsque ce dernier n'est pas à haut risque et ne met pas en cause un fournisseur ou un déployeur. Les autorités françaises s'interrogent sur la raison de cette dysmétrie dans le champ d'application entre les articles 3 et 4, ainsi que sur la cohérence générale du texte.

Elles constatent ensuite que pour bénéficier d'une telle présomption, le demandeur devra rapporter la preuve d'un manquement à un devoir de vigilance prévu par le droit de l'Union ou le droit national visant directement à protéger contre le dommage survenu. Elles rappellent que, ce faisant, la proposition de directive semble imposer une définition de la faute, ce qui n'est pas l'objet du texte.

De plus, elles soulignent que la définition donnée est très large puisqu'elle renvoie à tout « manquement à un devoir de vigilance prévu par le droit de l'Union ou le droit national **», sans plus de précision, alors que** la présente proposition de directive est limitée dans son champ d'application aux seules actions en réparation fondée sur la faute en lien avec un système d'intelligence artificielle. Cette limitation est justifiée en raison de la complexité et de l'opacité de ces systèmes d'IA. Elles s'interrogent dès lors sur la cohérence du texte.

Les autorités françaises estiment également que la condition selon laquelle le manquement doit concerner une règle « *visant à protéger directement contre le dommage survenu* » pourrait être très difficile à apprécier. Elles craignent alors que cette exigence cristallise inutilement les débats devant le juge sur l'objectif théorique poursuivi par la norme en cause et ne permette ainsi pas aux personnes lésées de déterminer clairement quelles fautes pourraient donner lieu ou non à la présomption de lien de causalité.

Sur l'article 4 §2 et 3

Les paragraphes 2 et 3 de l'article 4 conditionnent la présomption de lien de causalité, pour les fournisseurs (et assimilés) et déployeurs de systèmes d'IA classés à haut risque, à la caractérisation d'une faute consistant dans la violation d'obligations limitativement énumérées du règlement sur l'IA.

Or, la présente proposition de directive a été publiée avant que l'ensemble des obligations retenues dans la version définitive du règlement sur l'IA n'aient été connues ni appliquées. Les autorités françaises s'interrogent donc sur l'exhaustivité des manquement visés par le texte permettant de retenir une telle présomption avant même la mise en application de ces règles.

Le règlement sur l'IA a, ainsi, introduit de nouvelles obligations sur ces opérateurs, qui pourraient être visées aux paragraphes 2 et 3. A titre d'exemple, pourraient être concernés :

- l'article 4 du RIA relatif à la maîtrise de l'IA (applicable aux fournisseurs et déployeurs), ou
- l'article 20 §1 et §2 du RIA relatif aux mesures correctives et au devoir d'information (applicable aux fournisseurs), ou
- l'article 26 §2 et §5 du RIA relatif au contrôle humain à la surveillance du système et à l'information du fournisseur (applicable aux déployeurs), ou encore
- l'article 27 §1 du RIA relatif à l'analyse d'impact sur les droits fondamentaux (applicable aux déployeurs).

Enfin, il serait également opportun de s'interroger sur les conditions d'une telle présomption en cas de faute commise par les fournisseurs de modèle d'IA à usage général présentant un risque systémique (exemple : manquements aux obligations visées à l'article 55 §1 du règlement sur l'IA).

Sur l'article 4 §4

Dans le cas d'une action en réparation concernant un système d'IA à haut risque, le paragraphe 4 permet au défendeur d'écarter l'application de la présomption énoncée au §1 lorsqu'il *« démontre que le demandeur peut raisonnablement accéder à une expertise et à des éléments de preuve suffisants pour prouver le lien de causalité »*.

Cette disposition permet ainsi au défendeur de faire de nouveau peser la charge de la preuve du lien de causalité sur le demandeur, au motif que ce dernier pourrait raisonnablement accéder à des expertises et autres moyens de preuve. Le considérant 27 justifie cette règle par le fait que les difficultés liées à l'autonomie ou l'opacité de certains systèmes d'IA *« pourraient ne pas se poser dans les cas où le plaignant dispose d'une expertise et d'éléments de preuve suffisants pour prouver l'existence d'un lien de causalité. Tel pourrait être le cas, par exemple, pour les systèmes d'IA à haut risque pour lesquels le demandeur pourrait raisonnablement accéder à une expertise et à des éléments de preuve suffisant en raison des exigences en matière de documentation et de journalisation prévues par le RIA ».*

Les autorités françaises soulignent que l'article 4 §1 pose une présomption légale qui s'impose, en principe, au juge. Le paragraphe 4 permet, quant à lui, d'évincer cette présomption. Ce paragraphe crée donc une exception au principe posé au paragraphe 1. Les autorités françaises craignent que cette règle ne complexifie les débats devant le juge, qui serait alors amené à apprécier du caractère suffisant des diligences accomplies par le demandeur avant de décider ou non d'appliquer la règle de la présomption.

De plus, en cas d'expertise, les conclusions de celle-ci pourront ne pas être suffisamment probantes pour établir un lien de causalité entre la faute et le résultat produit par le système d'IA. Dans cette hypothèse et en application du texte, le demandeur ne pourrait alors pas bénéficier de la présomption alors même qu'il aura eu accès à une expertise (qui s'est révélée insuffisante).

Ainsi, les autorités françaises estiment que le mécanisme de la présomption légale est incompatible avec une disposition permettant de rétablir sur le demandeur la charge de la preuve du fait ou de l'acte censé être réputé certain.

Sur l'article 4 §5

Dans le cas d'une action en réparation concernant un système d'IA **qui n'est pas à haut risque**, le §5 dispose que la présomption énoncée au §1 ne s'applique que si la juridiction nationale estime qu'il est excessivement difficile pour le demandeur de prouver le lien de causalité.

Cette disposition est confuse car elle mélange diverses conceptions de présomption. En effet, comme déjà indiqué, l'article 4 §1 pose une présomption légale qui lie le juge et qui a pour effet de dispenser le demandeur de la charge de la preuve qui lui incombe si les conditions posées par le texte sont remplies.
Le paragraphe 5 pose une condition supplémentaire, à savoir la difficulté pour le demandeur d'établir la preuve qui lui incombe. Cette condition constitue le fondement, en droit national, de la présomption judiciaire. En effet, lorsque le demandeur a des difficultés à rapporter une preuve, mais qu'il peut établir un faisceau d'indices, alors le juge peut présumer le fait dont la preuve est difficile à rapporter.
Dès lors, cette disposition crée une confusion entre présomption légale et présomption judiciaire alors que ces deux types de présomptions sont distincts dans leur fondement et mécanisme.

Par ailleurs, les autorités françaises craignent à nouveau qu'il n'en découle une complexification substantielle des débats devant le juge, lequel devra apprécier, sur la base de critères inconnus, s'il est excessivement difficile ou non pour le demandeur de rapporter la preuve du lien de causalité. Elles soulignent à cet égard le risque de traitement inégalitaire des personnes lésées.

Courtesy Translation:

I. Preliminary comments

The French authorities thank the Presidency for having taken the initiative of requesting comments from the Member States on the proposal for a Directive on non-contractual civil liability for fault arising from artificial intelligence (AI) systems.

However, they point out that, at the working group meeting on 17 May 2024, the majority of Member States, including France, expressed major reservations about continuing negotiations on this text.

The French authorities once again wish to point out that the adoption of specific rules for artificial intelligence in the area of non-contractual liability for fault does not seem justified, particularly in the light of existing liability regimes in the Member States. They emphasise that French tort law is adaptable and has been able to adapt to the emergence of new technologies. French law thus offers people who have suffered damage caused by an artificial intelligence system the possibility of obtaining compensation on various legal grounds, and in particular on the basis of civil liability for fault.

In addition, French law has mechanisms to facilitate proof, the burden of which falls on injured parties. National provisions allow the court, for example, to order a party to produce evidence or to presume the existence of a causal link between fault and damage.

Furthermore, it will not always be necessary to demonstrate fault and a causal link with the damage, since the injured party may, where appropriate, rely on the strict liability regime, for example, on the basis of the new directive on liability for defective products (artificial intelligence systems now fall within the scope of this directive).

The French authorities therefore favour a cautious and measured approach to legislation, limiting legislative changes to clearly identified technical and legal difficulties, which does not appear to be the case here.

Finally, the French authorities point out that the proposed directive suggests the introduction of rules that are complex and difficult to implement, which could be an obstacle to the objective of fair compensation for people injured by artificial intelligence systems. Indeed, the text appears extremely complex, multiplying exceptions (essentially on the presumption of a causal link) and, as a result, is very difficult to understand. They are therefore concerned about the risk of legal uncertainty arising from this proposal for a directive and point out that the text does not appear to offer guarantees of progress in terms of protecting users of artificial intelligence systems.

The French authorities therefore maintain their position that negotiations on this proposed directive should not be resumed.

II. Detailed comments

At this stage, the French authorities have no specific comments on articles 5 to 9. Their comments will focus on Articles 1, 2, 3 and 4.

Article 1 - Subject matter and scope

Article 1(2) states that the Directive is intended to apply to civil actions based on non-contractual negligence.

The French authorities question whether there is any contradiction between recital 10, which excludes from harmonisation the general contours of civil liability, such as the definition of fault, and recital 22, which defines fault as 'an omission or an act of a human being resulting in a breach of a duty of care provided for by Union law or by national law and which is directly intended to protect against damage'.

Article 3 - Disclosure of evidence and rebuttable presumption of non-compliance

Article 3§1 limits the number of operators against whom disclosure of evidence in their possession may be ordered by a judge. Such an application for disclosure may only be made against suppliers, persons subject to the supplier's obligations and deployers of high-risk AI systems.

Recital 18 states that the obligation to disclose evidence should only be imposed on operators required to keep documentation under the recent AI Regulation[3], i.e. suppliers and deployers of high-risk AI systems.

However, the French authorities note that a certain number of other players involved in placing high-risk AI systems on the market (such as importers and notified bodies), although not subject to a specific documentation requirement, are nevertheless subject to obligations aimed at preventing any damage. They could therefore be in possession of evidence that could be disclosed. The French authorities therefore question the relevance of excluding them from the scope of Article 3.

Furthermore, since the publication of this proposed directive in September 2022, the text of the AI Regulation has evolved significantly and now imposes substantial new obligations on new players such as providers of general-purpose AI models presenting a systemic risk. The French authorities therefore question the relevance of the proposed directive, which does not cover these providers in particular.

Additional observations are developed in question 2.

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

All the comments relating to this article are set out below in the response to question 4.

[3] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Regulation on artificial intelligence)

Réponses aux questions de la présidence :

Article 3

> **In cases of damage caused by AI, identifying the potential liable person will often prove difficult for a victim. What measures would be available according to your national law to help the victim or which measures would you consider adequate to address this difficulty? If a victim would have to file several lawsuits for damages before identifying the appropriate liable person, could they recover all the legal costs incurred?**

French civil law provides a foundation for holding individuals and companies liable for damages caused by AI, even though the complexity of AI systems presents new challenges. In the **absence of AI-specific legislation** under French law, **general principles of civil law** will govern. In order to bring a successful claim under Article 1240 of the French Civil Code, which provides for a fault-based liability regime, the plaintiff must establish (i) fault on the part of the defendant; (ii) loss or damage; and (iii) causation.

1/ Firstly, with regard to the measures available under national law to help the injured party to identify the person potentially responsible:

Recital 17 of this proposal for a directive notes that 'the large number of persons generally involved in the design, development, deployment and operation of high-risk AI systems makes it difficult for injured parties to identify the person potentially responsible for the damage caused and to prove that the conditions for bringing an action for damages have been met'. The same recital proposes to help injured parties with this difficulty of identification by granting them 'the right to ask a court to order the disclosure of relevant evidence before bringing an action for damages'.

The French authorities point out that French law provides for measures allowing the disclosure of evidence, as indicated in response to the following question.

Furthermore, with regard to the precise identification of the person at fault (exact name, contact details, etc.), the French authorities note that the AI Regulation provides a number of guarantees, including the obligation for suppliers and deployers of high-risk AI systems to register on a database that can be consulted by the public and includes the names and contact details of the natural persons who are responsible for registering the system and legally authorised to represent the supplier or deployer (Articles 43 and 71).

Consequently, both national and European rules make it possible to alleviate the difficulties that injured parties may encounter in identifying those responsible.

2/ Secondly, on the question of the recovery of all legal costs, where an injured party brings several actions for damages before identifying the appropriate person liable:

In principle, the costs of proceedings, documents and enforcement procedures are payable by the losing party. However, the judge may, by reasoned decision, charge all or part of these costs to another party (article 696 of the Code of Civil Procedure).

In addition, a party required to pay costs or who loses the case may be ordered to pay the other party a sum determined by the court for costs incurred but not included in the costs. However, the judge must take into account the fairness or economic situation of the party ordered to pay costs. He may, even of his own motion, and for reasons derived from these considerations, exclude any order that the losing party pay costs not included in the costs (article 700 of the Code of Civil Procedure).

If the injured party brings several actions, it may, in accordance with the rules set out above, recover the legal costs in each of the actions brought.

Do you think the claimant should make attempts, according to Art. 3 (2), to gather relevant evidence from the defendant before the court orders a 'third party' to disclose such evidence? Does your legal system allow to take preliminary evidence before starting legal proceedings?

I. Measures ordered before any trial

The French authorities state that under current French law (Article 145 of the Civil Code), evidence can be gathered before legal proceedings are commenced by means of so-called '*in futurum'* investigative measures. This mechanism enables a party to preserve or establish evidence in anticipation of litigation, for example in cases where evidence is likely to disappear or is difficult to obtain. The judge may order all legally admissible evidentiary measures as part of a non-contradictory procedure introduced by motion (designed to surprise the person holding the evidence) or an adversarial procedure. The requesting party must show that it has a legitimate reason for requesting these measures, and the measures must relate only to facts likely to affect the resolution of a dispute.

Case law broadly interprets this provision as also authorising **the production of a document** held either by an adversary or by a third party, provided that it is essential to the ascertainment of the truth and constitutes the only means of obtaining its production. (Civ 1ère 20 December 1996 n°92-12.819, Civ 2ème 15 December 2005 n°03-20.081).

Lastly, article 834 of the Code of Civil Procedure provides that the president of the court may order any measures to resolve the dispute submitted to him that are justified by the existence of a dispute between the parties or that are not seriously disputed. In these circumstances, the court may take **general protective measures such as appointing a receiver to temporarily preserve evidence**. These summary orders may also be appealed.

II. Measures ordered during the trial

Under French law, a court may, at the request of a party, order the disclosure of evidence held by the **defendant** or by a **third party**:

- The second paragraph of Article 11 of the Code of Civil Procedure (CPC) states that 'If a party is in possession of evidence, the judge may, at the request of the other party, order it to be produced, if necessary under penalty of a fine. He may, at the request of one of the parties, request or order, if necessary under the same penalty, the production of any documents held by third parties if there is no legitimate impediment'.
- Under the terms of articles 138, 139, 141 and 142 of the CPC, a party may ask the court, **in the course of proceedings,** to order the issue of a copy or the production of a deed or document **held by a third party or a party**, without formality, and the court shall order its issue or production if it considers the request to be well-founded, under the conditions and subject to the guarantees that it shall determine, if necessary subject to a penalty. In the case of a document held by a third party, the judge may retract or modify his decision in the event of a legitimate impediment. The third party **may appeal** against the new decision within 15 days of its pronouncement. On the other hand**, when the document is in the possession of a party, the injunction cannot be appealed immediately, but only on a deferred basis, as part of an appeal against the decision on the merits**.

The aforementioned provisions apply before all the courts of the judicial order ruling in civil matters.

This is a simple option of forced production left to the discretion of the judge. (Cass. 1ère civ., 4 December 1973, no. 72-13.844). **It is only for the judge to decide which documents must be produced** (Cass. 2nd civ., 16 July 1979, no. 78-12.487).

These provisions do not apply where the requested measure is not intended to safeguard a legally recognised or judicially established right (Cass. 1ère civ., 6 Nov. 1990, no. 89-15.246).

The French authorities therefore consider that the existing provisions of ordinary law in French law already make it possible to meet most of the requirements of Article 3 of the proposal for a Directive, in particular the possibility of gathering evidence prior to any proceedings on the merits. Case law also shows that the court will only issue a disclosure order after checking that the interests at stake are proportionate. This is a discretionary power of the judge. However, in our view, the court should not be obliged to require the plaintiff to make any prior representations to the defendant in order to obtain the necessary documents.

Furthermore, the French authorities are not in favour of the provision requiring Member States to provide appropriate procedural remedies in response to an order to 'disclose or preserve evidence'. In our view, this requirement is a source of legal uncertainty in that it implies a posteriori control by the Court of Justice of the European Union of the appropriateness or otherwise of the remedies provided by domestic law in relation to the compulsory production of evidence, even though this issue falls within the procedural autonomy of the Member States.

Trade secret is one of the essential guardian of the appropriate functioning of the internal market. In which cases does your legal system allow the disclosure of trade secrets?

Law no. 2018-670 of 30 July 2018 transposing Directive (EU) 2016/943 of 8 June 2016 on the protection of undisclosed know-how and business information (business secrets) against unlawful obtaining, use and disclosure established business secrecy in French law by creating a Title V within Book I of the Commercial Code.

Under this law, business secrecy is extended to all civil and commercial proceedings, at any stage of the proceedings, and is protected by measures restricting access to documents and limiting the publicity of debates and decisions.

Section 4 of Title V of the Commercial Code (articles L. 151-7 to L. 151-9) provides for exceptions to the protection of business secrecy when :

- the law (European Union law, international treaties or agreements or national law) requires or authorises the disclosure of secrecy, in particular in the context of the powers of investigation, control, authorisation or sanction of the public authorities (judicial or administrative); business secrecy cannot, for example, be invoked against the Competition Authority, the Competition Directorate (DGCCRF) or the tax authorities

- this protection must be articulated with certain fundamental rights and freedoms expressly mentioned (in accordance with Article 5 of Directive (EU) 2016/943 of 8 June 2016).

Thus, in the context of proceedings relating to a breach of business secrecy, the disclosure of business secrets is authorised in the following cases:

- to ensure **the right to freedom of expression and communication**, including respect **for freedom of the press, and freedom of information** as proclaimed in the Charter of Fundamental Rights of the European Union (article L. 151-8 1° of the French Commercial Code);

- to reveal, with the aim of protecting the general interest and in good faith, illegal activity, misconduct or reprehensible behaviour, including in the exercise of the **right to alert** defined in article 6 of law no. 2016-1691 of 9 December 2016 under the conditions defined in articles 6 and 8 of this law (article L. 151-8 2° of the French Commercial Code) ;

- to **protect a legitimate interest recognised by European Union law or national law** (Article L. 151-8 3° of the French Commercial Code) ;

- to **protect the rights of employees, with regard to individual and collective labour relations**, in the context of the exercise of the right to information and consultation of employees or their representatives (article L. 151-9 1° of the French Commercial Code) or in the context of the legitimate exercise by employees' representatives of their functions, provided that this disclosure was necessary for this exercise (article L. 151-9 2° of the French Commercial Code).

Article 4

Currently the proposal introduces a rebuttable presumption concerning part of the causal link. Should the conditions for the presumption be changed? Should the tool of a rebuttable presumption be changed?

Preliminary observations

Under French civil liability law, a successful action requires proof of fault, loss or damage and a causal link[4]. The French authorities consider that the current wording of Article 4 of the IA Directive would shift the burden of proving the causal link from the claimant to the defendant, who would be required to establish its absence.

The French authorities also consider that, as it stands, Article 4 on the rebuttable presumption of a causal link between the fault and the result produced by the AI system is too imprecise and complex.

Article 4 (1)

Article 4§1 establishes a presumption of a causal link between the fault and the result produced by the AI system, where three cumulative conditions are met, namely:

- the characterisation of a fault (proven or presumed) consisting of a breach of a duty of care provided for by Union law or national law aimed directly at protecting against the damage that has occurred,

- it is reasonably probable, having regard to the circumstances of the case, that the fault influenced the result or lack of result of the AI system,

- the claimant has demonstrated that the result or lack of result of the AI system caused the damage.

Firstly, the French authorities note that while Article 3 lays down rules allowing the judge to order disclosure of evidence limited to certain operators of high-risk AI systems, Article 4 lays down the conditions for a presumption of causation covering damage caused by any type of AI system, even when the latter is not high-risk and does not involve a supplier or a deployer. The French authorities question the reason for this discrepancy in scope between Articles 3 and 4, as well as the overall consistency of the text.

They then note that in order to benefit from such a presumption, the claimant will have to prove a breach of a duty of care provided for by EU law or national law aimed directly at protecting against the damage that has occurred. They point out that, in so doing, the proposed directive appears to impose a definition of fault, which is not the purpose of the text.

[4] Article 1240 of french civil code

In addition, they point out that the definition given is very broad, since it refers to any 'breach of a duty of care provided for by Union or national law', without further clarification, whereas the scope of this proposal for a directive is limited to actions for damages based on fault in connection with an artificial intelligence system. This limitation is justified by the complexity and opacity of these AI systems. They therefore question the consistency of the text.

The French authorities also believe that the condition that the breach must concern a rule 'intended to protect directly against the damage which has occurred' could be very difficult to assess. They therefore fear that this requirement unnecessarily crystallises the debates before the court on the theoretical objective pursued by the rule in question and thus does not allow injured parties to clearly determine which faults could or could not give rise to the presumption of a causal link.

Article 4 (2) and (3)

Paragraphs 2 and 3 of Article 4 make the presumption of a causal link, for suppliers (and similar) and deployers of AI systems classified as high-risk, conditional on the characterisation of a fault consisting of the breach of obligations listed exhaustively in the AI Regulation.

However, this proposal for a directive was published before all the obligations set out in the final version of the AI Regulation were known. The French authorities therefore question whether the breaches covered by the text are exhaustive enough to allow such a presumption.

The AI Regulation has thus introduced new obligations for these operators, which could be referred to in paragraphs 2 and 3. By way of example, the following could be concerned

- Article 4 of the RIA on AI control (applicable to suppliers and deployers), or

- article 20 §1 and §2 of the RIA relating to corrective measures and the duty to inform (applicable to suppliers), or

- article 26 §2 and §5 of the RIA on human control, system monitoring and supplier information (applicable to deployers), or

- article 27 §1 of the RIA relating to impact analysis on fundamental rights (applicable to deployers).

Finally, it would also be appropriate to consider the conditions for such a presumption in the event of misconduct on the part of providers of general-purpose AI models presenting a systemic risk (e.g. breaches of the obligations referred to in Article 55(1) of the AI Regulation).

Article 4 (4)

In the case of an action for damages concerning a high-risk AI system, paragraph 4 allows the defendant to set aside the application of the presumption set out in §1 when it "demonstrates that the plaintiff has reasonable access to expertise and evidence sufficient to prove the causal link".

This provision thus enables the defendant to shift the burden of proof of causation back onto the claimant, on the grounds that the latter could reasonably have access to expert reports and other evidence. Recital 27 justifies this rule on the grounds that difficulties linked to the autonomy or opacity of certain AI systems "might not arise in cases where the plaintiff has sufficient expertise and evidence to prove the existence of a causal link. This could be the case, for example, for high-risk AI systems for which the plaintiff could reasonably access sufficient expertise and evidence due to the documentation and logging requirements set out in the RIA".

The French authorities point out that Article 4 §1 establishes a legal presumption which, in principle, is binding on the judge. Paragraph 4, on the other hand, allows this presumption to be rebutted. This paragraph therefore creates an exception to the principle laid down in paragraph 1. The French authorities fear that this rule would complicate proceedings before the judge, who would then have to assess the sufficiency of the steps taken by the claimant before deciding whether or not to apply the presumption rule.

What's more, in the event of expert appraisal, the conclusions may not be sufficiently convincing to establish a causal link between the fault and the result produced by the AI system. In such a case, and in application of the text, the claimant would not be able to benefit from the presumption even though he or she would have had access to an expert report (which proved insufficient).

Thus, the French authorities consider that the legal presumption mechanism is incompatible with a provision enabling the burden of proof of the fact or act deemed to be certain to be placed back on the claimant.

Article 4 (5)

In the case of an action for compensation concerning an AI system that is not high-risk, §5 provides that the presumption set out in §1 applies only if the national court considers that it is excessively difficult for the claimant to prove the causal link.

This provision is confusing because it mixes different conceptions of presumption. Indeed, as already indicated, Article 4 §1 establishes a legal presumption which is binding on the court and which has the effect of relieving the claimant of the burden of proof which falls on him if the conditions laid down in the text are met.

Paragraph 5 lays down a further condition, namely that the claimant must have difficulty in establishing the proof required of him. This condition forms the basis, in national law, of the judicial presumption. Indeed, when the claimant has difficulty in proving his case, but can establish a body of evidence, the court may presume the fact which is difficult to prove.

This provision therefore creates confusion between legal presumption and judicial presumption, whereas these two types of presumption are distinct in their basis and mechanism.

Furthermore, the French authorities are once again concerned that this could lead to a substantial increase in the complexity of proceedings before the judge, who would have to assess, on the basis of unknown criteria, whether or not it is excessively difficult for the claimant to prove the causal link. In this respect, they highlight the risk of unequal treatment of injured parties.

CROATIA

Article 3

1. In cases of damage caused by AI, identifying the potential liable person will often prove difficult for a victim. What measures would be available according to your national law to help the victim or which measures would you consider adequate to address this difficulty? If a victim would have to file several lawsuits for damages before identifying the appropriate liable person, could they recover all the legal costs incurred?

In the case of damage caused by the application of artificial intelligence, all means of evidence would be applied as in the case where the damage and harmful work would have occurred without the influence/application of artificial intelligence.

Regarding the bearing of litigation costs, the Civil Procedure Act ("Official Gazette", No. 53/91., 91/92., 112/99., 129/00., 88/01., 117/03., 88/05 ., 2/07., 84/08., 96/08., 123/08., 57/11., 148/11., 25/13., 89/14., 70/19., 80/22 ., 114/22 and 155/23; hereinafter: CPA) in article 154, paragraph 1, prescribes that the party that loses the litigation in its entirety is obliged to compensate the opposing party and its intervener for the costs caused by the conduct of the proceedings.

So, who will bear the litigation costs depends on the outcome of the litigation.

2. Do you think the claimant should make attempts, according to Art. 3 (2), to gather relevant evidence from the defendant before the court orders a 'third party' to disclose such evidence? Does your legal system allow to take preliminary evidence before starting legal proceedings?

When it comes to the disclosure of evidence as proposed in Article 3 of the proposed directive, specifically in relation to paragraph 2, which allows the court to order the disclosure of evidence only if the claimant has taken all reasonable steps to collect relevant evidence from the defendant, the proposal seems reasonable, however, the standpoint must be taken taking into account previous statements and attitudes.

Also, when the provisions of the CPA are taken into account, depending on the facts of the dispute, the parties may have the institute of a step by step lawsuit, as well as the institute of securing evidence.

A step by step action is a special type of condemnation action, which is an exception to the rule that the claim must be specified already in the action. The aim of the lawsuit is to enable the settlement of claims whose amount, quantity or other content is not fully known to the claimant because the defendant, who is aware of or has access to this information, refuses to communicate it to him or denies him access to it. The claim of this action is realized in two stages, in the form of the so-called manifestation request for submitting an account or giving an overview of a certain property and in the form of a certain request for the fulfillment of an obligation. Step by step lawsuits are intended to ease the position of plaintiffs in certain lawsuits.

Following the above, Article 186.b paragraph 1 of the CPA stipulates that the plaintiff who has a property interest in it can request the court with a lawsuit to order the defendant who, according to the content of the legal relationship, is obliged to submit an account or provide an overview of some assets and liabilities, i.e. the defendant for whom is likely that he knowssomething about hidden assets - to, under oath or without oath, submit an account or submit a complete overview of assets or liabilities, i.e. communicate what he knows about hidden assets, and to declare that accounts, overview of assets and liabilities, i.e. information provided on hidden assets is complete and accurate.

As for the institution of securing evidence, it consists in the taking of evidence that can be assumed to be necessary for the establishment of relevant facts earlier than is normal in the development of litigation and after its regular conclusion, even before the initiation of litigation, if there is a justified apprehension that these evidences will not be able to be presented later or that their presentation will be difficult. Thus, Article 272, paragraph 1 of the CPA stipulates that if there is a justified fear that some evidence will not be able to be presented or that its later presentation will be difficult, it is possible to propose that this evidence be presented during the course of, and even before the initiation of, litigation. In paragraph 2 of the same article, it is prescribed that the securing of evidence can be requested even after the decision ending the procedure becomes final, if it is necessary before or during the procedure for extraordinary legal remedies.

3. Trade secret is one of the essential guardian of the appropriate functioning of the internal market. In which cases does your legal system allow the disclosure of trade secrets?

In accordance with Article 8 of the Act on the Protection of Unpublished Information with Market Value ("Official Gazette" No. 30/18), the acquisition, use or disclosure of a trade secret shall not be considered illegal if it is done in any of the following cases:

1. in order to exercise the right to freedom of expression, the right to access information and freedom of reporting, in accordance with the Constitution of the Republic of Croatia and the Charter of the European Union on Fundamental Rights and the law regulating the right to access information, as well as the law regulating media coverage, and in accordance with respect for media freedom and pluralism

2. for the purpose of detecting an omission, transgression or illegal activity, provided that the other party acted for the purpose of protecting the public interest

3. disclosure of trade secrets by workers to their representatives within the framework of the legal performance of the functions of those representatives, in accordance with special regulations or the acquis of the European Union, provided that such disclosure was necessary for that performance, or

4. for the purpose of protecting legitimate interests recognized by special regulations or the legal acquis of the European Union.

Article 4

4. Currently the proposal introduces a rebuttable presumption concerning part of the causal link. Should the conditions for the presumption be changed? Should the tool of a rebuttable presumption be changed?

The Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive)for the purpose of application of rules on liability for damages assumes the existence of a cause-and-effect relationship between the fault of the defendant and the result or lack of results of the AI system.

The general regulation governing non-contractual obligations in the Republic of Croatia is the Civil Obligations Act ("Official Gazette", No. 35/05, 41/08, 125/11, 78/15, 29/18, 126/21, 114 /22., 156/22. and 155/23.; hereinafter: COA).

Provisions on liability for damage are contained in articles 1045 to 1110 of the COA. The provision of Article 1045 of the COA prescribes the assumptions of responsibility for damage. Paragraph 1 of the aforementioned article states that anyone who causes damage to another is obliged to compensate for it if he does not prove that the damage occurred without his fault, while paragraph 2 of the aforementioned article states that lack of duty of care shall be presumed.Liability for damage is an obligatory-legal relationship in which one party is obliged to repair the damage to the other party, and the other is authorized to demand repair of the damage from the first. Liability for damage arises on the assumption that the person responsible for the damage (the injurer) has committed an illegal harmful act that caused damage to the person seeking compensation for the damage (the injured party) and if there is a causal link between the harmful act and the damage as a consequence.

Causality as a presumption of responsibility for damage is the connection between a harmful action as a cause and the resulting damage as a consequence. Without the existence of a causal link between the harmful act and the damage, there is no responsibility of the injurer for the damage. The provisions of Article 1045, Paragraph 1 and 1063 of the COA stipulate that the person who caused the damage is obliged to compensate it.

Pursuant to Article 1046 of the COA, damage is a loss of a person’s assets (pure economic loss), halting of assets increase (loss of profit) and violation of privacy rights (non-material damage . According to the provisions of the COA, the injured party has the right to repair property and non-property damage, under the assumptions prescribed by law.

According to Article 1085 of the COA, the responsible person is obliged to restore the situation that existed before the damage occurred. If restitution does not eliminate the damage completely, the responsible person shall pay the compensation for the remaining damage in cash. When the restitution is not possible, the responsible person is obliged to pay the injured party the appropriate amount of money in the name of compensation for damages. Monetary compensation will be awarded to the injured party if he requests it, and the circumstances of the given case do not justify the restitution.

COA provides only a general concept of causal connection as a presumption of liability for damage.

The causal link between the harmful action and the damage is a necessary presumption of liability for the damage. It is not presumed, but the injured party is obliged to prove its existence. If causation were assumed, it would mean that the injured party, having proved the harmful action and damage, could hold the injurer accountable for every harmful action. However, every harmful action that is involved in the complex of causation still does not have to legally be the cause of certain damage.

However, although the COA does not define causation as a general assumption of liability for damage, certain legal theories are mentioned in judicial practice that serve as a useful legal tool for determining the limits of liability. The cause-and-effect relationship ultimately depends on the circumstances of the specific case and the approach of the court.

On the other hand, proving causation is not impossible, because in law there is a so-called the lower and upper limits of causation, so within these limits the court needs to find the cause that is typical, that is, that led to a certain harmful consequence. What is typical in a specific case, that is, what is expected from a certain human action, is shown by life experience primarily and the results of a certain profession.

Concerning the criterion for determining the existence of a cause-and-effect relationship, as well as the criterion for determining the limits of responsibility, the approach is generally adopted that in the first phase it is necessary to determine whether a certain circumstance played any role at all in the occurrence of a harmful consequence, and then in the second phase it is necessary to determine whether a circumstance, that undoubtedly played a certain role in the historical emergence of harmful consequences, is a legally relevant cause of damage.

Also, according to Article 1063 of the COA, an exception is prescribed according to which damage caused in connection with a dangerous thing or dangerous activity is considered to originate from that thing or activity, unless it is proven that they were not the cause of the damage. The purpose of this rebuttable presumption is to ease the position of the injured party by placing the burden of proof on the injurer.

Following on from the above, in the legal system of the Republic of Croatia, a similar standard of proof is applied in such a way that proof of the probability of the occurrence of damage is not sufficient to prove causation, but objective responsibility related to the causal link is required for the plaintiff to succeed with his claim.

At the same time, in our legal system, the determination of objective liability for damage related to a dangerous thing or dangerous activity in its essence very similarly governs the rebuttable presumption regarding the cause-and-effect relationship proposed by the directive.

In this sense, we agree to adopt the proposed legal solution regarding the rebuttable presumption regarding the cause-and-effect relationship in the case of guilt.

ITALY

Article 3

1. In cases of damage caused by AI, identifying the potential liable person will often prove difficult for a victim. What measures would be available according to your national law to help the victim or which measures would you consider adequate to address this difficulty? If a victim would have to file several lawsuits for damages before identifying the appropriate liable person, could they recover all the legal costs incurred?

2. Do you think the claimant should make attempts, according to Art. 3 (2), to gather relevant evidence from the defendant before the court orders a 'third party' to disclose such evidence? Does your legal system allow to take preliminary evidence before starting legal proceedings?

3. Trade secret is one of the essential guardian of the appropriate functioning of the internal market. In which cases does your legal system allow the disclosure of trade secrets?

A comparison between the Italian legal system and the current provisions of Article 3 of the draft directive reveals two main issues.

The first concerns the level of 'plausibility of the claim' that allows the judge to order the disclosure of evidence and, the second, the necessary balance with the protection of industrial property rights.

The Italian legal system knows very few cases of anticipation of the damaged party's protection to such a threshold where there are still no elements of fault attributable to the counterparty; in any case, they refer to areas where the protection of fundamental personal rights is at stake (for example, Protection Orders in the context of the protection of minors) and do not concern property rights. On the contrary, in the case of non-contractual liability, it is the injured party, in our system of law, who must be able to prove the elements of his claim (both the event, the damage, and the material and legal causal links). Therefore, the introduction of such an order of presumption with 'reversal' (see Art. 3(5)) of the proof of discharge on the other party seems difficult to reconcile with our system of non-contractual liability.

It would be more compatible with our system to require the injured party to demonstrate (even by means of presumptions) the elements of the claim and, once such demonstration has been made, albeit summary, to leave it to the judge to assess whether there are the prerequisites for ordering a technical examination (in which both the experts appointed by the judge and by the parties should participate) and, if necessary, to order the disclosure of the evidence, burdening the consultants and the parties with special obligations of secrecy and preservation of documents subject to industrial secrecy.

The risk, otherwise, could be the increase of unfounded or insufficiently substantiated claims. In such a case, the claim would have to be rejected and, in response to the request of the Presidency, the costs of litigation would be borne by the injured party, who would be totally unsuccessful pursuant to Article 92 of the Italian Code of Civil Procedure, without the possibility of repeating them given the groundlessness of the claim. There could even be a risk of aggravated liability for having brought an unfounded action.

In order to make the evidence-gathering system of Article 3 as compatible as possible with the Italian procedural system, it would also be necessary to maintain (and implement) the provision requiring the applicant to prove that he has actively tried to obtain the relevant information from the defendant before the court orders a 'third party' to disclose such evidence, as already provided by Art. 210 of the Italian Code of Civil Procedure.

The Italian legal system knows limited cases of gathering evidence 'preliminary' to the commencement of proceedings, which generally provide for mandatory prerequisites linked to reasons of urgency, unless they are aimed at the conciliation of the litigation.

Article 4

4. Currently the proposal introduces a rebuttable presumption concerning part of the causal link. Should the conditions for the presumption be changed? Should the tool of a rebuttable presumption be changed?

The Italian delegation considers that the instrument of the rebuttable presumption could be maintained on the condition that it does not turn into veiled forms of strict liability, and anchoring it to prior concrete attempts by the party to obtain the demonstration of the causal link.

LATVIA

Article 3

1. In cases of damage caused by AI, identifying the potential liable person will often prove difficult for a victim. What measures would be available according to your national law to help the victim or which measures would you consider adequate to address this difficulty? If a victim would have to file several lawsuits for damages before identifying the appropriate liable person, could they recover all the legal costs incurred?

Victims may find it challenging to identify the liable person in cases of damage caused by AI. According to our national law, a victim must specify the defendant in their claim submitted to the court, making it impractical to file multiple lawsuits before determining the appropriate liable person. Under the national Civil procedure law, if a person has a reason to believe that the submission of the necessary evidence on their behalf may later be impossible or problematic, they may request for such evidence to be secured. Applications for securing evidence may be submitted at any stage of the proceedings, as well as prior to the bringing of an action to a court. With a decision of a judge, evidence without summoning potential participants in the case may be ensured only in exceptional cases, including cases where it is impossible to determine the participants in the case.

The recovery of legal costs depends on the outcome of the case, irrespective of how many lawsuits were filed. If the claim is rejected, legal costs are not recovered either.

2. Do you think the claimant should make attempts, according to Art. 3 (2), to gather relevant evidence from the defendant before the court orders a 'third party' to disclose such evidence? Does your legal system allow to take preliminary evidence before starting legal proceedings?

The claimant should always make attempts to gather evidence from the defendant. The court intervenes upon claimant's request only when it is impossible for the claimant to submit the evidence. In such cases, the evidence is requested by the court. It is possible to secure the evidence before starting legal proceedings (see the answer to the previous question).

3. Trade secret is one of the essential guardian of the appropriate functioning of the internal market. In which cases does your legal system allow the disclosure of trade secrets?

This is generally regulated by the Trade Secret Protection Law, which contains legal norms arising from Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure. According to this law, other laws and regulations may provide exceptions to trade secret protection. It means that it may be possible to request information about the AI system if permitted by law.

Article 4

4. Currently the proposal introduces a rebuttable presumption concerning part of the causal link. Should the conditions for the presumption be changed? Should the tool of a rebuttable presumption be changed?

We should take into consideration the complementary impact assessment[5]. It is mentioned that the strict liability regime (imposing liability regardless of fault) should be considered, particularly in cases involving prohibited AI systems[6]. In the current proposal, proving guilt could be very difficult for the victim.

[5] Complementary impact assessment (Available here: https://www.europarl.europa.eu/RegData/etudes/STUD/2024/762861/EPRS_STU(2024)762861_EN.pdf)

[6] Complementary impact assessment pages: 27-29.

LITHUANIA

Lithuanian delegation would like to thank the Presidency for the opportunity to provide **responses to the questions set out in document No. CM 4365/24** regarding the Proposal for a Directive on adapting non-contractual civil liability rules to artificial intelligence (hereinafter: AI Liability Directive)**.** We would like to reserve the right to make further comments at a later stage with respect to further discussions regarding the entire document. Please note, that the answers provided hereby are preliminary in nature and could change, as the position regarding the renewed AI Liability Directive is still not finalised.

Article 3

1. **In cases of damage caused by AI, identifying the potential liable person will often prove difficult for a victim. What measures would be available according to your national law to help the victim or which measures would you consider adequate to address this difficulty? If a victim would have to file several lawsuits for damages before identifying the appropriate liable person, could they recover all the legal costs incurred?**

According to Lithuanian procedural law, a court, that has established that the action was brought not by a suitable claimant or not against a suitable defendant, may, at the reasoned request of one of the parties and without terminating the proceeding, replace the original claimant or defendant with a suitable claimant or defendant (Article 45(1) of the Code of Civil Procedure). If the wrong party is replaced by the right one, the proceedings continue, and the victim is entitled to reimbursement of the costs of the proceedings in accordance with general rules.

We consider this measure to be proportionate and effective in case a claimant does not correctly identify a defendant in the court case. The victims shouldn't have the need to bring multiple actions for damages and the court should not be burdened with several different actions for the same damage. The Lithuanian delegation supports the concept, that the victim should have the possibility to choose whether to go to court under the Product Liability Directive or under the AI Liability Directive, according to the individual circumstances of the claim.

2. **Do you think the claimant should make attempts, according to Art. 3 (2), to gather relevant evidence from the defendant before the court orders a 'third party' to disclose such evidence? Does your legal system allow to take preliminary evidence before starting legal proceedings?**

In Lithuania there is no regulatory mechanism providing for the submission of pre-trial evidence. In our view, the provisions proposed interfere with national procedural law in a significant way and could be considered as going beyond what is necessary to achieve the objectives of the AI Liability Directive. In accordance with Lithuanian procedural law, there is a possibility to ask a court to order the disclosure of evidence *only after the claim was brought to a court* (Article 199 of the Code of Civil Procedure). In our view, such a rule helps to prevent abuse of procedure and inappropriate access to data.

Additionally, there is a possibility to ask a court to safeguard evidence even before starting legal proceedings if there is reasonable risk of future inability or difficulty to present required evidence to a court (Article 221 of the Code of Civil Procedure).

3. **Trade secret is one of the essential guardian of the appropriate functioning of the internal market. In which cases does your legal system allow the disclosure of trade secrets?**

The protection of trade secrets in Lithuania is regulated in detail by the Law on the Protection of Trade Secrets (which implements the Directive (EU) 2016/943). Individual circumstances under which a trade secret could be disclosed are not regulated in the Lithuanian legal system. However, it is inevitable that a trade secret could be disclosed in court proceedings, i.e. such trade secrets are disclosed to the court *ad hoc.* The Code of Civil Procedure (Article 10-1) establishes the peculiarities of the protection of trade secrets in cases concerning the unlawful acquisition, use or disclosure of trade secrets and in other civil cases. Nevertheless, the court has the power to determine that some information of the case material is not public for the purpose of protecting trade secrets.

Article 4

4. Currently the proposal introduces a rebuttable presumption concerning part of the causal link. Should the conditions for the presumption be changed? Should the tool of a rebuttable presumption be changed?

The rebuttable presumption could remain, but the application of presumption should be simplified, made clearer, with fewer conditions. In our opinion, in such a case, more discretion would be left to the court to decide on the allocation of the burden of proof, which is especially relevant in such dynamic disputes. In addition, other alternatives regulating this issue could also be considered.

NETHERLANDS

General comments

NL **supports** the **underlying goals** of the proposal for an AI Liability Directive (the "Proposal") to strengthen consumer protection and trust in AI, and to offer legal protection to providers and deployers of AI systems.

In general, we believe that liability rules must be aimed at **protecting parties in weaker positions** and that **legal certainty** can only be achieved when those rules are clear. In addition to this, new liability rules at EU level must be without prejudice to existing (level of) national legal protection. **Minimum harmonization** must be the starting point.

With this in mind, we are not convinced that the current Proposal offers the envisaged legal protection. The text of the **Proposal** is **very complex**. Furthermore, the text of the Proposal is **not** always consistent with the principle of **minimum harmonization**. We will elaborate on this in our comments on the specific provisions.

For any future work on the Proposal, we believe it is important to first identify more clearly the problems that the Proposal aims to address and secondly to work further on the solutions to solve those problems. Therefore, we propose:

1) To organize **workshops based on concrete cases** that exemplify the issues at stake in order to clarify the problems at hand and how the Proposal would address those problems;
2) The findings of these workshops should be used to **clarify and simplify the Proposal**. For NL, it is important that this is based on minimum harmonization with the goal to safeguard the legal certainty of persons when AI is used.

Article 2

The definition of "***high-risk AI system***" needs **clarification**.

- According to Article 6 (3) jo. 6 (4) AI Act, a provider may assess in certain cases that its AI-system is not high-risk, even though it falls under Annex III. The provider who considers that an AI system as referred to in Annex III is not high-risk, needs to document its assessment and is subject to the registration obligation set out in Article 49(2) of the AI Act.
- Such a non-high-risk-assessment would mean that the AI-system would not fall under the Proposal. This will require a claimant to first request the Market Surveillance Authority to look into this assessment before being able to use the provisions of the Proposal. This also raises questions on whether there are (other) ways in which a claimant can show that an AI-system is high-risk, contrary to the assessment of the provider.

- For the purposes of this Proposal, should the assessment by the provider always be followed? That is, when the provider assesses its system as not high-risk, does this always mean that the system is not a "high-risk AI system" in the sense of Article 2(2) of the Proposal? Or may the claimant show that the conditions of Article 6(3) of the AI Act are not met and the system is in fact a "high-risk AI system", contrary to the assessment of the provider?

With regard to the definition of a "***claim for damages***", we have two **questions**.

- Firstly, this claim is limited to a "*non-contractual fault based civil law claim*". Does this mean that where a contractual relation exists between the claimant and the defendant, this criterion is not met? In the Netherlands, claimants in some cases may base the same claim both on a contractual basis and, subsidiary, on a non-contractual basis. May such a claim (which is based on two separate grounds) qualify as a "*claim for damages*" for the purposes of this provision?
- Secondly, this claim needs to be a "*non-contractual fault based civil law claim*". We are wondering whether it will be always easy to determine whether a claim is fault based or not. For example, in the Netherlands, courts have developed case law for specific situations on the basis of the fault based liability regime, which in fact comes down to the creation of a liability comparable to a strict liability. How should a claim based on such case law be dealt with for the purposes of this Proposal?

Article 3

General remarks

In general, it is important that articles relating to civil procedural law do not become **too detailed**. We cannot include a **separate set of procedural rules** for every type of procedure; that becomes unworkable and compromises legal certainty, both for litigants and for lawyers, the judiciary and everyone else involved. Part of the comments below have to do with this general premise.

Presidency's questions 1, 2 and 3

We answer the Hungarian Presidency's questions 1, 2 and 3 (in bold italics) as follows:

1. ***In cases of damage caused by AI, identifying the potential liable person will often prove difficult for a victim. What measures would be available according to your national law to help the victim or which measures would you consider adequate to address this difficulty? If a victim would have to file several lawsuits for damages before identifying the appropriate liable person, could they recover all the legal costs incurred?***

If it is not a consumer dispute, the following applies: If the damage caused by AI is related to a product or to services delivered to the victim, the victim can turn to the supplier of the product or the service provider and claim damages. If the supplier has made use of another company or person to deliver the AI software, the supplier or service provider has to turn to this company or person to pass the damages on to this company of person. The victim can confine himself with a claim to the person or company with whom he has a legal relationship.

If the victim needs more information in order to be able to file the right claim to the right person or to found his claims, Dutch law provides for the following possibilities:

1. If the victim already has a legal procedure in court, he can in that same procedure request information from the defendant and also from a third person if he has a reasonable interest in this information. The third person doesn't become a party to that procedure, but he has the right to be heard. The requested information can be used in the legal procedure.
2. Even if proceedings have not yet been initiated, the victim may request information from another person. The court may order that person to disclose information. The main requirements in this case are that (1) the information relates to a legal relationship to which both the victim and the other person are parties, (2) the person who is ordered to disclose information has the information about this legal relationship or can easily obtain it from a third person, (3) the victim has a reasonable interest in the information and (4) the requested information is sufficiently specified.

If a victim has to file several lawsuits for damages before identifying the appropriate liable person, he can try to recover all the legal costs incurred as part of the damages. However, the fact that several lawsuits were necessary before finding the right defendant, has to be attributable to the defendant in order to hold him liable for the costs.

2. ***Do you think the claimant should make attempts, according to Art. 3 (2), to gather relevant evidence from the defendant before the court orders a 'third party' to disclose such evidence? Does your legal system allow to take preliminary evidence before starting legal proceedings?***

It should only be possible to address a third party if the opponent party in an actual court procedure cannot provide the claimant with the necessary information. The Dutch legal system allows to request preliminary evidence (see answer above).

3. ***Trade secret is one of the essential guardian of the appropriate functioning of the internal market. In which cases does your legal system allow the disclosure of trade secrets?***

The Netherlands has implemented Directive 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure. That means that the disclosure of trade secrets is not allowed as laid down in that directive. In legal procedures there are several possibilities to preserve the confidentiality of any trade secret used or referred to as evidence in the course of legal proceedings. The judge can take measures like deciding that examination of the documents is reserved for the attorney of the opponent party or for the judge only. The judge also can decide that the number of persons in the proceedings is limited to protect the rights of the parties.

Preliminary comments article 3

Paragraph 1

The second subparagraph of paragraph 1 interferes too much in the national legal system. We propose to replace this subparagraph by the following text: "***The potential claimant must have a legitimate interest in this request***."

Alternatively, one could add to the first line of paragraph 1 the following bold text: "*Member States shall ensure that national courts are empowered, either upon the* ***duly reasoned*** *request of a potential claimant (...)*".

When choosing the former suggestion, the first and second subparagraph of paragraph 4, can be deleted, as this will be covered by the legitimate interest. Also the last part of subparagraph 2 on trade secrets and confidential information can be deleted, as subparagraph 3 covers those subjects.

Paragraph 5

In paragraph 5 the text "*a national court shall presume*" should be amended as judges always have discretionary power, they cannot (and should not) be compelled to give a certain judgment. The rebuttable presumption in paragraph 5 as proposed is too rigid.

We would prefer to draft the text as follows: "*Where a defendant fails to comply with an order by a national court in a claim for damages to disclose or to preserve evidence at its disposal pursuant to paragraphs 1 or 2, a national court* ~~*shall*~~ ***may draw the conclusion which it deems appropriate and may*** *presume the defendant's non-compliance with a relevant duty of care, in particular in the circumstances referred to in Article 4(2) or (3), that the evidence requested was intended to prove for the purposes of the relevant claim for damages*."

Article 4

Presidency's question 4

4. Currently the proposal introduces a rebuttable presumption concerning part of the causal link. Should the conditions for the presumption be changed? Should the tool of a rebuttable presumption be changed?

In response to the questions posed by the Hungarian Presidency, we would like to say that in general, we **support** the tool of a **rebuttable presumption**.

However, we believe the current conditions in the **Proposal** would **increase the burden of proof** for claimants in the Netherlands instead of helping them. We base this on the following points:

1. The text is **very complex** and therefore does not offer legal certainty. We are afraid it will give defendants ample opportunity to prolong proceedings by starting discussions on whether the presumption applies or not, making litigation more burdensome.

2. The **conditions** for the rebuttable presumption are **cumulative**. The claimant must prove that all those conditions are met. These conditions are far-reaching: for Dutch law, this will mean increasing the burden of proof instead of lowering it.

3. Article 4, paragraphs 4, 5 and 6, determine situations where the presumption may not be applied. In our view, this goes **against** the principle of **minimum harmonization**. We cannot support this.

We therefore think the text of Article 4 needs to be **simplified** as discussed in more detail below.

Preliminary comments article 4

Paragraph 1

We believe that it will be very difficult for claimants to meet all of the cumulative conditions (a)-(c). Specifically, it will be extremely difficult for claimants to meet condition (c).

> For example, take the case of an AI-vacuum cleaner that bumps into a baby chair. There may be several causes for this accident. The AI-vacuum cleaner may have failed to identify the baby chair as an object that needed to be avoided (a failure to produce an output). However, it is also possible the AI-vacuum cleaner did identify the baby chair as an object to avoid, but there was a defect in the steering mechanism (hardware vs software malfunction). For the claimant, it will be difficult to prove that the cause of the accident was a failure to produce an output by the AI-system that is built into the hardware.

The rebuttable presumption could be simplified by giving it a wider scope: it needs to see to the **causal link** between **the fault** of the defendant **and the damage** that occurred. We would have more specific text suggestions to this end.

Paragraphs 4 and 5

In our view, paragraphs 4 and 5 will almost completely **undermine the added value** of the presumption of evidence and lead to a lot of discussions on whether the presumption in a particular case applies or not. This will lead to lengthy proceedings with unpredictable outcomes. Therefore, paragraphs 4 and 5 seem undesirable and need to be **deleted**.

Paragraph 6

We agree that in case of non-professional defendants, the presumption of the Proposal should not apply. However, Member States should be allowed to offer **more protection**. Therefore, the text of this paragraph should read: "*Member States **may provide** that the presumption (...) shall not apply*".

This wording will also give Member States the freedom to only apply the presumption in specific circumstances, for example only where the non-professional defendant materially interfered with the conditions of the operation of the AI system or the non-professional defendant was required and able to determine the conditions of operation of the AI system and failed to do so.

AUSTRIA

Austria would like to thank the Hungarian Council Presidency for the opportunity to comment in writing on the AILD in its updated version (document st.12523.en24). The previously stated Austrian position remains unchanged. Due to the specific nature of the AILD Austrian national stakeholders have conflicting opinions on the proposal. However, they concur that the AILD is very complicated. It is difficult to understand and there are important questions of interpretation that would pose major problems for practitioners. The relief for the injured party is only minimal and it is questionable what practical significance this Directive would have next to the PLD. In its updated version, which has been adapted to match the now finalised AI Act, only minimal changes have been made in the definitions, references and one addition. Furthermore, it will be necessary to examine in detail whether deviations from the parallel provisions in the PLD are justified.

In detail, numerous questions have arisen regarding the understanding of this Directive as it stands:

- The potential claimant has to present facts and evidence sufficient to support the plausibility of a claim for damages. Why does this provision only apply to the potential claimant? In the PLD a similar provision applies to the claimant. Why are there deviations from the PLD?
- Does the potential claimant have to specify which evidence has to be disclosed?
- Do the Disclosure of evidence provisions only apply to evidence that has to be kept under the provisions of the AI Act? In the last Working Party Meeting the Commission stated that the AILD is not intended to introduced new obligations for providers or deployers of AI systems. If only evidence under the AI Act has to be disclosed, this should be made clear in a recital.
- Under Art. 4 (4) AILD the presumption of a causal link in the case of fault shall not be applied where the defendant demonstrates that sufficient evidence and expertise is reasonably accessible for the claimant to prove the link. If the provider or deployer of a high-risk AI system discloses the relevant evidence at its disposal pursuant to Art. 3 AILD, does this mean that the presumption of causality is not applicable anymore?
- How are the proportionate attempts at gathering the relevant evidence to be understood? Does the disclosure have to be immediate or does the claimant have to wait a certain period to make proportionate attempts?
- Art. 3 (5) AILD seems to only apply to cases where the defendant fails to comply with an order to disclose or preserve evidence in a claim for damages. However, it should also apply to cases where the potential claimant requests the disclosure of evidence and then goes to trial.
- Art. 4 (1)(a) refers to Art. 3 (5) AILD. Can the disclosure of evidence procedure only be used to prove Art. 4 (1)(a) or also Art. 4 (1)(b) and (c) AILD?

Presidency questions on Art. 3 and 4:

1. In cases of damage caused by AI, identifying the potential liable person will often prove difficult for a victim. What measures would be available according to your national law to help the victim or which measures would you consider adequate to address this difficulty? If a victim would have to file several lawsuits for damages before identifying the appropriate liable person, could they recover all the legal costs incurred?

Austrian procedural law does not contain any specific provision that enables an injured person to identify the person liable. Even outside of AI liability there can be many cases in which it is extremely difficult to determine the liable person. Consider, for example, the issue of liability in the area of environmental law. In Austria's view, however, identifying the liable person is not first and foremost a matter of civil procedural law. Adequate measures to address the difficulty identifying the potential liable person would not be procedural provisions but would have to be substantive rights to access such information and should not necessarily be linked to a (pre-)trial situation.

The reason why identifying the liable person is not considered a matter of procedural law is that procedural law primarily governs the process and rules for how legal cases are conducted, rather than the substantive rights and obligations of the parties involved. Identifying the liable person is a substantive issue that pertains to the facts of the case and the applicable substantive law. It often also depends on the substantive legal basis invoked, which determines who the correct defendant is. Procedural law provides the framework for how a case is brought to court, how evidence is presented, and how judgments are enforced, but it does not typically address the underlying factual determinations of liability. Therefore, measures to assist victims in identifying the liable person would fall under substantive law, such as rights to information, rather than procedural law.

If a victim would have to file several lawsuits for damages before identifying the appropriate liable person, they could most probably not recover all the legal costs incurred, except for very special constellations.

2. Do you think the claimant should make attempts, according to Art. 3 (2), to gather relevant evidence from the defendant before the court orders a 'third party' to disclose such evidence? Does your legal system allow to take preliminary evidence before starting legal proceedings?

An answer to the question if the claimant should attempt, according to Art. 3 (2) AILD, to gather relevant evidence from the defendant before the court orders a 'third party' to disclose such evidence, cannot be given universally. It depends entirely on the specifics of the individual case. For example, the assessment of the probative value by the claimant in light of his strategy, which he likely prefers not to disclose or discuss in advance, plays an important role. Furthermore, there are constellations in which asking the defendant would be a foreseeable detour or in which there is a pre-existing legal obligation of the third party or the third party has clear proximity to the proof.

The Austrian legal system generally does not permit the collection of preliminary evidence before initiating legal proceedings; and none of the exceptions known to Austrian civil procedural law seems applicable to the current situation.

3. Trade secret is one of the essential guardians of the appropriate functioning of the internal market. In which cases does your legal system allow the disclosure of trade secrets?

Austrian procedural law protects trade secrets in general, primarily based on provisions transposing European legislation on this matter. The disclosure of trade secrets in procedural situations (against the will of the owner of the secret) will depend on the specific circumstances, such as the type of evidence (witnesses, documents, etc.) and whether that evidence is held by the owner of the secret, the opposing party, or third parties.

4. Currently the proposal introduces a rebuttable presumption concerning part of the causal link. Should the conditions for the presumption be changed? Should the tool of a rebuttable presumption be changed?

As far as Austria is concerned, a rebuttable presumption is fine. On the conditions for the presumption and its details Austrian national stakeholders have conflicting opinions.

POLAND

Article 3

1. **In cases of damage caused by AI, identifying the potential liable person will often prove difficult for a victim. What measures would be available according to your national law to help the victim or which measures would you consider adequate to address this difficulty? If a victim would have to file several lawsuits for damages before identifying the appropriate liable person, could they recover all the legal costs incurred?**

According to the Polish regulations of civil procedure, there are no specified measures to help the injured party identify the entity that is liable for the damage caused by AI-based products or services. Domestic regulations do not provide for specific regulations for those bringing such claims, including with regard to the costs incurred. However, under the Polish civil procedural law, if it occurs in the course of the proceedings that the claim has not been brought against the person who should be a defendant in the case, the court, on request of the claimant or the defendant, shall summon that person to participate in the case. The summoned person may replace the defendant, who will then be excused from his obligation to participate in the case. This mechanism can help to reduce the costs of filing several lawsuits.

2. **Do you think the claimant should make attempts, according to Art. 3 (2), to gather relevant evidence from the defendant before the court orders a 'third party' to disclose such evidence? Does your legal system allow to take preliminary evidence before starting legal proceedings?**

According to Article 3(2) the claimant can request the disclosure of evidence from providers or deployers that are not defendants only in case all proportionate attempts were unsuccessfully made to gather the evidence from the defendant. In our opinion gathering the relevant evidence before the court orders a 'third party' to disclose such evidence may prove in practice excessively difficult for injured persons. Such a requirement may also cause undue difficulty for the court, which will have to determine whether the attempts taken by the claimant were sufficient.

The provisions of the Polish Code of Civil Procedure provide for the possibility of preserving evidence prior to the commencement of civil proceedings. According to national law evidence may be preserved on a motion before proceedings are commenced or *ex officio* in the course of proceedings where there are reasonable grounds to believe that the taking of such evidence will be prevented or significantly obstructed or where it is otherwise necessary to determine the current *status quo*. In the motion, the reasons justifying the need to preserve evidence must be indicated. In urgent cases or where the opposing party cannot be identified or where the opposing party's place of stay is unknown, evidence may be preserved without the opposing party being summoned. It is to underline that these proceedings are accessory in nature, which means that the evidence preserved will be irrelevant if it is not used in the proceedings on the merits.

3. Trade secret is one of the essential guardian of the appropriate functioning of the internal market. In which cases does your legal system allow the disclosure of trade secrets?

According to the Polish regulations of civil procedure, trade secret is subject to special protection. In particular, the court, at the request of a party, orders a hearing to be held in camera when circumstances constituting the trade secret are likely to be disclosed. Disclosure of trade secrets under national law is permissible under strictly defined circumstances, e.g. in proceedings concerning competition and consumer protection or in proceedings concerning intellectual property. The possibility of disclosing a trade secret is therefore limited in nature and subject to specific conditions.

Article 4

4. Currently the proposal introduces a rebuttable presumption concerning part of the causal link. Should the conditions for the presumption be changed? Should the tool of a rebuttable presumption be changed?

The wording of the proposed Article 4(5) may raise some doubts. The provision as drafted may, in practice, result in either limited protection for persons injured by an AI system that is not a high-risk system, or that such persons are even deprived of adequate protection. The application of the presumption of a causal link is based on a rather vague, highly discretionary criteria for a national court to find that it is excessively difficult for a claimant to prove a causal link. It is also unclear, whether excessively difficulty should be assessed according to an objective criteria, and if so, what kind. Or whether it should be a subjective criteria, taking into account the situation of a particular claimant. In addition, the provision as drafted may result in inconsistence in the jurisprudence of national courts.

PORTUGAL

Article 3

1. In cases of damage caused by AI, identifying the potential liable person will often prove difficult for a victim. What measures would be available according to your national law to help the victim or which measures would you consider adequate to address this difficulty? If a victim would have to file several lawsuits for damages before identifying the appropriate liable person, could they recover all the legal costs incurred?

2. Do you think the claimant should make attempts, according to Art. 3 (2), to gather relevant evidence from the defendant before the court orders a 'third party' to disclose such evidence? Does your legal system allow to take preliminary evidence before starting legal proceedings?

There are no specific regulations in Portugal on determining who is civilly liable for acts carried out by AI systems.

Nevertheless, the Code of Civil Procedure (CCP) establishes rules on common precautionary measures related to the gathering of evidence at an early moment:

a) CCP determines the scope of non-specified precautionary measures (Article 362), stating that whenever someone shows a well-founded fear that another person will cause serious and difficult-to-repair damage to their right, they can request the conservatory or anticipatory measure that is concretely appropriate to ensure the effectiveness of the threatened right. The applicant's interest can be based on an existing right or on a right arising from a decision to be handed down in a constitutive action, either already in course or to be brought. The above-mentioned measures are not applicable when the intention is to safeguard the risk of injury specifically prevented by one of the measures typified by law and the repetition of a measure that has been judged unjustified or has lapsed is not admissible on the same grounds. With the application, the applicant provides summary evidence of the threatened right and justifies the fear of injury (Article 365). According to this article, it is always admissible to set, under the terms of civil law, the penalty payment that is appropriate to ensure the effectiveness of the order.

b) It is also possible to take evidence in advance during the course of a trial.

Under the terms of Article 419 of the CCP, if there is a justifiable fear that it will be impossible or very difficult to depose certain people or verify certain facts by means of expertise or inspection, the deposition, expertise or inspection may be carried out in advance and even before the action is brought.

The applicant for advance evidence briefly justifies the need for it, mentions precisely the facts to be examined and identifies the people who will be heard, in the case of party or witness testimony (Article 420 of the CCP).

3.Trade secret is one of the essential guardian of the appropriate functioning of the internal market. In which cases does your legal system allow the disclosure of trade secrets?

According to the CCP, the general rule is that those who are bound by professional secrecy, the secrecy of public officials and the secrecy of state must refuse to testify in relation to the facts covered by the secrecy.

Specifically on trade secret, the Industrial Property Code establishes the following regime:

The interested party may request detailed information on the origin and distribution networks of goods or services suspected of infringing industrial property rights or trade secrets, in particular:

a) the names and addresses of producers, manufacturers, distributors, suppliers and other previous owners of the goods or services, as well as the wholesalers and retailers to whom they are addressed;

b) information on the quantities produced, manufactured, delivered, received or ordered, as well as the price obtained for the goods or services.

The provision of this information may be ordered from the alleged infringer or any other person who:

a) has been found in possession of the goods or using or providing the services, on a commercial scale, which are suspected of infringing industrial property rights or trade secrets;

b) has been indicated by a person referred to in the previous subparagraph as having participated in the production, manufacture or distribution of goods or in the provision of services which are suspected of infringing industrial property rights or trade secrets.

This provision is without prejudice to the application of other legislative or regulatory provisions which, in particular: a) grant the person concerned the right to more extensive information; b) regulate its use in civil or criminal proceedings; c) regulate liability for abuse of the right to information; d) grant the right not to make statements which could oblige any of the persons referred to in the previous paragraph to admit their own participation or that of close family members; e) grant the right to invoke professional secrecy, the protection of the confidentiality of information sources or the legal regime for the protection of personal data. (Article 344).

The Industrial Property Code also includes rules applicable to precautionary measures, whenever there is an infringement or a well-founded fear of serious and difficult-to-repair damage to an industrial property right or trade secret, the court may, at the request of the interested party, order the appropriate measures to: a) Inhibit any imminent infringement; or b) Prohibit the continuation of the infringement.

Article 4

4. Currently the proposal introduces a rebuttable presumption concerning part of the causal link. Should the conditions for the presumption be changed? Should the tool of a rebuttable presumption be changed?

We have no comments for the moment.

FINLAND

Contributions of the Finnish Delegation to the questions put forward by the Presidency on 26 September

The Finnish Delegation thanks the Hungarian Presidency for consulting the delegations in writing in anticipation of the detailed discussion on the AI Liability Directive Proposal.

The Finnish Delegation answers the questions as follows. In addition, we take the opportunity to present our drafting suggestion on Article 3, as encouraged by the Presidency.

Question 1 (on Article 3)

In cases of damage caused by AI, identifying the potential liable person will often prove difficult for a victim. What measures would be available according to your national law to help the victim or which measures would you consider adequate to address this difficulty?

The same measures as in all other civil matters. The victim can use an attorney to assist in formulating the claim, addressing it to the right person and, if necessary, bringing an action. If the victim wins the case, they can be compensated for the legal costs incurred. The victim can be entitled to free legal aid if they meet its financial requirements.

In on-going proceedings, a court can order a disclosure of relevant evidence. See answer to Question 3 for details.

If the damage were caused criminally, the police would examine the matter. The competencies of the police are undoubtedly sufficient to identify the liable person and all other aspects related to the damage.

What is more, a civil claim arising from an offence for which a criminal charge has been brought may be pursued in connection with the charge. This means that the victim would not need to bring a separate action. Instead, the victim's claim for damages could be examined at the same proceedings as the criminal case.

Additionally, the public prosecutor can pursue the victim's claim for damages in court if it is possible without essential inconvenience. In that case the prosecutor acts in effect as the victim's representative.

So far, we have not seen indications that the above-mentioned measures would not be sufficient to guarantee both the interests of the victim and the due process in AI related matters.

If a victim would have to file several lawsuits for damages before identifying the appropriate liable person, could they recover all the legal costs incurred?

No, they could not.

If the victim sues a wrong person, the victim will lose the case and be liable to pay the legal costs of the winner. As the wrong defendant would not have done anything wrong and has won the case, it would not be justified to hold him responsible for the legal costs of the victim. In this scenario, the victim has acted negligently and caused unnecessary costs.

If the victim would eventually find and sue the right defendant and win the case, it would not be justified to order the right defendant to pay the legal costs that have been caused by the victim losing their previous actions against the wrong defendants. It is reasonable to expect the victim to find and sue only the right defendant. The right defendant is not responsible for the victim's failure to do so. If this would not be required, it would encourage bringing lawsuits negligently.

In civil procedure, bringing a lawsuit always entails a risk of losing and being held liable to pay the opponent's legal costs.

Question 2 (on Article 3)

Do you think the claimant should make attempts, according to Art. 3 (2), to gather relevant evidence from the defendant before the court orders a 'third party' to disclose such evidence?

Yes, the claimant should do that.

Does your legal system allow to take preliminary evidence before starting legal proceedings?

Yes, it does.

The court can take evidence before starting legal proceedings if the right of the applicant may depend on it. A further precondition for this is a danger that the witness can be heard later only with difficulty or that other evidence disappears or can be presented later only with difficulty.

Question 3 (on Article 3)

Trade secret is one of the essential guardian of the appropriate functioning of the internal market. In which cases does your legal system allow the disclosure of trade secrets?

In our legal system, a court can, as a rule, order disclosure of all evidence, as long as it could be of significance as proof in the matter. However, several exceptions and limitations apply, also regarding trade secrets.

The defendant may refuse to disclose a trade secret unless very important reasons require its disclosure. When deciding whether such reasons exist, the court should take into consideration the nature of the matter, the significance of the evidence for deciding the matter, and the consequences of presenting it and other circumstances.

When a court orders disclosure of a trade secret, the court can also order it to be kept secret. The court can do so if revealing it would probably cause significant detriment or harm to the defendant. Disobeying a court-ordered obligation to keep a document secret can lead to criminal prosecution.

Question 4 (on Article 4)

Currently the proposal introduces a rebuttable presumption concerning part of the causal link. Should the conditions for the presumption be changed? Should the tool of a rebuttable presumption be changed?

The article is in its current form very difficult to understand. Finland welcomes any attempts to simplify it.

Drafting suggestion on Article 3

As we have previously made clear, Finland strongly opposes the introduction of a pre-trial disclosure procedure. Because of this, we cannot support Article 3 in its current form. We suggest rewriting the Article to correspond to this.

This can be done by omitting any mentions of "a potential claimant" in the text. The Article could also be modelled after Article 8 in the newly adopted Directive on Liability for Defective Products.

SWEDEN

Sweden's written comments on the Proposal for a Directive on adapting non-contractual civil liability rules to artificial intelligence

We appreciate the opportunity given to provide our written comments.

General comments regarding the proposal

Sweden supports the general ambition to make it easier for people who have been injured by an AI system to receive compensation. However, Sweden has, along with several other Member States, previously raised objections regarding different aspects of the proposal, as well as the need for it. For example, we would argue that the proposal's presumption rules are too complex to apply and can lead to legal uncertainty. We are also not convinced of the need for the proposed pre-trial discovery rules in lieu of our own such rules. In any case there would be a need to not put a disproportionate burden to produce documents on e.g. SME's that trade secrets are compromised.

Article 3 – Disclosure of evidence and rebuttable presumption of non-compliance

Q1. In cases of damage caused by AI, identifying the potential liable person will often prove difficult for a victim. What measures would be available according to your national law to help the victim or which measures would you consider adequate to address this difficulty? If a victim would have to file several lawsuits for damages before identifying the appropriate liable person, could they recover all the legal costs incurred?

The rules regarding disclosure of documents in civil litigations is found in Chapter 38 of the Swedish Code of Judicial Procedure (hereinafter CJP). Anybody holding a written document that can be assumed to be of importance as evidence can be ordered by the court to produce it (section 2 and 4). Certain conditions need to be met for a party to be ordered to disclose such documents if:

(i) it concerns an identified document or a category of documents that can be identified through their connection to a specific evidentiary theme,

(ii) the document can be assumed to be of importance as evidence (this is a low threshold),

(iii) the document is in the possession of the party against which the request is made, and

(iv) a proportionality assessment by the Court weighs in favour of the applicant.

When it comes to legal fees, there is a possibility for a victim to be reimbursed for their legal fees. The general rule is that the losing party shall reimburse the opposing party for litigation costs unless otherwise provided (Chapter 18, section 1 CJP). In cases of unnecessary or negligent litigation, the party causing such may be ordered to pay the other party's fees or it may be decided by the court that each party bear their own costs. When the circumstances upon which the outcome rested were not known nor should have been known by the losing party prior to the commencement of the action, the court may order that each party bear their own costs (section 3).

A party with limited financial means may also qualify for legal aid under the Legal Aid Act, which would cover the main part of the party's legal expenses but not the expenses of the opposing party.

We believe that the Swedish disclosure rules adequately address the potential need for disclosure of documents in cases of damage caused by AI. We also believe that the rules on litigation costs and legal aid adequately allow for a party to be reimbursed for their costs in such procedures.

Q2. Do you think the claimant should make attempts, according to Art. 3 (2), to gather relevant evidence from the defendant before the court orders a 'third party' to disclose such evidence? Does your legal system allow to take preliminary evidence before starting legal proceedings?

Yes to both questions. A request for disclosure of documents can be made in a pending civil case but it can also be made in a separate filing concerning only disclosure of evidence if there is a risk that evidence concerning a circumstance of importance to a person's legal rights may be lost or difficult to obtain and no trial concerning the rights is pending. The court may then take and preserve for the future evidence in the form of e.g. written evidence (Chapter 41, section 1 CJP).

A party may request the court to have a hearing under oath with the other party to ascertain whether they have the relevant documents (Chapter 38, section 4). A party may also request the court to order the other party to present a full list of the evidence in its possession (Chapter 42, section 8 CJP).

The Directive's rules on disclosure in pending and prior to court proceedings thus largely correspond to rules in Swedish law.

Q3.Trade secret is one of the essential guardian of the appropriate functioning of the internal market. In which cases does your legal system allow the disclosure of trade secrets?

The courts can only order a party to disclose documents containing trade secrets in exceptional circumstances, when it can be considered proportional to disclose such documents (see Chapter 38, section 2 and Chapter 36, section 6 CJP). Furthermore, there are rules in the Public Access to Information and Secrecy Act (2009:400) that protects trade secrets in court proceedings.

SE does not support the inclusion of this provision as we can't identify any need for it and as we believe that the existing rules allow for the flexibility needed on discovery of documents including those containing trade secrets.

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

Q4. Currently the proposal introduces a rebuttable presumption concerning part of the causal link. Should the conditions for the presumption be changed? Should the tool of a rebuttable presumption be changed?

The presumption rules in the proposal are too complex to apply and can lead to legal uncertainty. Further, legislative rules of evidence are contrary to the Swedish principle of free examination of evidence. SE would ask for the removal of these rules.