



EUROPEAN DATA PROTECTION SUPERVISOR

The EU's independent data
protection authority

11 October 2023

Opinion 42/2023 on the Proposals for two Directives on AI liability rules

The European Data Protection Supervisor (EDPS) is an independent institution of the EU, responsible under Article 52(2) of Regulation 2018/1725 ‘With respect to the processing of personal data... for ensuring that the fundamental rights and freedoms of natural persons, and in particular their right to data protection, are respected by Union institutions and bodies’, and under Article 52(3) ‘...for advising Union institutions and bodies and data subjects on all matters concerning the processing of personal data’.

Wojciech Rafał Wiewiórowski was appointed as Supervisor on 5 December 2019 for a term of five years.

Under Article 42(1) of Regulation (EU) 2018/1725, the Commission shall ‘following the adoption of proposals for a legislative act, of recommendations or of proposals to the Council pursuant to Article 218 TFEU or when preparing delegated acts or implementing acts, consult the EDPS where there is an impact on the protection of individuals’ rights and freedoms with regard to the processing of personal data’ and under Article 57(1)(g), the EDPS shall ‘advise on his or her own initiative or on request, all Union institutions and bodies on legislative and administrative measures relating to the protection of natural persons’ rights and freedoms with regard to the processing of personal data’.

This own initiative Opinion relates to two proposals adopted by the Commission on 28 September 2022, namely the revision of the Product Liability Directive (PLD)¹, and the Directive on adapting non contractual civil liability rules to artificial intelligence (AILD)². This Opinion does not preclude any future additional comments or recommendations by the EDPS, in particular if further issues are identified or new information becomes available. Furthermore, this Opinion is without prejudice to any future action that may be taken by the EDPS in the exercise of his powers pursuant to Regulation (EU) 2018/1725. This Opinion is limited to the provisions of the Proposal that are relevant from a data protection perspective.

¹ COM(2022) 496 final.

² COM(2022) 495 final.

Executive Summary

On 28 September 2022, the European Commission issued the two following Proposals ('the Proposals'):

- Proposal for a directive of the European Parliament and of the Council on liability for defective products ('the PLD Proposal'),
- Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence ('the AILD Proposal').

The common objective of the Proposals is to adapt liability rules to the digital age, in order to ensure that victims benefit from the same standards of protection when harmed by artificial intelligence (AI) products or services, as they would if harm was caused under any other circumstances. The two Proposals are part of the package of measures to support the deployment of AI in Europe, which also comprises a legislative proposal laying down horizontal rules on AI systems (the proposed Artificial Intelligence Act). The EDPS fully supports the objective of the Proposals, namely to ensure that victims of damage caused by AI enjoy a level of protection equivalent to that enjoyed by persons claiming compensation for damage caused without the involvement of an AI system. In this regard, the specific characteristics of AI systems, such as opacity, autonomy, complexity, continuous adaptation and lack of predictability, can create significant obstacles for individuals seeking remedy for harm resulting from the use of such systems.

In this own initiative Opinion, the EDPS makes a number of specific recommendations. Firstly, he calls on the co-legislators to ensure that individuals who have suffered damages caused by AI systems produced and/or used by EU institutions, bodies and agencies enjoy an equivalent level of protection as individuals who suffered damages caused by AI systems produced and/or used by private actors or national authorities. Second, the procedural safeguards under Article 3 and 4 of the AILD Proposal should apply in all cases of damages caused by an AI system, irrespective of its classification as high-risk or non-high-risk. Moreover, providers and users should be explicitly required to disclose information pursuant to Article 3 of the AILD Proposal in an intelligible and generally understandable form. The EDPS also recommends that the AILD Proposal explicitly confirms that it is without prejudice to the Union data protection law, so as not to limit in any way the potential avenues of redress for individuals.

Finally, the EDPS invites co-legislators to consider whether additional measures to further alleviate the burden of proof would not be a fairer and more balanced approach to address the challenges posed by AI systems to the effectiveness of EU and national liability rules. In the same vein, he recommends that the review period stipulated in the AILD Proposal be shortened.

Contents

1. Introduction	4
2. General remarks	5
3. Liability of EU institutions, bodies and agencies.....	6
4. The relationship between the Proposals and the existing EU data protection law	6
5. Specific comments on the AILD Proposal	8
5.1. Relationship to the proposed AI Act.....	8
5.2. AI systems not classified as “high risk”	8
5.3. Explainability	9
5.4. Risks of circumvention and potential gaps in protection.....	9
5.5. Burden of proof.....	10
5.6. Review	11
6. Conclusions	11

THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data ('EUDPR')³, and in particular Article 42(1) thereof,

HAS ADOPTED THE FOLLOWING OPINION:

1. Introduction

1. On 28 September 2022, the European Commission issued the following Proposals ('the Proposals'):
 - Proposal for a directive of the European Parliament and of the Council on liability for defective products ('the PLD Proposal'), and
 - Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence ('the AILD Proposal').
2. A common objective of the Proposals is to adapt liability rules to the digital age, in order to ensure that victims benefit from the same standards of protection when harmed by artificial intelligence (AI) products or services, as they would if harm was caused under any other circumstances⁴. In this regard, they aim to "form an overall effective civil liability system"⁵.
3. The two Proposals are closely linked and complement each other. The PLD Proposal concerns the manufacturer's no-fault liability for defective products and would update the current legal framework by including software and digital manufacturing files within the definition of product and clarifying when a related service is to be treated as a component of a product. It would allow compensation for material losses resulting from death, personal injury, damage to property, and loss or corruption of data. The AILD Proposal concerns liability claims pursued under national fault-based liability regimes in cases where certain AI systems are involved in causing damage⁶. It lays down uniform rules for access to information and alleviation of the burden of proof in relation to damages caused by certain AI systems.
4. The Proposals are part of a package of measures to support the deployment of artificial intelligence in Europe, which also comprises a legislative proposal laying down horizontal rules on AI systems (the proposed AI Act) and a revision of sectoral and horizontal product safety rules. They are in line with the objectives of the AI White Paper⁷, where the Commission undertook to promote the uptake of AI and to address the risks associated with certain of its uses.

³ OJ L 295, 21.11.2018, p. 39.

⁴ Recital (3) of the PLD Proposal and recital (7) of the AILD Proposal.

⁵ COM(2022) 496 final, p. 3.

⁶ COM(2022) 495 final, p. 4.

⁷ COM(2020) 65 final.

5. The present Opinion is an own-initiative Opinion issued pursuant to Article 57(1)(g) EUDPR. This Opinion should be read in conjunction with the EDPB-EDPS Joint Opinion⁸ on the proposed Artificial Intelligence Act.

2. General remarks

6. The EDPS welcomes the initiative of the Commission, which aims at ensuring that victims of damage caused by AI enjoy a level of protection equivalent to that enjoyed by persons claiming compensation for damage caused without the involvement of an AI system⁹. In this regard, the EDPS supports the finding of the Commission that the specific characteristics of AI systems “may make it difficult or prohibitively expensive for victims to identify the liable person and prove the requirements for a successful liability claim”¹⁰.
7. The need to lay down specific liability rules in the context of use of AI systems has been clearly identified by the Commission, in particular in its impact assessment report accompanying the AILD Proposal¹¹. The EDPS agrees that due to the characteristics of AI systems, such as opacity, autonomy, complexity, continuous adaptation and lack of predictability, the current liability rules, in particular those based on fault, may not be suited to handling liability claims for damage caused by AI-enabled products and services and therefore have to be modernised.
8. In their Joint Opinion on the Proposal for a Regulation laying down harmonised rules on artificial intelligence (AI Act), the EDPS and EDPB have urged the legislators to explicitly address the rights and remedies available to individuals subject to AI systems¹². One of the main objectives of this Opinion is to assess to what extent the two Proposals address the need of ensuring that individuals harmed by AI systems are capable of obtaining remedies in practice.
9. In addition, the EDPS considers that the scope of the two Proposals as well as their relationship with the Union law on the protection of personal data and with the proposed AI Act need to be carefully analysed in order to ensure a comprehensive and coherent legal framework that guarantees access to effective remedies for individuals in the specific context of AI systems.
10. The EDPS shares the view of the Commission that safety and liability are two sides of the same coin, which reinforce each other and that while rules to ensure safety and protect fundamental rights will reduce risks, they do not eliminate those risks entirely¹³. Therefore, the EDPS underlines that the additional rules on liability should not entail lowering of the safeguards applied to diminish the risks created by AI. Even more importantly, the implementation of new liability rules should not be considered as an alternative to the prohibition of certain AI systems posing unacceptable risks as identified by the EDPS and

⁸ EDPB-EDPS Joint Opinion 5/2021 on the proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Proposed AI Act).

⁹ Recital (3) of the PLD Proposal and recital (7) of the AILD Proposal. See also COM(2022) 496 final, page 2.

¹⁰ COM(2022) 496 final, page 1. See in the same vein also recital (3) of the PLD Proposal.

¹¹ Commission staff working document impact assessment report accompanying the AILD, page 29.

¹² EDPB-EDPS Joint Opinion 5/2021 on the proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Proposed AI Act), paragraph 18.

¹³ COM (2022) 496 final, page 2.

EDPB in their Joint Opinion on the proposal for a Regulation laying down harmonised rules on artificial intelligence (AI Act)¹⁴ (e.g. AI systems for “social scoring”, remote biometric identification in publicly accessible spaces, AI systems categorizing individuals from biometrics, AI systems inferring emotions, etc...).

3. Liability of EU institutions, bodies and agencies

11. The proposed AI Act would apply to Union institutions, offices, bodies and agencies (EUIs) when acting as a provider or user of an AI system¹⁵. In their Joint Opinion on the Proposal for AI Act, the EDPB and EDPS strongly supported the fact that the scope of the Proposal covers the provision and use of AI systems by EUIs, stressing that “as the use of AI systems by [EUIs] may also have a significant impact on the fundamental rights of individuals, similar to use within EU Member States, it is indispensable that the new regulatory framework for AI applies to both EU Member States and EU institutions, offices, bodies and agencies in order to ensure a coherent approach throughout the Union”¹⁶.
12. The EDPS notes that neither the AILD Proposal, nor the PLD Proposal would appear to apply in cases of damages stemming from AI systems produced and/or used by EU institutions, bodies and agencies.
13. The EDPS recalls in this regard that the rules governing the non-contractual liability for damages caused by Union bodies or by its servants in the performance of their duties are set out in Article 340(2) TFEU as interpreted by the CJEU. At the same time, the choice of legal instrument for the Proposals, namely directives pursuant to Article 288 of TFEU, implies that the envisaged rules, including the procedural safeguards provided for in Article 3 and 4 of the AILD Proposal, are addressed to the EU Member States and have no direct legal bearing on non-contractual liability of EUIs.
14. Mindful of the different legal frameworks for non-contractual liability applicable to Member States and to EUIs, the EDPS calls upon the co-legislators and the Commission to consider the necessary measures to address this situation, and thus ensure that individuals who have suffered damages caused by AI systems produced and/or used by EU institutions, bodies and agencies are not placed in a less favourable position and enjoy the same standards of protection as individuals who suffered damages caused by AI systems produced and/or used by private actors or national authorities.

4. The relationship between the Proposals and the existing EU data protection law

15. The EDPS considers it important to ensure that the Proposals should not affect the applicability of Union law on the protection of personal data. Therefore, he welcomes the fact that this point is expressly indicated in Article 2(3)(a) of the PLD Proposal.

¹⁴ EDPB-EDPS Joint Opinion 5/2021 on the proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Proposed AI Act), paragraphs 27 to 35.

¹⁵ Article 2(1) and Article 59 of the Proposed AI Act. See also recital (12) of the Proposed AI Act.

¹⁶ EDPB-EDPS Joint Opinion 5/2021 on the proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Proposed AI Act), 18 June 2021, page 8.

16. At the same time, the Union rules on the protection of personal data are not mentioned among the rules which should not be affected by the AILD Proposal¹⁷, which could create legal uncertainty about the relationship between this Proposal and the existing EU data protection law. The EDPS therefore recommends adding an explicit clarification in the AILD Proposal to that effect as well.
17. The EDPS furthermore notes that the explanatory memorandum accompanying the PLD Proposal specifies that the Regulation (EU) 2016/679¹⁸ ('the GDPR') concerns liability of data processors and controllers for material and non-material damage caused by personal data processing infringing the GDPR, "whereas the PLD proposal provides compensation only for material losses resulting from death, personal injury, damages to property and loss or corruption of data"¹⁹.
18. Indeed, Article 4 of the PLD Proposal includes in the definition of "damage" the "loss or corruption of data that is not used exclusively for professional purposes", and defines "data" by reference to Article 2(1) of Regulation (EU) 2022/868²⁰ (the Data Governance Act). The EDPS notes, however, that it is very likely that the data in question may also include personal data. Given that the definition of damages under the PLD Proposal is limited to material damages which might be caused by loss or corruption of data, there may be few instances in which the liability regime of the PLD would be relevant to individuals suffering damage from AI systems involving processing activities constituting an infringement of the GDPR. At the same time, it is not inconceivable that the damage to an individual by the AI product represents also a physical or material damage as per recital 75 of the GDPR, which would entail the parallel applicability of the liability regime in the current EU data protection framework²¹. In cases of a dataset consisting of personal and non-personal data where both types of data are inextricably linked, the EDPS considers, in line with the guidance issued by the Commission²², that the GDPR applies to that entire dataset. In view of Article 2(3)(a) of the PLD Proposal, it is the understanding of the EDPS that in such circumstances the natural persons who suffered damage may have a choice whether to base their claims on the revised PLD or on the relevant provisions of the GDPR or Directive (EU) 2016/680²³ ('the LED'), or on both. The EDPS is convinced that the same principle should apply with regard to the AILD Proposal, as well.
19. Thus the EDPS recommends, as a minimum, making an explicit reference in the AILD Proposal to the Union rules on the protection of personal data among the rules which would not be affected by that Proposal, so as not to limit in any way the potential avenues of redress for individuals.
20. The EDPS also recalls that, in a spirit of clarity, special consideration should be given to the consistency of the roles and responsibilities of the various parties - provider, manufacturer,

¹⁷ Article 1(3) of the AILD Proposal.

¹⁸ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1–88.

¹⁹ COM (2022) 495 final, page 3.

²⁰ According to Article 2(1) of Regulation (EU) 2022/868 "data' means any digital representation of acts, facts or information and any compilation of such acts, facts or information, including in the form of sound, visual or audiovisual recording".

²¹ See e.g. the example provided in the EDPB Guidelines 9/2022 on personal data breach notification under GDPR, para. 22, page 9, available at https://edpb.europa.eu/system/files/2023-04/edpb_guidelines_202209_personal_data_breach_notification_v2.0_en.pdf.

²² Communication from the Commission to the European Parliament and the Council. Guidance on the Regulation on a framework for the free flow of non-personal data in the European Union. COM(2019)250 final.

²³ Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119, 4.5.2016, p. 89–131.

importer, distributor or user of an AI system - with the notions of data controller and data processor carried by the data protection framework, since both norms are not congruent²⁴.

5. Specific comments on the AILD Proposal

5.1. Relationship to the proposed AI Act

21. As a preliminary matter, the EDPS supports the intention of the Commission to ensure consistency between the AILD Proposal and the main Union regulatory framework on AI - the proposed AI Act - in particular as regards the definitions of “AI system”, “high-risk AI system”, “provider” and “user” in the AILD, which refer directly to those laid down in the Proposal for AI Act.
22. While the Proposal for the AI Act and the AILD Proposal are part of the same legislative package²⁵, the EDPS recalls that they serve different purposes: the former aims to lay down horizontal rules on AI, the latter seeks to address liability issues related to AI systems. Against this background, the EDPS is concerned that the specific rules provided by the AILD would apply mainly to “high-risk AI systems” as set out in the proposed AI Act. However, the actual harm caused by AI systems not labelled as high risk could still be quite significant in practice. It might be the case, for instance, with AI systems intended to be used for making decisions on the eligibility of natural persons for home insurance or liability insurance. Moreover, victims of damages caused by AI systems not labelled as high risk may face similar difficulties in obtaining evidence to substantiate their liability claim.
23. Under the AILD Proposal, the new mechanism of disclosure of evidence laid down in Article 3 would be limited only to high-risk AI systems. At the same time, access to information about specific AI systems that are suspected of having caused damage could be an important and even crucial factor to substantiate the claim for compensation of the affected individual²⁶.
24. Similarly, Article 4 of the AILD, which sets up a rebuttable presumption of a causal link between the fault of the provider or user, and the output produced by the AI system, or the failure of the AI system to produce an output, would apply mainly to high-risk AI systems. The presumption should also be applied for AI systems, which are not high-risk, but only in cases where national courts consider it “excessively difficult” for the claimant to prove the causal link²⁷, which wrongly suggests that such situations will remain exceptional.

5.2. AI systems not classified as “high risk”

25. The EDPS considers that AI systems, which are not classified as “high-risk”, nevertheless have the potential to significantly harm individuals, even if those systems are not deemed to pose the same level of risk to the society at large. Moreover, non-high-risk AI systems

²⁴ EDPB-EDPS Joint Opinion 5/2021 on the proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Proposed AI Act), paragraph 6.

²⁵ COM (2022) 496 final, p. 2.

²⁶ See Recital 16 of the AILD Proposal.

²⁷ Article 4(5) of the AILD Proposal.

might be similarly complex and opaque ('black box'), hence the victims could face serious difficulties getting access to the necessary evidence in order to identify the potential fault.

26. The EDPS recalls that the stated purpose of the AILD Proposal is “to ensure that persons claiming compensation for damage caused to them by an AI system enjoy a level of protection equivalent to that enjoyed by persons claiming compensation for damage caused without the involvement of an AI system”²⁸. In view of the objective to create such level-playing field, there is an even stronger argument not to differentiate between the individuals affected by AI systems based on the classification of the AI system in question as high-risk or non-high risk.
27. For these reasons, the EDPS recommends that both the disclosure of evidence mechanism under Article 3 of the AILD Proposal and the rebuttable presumption of a causal link in the case of fault under Article 4 should be disconnected from the definition of “high-risk” systems as defined in the AI Act and should apply to all AI systems.

5.3. Explainability

28. The EDPS notes that the information to be disclosed under Article 3 of AILD Proposal would be in practice the technical documentation that providers of high-risk AI systems would be obliged to draw up pursuant to Article 18 and Annex IV of the Proposal for AI Act²⁹, as well as automatic recordings of events ('logs') pursuant to Article 12 thereof. In this context, the EDPS is concerned that the complexity and opacity of an AI system may have an impact on its documentation, making it very technical and thus only understandable by a handful of experts. This fact has already been highlighted in the EDPB-EDPS Joint Opinion on the proposed AI Act³⁰ as well as in the ongoing work on so-called Explainable AI (XAI)³¹.
29. The EDPS recalls that the Proposal for AI Act strives to address the problem by introducing in Article 13(2) an obligation for providers of high-risk AI systems to accompany them with instructions for use that include “concise, complete, correct and clear information that is relevant, accessible and comprehensible to users”. Therefore, in order for the information disclosed pursuant to Article 3 of the AILD Proposal to have an effective evidential value, the EDPS recommends introducing in the AILD a similar requirement that the disclosed information is not limited to the disclosure of technical documentation only, but must also be complemented with clear and comprehensible explanations.

5.4. Risks of circumvention and potential gaps in protection

30. The EDPS also draws attention to recital 15 of the Proposal for AILD, according to which “[t]here is no need [the AILD] 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 provided information or advice which was taken into account by the relevant human actor. In the latter case, it is possible to trace back the damage to a human act or omission, as the AI system output is not interposed between the human act or omission and the damage, and

²⁸ See Recital 7 of the AILD Proposal.

²⁹ See Recital 16 of the AILD Proposal and the Impact Assessment Report, SWD(2022) 319 final, page 30.

³⁰ EDPB-EDPS Joint Opinion 5/2021 on the proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Proposed AI Act), 18 June 2021, paragraph 72.

³¹ For more information see the EDPS blog 'Explainable Artificial Intelligence needs Human Intelligence' available at https://edps.europa.eu/press-publications/press-news/blog/explainable-artificial-intelligence-needs-human-intelligence_en

thereby establishing causality is not more difficult than in situations where an AI system is not involved”.

31. The EDPS notes that that this clarification of the scope of the proposed AILD is provided only in a non-binding recital and does not have a corresponding legal provision in the operative part of the Directive. Nevertheless, he is concerned about the potential legal uncertainty it may create as well as by the risk for circumvention of the new AI liability rules by AI providers or users, e.g. by including a human actor who simply 'rubber-stamps' the outcome of the AI assessment, without offering any meaningful safeguards for the affected individuals ('automation bias')³². In such situations, the claimants would have to follow the standard liability rules, without any possibility to alleviate the burden of proof by taking advantage of the procedural safeguards foreseen in Article 3 and 4 of the AILD Proposal.
32. Therefore, in the interest of legal certainty, the EDPS recommends deleting the last two sentences of Recital 15 of the Proposal for AILD.

5.5. Burden of proof

33. The EDPS notes that despite the introduction of specific procedural safeguards such as disclosure of evidence and the rebuttable presumption of a causal link, aimed at alleviating the victims' burden of proof, the Proposed AILD would remain a fault-based liability regime, which means that victims would still have to prove the fault or negligence of the AI system provider, operator or user³³. Meeting such a requirement may be particularly difficult in the context of AI systems, where risks of manipulation, discrimination, and arbitrary decisions will be certainly occurring, even when the providers, operators and users have *prima facie* complied with their duty of care as defined by the proposed AI Act.
34. In its impact assessment report, the Commission has acknowledged that “the specific characteristics of the AI-system could make the victim’s burden of proof prohibitively difficult or even impossible to meet”³⁴. In order to overcome these proof-related difficulties, the Commission has evoked different approaches, among which the reversal of the burden of proof. In such a case, it would be for the provider or user of the AI system to prove that one or all conditions of liability are not fulfilled. As mentioned by the Commission, such a solution was proposed by the European Parliament for fault-based liability: the operator of an AI system would by default be liable for harm or damage caused by that system, unless they can prove that the harm or damage was caused without his or her fault³⁵.
35. The Commission has also recognized that representatives of consumer interests emphasised the crucial importance of the burden of proof for all AI products, stressing that it is almost impossible for the consumer to prove fault and even harder to prove causality. According to these consumer organisations, consumers should have to prove only the existence of a damage, the justification of the reversal of the burden of proof with respect to all other liability conditions relying on “the prevailing information asymmetry between consumers and professionals”³⁶. However, the Commission has not retained a general reversal of the

³² See also Guidelines on automated individual decision-making and profiling for the purposes of Regulation 2016/679, adopted by the former Article 29 Working party and endorsed by the EDPB, WP251rev.01, page 21, available at <https://ec.europa.eu/newsroom/article29/items/612053>

³³ See Recital 22 and Article 2(9) of the AILD Proposal.

³⁴ Commission staff working document impact assessment report accompanying the AILD, page 32.

³⁵ European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL)).

³⁶ Commission staff working document impact assessment report accompanying the AILD, page 86.

burden of proof among the different policy options, since this rule was criticised as unjustified by a number of representatives of the tech and software industry³⁷.

36. The EDPS therefore invites co-legislators to consider whether additional measures to further alleviate the burden of proof would not be a fairer and more balanced approach to address the challenges posed by AI systems to the effectiveness of EU and national liability rules.

5.6. Review

37. The EDPS does not underestimate the difficulty of establishing new liability rules in a constantly evolving area like AI. In this regard, the EDPS positively notes that the review of the AILD would specifically look into “the appropriateness of no-fault liability rules for claims against the operators of certain AI systems”³⁸. However, pursuant to Article 5(2) of the AILD Proposal, the review is envisaged after a relatively long period of 5 years.

38. In light of above, the EDPS recommends shortening of the review period, in order to achieve a timely understanding of the extent to which the natural persons who have suffered damages caused by an AI system have an effective access to compensation.

6. Conclusions

39. In light of the above, the EDPS makes the following recommendations:

- (1) *to ensure that individuals who have suffered damages caused by AI systems produced and/or used by EU institutions, bodies and agencies are not placed in less favourable position and can enjoy an equivalent level of protection as provided for in the Proposals;*
- (2) *to explicitly confirm that the AILD Proposal is without prejudice to Union data protection law;*
- (3) *to extend the procedural safeguards provided for in Article 3 and 4 of the AILD Proposal, namely the disclosure of evidence and the presumption of causal link, to all cases of damages caused by an AI system, irrespective of its classification as high-risk or non-high-risk;*
- (4) *to ensure that the information disclosed pursuant to Article 3 of the AILD Proposal is accompanied by explanations to be provided in an intelligible and generally understandable form;*
- (5) *to delete the last two sentences of Recital 15 of the AILD Proposal;*
- (6) *to consider additional measures to further alleviate the burden of proof for victims of AI systems as means to ensure the effectiveness of EU and national liability rules;*
- (7) *to shorten the review period laid down in Article 5(2) of the AILD Proposal.*

Brussels, 11 October 2023

(e-signed)

Wojciech Rafał WIEWIÓROWSKISKI

³⁷ Commission staff working document impact assessment report accompanying the AILD, pages 35 and 87.

³⁸ See Article 5 (2) of the AILD Proposal.