Position Paper on the European Commission's 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) COM (2022) 496 final

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On 28 October 2022, the European Commission presented its draft AI Liability Directive. With this draft, the Commission is pursuing the goal of modernising the current legal framework for product liability and extending it to the specific characteristics of AI products. The Directive is also devised in the context of the planned AI Act, which is intended to create a regulatory framework for AI in the European Union. On its part, the AI Liability Directive is intended to create legal certainty regarding the rights and obligations of claimants and defendants in liability cases involving AI-enabled products. It will in its current form create a new right of disclosure of evidence to strengthen the ability of claimants to enforce their right to compensation. In the eyes of the Commission, the complexity of AI applications makes it difficult for claimants to prove that there is a causal link between the damages suffered and a defective AI. To address this problem, the principle of a rebuttable presumption is also established, according to which courts can consider this connection to exist if the injured party can plausibly provide evidence of it. The defendant can then rebut the presumption. This is intended to protect the rights of injured parties at the same level as is the case with non-AI products, where such causality is usually easier to prove.

In the following output, eco presents its initial comments on the present draft Directive.

I. General remarks

- **On the proposal**

eco generally supports initiatives for harmonisation of the regulatory framework in the field of AI and in digital policy in general. In our view, this is a step towards the completion of the Digital Single Market. From the perspective of the Internet industry, it would make sense to only pursue the AI Liability Directive after the AI Act has been passed. On the one hand, the definitions, such as which applications fall into the high-risk area, and thus also the scope of regulation, refer to a legal act that is not yet finalised; on the other hand, the AI Act is also intended to regulate the obligations of manufacturers of AI systems – for example, with regard to transparency.

Since the AI Act has not yet been passed and the definitions can still change, this makes it difficult to assess the regulations in the current draft.

- **On the inclusion of non-material damages**

The definition of damage is central in determining who gets access to compensation as the claimant. The Directive does include non-material damage in its definition. This is for example described in recital 2, which explicitly mentions the rights to non-discrimination and equal treatment as sources for possible damage claims. From eco's point of view, the inclusion of non-material damages, such as alleged discrimination, is understandable, since the protection of universal fundamental rights, such as protection against discrimination, is important and critical.

Nevertheless, eco advises against including non-material damages in the definition of damage under this Directive. In practice, this would give rise to a variety of problems. For example, in some cases it may be impossible to prove that a specific action or non-action of an AI constitutes unequal treatment or discrimination. This could therefore lead to unjustified allegations against producers of AI products, as many of these non-material damages are generally difficult to prove due to their very nature. It should also be noted that it can be difficult for manufacturers to completely eliminate erroneous actions and non-actions due to the complexity and adaptive nature of AI systems. It should also be mentioned that there are already legal acts that address these issues (e.g., anti-discrimination legislation).

- **On the reversed burden of proof**

The core of the proposed Directive, in addition to the obligation to disclose relevant evidence, is the rebuttable presumption of non-compliance described in Article 3 and the rebuttable presumption of a causal link described in Article 4. Both articles essentially shift the burden of proof from the claimants to the defendant. The latter is to prove that allegations made by the claimants are false, which in some cases may be difficult or even impossible. Even if the reversal of the burden of proof is well-intentioned from the Commission's point of view, it leads to more bureaucracy and costs for companies, some of whom would have to go to great lengths to refute an allegation. Moreover, it may in some cases be difficult for manufacturers of AI products to assess in which contexts a product has been used or whether damage is related to incorrect use or non-compliance with instructions for use. In principle, the claimant should have good arguments and evidence to claim damages and avoid a multitude of unsubstantiated claims. This could be jeopardised by a shift in the burden of proof, as it could encourage claims.

II. The Directive in detail

On Article 1: Subject matter and scope
Article 1 (3) states that “national rules determining which party has the burden of proof, which degree of certainty is required as regards the standard of proof, or how fault is defined, other than in respect of what is provided for in Articles 3 and 4”. The possibility of interpreting these terms differently at national level could lead to a fragmentation of enforcement and hinder the desired Digital Single Market. Despite some harmonization through this Directive, the legal situation within the EU will still not be uniform. In eco’s opinion, more far-reaching harmonisation would be advisable.

A similar problem arises from Article 1 (4). This article grants the Member States the right to take further measures beyond the provisions of this Directive in order to make it easier for claimants to substantiate a claim for damages, as long as this is compatible with EU law. eco can understand this step, but nevertheless does not consider it to be purposeful. Instead of harmonisation, this could lead to a fragmentation of the legal situation, which this Directive was explicitly intended to prevent. eco recommends that an evaluation should take place concerning which parts of the Directive can be accomplished through a regulation.

On Article 2: Definitions
Article 2 adopts most of the key definitions of the planned AI Act. eco welcomes this approach, as these two proposals will only work in combination with each other. In particular, the definition of “AI” that is currently used in the AI Act is still imperfect in eco’s opinion, as has been expressed in our statement on the AI Act. In principle, the definition given here is too broad and could include products that do not belong to classic AI applications. This also applies to the definition of a high-risk AI. Here, work should be done in the AI Act to further sharpen the term. Additionally, close attention should be paid to the development of the AI Act, in order to avoid diverging definitions.

Article 2 (9) refers to the lack of a uniform definition of the duty of care. The article states that duty of care 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". In our view, the greatest possible harmonisation should be achieved here.

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

Article 3 establishes the right to disclosure of relevant evidence to claimants. eco is generally of the opinion that such an obligation can help to strengthen the trust of consumers in AI products, as they can more easily assert their claims in the event of damage. Nevertheless, we have concrete suggestions for improvement in the proposed implementation. Article 3 (1) states that "a potential claimant must present facts and evidence sufficient to support the plausibility of a claim for damages" in order to gain access to the relevant evidence. This is an important limitation and there should be clear rules on the criteria.

In Article 3 (3) and (4), there is an expansion on the handling of the disclosed evidence, especially if they contain trade secrets. The protection of trade secrets is especially important since evidence will be most likely found in the algorithms of AI products, which also contain trade secrets. For many AI companies, the composition of their AI is the foundation of their business models; therefore, there should be resolute measures to secure the full protection of these trade secrets. It is therefore necessary to allow AI developers to decide what part of the disclosed evidence should be considered as a trade secret. According to Article 3 (4) this is to be decided by the courts, which might lead to inaccurate decisions and could therefore endanger trade secrets of AI developers across Europe. Article 3 (4) should therefore be amended to allow the companies concerned to decide what they consider to be a trade secret.

Article 3 (5) states that if "a defendant does not comply with an order by a national court in a claim for damages to disclose or to preserve evidence at its disposal", the court would automatically presume the defendant's non-compliance with a relevant duty of care. An automatic presumption of breach of the duty of care is not appropriate in eco's view, as there can be many reasons why a specific demand is not met in a given time. Especially in complex cases, providing the relevant information can be time and resource consuming. Moreover, it is not always clear as to whether the defendant itself has all the information that could be relevant.

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

Article 4 creates the basis for courts to adopt a "rebuttable presumption of a causal link in the case of fault". Thus, similar to Article 3, the Directive

creates a reversal of the burden of proof to the disadvantage of the defendant.

Article 4 (4) creates a limitation to the presumption under Article 4 (1) for systems that fall under the definition of high-risk AI. Here, the rebuttable presumption under Article 4 (1) shall not apply if the defendant can prove that the claimant had sufficient access to information to establish a link. Providers of high-risk AI are to be obliged by the AI Act to comply with comprehensive transparency and information obligations, which could lead to less use of the presumption under paragraph 1, as a great deal of information should be available. Nevertheless, from eco's point of view, it is not comprehensible as to why the burden of proof here lies with the defendant. It would also be possible for the claimant to reasonably argue as to why the information available to him/her is not sufficient to prove a connection between damage and defective AI.

Article 4 (5) also contains restrictions on this practice according to Article 4 (1). It should only apply to systems that do not fall under the definition of high-risk AI if "the national court finds it excessively difficult for the claimants to prove the casual link". eco welcomes the fact that this exists in order to relieve companies of this burden; however, the wording leaves a great degree of leeway for national courts, which could possibly weaken the protective effect of this clause.

III. Conclusion

eco supports the Commission's decision in principle to extend and harmonise the product liability directives to the special features of AI products with the present draft. In essence, this could create Europe-wide legal certainty for providers of AI products and strengthen consumer confidence in these products. In this context, the term AI must be clearly delimited and defined so that the Directive is only applied to products where it really makes sense to do so. From the perspective of eco, the definition from the AI Act, which is also to be applied here, does not yet fulfil these characteristics. At the same time, it must be ensured that potential trade secrets are subject to a very high level of protection and that companies can decide for themselves what they consider to be trade secrets. The reversal of the burden of proof provided for in the draft in Articles 3 and 4 is not purposeful in our view. For businesses, this could lead to more bureaucracy and unfounded claims for damages. In order to realise the aim of the Directive and to create legal certainty for providers and users of AI products throughout Europe, it is also important to define relevant terms in a uniform manner and not to leave them to national legal systems. This would lead to

fragmentation of implementation and hinder the development of the Internal Market.

About eco: With more than 1,100 member companies, eco is the largest Internet industry association in Europe. Since 1995, eco has been instrumental in shaping the Internet, fostering new technologies, forming framework conditions, and representing the interests of members in politics and international committees. The focal points of the association are the reliability and strengthening of digital infrastructure, IT security, trust, and ethically-oriented digitalisation. That is why eco advocates for a free, technology-neutral, and high-performance Internet.