

New Product Liability Directive

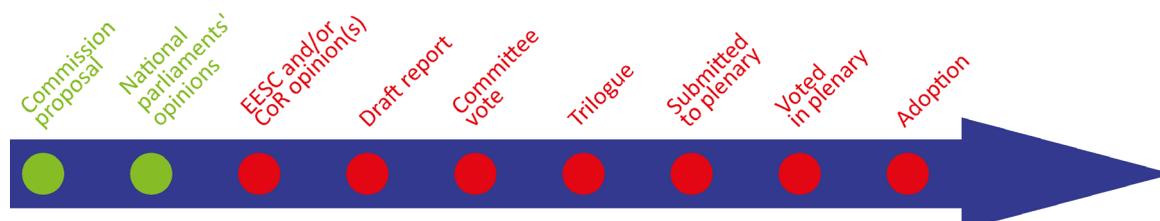
OVERVIEW

As products have become more complex in the digital age, on 28 September 2022, the European Commission published a proposal for a new directive on liability of defective products. This would revise the existing Product Liability Directive, adopted nearly 40 years ago in 1985. The proposal aims to bring the European Union's product liability regime up to speed with the digital age, circular economy business models and global value chains.

Addressing the need to ease the burden of proof for consumers seeking compensation for damages suffered because of defective products, the proposal also introduces new provisions to address liability for products such as software (including artificial intelligence systems) and digital services that affect how the product works (e.g. navigation services in autonomous vehicles). As the circular economy is about extending product lifecycles, the proposal clarifies the liability rules for companies that substantially modify products before resale. The proposed rules also ensure that consumers are compensated for defective products manufactured outside the EU. The proposal alleviates the burden of proof for victims under certain circumstances and obliges manufacturers to disclose information where plausible claims for compensation are made.

The next step is for the European Parliament and the Council to consider the proposal. In Parliament, the file has been assigned jointly (under Rule 58) to the Committee on Internal Market and Consumer Protection (IMCO) and the Legal Affairs Committee (JURI).

Proposal for a directive of the European parliament and of the Council on liability for defective products		
<i>Committee responsible:</i>	Internal Market and Consumer Protection (IMCO) and Committee on Legal Affairs (JURI) (jointly under Rule 58)	COM(2022) 495 28.9.2022 2022/0302/(COD)
<i>Rapporteurs:</i>	Vlad Botoş (Renew, Romania) and Pascal Arimont (EPP, Belgium)	Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')
<i>Shadow rapporteurs:</i>	To be appointed	
<i>Next steps expected:</i>	Publication of draft report	



Introduction

The transformation to a digital economy and society is changing the economic reality of the single market. New emerging technologies (e.g. cleaning robots and medical health apps) already benefit our society and economy, but also present potential risks.

Certain features of digital technologies, such as the intangibility of digital products, their dependence on data, their complexity and connectivity, pose challenges in applying liability rules. So do features specific to artificial intelligence (AI), such as autonomous behaviour, continuous adaptation, limited predictability and opacity. This creates legal uncertainty for businesses and may make it difficult for consumers and other injured parties to obtain compensation for damage caused by products and services that use these technologies.¹

The transition to a circular economy – extending the life of materials through upgrading and repairing digital products and components – will benefit the environment. However, it raises questions about liability for any subsequent damage. Circular business models in which products are repaired, recycled, refurbished or upgraded are increasingly common and central to the EU's efforts to achieve sustainability and waste-reduction goals. In its [2020 circular economy action plan](#), the European Commission announced a sustainable product policy to provide high-quality, functional and safe products designed for reuse, repair, manufacturing and recycling. However, existing product liability rules do not define who should be liable for defects resulting from changes to products after they are put into circulation.

Modern supply chains sometimes involve economic operators whose novel form (e.g. fulfilment service providers,² such as e-commerce platforms) means that they do not fit easily into traditional supply chains under the existing liability legal framework. One of the challenges is creating a level playing field between EU and non-EU manufacturers by making sure compensation is available to consumers for defective products imported directly from outside the EU.

Existing situation

When 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. The PLD introduced a common set of rules enabling harmonisation and an equal level of protection for consumers throughout the single market, using the concept of no fault-based producer liability for damage caused by defective products. **No fault-based liability** means that the liability does not depend on manufacturer fault or negligence (also called 'strict liability', where producers are responsible for defective products, regardless of whether the defect is their fault). This form of liability differs from **fault-based liability regimes** where an injured person can make a claim for damages caused by products and services based on a person's conduct by generally proving: (i) existence of damage, (ii) fault of the liable person, and (iii) causality between that fault and the damage. To be compensated under the PLD no-fault liability regime, the burden of proof for the injured person consists in showing only that:

- the product was defective;
- damage was suffered;
- a casual link exists between the damage and the product's defectiveness.

The existing PLD sets an EU **liability regime** for financial compensation claims for death, personal injury, or material damage caused by an item or product intended for private use above a certain threshold (set at €500 today). It allows Member States to impose a maximum compensation limit, which may not be less than €70 million (Article 16(1)). 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 have elapsed since the product was put on the market.

Parliament's starting position

On 20 October 2020, the European Parliament adopted a legislative-initiative [resolution](#) on a civil liability regime for artificial intelligence.³ 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 Parliament has highlighted the importance of clear liability rules and improved legal certainty in general as vital to enabling 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](#).

Council and European Council starting position

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.

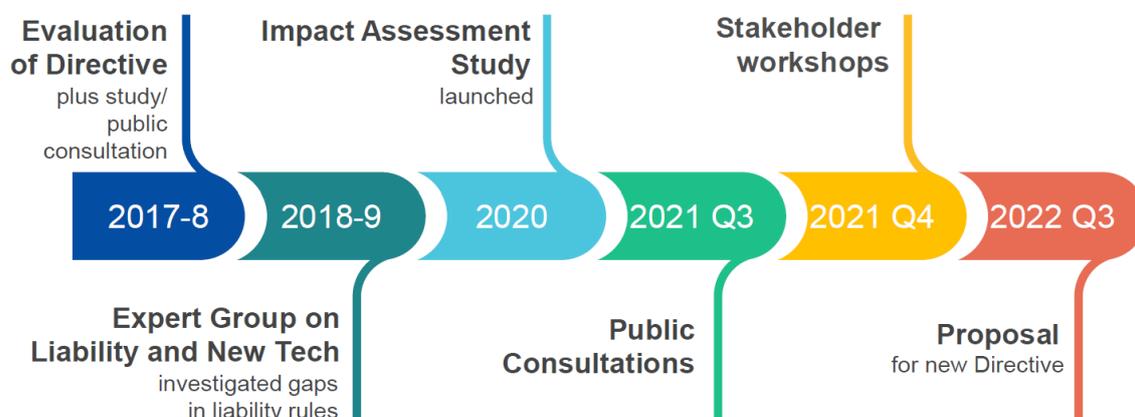
In its 18-month programme of December 2021, entitled '[Taking forward the Strategic Agenda](#)', the Council confirmed that the priorities set out in the strategic agenda for 2019 to 2024 remain fully relevant. Product safety, cybersecurity and ensuring a level playing field in all aspects of the single market to ensure its competitiveness feature prominently in the programme, although product liability as such is not mentioned explicitly.

Preparation of the proposal

The [proposal](#) builds on the Commission's [evaluation](#) of the directive, as well as collecting evidence and views from a broad range of stakeholders. Furthermore, the Commission held a public consultation and carried out a [study](#), as well as an [impact assessment](#) on product liability. The expert group on liability and new technologies also prepared a [report](#) on 'Liability for Artificial Intelligence and other emerging technologies'.

EPRS published an [implementation appraisal](#) of the existing PLD in October 2022, as well as an [initial appraisal](#) of the Commission impact assessment of the proposal to review the PLD in January 2023.

Figure 1 – Revision process



Source: European Commission, 2022.

The changes the proposal would bring

Principle and objectives

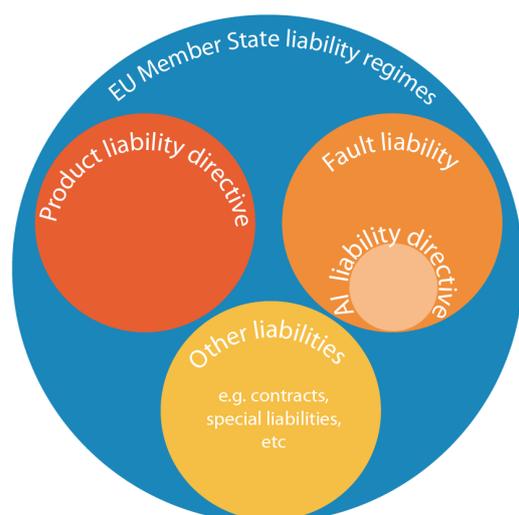
On 28 September 2022, the Commission [published](#) two complementary draft directives to adapt the existing liability rules to new digital technologies, including AI, and the circular economy:

- The proposed [directive on liability for defective products](#) (revised PLD), a revision of the PLD, aims at modernising the existing EU harmonised regime on **no fault-based liability** for manufacturers of defective products. The revised PLD will repeal and replace the current PLD.
- The proposed [directive on adapting non-contractual civil liability rules to artificial intelligence](#) (AI liability directive) intends to ensure broader protection for damage caused by AI systems by alleviating the burden of proof in compensation claims pursued under national **fault-based** liability regimes.⁴

According to the European Commission, no overlap is intended between claims brought under the proposed no fault-based PLD and the fault-based AI liability directive.⁵ The proposal is also complementary to existing **EU liability** and **EU safety legislation**.

EU liability legislation

Figure 2 – Liability regimes in the EU



Source: European Commission, 2022.

As far as **contractual liability**⁶ is concerned, the [Sale of Goods Act](#) and the [Digital Content and Services Directive](#) give consumers the right to 'remedy'¹⁷ when goods, including digital content or a digital service, do not conform to contract or do not work properly. However, those laws concern contractual liability, whereas the revised PLD no-fault liability regime concerns rules allowing a compensation claim irrespective of a contractual link between the victim and the liable person (also called **extra-contractual liability**).

Moving to **data**, the General Data Protection Regulation (GDPR) concerns data processors and controllers' liability for 'material' or 'non-material' damage caused by data processing that infringes the GDPR. The revised PLD instead focuses on material' damage alone, such as loss or corruption of data.

EU product safety legislation

Product safety legislation (e.g. the [General Product Safety Directive](#), or sectoral laws such as on [radio equipment](#)) aims to ensure that only safe products are placed on the EU internal market, by setting essential safety requirements for products. However, this type of legislation contains no specific provisions on liability and refers to the application of the PLD when a defective product causes damage.

For instance, the proposed [machinery regulation](#) and the proposed [general product safety regulation](#), which revise the existing [Machinery](#) and General Product Safety Directives, aim, in their respective fields, at addressing the risks of digitalisation in the area of product safety, but not liability. As another example, when AI systems – as defined under the draft [regulation on artificial](#)

[intelligence](#) (AI act)⁸ currently under negotiation – do not meet the safety requirements set in the AI act, the revised PLD would apply if the defective product causes physical harm, property damage or data loss. The same can be said of the recently proposed [cyber-resilience act](#), which builds on existing rules to encourage manufacturers and software developers to mitigate cybersecurity risks through the respect of essential cybersecurity and vulnerability handling requirements.

The revised PLD makes clear that all these mandatory safety requirements should be taken into account when a court assesses if a product is defective.⁹

Scope

The revised PLD sets a wider definition of product (Article 4(1)) and a broader scope of liable parties (Articles 4(16) and 7), than the existing PLD.

To adapt to the digital age, the proposal covers:

- **Software** (including software updates) – whether embedded or standalone, including AI systems.¹⁰
- **Digital manufacturing files** – enabling the automated control of machinery or tools, such as 3D printers.
- **Digital services** – where these are necessary for products to function as components of the product with which they are interconnected or integrated (e.g. navigation services in an autonomous vehicle).

Whether software (including apps) was covered under the existing PLD has always been controversial.ⁱ For instance, there is controversy as to whether software should qualify as a **product in the sense of the directive**,ⁱⁱ or whether it is part of either the **services** or of the **intangible goods** category,ⁱⁱⁱ which falls outside the scope of the existing PLD.^{iv}

ⁱ D. Wuyts, [The product liability directive - more than two decades of defective products in Europe](#), 2014, and [BEUC position paper on the Review of Product Liability Rules](#), 2017.

ⁱⁱ See [Article 2](#) of the existing PLD, A product has to be distinguished from a service and must be understood as 'all movables even if incorporated into another movable or into an immovable'.

ⁱⁱⁱ See pages 53-54 of the [Commission staff working document](#) on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, 2018: 'The definition of "product" as per article 2 of the Directive is related to the concept of "movable". This has been interpreted as meaning that only tangible goods shall be considered products ... the non-tangible nature of some new technological developments (software, applications, Internet of Things, Artificial Intelligence systems) makes it difficult to classify them as products rather than services'.

^{iv} K. Alheit, [The applicability of the EU Product Liability Directive to software](#), 2001.

With the aim of not hampering innovation: (i) free and open-source software developed or supplied outside the course of commercial activity, as well as (ii) the source code of software, should be excluded from the definition of products covered under the proposal (Recital 13). As far as the broader scope of the proposal compared to the existing PLD on liable parties is concerned, Article 7 of the revised PLD lists the types of **'economic operators'** which can be held liable for defective products, by introducing a layered approach to liability depending on the different qualification of the economic operator. Among the list of economic operators are: (i) the manufacturer of a product or component, (ii) the provider of a related service, (iii) the authorised representative, (iv) the importer, and (v) the fulfilment service provider or the distributor (Article 4(16)). The **manufacturer** should be liable for damages caused by a defect in their product or components. An innovation introduced in the revised PLD is considering **any economic operator who has substantially modified the product** outside the control of the manufacturer liable for any defect. Such a party is then considered as a manufacturer.

When a manufacturer is **established outside the EU**, the revised PLD would further attribute liability for a defective product to the **importer** and the **authorised representative in the EU**. As a last resort, the **fulfilment service provider** (offering at least two of the following services: warehousing, packaging, addressing and dispatching of a product, without having ownership of the product), will be held liable when the importer and authorised representative in the EU are based outside the EU (Article 7(3)).

Distributors of a defective product (offline and online sellers) can also be held liable upon request by a claimant and when the distributor fails to identify any of the above operators.

Online platforms should be liable in respect of a defective product on the same terms as such economic operators when performing the role of manufacturer, importer or distributor. According to the [Digital Services Act](#), online platforms will not enjoy the conditional liability exemption for merely playing an intermediary role in the sale of goods between traders and consumers when 'they present the product, or otherwise enable the specific transaction in question, in a way that would lead an average consumer to believe that the product is provided either by the online platform itself or by a trader acting under its authority or control'. In keeping with this principle, when online platforms act as intermediaries, it should be possible to hold them liable in the same way as distributors under the revised PLD (Recital 28).

Main provisions

The nature of damage: psychological health and loss or corruption of data

Under the existing PLD, the producer is liable for defective products which have caused death, personal injury, or material damage.

The revised PLD would expand the definition of damage (Article 4(6)), by including material losses resulting from:

- death or personal injury, including medically recognised harm to psychological health;
- property damage, while removing the threshold of €500 and the possibility for Member States to impose a financial ceiling of €70 million; and
- loss or corruption of data that is not used exclusively for professional purposes.

The revised PLD also extends the 10-year liability period to 15 years for latent health injuries (Article 14(2) and (3)).

EU Member States would need to lay down the rules on compensation for such damages.

Product defects

In certain circumstances, liability would continue to apply when a defect came into being after a product has already been placed on the market or put into service (Recitals 37 and 38). This entails: (i) software updates under the manufacturer's control, (ii) failure to address cybersecurity vulnerabilities, and (iii) machine learning. This differs from the exclusion of liability under Article 7(b) of the existing PLD, which exempts the manufacturer from liability when 'it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect came into being afterwards'.

In short, developers would continue to be responsible for emerging technologies that learn independently and for deployment updates or lack thereof.

Alleviation of the burden of proof: presumption of causality and right to disclosure of evidence

The burden of proof remains with the injured person, who must prove that the product was defective, that he/she suffered damage, and the causal link between the damage and the defect.

However, Article 8 of the revised PLD obliges the manufacturer to disclose necessary information in court when the injured person has presented facts and evidence sufficient to support the '**plausibility of the claim for compensation**'. This obligation on the manufacturer is always subject to protection of trade secrets and confidentiality. In addition, Article 9 of the revised PLD eases the burden of proof for the injured person by establishing a **presumption of defectiveness and causal link** under certain conditions.

Defectiveness is presumed when:

- A manufacturer fails to comply with obligation to disclose information.
- A product does not comply with mandatory safety requirements.
- Damage is caused by obvious product malfunction.

A causal link is presumed when:

- Damage is typically consistent with the defect in question; or
- Technical or scientific complexity causes excessive difficulty in proving liability (e.g. 'black box' AI systems).

The manufacturer retains the right to contest the existence of difficulties in achieving the burden of proof, or to rebut the presumptions.

Defences available for economic operators

Article 10 of the revised PLD contains several defences available to economic operators to escape liability, as does the current PLD. The exemptions from liability for which economic operators carry the burden of proof are when:

- they did not put the product into circulation;
- the defect did not exist when they placed the product on the market; or
- the state of technical knowledge at the time of placing the product on the market made it impossible to discover the defect (also known as the 'development risk defence').

The '**development risk defence**' would no longer be subject to Member State derogations under the revised PLD.

Exemptions from liability would not apply in the case of product defects within the manufacturer's control, linked to:

- a related service;
- software including software updates or upgrades; or
- a lack of updates or upgrades necessary to maintain safety.

Advisory committees

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 to adapt them 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.

The European Committee of the Regions (CoR) has not published an 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.

National parliaments

The [subsidiarity deadline](#) for national parliament to issue opinions on the proposal was 12 December 2022. In its contribution, the **German Bundesrat** welcomes the proposal to adapt the existing PLD to the digital transformation in the economy and society. Although it praises the alleviation of the burden of proof and the facilitated access to evidence in favour of the injured party, the Bundesrat stresses the requirement of excessive evidentiary difficulties for the **reduction of 'the standard of proof'** should be specified in more detail in the procedure. In addition, the Bundesrat advocates a more precise definition of the required security level of software and an exemption from product liability for free and open-source software developed or provided outside a commercial activity.

Stakeholder views¹¹

Scope and type of damage

The EU consumer protection organisation, BEUC, acknowledges the positive changes the new proposed product liability rules would bring relating to increased coverage. Specifically, BEUC [welcomes](#) that software is included as a product and that data loss can be considered as a damage for which manufacturers can be liable. The Irish Council for Civil Liberties [favours](#) the inclusion of software as a product, stressing how consumers could finally hold companies liable for damages caused by software, including third-party software. BusinessEurope [asks](#) that physical and property damage alone should continue to be covered under the revised PLD. The Computer and Communications Industry Association (CCIA) [stresses](#) that it is wrong to consider software as a product, considering it tends to evolve over time and has never caused any physical harm in itself. The CCIA also warns that non-material damages such as loss of data or psychological harm should not be part of the revised PLD's liability regime. The Information Technology Industry Council (ITI) is [concerned](#) by the inclusion of standalone software and AI systems in the scope of the revised PLD. The ITI states that strict liability seems ill suited in respect of complex software and AI supply chains, where unknown vulnerabilities can always emerge.

Liability of online marketplaces

On online marketplaces, BEUC [fears](#) that the proposed new rules to hold online platforms liable for defective or illegal products sold on them are subject to conditions limiting their effective application. In contrast, DOT Europe – an association representing digital, online and tech companies operating in Europe – [argues](#) that marketplaces have neither access nor control over products. Therefore, imposing liability for them would put marketplaces at a disadvantage compared to other sales channels in Europe. The CCIA [recommends](#) that marketplaces should not be liable for defective products sold on their platforms when no other economic operator can be identified. According to the CCIA, recent EU legislation confirmed that marketplaces do not have to vet all products listed by traders. Therefore, extending liability to them means punishing them for products they have never seen. BusinessEurope [stresses](#) that the existing EU legal framework on product safety already ensures sufficient consumer protection for products bought online.

Modernisation or hampering innovation?

Given that digital products are increasingly complex, opaque and can take decision autonomously when powered with AI, BEUC [calls](#) for a modernisation of the EU liability rules. In contrast, DigitalEurope [notes](#) that existing liability rules have been in force for over 30 years, have proved to function well and have accommodated many technological changes. According to DigitalEurope, there is not enough evidence to justify major changes, particularly specific obligations for AI. In fact, very few AI lawsuits are currently ongoing. Liability rules should therefore remain technology neutral, because the existing liability rules can also be applied to AI and other emerging technologies. Representing European companies in the mechanical engineering industry, the Verband Deutscher Maschinen- und Anlagenbau e.V. (VDMA) [argues](#) that the existing technology-neutral liability regime already solves issues with current AI use cases. New liability rules should therefore target only specific and high-risk use cases.

Burden of proof, development risk defence and substantial modification

The American Chamber of Commerce to the European Union (AmCham EU) is [concerned](#) regarding the unintended consequences of the alleviation of the burden of proof. According to AmCham EU, while the proposal does not intend to reverse the burden of proof, the presumption of defectiveness and causality effectively amount to a reversal of the burden of proof for products that are particularly technically or scientifically complex. The Irish Council for Civil Liberties, instead, [warns](#) against placing the burden of proof of emerging technology defectiveness on victims rather than manufacturers. This because, in a world of highly complex and obscure AI systems, gathering evidence against operators and identifying who is responsible for the defect is a challenge in itself. Under the proposed directive, unlike the case of no-fault transportation sector liability, 'victims still need to demonstrate that the output produced by the AI system or the failure of the AI system to produce an output gave rise to the damage'. The council praises the fact that manufacturers will be held liable for product defects as long as the product is under the manufacturer's control (e.g. through software updates), but demands the removal of the development risk defence. BusinessEurope [supports](#) the shift in responsibility for a defective product from the manufacturer to other economic operators when they make a 'substantial modification' of the product already placed on the market.

Removal of thresholds and extension of the longstop period

AmCham EU is [against](#) the proposed removal of both the €500 minimum value threshold and the possibility for Member States to impose a maximum limit of compensation (minimum €70 million). According to AmCham EU, a minimum threshold prevents frivolous claims, while an upper maximum allows for insurable risks. In addition, it argues that extending the longstop period from 10 to 15 years increases legal uncertainty and places a significant burden on companies. For AmCham EU, this extension is not in line with the reality of software development and AI and creates complexities regarding data retention and processing laws, where some companies are restricted under the General Data Protection Regulation.

Academic views

Inclusion of software under the product liability coverage

A report by the Centre on Regulation in Europe (CERRE) favours the inclusion of software under the scope of the revised PLD. Indeed, CERRE warns that differentiating between tangible (e.g. hardware) and intangible (e.g. software) products does not make sense in the digital age. For example, if software is stored on a tangible medium, such as a disc or flash-drive, it qualifies as a product under the current PLD. However, if the software is downloaded, the application of the current PLD is

unclear.¹² Cabral shares the same concern by advocating the extension of the PLD to cover software in general. Indeed, Cabral states that software plays a necessary part in the functioning of certain products today and should probably be considered part of such products.¹³ Dheu et al. welcome the clear integration of software and digital manufacturing in the scope of the proposal as a positive outcome of the revised PLD. According to the authors mentioned above, the proposal has taken account of the specificities of internet of things (IoT) products that include software as components. The qualification of software as product also seems to cover AI products, even though the proposal does not mention AI directly.¹⁴

In opposition with this view, but recognising a lack of clarity, Koch et al. take the position that the existing PLD already extends to products with digital content, such as when operating software is installed on a physical item.¹⁵ Case law and jurisprudence has largely taken this approach. It could be argued that a product does not need to be tangible, considering that the existing PLD already covers electricity.¹⁶ Nonetheless, Koch et al. acknowledge the existing PLD's lack of clarity and its possible application gaps regarding standalone software which are bought separately from any tangible items such as apps installed on tablets or smartphones.

Scope of damage

Dheu et al. support the inclusion of harm to psychological health and of loss or corruption of data – including when not used exclusively for professional purposes – as part of damage suffered by natural persons under the coverage of the revised PLD. Cabral stresses the importance of compensating non-pecuniary damage (e.g. psychological health), considering how close the new emerging technologies will work to human beings. On this point, Koch et al. clarify that the revised PLD regime on non-pecuniary damage should explicitly state that such damage should always be linked to pain and suffering triggered by bodily injury, and not to stand-alone immaterial harm, such as purely emotional distress.

Against the limited €500 threshold for compensation of damage under the existing PLD, Cabral proposes the implementation of a quicker and simpler procedure to settle claims regarding small values under the revised PLD.

Burden of proof

According to one expert, considering the technical complexity and the opacity ('black box') of the systems used in emerging technologies, it might be difficult for injured parties to prove a product's defectiveness, or the link between the latter and the damage suffered.¹⁷ Following this approach, de Bruin argues that injured parties would have to acquire a thorough understanding of the '(mal)functioning' of a software to prove defectiveness.¹⁸

Dheu et al. therefore praise the new proposal's provisions where an injured party can benefit from rebuttable presumptions of defectiveness or causality under certain conditions. According to them, such provisions will be effective in lowering some of the obstacles encountered by victims when bringing a claim against a manufacturer of AI systems. de Bruin also suggests reversing the burden of proving the defect when there is: (i) disproportionate difficulty, or (ii) costs to establish the level of a safety of a complex product. Some academics have even advocated completely reversing the burden of proof in the context of digital technologies such as AI (e.g. from injured person to manufacturer). In this case, the victim's obligation to prove the defect should be removed and victims should only be required to prove the damage. It would then be for the producer to prove that the product was not defective when the damage occurred.¹⁹

The CERRE report advocates lowering the standard of proof for the injured party under the new PLD. According to the report, this could be achieved by:

- imposing cost-shifting rules to collect expert evidence, which are currently borne by victims; as well as

- requesting evidence disclosure duties of manufacturers, which would allow victims to understand the functioning of the emerging technologies system.

Concept of economic operator too broad and mandatory insurance obligations

Dheu et al. warn that the notion of liable economic operator under the revised PLD is rather confusing and too broad. By including many different actors (e.g. manufacturers, the importer, the authorised representative and online platforms) as 'economic operator', the new proposal extends the liability regime beyond the 'realm of pure manufacturing'. Because such a modification would change the nature of the existing PLD, Dheu et al recommend that policy makers reflect on the long-term consequences of this choice.

A European Law Institute [Innovation Paper](#) proposes introducing mandatory insurance schemes for economic operators or compensation funds in the proposed product liability package.²⁰ According to Dheu et al., such schemes might solve the potential insolvency problem for the liable party and ensure victims receive effective compensation.

Legislative process

In Parliament, the file has been assigned jointly (under Rule 58) to the Committee on Internal Market and Consumer Protection (IMCO) and the Legal Affairs Committee (JURI). Vlad Botoş (Renew, Romania) and Pascal Arimont (EPP, Belgium) have been appointed as rapporteurs. The next step for the directive is for the European Parliament and Council to consider the draft text.

EUROPEAN PARLIAMENT SUPPORTING ANALYSIS

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Tenhunen S., [Aligning the Product Liability Directive with the circular economy and emerging technologies: Revision of Directive 85/374/EEC](#), EPRS, European Parliament, October 2022.

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[A study on Artificial Intelligence and Civil Liability](#), Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies, European Parliament, 2020.

Kritikos M., [Artificial Intelligence ante portas](#): Legal & ethical reflections, EPRS, European Parliament, 2019.

OTHER SOURCES

[Liability for Defective Products](#), Legislative Observatory (OEL), European Parliament.

European Commission, [Proposal for a Directive on Liability of Defective Products](#), COM(2022) 495.

European Commission, [Adapting liability rules to the digital age, the circular economy and global value chains](#), June 2021.

European Parliament, [Committee on Legal Affairs draft report with recommendations to the Commission on a Civil liability regime for artificial intelligence](#), 2020/2014 (INL).

ENDNOTES

- ¹ European Commission report, [Liability for artificial intelligence and other emerging technologies](#), 2019.
- ² Article 4(7) of the revised PLD defines fulfilment service providers as any natural or legal person offering, in the course of commercial activity, at least two of the following services: warehousing, packaging, addressing and dispatching of a product, without having ownership of the product, with the exception of postal services.
- ³ Under Article 225 Treaty on the Functioning of the EU, 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.
- ⁴ See Madiega T., EPRS, [Artificial intelligence liability directive](#), EPRS, European Parliament, January 2023.
- ⁵ See [Explanatory Memorandum](#) at section 1.2.

- ⁶ Contractual liability is liability arising from a refusal or neglect to honour the commitments made under a contract. Not fulfilling, or only partially fulfilling, obligations results in harm (or damage).
- ⁷ i.e. replacement, repair or reimbursement.
- ⁸ AI systems are defined in the draft AI act as software developed with certain techniques and approaches (machine learning, logic- and knowledge-based approaches, statistical approaches etc.) that can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments with which these systems interact.
- ⁹ See European Commission, [Questions and answers on the revision of the Product Liability Directive](#), 28 September 2022.
- ¹⁰ Ibid.
- ¹¹ This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. Additional information can be found in related publications listed under 'European Parliament supporting analysis'.
- ¹² CERRE report, [EU Liability Rules for the Age of Artificial Intelligence](#), March 2021.
- ¹³ T. S. Cabral, [Liability and artificial intelligence in the EU: Assessing the adequacy of the current Product Liability Directive](#), 2020.
- ¹⁴ O. Dheu et al., [The European Commission's Approach To Extra-Contractual Liability and AI – A First Analysis and Evaluation of the Two Proposals](#), 6 October 2022.
- ¹⁵ 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](#), 2022.
- ¹⁶ Ebers, [Liability For Artificial Intelligence And EU Consumer Law](#), 2021.
- ¹⁷ C. de Meeus, [The Product Liability Directive at the Age of the Digital Industrial Revolution: Fit for Innovation?](#), 2019.
- ¹⁸ R. de Bruin, [Autonomous Intelligent Cars on the European Intersection of Liability and Privacy](#), 2016.
- ¹⁹ Ibid
- ²⁰ European Law Institute Innovation Paper, [Guiding Principles for Updating the Product Liability Directive for the Digital Age](#), January 2021.

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