

THE PRODUCT LIABILITY DIRECTIVE (PLD) & THE ARTIFICIAL INTELLIGENCE LIABILITY DIRECTIVE (AILD)

POLICY BRIEF

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The European Commission has adopted two proposals in order to address the changes brought about by:

- a. The digital age,
- b. Circular economy
- c. And the impact of global value chains.

The European Commission is therefore proposing the following two directives:

(1) The Product Liability Directive (PLD) – which proposes to recast the existing rules on liability of manufacturers in the case of defective products in ensuring that victims can get a fair compensation.

(2) The Artificial Intelligence Liability Directive AILD – which is a new proposal that is separate from yet related to the aforementioned directive and which its primary objective is to make it simplified for the victims of AI-related damage to be compensated.



BACKGROUND TO THESE DIRECTIVES

Adopted in 1985, the PLD recast aims to:

- (a.) Update old definitions of products to conform with modern and technological age;
- (b.) Update the burden of proof to claim compensation by the injured party which was deemed as too complex; and
- (c.) Aims to remove any exemptions for claims. (In the current Directive, property damage less than five hundred Euro did not fall within the scope of PLD).

ARTIFICIAL INTELLIGENCE (AI) WITHIN THE PLD

Within the proposed PLD text, AI is classified as a product and therefore AI systems fall within this directive's scope as well. A novelty to this directive is that this framework goes beyond the previously accepted hardware scope and will also apply to AI software providers and providers of digital services. This means that manufacturers can also be held liable in the event of damage done that is already existent on the market in the event that this is triggered through a software update.

REVISION OF THE PRODUCT LIABILITY DIRECTIVE

The PLD's framework includes rules for claims for compensation in the case of personal injury, damage to property or data loss caused by unsafe products and in holding manufacturers liable. The new text for the PLD aims to do this by:

1. Adopting rules to the circular economy business models which means that it will now be possible to hold companies who modify products within their lifecycle liable as well.
2. Compensation can be claimed in the case of damage caused by products which underwent software updates.
3. Make it easier for consumers to hold importers or the manufacturer's EU representative responsible for imported (non-EU) manufactured products.
4. Simplifying the process for claimants by giving more flexibility on the time restrictions to submit a claim, reducing the burden of proof in complex cases related to pharmaceuticals or AI.

CONTENTS OF THE AILD

The new rules strike a balance between protecting consumers and fostering innovation. The AILD aims to:

- (1) provide for uniform rules on access to information in the case of AI systems;
- (2) alleviate the burden of proof in case damages caused by AI;
- (3) and cater for claims that fall within the scope of the PLD (which includes breaches of privacy or damages caused by safety issues).

A practical example of a compensation that falls within the remit of the AILD includes having someone discriminated against in a recruitment process involving AI technology.

Moreover, the directive makes it simpler to claimants by:

- a. Introducing the concept of 'presumption of causality' which will make it easier for victims to address a fault to an AI system when dealing with complex AI systems.
- b. Introducing the right of access to evidence. This means that victims will have an easier time in filing a claim by having the right to evidence from companies and suppliers. This is to only be applicable in the case of high-risk AI.

WHAT THE AILD WILL MEAN FOR COMPANIES:

If the AILD is adopted, tech companies dealing with AI systems are to expect significant impact. Firstly, within AILD, there will be a new liability regime that includes technologically advanced products. The new directive will also make it easier for businesses to have more certainty on their potential liability. However, it will be simpler for claimants (which can be both businesses and consumers) to put forward their claims and therefore developers of AI must take this into consideration when doing risk assessments for their business prior to developing innovative systems.

The AILD will produce or disprove a causal link between the manufacturer and output produced by the AI system (or lack of in case of malfunction). This will be done in the event that the following three conditions are satisfied:

- (1) The fault of the AI system is demonstrated.
- (2) There is a "reasonable likelihood" that the fault led to the output or lack of the AI system.
- (3) The demonstration that the output resulted in damage.

To be able to demonstrate this causal link, the courts may oblige providers or users of high-risk AI systems to disclose information about their systems.

THE AILD'S RELATIONSHIP WITH THE PRODUCT LIABILITY DIRECTIVE

The new AI Liability Directive makes a targeted reform of national fault-based liability regimes and will apply to claims against any person for fault that influenced the AI system which caused the damage; any type of damage covered under national law (including resulting from discrimination or breach of fundamental rights like privacy); and claims made by any natural or legal person.

As regards alleviations to the burden of proof, the two Directives introduce similar tools (right to disclosure of evidence, rebuttable presumptions) and use similar wording to ensure consistency, regardless of the compensation route chosen.[1]

AILD'S RELATIONSHIP WITH THE ARTIFICIAL INTELLIGENCE ACT

The AI Act and the AI Liability Directive are two sides of the same coin: they apply at different moments and reinforce each other. Safety-oriented rules aim primarily to reduce risks and prevent damages, but those risks will never be eliminated entirely. Liability provisions are needed to ensure that, in the event that a risk materialises in damage, compensation is effective and realistic. While the AI Act aims at preventing damage, the AI Liability Directive lays down a safety-net for compensation in the event of damage.

The AI Liability Directive uses the same definitions as the AI Act, keeps the distinction between high-risk/non-highrisk AI, recognises the documentation and transparency requirements of the AI Act by making them operational for liability through the right to disclosure of information, and incentivises providers/users of AI-systems to comply with their obligations under the AI Act. The Directive will apply to damage caused by AI systems, irrespective if they are high-risk or not according to AI Act.[2]

TIMELINE FOR ADOPTION AND ENFORCEMENT

The proposal is currently going through the legislative process. Once adopted by the EU Council and the European Parliament, Member States would have two years to implement this new liability framework under domestic law. The Directive would not apply retroactively, but rather, only to claims that arise after this two-year period elapses.

[1] https://ec.europa.eu/commission/presscorner/detail/en/QANDA_22_5793

[2] https://ec.europa.eu/commission/presscorner/detail/en/QANDA_22_5793

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