BRIEFING
EU Legislation in Progress

European Parliament

New Product Liability Directive

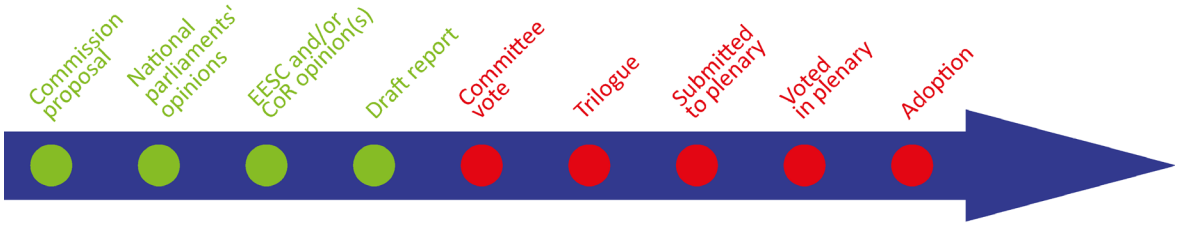
OVERVIEW

As products have become more complex in the digital age, the European Commission published a proposal for a new directive on liability of defective products in September 2022. 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. The proposal 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). It also alleviates the burden of proof for victims under certain circumstances. The proposal clarifies the liability rules for companies that substantially modify products before resale to extend the product lifecycle (circular economy). The proposed rules would also ensure that consumers are compensated for defective products manufactured outside the EU.

The Parliament and Council are currently working on establishing their respective positions on the draft legislation.

Proposal for a directive of the European Parliament and of the Council on liability for defective products		
Committees responsible:	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)
Rapporteurs:	Vlad Botoş (Renew, Romania) and Pascal Arimont (EPP, Belgium)	Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')
Shadow rapporteurs:	Krzysztof Hetman (EPP, Poland) Maria Manuel Leitão Marques (S&D, Portugal) René Repasi (S&D, Germany) Karen Melchior (Renew, Denmark) Marcel Kolaja (Greens/EFA, Czechia) Sergey Lagodinsky (Greens/EFA, Germany) Eugen Jurzyca (ECR, Slovakia) Kosma Złotowski (ECR, Poland) Emmanuel Maurel (The Left, France)	
Next steps expected:	Vote in committee on draft report	



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Author: Stefano De Luca
Members' Research Service
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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 damage 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 causal 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. 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.

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.

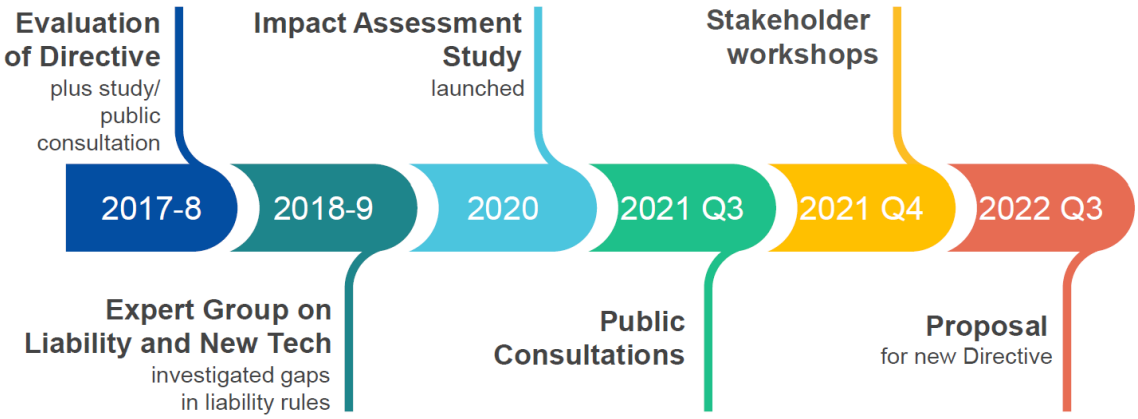
In its 18-month programme of December 2021, entitled 'Taking forward the Strategic Agenda', the Council confirmed that the priorities set out in the strategic agenda for 2019 to 2024 remain fully relevant. Product safety, cybersecurity and ensuring a level playing field in all aspects of the single market 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

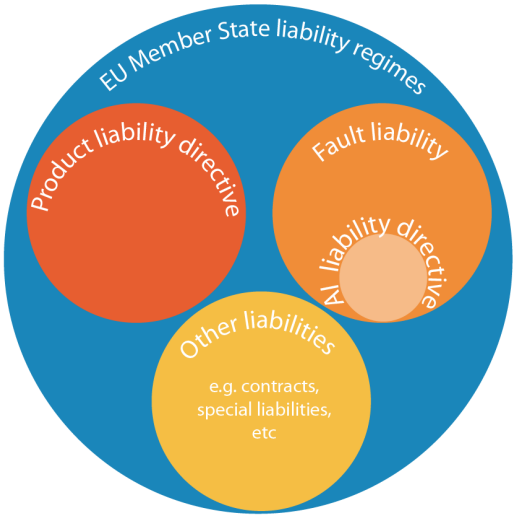
On 28 September 2022, the Commission published two complementary draft directives to adapt the existing liability rules to new digital technologies, including AI, and the circular economy:

- 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'[7] 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, to address 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 respect for 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 damage 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 damage.

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 the obligation to disclose information;
- a product does not comply with mandatory safety requirements;
- damage is caused by an 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 (i) a related service, (ii) software including software updates or upgrades, or (iii) 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.

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.

National parliaments

The subsidiarity deadline for national parliaments to issue opinions on the proposal was 12 December 2022. In its contribution, the **German Bundesrat** praises the alleviation of the burden of proof and the facilitated access to evidence in favour of the injured party. However, 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 views[11]

Scope and type of damage

The EU consumer protection organisation, BEUC, welcomes the fact that software is included as a product and that data loss can be considered as 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 damage caused by software, including third party software. The Software Alliance (BSA) stresses how the proposed inclusion of a provision on 'loss or corruption of data' might create confusion and overlaps with the GDPR. Furthermore, BSA believes the provision on 'medically recognised harm to psychological health' must be clarified by including what claimants must prove to claim such damage (e.g. diagnosis by any medical professional and/or defined categories of conditions). 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 damage such as loss of data or psychological harm should not be part of the revised PLD's liability regime.

Product defectiveness

As no product can ever be fully cyber-secure, Orgalim (representing Europe's technology industries) recommends that a product should be considered defective under the PLD for cybersecurity vulnerabilities only when it does not comply with mandatory cybersecurity requirements under EU or national law. In addition, it requests to delete the reference to 'foreseeable misuse' of a product because it extends the scope of liability for manufacturers and might bring legal uncertainty. The Software Alliance (BSA) also asks for clarification of the concept of defectiveness and suggests aligning the timeline related to the responsibility of manufacturers for defects that should have been solved via updates with the proposed CRA (e.g. expected product lifetime or a period of five years, whichever is shorter). According to BSA, this solution would reflect realities of software development and maintain consistency between the PLD and CRA.

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 functioned 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. Digital Europe flags that what a claimant must do and prove before alleviating the burden of proof should be clarified and that more safeguards should be put in place to protect trade secrets in the disclosure of evidence. The Irish Council for Civil Liberties, instead, warns against placing the burden of proof of emerging technology defectiveness on victims rather than manufacturers. This is 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.

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] Wagner praises the proposal to extend the product concept to software, including 3D printing programmes and product-related digital services, as necessary changes to adapt the current PLD to the digital age.[14] 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 a product also seems to cover AI products, even though the proposal does not mention AI directly.[15]

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;[16] 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.[17] Nonetheless, Koch et al. acknowledge the existing PLD's lack of clarity and its

possible application gaps regarding standalone software which is 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. Wagner underlines how the inclusion of digital data within the scope of protection of the revised PLD is a welcome acknowledgment of the changing landscape of property in the digital era. 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 and disclosure of evidence

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.[18] 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.[19]

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.[20]

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 policymakers 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.[21] 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 Committee on Legal Affairs (JURI). Vlad Botoș (Renew, Romania) and Pascal Arimont (EPP, Belgium) have been appointed as rapporteurs. The co-rapporteurs unveiled their draft report on 5 April 2023; their amendments to the Commission proposal concern, inter alia:

The notion of damage – the co-rapporteurs removed the loss or corruption of data from the scope because they considered that it was already covered by other EU laws (e.g. GDPR). In addition, the draft report clarified that medically recognised harm to psychological health should be confirmed 'by a court-ordered medical expert'.

Concept of defectiveness – the co-rapporteurs specified that cybersecurity vulnerabilities in a product qualify as a defect only when the product does not comply with mandatory cybersecurity requirements set in EU or national law. The draft report aligned the liability for defects due to lack of software updates with the proposed cyber-resilience act (e.g. expected product lifetime or five years, whichever is shorter).

Reversal of the burden of proof – the co-rapporteurs opposed a general reversal of the burden of proof for highly complex products (e.g. AI systems) by removing the presumptions and adding that the defendant must prove that it is ***highly likely*** that 'the product was defective in such a way that the defectiveness is ***highly likely*** the cause of the damage'.

Collection of evidence – the co-rapporteurs narrowed down the conditions for court-ordered disclosure of evidence putting safeguards to assure confidentiality of the information. In addition, the draft report gave the manufacturers the possibility to request access to the evidence of the claimant.

In the **Council**, the Working Party on Civil Law Matters discussed a compromise text on the new Product Liability Directive on 17 March 2023 and 19 April 2023.

EUROPEAN PARLIAMENT SUPPORTING ANALYSIS

Kramer E., Updating liability rules for defective products, EPRS, European Parliament, January 2023.

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.

Madiega T., Artificial intelligence liability directive, EPRS, European Parliament, February 2023.

Evas T., Civil liability regime for artificial intelligence, EPRS, European Parliament, September 2020.

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 (OEIL), 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 T. Madiega, Artificial intelligence liability directive, EPRS, European Parliament, January 2023.

5 See Explanatory Memorandum in 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. Cabral, Liability and artificial intelligence in the EU: Assessing the adequacy of the current Product Liability Directive, 2020.

14 G. Wagner, Liability Rules for the Digital Age – Aiming for the Brussels Effect, 2023.

15 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.

16 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.

17 M. Ebers, Liability For Artificial Intelligence And EU Consumer Law, 2021.

18 C. de Meeus, The Product Liability Directive at the Age of the Digital Industrial Revolution: Fit for Innovation?, 2019.

19 R. de Bruin, Autonomous Intelligent Cars on the European Intersection of Liability and Privacy, 2016.

20 Ibid.

21 European Law Institute Innovation Paper, Guiding Principles for Updating the Product Liability Directive for the Digital Age, January 2021.

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eprs@ep.europa.eu (contact)

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