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I. Introduction

The Council of The Bar of Ireland is the accredited representative body of the independent referral Bar in Ireland. The independent referral bar are members of the Law Library and has a current membership of approximately 2,200 practising barristers.

The Council of The Bar of Ireland ("the Council") has prepared these submissions at the request of the Department of Enterprise, Trade and Employment for the purposes of the Department's public consultation on the European Commission's draft proposal for a directive on adapting non-contractual civil liability rules to Artificial Intelligence ("AILD").

II. Legal Context

The Proposal for a Directive on Adapting Non-Contractual Civil Liability Rules to Artificial Intelligence ("the AILD")[1] results from the February 2020 White Paper on AI which laid out a coordinated European approach to both promote innovation in, and the uptake of, AI while also addressing the risks associated with its use. The purpose of the AILD is thus to improve the functioning of the internal market by laying down uniform rules for certain aspects of non-contractual civil liability for damage caused where AI systems are involved. The proposal is part of a package of measures which also includes:

- a legislative proposal laying down horizontal rules on artificial intelligence systems (the Artificial Intelligence Act);[2] and
- a revision of sectoral and horizontal product safety rules (The Product Liability Directive).[3]

[1] 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.

[2] Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, COM (2021) 206 final.

[3] Proposal for a Directive of the European Parliament and of the Council on Liability for Defective Products COM (2022) 495 final.

In particular, the proposed AILD sets out:

- To provide persons seeking compensation for damage caused by high-risk AI systems with effective means to identify potentially liable persons and relevant evidence for a claim through a system of court ordered disclosure;
- To provide for the creation of a rebuttable presumption of causality where harm is suffered; and
- To establish a programme of monitoring to provide the Commission with a report on incidents involving AI systems, five years from the date of entry into force of the Regulation.

The proposed legislative package of which the AILD is part does not seek to alter the concepts of 'product' or 'damage' as they exist under current EU product liability law.[4] Rather, the existing concepts will be extended to cover AI systems under the AI Act and will include the loss or corruption of data that is not used for professional purposes while, in a personal injury context, the concept will be extended to include 'medically recognised harm to physical health.' Similarly, the proposed package retains the existing definition of 'fault' and provides for amendments to existing evidential rules to recognise the broader concept.

In the Irish civil legal order, non-contractual civil liability or fault based tortious liability can arise in the areas of:

(1) negligence;
(2) product liability;
(3) defamation;
(4) data protection, privacy and confidence;
(5) discrimination and harassment;
(6) torts involving land and goods;
(7) intellectual property rights;

[4] European Commission, Directorate-General for Justice and Consumers, Karner, E., Koch, B., Geistfeld, M., Comparative law study on civil liability for artificial intelligence, Publications Office of the European Union, 2021.

(8) economic torts; and

(9) competition and sectoral regulatory law.

Each discrete area of law set out above has been broadly considered in the context of these submissions.

III. Key Proposals of the AILD

The substantive provisions of the AILD include those changes provided for in Articles 1 through to 4 providing, in particular, for rules related to the disclosure of evidence on high-risk[5] AI systems in cases involving non-contractual, fault-based civil law claims in order to enable claimants to substantiate claims; and to provide for the relevant burden of proof in such cases.

(i) Disclosure of Evidence and Rebuttable Presumption of Non-Compliance

Article 3(1) requires Member States to ensure that national courts are empowered, on request of a potential claimant, to order the disclosure of all relevant evidence held by a provider or person[6] regarding a specific high-risk AI system suspected of having caused damage in circumstances where a request for voluntary discovery has been made and subsequently refused by a given Defendant. To succeed in securing such an order, Article 3(2) provides that a potential claimant must present facts and evidence sufficient to support the plausibility of a claim for damages and have undertaken all proportionate efforts to secure such evidence from the Defendant in accordance with Article 3(2).

This position accords broadly with the procedure for discovery and disclosure in Irish law, and in particular before the High and Circuit Courts, as part of which parties are required to seek

[5] AI systems are considered high risk are outlined in Article 6 of the AI Act which provides that a high-risk AI system is one which is intended to be used as a safety component of a product or it itself a product covered by the legislation provided in Annex II or its safety component is the AI system, or the AI system itself as a product, which is required to undergo a third-party conformity assessment with a view to the placing on the market or putting into service of that product pursuant to the Union harmonisation legislation listed in Annex II.

[6] Article 24 and 28(1) of the AI Act

voluntary discovery of documents within the possession, power or procurement of the defendant prior to making an application to the Court.[7] Where efforts to secure voluntary discovery are not successful the party seeking discovery may then issue a motion, on notice, and grounded on an affidavit.

The Court will grant an order where it is satisfied that the documents sought are relevant to the matters at issue in the proceedings and necessary for the fair disposal of the proceedings or for saving costs. This standard of review diverges from the requirement to provide evidence sufficient to support the plausibility of a claim for damages (as the Directive proposes), however, if the Directive's wording is intended to exclude frivolous or vexatious claims or claims otherwise without merit then this would be in keeping with the existing approach in Irish law.

The Court can also grant non-party discovery in circumstances where any person not a party to the cause or matter pending before the Court and who appears to the Court to be likely to have or to have had in his possession custody or power any documents which are relevant to an issue arising or likely to arise out of the cause or matter or is or is likely to be in a position to give evidence relevant to any such issue.[8]

A further exception to these standards is in cases involving applications for a Norwich Pharmacal Order[9] in which the applicant must establish "clear and unambiguous" evidence of wrongdoing or harm and in respect of each element of the alleged tort.[10] Norwich Pharmacal Orders are only granted when there is some aspect of an unknown user or tortfeasor element to the fault or tortious liability arising. For example, in a case where an online platform user is operating under a pseudonym and has defamed a plaintiff, a platform will be invariably entitled to the host defence,[11] and cannot simply announce the private

[7] See, Order 31 Rule 12 of the Rules of the Superior Courts; Order 32 Circuit Court Rules; Order 45B of the District Court Rules.
[8] See, Order 31 Rule 29 of the Rules of the Superior Courts
[9] See, *Megaleasing UK Ltd v Barrett* [1993] ILRM 497 and *Doyle v Commissioner of An Garda Síochána* [1999] 1 IR 249.
[10] *O'Brien v Red Flag Consulting Ltd* [2015] IEHC 867.
[11] Article 14 of 2000/31/EC or Regulation 18 of S.I. 68 of 2003 – the Ecommerce Directive and National Regulation.

information or the real user operating the pseudonymous account in the absence of a court order.

The Directive should not seek to impose any threshold beyond the above on parties in matters of discovery given the centrality of the process of discovery to establishing the details of damage and/or injury in a particular case. In addition, and in light of the decision of Laffoy J in *Doyle v Commissioner of An Garda Síochána*[12] any provision made in Irish law could not treat the making of an order of discovery as a substantive relief but rather a procedural mechanism to establish injury or damage on foot of which substantive relief might be claimed.

Finally, no mention is made in the Directive's current text of privileges against disclosure. As required in Irish law,[13] and indeed under Article 8 of the European Convention on Human Rights, protection of legal professional privilege would exempt certain categories of document from disclosure.[14] More generally, any mandatory disclosure obligations would need to be made subject to the requirements of privilege more generally.

Article 3(3) further requires that national court are empowered to order specific measures to preserve the evidence sought while Article 3(4) requires national courts to limit the disclosure to that evidence which is necessary and proportionate to support a potential claim or a claim for damages and the preservation of which is necessary and proportionate. This is in keeping with the test for discovery, including a proportionality assessment, as provided for in Order 31 Rule 12 of the Rules of the Superior Courts and as articulated by Morris J in *Swords v Western Proteins Ltd*[15] and, more recently, by the High Court in *Astrazeneca v Pinewood Laboratories Ltd*.[16]

Article 3(4) provides that courts shall consider the legitimate interests of all parties, including third parties, including the interests of those parties in respect of trade secrets, and

[12] [1999] 1 IR 249.
[13] *Smurfit Paribas Bank v AAB Export Finance Ltd* [1990] 1 IR 469.
[14] *Brito Ferrinho Bexiga v Portugal*, App no 69436/10 (ECHR, 1 December 2015); Saber *v Norway*, App no 459/18 (ECHR, 17 December 2020); *M v The Netherlands*, App no 2156/10 (ECHR, 25 July 2017).
[15] [2001] ILRM 481, approved by the Supreme Court in *Burke v DPP* [2001] IR 760 (Keane CJ) and *Framus Ltd & Ors v CRH plc & Ors* [2004] 2 IR 20.
[16] [2011] IEHC 159.

confidential information including information related to public or national security. Where the disclosure of trade secrets of confidential information is implicated, Article 3(4) provides that courts shall be empowered to take specific measures to preserve confidentiality of information when it is used or referred to in legal proceedings. In this respect, a distinction will likely need to be drawn between privileged information, which the parties cannot be obliged to disclose, and confidential or sensitive information which is currently subject to disclosure obligations or challenges where redaction is often sought.

The position in Irish law, and in common law traditions more generally, has long been that balancing should be undertaken in cases where the information which a claim of confidentiality is made. In this respect, Lord Wilberforce noted in *Science Research Council v Nassé*[17] that "protective measures" may be appropriate in certain cases, while Hardiman J in *O'Callaghan v Mahon*[18]noted that balancing should be considered. However, the Irish courts have also considered confidentiality to be a lesser defence to production than claims of privilege.[19] In so far as provision is made in the Directive for obligations to have regard to confidentiality or other claims less than privilege, judicial discretion should be retained.

Finally, Article 3(4) provides that those ordered to disclose or preserve evidence should have appropriate procedural remedies in response to such orders. This provision would be accommodated through existing Rules of the Superior Courts which make provision for the appeal of an application for discovery.[20]

In accordance with Article 3(5), where a Defendant fails to comply with an order for disclosure or preservation, there will be a rebuttable presumption that the Defendant has not complied with the relevant duty of care that the evidence was intended to show had been breached. The subsection provides hat this shall be the case "in particular" where the claim relates to damages as provided for in Article 4(2) or (3). The intention is that by introducing a rebuttable

[17] [1980] AC 1028. See also, *Alfred Crompton Amusement Machines Ltd v Commissioners of Customs and Excise (No. 2)* [1974] AC 405.
[18] [2006] 2 IR 32.
[19] *Maye v Adams* [2005] IEHC 530; *Persona Digital Telephony Ltd v Minister for Public Enterprise* [2015] IEHC 457.
[20] Orders 86 and 86A of the Rules of the Superior Courts; Order 18 Rule 7 Circuit Court Rules.

presumption, the Directive would discourage non-compliance and ease the burden on potential claimants

The reversal of the burden of proof has been considered by Irish courts to be justified in circumstances where a presumption can be rebutted and the evidence necessary in order to rebut the presumption is available to the Defendant. Thus, in *Hanrahan v Merck, Sharp and Dohme (Ireland) Ltd*[21] 'the Supreme Court noted that,

> 'The rationale behind the shifting of the onus of proof to the defendant in such cases would appear to lie in the fact that it would be palpably unfair to require a plaintiff to prove something which is beyond his reach, and which is peculiarly within the range of the defendant's capacity of proof.'

(ii) Rebuttable presumptions of Causal Links in the Case of Fault

Article 4(1) provides that national courts shall presume a causal link between the fault of the Defendant and the output produced by the AI system or the failure of that system to produce the output where:

(a) the claimant has demonstrated or the court has presumed pursuant to Article 3(5), the fault of the defendant, with a duty of care laid down in Union or national law directly intended to protect against the damage that occurred;

(b) it is reasonably likely, in the circumstances, that the fault has influenced the output produced by the AI system or the failure of the AI system to produce an output; or

[21] [1988] ILRM 629.

(c) the claimant has demonstrated the output produced or the failure to produce an output gave rise to the damage suffered.

Article 4(2) provides that Article 4(1)(a) shall be satisfied only where the complainant has demonstrated that the Defendant (where the Defendant is a provider or in the position of a provider) failed to comply with the obligations laid down in chapters 2 and 3 of Title III of the AI Act or Article 24 or Article 28(1) of the AI Act as relevant where the Defendant failed to comply with the following requirements in light of the risk management system in place:

(a) the AI system is a system which makes use of techniques involving the training of models with data and which was not developed on the basis of training, validation and testing data sets that meet the quality criteria referred to in Article 10(2) to (4) of the AI Act;

(b) the AI system was not designed and developed in a way that meets the transparency requirements laid down in Article 13 of the AI Act;

(c) the AI system was not designed and developed in a way that allows for an effective oversight by natural persons during the period in which the AI system is in use pursuant to Article 14 of the AI Act;

(d) the AI system was not designed and developed so as to achieve, in the light of its intended purpose, an appropriate level of accuracy, robustness and cybersecurity pursuant to Article 15 and Article 16, point (a), of the AI Act; or

(e) the necessary corrective actions were not immediately taken to bring the AI system in conformity with the obligations laid down in Title III, Chapter 2 of the AI Act or to withdraw or recall the system, as appropriate, pursuant to Article 16, point (g), and Article 21 of the AI Act.

Article 4(3) provides that the requirements laid down at Article 4(1)(a) shall be satisfied where the complainant has demonstrated that the Defendant (where the Defendant is a user) only where the claimant proves that the Defendant,

(a) did not comply with its obligations to use or monitor the AI system in accordance with the accompanying instructions of use or, where appropriate, suspend or interrupt its use pursuant to Article 29 of the AI Act; or

(b) exposed the AI system to input data under its control which was not relevant in view of the system's intended purpose pursuant to Article 29(3) of the Act.

Several further qualifications to the presumptions outlined in Article 4(1) are provided for in the subsequent provisions.

Article 4(4) requires that, in the case of a claim for damages, a national court shall not apply the presumption where the Defendant demonstrates that sufficient evidence and expertise is reasonably accessible for the claimant to prove the causal link. In addition, Article 4(5) requires that, in the case of a claim for damages concerning an AI system that is not a high-risk system, the presumption shall only apply where the national court considers it "excessively difficult" for the claimant to prove a causal link.

Article 4(6) provides that, in the case of a claim for damages against a Defendant who used the AI system in the course of a personal, non-professional activity, the presumption shall apply only where the Defendant materially interfered with the conditions of the operation of the AI system or was required and able to determine the conditions of operation of the AI system and failed to do so.

Finally, Article 4(7) provides that the Defendant shall have the right to rebut the presumption laid down in paragraph 1.

The presumptions provided for under Article 4 do not present a difficulty as a matter of Irish law and, in as much as they reverse the burden of proof by imposing a rebuttable presumption, does so in a manner which is proportionate and appears to appropriately balance the interests of the parties, and the obligations to be imposed on different classes of Defendant.

It should be noted that while a rebuttable presumption as framed is proportionate, a move towards a strict liability mechanism would not be advisable. While strict liability torts are known to Irish law, not least in the context of consumer protection, they have been recognised in contexts where the damage or injury suffered by the plaintiff results from a failure to control a force or process which results in observable injury and can be traced with relative certainty to something within the Defendant's control.[22] Crucially, in the case of Artificial Intelligence, the complexity of the process itself, as well as the nature of the harms or injuries alleged to have been occasioned by the AI system, render the relationship between the system and the harm or injury more opaque and a strict liability standard more questionable in terms of proportionality.

(iii) Evaluation and Reporting on the Directive

Article 5 provides that five years following the end of the transposition period, the Commission shall review the application of the Directive and report to the Parliament, Council and the European Economic and Social Committee (that report to be accompanied, where appropriate, by a legislative proposal) on the effects of Articles 3 and 4 and the appropriateness of no-fault liability rules.

Article 5(3) provides that, in preparation for that report, the Commission shall establish a monitoring programme, setting out how and at what intervals the data and other necessary evidence will be collected and specifying the action to be taken by the Commission and by the Member States in collecting and analysing the data and other evidence.

[22] As in the Rule in *Rylands v Fletcher* (1868) LR 3 HL 330, affg (1866) LR 1 Ex 265 or pursuant to the scienter principle in common law Bryan McMahon and William Binchy 'Law of Torts' (Bloomsbury, 4th edn, 2013), [27.15] or the Control of Dogs Act 1986, s.21. See also, the Liability for Defective Products Act 1991.

V. Concluding Comments

The specific provision for non-contractual claims relating to Artificial Intelligence which the AILD and associated measures propose is to be welcomed. In particular, the proposals to impose rebuttable presumptions on Defendants as they are made in their current form are a welcome effort to ensure an equality of arms in litigating claims involving AI.

The AILD appears to ensure that existing laws, policies and procedures are sufficiently flexible to embrace and capture the emergence of new technology. It is essential that liability be approached in a neutral manner, so that the law responds to an activity carried out by a human in the offline environment in the same manner as it would in the digital or online environments. Any major distinctions in approach could serve to undermine the wider liability regime and could lead to evasive or avoidance behaviours in the context of non-contractual civil litigation. Accordingly, the fault-based liability regime contemplated within AILD appears to set an appropriate and consistent standard for assessing liability.

The success of the AILD in this respect will turn on the definitions which are eventually adopted in the AI Act and in the new Product Liability Directive both of which control the types of damage and fault in respect of which liability can be imposed.

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