Aligning the Product Liability Directive with the circular economy and emerging technologies
Revision of Directive 85/374/EEC

This briefing is one in a series of ‘implementation appraisals’, produced by the European Parliamentary Research Service (EPRS), on the operation of existing EU legislation in practice. Each briefing focuses on a specific EU law that is to be amended or reviewed, as envisaged in the European Commission’s annual work programme. The briefing aims at providing a succinct overview of publicly available material on the implementation, application and effectiveness to date of specific EU law, drawing mainly on input from EU institutions and bodies. Implementation appraisal briefings are provided by the Ex-Post Evaluation Unit of EPRS, to assist parliamentary committees.

SUMMARY

Adopted in 1985, the Product Liability Directive (PLD) introduced a strict, harmonised product liability framework and legal certainty for producers and consumers facing damage caused by defective products. The PLD has co-existed for almost 40 years with national liability rules, offering a fault-based product liability system. The PLD also complements other legal instruments within the EU liability framework that address, for example, contractual liability and product safety. Significant societal change since 1985, leading to new ways to produce, distribute and operate products and services on the internal market, poses challenges for the current EU liability regime.

As the EU is committed to a green and digital transition, which is expected to bring enormous benefits to society and the economy, it is all the more important to update the product liability rules so that the regulatory framework for compensation ensures equal treatment, whether the damage stems from use of emerging technologies or not. On 28 September 2022, the Commission launched a revision of the product liability rules by presenting two separate initiatives. The first is for a directive on liability for defective products. It repeals the existing PLD by adapting the product liability rules to the circular and digital world. The second is a new proposal for a directive on adapting extra-contractual civil liability rules to artificial intelligence, with the aim of creating a harmonised, fault-based civil liability framework for Member States. Both proposals seek to address the challenges identified in the PLD evaluation report, further developed in the white paper on artificial intelligence (AI) and in the report of the Expert Group on liability and new technologies.

The European Parliament has highlighted the need to adapt the EU liability rules in several resolutions, including legislative-initiative resolutions. It has called for a product liability regime to underpin the functioning of the internal market, including a level playing field with adequate legal certainty for all businesses, while ensuring high protection of consumers’ health and property. Several other EU institutions have also urged the Commission to update the PLD in order to serve the EU’s aspiration to become a leader in green and digital technologies and to achieve climate-neutrality by 2050.
Legal framework

At the time the Product Liability Directive (PLD) was adopted in 1985, the Commission saw a need to harmonise the fragmented legal protection on damage caused by defective products, to fulfil three objectives: free movement of goods, protection of consumers’ health and property and undistorted competition among market operators in the single market. At that time, product liability rules were fragmented due to discrepancies between national rules. PLD introduced a common set of rules enabling harmonisation and an equal level of protection throughout the single market using the concept of strict liability – without fault, negligence or intent – of producers for damage caused by defective products. It set common EU rules by providing an extra-contractual liability regime to claim financial compensation for death, personal injuries or material damage above a certain threshold – equivalent to €500 today – caused by an item or product intended for private use. The injured person need only prove the product defect, the damage and the causal link between them. The injured person has three years within which to seek compensation from the date on which they became aware of the damage, the defect and the identity of the producer. An expiry period protects the producer, who is no longer liable once 10 years has elapsed since the product was put on the market.

According to successive application reports and the recent evaluation report, the PLD manages to strike the right balance, allowing consumers to claim compensation for damage caused by defective products and imposing strict liability on producers. The PLD provides for exhaustive harmonisation on the matters it covers explicitly, leaving several issues to national legislation, such as contractual liability, specific product liability and tort liability. Consequently, many countries have a complementary and more comprehensive consumer protection regime than the one explicitly provided for in the PLD.

Over the years, only two articles (Articles 2 and 15) of the PLD have been subject to amendment; that was in 1999. The amending directive extended the principle of strict liability to primary agricultural products and game, originally excluded from the scope of the directive (see Articles 2 and 15). This happened in the aftermath of the ‘mad cow disease’ crisis. The amendment also extended the definition of a product to cover all moveables, including electricity.

The original legal basis of the PLD was Article 100 of the Treaty establishing the European Economic Community (TEEC), now Article 114 of the Treaty on the Functioning of the European Union (TFEU), on the approximation of laws to ensure the internal market functions properly. It is also the legal basis for the proposed two new legal acts on product liability.

The Commission launched a revision of the product liability rules by presenting two separate initiatives on 28 September 2022. A proposal for a directive on liability for defective products, repealing the existing PLD, extends the product liability rules to the circular economy and digital world while a new proposal for a directive on adapting non-contractual civil liability rules to AI extends fault-based civil liability rules to AI and provides for targeted harmonisation. The two Commission proposals seek to provide effective and proportionate ways to achieve a thorough revision of the PLD and a targeted approach to civil liability rules on AI. They seek to harmonise EU liability rules only to the extent necessary to ensure a certain degree of legal certainty and EU-wide consumer protection. By doing so, they recognise the principle that in a fast-developing area, such as AI, legislation should leave room for future developments.

By minimising the risks linked to emerging technologies and embracing circular business models, the revision package continues the process of modernising the EU’s product safety and product liability rules. At the heart of this process is the revision of the General Product Safety Directive and specific sectorial safety legislation, such as revision of the Machinery Directive. Recent updates of consumer protection measures and rules on dispute resolution also tie in with this revision process. The package builds on the AI act, in particular the definition of artificial intelligence systems and risk-related considerations. On the circular economy, the 2020 action plan included a sustainable product policy, but did not provide for measures on liability for defective products.
Aligning the product liability directive with the circular economy and emerging technologies

According to the preliminary findings of an EPRS study, the potential economic and social European added value of a revision of the EU civil liability regime for AI systems could be substantial. The analysis suggests that by 2030, common EU action could generate as much as €54.8 billion for the EU economy in terms of acceleration of AI development and research activities. Taking into account the broader impacts – reduction in accident numbers, and positive health and environmental impacts, for instance – of a clear and coherent EU civil liability regime for AI, EU added value could reach as much as €498.3 billion. The impact assessment for the new proposal for an AI liability directive, identifies increased legal certainty, reduced fragmentation of the regulatory landscape and an increased level of consumer uptake in AI technologies as potentially generating added value in the range of €500 million to €1.1 billion, depending on the choice of policy options.

Box 1 – Definitions of the product and the producer in Directive 1985/374/EEC, as amended

According to Article 2, the term product as including all movables, even if incorporated into another movable or into an immovable. Electricity is also a product.

According to Article 3, the term producer covers the manufacturer of a finished product, the producer of any raw material and the manufacturer of a component part and any person who, by putting their name, trademark or other distinguishing feature on the product presents themselves as its producer.

Implementation and application in practice

All the Member States transposed the PLD and its amendments. The PLD allowed national leeway on certain issues. Notably it allowed derogation from the 'development risk clause'. Under this derogation, each Member State may establish strict producer liability even if the producer proves that the state of scientific and technical knowledge at the time when the product was put into circulation was not such as to enable the existence of a defect to be discovered. Five Member States opted for this derogation. Some Member States used national options and elaborated on certain of the directive's concepts, for example, establishing the criterion of when a product is put into circulation; the time within which the supplier of the product must inform the injured person of the identity of the producer; and the deadline for recourse against the producer.

Five application reports

Article 21 of the PLD imposes an obligation on the Commission to present a report on its application every five years and, if needed, allows the Commission to submit proposals to revise its content. The first application report (1995) was published 10 years after the adoption of the PLD. However, the first report noted that practical experience of the PLD’s application was still rather limited, owing in part to its late transposition by some Member States. The report also noted the slow development of national jurisprudence. At the time of the first report, no references for preliminary rulings had been made to the Court of Justice of the European Union. The first report did not see a need for amendments, although it mentioned the debate over the burden of proof of the injured person – i.e. their duty to demonstrate a causal link between the product defect and the damage – as something that might become problematic in some cases.

During the negotiations on amending directive 99/34/EC, the European Parliament called for an extensive revision of the PLD. The Commission reacted by launching a green paper on liability for defective products, in order to collect evidence from stakeholders on how the directive had worked in practice and whether it should be modified. The findings of the green paper, published in 1999, underpinned the second application report (2001), in which the Commission’s view remained unchanged – no need to update the PLD. However, it proposed short- and medium-term follow-up activities directly linked to product liability to address the concerns brought up in the green paper.

The manifold follow-up measures included the establishment of the Expert Group on product liability to provide the Commission with special expertise on the applicability of the PLD and to assist in developing principles for possible adaptations.
Other measures in areas complementary to product liability included the recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes. The Commission also published a green paper on alternative dispute resolution (ADR), which contributed to better access to justice and broadened the scope of dispute resolution options, including in product liability cases. The second report also identified certain issues, such as environmental liability and treatment of mental damage, as new areas to examine, alongside some longstanding issues, such as burden of proof; development risks; the impact of the €500 threshold and the financial limit for compensation; the liability period; and the insurance requirement.

In December 2002, the Council proposed to amend the Product Liability Directive. However, the Commission did not consider it necessary to propose amendments or updates to the PLD, as the stakeholders did not express demand for major revision.

The third report (2006) was accompanied by two studies on the application of the PLD. It reported an increase in Court of Justice of the European Union (CJEU) preliminary rulings on product liability and expressed concern at diverging jurisprudence between national courts in some Member States, with potentially adverse effects on competitiveness in the internal market. In the conclusions of the third report, the Commission underlined that the harmonisation and interpretation of legal concepts of the PLD could be achieved through the case law of the CJEU, through continuous analysis within the working groups, and through the Commission’s monitoring of national transposition measures. From 2001 to 2006, the CJEU gave several important rulings on PLD. These covered issues such as the concept of damage and the definition of ‘putting a product into circulation’, including cases relating to the transposition of the PLD.

The fourth report (2011), underpinned by a consultation of national experts and stakeholders reported an increase in the number of product liability cases before national courts. Greater consumer awareness and better organisation of consumer groups were seen as possible reasons for this increase. However, in some countries, the high cost of court litigation potentially discouraged consumers from seeking to defend their rights. The report also noted an increase in out-of-court settlements for compensation. The CJEU gave a number of rulings during the 5-year period of the fourth application report, including four cases for preliminary rulings. The issues requiring constant monitoring by the Commission and reporting in subsequent application reports remained to a large extent the same in the third and fourth reports. Issues such as burden of proof, concept of defect, development risk, minimum threshold, novel products, defence of regulatory compliance, and access to justice featured prominently on that list.

The fifth report (2018) was accompanied by the PLD evaluation report. It clearly signalled a need to revise the product liability rules to maintain legal certainty in changing times. It emphasised the complementarity between the legal frameworks for product safety and for product liability. The technology-neutral safety framework should prevent accidents as far as possible whereas the liability framework should ensure that those who nevertheless suffer injury are compensated.

The impact of emerging technologies and global value chains on the definition and scope of the PLD was evident and created a need to clarify various concepts, such as (i) the distinction between products and services, (ii) the distribution of costs between different parties, (iii) the definition of a producer and (iv) the burden of proof. Only a few cases were brought before the Court of Justice of the European Union between 2011 and 2017. The Expert Group convened in two configurations: the product liability formation and new technologies formation.

Evaluation report

The evaluation report, published at the same time as the fifth application report, was carried out as part of the Commission’s regulatory fitness and performance (REFIT) programme. Underpinned by a study, the evaluation report explained the extent to which the three main objectives of the PLD – consumer protection, undistorted competition and free movement of goods – had been fulfilled and gave a positive appraisal of its effectiveness and uniform interpretation. The evaluation report concluded that the directive had provided legal certainty for several decades but that certain concepts needed clarification for it to remain fit for purpose.
In terms of efficiency, the directive was deemed balanced on the division of costs and benefits to all sizes of companies, while the situation looked more complex for consumers. Costs relating to the burden of proof or to the judicial procedure created most problems as they essentially reduced access to justice. Nevertheless, it is worth noting that the costs and benefits relating to the PLD varied greatly by Member State. The greatest administrative burden was indeed the cost and duration of judicial procedures, which did not derive from the directive itself but did have direct impact on its efficiency in practice.

The analysis of the coherence of the PLD covered consistency with other relevant EU legislation and the extent to which divergences prevented achievement of its objectives. According to the evaluation report, the PLD was aligned with EU safety legislation, EU consumer protection rules and the rules applicable in disputes. Product safety rules define the general safety measures whereas product liability rules stipulate the right for compensation caused by a defective product. However, the revisions of the Machinery Directive and Radio Equipment Directive and other updates in this policy area, stemming from the digitalisation of the economy, have amplified the need to review the PLD. For the PLD to stay relevant and coherent it needs to ensure the same level of protection for victims of both emerging and traditional technologies, while also fostering innovation.

How well the legal act under revision responds to the current problems defines its relevance. The analysis concluded that the PLD remained relevant in meeting its original objectives in the context of tangible products. In terms of emerging technologies, however, the relevance of the current concepts was clearly compromised.

The EU added value of having a common harmonised product liability framework across the single market as opposed to separate actions by Member States remained uncontested, according to the evaluation report. Without harmonisation, the differing sets of Member States’ liability measures would have led to varying levels of consumer protection and created a fragmented business environment, causing legal uncertainty for manufacturers and producers. Regarding the current revision, the need to act is imminent since several Member States are envisaging targeted measures in their national AI strategies, to respond to the challenges posed by emerging technologies.

The evaluation concluded by raising certain aspects of the directive that merited scrutiny in light of the revision. Old concepts, such as the distinction between products and services were considered no longer as clear-cut as they were at the time when the PLD was adopted. Similarly, the original definition of a ‘producer’ was considered outdated in the context of the circular economy and emerging technologies, since products might be more easily and more often than previously altered, adapted and combined with services. The existing definition of a ‘producer’, which is essential in defining the scope of strict liability, may no longer be fully relevant either. The concept of burden of proof appears challenging for complex products, such as pharmaceuticals and emerging technologies, and in terms of access to and availability of technical information, which is essential for consumers to prove a link between defect and damage. Moreover, the material damage threshold of €500 to get compensation under the PLD can be seen as a barrier for consumers and limit the number of claims. Finally, the limitation of damage to physical and material damage, to the detriment of other types of damage, such as environmental or mental harm, was highlighted as an area for a potential update.

The evaluation report and the study examined national case law on product liability from 2000 to 2016, covering 798
claims in all Member States. The products claimed to be defective usually originated from the same Member State as that in which the claim was introduced. Only a few cases concerned products originating from another Member State. The distribution of cases by sector revealed that raw materials (21.2%), pharmaceuticals (16.1%), vehicles (15.2%) and machinery (12.4%) triggered most claims under the PLD. Overall, about 60% of the claims brought for defective products were successful. Notably, the most common reasons for rejection related to the concept of the burden of proof. The claims were settled using means normally available under private law (see Figure 1). Almost half the cases were settled through direct negotiations (46%), while 32% were resolved in court, and 15% by means of mechanisms for alternative dispute resolution. Consequently, the study concluded that most of the product liability claims were settled out of court. A small share (7%) were resolved by other available instruments, such as the insurance of the party responsible.

Road to revision

The work of the Expert Group on Liability and New Technologies and the evaluation report clearly identified a need to revise the PLD. The road to revision continued in 2020 with a white paper on AI – ‘A European approach to excellence and trust’ – accompanied by the report on safety and liability on artificial intelligence, internet of things and robotics, and European strategy for data. The evaluation report revealed issues relating specifically to the PLD, whereas the white paper on AI and the report, as well as the Expert Group, analysed further the nature of and risks relating to questions specific to emerging technologies. The EU aspires to become a secure and dynamic data-agile economy. The white paper and accompanying report, as well as the data strategy, presented policy options for the trustworthy and secure development of AI in Europe, fully upholding EU values and citizens’ rights. The data strategy also set out policy measures, including for mobilising public and private investment for sustainable economic growth and societal wellbeing. The white paper introduced an ‘ecosystem of excellence’ and an ‘ecosystem of trust’ and identified key requirements for high-risk AI.

Box 2: Special characteristics of AI and challenges to the existing product liability framework

Artificial intelligence is a collection of technologies combining data, algorithms and computing power. The special characteristics of AI – complexity, opacity, openness, autonomy, predictability and vulnerability – challenge the existing framework in various ways.

**Complexity of products:** the division between products and services is blurred and increasingly intertwined. Software and artificial intelligence might be part of a product, enable the use of a product or form an independent product. Software or other data-driven services might be steering a tangible product, or might be essential to the functioning of a large number of products. Moreover, the complexity of the internet of things environment leads to multiplication of the different factors mentioned above and may further complicate identification of where damage originates and where responsibility lies.

**Connectivity and openness:** this aspect of AI raises concerns about cybersecurity and exposes the vulnerability of data-driven systems. Currently, it is not clear whether such damage would fall under the coverage of damage compensated by the PLD. Additional questions concern whether compensation should be linked to a notion of reasonable use and the issue of contributory negligence, such as failure to update a software or programme.

**Autonomy, opacity and predictability:** access to algorithms and data can be costly and difficult, which in practice affects the possibility to fulfill the requirement of burden of proof. The autonomous side of AI-applications may affect the safety of the product by substantially changing its qualities. This sheds doubt on the future of the current guiding principle of EU safety and product liability where the producer ensures all products put on market should be safe throughout their lifecycle for reasonable, expected use.

Sources: Expert Group, Liability for AI and other emerging digital technologies, 2019; and European Commission, white paper on AI, COM(2020)65.

**In the inception impact assessment (IIA) published in June 2021, the Commission presented the objectives of its upcoming initiative. It confirmed that the general objectives would remain the same in the revision as they had for almost four decades: to ensure proper functioning of the internal market and high-level consumer protection. However, the specific objectives were announced as relating closely to the need to update the PLD. First, the aim was to bring liability rules up to date**
with the needs and challenges of today's society, not least to cover the risks and characteristics of emerging technologies and new circular business models. Second, the revision was intended to create trust in innovative products, by ensuring equal protection throughout the single market and reducing the obstacles preventing injured parties from seeking compensation for damage.

The inception impact assessment (IIA) confirmed many of the findings already highlighted in the evaluation report and studies. It raised two major challenges: 1) the fact that liability rules are no longer fit for the requirements of the digital age and the circular economy; 2) the need to tackle current obstacles to getting compensation and obstacles in ensuring competitiveness in the internal market. The complexity of emerging technologies challenges several concepts of the current legal framework. The intangibility, connectivity and cybersecurity of digital solutions play a critical role in the revision of risk assessments and the scope of damage, which are no longer limited to physical or material damage. Online value chains pose challenges for injured parties who might have difficulties in identifying the producer responsible. Emerging technologies and AI are especially challenging in this context. Injured parties bear the burden of proof when it comes to showing a causal link between damage and a defective product. However, they may lack access to sufficient technical information to build this link.

If these issues are resolved at national level, it might lead to fragmentation of the liability rules in the internal market and undermine the importance of AI as an enabling technology. Similarly, the concept of the 'development risk defence' is now deemed outdated in relation to AI capable of autonomous decisions and continuous adaptation. From the side of consumers, the time limits and the minimum threshold for making claims were mentioned as limiting claims and access to compensation. In line with the previous application reports, the IIA noted that environmental damage does not belong to the scope of the present PLD. It also noted that in addition to technological evolution, circular business models should be at the heart of rethinking the product liability framework.

With the white paper, the Commission launched a public consultation in 2020, which received 1,216 replies, and contributed to the preparatory work of the policy field, including product liability and the challenges some features of AI pose for civil liability rules. Following the inception impact assessment, the Commission organised a public consultation exercise from 18 October 2021 to 10 January 2022. The consultation was divided into two sections. One focused on the existing PLD, aiming to increase understanding of difficulties in its application, while the other covered certain types of AI and some specific questions relating to liability. This public consultation received 291 replies, of which 233 covered both sections. A number of targeted consultations, stakeholder workshops and interviews also fed into the revision. In addition to the Expert Group report, a number of studies have contributed to the evidence base of this revision, such as a comparative law study on civil liability for artificial intelligence.

According to a summary report on the public consultation, the majority of stakeholders confirmed problems relating to PLD concepts. EU citizens, consumer organisations and academic institutions in particular underlined the need to ease victims' problems with the burden of proof. Legal uncertainty and fragmentation were seen as major risks. Businesses recognised the negative effects of the uncertainty around the application of the liability rules, but were more cautious in terms of interventions. In general, respondents supported common action at EU level. In light of specific questions relating to AI policy options, the majority of stakeholders were in favour of measures such as easing the burden of proof and harmonising of strict liability, coupled with mandatory insurance. Businesses, however, were more divided. They considered strict liability disproportionate and expressed caution regarding easing the burden of proof.

**Views of the European Parliament**

Since the previous term, discussion about a European legal framework for artificial intelligence has gained in importance and emerged on the political agenda. During the current term, the European Parliament has actively expressed its commitment to the twin transition and to shaping EU legislation accordingly. It supports the concept of a circular economy and a human-centric approach to artificial intelligence. In its position as co-legislator, Parliament has sought to strike the right
balance between fostering innovation in the internal market, boosting uptake of emerging technologies and ensuring trust, legal certainty and protection of EU values.

On the revision of the Product Liability Directive, Parliament has adopted a legislative-initiative resolution on civil liability rules on artificial intelligence and another on ethical questions relating to AI. Parliament also touched on liability issues relating to artificial intelligence in the resolution of the Special Committee for Artificial Intelligence in a Digital Age (AIDA). These form the most prominent parliamentary resolutions feeding the discussion on keeping the product liability rules fit for purpose.

Civil liability regime for artificial intelligence

On 20 October 2020, the European Parliament adopted a legislative-initiative resolution on a civil liability regime for artificial intelligence. In this resolution, Parliament called on the Commission to put forward a proposal for a regulation laying down rules on the civil liability claims of natural and legal persons against operators of AI systems.

The European Commission replied with a letter from Commission Vice-President Maroš Šefčovič to Parliament President David Sassoli on 15 December 2020. Šefčovič welcomed the legislative-initiative resolution as it reflected the importance of EU action on civil liability rules for artificial intelligence. The Commission responded positively to the objectives set out in the resolution, including the risk-based approach. It also agreed on the need to provide adequate compensation for victims, who should be compensated for damage caused by AI in the same way as for damage caused by traditional products or services. As trust and legal certainty are key in fostering the roll out of AI, the European Commission emphasised the importance of EU action on AI so as to avoid fragmentation of the market through diverging national approaches. The Commission took a more reserved position, however, on Parliament’s proposal to use a regulation as an instrument to ensure an adequate level of harmonisation.

The new proposal for an AI liability directive, laying down uniform requirements for certain aspects of non-contractual civil liability for damage caused with the involvement of AI systems, explicitly mentions that it follows up on the European Parliament’s legislative-initiative resolution.

In terms of liability, Parliament called for operators of high-risk AI systems to be strictly liable for any harm or damage caused by those systems, while operators of other types of lower-risk AI systems would be subject to fault-based liability. This would entail a mandatory insurance regime for high-risk AI systems. According to the resolution, an exhaustive list of high-risk AI systems could be included as an annex to the proposed legal act and regularly updated through delegated acts. Parliament also requested a revision of the Product Liability Directive. This was well received by the Commission.

Ethical aspects of AI, robotics and related technologies

On 20 October 2020, the European Parliament adopted a legislative-initiative resolution on a ‘framework of ethical aspects of artificial intelligence, robotics and related technologies’. In this resolution, Parliament called for a comprehensive regulatory framework of ethical principles and legal obligations relating to the development, deployment and use of artificial intelligence, robotics and related technologies within the Union. It called for ‘human-centric and human-made artificial intelligence’ based on Union law, the Charter and international human rights law. The new legal act should ensure Union-wide ethical principles for the development, deployment and use of AI. These principles should be incorporated by design into innovative products and services.

Commission replied with a letter from Maroš Šefčovič to David Sassoli on 15 December 2020. The Commission welcomed the Parliament’s recommendations for legislative action and confirmed that the main objectives presented in the proposal were common to both institutions.

In terms of scope, Parliament and the Commission had somewhat different views however. Parliament advocated a large scope of application, in particular, to take in high-risk technologies, in order to establish equal standards throughout the EU. The Commission highlighted that the working assumption in its white paper was that the regulatory framework would apply to products
and services relying on artificial intelligence and that only artificial intelligence that displayed specific features, such as high complexity or opacity, justified specific regulation. The Commission and Parliament found common ground on the consideration that the new legal act should not go beyond what was necessary to address the risks posed to fundamental rights and safety, while ensuring a stable regulatory environment that supported innovation. The scope should be precise enough to provide the necessary legal certainty and provide a clear definition on technologies in its scope, while leaving some flexibility to accommodate technical progress.

Parliament called on the Commission to ensure consistent risk assessment of AI, and included in its resolution a list of high-risk sectors and high-risk uses or purposes, with a proposal for the Commission to update the list regularly by means of delegated acts. Products and services not considered high risk could seek compliance certification on a voluntary basis. The Commission welcomed the list as a valuable contribution but emphasised that it would examine the criteria further to define high-risk artificial intelligence.

On several occasions, Parliament has underlined the need to adapt liability legislation, mentioning specifically product liability measures together with safety legislation and market surveillance. In its resolution, Parliament took a similar approach to the Commission white paper in terms of making high-risk products and services subject to an assessment of compliance and subsequent monitoring by national supervisory authorities. This would entail creating centres of excellence and establishing a European governance structure in the form of a European framework for cooperation between national competent authorities.

The Commission took on board many of Parliament’s views in its proposal for a regulation on the AI act, put forward in about six months after the adoption of the resolution. In its proposal, the Commission referred explicitly to Parliament’s own-initiative legislative resolution.

AIDA: Special Committee on Artificial Intelligence in a Digital Age

The Parliament resolution of 3 May 2022 on artificial intelligence in a digital age based on the AIDA Special Committee report, presented an ambitious vision for the EU to act as a global standard-setter on AI. Parliament emphasised that, although the EU is not a leader in deployment or development of AI, it has the opportunity to shape the international debate to develop common digital standards and rules. Parliament called for a human-centred trustworthy and sustainable approach to AI in full respect of fundamental rights. It continued by emphasising that a clear legal framework is at the core of a competitive, accessible and fair data economy. In this light, Parliament put forward an EU roadmap for AI, with policy recommendations on six key areas: an improved regulatory environment; completion of the digital single market; digital green infrastructure; an ecosystem of excellence; an ecosystem of trust; and mass surveillance and military concerns.

The Parliament resolution was in line with the approach of the Commission white paper on artificial intelligence to establish a risk-based legal framework composed of high ethical norms, built on transparency, auditability and accountability, accompanied by adequate product safety and liability rules. Parliament argued that the regulation should be commensurate with the potential risk of AI systems to society as a whole or to individuals. Consequently, it proposed to distinguish between high-risk and low-risk AI systems and suggested that a compulsory mandatory insurance regime should ensure compensation for harm caused by high-risk AI. Stricter legislative safeguards should apply to high-risk artificial intelligence. Parliament asked for guidance to support this classification and for an exchange of best practice. Moreover, Parliament called for special attention to be paid to protecting children, given their vulnerability, by ensuring safety, security and privacy by design. In business-to-business (B2B) relationships, Parliament asked the Commission to examine further whether smaller businesses would need protection from market power abuse by more dominant actors in situations such as technical or commercial lock-ins, barriers to market entry or asymmetric information problems.

The AIDA resolution referred directly to the PLD revision and recognised the legal challenges posed by artificial intelligence in this context. It underlined that the PLD and national fault-based liability regimes should remain at the centre of the legal framework applicable to harm caused by AI-
systems. It stressed that a revision should consider existing rules, be well grounded and future-proofed. Some key legal definitions, such as ‘product’ and ‘producer’, will have to be updated to reflect the special nature of artificial intelligence. The Commission took note of many of Parliament’s positions in its new proposal on AI liability rules.

European Parliament position on the circular economy and product liability

The European Parliament has highlighted the importance of clear liability rules and improved legal certainty in general as vital to enable new business concepts to work well. For example, in its resolution on the new circular economy action plan, it called for the Commission to examine further challenges relating to liability issues in the context of the sharing and service economy. The Parliament urged the Commission to identify regulatory measures and other actions to remove the administrative and legal obstacles to fostering the circular economy. In its resolution on the right to repair, Parliament called on the Commission to analyse the possibility of introducing a joint manufacturer and seller liability mechanism when products do not meet standards. It also encouraged Member States to go beyond the minimum harmonisation rules for defective goods introduced in the Sale of Goods Directive.

Parliamentary questions

On 29 September 2021, a Member of the European Parliament (MEP) Jan Huitema (Renew, the Netherlands) posed a parliamentary question for a written answer to the European Commission on the circular economy. More precisely, the question entailed the transition to a sharing economy in relation to the administrative and legal measures on ownership rights as well as liability. In the context of the circular economy action plan, Huitema asked whether the Commission’s intention was to present a legal framework for reuse systems and the sharing and service economy, covering liability rules, for instance. Commission replied that no such specific legal framework for liability and ownership rights concerning the circular economy was on the agenda. It highlighted that the new circular economy action plan put forward several measures to boost reuse and product-as-a-service models, such as the ‘sustainable products’ initiative, the Waste Framework Directive and the Packaging and Packaging Waste Directive, as well as a legal act on the right to repair. Moreover, it left open the possibility to introduce specific measures should important barriers to the development of the circular economy stem from ownership rights and liability issues.

On 7 April 2022, several MEPs asked the Commission a question for written answer on the liability rules for COVID-19 vaccines negotiated by the Commission under the joint procurement scheme with vaccine manufacturers. They asked about the legal basis for the de facto lifting of the liability provided under conditional marketing and ensuring compensation from the respective Member State. The MEPs also enquired about the legal basis for the requirement for Member States to compensate the producer. In her reply, European Commissioner Stella Kyriakides reassured MEPs that the advance purchase agreements for the COVID-19 vaccines had been fully compliant with EU law. The agreements provided Member States with the possibility to fine the manufacturers for some liabilities incurred under specific conditions set out in the agreement. In accordance with the PLD, liability remains with the company. The Commission also stressed that Member States had been kept fully informed on the progress of the negotiations, including on liability-related aspects.

Views of the European Council and the Council of the EU

The Heads of State or Government have demonstrated longstanding support for tackling climate change through the implementation of the Paris Agreement and they have repeatedly expressed their commitment to the twin transition. Consequently, the major goals set in the European Council’s 2019-2024 strategic agenda include becoming a world leader in the circular economy and digitalisation of the economy and society.

The Council of the European Union has participated in its role as a co-legislator in the adoption of the PLD and its amendments and it has taken note of all the main reports on its application over the
Aligning the product liability directive with the circular economy and emerging technologies

years. In its December 2021 18-month programme, entitled ‘Taking forward the Strategic Agenda’, the Council confirmed that the priorities set out in the Strategic Agenda for 2019 to 2024 remain fully relevant. The recent French Presidency, the ongoing Czech and the upcoming Swedish Presidencies are committed to making the most of the digitalisation process and to promoting the transition towards a circular economy. Product safety, cybersecurity and ensuring a level playing field in all aspects of the single market to ensure its competitiveness feature prominently on the programme, although product liability as such is not mentioned explicitly.

European Committee of the Regions

The European Committee of the Regions (CoR) has published no opinion on the revision of the PLD specifically. Nevertheless, the need to revise and update safety and liability rules is mentioned in several CoR opinions, for example, in the opinions on the new industrial strategy for Europe and the European approach to artificial intelligence. In these opinions, the CoR welcomed the Commission’s efforts to adapt civil liability rules to the specific challenges of the digital age and artificial intelligence and underlined the importance of legal certainty for the uptake of AI and innovation. It also emphasised that the updated framework should ensure consumer redress for damage caused by AI.

European Economic and Social Committee

Although it has not yet published an opinion on the revision of the PLD, the European Economic and Social Committee (EESC) has, on several occasions, called for revision of the product liability rules and for them to be adapted to economic and societal changes. For example, in 2018, it published an own-initiative opinion on transport, energy and services, in which it called for an update of the PLD to take account of a reality where decisions are increasingly made by software. The EESC also emphasised principles of security and safety by design and by default. These principles should be applied systematically to increase trust in emerging technologies. In 2019, in an own-initiative opinion on artificial intelligence, the EESC called for an ambitious revision of the PLD to address health and safety risks for workers and to clarify responsibility for autonomous systems in the event of accidents.
SELECTED REFERENCES


ENDNOTES

1  Two Member States applied the derogation to all categories of producers and products (Finland and Luxembourg). Others excluded only certain categories. Hungary excluded pharmaceuticals, whereas Spain does not apply the PLD to medicinal products, foodstuffs or food products intended for human consumption. France applies the derogation only to products derived from the human body.


4  Cases C-154/00, C-203/99, C-52/00, C-154/0, C-183/00, C-402/03 and C-127/04.

5  Six Member States – Germany, Spain, France, Italy, Austria and Poland – saw a significant increase in product liability cases.

6  Cases C-402/03, C-127/04 3, C-358/08 5 and C-285/08.

7  Cases C-495/10, C-310/13 and C-621/15, and Joined Cases C-503/13 and C-504/13.

8  *Liability for artificial intelligence and other emerging digital technologies*, 2019; Kantar, Behavioural Study on the link between challenges of Artificial Intelligence for Member States’ civil liability rules and consumer attitudes towards AI-enabled products and services, Final Report 2021.

9  Under Article 225 TFEU, Parliament can ask the Commission to submit a legislative proposal on matters on which it considers a Union act is necessary in order to implement the Treaties.

10  Parliament has the right to establish a temporary special committee, in accordance with Rule 207 of its Rules of Procedure.

11  Christine Anderson (ID, Germany), Ivan Vilibor Sinčić (NI, Croatia), Milan Uhrík (NI, Slovakia), Ladislav Ilčič (ECR, Croatia), Virginie Joron (ID, France), Nicolaus Fest (ID, Germany).

12  Joint procurement based on Article 4(5)(b) of the Emergency Support Instrument (ESI) Regulation. Member States gave the Commission a mandate – approved with the Commission Decision of 18 June 2020 – to negotiate, on their behalf, the procurement of COVID-19 vaccines from the vaccine manufacturers.

DISCLAIMER AND COPYRIGHT

This document is prepared for, and addressed to, the Members and staff of the European Parliament as background material to assist them in their parliamentary work. The content of the document is the sole responsibility of its author(s) and any opinions expressed herein should not be taken to represent an official position of the Parliament.

Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the European Parliament is given prior notice and sent a copy.