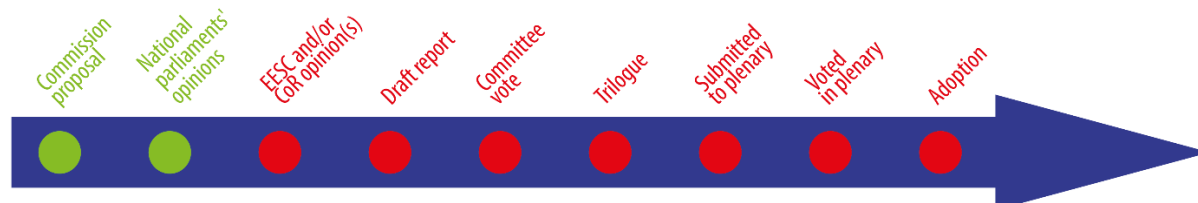


# Artificial intelligence liability directive

## OVERVIEW

The European Commission published a proposal for a directive on adapting non-contractual civil liability rules to artificial intelligence (the 'AI liability directive') in September 2022. The Commission proposes to complement and modernise the EU liability framework to introduce new rules specific to damages caused by AI systems. The new rules intend to ensure that persons harmed by AI systems enjoy the same level of protection as persons harmed by other technologies in the EU. The AI liability directive would create a rebuttable 'presumption of causality', to ease the burden of proof for victims to establish damage caused by an AI system. It would furthermore give national courts the power to order disclosure of evidence about high-risk AI systems suspected of having caused damage. Stakeholders and academics are questioning, inter alia, the adequacy and effectiveness of the proposed liability regime, its coherence with the artificial intelligence act currently under negotiation, its potential detrimental impact on innovation, and the interplay between EU and national rules.

<b>Proposal for a directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI liability directive)</b>		
<i>Committee responsible:</i>	Committee on Legal Affairs (JURI)	COM(2022) 496 final 28.9.2022
<i>Rapporteur:</i>	Axel Voss (EPP, Germany)	2022/0303 (COD)
<i>Shadow rapporteurs:</i>		Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')
<i>Next steps expected:</i>	Publication of draft report	



## Introduction

Artificial intelligence (AI) technologies are increasingly used to improve decision-making processes in a number of sectors such as health (e.g. disease diagnosis tools), mobility (e.g. autonomous driving systems), or agriculture (e.g. monitoring tools).<sup>1</sup> To ensure that Europeans can benefit from these new technologies in full respect of EU values and principles, the European Commission pledged to adopt a ['human-centric' approach to AI](#) and to address the risks associated with AI uses in its 2020 [White Paper on Artificial Intelligence](#).

Liability rules that determine how damage – caused by human activities or goods for which humans are considered liable by law – can be compensated have proved particularly complex to enforce in the context of emerging digital technologies like AI, the internet of things and robotics.<sup>2</sup> As a result, EU citizens and EU businesses' trust in AI technologies is impaired. While European consumers generally consider AI applications potentially useful for their everyday life, such applications are perceived as risky, which, in turn, leads to a lower potential level of take-up.<sup>3</sup> Likewise, a recent [EU survey](#) on the use of technologies based on AI concluded that 33% of enterprises find liability for potential damages to be one of the major external challenges to AI adoption in the EU.

Against this background, the European Commission proposes to address liability-related challenges to encourage trust in these new emerging digital technologies and create the investment stability necessary for the success of AI product and service take-up in the Union.<sup>4</sup> The [new EU rules to address liability issues related to AI systems](#) are part of a broader set of initiatives including a proposal for setting common rules applicable to all AI systems placed on the market or used in the EU (i.e. the [AI act](#)) and the revision of the [General Product Safety Directive](#) and [Machinery Directive](#).

## Existing situation

### Existing liability rules

The existing EU liability framework consists of the [Product Liability Directive 85/374/EEC](#) (the 'PLD') and of national liability rules that apply in parallel.

- **National liability rules** offer different avenues to victims to claim compensation. A victim can make a claim for damages caused by products and services based on a person's conduct (**'fault-based liability'**). A fault-based claim usually requires proving the existence of damage, a fault of the liable person, and a causality between that fault and the damage. A victim can also make a claim for damage suffered irrespective of fault (**'strict liability'**). Strict liability rules assign liability for the relevant risk to a person without the need to prove a fault. Under national rules, the victim has usually only to prove that the risk stemming from the liable person identified by law (e.g. the operator who benefits from an activity that exposes the public to a risk) materialised.<sup>5</sup>
- The **PLD** harmonises no-fault based (strict) liability regimes for claims for damage caused to a consumer due to the defectiveness of a product at EU level. The directive applies to a vast range of products (from raw materials to AI-driven devices) and lays down common rules under which the producer (and in some cases the supplier/seller) is held **liable for damage caused by a defect** in their product, provided that the injured party proves the damage, the defect and the causal link between the two. Under the PLD, the victim can claim compensation for personal injury or damage to consumer property stemming from a defective product up to 10 years after such product is put into circulation.<sup>6</sup>

As a result, three avenues for liability claims exist in the EU. The victim can seek compensation based on a **fault-based liability claim** (requires proving damage, fault and causality), on a **strict liability**

**claim** (independent of fault), or on a **claim against the producer of a defective product** (victims must prove that the product was defective and the causal link between that defect and the damage).

## Concerns regarding existing liability rules

The 2018 evaluation [report](#) of the PLD identified several shortcomings in relation to digital technologies in general and to AI in particular.

First, the European Commission found that while digital content, software and data play a crucial role in the functioning of many new products, it remains unclear to what extent such intangible elements can be classified as products under the PLD. This triggers legal uncertainty regarding how injured parties can be compensated for damage caused by **software**, including software updates, and who will be liable for such damage. Second, the Commission's investigations showed that new technologies introduce **new risks**, such as openness to data inputs that affect safety or cybersecurity risks, while the PLD provides for compensation only for physical or material damage. Third, the **specific characteristics of AI** (e.g. opacity/lack of transparency, explainability, autonomous behaviour, continuous adaptation, limited predictability) make it particularly difficult to meet the burden of proof for a successful claim. Under current liability rules, in order to claim compensation for damages, victims usually have to prove the existence of damage, a fault of the liable person, and a causality between that fault and the damage or prove the damage, the defect and the causal link between the two. However, AI systems have characteristics that make it excessively difficult or even impossible for victims to identify and prove the fault of a potentially liable person or a defect and the causal link between that fault/defect and the damage suffered, and therefore to obtain compensation.<sup>7</sup>

As a result, there is a risk that national courts will diverge in their approaches, which could lead to further fragmentation of liability rules for damage caused by AI across the EU. The Commission's impact assessment warns of a risk of **legal fragmentation**, with judges having to interpret general rules that were not designed with AI in mind to decide liability claims.<sup>8</sup> Given that the law applicable to a liability claim in a cross-border context is by default the law of the country in which the damage occurs, different liability regimes and burden of proof rules could be applied to the same kind of AI product or service deployed in several Member States although they cause the same kind of damage. Therefore, businesses face **legal uncertainty** due to outdated and unclear EU and national liability rules, and victims of harm caused by AI products experience difficulty in obtaining compensation in the EU.

The Commission concludes that this **compensation gap** could undermine citizens' trust in AI, as well as the ability of the legal and judicial system to ensure fair and equitable results in claims involving AI systems.<sup>9</sup>

## Reforming the EU liability framework applicable to AI

The ongoing [reform](#) of the EU liability framework applicable to AI is twofold.

The Commission proposed to undertake a review of the PLD<sup>10</sup> to adapt it to the digital age and preserve its technology-neutral nature and coverage. The proposal tabled in September 2022 aims to **modernise the existing rules on the strict liability of manufacturers for defective products** (from smart technology to pharmaceuticals) and ensure that victims can get fair compensation when defective products, including digital and refurbished products, cause harm. It also helps victims of damage caused by AI-enabled products to make a more effective compensation claim against the producer. As such, the PLD review concerns the adaptation of the **producers' strict liability regime for defective products** to allow for compensation for damages without the need to prove a fault.<sup>11</sup>

In parallel, the European Commission has unveiled a proposal for an [AI liability directive](#) meant to tackle consumers' liability claims for damage caused by AI-enabled products and services. The

Commission notes that while the [draft AI act](#) currently under negotiation aims at **reducing risks for safety and fundamental rights**, such rules do not prohibit AI systems posing a residual risk to safety and fundamental rights being placed on the market. Therefore, harm can still occur when the AI systems are used in the EU and the draft AI act contains no provisions on liability for the purposes of damages claims and does not compensate the victim for the harm suffered. Against this background, the AI liability proposal sets a fault-based liability regime with a view to compensating any type of damage caused by AI systems (the difference in scope between the draft PLD review and the draft AI liability directive is further explained below, under Scope).

Several EU Member States are considering or planning legislative action on civil liability for AI. For instance, Finland and Portugal are developing national regulations for automated decision-making to determine liability issues.\* In the United States, the Federal Trade Commission issued [guidance](#) on AI in 2021, and a number of States have [passed](#) specific legislation to help address liabilities associated with self-driving cars. However, there is no comprehensive federal legislation on AI and addressing liabilities in the US to date.

\* See JRC-OECD report, [AI Watch, National strategies on artificial intelligence – a European perspective](#), 2021.

## Parliament's starting position

The European Parliament adopted a resolution with recommendations to the Commission on a civil liability regime for artificial intelligence ([2020/2014\(INL\)](#)) in October 2020. The Parliament asked the Commission to adopt a proposal for a civil liability regime for AI based on Article 114 TFEU. Parliament recommended setting up a common **strict liability regime for high-risk autonomous AI systems**. Operators of a high-risk AI system would be held liable when such systems cause harm or damage to the life, health, or physical integrity of a natural person, to the property of a natural or legal person, or cause significant immaterial harm resulting in a verifiable economic loss. In its subsequent resolution of 3 May 2022 on artificial intelligence in a digital age ([2020/2266\(INI\)](#)), Parliament stressed that, while high-risk AI systems should fall under **strict liability** laws (combined with mandatory insurance cover), any other activities, devices or processes driven by AI systems that cause harm or damage should remain subject to **fault-based liability**. The affected person would benefit from a **presumption of fault** on the part of the operator, unless the latter is able to prove that it has abided by its duty of care.

## Council starting position

In its [conclusions on shaping Europe's digital future](#) of 9 June 2020, the Council called upon the Commission to put forward concrete proposals on the liability implications of AI.

## Preparation of the proposal

The Commission launched a broad [public consultation](#) in 2021 on adapting liability rules to the digital and published an [Impact Assessment](#), as well as supporting studies.<sup>12</sup>

The European Parliament commissioned a study analysing the notion of AI technologies and the applicable legal framework for civil liability.<sup>13</sup> The European Parliamentary Research Service published a [study](#) calling for a harmonised EU regulatory framework regarding robotics and AI liability issues, as well as several supporting briefings.<sup>14</sup>

## The changes the proposal would bring

The Commission seeks to introduce a new liability regime aiming at ensuring greater legal certainty, thereby enhancing consumer trust in AI and ensuring successful innovations across the EU.

## Principle and objectives

The purpose of the AI liability directive is to improve the functioning of the internal market by laying down **uniform requirements for non-contractual civil liability for damage caused with the involvement of AI systems**. The overall objective of the proposal is to **promote the rollout of trustworthy AI**, to harvest its full benefits for the internal market by ensuring victims of damage caused by AI obtain equivalent protection to victims of damage caused by products in general.<sup>15</sup> The proposal also aims to **reduce legal uncertainty** for businesses developing or using AI regarding their possible exposure to liability and **prevent the emergence of fragmented AI-specific adaptations of national civil liability rules**. The legal basis for the proposal is Article 114 TFEU, which provides for the adoption of measures to ensure the establishment and functioning of the internal market. The choice of a directive leaves the Member States some flexibility for their internal transposition of the legislation, as directly applicable rules would be too strict in relation to the scope of tortious liability, which is based on specific and long-established legal traditions in each Member State.<sup>16</sup>

## Scope

The proposed AI liability directive seeks to harmonise **non-contractual civil liability rules for damage caused by artificial intelligence (AI) systems** (Article 1). The AI liability directive would not define AI, but refer to the same general concept of AI as in the AI act and particularly its definition of 'AI systems'.<sup>17</sup> The new rules would apply to damage caused by AI systems, **irrespective of whether they are defined as high-risk or not** under the AI act.<sup>18</sup>

The AI liability directive concerns 'extra-contractual' civil liability rules, i.e. rules providing a compensation claim irrespective of a contractual link between the victim and the liable person.<sup>19</sup> The rules would ensure that any type of victim (individuals or businesses) can be compensated if they are harmed by the fault or omission of a provider, developer or user of AI resulting in a damage covered by national law (e.g. health, property, privacy, etc.).

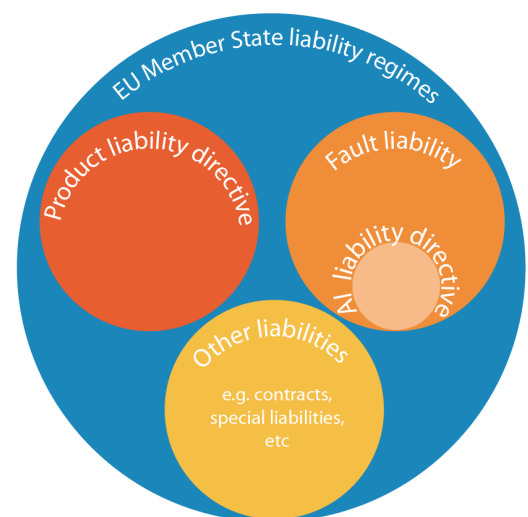
The AI liability directive would not affect existing rules laid down in other EU legislation, particularly the EU rules regulating conditions of liability in the field of transport, the proposed revision of the Product Liability Directive or the Digital Services Act. Furthermore, while the AI liability directive does not apply with respect to criminal liability, it may be applicable with respect to state liability given that state authorities are subject of the obligations in the AI act.<sup>20</sup>

### PLD and AI liability directive.

The revised PLD proposal aims to modernise the existing EU no-fault-based (strict) product liability regime and would apply to claims made by private individuals against the manufacturer for damage caused by defective products.

In contrast, the new AI liability directive proposes a targeted reform of national fault-based liability regimes and would apply to claims, made by any natural or legal person against any person, for fault influencing the AI system that caused the damage.

Figure 1 – Liability regimes in the EU



Source: European Commission, 2022.

## Main provisions

### Definitions

To ensure consistency, the AI liability directive refers to a number of key notions such as 'AI system', 'high-risk AI system', 'provider' and 'user' enshrined into the **draft AI act** that is currently under negotiation (Article 1). The AI liability directive also defines '**claim for damages**' as a **non-contractual fault-based civil law claim** for compensation of the damage caused by an output of an AI system or the failure of such a system to produce an output where such an output should have been produced.

### Presumption of causality

The AI liability directive would create a **presumption of causality** that gives claimants seeking compensation for damage caused by AI systems a more reasonable burden of proof and a chance of a successful liability claim. Article 4 lays down a rebuttable presumption of causality establishing a causal link between non-compliance with a duty of care under Union or national law (i.e. the fault) and the output produced by the AI system or the failure of the AI system to produce an output that gave rise to the relevant damage. Such presumption of causality would apply when the cumulative following conditions are met:

- First, the claimant has demonstrated that the **non-compliance with a certain EU or national obligation** relevant to the harm of an AI system caused the damage (Article 4 (1)(a)).

Claims for damages involving providers and users of high-risk AI systems are subject to conditions related to the non-compliance of provisions applicable under the AI act including the requirements regarding data training, transparency, human oversight, accuracy, robustness and cybersecurity (Article 4 (2) and (3)). In the case of a claim for damages against a provider of a high-risk AI system, national courts must therefore presume the causal link between the non-compliance of these requirements and the output produced by the AI system, or the failure of the AI system to produce an output that gave rise to a relevant damage (Recital 26).

In the case of a claim for damages concerning an AI system that is not a high-risk AI system, the presumption would only apply where the national court considers it excessively difficult for the claimant to prove the causal link (Article 4 (5)). Furthermore, the presumption of causality does not apply if the defendant proves that the claimant has sufficient evidence and expertise to prove the causal link between the fault of the defendant and the output produced by the AI system or the failure of the AI system to produce an output that gave rise to a relevant damage (Article 4 (4)).

Furthermore, the AI liability directive would establish a further differentiated regime for situations where the AI system from which the alleged damage arose was used during a personal, non-professional, activity (Article 4 (6)).

- Second, it must be **reasonably likely** that, based on the circumstances of each case, the defendant's negligent conduct has influenced the output produced by the AI system or the AI system's inability to produce an output that gave rise to the relevant damage (Article 1 (b)). For the presumption of causality to apply, the fault of the defendant should be established as a human act or omission that does not meet a duty of care under Union law or national law directly intended to protect against the damage that occurred (Recital 22). A breach of a requirement to file certain documents or to register with a given authority, even though this might be envisaged for that particular activity, would not be considered 'as reasonably likely' to have influenced the output produced by the AI system or the failure of the AI system to produce an output (Recital 25).



- Third, the claimant has demonstrated that the output produced by the AI system or the AI system's inability to produce an output **gave rise to the damage** (Article 1(c)).

By reducing the burden of proof, the AI liability directive intends to make it easier for people alleging injury from AI to succeed in bringing claims, given the complexity of the AI environment (i.e. 'black box').<sup>21</sup> In practice, the new rule means that if a victim can show that someone was at fault for not complying with a certain obligation relevant to their harm, and that a causal link with the AI performance is reasonably likely, the court can presume that this non-compliance caused the damage.

The defendant may, however, **rebut this presumption of causality**, for example by showing that its fault could not have caused the damage (recital 30).

The proposed approach **does not entail a reversal of the burden of proof**, according to which the victim no longer bears the burden of proof and it is for the person liable to prove that the conditions of liability are not fulfilled. The Commission discards such a reversal of the burden of proof to avoid exposing providers, operators and users of AI systems to higher liability risks, which could hamper innovation in AI-enabled products and services.<sup>22</sup> Under the proposed approach, the victim would, instead, still bear the burden of proof, but the presumption of causality would result in a targeted alleviation of the burden of proof regarding the question as to how or why an AI system reached a certain harmful output. This approach would relieve victims of the need to demonstrate the inner workings of the AI system at stake.

## Disclosure of evidence

The large number of people potentially involved in the design, development, deployment and operation of high-risk AI systems, makes it very difficult for plaintiffs to identify the person potentially liable for damage caused and to prove the conditions for a claim for damages. To remedy this, the AI liability directive would give national courts the power to **order disclosure of evidence about high-risk AI systems** that are suspected of having caused damage (Article 3(1)). The new rules would help victims to access relevant evidence to identify the person that could be held liable, for instance, when damage is caused because an operator of drones delivering packages does not respect the instructions for use or because a provider does not follow requirements when using AI-enabled recruitment services.<sup>23</sup> Accordingly, companies responsible for high-risk AI systems would be required to disclose a range of information including specific documentation, information and logging requirements.<sup>24</sup>

Requests are to be addressed to parties that bear obligations under the AI act, i.e. the provider of an AI system, a person who is subject to the provider's obligations laid down under the AI act or a user pursuant to the AI act. The claimant must present sufficient evidence to support the claim and make proportionate effort to obtain evidence from the defendant. The claimant could also request the disclosure of evidence from providers or users that are not defendants, but only in cases where all proportionate attempts made to gather the evidence from the defendant were unsuccessful. In addition, for the judicial means to be effective, the AI liability directive would also provide that a court may also order the preservation of such evidence (Article 3(3)).

Disclosure of evidence must be **necessary and proportionate** to support a claim for damages. In this respect, national courts would be required to consider the legitimate interests of all parties, (including third parties) and the protection of trade secrets and of confidential information, such as information related to public or national security (Article 3(4)). Should a defendant fail to comply with an order by a national court to disclose or to preserve evidence at its disposal, the national court would be entitled to presume the evidence requested was intended to prove non-compliance with a relevant duty of care obligation. The defendant, however, has the right to rebut that presumption.

## Relation to national laws

The draft AI liability directive leaves some margin of appreciation and interpretation to Member States' legal orders. The directive would lay down EU rules for presumption of causality but not harmonise rules regarding which party has the burden of proof or which degree of certainty is required as regards the standard of proof. This remains a Member State competence within national laws.<sup>25</sup> Furthermore, the proposed directive follows a **minimum harmonisation approach**. This would allow claimants to invoke more favourable rules under national law (e.g. reversals of the burden of proof under national fault-based regimes or national no-fault liability), for instance in cases of damage caused by AI systems.<sup>26</sup>

## Review clause

The Commission will have to submit a report to the Parliament, the Council, and the Economic and Social Committee, assessing the achievement of the AI liability directive five years after its transposition (Article 5). The AI liability directive therefore proposes to leave the door open for future legislative development. In particular, that review should examine whether there is a **need to create no-fault liability rules** for claims against the operator combined with a mandatory insurance for the operation of certain AI systems, as suggested by the European Parliament resolution of 20 October 2020 on a civil liability regime for artificial intelligence ([2020/2014\(INL\)](#)). Such a review should consider, in particular, risks involving damage to important legal values, such as the life, health and property of unwitting third parties, through the operation of AI-enabled products or services as well as the insurance market's development of appropriate solutions.

## Advisory committees

The European Economic and Social Committee (EESC) adopted an [opinion](#) on the proposal on 25 January 2023. The European Committee of the Regions (CoR) has not adopted an opinion.

## National parliaments

The [subsidiarity deadline](#) for national parliament was set at 28 November 2022. In its submission, the **German Bundesrat** warns that the term 'AI system' in the AI liability directive is based on a definition proposed in the draft AI act that would lead to an excessively broad scope of application. Furthermore, the Bundesrat stresses that, under the current draft text, in the case of a claim for damages concerning an AI system that is not a high-risk AI system, the presumption of causality would only apply where the national court considers it 'excessively difficult' for the claimant to prove the causal link (Article 4(5)). This requirement rests therefore on an imprecisely defined legal concept.

## Stakeholder views<sup>27</sup>

Some of the main contentious points raised so far are listed below.

### Presumption of causality, burden of proof and coherence with the proposed AI act

Consumer associations and civil society groups welcome the proposed new EU liability rules but warn they contain blind spots. The main EU consumer protection association, BEUC, [criticises](#) the proposal for placing the responsibility on consumers to prove the fault lies with the operator. Considering how opaque and complex AI systems are, BEUC argues these conditions will de facto make it impossible for consumers to use their right to compensation for damages. The Future of Life Institute (FLI), an independent non-profit organisation, [recommends](#) a strict liability regime for high-risk AI systems as well as for general purpose AI systems and proposes that all other AI systems fall under a fault-based liability regime where the presumption of fault lies on the operator. Furthermore, FLI calls upon EU lawmakers to harmonise the immaterial damages and indirect harms



(e.g. freedom of expression, human dignity, discrimination) for which compensation is allowed, and to define the specific types of damages that would be recoverable in EU law. The FLI also calls to include clear EU rules on allocating liability for damages caused by AI systems across the value chain in the proposal, i.e. clarify which operators can be held liable. SMEUnited [argues](#) that the AI liability directive should take better account of the size and resources of the different economic actors and highlights the reference to the AI act currently under negotiation – which it claims is problematic because it remains unclear to which AI systems the liability rules will apply, and which disclosure obligations will exist.

## Impact on innovation

Part of the tech industry worries that the proposed rules could have a chilling effect on innovation. The App Association [stresses](#) that the proposed rules will hurt business and lead to extensive de facto liability claims and unnecessarily increased business and insurance costs. Furthermore, the App Association urges the Commission to reconsider the provisions that would mean AI developers should disclose confidential information and that would lead to extensive liability claims and increased insurance costs, disproportionately harming small businesses. Similarly, the Developers Alliance [believes](#) that the proposal rests on a faulty presumption of harm for products embedding AI systems and will have a chilling effect on the EU market, acting as a disincentive for innovators, entrepreneurs and investors. The computers and communications industry association (CCIA) [reiterates](#) that AI-powered innovations may only be able to achieve their huge potential if they are not curtailed by excessive regulation. MedTech Europe questions the need to create a separate directive for civil liability involving AI systems and stresses that the presumptions listed in Article 4 are too wide-ranging.<sup>28</sup> The Information Technology Industry Council (ITI) [called](#) on legislators to ensure coherence between the AI act and the AI liability directive, to introduce more safeguards for disclosure orders and to adopt stricter conditions for triggering the causation presumption.

## Academic views

### Presumption of causality, burden of proof and coherence with the AI act

Dheu, De Bruyne and Ducuing<sup>29</sup> see many positive elements in the draft, such as the choice of a targeted approach to tort liability, the alignment with the AI act to ensure consistency, the leeway left to national law and the option to include a no-fault liability mechanism for AI in EU law in the future. However, the authors also warn against shortcomings. The lack of clarity in some key notions that will have to be applied according to national law and will depend upon national judges' interpretation risks resulting in diverging approaches. For instance, the notions of 'fault' and 'duty of care' or 'user' raise serious interpretation issues. They stress that the question whether the requirement of 'reasonably likely' is met would rest on a subjective assessment by national judges on a case-by-case basis. This may affect legal certainty and cause fragmentation across the EU depending on national tort law traditions. Furthermore, they argue that the draft text creates uncertainty regarding the allocation of roles between the parties (e.g. 'defendants' and 'users' or 'providers') and that the victims of AI-related damage could still face some difficulties in proving a liability claim despite the presumption of causality. The authors therefore call for a clearer distribution of roles, better explanation of the underlying notions and that the text address the need for technical expertise and financial resources victims require to prove their claims.<sup>30</sup>

The Ada Lovelace Institute recommends introducing a strict liability regime for high-risk AI systems and a complete reversal of the burden of proof for other AI systems to clarify the scope and application and offer greater legal certainty.<sup>31</sup> Another commentator [stresses](#) that the draft text does not make it easy for injured parties to establish a presumption of causality, given the heavy burden of proof they face, and argues that amendments should be introduced to facilitate the mechanism of redress available to victims of AI harm.

**Debate on the legal personality for AI systems.** In its landmark 2017 [resolution on Civil Law Rules on Robotics](#), the Parliament called on the Commission to explore the possibility to grant the most sophisticated autonomous robots a status of electronic persons (close to the notion of 'legal personality'), so that such robots can be held responsible for any damage they may cause. A number of academics in the field have refuted the need to adopt such an approach and grant legal personality to emerging digital technologies.<sup>i</sup> In this respect, it has been [stressed](#) that granting AI a legal personality would result in shifting liabilities to AI systems and in shielding humans from the consequences of their conduct. However, for other experts, adapting traditional policies on strict liability and fault-based liability to the context of AI services and products as proposed is likely to fall short, especially when no human is liable for damages or when the victim is unable to identify the person that has committed harm. The pace of technological developments might require lawmakers to take new radical approaches, including granting AI systems legal personhood, including the attribution of legal personality to AI.<sup>ii</sup> In this way, a 2020 European Parliament study on artificial intelligence and civil liability [stresses](#) that there may be cases, now or in the future, where it might be sensible to attribute the machine some form of legal personhood.

<sup>i</sup> See, in particular, European Commission, [Liability artificial intelligence and other emerging technologies](#), 2019.

<sup>ii</sup> See, for instance, U. Pagallo, [The way ahead on AI liability issues - Will the developing EU liability framework for regulating AI prove sufficient?](#), 2022.

## Burden of proof and effectiveness

Some commentators highlight that it is questionable whether a fault-based liability regime would succeed in simplifying victims' claims even with a regime of presumption of causality. They argue that AI systems can be so complex that even when a user complies with their duty of care, damage can still arise and it is not clear who will be held liable for such damages and on what grounds.<sup>32</sup>

## Impact on innovation

According to some experts, providers of AI systems will find it difficult to adequately protect themselves from liability, as they will have to comply with several product safety and liability regulations, including potential claims under the new AI liability directive and the PLD, and the forthcoming AI act. As a result, there is a risk of substantial chilling effect on AI innovation in Europe.<sup>33</sup>

## Interplay between EU and nation rules

The Commission chose to table a directive. However, it has been stressed that if Member States maintain a strict liability regime in relation to certain cases, this would run against providing economic operators with legal certainty, thereby threatening the harmonisation of liability rules on a European scale.<sup>34</sup> Furthermore, since the directive does not harmonise the conditions related to the damage, discrepancies between Member States' national systems can be a source of problems. For instance in some Member States, one would be able to invoke the directive as a means of claiming compensation due to a psychological harm caused by an AI system, while in other Member States, such harms would not be eligible for compensation.<sup>35</sup>

## Legislative process

In **Parliament**, the file has been assigned to the Legal Affairs Committee (JURI) and Axel Voss (EPP, Germany) has been appointed as rapporteur. The next step for the directive is for the European Parliament and Council to consider and adopt the draft text.

## EUROPEAN PARLIAMENT SUPPORTING ANALYSIS

EPRS Implementation appraisal briefing, [Aligning the Product Liability Directive with the circular economy and emerging technologies](#) – Revision of Directive 85/374/EEC, 2022.

EPRS, [New Product Liability Directive](#), February 2023.

EP, [A study on Artificial Intelligence and Civil Liability](#), 2020.

T. Evas, [Civil liability regime for artificial intelligence](#), EPRS study, 2020.

## OTHER SOURCES

[AI Liability Directive](#), Legislative Observatory (OEL), European Parliament.

## ENDNOTES

- <sup>1</sup> While there is no exact definition of AI, it is generally acknowledged that AI technologies are a combined range of technologies including [machine-learning techniques](#), [robotics](#) and [automated decision-making systems](#) used to improving prediction, for optimising operations and resource allocation, and for personalising service. See European Commission, [Proposal for a regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence \(artificial intelligence act\)](#) 2021/0106 (COD), Explanatory memorandum. See OECD, [Artificial Intelligence in Society](#), 2022. See also: [McKinsey Global Survey on AI in 2021](#).
- <sup>2</sup> See European Commission, [Report on the safety and liability implications of Artificial Intelligence, the Internet of Things and robotics](#), 2020.
- <sup>3</sup> See European Commission, Directorate-General for Justice and Consumers, M. Mosoreanu, D. Ulicna, S. Paetz, and al., [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](#), 2022.
- <sup>4</sup> See European Commission, [Impact assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence](#), SWD(2022) 319, 2022 (hereinafter, the AI liability directive impact assessment'). See also: European Commission, [Inception impact assessment](#), Adapting liability rules to the digital age and circular economy, 2021.
- <sup>5</sup> See European Commission, [Impact assessment accompanying the document: Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence](#), above.
- <sup>6</sup> Ibid. The PLD does not cover damage caused to property intended for professional use, damage caused during the provision of a service, damage to victims other than natural persons or claims based on the wrongful use of a product. In all these cases, victims can only get compensation according to national liability rules.
- <sup>7</sup> See European Commission, Report on the safety and liability implications of AI, above. See also the AI liability directive impact assessment, above.
- <sup>8</sup> Ibid.
- <sup>9</sup> See European Commission, impact assessment at p.20. Academics have also [stressed](#) a number of gaps exist in current EU consumer law on addressing AI liability issues. While some support the harmonisation of liability regimes concerning AI-related harm, the right approach is subject to debate (see B. Schütte, L. Majewski; K. Havu, [Damage s Liability for Harm Caused by Artificial Intelligence – EU Law in Flux](#), 2021; G. Wagner, [Liability for Artificial Intelligence: A Proposal of the European Parliament](#), 14 July 2021).
- <sup>10</sup> See S. De Luca, EPRS, [New Product Liability Directive](#), January 2023.
- <sup>11</sup> European Commission, Proposal for a directive of the European Parliament and of the Council on liability for defective products, COM(2022) 495. See European Commission, [New liability rules on products and AI to protect consumers and foster innovation](#), 2022. See also: S. De Luca, above.
- <sup>12</sup> See European Commission, [Comparative law study on civil liability for artificial intelligence](#), 2021. See also: European Commission, [Liability for Artificial Intelligence and other emerging technologies, report of the New Technologies formation of the Expert Group on Liability and New Technologies](#), 2019.
- <sup>13</sup> See European Parliament, [A study on Artificial Intelligence and Civil Liability](#), 2020.
- <sup>14</sup> See T. Evas, [Civil liability regime for artificial intelligence](#), EPRS study, 2020. See EPRS implementation appraisal briefing, [Aligning the Product Liability Directive with the circular economy and emerging technologies](#) – Revision of Directive 85/374/EEC, 2022.
- <sup>15</sup> See [Explanatory memorandum](#) at p.2.
- <sup>16</sup> Ibid.
- <sup>17</sup> 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.

- <sup>18</sup> See European Commission, [Questions & Answers: AI Liability Directive](#), 28 September 2022.
- <sup>19</sup> See [Explanatory memorandum](#) at p.3. Criminal liability is not covered.
- <sup>20</sup> See Explanatory memorandum at p.11. The proposed directive does not affect existing rules regulating the conditions of liability in the transport sector and those set by the Digital Services Act.
- <sup>21</sup> See European Commission, [Questions & Answers: AI Liability Directive](#), above.
- <sup>22</sup> Ibid. See also: explanatory memorandum above, at p.6.
- <sup>23</sup> See [Questions & Answers: AI Liability Directive](#), above.
- <sup>24</sup> See Recital 16.
- <sup>25</sup> Recital 13.
- <sup>26</sup> Recital 14.
- <sup>27</sup> 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'.
- <sup>28</sup> See MedTech Europe, [Feedback on the European Commissions proposal for a Directive on Liability rules for Artificial Intelligence](#), 24 November 2022.
- <sup>29</sup> See O. Dheu, J. De Bruyne and C. Ducuing, [The European Commission's Approach To ExtraContractual Liability and AI – A First Analysis and Evaluation of the Two Proposals](#), October 2022.
- <sup>30</sup> Ibid.
- <sup>31</sup> See Ada Lovelace Institute, Feedback to the European Commission on its proposal for a Directive on adapting non-contractual civil liability rules to artificial intelligence, 2022.
- <sup>32</sup> See A. Lodie, S. Celis J. and T. Karathanasis, [Towards a new regime on civil liability for AI systems: Comment on the European Commission proposals](#), October 2022.
- <sup>33</sup> See U.S. Chamber of Commerce Institute of Legal Reform, [Comments on the Proposed AI Liability Directive Burden of Proof: Presumption of Causality](#), November 2022.
- <sup>34</sup> A. Lodie, S. Celis J. and T. Karathanasis above.
- <sup>35</sup> Ibid.

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