CIVIL LIABILITY FOR ARTIFICIAL INTELLIGENCE IN EU: GENERAL REMARKS

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Purpose of the contribution

- This contribution aims to present a general overview of the liability regimes currently in place in EU Member States and to determine if they provide for an adequate distribution of all such risks.

- The starting idea of this research is that such cases in the EU will often have different outcomes due to peculiar features of these legal systems that may play a decisive role, especially in cases involving AI.

Mainly, these legal regimes largely attribute liability to human actors, emphasizing concepts such as negligence or intentional misconduct. On the other hand, although there are strict liabilities in place in all European jurisdictions, for the legal theory at present many AI systems do not fall under these regimes, and the victims are left with the sole option of pursuing their claims via fault liability.

Starting hypothesis

Artificial Intelligence – general notes

specific characteristics of AI (e.g. opacity/lack of transparency, explainability, autonomous behavior, continuous adaptation, limited predictability) make it particularly difficult to meet the burden of proof for a successful claim
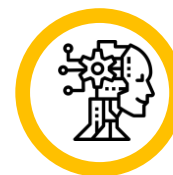
increasingly prominent and influential technology in modern society

possess the ability to analyze vast amounts of data, recognize patterns, and make complex decisions with remarkable speed and accuracy.

AI has facilitated significant improvements in efficiency, productivity, and problem-solving capabilities across various industries

alongside its transformative power, AI presents inherent risks and potential for damage. As AI systems become increasingly autonomous and capable of independent decision-making, questions regarding liability arise.

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.

SURVEY

Three avenues for liability claims that exist in the EU

The victim can seek compensation based on:

- a fault-based liability claim (requires providing 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)

The PLD covers only part of the harm that can be caused by AI-systems. It covers **damage done by defective products**, while other liability rules compensate also for the harm caused for instance by services or any use of products.
It covers the producer as a liable person, while other liability rules cover the harm done by other actors like operators/users of AI-systems.
It covers certain damages, while other liability rules compensate also other harm suffered by victims like economic and non-economic loss.

PLD VS OTHER LIABILITY RULES

Casus sentit dominus

Whoever suffers harm has to cope with it herself unless there is a justification recognized by law to shift that loss at least in part onto somebody else.

This exclude alternative or complementary systems providing relief to victims, such as insurance or fund solutions.

Example

- **A company deploys a fleet of autonomous cleaning robots to provide cleaning services throughout a city. It tasks one of its employees with the remote supervision of the fleet. One of the cleaning robots fails to recognise a colourful baby stroller, which is parked in front of a similarly patterned advertising banner. Because of the collision, the baby is injured and the stroller is damaged. The father witnessing the accident suffers psychological trauma. The accident could be due to a variety of possible causes, e.g. an image segmentation error of the robot's AI-based perception system, a failure by the provider of the AI vision component to provide an available software update or a failure by the user (the cleaning company) to install it, a failure by the human remote operator to appropriately monitor the operation of the fleet (possibly due to a malfunction of the human-robot interface) or also a deliberate attack on the robot's sensors by a third party (jamming, spoofing, sabotage through adversarial machine learning etc.).**

fault

Fault: Given the cleaning robot's highly autonomous mode of operation, as well as the opacity and complexity of the different AI components, it is highly uncertain that the victim could ascertain relevant actions or omissions of, for instance, the employee charged with providing the cleaning instructions or monitoring the fleet of robots remotely. This would however be necessary to make a successful claim against the company.

Causality:

- Assuming a wrongdoer's fault can be established, it is uncertain whether and how the victim can prove the causal link between such faulty behaviour and the damage. If an expert has access to logged information on inputs, outputs and internal states of the AI subsystems, she may be able to discard certain causes of the accident (e.g. jamming or spoofing of sensors) and to suppose certain correlations between, for instance, a detection failure and a control decision to move forward until colliding with the stroller. Due to the high degree of autonomy, complexity and the lack of explainability of the AI systems involved (not only the perception module but also e.g. the trajectory planning system and low-level controllers), it will likely be impossible to infer a clear causal link between any specific input and the harmful output. In view of AI specificities, to prove the necessary degree of likelihood is highly uncertain

PLD

- When claiming compensation under the PLD, the victim does not have to prove the producer's fault, but that the cleaning robot was defective (i.e. it failed to provide the level of safety the public at large is entitled to expect) and the causal link between the defect and the harm. The victim would not have to prove how the cleaning robot became defective; whether it was a mechanical or software flaw is irrelevant. However, the PLD has shortcomings when it comes to digital products: producers are not liable for defects that emerge after the product was put into circulation (e.g. if the defect was due to a subsequently downloaded software module) and software producers themselves, including AI-system providers, cannot be pursued. These issues are dealt with in the PLD impact assessment, as they concern not only AI technologies. The PLD does not help the victim for any claims against other parties than the producer (e.g. the cleaning company), claims based on other grounds than defect (e.g. a failure to appropriately supervise the product) etc.

The ongoing reform of the EU liability framework applicable to AI is twofold

Reform of PLD

- The proposal tabled in September 2022 aims to modernize 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

Proposal for an AI Liability directive

- 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 from 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 (

INITIATIVE FOR NEW PRODUCT LIABILITY DIRECTIVE - BACKROUND

- On 20 October 2020, the European Parliament adopted a legislative-initiative resolution on a civil liability regime for artificial intelligence. 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.

- Regarding the existing PLD - the directive has several shortcomings:

- it was legally unclear how to apply the PLD's decades-old definitions and concepts to products in the modern digital economy and circular economy (e.g. software and products that need software or digital services to function, such as smart devices and autonomous vehicles);

- the burden of proof (i.e. the need, in order to obtain compensation, to prove the product was defective and that this caused the damage suffered) was challenging for injured persons in complex cases (e.g. those involving pharmaceuticals, smart products or AI-enabled products);

TERM PRODUCT – IN THE PROPOSAL

- 'product' means all movables, even if integrated into another movable or into an immovable. 'Product' includes electricity, digital manufacturing files and software;

- In respect of AI in particular, this proposal confirms that AI systems and AI-enabled goods are "products" and therefore fall within the PLD's scope, meaning that compensation is available when defective AI causes damage, without the injured person having to prove the manufacturer's fault, just like for any other product. Second, the proposal makes it clear that not only hardware manufacturers but also software providers and providers of digital services that affect how the product works (such as a navigation service in an autonomous vehicle) can be held liable.

PROPOSAL AI Liability Directive

- The Parliament asked the Commission to adopt a proposal for a civil liability regime for AI. 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.

Principle and objectives of AI Directive

- 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. 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.

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'. 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.

- 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. 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 AIresulting in a damage covered by national law (e.g. health, property, privacy, etc.).

INTERPLAY WITH OTHER ACTS

- 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.

- The revised PLD proposal aims to modernize 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.

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:

- 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

- 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)).

- 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

NOTE

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. 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 of 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

Review clause

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 mandatory insurance for the operation of certain AI systems