

The Liability Package

On 28 September 2022, the Commission adopted the Liability Package, including a proposal for a Directive adapting non-contractual civil liability rules to artificial intelligence and a Revision of the Product Liability Directive.

These texts are aimed at adapting the liability regime to the latest technological, social and economic developments, particularly, the increased take-up of Artificial Intelligence technologies and the growing importance of the circular economy and e-commerce.

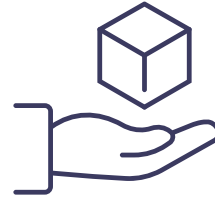
REVISION OF THE PRODUCT LIABILITY DIRECTIVE

The revision of the Product Liability Directive (PLD) arrives nearly 40 years after its original adoption. The existing text, which allows citizens to claim compensation for damages caused by all types of defective products, from pharmaceuticals and cancer medicines to agricultural products or advanced machinery, is now being adapted to reflect the technological, societal and economical developments that have taken place in the last decades.

What does it entail?

The proposal:

- 1 Broadens the scope of application.** Particularly, it gives an answer to the open legal question of whether software can be considered a product and includes 'components' when they remain under the manufacturer's control. Moreover, it also explicitly mentions AI systems and AI-enabled goods and includes digital manufacturing files, such as the templates needed to produce 3D prints.
- 2 Clarifies the concept of defectiveness and the defectiveness test** by introducing new factors that could be taken into account by the Courts when determining defectiveness, such as interconnectedness and self-learning.
- 3 Eases the burden of proof** by introducing rebuttable presumptions of the defectiveness of products and the causal link between the defectiveness and the damage under certain conditions.



Who is who?

Article 7 lists the economic operators that can be held liable for the damage caused by defective products, including:

- the manufacturers of products and components;
- manufacturers established in third countries, importers and the authorised representatives of the manufacturers in the EU;
- a fulfilment service provider if the manufacturer or importer is not established in the EU;
- a natural or legal person that substantially modifies a product (circular economy);
- the distributor under certain circumstances;
- provider of an online platform that allows consumers to conclude distance contracts.

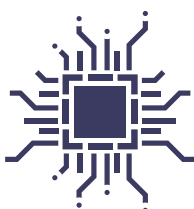
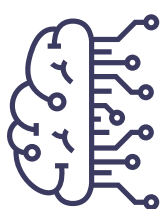
The proposal will, therefore, be especially relevant for:

- **economic operators in the circular economy sector**, such as those that repair, upgrade, remanufacture or recycle products. The rules will apply to remanufacturers and those that substantially modify products unless they can prove that the damage is related to an unmodified part of the product. With this, the Commission seeks to provide legal certainty and boost the sector, in line with the circular economy action plan.
- **e-commerce platforms**, as fulfilment service providers, when they take the role of manufacturer, importer or distributor. However, when they act as mere intermediaries they will still be subject to the conditional liability exception under the Digital Services Act.
- **software providers**, since the new rules will allow receiving compensation for damages caused by any AI or digital service needed to operate a product or for failures to address cybersecurity vulnerabilities. Injured parties will be able to claim compensation if a software or AI system caused them damage, either when used independently i.e. a health app, or when they're embedded in other products, such as cleaning robots, drones or smart-home systems.
- **non-EU manufacturers**, since consumers can now acquire products from outside the EU without the intermediation of an importer, the revised rules will allow them to direct their claims to the representative in the EU of a non-EU manufacturer. Distributors (including online marketplaces if they present themselves as such) could be held liable if they fail to give the name of the EU representative.

ARTIFICIAL INTELLIGENCE LIABILITY DIRECTIVE

The Artificial Intelligence Liability Directive (AILD), the first set of rules to specifically address compensation for damages caused by AI, seeks to tackle the specific challenges created by artificial intelligence for extra-contractual liability systems, such as its complexity, autonomy, self-learning characteristics, and its 'black-box effect'. Therefore, the Commission proposes a set of harmonised rules for access to information and for easing the burden of proof for citizens that have suffered damage caused by AI systems.

The proposal is complementary to both the PLD and the Artificial Intelligence Act (AI Act). It refers to fault-based liability, meaning that the damage must be linked to 'wrongful behaviour' which falls outside the PLD. Moreover, although the AI Act aims at avoiding fundamental rights breaches caused by the use of AI technologies, these may still arise, so it establishes necessary measures to protect citizens.



Who is who?

The proposal gives rights to **claimants** that have already filled a complaint but also those that are considering it (**potential claimants**).

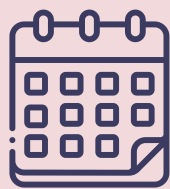
The obligations will be placed on the **defendant**, who can be:

- **a provider of AI**, within the meaning of Article 3(2) AI Act.
 - "natural or legal person, public authority, agency or other body that develops an AI system or that has an AI system developed with a view to placing it on the market or putting it into service under its own name or trademark, whether for payment or free of charge";
- **a user**, as per Article 3(4) AI Act under certain circumstances.
 - "any natural or legal person, public authority, agency or other body using an AI system under its authority, except where the AI system is used in the course of a personal non-professional activity". If the AI system is used in the course of a personal non-professional activity, only when they have materially interfered with the conditions of the operation of the AI system or when the defendant was required and able to determine the conditions of operation of the AI system and failed to do so.

What does it entail?

The proposal acts on two main fronts:

- 1 The disclosure of evidence:** The complexity of AI systems may make it difficult for the affected party to identify the specific causes of a bad outcome or lack thereof. In order to correct the asymmetry of information between providers and users, and in coherence with the logging and documentation obligations for high-risk AI systems established in the Artificial Intelligence Act, the Directive will allow national courts to order the disclosure of evidence related to a high-risk AI system suspected to have caused damage upon request by a claimant or potential claimant. The Courts will also be able to order specific measures to ensure the preservation of evidence and to protect the confidentiality of trade secrets.
- 2 The presumption of a causal link in the case of fault:** Since it can be difficult to establish a causal link, the Directive establishes a rebuttable presumption in Article 4. When there's not enough evidence the defendant will have to prove the lack of a causal link. If the court considers it excessively difficult to prove the causal link, the presumption may also be applied to non-high-risk AI systems.



NEXT STEPS

- Deadline for feedback to the Commission Adoption: 11 December 2022.
- EP JURI will lead the work on both files in the European Parliament.
- The Council has started its preliminary discussions on the texts in its Working Party on Civil Law Matters (Civil Liability).

Sign up to our free Newsletter
to receive our policy content and coverage
direct to your inbox!

