

EUROPEAN UNION PROPOSAL FOR THE REGULATION OF CIVIL LIABILITY FOR ARTIFICIAL INTELLIGENCE IN THE CONTEXT OF CORPORATE GOVERNANCE

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Introduction/background: Artificial intelligence (AI) is becoming increasingly important in today's business environment, but operation of AI devices may pose a risk to purchasers of products incorporating the AI or recipients of services using the AI. This risk must be taken into account by the entrepreneur in his or her business activity. For this to happen, the entrepreneur must know the legal regime under which he or she will be held liable in the event of damage caused by the AI he or she uses.

Aim of the paper: The article is devoted to a critical analysis of the draft Regulation of the European Parliament and of the Council on liability for the operation of artificial intelligence systems contained in the resolution of the European Parliament of 20 October 2020 with recommendations to the Commission on the liability regime for artificial intelligence (2020/2014 (INL)).

Materials and methods: The considerations in this article are based on the literature on the subject and on the European Parliament proposed a Regulation of the European Parliament and of the Council on liability for the operation of artificial intelligence systems. These materials have been subjected to critical analysis.

Results and conclusions: The conducted analysis leads the author to the conclusion that the proposed regulation introducing different liability regimes corresponds to the specificity of AI, and compulsory insurance for high-risk AI system operators is an important step towards securing the interests of the aggrieved party, however, limiting the operator's liability at the proposed level does not sufficiently guarantee protection of the interests of the victims. The author is also critical of the fact that the regulation links the compensation for personal injury to the economic consequences of the infringement of personal rights, does not regulate the issue of the causal link between the operation of AI systems and the damage and the difficulties of proof faced by victims of the operation of AI systems. Consequently, the author questions the advisability of regulating civil liability for the actions of artificial intelligence systems at EU level in the form of a regulation, when it would be sufficient to allow individual Member States to regulate this matter while harmonizing national regulations by means of a directive.

Keywords: civil liability, artificial intelligence, operator, enterprise management.

1. Introductory remarks

Artificial intelligence (AI) is becoming increasingly important in today's business environment. The term is used to describe a system that is capable of performing tasks that require a process of learning and taking new circumstances into account when solving a given problem and that can, to varying degrees - depending on its configuration - operate autonomously and interact with its environment (Lai, Świerczewski, 2020). This system, in the form of computer software, is incorporated into various types of products. However, its use raises a number of ethical, social and legal issues (Stylec-Szromek, 2018). Among the legal problems, the issues of the legal subjectivity of AI, exclusive rights to AI-created creations and civil liability for damage caused by AI emerge to the forefront (Auleytner, Stępień 2019).

This is because the operation of AI devices may pose a risk to purchasers of products incorporating the AI or recipients of services using the AI. The related risk for an entrepreneur using AI as part of its business activities, whether in the form of services provided or products offered, qualifies as an internal risk caused by organisational factors, in this case the technological solutions used by the entrepreneur (Iwaszczuk, 2021). The incorporation of this risk into business activities must be long-term and consistent with the overall business management strategy. For this to happen, the entrepreneur must know the legal regime under which he or she will be held liable in the event of damage caused by the AI he or she uses. Awareness of the risks and knowledge of the rules under which a trader will be held liable for the performance of the AI system he uses in his business will influence the decision to use a particular AI system.

For this reason, the basis of liability for damage caused by the operation of AI is being sought worldwide (see for instance Beckers, Teubner 2021), including in Poland (Bosek, 2019; Godlewska, Morawska, Banasik 2020; Lai, Świerczewski, 2020; Bączyk-Rozwadowska, 2021; Koczan, 2022). The inadequacy of existing civil law regulations on liability for damage caused by AI leads to a search for new legal solutions that correspond to the risks it poses (Bertolini, Episcopo, 2021). The European Parliament's response to this search is a resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL)) (OJ EU.C 2021, No. 404, p. 107). As part of this resolution, the European Parliament proposed a Regulation of the European Parliament and of the Council on liability for the operation of artificial intelligence systems (hereinafter RAIS).

The draft regulation, both in Poland (Michalak, 2021; Staszczuk, 2022) and in other countries (Sousa Antunes, 2020; Wenderhorst, 2020; Wagner, 2021), is assessed overwhelmingly critically. In the first instance, some authors point out that there is no need at all for a specific regulation of civil liability for the actions of artificial intelligence systems, which does not create new liability rules (Michalak, 2021; Wagner, 2021; Staszczuk, 2022). With regard to the specific solutions contained in the proposed regulation, the literature is

critical of the limitation of civil liability (Sousa Antunes, 2020; Michalak, 2021; Wagner, 2021), the linking of compensation for personal injury to the occurrence of economic consequences of the violation of personal rights (Sousa Antunes, 2020), the lack of comprehensive regulation of all problems related to civil liability for artificial intelligence systems e.g. concerning causation (Michalak, 2021) or facilitation of evidence (Staszczyk, 2022), or the overly restrictive liability of the front-end operator (Wenderhorst, 2020; Wagner, 2021).

The purpose of this article is, on the one hand, to critically assess the proposed regulation and, on the other hand, to familiarise practitioners and managers with the solutions adopted in the RAIS. The evaluation of the proposed regulation is based on a critical analysis of the text of the RAIS and the opinions expressed in the literature to date. The remainder of the article discusses the subject matter and scope of the RAIS, the proposed concept of an AI system, the entity responsible for the operation of an AI system, the principles and scope of liability for the operation of an AI system, the scope of compensation and its amount, and the issues of limitation of claims and insurance of liability for the operation of an AI system. The considerations in the article are crowned by the final conclusions.

2. Subject matter and scope

The proposed regulation sets out the rules for bringing, by both natural and legal persons, liability claims against AI system operators (Article 1 RAIS).

In the view of the EU legislator, the provisions of the Regulation are intended to apply throughout the European Union, where the physical or virtual operation of an AI system, the functioning of a device running on such a system, or a physical or virtual process based on such a system deprives persons of their lives, injures or maims them, causes damage to property of natural or legal persons, or causes serious intangible damage resulting in verifiable economic loss (Article 2(1) RAIS). The criterion for the application of the RAIS is therefore not the seat of the entity responsible for the damage, nor the place of operation of the AI system, but the place of the effect resulting from the operation of such system.

The Regulation provides for the primacy of its regulations over contractual obligations, which has the effect of sanctioning the nullity, in terms of the rights and obligations provided for in the RAIS, of any agreement between the operator of an AI system and a natural or legal person injured by the operation of that system which circumvents or restricts the rights and obligations provided for in the RAIS, regardless of whether such an agreement was concluded before the injury occurred or afterwards (Article 2(2) RAIS).

At the same time, the liability provided for in the RAIS does not exclude the right to assert additional liability claims arising from contractual relations (*ex contractu liability*) and regulations on product liability, consumer protection, non-discrimination, labour protection and

environmental protection between the operator and a natural or legal person harmed by the operation of an AI system, which may be brought against the operator under EU or national law (Article 2(3) RAIS).

3. The concept of an artificial intelligence system

First of all, it should be noted that it is in vain to find a definition of an AI in the RAIS, as the EU legislator decided only to formulate a legal definition of an AI system. For the purposes of the proposed regulation, it is understood to mean a system that relies on software or is embedded in devices, exhibits behaviour simulating intelligence based, *inter alia*, on collecting and processing data, analysing and drawing conclusions about the environment, and takes actions with a degree of autonomy to achieve a specific goal (Article 3a of the RAIS). The AI system therefore refers to both computer programmes and non-computer embedded programmes (Michalak, 2021, incorrectly). By “autonomous artificial intelligence system”, the RAIS understands an artificial intelligence system that operates on the basis of the interpretation of specific input data and uses a set of predefined instructions, but is not limited to these instructions, although the system's behaviour is constrained by the goal set for it, directed towards its achievement and conditioned by other relevant choices of the system developer (Article 3b RAIS).

4. Entity responsible for the operation of the artificial intelligence system

The regulation recognises both the front-end operator and the back-end operator as the subject of liability for damage caused by the operation of the AI. The operator may be either a natural or a legal person. It should be assumed that in Poland, the group of operators will also include legal entities. Thus, the solution adopted by the EU legislator as regards the entity responsible for AI operation seems to postpone for the time being the discussion on the issue of granting legal personality to the AI.

The first of the designated operators means a person who, to some extent, controls the risks associated with the operation of an AI system by deriving benefits from its operation (Article 3e RAIS). Control in this case means any action by the operator that affects the operation of the AI system and thus the extent to which the operator exposes third parties to potential risks associated with the operation of the AI system. Such actions can affect the operation at any stage by determining inputs, outputs or outcomes, or alter specific functions or processes in the AI system. The degree to which these aspects of the AI system's operation are determined

depends on the level of the operator's influence on the risks associated with the operation of the AI system (Article 3g RAIS). By back-end operator, on the other hand, the Regulation understands the person who continuously determines the features of the technology, provides data and basic support services, and therefore also exercises some control over the risks associated with the operation of the AI system (Article 3f RAIS). However, the Regulation exempts the back-end operator from the liability set out in the RAIS if its liability is already covered by regulations implemented in the legal orders of the Member States on the basis of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (Official Journal of the EU L No. 210, p. 29; hereinafter Directive 85/374/EEC) (Article 3d *in fine* RAIS).

This identification of the entity responsible for the damage caused by the AI allows, on the one hand, the easy identification of this entity by the victim and, on the other hand, a clear indication to the trader that he or she is responsible for the damage caused by the AI system used by him or her, which should be an impulse for the trader to take measures to minimise the risks involved.

5. Principles and responsibilities for artificial intelligence activities

Due to the insufficient protection offered to the injured party by the application of the existing rules of tort (*ex delicto*) and contract (*ex contractu*) liability towards the AI system operator, the EU legislator decided to introduce, with regard to AI system operators, a specific regulation providing for liability based on two different - already known to civil law - regimes of liability, i.e. strict liability and fault liability, thus complying with the demands made in the literature (Bączyk-Rozwadowska, 2021). The essence of the difference between the two regimes boils down to the fact that the entity incurring strict liability cannot discharge itself from liability by proving the lack of fault, i.e. exculpating itself, and will only be released from liability in strictly defined (so-called exonerative) circumstances.

The criterion determining the liability regime to which an operator is subject depends on whether or not the AI system in question is high risk. By high risk, we mean the significant potential for an autonomously operating AI system to cause random harm to one or more persons in such a way that it goes beyond what could reasonably be expected. The significance of this potential depends on the interplay between the severity of the potential harm, the degree of autonomy in decision-making, the likelihood that the risk will actually occur, and the manner and context of use of the AI system (Article 3c RAIS).

The liability of the operator of a high-risk AI system is based on the risk principle (Article 4(1) RAIS). Such systems - in the Annex to the Regulation in question - include three systems from the transport sector, i.e. unmanned aerial vehicles (UAVs) within the meaning of Article 3(30) of Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union agency for civil aviation safety and amending Regulation (EC) No 2111/2005, (EC) No 1008/2005, (EC) No 1008/2005, (EC) No 1008/2005 and (EC) No 1008/2005. Aviation Safety and amending Regulations of the European Parliament and of the Council (EC) No 2111/2005, (EC) No 1008/2008, (EU) No 996/2010, (EU) No 376/2014 and Directives of the European Parliament and of the Council 2014/30/EU and 2014/53/EU and repealing Regulations of the European Parliament and of the Council (EC) No 552/2004 and (EC) No 216/2008 and Council Regulation (EEC) No 3922/91 (Official Journal of the European Union L No. 212, p. 1), vehicles of automation level 4 and 5 according to SAE J3016 classification and autonomous traffic control systems, and two from the field of assistance provision, i.e. autonomous robots and autonomous washing machines for public places.

The liability of a high-risk AI system operator covers damage caused by a physical or virtual operation, a physical or virtual operation of a device, or a physical or virtual process using the AI system (Article 4(1) RAIS). As indicated in the Regulation, these operators cannot exempt themselves from liability by claiming that they acted with due diligence or that the damage was caused by an autonomous action, device or process controlled by an AI system belonging to them (Article 4(3), first sentence, RAIS). Force majeure (*vis maior*), on the other hand, is provided for as an exonerating circumstance for the operator (Article 4(3), 2nd sentence, RAIS).

At the same time, the EU legislator has introduced the primacy of RAIS over national liability regimes in the event of conflicting classifications of AI systems as covered by strict liability (Article 4(5) RAIS)

On the other hand, the liability of an AI system operator, which is not a high risk and therefore not listed in the annex to the regulation in question, is shaped on the basis of fault (Article 8(1) RAIS). It is understood that this liability covers both intentional and unintentional fault. The liability of such an operator covers damage caused by the physical or virtual operation of that AI system, the operation of a device controlled by that system or by a process based on that system (Article 8(1) *in fine* RAIS). Such an operator may exculpate itself, including by claiming that the AI system was activated without its consent, while all reasonable and necessary measures were taken to avoid such activation beyond the operator's control or due diligence was exercised by performing all of the following: selected the appropriate AI system for the task and skills involved, commissioned it appropriately, supervised its operation and maintained it in good condition by regularly installing available updates. However, the operator cannot escape liability by stating that the damage was caused by the autonomous operation of the AI system, by the autonomous operation of a device controlled by such a system or by

a process based on such a system. Damage caused by force majeure is also excluded from the operator's liability (Art. 8(2) RAIS).

An exception has been made in the liability of a high-risk operator of an AI system based on the principle of fault in favour of the situation where the damage has been caused by a third party who has interfered with the operation of the AI system by modifying its functioning or effects, but whose whereabouts cannot be established or who is insolvent. In such a case, the operator is liable irrespective of whether fault can be attributed to it (Article 8(3) RAIS) and therefore in equity. In order to make it possible to determine the operator's liability, an obligation is imposed on the producer of the AI system, at the request of the operator or the injured party, to cooperate with them and provide them with information to the extent justified by the seriousness of the claim (Article 8(4) RAIS).

Regardless of whether the operator of an AI system, which is subject to a high degree of risk or not, is liable, if the damage is caused either by the physical or virtual operation of the AI system, the operation of a device controlled by such a system or by a process based on such a system and the actions of the victim or of any person for whose actions the victim is liable under the Regulation, and the victim or any third party has therefore contributed to the damage, the liability of the operator is reduced accordingly. On the other hand, the operator's liability is excluded altogether where the injured party or a person for whom he is responsible is solely responsible for the damage caused (Article 10(1) RAIS). The operator who is held liable may use data generated by the artificial intelligence system to prove that the injured party is also liable in accordance with 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 (Official Journal of the EU. L No. 119, p. 1) and other relevant data protection legislation. The injured party may also use such data to prove or specify a claim for damages (Article 10(2) RAIS).

The liability of several operators operating one AI system has been made joint and several by the EU legislator, which means that it is up to the injured party to choose which of the jointly liable operators to address his or her claims to. The legislator has also stipulated that, where the front-end operator is also the manufacturer of the AI system, this regulation takes precedence over Directive 85/374/EEC. On the other hand, if the back-end operator can also be considered as a producer of an AI system as defined in Article 3 of Directive 85/374/EEC, that Directive applies to it with priority over the Regulation. Finally, where the sole operator is also the manufacturer of an AI system, the Regulation in question takes precedence over Directive 85/374/EEC (Article 11 of the RAIS).

The proposed regulation also contains rules on recourse between AI system operators and between an AI system operator and a manufacturer. The condition for recourse by the operator is that the operator has paid the victim the full amount of compensation to which the victim is entitled under this regulation (Article 12(1) RAIS). Where the operator is jointly and severally liable with other operators towards the injured party and has itself paid the full amount of

compensation to the injured party, it is entitled to recover its share of compensation from the other operators. The proportions of liability depend on the degree of control each operator has over the risks associated with the operation of the AI. In the event of the insolvency of one of the operators jointly and severally liable to the injured party, its share of the jointly and severally liable compensation is borne by the other operators. The jointly and severally liable operator that pays compensation to the injured party and demands an adjustment of the advance payments from the other responsible operators shall subrogate to the rights of the injured party to claims for compensation against the other operators. This subrogation shall not prejudice the original claim (Art. 12(2) RAIS). In the event that the operator of the defective AI system fully compensates the injured party, in accordance with the provisions of the Regulation in question, he may exercise his right to claim compensation from the manufacturer of the defective AI system in accordance with the provisions of Directive 85/374/EEC and national legislation on liability for defective products (Article 12(3) RAIS). In the event that the operator's insurer compensates the injured party in accordance with the regulations of the Regulation in question, the operator's insurer shall exercise a right of recourse against another person for the same damage, in the amount of the compensation paid to the injured party by that insurer (Article 12(4) RAIS).

6. Scope and amount of compensation

The liability of the operator covers any damage caused, regardless of whether the operator is a high-risk (Article 4(1) RAIS) or non-risk (Article 8(1) RAIS) AI system operator. Reparable harm is defined as an adverse effect on the life, health and physical integrity of a natural person, on the property of a natural or legal person, or an adverse effect causing serious intangible damage resulting in verifiable economic loss (Article 3i RAIS). It follows that damage in RAIS terms is framed quite broadly to include both so-called personal injury, and therefore immaterial damage, and material damage.

In turn, an aggrieved party entitled to compensation is person who has suffered or suffered damage as a result of a physical or virtual action, device or process using an AI system and who is not also an operator (Article 3h RAIS). The circle of victims therefore includes consumers as well as other traders who are affected by the operation of an AI system.

At the same time, however, compensation is limited as to its amount, albeit only in the case of a high-risk operator of an AI system. It is limited to a maximum of €2 million in the event of death, injury or maiming of a person as a result of the operation of an AI system and a maximum of €1 million in the event of serious immaterial damage resulting in verifiable economic loss or damage to property, including the destruction of several objects belonging to the victim as a result of a single operation of a single AI system. However, if under the contract

the injured party also has a claim against the operator, no compensation is payable under this regulation if the total value of the destroyed property or serious immaterial damage does not exceed €500 (Article 5(1) RAIS). Furthermore, where the total compensation to be paid to several persons injured by the same operation of the same AI exceeds the limits indicated above, the amounts paid to each of the injured persons shall be reduced proportionally so that the total compensation does not exceed the limits indicated above (Article 5(2) RAIS).

The compensation to be paid by the operator liable for the mutilation resulting in the death of the victim is calculated - up to €2 million - on the basis of the medical expenses incurred by the victim prior to death and the property damage incurred prior to death due to the cessation or limitation of earning capacity or the increase in needs due to the damage incurred prior to death. The operator held liable should also reimburse the burial expenses of the injured party to the party who incurred these expenses. If, at the time of the incident that caused the damage and consequently led to death, the injured party was in a relationship with a third party and was legally obliged to maintain that third party, the liable operator shall bear the maintenance of that third party to the extent that the injured party would have been obliged to bear those costs, for a period corresponding to the life expectancy of a person of that age and condition. The operator shall also bear the maintenance costs of the third person if, at the time of the incident, he or she has already been conceived but not yet born (Article 6(1) RAIS). The compensation to be paid by the operator responsible for the injury or mutilation of the injured person shall include, up to an amount of €1 million, reimbursement of the costs of medical treatment related to the injury, as well as reimbursement of the costs of material damage suffered by the injured person as a result of the temporary suspension, limitation or total cessation of earning capacity or of the increase in needs resulting from the injury, certified by a medical certificate (Article 6(2) RAIS).

Limiting the compensation due to the injured party should be assessed negatively. While the limitation of the amount of liability of the operator, as established by the EU legislator, will be irrelevant in the case of minor damages to individuals, including personal injury, in the event of the death of an individual or injury to their health or maiming, may result in the operator not covering part of the damage caused by the operation of an AI system. This will be particularly evident where more than one person is affected by a particular AI action, resulting in a proportional re-education of the compensation to which they are entitled. The limitation of the operator's liability will also adversely affect situations where damage in excess of €1 million arises to the operator's assets.

At the same time, it should be noted that both the limits on the amount of damages to be paid by the operator and the extent of such liability set out in the regulation in question do not apply to a non-risky AI system operator with liability based on fault. Indeed, these issues in this case are subject to the national regulations of individual Member States (Article 9 RAIS).

7. Limitation of claims

Claims of an injured party by the high-risk operation of an AI system are subject to the limitation periods set out in the regulation in question. In the case of claims relating to death, damage to health or invalidity, the limitation period is 30 years from the date on which the damage occurred. (Article 7(1) of the RAIS) By contrast, for claims relating to damage to property or serious intangible damage resulting in verifiable economic loss, the limitation period is 10 years from the date on which the damage to property or verifiable economic loss resulting from serious intangible damage occurred, or 30 years from the date on which the high-risk AI operation that led to the destruction of the victim's property or serious intangible damage was carried out. The claim shall be barred by the expiry of whichever period ends first. (Article 7(1) of the RAIS) The issue of suspension and interruption of the limitation period is, however, subject to the national law of individual Member States (Article 7(3) of the RAIS), which in the case of Poland means the application of Articles 121 of the Civil Code and 123 and 124 of the Civil Code.

With regard to claims directed against the AI system operator, which is not a high risk, the EU legislator did not decide to introduce specific limitation periods, referring in this respect to the national law regulations of individual member states (Article 9 RAIS), which in the case of Poland is equivalent to the application of Article 442 of the Civil Code.

8. Artificial intelligence liability insurance

The proposed regulation introduces mandatory third-party liability insurance for a high-risk AI system operator to the extent and amount limit of such operator's liability indicated above, responding to the doctrine's demands on this issue (Bączyk-Rozwadowska, 2021). This applies to both the front-end operator for the operation of the AI system and the back-end operator for the services it provides. Where the compulsory insurance schemes of the front-end operator or the back-end operator already in force under other national or EU legislation or voluntary corporate insurance funds cover the operation of the AI system or the service provided, the obligation to insure the AI system or the service provided under this regulation is fulfilled if the said existing compulsory insurance or voluntary corporate insurance funds cover the aforementioned scope and limits of the amount of compensation. (Article 4(4) RAIS) However, the liability insurance obligation does not apply to the operator of an AI system, which is not a high risk. For these operators, their liability insurance is therefore voluntary.

9. Concluding remarks

The attempt by the EU legislator to regulate liability for AI should be assessed positively, although individual solutions may be considered controversial. On the one hand, the introduction of a differentiated liability regime tailored to the specific nature of the AI and the introduction of compulsory insurance for operators of high-risk AI systems are to be welcomed as an important step towards safeguarding the interests of those affected by the operation of the AI. On the other hand, however, the quantitative limitation of the liability of the operator at the level proposed by the European Parliament, which in many cases may be too low in relation to the damage caused by an AI operation and the linking of compensation for personal injury to the existence of the economic consequences of the violation of personal rights should be criticised. The regulation's failure to regulate the matter of the causal link between the operation of AI systems and the damage and the evidentiary difficulties faced by victims of AI systems also deserves criticism. This raises doubts as to the appropriateness of regulating civil liability for the actions of AI systems at EU level in the form of a regulation, when it would be sufficient to allow individual Member States to regulate the matter while harmonising national regulations by means of a directive.

The proposed regulation is not indifferent to the management of a company, especially if the entrepreneur uses AI in its activities, which are particularly high-risk. Therefore, he or she will not only have to constantly monitor whether he or she is liable as an operator and take measures to minimise the risk of damage caused by the use of AI, but also to include the costs of possible damages and compulsory insurance in the costs of business.

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