

GROUNDS FOR EXCLUSION OF LIABILITY FOR DAMAGE CAUSED BY ARTIFICIAL INTELLIGENCE: A TRADITIONAL APPROACH TO NEW TRENDS***

Summary

The subject of this paper is the analysis and reconsideration of the grounds for exclusion of liability for damage caused by artificial intelligence. The aim of the paper is to identify and examine the relevant bases of liability for damage caused by artificial intelligence and, accordingly, to present the potential grounds for its exclusion. The paper, therefore, seeks to outline the exonerating grounds that may apply within the framework of traditional tort law in the continental legal tradition, as well as to highlight potential difficulties or shortcomings in their application to cases where damage has been caused by artificial intelligence in the broadest sense of the term. The purpose of the paper is also to emphasize the need to analyze and reconsider traditional legal concepts in order to ensure their alignment with modern legal developments, particularly in light of the continuous digitalization and rapid advancement of artificial intelligence in the modern era. In preparing this paper, the relevant legislation of the Republic of Serbia has been used, along with instruments aimed at harmonizing artificial intelligence law at the level of the European Union, such as the Artificial Intelligence Act and the Proposal for a Directive of the European Parliament and of the Council on Adapting Non-Contractual Civil Liability Rules to Artificial Intelligence.

Keywords: *Liability for Damage, AI Liability Directive, Strict Liability, Artificial Intelligence, Tort Liability.*

* Associate, Institute of Comparative Law, Belgrade, e-mail: i.radomirovic@iup.rs, ORCID: <https://orcid.org/0000-0001-8818-1464>

** Senior Research Associate, Institute of Comparative Law, Belgrade, e-mail: j.vukadinovic@iup.rs, ORCID: <https://orcid.org/0000-0002-3949-4672>

*** This work is a result of research within the project "Adapting the Legal Framework to Social and Technological Changes with a Special Focus on Artificial Intelligence", carried out in 2025 by the Institute of Comparative Law with financial support from the Ministry of Science, Technological Development and Innovation (contract number 451-03-136/2025-03/200049).

1. INTRODUCTION

The development of artificial intelligence as a global phenomenon and its impact on society as a whole is comprehensive and pervasive, affecting all social spheres.¹ In confronting the challenges brought by artificial intelligence, the law, in its inherent tendency to regulate relevant social relations, faces multiple challenges and dilemmas. Although new phenomena often require new solutions, the law rarely arrives at entirely innovative, previously unseen responses. As a rule, legal doctrine and practice tend to rely on existing frameworks. In doing so, traditional concepts are frequently invoked to accommodate and adapt social novelties to established views and solutions, even though such approaches may ultimately prove inadequate or incompatible with actual needs.² Most often, such rigid approaches lead to a continuous need for re-examination and subsequent amendments, which introduces legal uncertainty into the system and creates the impression that the law cannot keep pace with reality. Nevertheless, one should not disregard the existence of doctrinally and practically well-established legal institutions, which, over time, have been refined and developed to a high level of quality and theoretical sophistication. Moreover, few legal solutions emerge *ex nihilo*; rather, they are typically built upon pre-existing foundations, which are then elaborated and adjusted to meet specific needs. Therefore, established legal frameworks for various relations should not be prematurely abandoned merely because they appear, at first glance, ill-suited to contemporary realities.

In line with the above considerations, the paper is structured so as to reflect the positions presented. Accordingly, the first part of the paper is devoted to the issue of liability for damage caused by the use, operation, or functioning of artificial intelligence in a broader sense, with particular reference to the questions that have most frequently been the subject of scholarly debate and have attracted the greatest academic attention. The following section deals with the general rules on liability for damage and the foundations of liability rooted in the continental legal tradition, highlighting the advantages and disadvantages of their application to artificial intelligence. Thereafter, the paper presents the solutions contained in one of the most important initiatives aimed at regulating the field of liability for artificial intelligence, the Proposal for a Directive of the European Parliament and of the Council on Adapting Non-Contractual Civil Liability Rules to Artificial Intelligence (AI Liability Directive), and other EU instruments where necessary, emphasizing its specific features.³ One section of the paper is also dedicated to the issue of the grounds for exemption from liability for damage caused by artificial

¹ J. Vukadinović Marković, I. Kambovski, "The Application of Artificial Intelligence in Healthcare: Diagnostic Potential, Legal Framework and Ethical Challenges", *Srpska politička misao* (accepted).

² For a similarly motivated evolution of the form of the arbitration agreement: I. Radomirović, J. Vukadinović Marković, „Forma arbitražnog sporazuma”, *Revija za evropsko pravo* 1/2023, 99.

³ 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 2022/0303(COD).

intelligence, both in the context of the AI Liability Directive and in national legal systems, taking into account the scope of application of the Directive. Finally, in accordance with the authors' intended goal, the paper concludes with final reflections aimed at assessing the current state of law within the European Union and, consequently, within the legal systems of its Member States and other jurisdictions that follow their model, while underscoring the advantages and shortcomings of the current normative framework.

2. LIABILITY FOR DAMAGE CAUSED BY ARTIFICIAL INTELLIGENCE

The presence of artificial intelligence in contemporary life is widespread, perhaps even more pervasive than it may initially appear. Beyond its so-called virtual presence on the Internet and in other digital environments, artificial intelligence has transcended the boundaries of the virtual realm and firmly entered the real world, becoming integrated into various social spheres and relations, including private homes, workplaces, transportation systems, public spaces.⁴ The diversity of its applications inevitably entails a corresponding diversity of risks of harm to personal interests and human property. In this respect, the AI Act⁵ also recognizes the need to regulate artificial intelligence in such a way as to ensure safeguards against misuse and violations of human rights and freedoms.⁶ Since it is evident that artificial intelligence, despite its attribute of "intelligence" cannot itself bear responsibility for the harm it causes,⁷ it follows that a responsible party must be identified. The list of potential responsible persons, though not necessarily direct wrongdoers, is extensive, and may include various actors such as manufacturers, system administrators, maintenance providers, as well as the owners or users of the artificial intelligence system.

Although the very purpose of developing and employing artificial intelligence is to minimize the risk of harm caused by human error, alongside, of course, enhancing efficiency and productivity, it nevertheless occurs that the operation of artificial intelligence itself results in damage to human personal or property rights.⁸ Thus, artificial intelligence can generate the same kind of harm as any other causal factor. It is beyond doubt that, in addition to the occurrence of damage, the establishment

⁴ B. Arsenijević, „Odgovornost za štetu od veštačke inteligencije“, in: *Prouzrokovanje štete, naknada štete i osiguranje* (eds. Z. Petrović, V. Čolović, D. Obradović), Institut za uporedno pravo, Udruženje za odštetno pravo, Pravosudna akademija, Beograd-Valjevo 2023, 136.

⁵ Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) (Text with EEA relevance) PE/24/2024/REV/1.

⁶ I. Miljuš, „Algoritmi veštačke inteligencije za „ocenu rizika“ u domenu savremenog prognozirajućeg rada policije“, *Strani pravni život* 3/2025, 399.

⁷ Although the potential legal personality of artificial intelligence, even in a limited or partial form, has already been the subject of numerous debates, no legal instrument has departed from the so-called anthropocentric model of legal personality.

⁸ B. Arsenijević, 137, 138.

of a causal link between the harmful act and the resulting damage is a general prerequisite for liability.⁹ This brings us, potentially, to the final condition for establishing liability. A particularly challenging question is whether liability for damage caused by artificial intelligence should depend on fault or exist independently of it. The key issue for further analysis is therefore the role of fault in establishing liability, which leads us back to the fundamental basis of liability for damage. Naturally, fault must be attributable to a specific person, which makes it essential to determine whose fault will constitute the basis for liability. On the other hand, if one accepts the view that artificial intelligence inherently generates a higher level of risk of damage, liability in such cases could be considered objective. Although this assumption might simplify the analysis, it cannot be convincingly maintained as a general rule that artificial intelligence necessarily increases the risk of damage. Artificial intelligence, as a technological and global phenomenon, is highly diverse in its manifestations and therefore cannot be said to *a priori* create a certain degree of risk, let alone an increased one. In accordance with the definition contained in the AI Act, risk is defined as “the combination of the probability of an occurrence of harm and the severity of that harm”, meaning that the assessment of liability must depend on the specific form and function of the given AI system. The term itself is extremely broad, encompassing a wide range of technologies such as computer programs, algorithms, and robots, which are automated and capable of making autonomous decisions,¹⁰ which significantly complicates the drawing of general conclusions. For instance, the AI Act, in Article 3, defines the concept of an AI system as follows:

„AI system’ means a machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments”.¹¹

The question of whether there exists an increased risk of damage can be directly linked to the very nature of artificial intelligence. The existence of such risk depends on its characteristics, its mode of operation, and its capacity to develop and change throughout its use. When referring to its nature, the primary consideration is its ability to function autonomously. The relevant issue is whether artificial intelligence, or its use, exceeds the boundaries of ordinary, socially acceptable risk, and whether the person who creates and maintains such risk should also bear responsibility for it. However, before reaching a final conclusion on this

⁹ For damage caused by a violation of competition rules, see J. Vukadinović Marković, “The German Model of Collective Redress in Competition Law: Lessons and Recommendations for Serbia”, *Economics of Enterprise* 7–8/2025.

¹⁰ N. Zdraveva, „Odgovornost za štetu prouzrokovanu upotrebom sistema veštačke inteligencije u pravu Evropske Unije – stanje i izazovi”, in: *Veštačka inteligencija: izazovi u poslovnom pravu* (ed. D. Popović), Pravni fakultet Univerziteta u Beogradu, Beograd 2024, 198.

¹¹ Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (AI Act) (Text with EEA relevance) PE/24/2024/REV/1, Art 3.1.

matter, it is necessary to conduct an analysis of the range of persons who may be held liable for the damage, as the identity and characteristics of the liable party may influence the determination of the type of liability to be applied.

2.1. The Person Liable for Damage Caused by Artificial Intelligence

In the Explanatory Memorandum accompanying the AI Liability Directive, which sets out its rationale and objectives, the European Commission provides the reasons why the existing national rules of the Member States governing civil liability are not deemed adequate to regulate, in a uniform manner across the European Union, liability for damage caused by artificial intelligence. The specific features that characterize AI - such as its complexity, autonomy, and even opacity or lack of transparency - make it exceptionally difficult and financially burdensome, among other things, to identify and prove the status and responsibility of the liable party.¹² This fact supports the assertion that national legal systems, within their traditional frameworks, often face difficulties in responding to the challenges posed by the emergence of artificial intelligence, which is precisely one of the key motives behind the introduction of this Proposal.¹³ In the field of liability for damage caused by artificial intelligence, the aforementioned AI Liability Directive, together with the Product Liability Directive, which complements it, forms a coherent legislative framework designed to address different aspects of liability arising from the use and operation of AI systems,¹⁴ as well as Digital Services Act to some extent,¹⁵ together form a set of legislative instruments that aim to regulate this area at the level of the European Union.¹⁶

Under the general concept of liability for damage, the injured party has two main avenues for seeking compensation. The first allows a claim against the manufacturer under a regime of strict liability, provided that the harm was caused by a defect in the product itself. The second, applicable in most situations, enables the injured person to pursue compensation on the basis of fault. With regard to the first route, it should be noted that a harmonised Product Liability Directive has been in force since 1985. By contrast, all other aspects of damage liability remain governed by fragmented national legal systems.¹⁷

In the AI Liability Directive, liability for damage caused by an artificial intelligence system has a subjective character, that is, it is based on fault (fault-based

¹² AI Liability Directive, Explanatory Memorandum.

¹³ M. Ziosi *et al.*, “The EU AI Liability Directive (AILD): Bridging Information Gaps”, *European Journal of Law and Technology* 3/2023, <https://ejlt.org/index.php/ejlt/article/download/962/1079/4212>, 31. 10. 2025.

¹⁴ Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products and repealing Council Directive 85/374/EEC (Text with EEA relevance) PE/7/2024/REV/1.

¹⁵ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance) PE/30/2022/REV/1.

¹⁶ M. Ziosi *et al.*

¹⁷ Sh. Li, B. Schütte, “The Proposed EU Artificial Intelligence Directive. Does/Will Its Content Reflect Its Ambition?”, *Technology and Regulation* 2024, 143.

liability) rather than on the principle of strict or objective liability.¹⁸ That is clearly stems from the provisions of the AI Liability Directive itself, particularly in Article 4, which states that the presumption of causality applies if the liable person has breached a duty of care (*'failure to comply with a duty of care'*).¹⁹ Therefore, for liability to exist, it is necessary to establish the existence of fault, a failure to fulfil obligations relevant to the use, supervision, or development of the AI system.²⁰ In other words, liability does not arise automatically from the mere realization of risk but only if it is proven that the damage resulted from a failure to comply with the duty of care, whether on the part of the provider or the user of the AI system.²¹

It is considered that, in the event of damage caused by artificial intelligence, the liable person should be identified as the one connected to its production or operation.²² This category may include a wide range of persons, starting with software engineers, programmers, and individuals performing similar tasks, but also many others. The complexity of such cases is further increased by the participation of users in the ongoing development and functioning of artificial intelligence. Namely, even individuals who input certain data into AI software, or who, through their use, enrich and enhance it in a way that influences its further evolution, may, in that sense, be considered connected to the production or operation of artificial intelligence.²³ This also includes persons who hold ownership rights. Furthermore, if we rely on the formulation contained in the Serbian Law on Obligations²⁴ regarding general liability for damage caused by a dangerous object or dangerous activity, the person deemed liable is its holder, which, by its nature, is a broader concept than that of the owner. In legal doctrine, the holder of a dangerous object is understood to be the person who derives direct benefit from the object, possesses the authority to dispose of it, and is in a position to eliminate or prevent the occurrence of harm.²⁵

3. GROUNDS OF CIVIL LIABILITY FOR DAMAGE AND THEIR RELATION TO DAMAGE CAUSED BY ARTIFICIAL INTELLIGENCE

The explanatory part preceding the normative section of the AI Act sets out the reasons for adopting a clearly defined risk-based approach. The drafters of

¹⁸ *Ibid.*, 144.

¹⁹ On the criticism of the solution related to the breach of the negligence rule, see: A. Bertolini, *Artificial Intelligence and Civil Liability. A European Perspective*, Policy Department for Justice, Civil Liberties and Institutional Affairs, Brussels 2025, 74 and further.

²⁰ S. Narayanan, M. Potkewitz, A risk-based approach to assessing liability risk for AI-driven harms considering EU liability directive, 2023, 8, <https://arxiv.org/abs/2401.11697>, 31. 10. 2025.

²¹ Ph. Hacker, The European AI Liability Directives - Critique of a Half-Hearted Approach and Lessons for the Future, 2023, 48, <https://arxiv.org/pdf/2211.13960>, 31. 10. 2025.

²² B. Arsenijević, 143.

²³ S. Narayanan, M. Potkewitz, 1–17.

²⁴ Zakon o obligacionim odnosima – ZOO, *Službeni list SFRJ*, br. 29/78, 39/85, 45/89 – odluka USJ i 57/89, *Službeni list SRJ*, br. 31/93, *Službeni list SCG*, br. 1/2003 – Ustavna povelja i *Službeni glasnik RS*, br. 18/2020.

²⁵ J. Radišić, *Obligaciono pravo*, Pravni fakultet Niš, Niš 2019, 279.

the AI Act recognized the need to introduce a proportional and effective binding regulatory framework applicable to all AI systems. This approach, as stated in the explanatory section, is designed so that the type and substance of the applicable rules correspond to the level of risk that may arise from the operation of an AI system. It is therefore further emphasized that it is necessary to identify and prohibit certain practices in the field of artificial intelligence that, from the perspective of the legislators, are deemed unacceptable.

Another argument in favor of establishing objective liability, besides the ones previously mentioned, in addition to the notion that responsibility should lie with those who create and maintain an increased risk of harm, concerns the potential difficulties in proving fault, particularly in cases that are inherently complex due to the involvement of sophisticated machines and technologies.²⁶ In addition, general reasons for introducing rules on strict, or objective, liability include the following: the fact that the person who uses an object that poses an increased risk of causing harm is in the best position to be aware of that risk and, consequently, has the greatest ability to minimize and control it.²⁷ Further reasons include the prevention of harmful events from the perspective of the economic analysis of law, as well as the frequent economic superiority of the person using a high-risk object, since such objects often require a certain level of financial capacity, and those persons are generally also capable of obtaining insurance coverage against such liability.²⁸ When it comes to the reasons or motives that justify establishing liability for damage regardless of the fault of the wrongdoer and/or the responsible party, it may be concluded that the specific nature of liability for damage caused by artificial intelligence can justify its regulation as a form of objective liability. Moreover, the application of the principle of fault-based, or subjective, liability to AI systems is considerably more difficult since such systems are characterized by unpredictability and the capacity for advancement and development without direct human influence.²⁹

Since liability in this case is, nevertheless, subjective, in accordance with the position adopted in the AI Liability Directive, it is based on the culpable conduct of the liable person. It is therefore necessary to establish a breach of obligations by the liable person, specifically those relating to compliance with the standard of due care in the performance of actions or activities that could potentially cause harm to others,³⁰ but in the context of the specificities imposed by AI. Here, as throughout the entire normative framework regulating artificial intelligence,

²⁶ M. Karanikić Mirić, *Objektivna odgovornost za štetu*, Službeni glasnik, Beograd 2019, 35.

²⁷ *Ibid.*, 35, 36.

²⁸ *Ibid.*, 36–40.

²⁹ M. L. Montagnani, M.-C. Najjar, “The EU Regulatory Approach(es) to AI Liability”, in: *European Union Law Working Papers* (eds. F. Sigfried, R. Vogl), Stanford Law School, the University of Vienna School of Law, Stanford, Vienna 2023, <https://law.stanford.edu/wp-content/uploads/2023/04/EU-Law-WP-76-MontagnaniNajjar.pdf>, 31. 10. 2025.

³⁰ B. A. Koch *et al.*, “Response of the European Law Institute to the Public Consultation on Civil Liability – Adapting Liability Rules to the Digital Age and Artificial Intelligence”, *Journal of European Tort Law* 1/2022, 25–63. <https://doi.org/10.1515/jetl-2022-0002>, 31. 10. 2025.

the degree of risk is of particular importance, and the obligations imposed will depend on the level of risk associated with a given system.³¹ Thus, such obligations will be prescribed with respect to system design. For lower-risk systems, there will be a duty to take into account requirements concerning transparency, environmental protection, and inclusiveness, whereas for high-risk systems a wide range of requirements will apply, including those related to data quality, data processing and management, effective oversight, and other relevant safeguards.³²

4. 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)

In presenting the AI Liability Directive, the European Commission took the position that the rules on liability established within national legal systems, particularly those based on fault, are not suitable for regulating liability for damage caused by artificial intelligence.³³ The reason cited lies in the demanding and lengthy nature of the evidentiary process in such proceedings, which becomes even more complex due to the involvement of AI systems, and may also lead to legal uncertainty as a result of the risk of inconsistent decision-making by national courts.³⁴ One of the main normative techniques of the AI Liability Directive is the extensive use of rebuttable legal presumptions, which will be discussed in further detail later in the text.

The Proposal for a Directive on Adapting Non-Contractual Civil Liability Rules to Artificial Intelligence aims to form a balance between the free development and use of artificial intelligence and the protection of individuals from the damages that such systems may cause.³⁵ One of the main characteristics of the AI Liability Directive is the issue of proving causation and the possibility of exemption from liability in situations where the nature of AI systems makes it difficult to apply traditional rules of civil liability.³⁶ As is evident from the very title of the Proposal, it regulates exclusively the matter of non-contractual liability, while issues of contractual and criminal liability remain outside its scope.^{37, 38} More precisely, the

³¹ S. Wachter, "Limitations and Loopholes in the EU AI Act and AI Liability Directives: What This Means for the European Union, the United States, and Beyond", *Yale Journal of Law & Technology* 26(3)/2023, 677, 678.

³² Đ. Krivokapić, A. Nikolić, „Odgovornost u doba veštačke inteligencije“, in: *Odgovornost i savremenost – odgovornost u savremenom društvu* (ed. A. Losonczi), SANU, ogranak u Novom Sadu, Novi Sad 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4563932, 31. 10. 2025.

³³ The starting point was not the same as in other unification efforts aimed at finding solutions in the field of the law of obligations. I. Višnjić, „Posledice nedostatka forme ugovora u evropskom pravu i pravima evropskih zemalja“, *Revija za evropsko pravo* 27/2015, 36–38.

³⁴ N. Zdraveva, 209.

³⁵ S. Narayanan, M. Potkewitz, 1-17.

³⁶ M. Ziosi, *et al.*

³⁷ Sh. Li, B. Schütte, 143.

³⁸ Serious criticism may be directed at the substance of the AI Liability Directive, although it should be borne in mind that its aim is to regulate AI-related liability at a minimal level. It is considered that the Proposal should

AI Liability Directive does not provide for exemption from liability but introduces procedural mechanisms that allow for the mitigation of liability or the shifting of the burden of proof under certain conditions.³⁹ This reflects the understanding that artificial intelligence systems operate autonomously, that their functioning often involves complex algorithms and automated decision-making processes whose causes are difficult to identify, which creates serious obstacles for injured parties in proving their claims, particularly in establishing the existence of a causal link.

In this context, the proposal introduces a rebuttable presumption of causality aimed at alleviating the position of the injured party. In this way, it relaxes the rules on the burden of proof imposed on the injured party, significantly improving their procedural standing and serving as an incentive for the protection of victims' rights in potential judicial proceedings.⁴⁰ According to the Article 4 of the AI Liability Directive, if the injured party proves that there has been a breach of the duty of care by the liable person, for example, a failure to comply with obligations⁴¹ of transparency, safety, or supervision established by the Artificial Intelligence Regulation, and that it is likely that such a breach contributed to the occurrence of the damage, a causal link between the failure and the damage shall be presumed, unless the liable person proves otherwise.⁴² Such a solution, in effect, provides the possibility that, in certain cases, the defence against liability may be based on proving that causation could not be established or that the damage resulted from circumstances beyond the control of the liable party.⁴³ What further improves the position of the injured party is the possibility for the court to order the disclosure of relevant evidence, particularly in relation to high-risk AI systems,⁴⁴ which are suspected of having caused the damage, thereby significantly facilitating the process of identifying the liable party. If the liable person fails to comply with such an order, a rebuttable presumption is introduced that this person has not fulfilled their duty of care, which indirectly affects their position in the court proceeding.⁴⁵

Of particular importance is the provision stipulating that the presumption of causality does not apply in cases involving high-risk AI systems if the liable person proves that the injured party had access to all the information and technical means necessary to establish causation independently.⁴⁶ In this way, the possibility

have addressed the possibility of opting for and/or combining claims based on contractual and non-contractual liability for damage, which is of particular importance for countries that do not prohibit the cumulation of claims on different grounds, as well as for those legal systems in which the scope of compensation may vary depending on the basis of liability.

³⁹ D. Lunca, "Towards a Coherent EU Civil Liability Regime for AI-Caused Harm", *European Journal of Law and Public Administration* 12(1)/2025, 45.

⁴⁰ Sh., Li, B. Schütte, 143.

⁴¹ D. Lunca, 23-50.

⁴² AI Liability Directive, Art. 4.1.

⁴³ Sh. Li, B. Schütte, 145.

⁴⁴ M. Ziosi, *et al.*

⁴⁵ Sh. Li, B. Schütte, 148.

⁴⁶ AI Liability Directive, Art 4.4.

of exemption from the presumption of liability is introduced in situations where the injured party was in a position to prove the link between the conduct and the damage but failed to do so.

The AI Liability Directive also distinguishes between professional and non-professional users of AI systems.⁴⁷ With regard to non-professional users, who do not act in the capacity of traders and who have not had any real influence over the functioning of the system, the presumption of causality does not apply, which in effect means that such users may be exempted from liability if they were unable to control the operation of the system or foresee the consequences of its use.⁴⁸ Although these provisions do not constitute an exemption from liability in the strict sense, they introduce flexibility and allow for an adequate consideration of the specific circumstances of each case. In this way, the Directive establishes a framework in which liability for damage caused by artificial intelligence is well adapted, and the possibility of exemption from liability exists not as a privilege but as an exception based on demonstrated diligence and transparency.⁴⁹ Such an approach serves a dual function: it protects injured parties from legal uncertainty while also providing legal certainty to those who apply the regulations conscientiously and in accordance with the requirements of the Union.⁵⁰ In conclusion, the European legislator does not seek to weaken liability but rather to adapt it to the context of new technological circumstances, while at the same time preserving the fundamental principle of fairness and responsibility for the harm caused (*neminem laedere*).⁵¹

4.1. The Scope of Grounds for Exemption of Liability for Damage Applicable to Liability for Damage Caused by Artificial Intelligence

The previously mentioned mechanisms, taken together, do not constitute grounds for the exclusion of liability in traditional sense, as they do not completely eliminate responsibility, but they do allow the liable person to avoid the application of the presumption of causality if they can prove that the injured party had access to all the necessary evidence or that they had no real influence over the system.⁵²

Within the discussion on liability for damage caused by artificial intelligence, a particularly complex issue concerns the range of grounds for exclusion of liability, since traditional tort law institutes do not account for the specific features of systems that operate autonomously, learn from data, and develop their own patterns of behaviour. In traditional civil law systems of continental Europe,

⁴⁷ Sh. Li, B. Schütte, 145.

⁴⁸ AI Liability Directive, Art. 4.6.

⁴⁹ AI Liability Directive, explanatory provisions from 14 to 16.

⁵⁰ S. Narayanan, M. Potkewitz, 1-17.

⁵¹ B. Garcia, „The Regulation of AI Liability in Europe: A Critical Overview of Two Recent Directive Proposals – the (New) AILD and the (Revised) PLD”, *e-Publica* 3/2024, 39.

⁵² *Ibid.*, 36.

exonerating grounds, such as self-defence or the consent of the injured party, for example, serve as instruments through which liability may be mitigated or excluded, or as situations in which a claim for compensation would be considered contrary to the principles of fairness and the social function of civil liability.⁵³

In the AI Liability Directive, the classical grounds for exclusion of liability found in national civil law systems, such as self-defence, necessity, acting to prevent harm to another, self-help, consent of the injured party, and others, are not specifically regulated in the text of the Directive. This is intentional, as the proposal does not deal with the substantive grounds of liability but rather with procedural instruments designed to facilitate the proof of causation and access to evidence in cases involving artificial intelligence.⁵⁴

In the explanatory memorandum to the proposal, particularly in Recital 13, it is explicitly stated that the Directive *‘does not harmonise the conditions for liability itself, such as the definition of fault, damage or the grounds for exemption from liability’*. Therefore, the grounds and reasons for exemption from liability remain within the competence of the national law of each Member State. This means that questions concerning the existence of any legal institutes excluding liability for damage will be assessed according to the rules of tort law in each Member State, rather than under the AI Liability Directive. The AI Liability Directive neither prescribes nor excludes such grounds but simply leaves them to the existing domestic norms governing liability for damage.

In this sense, the structure of liability introduced by the AI Liability Directive can be understood as an additional rule that operate alongside national rules, that is, it regulates only those situations in which proving the causal link is difficult due to the complexity of AI systems, while all grounds for exclusion of liability for damage continue to be governed by domestic law. In other words, if a dispute were brought before the national court, the court would first apply the procedural mechanisms established by the AI Liability Directive, such as presumptions and other provisions, and then, when determining liability itself, it would apply national rules on exemption from liability.

However, in the context of artificial intelligence, the question of applicability of these institutes may become unclear. The autonomy and independence of AI systems often make it difficult to identify the cause of the harmful event and the legal subject who could invoke exonerating grounds.⁵⁵ For instance, the question arises whether the unpredictable behavior of an AI system should be regarded as a force majeure in the traditional sense, or rather as a risk inherent in its use, and therefore foreseeable and attributable to the party deploying it. This issue stands

⁵³ More about civil liability, see: J. Vukadinović Marković, I. Radomirović, „Pravo na naknadu štete kao posledica povrede receptum arbitri -građansko pravna odgovornost arbitara”, in: *Zbornik radova XXV Međunarodna naučna konferencija Prouzrokovanje štete, naknada štete i osiguranje* (eds. Z. Petrović, V. Čolović, D. Obradović), Institut za uporedno pravo, Beograd-Valjevo 2022, 231–245.

⁵⁴ Sh. Li, B. Schütte, 143.

⁵⁵ M. L. Montagnani, M. C. Najjar.

as one of the important points of discussion in determining how classical legal doctrines can be applied to the realities of artificial intelligence.⁵⁶ Another example illustrating the difficulty of applying classical legal rules is the institute of the consent of the injured party, which also encounters ambiguities, given that in many cases users do not have a genuine understanding of how artificial intelligence works.

In EU law, namely within the AI Liability Directive, there is a clear effort to redefine these traditional exemption grounds by the means of risk management and algorithmic transparency. This shift moves the focus away from classical notion of causation and fault toward the assessment of the reasonableness of the preventive measures undertaken. However, such an approach raises a new question: whether the introduction of special rules for artificial intelligence risks disturbing the balance between protecting the injured party and safeguarding the interests of the liable party, particularly in relation to the preservation of confidential information, for example.⁵⁷

On the one side, if the exemption grounds were to be defined too broadly, the victim would be deprived of effective protection. On the other side, if they were set too narrowly, the development and application of artificial intelligence could be seriously discouraged. Therefore, it is argued that the rules on the exemption of liability for damage should be interpreted restrictively. This approach aims to avoid a situation in which no person can be identified as liable for damage caused by the artificial intelligence, while at the same time ensuring that those engaging with AI, particularly professional users, are not unduly discouraged and are able to preserve their competitive advantage.

5. CONCLUSION

Liability for damage caused by artificial intelligence represents one of the most current and significant topics and challenges of modern law, as it requires a reconsideration of the fundamental institutes of civil liability in light of technological advancements, namely artificial intelligence. Classical models of liability, based on the assumptions of the existence of a legal subject endowed with consciousness, will, and the ability to control their actions, are faced with a serious challenge when it comes to artificial intelligence systems that operate autonomously, learn independently, and make decisions without direct human intervention.⁵⁸

Within the continental legal tradition, liability for damage is generally based on fault, that is, on the establishment of unlawful conduct and a causal link between such conduct and the resulting damage. However, in the context of artificial intelligence, the concept of fault loses much of its functionality, since it is difficult, and sometimes impossible, to identify elements of consciousness or

⁵⁶ Ph. Hacker.

⁵⁷ M. Ziosi *et al.*

⁵⁸ N. Zdraveva, 209.

intent in autonomous systems. Consequently, the focus shifts toward the objects of liability and the consideration of the possibility of applying models of strict, risk-based liability. Although the continental European legal tradition already recognizes strict liability as an independent basis of liability, for example, in the case of dangerous objects and hazardous activities, the question arises as to whether these models can be fully applied to artificial intelligence systems, given their high degree of autonomy and unpredictability.

In the most recent regulatory initiative, the AI Liability Directive, a modified regime of fault-based liability has been proposed, which seems less suitable to address the challenges posed by tort law in the field of artificial intelligence. The European legislator, through this proposal, introduces the presumption of liability for those who exercise “control” over the risks generated by artificial intelligence. This may be interpreted as a partial shift from the traditional notion of fault toward concepts of risk and harm prevention.

Nevertheless, the AI Liability Directive has rightly been subject to serious criticism in legal scholarship regarding its scope of application, as it covers only fully automated AI systems, while those involving a human factor remain excluded. In addition to its overly narrow material scope, it could be argued that, once a risk-based classification of AI systems has been introduced, the legislator could have considered a differentiated approach to liability for each risk category. This would have reflected the reality that, even in national legal systems, which should serve as valuable foundations for new European legal solutions, strict liability is not imposed for every type of risk, whereas for excessively high levels of risk, fault is considered unnecessary as a condition for establishing liability.

Further criticism has been directed at the conception of fault in the Directive proposal (despite the Explanatory Memorandum stating that the Directive does not affect the substantive concepts of tort law), as fault has been heavily objectivised, thereby creating a kind of inversion of the traditional relationship between causation, typically regarded as an objective element, and fault.

It is therefore necessary to devise compromise solutions that reconcile the principles of traditional tort law with new approaches based on prevention, risk management, and the proportional allocation of liability, while preserving the core values of legal certainty, fairness, and predictability that underpin every modern legal system. Such solutions should, on the one hand, avoid hindering or discouraging further development and advancement of artificial intelligence systems, while, on the other hand, remaining faithful to the values and foundations of traditional tort law.

Business entities engaged in the production, dissemination, or management of artificial intelligence today approach cross-border business operations with caution, due to uncertainty regarding the application of traditional tort rules to cases involving AI. Consequently, the strategic frameworks of EU Member States reveal a tendency to regulate this matter also at the national level. The Republic of Serbia,

likewise, seeks to position itself as one of the codificatory innovators in this area, and the forthcoming results of such legislative efforts are eagerly awaited, both as a valuable contribution to further scholarly debate and as a step toward improving the legal framework for liability for damage caused by artificial intelligence.

Ivana Višnjić

Institut za uporedno pravo, Beograd

Jelena Vukadinović Marković

Institut za uporedno pravo, Beograd

OSNOVI ZA ISKLJUČENJE ODGOVORNOSTI ZA ŠTETU KOJU PROUZROKUJE VEŠTAČKA INTELIGENCIJA: TRADICIONALNI PRISTUP NOVIM TENDENCIJAMA

Apstrakt

Predmet rada je analiza i preispitivanje osnova za isključenje odgovornosti za prouzrokovanu štetu koju prouzrokuje veštačka inteligencija. Cilj rada je da se kroz analizu odgovarajućeg osnova za odgovornost za štetu koju prouzrokuje veštačka inteligencija, prikažu i potencijalni osnovi za njeno isključenje. Stoga, radom se teži prikazati koji su to oslobađajući razlozi koji se mogu primeniti u materiji takozvanog tradicionalnog deliktneog prava kontinentalnog pravnog kruga, te prikaza potencijalnih poteškoća ili nedostataka istih u primeni na slučajeve kod kojih je štetu prouzrokovala veštačka inteligencija u najširem smislu reči. Cilj rada je da se, uz prikaz problematike koja je tema ovog rada, ujedno ukaže i na potrebu analize, pa i preispitivanja tradicionalnih koncepta, radi usklađivanja sa savremenim pravnim tekovinama, a naročito sa opšteprisutnom digitalizacijom i ubrzanim razvojom veštačke inteligencije u savremeno doba. U izradi rada su korišćeni relevantni propisi Republike Srbije, kao i instrumenti kojima se teži harmonizaciji prava veštačke inteligencije na nivou Evropske unije, kao što je Uredba o veštačkoj inteligenciji i Predlog direktive Evropskog parlamenta i Saveta o prilagođavanju pravila vanugovorne građanske odgovornosti veštačkoj inteligenciji.

Ključne reči: *odgovornost za štetu, oslobađajući razlozi, objektivna odgovornost, veštačka inteligencija, deliktne odgovornost.*

References

Arsenijević, B. „Odgovornost za štetu od veštačke inteligencije”, in: *Prouzrokovanje štete, naknada štete i osiguranje* (eds. Z. Petrović, V. Čolović, D. Obradović), Institut za uporedno pravo, Udruženje za odštetno pravo, Pravosudna aka-

- demija, Beograd-Valjevo 2023, 135–155. https://doi.org/10.56461/ZR_23.ONS.08
- Bertolini, A. *Artificial Intelligence and Civil Liability. A European Perspective*, Policy Department for Justice, Civil Liberties and Institutional Affairs, Brussels 2025.
- Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products and repealing Council Directive 85/374/EEC (Text with EEA relevance) PE/7/2024/REV/1.
- Garcia, B. “The Regulation of AI Liability in Europe: A Critical Overview of Two Recent Directive Proposals – the (New) AILD and the (Revised) PLD”, *e-Publica* 3/2024, 27–41.
- Hacker, Ph. “The European AI Liability Directives – Critique of a Half-Hearted Approach and Lessons for the Future”, <https://arxiv.org/pdf/2211.13960>, 31. 10. 2025.
- Karanikić Mirić, M. *Objektivna odgovornost za štetu*, Službeni glasnik, Beograd 2019.
- Koch, B. A., Borghetti, J. S., Machnikowski, P., Pichonnaz, P., Rodríguez de las Heras Ballell, T., Twigg-Flesner, Ch., Wendehorst, Ch. “Response of the European Law Institute to the Public Consultation on Civil Liability – Adapting Liability Rules to the Digital Age and Artificial Intelligence”, *Journal of European Tort Law* 1/2022, 25–63, <https://doi.org/10.1515/jetl-2022-0002>, 31. 10. 2025.
- Krivokapić, Đ., Nikolić, A., „Odgovornost u doba veštačke inteligencije”, in: *Odgovornost i savremenost – odgovornost u savremenom društvu* (ed. A. Losoncz), SANU, ogranak u Novom Sadu, Novi Sad 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4563932, 31. 10. 2025.
- Li, Sh., Schütte, B. „The Proposed EU Artificial Intelligence Directive. Does/Will Its Content Reflect Its Ambition?”, *Technology and Regulation* 2024, 143–151. <https://doi.org/10.71265/82fwbw94>
- Lunca, D. “Towards a Coherent EU Civil Liability Regime for AI-Caused Harm”, *European Journal of Law and Public Administration* 1/2025, 23–50. <https://doi.org/10.18662/eljpa/12.1/253>
- Miljuš, I. „Algoritmi veštačke inteligencije za „ocenu rizika” u domenu savremenog prognozirajućeg rada policije”, *Strani pravni život* 3/2025, 387–406. https://doi.org/10.56461/SPZ_25303KJ
- Montagnani, M. L., Najjar, M.-C. “The EU Regulatory Approach(es) to AI Liability”, in: *European Union Law Working Papers* (eds. F. Sigfried, R. Vogl), Stanford Law School, the University of Vienna School of Law, Stanford, Vienna 2023, <https://law.stanford.edu/wp-content/uploads/2023/04/EU-Law-WP-76-MontagnaniNajjar.pdf>, 31. 10. 2025.
- Narayanan, S., Potkewitz, M. A risk-based approach to assessing liability risk for AI-driven harms considering EU liability directive, Working Paper 2023, 1–17, <https://arxiv.org/abs/2401.11697>, 31. 10. 2025.
- 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 2022/0303(COD).

- Radišić, J. *Obligaciono pravo*, Pravni fakultet Niš, Niš 2019.
- Radomirović, I., Vukadinović Marković, J. „Forma arbitražnog sporazuma”, *Revija za evropsko pravo* 1/2023, 91–106.
- Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance) PE/30/2022/REV/1.
- Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) (Text with EEA relevance) PE/24/2024/REV/1.
- Višnjić, I. „Posledice nedostatka forme ugovora u evropskom pravu i pravima evropskih zemalja”, *Revija za evropsko pravo* 27/2025, 33–53.
- Vukadinović Marković, J. “The German Model of Collective Redress in Competition Law: Lessons and Recommendations for Serbia”, *Economics of Enterprise* 7–8/2025.
- Vukadinović Marković, J., Kambovski, I., „The Application of Artificial Intelligence in Healthcare: Diagnostic Potential, Legal Framework and Ethical Challenges”, *Srpska politička misao* (accepted).
- Vukadinović Marković, J., Radomirović, I. „Pravo na naknadu štete kao posledica povrede receptum arbitri -građansko pravna odgovornost arbitara“, u: *Zbornik radova XXV Međunarodna naučna konferencija Prouzrokovanje štete, naknada štete i osiguranje* (eds. Z. Petrović, V. Čolović, D. Obradović), Institut za uporedno pravo, Beograd-Valjevo 2022, 231–245.
- Wachter, S. “Limitations and Loopholes in the EU AI Act and AI Liability Directives: What This Means for the European Union, the United States, and Beyond“, *Yale Journal of Law & Technology* 3/2023, 671–718.
- Zakon o obligacionim odnosima – ZOO, *Službeni list SFRJ*, br. 29/78, 39/85, 45/89 – odluka USJ i 57/89, *Službeni list SRJ*, br. 31/93, *Službeni list SCG*, br. 1/2003 – Ustavna povelja i *Službeni glasnik RS*, br. 18/2020.
- Ziosi, M., Mökander, J., Novelli, C., Casolari, F., Taddeo, M., Floridi, L. “The EU AI Liability Directive (AILD): Bridging Information Gaps”, *European Journal of Law and Technology* 3/2023, <https://ejlt.org/index.php/ejlt/article/download/962/1079/4212>, 31. 10. 2025.
- Zdraveva, N. „Odgovornost za štetu prouzrokovanu upotrebom sistema veštačke inteligencije u pravu Evropske Unije – stanje i izazovi“, u: *Veštačka inteligencija: izazovi u poslovnom pravu* (ed. D. Popović), Pravni fakultet Univerziteta u Beogradu, Beograd 2024, 195–218. https://doi.org/10.51204/Internet_Dijalog_2410A