Contribution ID: f601b0b4-45c6-493c-9a5c-4f617566941e
Date: 10/01/2022 06:52:26

Adapting liability rules to the digital age and Artificial Intelligence

Fields marked with * are mandatory.

Introduction

This public consultation aims to:

- confirm the relevance of the issues identified by the 2018 evaluation of the Product Liability Directive (e.g. how to apply the Directive to products in the digital and circular economy), and gather information and views on how to improve the Directive (Section I);
- collect information on the need and possible ways to address issues related specifically to damage caused by Artificial Intelligence systems, which concerns both the Product Liability Directive and national civil liability rules (Section II).

You can respond to both sections or just to Section I. It is not possible to respond only to Section II.

About you

* Language of my contribution

- ○ Bulgarian
- ○ Croatian
- ○ Czech
- ○ Danish
- ○ Dutch
- ◉ English
- ○ Estonian
- ○ Finnish
- ○ French
- ○ German
- ○ Greek
- ○ Hungarian

Do you agree or disagree that consumers should get compensation under the Directive if the following intangible items are defective and cause physical /property damage?

	Strongly agree	Agree	Neutral	Disagree	Strongly disagree	No opinion
Software embedded in a tangible product at the moment the tangible product is placed on the market	○	◉	○	○	○	○
Software made available separately via download for use on a tangible product (e.g. domestic robot) that has already been placed on the market	○	○	○	○	◉	○
Software upgrades and updates (e.g. to deliver new functionalities or fix a security flaw)	○	○	◉	○	○	○
Software that controls how a product operates (e.g. a car's engine control system, a robot's operating system)	○	◉	○	○	○	○
Software that is used on a device but does not drive the device (e. g. a gaming app on a computer or other device)	○	○	○	○	◉	○
Bespoke software (e.g. software customised to control the production line in a factory)	○	◉	○	○	○	○
Digital services that control how a product operates (e.g. cloud-based service for operating smart thermostat)	○	○	○	○	◉	○
Data capable of influencing how a product operates (e.g. training data for an autonomous vehicle)	○	○	○	○	◉	○
Data that comprises only information (e.g. a digital map, a menu)	○	○	○	○	◉	○
Software that provides immediate decision-triggering information (e.g. blood glucose meter)	○	○	○	○	◉	○

Software that provides only guidance or advice to an end user (e.g. software that interprets medical imaging and provides diagnoses)	○	○	○	○	◉	○

The Directive holds importers strictly liable for damage caused by defective products when the producer is based outside the EU. Nowadays online marketplaces enable consumers to buy products from outside the EU without there being an importer.

Online marketplaces intermediate the sale of products between traders, including those established outside the EU, and consumers. Typically, they are not in contact with the products they intermediate and they frequently intermediate trade between many sellers and consumers.

Under the current rules, online marketplaces are covered by a conditional liability exemption (Article 14 of the e-Commerce Directive). The new proposal for a Digital Services Act includes obligations for online marketplaces to tackle illegal products online, e.g. gathering information on the identity of traders using their services. Moreover, the new proposal for a General Product Safety Regulation includes provisions for online marketplaces to tackle the sale of dangerous products online.

Do you agree or disagree with the following statements?

	Strongly agree	Agree	Neutral	Disagree	Strongly disagree	No opinion
The proposals for a Digital Services Act and General Product Safety Regulation are sufficient to ensure consumer protection as regards products bought through online marketplaces where there is no EU-based producer or importer.	○	◉	○	○	○	○
The Product Liability Directive needs to be adapted to ensure consumer protection if damage is caused by defective products	○	○	○	○	◉	○

bought through online marketplaces where there is no EU-based producer or importer.						

What do you think is the appropriate approach for consumers to claim compensation when damage is caused by a defective product bought through an online marketplace and there is no EU-based producer or importer?

2000 character(s) maximum

Consumers should claim compensation directly to producers even if they are not EU-based. Online marketplaces neither produce, import or supply any of the goods that are sold by others on their platforms. However, the responsibilities of these platforms should be clearly defined and reflect what platforms could do to supervise those that sell products on their platforms.

Digital technologies may bring with them new risks and new kinds of damage.

- Regarding risks, it is not always clear whether cybersecurity vulnerabilities can be considered a defect under the Directive, particularly as cybersecurity risks evolve throughout a product's lifetime.
- Regarding damage, the Directive harmonises the rights of consumers to claim compensation for physical injury and property damage, although it lets each Member State decide itself whether to compensate for non-material damage (e.g. privacy infringements, psychological harm). National rules on non-material damage differ widely. At EU level both material and non-material damage can be compensated under the General Data Protection Regulation (GDPR) when a data controller or processor infringes the GDPR, and the Environmental Liability Directive provides for the liability of companies for environmental damage.

Do you agree or disagree with the following statements?

	Strongly agree	Agree	Neutral	Disagree	Strongly disagree	No opinion
Producers should potentially be held strictly liable for damages caused as a result of failure to provide necessary security updates for smart products	○	○	○	○	◉	○

The Directive should harmonise the right of consumers to claim compensation from producers who are not simultaneously data controllers or processors, for privacy or data protection infringements (e.g. a leak of personal data caused by a defect)	○	○	○	○	◉	○
The Directive should harmonise the right of consumers to claim compensation for damage to, or destruction of, data (e.g. data being wiped from a hard drive even if there is no tangible damage)	○	○	○	○	◉	○
The Directive should harmonise the right of consumers to claim compensation for psychological harm (e.g. abusive robot in a care setting, home-schooling robot)	○	○	○	○	◉	○
Some products, whether digital or not, could also cause environmental damage. The Directive should allow consumers to claim compensation for environmental damage (e.g. caused by chemical products)	○	○	○	○	◉	○
Coverage of other types of harm	○	○	○	○	◉	○

Adapting the Directive to the circular economy

The Directive addresses defects present at the moment a product is placed on the market. However, changes to products after they are placed on the market are increasingly common, e.g. in the context of circular economy business models.

The Evaluation of the Directive found that it was not always clear who should be strictly liable when repaired, refurbished or remanufactured products were defective and caused damage. It is worth noting here that the Directive concerns the

defectiveness of products and not the defectiveness of services. So, a third-party repair that was poorly carried out would not lead to the repairer being held liable under the Directive, although remedies may be available under national law.

Do you agree or disagree with the following statements?

	Strongly agree	Agree	Neutral	Disagree	Strongly disagree	No opinion
Companies that remanufacture a product (e.g. restoring vehicle components to original as-new condition) and place it back on the market should be strictly liable for defects causing damage	◉	○	○	○	○	○
Companies that refurbish a product (e.g. restoring functionality of a used smartphone) and place it back on the market should be strictly liable for defects causing damage	◉	○	○	○	○	○
The manufacturer of a defective spare part added to a product (e. g. to a washing machine) during a repair should be strictly liable for damage caused by that spare part	◉	○	○	○	○	○

Policy approach and impacts of adapting the Directive to the digital and circular economy

Please rank the following options for adapting the Directive to the digital and circular economy from 1 (like best) to 3 (like least)

	1	2	3
* Option 1. No legislative change	◉	○	○
* Option 2. Make explicit that strict liability rules apply to products incorporating digital content (e.g. software, data). Address defects resulting from changes to products after they are put on the market (due to circular economy activities such as refurbishments, software upgrades, interactions with other products and services, or due to safety-related cybersecurity risks)	○	◉	○
* Option 3. Address defects resulting from changes to products as in Option 2 **and** extend strict liability to digital content itself (and producers of such digital content) when placed on the market separately from the tangible product	○	○	◉

In addition to the policy options presented in the previous question, should the EU take the following additional measures to adapt the Directive to the digital and circular economy?

	Yes	No	I don't know /no opinion
* Harmonise right to claim for non-material damages under the Directive (e.g. privacy infringement, psychological harm, environmental damage)	○	◉	○
* Define liability rules where there is no EU importer	○	◉	○
* Other measures	○	◉	○

Please specify all the relevant impacts that you think the option you 'like least' and additional measures that you were against will have on the following aspects, compared to Option 1 (no legislative change). Only select an answer for those impacts that you expect the option you 'like least' to have. Impacts left blank will be processed as a 'No opinion' reply.

	Large increase	Small increase	No/negligible impact	Small decrease	Large decrease	No opinion
Legal certainty	○	○	○	○	◉	○
Costs for your company	◉	○	○	○	○	○
Consumer protection	○	○	○	○	◉	○
Consumer uptake of products in the digital and circular economy	○	○	○	○	◉	○
Purchase price of products	◉	○	○	○	○	○
Incentives for companies to place innovative products on the market	○	○	○	○	◉	○
Competitiveness of micro, small- and medium-sized enterprises (SMEs)	○	○	○	○	◉	○
Ability of producers to obtain product liability insurance	○	○	○	○	◉	○

Other impacts (please specify):

200 character(s) maximum

Reducing obstacles to getting compensation

The Evaluation of the Directive found that in some cases consumers face significant difficulties in getting compensation for damage caused by defective products.

In particular it found that difficulties in proving the defectiveness of a product and proving that the product caused the damage accounted for 53% of rejected compensation claims. In particular, the technical complexity of certain products (e. g. pharmaceuticals and emerging digital technologies) could make it especially difficult and costly for consumers to actually prove they were defective and that they caused the damage.

To what extent do you think that the following types of product present difficulties in terms of proving defectiveness and causality in the event of damage? (See additional burden of proof question concerning AI in Section II)

	To a very large extent	To a large extent	To a moderate extent	To a small extent	Not at all	Don't know /no answer
All products	○	○	○	○	◉	○
Technically complex products	○	○	○	○	◉	○
Pharmaceuticals	○	○	○	○	◉	○
AI-enabled products	○	○	○	○	◉	○
IoT (Internet of Things) products	○	○	○	○	◉	○

Other types of product (please specify):

50 character(s) maximum

In an effort to promote innovation, the Directive exempts producers from liability when a product's lack of safety was not discoverable based on the best scientific knowledge at the time it was placed on the market ('development risk defence', Art. 7(e)).

However, the Evaluation found that this defence might be inappropriate when dealing with emerging technologies due to the increasing rate of development and the ability of certain products to adapt while in operation. Furthermore, certain stakeholders considered the defence too advantageous to producers.

When should producers be able to use the 'development risk defence'?

	Strongly agree	Agree	Neutral	Disagree	Strongly disagree	No opinion
The defence should remain available without any change	◉	○	○	○	○	○
The defence should be removed	○	○	○	○	◉	○
The defence should not be available for products designed to be influenced by other interconnected products or services (e.g. complex IoT systems)	○	○	○	○	◉	○
The defence should not be available for AI products that continue to learn and adapt while in operation	○	○	○	○	◉	○
The defence should not be available for any AI products	○	○	○	○	◉	○

Please specify any other conditions you think should apply to the use of the development risk defence:

1000 character(s) maximum

Existing defence mechanisms should not be removed, as this would deter technological innovation and hinder economic development.

Reducing obstacles to making claims

The Evaluation of the Directive found that in some cases consumers faced or could face significant difficulties in making compensation claims for damage caused by

defective products. The current rules allow consumers to claim compensation for personal injury or property damage. Time limits apply to all compensation claims and several other limitations apply to compensation for property damage.

To what extent do the following features of the Directive create obstacles to consumers making compensation claims?

	To a very large extent	To a large extent	To a moderate extent	To a small extent	Not at all	Don't know /no answer
Producers are released from liability for death/personal injury 10 years after placing the product on the market	○	○	○	○	◉	○
Producers are released from liability for property damage 10 years after placing the product on the market	○	○	○	○	◉	○
Consumers have to start legal proceedings within 3 years of becoming aware of the damage	○	○	○	○	◉	○
Consumers can claim compensation only for damage to property worth more than EUR 500	○	○	○	○	◉	○
Consumers can claim compensation only for damage to property intended and used for private purposes	○	○	○	○	◉	○

Policy approach and impacts of reducing obstacles to getting compensation and making claims

Please rank the following options for adapting the Directive to the digital and circular economy from 1 (like best) to 4 (like least)

	1	2	3	4
* Option 1. No legislative change	◉	○	○	○
* Option 2. Alleviate the burden of proof for technically complex products by: a) obliging the producer to disclose technical information (e.g. data from clinical trials or log data of a robot vacuum cleaner) to the injured party to better enable the latter to prove their claim; and b) allowing courts to infer that a product is defective or caused the damage under certain circumstances (e.g. when other products in the same production series have already been proven to be defective or the product clearly malfunctioned).	○	◉	○	○
*				

Option 3. Reverse the burden of proof for technically complex products. In the event of damage, the producer would have to prove the product was not defective.	○	○	◉	○
* Option 4. In addition to option 2 or 3: a) adapt the notion of 'defect' and the alleviation/reversal of burden of proof to the specific case of AI; and b) remove the 'development risk defence' to ensure producers of products that continuously learn and adapt while in operation remain strictly liable for damage.	○	○	○	◉

In addition to the policy options presented in the previous question, should the EU take the following additional measures to adapt the Directive to reduce obstacles to making claims?

	Yes	No	I don't know /no opinion
* Harmonise right to claim for non-material damages under the Directive (e.g. privacy infringement, psychological harm, environmental damage)	○	◉	○
* Define liability rules where there is no EU importer	○	◉	○
* Other measures	○	◉	○

Please specify all the relevant impacts that you think the option you 'like least' and additional measures that you were against will have on the following aspects, compared to Option 1 (no legislative change). Only select an answer for those impacts that you expect the option you 'like least' to have. Impacts left blank will be processed as a 'No opinion' reply.

at least 4 answered row(s)

	Large increase	Small increase	No/negligible impact	Small decrease	Large decrease	No opinion
Legal certainty	○	○	○	○	◉	○
Costs for your company	◉	○	○	○	○	○
Consumer protection	○	○	○	○	◉	○
Consumer uptake of products in the digital and circular economy	○	○	○	○	◉	○
Purchase price of products	◉	○	○	○	○	○
Incentives for companies to place innovative products on the market	○	○	○	○	◉	○
Competitiveness of micro, small- and medium-sized enterprises (SMEs)	○	○	○	○	◉	○
Ability of producers to obtain product liability insurance	○	○	○	○	◉	○

Other impacts (please specify):

200 character(s) maximum

End of Section I on Product Liability Directive

* In Section II of this consultation the problems linked to certain types of Artificial Intelligence – which make it difficult to identify the potentially liable person, to prove that person's fault or to prove the defect of a product and the causal link with the damage – are explored further.

Would you like to continue with Section II on Artificial Intelligence?

- (•) Continue with Section II on Artificial Intelligence
- ( ) Close the questionnaire

Section II - Liability for AI

Introduction

As a crucial enabling technology, AI can drive both products and services. AI systems can either be provided with a physical product (e.g. an autonomous delivery vehicle) or placed separately on the market.

To facilitate trust in and the roll-out of AI technologies, the Commission is taking a staged approach. First, on 21 April 2021, it proposed harmonised rules for development, placing on the market and use of certain AI systems (AI Act). The AI Act contains obligations on providers and users of AI systems, e.g. on human oversight, transparency and information. In addition, the recent proposal for a Regulation on Machinery Products (published together with the AI act) also covers new risks originating from emerging technologies, including the integration of AI systems into machinery.
However, safety legislation minimises but cannot fully exclude accidents. The liability frameworks come into play where accidents happen and damage is caused. Therefore, as a next step to complement the recent initiatives aimed at improving the safety of products when they are placed on the EU market, the Commission is considering a revision of the liability framework.

In the White Paper on AI and the accompanying 2020 Report on Safety and Liability, the Commission identified potential problems with liability rules, stemming from the specific properties of certain AI systems. These properties could make it difficult for injured parties to get compensation based on the Product Liability Directive or national fault-based rules. This is because in certain situations, the lack of transparency (opacity) and explainability (complexity) as well as the high degree of autonomy of some AI systems could make it difficult for injured parties to prove a product is defective or to prove fault, and to prove the causal link with the damage.

It may also be uncertain whether and to what extent national strict liability regimes (e.g. for dangerous activities) will apply to the use of AI-enabled products or services. National laws may change, and courts may adapt their interpretation of the law, to address these potential challenges. Regarding national liability rules and their application to AI, these potential problems have been further explored in this recent study.

With this staged approach to AI, the Commission aims to provide the legal certainty necessary for investment and, specifically with this initiative, to ensure that victims of damage caused by AI-enabled products and services have a similar level of protection to victims of technologies that operate without AI. Therefore, this part of the consultation is looking at all three pillars of the existing liability framework.

1. The **Product Liability Directive**, for consumer claims against producers of defective products. The injured party has to prove the product was defective and the causal link between that defect and the damage. As regards the Directive, the proposed questions build on the first section of the consultation.
2. **National fault-based liability rules**: The injured party has to prove the defendant's fault (negligence or intent to harm) and a causal link between that fault and the damage.
3. **National strict liability regimes** set by each Member State for technologies or activities considered to pose an increased risk to society (e.g. cars or construction activities). Strict liability means that the relevant risk is assigned to someone irrespective of fault. This is usually justified by the fact that the strictly liable individual benefits from exposing the public to a risk.

In addition to this framework, the General Data Protection Regulation (GDPR) gives anyone who has suffered material or non-material damage due to an infringement of the Regulation the right to receive compensation from the controller or processor.

Problems – general

Do you agree or disagree with the following statements?

	Strongly agree	Agree	Neutral	Disagree	Strongly disagree	No opinion
There is uncertainty as to how the Product Liability Directive (i. e. liability for defective products) applies to damage caused by AI	○	○	○	○	◉	○
There is uncertainty as to whether and how liability rules under national law apply to damage caused by AI	○	○	○	○	◉	○
When AI operates with a high degree of autonomy, it could be difficult to link the damage it caused to the actions or omissions of a human actor	○	○	○	◉	○	○

In the case of AI that lacks transparency (opacity) and explainability (complexity), it could be difficult for injured parties to prove that the conditions of liability (such as fault, a defect, or causation) are fulfilled	○	○	◉	○	○	○
Because of AI's specific characteristics, victims of damage caused by AI may in certain cases be less protected than victims of damage that didn' t involve AI	○	○	○	○	◉	○
It is uncertain how national courts will address possible difficulties of proof and liability gaps in relation to AI	○	○	○	○	◉	○

Please elaborate on your answers or specify other grounds of legal uncertainty regarding liability for damage caused by AI:

2000 character(s) maximum

With regard to boxes 3 and 4, more transparency around the inner workings of AI-driven products (eg. Logging obligations and tracking of software updates) could assist injured parties in, in the case of 3, linking the damage caused to the actions or omissions of a human actor and, in the case of 4, proving that the conditions of liability are fulfilled.

Do you agree or disagree with the following statements?

	Strongly agree	Agree	Neutral	Disagree	Strongly disagree	No opinion
The lack of adaptation of the current liability framework to AI may negatively affect trust in AI	○	○	○	○	◉	○
The lack of adaptation of the current liability framework to AI may negatively affect the uptake of AI-enabled products and services	○	○	○	○	◉	○

Please elaborate on your answers. You may reflect in particular on the recently proposed AI Act and on the complementary roles played by liability rules and the other safety-related strands of the Commission's AI policy in ensuring trust in AI and promoting the uptake of AI-enabled products and services:

2000 character(s) maximum

If the current liability framework is not adapted, to what extent do you expect the following problems to occur in relation to the production, distribution or use of AI-enabled products or services, now or in the foreseeable future? This question is primarily aimed at businesses and business associations.

	To a very large extent	To a large extent	To a moderate extent	To a small extent	Not at all	Don't know /no answer
Companies will face additional costs (e.g. legal information costs, increased insurance costs)	○	○	○	○	◉	○
Companies may defer or abandon certain investments in AI technologies	○	○	○	○	◉	○
Companies may refrain from using AI when automating certain processes	○	○	○	○	◉	○
Companies may limit their cross-border activities related to the production, distribution or use of AI-enabled products or services	○	○	○	○	◉	○
Higher prices of AI-enabled products and services	○	○	○	○	◉	○
Insurers will increase risk-premiums due to a lack of predictability of liability exposures	○	○	○	○	◉	○
It will not be possible to insure some products/services	○	○	○	○	◉	○
Negative impact on the roll-out of AI technologies in the internal market	○	○	○	○	◉	○

Please elaborate on your answers, in particular on whether your assessment is different for AI-enabled products than for AI-enabled services

2000 character(s) maximum

Liability insurance is generally sold on an all-risks basis, meaning that unless specific exclusions are written in, all liabilities would be covered under the policy.

With the growing number of AI-enabled products and services on the market, Member States may adapt their respective liability regimes to the specific challenges of AI, which could lead to increasing differences between national liability rules. The Product Liability Directive could also be interpreted in different ways by national courts for damage caused by AI.

If Member States adapt liability rules for AI in a divergent way, or national courts follow diverging interpretations of existing liability rules, to what extent do you expect this to cause the following problems in the EU? This question is primarily aimed at businesses and business associations.

	To a very large extent	To a large extent	To a moderate extent	To a small extent	Not at all	Don't know /no answer
Additional costs for companies (e.g. legal information costs, increased insurance costs) when producing, distributing or using AI-equipped products or services	○	○	○	○	◉	○
Need for technological adaptations when providing AI-based cross-border services	○	○	○	○	◉	○
Need to adapt AI technologies, distribution models (e.g. sale versus service provision) and cost management models in light of diverging national liability rules	○	○	○	○	◉	○
Companies may limit their cross-border activities related to the production, distribution or use of AI-enabled products or services	○	○	○	○	◉	○
Higher prices of AI-enabled products and services	○	○	○	○	◉	○
Insurers will increase premiums due to more divergent liability exposures	○	○	○	○	◉	○
Negative impact on the roll-out of AI technologies	○	○	○	○	◉	○

Please elaborate on your answers, in particular on whether your assessment is different for AI-enabled products than for AI-enabled services, as well as on other impacts of possible legal fragmentation

2000 character(s) maximum

The above will not create more barriers than currently exist for companies trading in non AI-driven products across the EU. Adopting a separate liability regime for AI would rather act as a barrier to innovation, leading to less new entrants in the market and likely to higher prices of AI-enabled products and services. This could, in turn, lead to higher insurance premiums, not due to increased risk, but rather to an increase in the operating costs of the producer.

Policy options

Due to their specific characteristics, in particular their lack of transparency and explainability ('black box effect') and their high degree of autonomy, certain types of AI systems could challenge existing liability rules.

The Commission is considering the policy measures, described in the following questions, to ensure that victims of damage caused by these specific types of AI systems are not left with less protection than victims of damage caused by technologies that operate without AI. Such measures would be based on existing approaches in national liability regimes (e.g. alleviating the burden of proof for the injured party or strict liability for the producer). They would also complement the Commission's other policy initiatives to ensure the safety of AI, such as the recently proposed AI Act, and provide a safety net in the event that an AI system causes damage.

Please note that the approaches to adapting the liability framework presented below relate only to civil liability, not to state or criminal liability. The proposed approaches focus on measures to ease the victim's burden of proof (see next question) as well as a possible targeted harmonisation of strict liability and insurance solutions (subsequent questions). They aim to help the victim recover damage more easily.

Do you agree or disagree with the following approaches regarding the burden of proof? The answer options are not mutually exclusive. Regarding the Product Liability Directive, the following approaches build on the general options in the first part of this questionnaire.

	Strongly agree	Agree	Neutral	Disagree	Strongly disagree	No opinion
The defendant (e.g. producer, user, service provider, operator) should be obliged to disclose necessary technical information (e.g. log data) to the injured party to enable the latter to prove the conditions of the claim	○	◉	○	○	○	○
If the defendant refuses to disclose the information referred to in the previous answer option, courts should infer that the conditions to be proven by that information are fulfilled	○	◉	○	○	○	○
Specifically for claims under the Product Liability Directive: if an AI-enabled product clearly malfunctioned (e.g. driverless vehicle swerving off the road despite no obstacles), courts should infer that it was defective and caused the damage	○	○	◉	○	○	○
If the provider of an AI system failed to comply with their safety or other legal obligations to prevent harm (e.g. those proposed under the proposed AI Act), courts should infer that the damage was caused due to that person's fault or that, for claims under the Product Liability Directive, the AI system was defective	○	○	○	◉	○	○
If the user of an AI system failed to comply with their safety or other legal obligations to prevent harm (e.g. those proposed under the proposed AI Act), courts should infer that the damage was caused by that person's fault	○	○	◉	○	○	○
If, in a given case, it is necessary to establish how a complex and /or opaque AI system (i.e. an AI system with limited transparency and explainability) operates in order to substantiate a claim, the burden of proof should be shifted	○	◉	○	○	○	○

from the victim to the defendant in that respect						
Specifically for claims under the Product Liability Directive: if a product integrating an AI system that continuously learns and adapts while in operation causes damage, the producer should be liable irrespective of defectiveness; the victim should have to prove only that the product caused the damage	○	○	○	○	◉	○
Certain types of opaque or highly autonomous AI systems should be defined for which the burden of proof regarding fault and causation should always be on the person responsible for that AI system (reversal of burden of proof)	○	○	○	○	◉	○
EU action to ease the victim's burden of proof is not necessary or justified	◉	○	○	○	○	○

Please elaborate on your answers and describe any other measures you may find appropriate:

2000 character(s) maximum

Logging and disclosure obligations should be imposed for AI-systems, but only if necessary, as the technical information that is disclosed may be considered as trade secrets, and if technical information is shared too easily, the disclosure obligation may be e.g. misused to perform industrial espionage.
If the AI-system is very complex and opaque, it can be hard for the injured party to prove the causal relation. Even if complex and opaque are vague terms, and they are open to interpretation by courts, the injured person should have a real possibility to get compensation. However, a causal relationship should always exist between the damage and the product, and the burden of proof for this should always remain with the injured party.
If the failure to comply with safety or other legal obligations is in a causal relation with the damage, then the damage should be seen as caused by the product, but only the fact that some safety or legal obligations were not complied with (without any causal relation to the damage), should not cause the burden of proof to change.

Separately from the strict liability of producers under the Product Liability Directive, national laws provide for a wide range of different strict liability schemes for the owner/user/operator. Strict liability means that a certain risk of damage is assigned to a person irrespective of fault.

A possible policy option at EU level could be to harmonise strict liability (full or minimum), separately from the Product Liability Directive, for damage caused by the operation of certain AI-enabled products or the provision of certain AI-enabled services. This could notably be considered in cases where the use of AI (e.g. in autonomous vehicles and autonomous drones) exposes the public to the risk of damage to important values like life, health and property. Where strict liability rules already exist in a Member State, e.g. for cars, the EU harmonisation would not lead to an additional strict liability regime.

Do you agree or disagree with the following approaches regarding liability for operating AI-enabled products and providing AI-enabled services creating a serious injury risk (e.g. life, health, property) for the public?

	Strongly agree	Agree	Neutral	Disagree	Strongly disagree	No opinion
Full harmonisation of strict liability for operating AI-enabled products and providing AI-enabled services, limited to cases where these activities pose serious injury risks to the public	○	○	○	○	◉	○
Harmonisation of strict liability for the cases mentioned in the previous option, but allowing Member States to maintain broader and/or more far-reaching national strict liability schemes applicable to other AI-enabled products and services	○	○	○	○	◉	○
Strict liability for operating AI-enabled products and providing of AI-enabled services should not be harmonised at EU level	◉	○	○	○	○	○

Please elaborate on your answer, describe any other approaches regarding strict liability you may find appropriate and/or indicate to which specific AI-enabled products and services strict liability should apply:

2000 character(s) maximum

The availability, uptake and economic effects of insurance policies covering liability for damage are important factors in assessing the impacts of the measures described in the previous questions. Therefore, this question explores the role of (voluntary or mandatory) insurance solutions in general terms.

The subsequent questions concern possible EU policy measures regarding insurance. **To what extent do you agree with the following statements?**

	Strongly agree	Agree	Neutral	Disagree	Strongly disagree	No opinion
Parties subject to possible harmonised strict liability rules as described in the previous question would likely be covered by (voluntary or mandatory) insurance	○	○	◉	○	○	○
In cases where possible facilitations of the burden of proof would apply (as described in the question on approaches to burden of proof), the potentially liable party would likely be covered by (voluntary or mandatory) liability insurance	○	○	○	○	◉	○
Insurance solutions (be they voluntary or mandatory) could limit the costs of potential damage for the liable person to the insurance premium	○	◉	○	○	○	○
Insurance solutions (be they voluntary or mandatory) could ensure that the injured person receives compensation	○	◉	○	○	○	○

Please elaborate on your answers:

2000 character(s) maximum

Mixing voluntary and mandatory in this context does not work. When insurance is voluntary it means that its take-up is dependent on the decision of the concerned party. Predicting likelihood is therefore not possible.

Strict liability schemes only work when the risks to be covered are sufficiently similar and when specific market pre-conditions are met (availability of sufficient data, adequate competition, insurers' interest in providing cover and sufficient reinsurance capacity). This is not the case for AI, which covers a very wide range of different appliances and uses.

Without these conditions in place, making product liability insurance mandatory could end up doing more

harm than good, at national level and especially at EU level, potentially resulting in:

• A lack of underwriting/contractual freedom, stifling insurance product innovation. Compulsory insurance could have an adverse effect on market penetration if, depending on minimum legal requirements, the insurance market was unable to provide sufficient cover for the whole spectrum of affected producers at terms that are economically viable for insurance buyers.
• Higher premiums.
• Insufficient prevention, as policyholders feel the burden is on the insurer.
• Difficulties in identifying the “operator” of the AI application obliged to take out the insurance. Given that AI operators are likely to be found in various fields of activity, there does not seem to be an obvious source of information (such as the vehicle registers for motor insurance).

Box 3 and 4 merely describes how insurance works. However, deductibles and possible limits on cover should also be taken into consideration.

Under many national strict liability schemes, the person liable is required by law to take out insurance. A similar solution could be chosen at EU level for damage caused by certain types of AI systems that pose serious injury risks (e.g. life, health, property) to the public.
Possible EU rules would ensure that existing insurance requirements are not duplicated: if the operation of a certain product, such as motor vehicles or drones, is already subject to mandatory insurance coverage, using AI in such a product or service would not entail additional insurance requirements.

Do you agree or disagree with the following approach on insurance for the use of AI systems that poses a serious risk of injury to the public?

	Strongly agree	Agree	Neutral	Disagree	Strongly disagree	No opinion
A harmonised insurance obligation should be laid down at EU level, where it does not exist yet, for using AI products and providing AI-based services that pose a serious injury risk (e.g. life, health, property) to the public	○	○	○	○	◉	○

In reply to the previous question you expressed the view that there should not be a harmonised insurance obligation for AI-enabled products and services. This implies that you consider voluntary insurance and existing mandatory insurance regimes to be sufficient. **Please elaborate on the reasons for your opinion:**

2000 character(s) maximum

Under the present regime, insurance can lessen the negative consequences of accidents involving AI by ensuring that the victim receives compensation. There are already many such insurance solutions available in the European insurance market. Protection against material damage incurred by AI generally falls within the remit of general liability insurance policies, which are sold on an all-risks basis. Existing product liability policy wordings are adequate to cover risks arising out of new digital technologies.

As AI encompasses a set of technologies that are still at an early stage of development, legislating on liability for such highly advanced systems should be deferred until their specific risk potential can be better understood in the context of their use in different lines of business and the needs of those sectors. Any new rules at EU level would be useful and appropriate only to address any potential gaps where current rules and regulations are found to be insufficient. In our view, this is currently not the case.

When it comes to mandatory insurance, see above.

Taking into account the description of various options presented in the previous questions, please rank the following options from 1 (like best) to 8 (like least)

	1	2	3	4	5	6	7	8
Option 1: (Aside from measures to ease the burden of proof considered in Section I) Amending the Product Liability Directive to ease the burden on victims when proving an AI-enabled product was defective and caused the damage	○	◉	○	○	○	○	○	○
Option 2: Targeted harmonisation of national rules on proof, e.g. by reversing the burden of proof under certain conditions, to ensure that it is not excessively difficult for victims to prove, as appropriate, fault and/or causation for damage caused by certain AI-enabled products and services	○	○	◉	○	○	○	○	○
Option 3: Harmonisation of liability irrespective of fault ('strict liability') for operators of AI technologies that pose a serious injury risk (e.g. life, health, property) to the public	○	○	○	◉	○	○	○	○
Option 4: option 3 + mandatory liability insurance for operators subject to strict liability	○	○	○	○	○	◉	○	○
Option 5: option 1 + option 2	○	○	○	○	◉	○	○	○
Option 6: option 1 + option 2 + option 3	○	○	○	○	○	○	◉	○
Option 7: option 1 + option 2 + option 4	○	○	○	○	○	○	○	◉
Option 8: No EU action. Outside the existing scope of the Product Liability Directive, each Member State would be free to adapt liability rules for AI if and as they see fit	◉	○	○	○	○	○	○	○

Please elaborate on your answers, also taking into account the interplay with the other strands of the Commission's AI policy (in particular the proposed AI Act). Please also describe any other measures you may find appropriate:

2000 character(s) maximum

Types of compensable harm and admissibility of contractual liability waivers

Aside from bodily injury or damage to physical objects, the use of technology can cause other types of damage, such as immaterial harm (e.g. pain and suffering). This is true not only for AI but also for other potential sources of harm. Coverage for such damage differs widely in Member States.

Do you agree or disagree with harmonising compensation for the following types of harm (aside from bodily injury and property damage), specifically for cases where using AI leads to harm? Please note that this question does not concern the Product Liability Directive – a question on the types of harm for which consumers can claim compensation under this Directive can be found in Section I. The answer options are not mutually exclusive.

	Strongly agree	Agree	Neutral	Disagree	Strongly disagree	No opinion
Pure economic loss (e.g. loss of profit)	○	○	○	○	◉	○
Loss of or damage to data (not covered by the GDPR) resulting in a verifiable economic loss	○	○	○	○	◉	○
Immaterial harm like pain and suffering, reputational damage or psychological harm	○	○	○	○	◉	○
Loss of or damage to data (not covered by the GDPR) **not** resulting in a verifiable economic loss	○	○	○	○	◉	○
All the types of harm mentioned above	○	○	○	○	◉	○

Please specify any other types of harm:

500 character(s) maximum

Extending the scope of damages to include damages other than physical injury or property damage is likely to result in legal uncertainty and/or provoke a conflict between provisions. Damage to the environment in the sense of a public good is governed by the Environmental Liability Directive, and there is no scope for this under the PLD because, by definition, there can be no injured person.

Sometimes the person who has suffered damage has a contract with the person responsible. That contract may exclude or limit the right to compensation. Some Member States consider it necessary to prohibit or restrict all or certain such clauses. The Product Liability Directive also does not let producers limit or exclude their liability towards the injured person by contract.

If the liability of operators/users for damage caused by AI is harmonised at EU level, do you agree or disagree with the following approaches regarding contractual clauses excluding or limiting in advance the victim's right to compensation?

	Strongly agree	Agree	Neutral	Disagree	Strongly disagree	No opinion
The admissibility of contractual liability waivers should not be addressed at all	○	○	○	○	○	◉
Such contractual clauses should be prohibited vis-à-vis consumers	○	○	○	○	○	◉
Such contractual clauses should be prohibited vis-à-vis consumers and between businesses	○	○	○	○	○	◉
The contractual exclusion or limitation of liability should be prohibited only for certain types of harm (e.g. to life, body or health) and/or for harm arising from gross negligence or intent	○	○	○	○	○	◉

Please elaborate on your answer and specify if you would prefer a different approach, e.g. an approach differentiating by area of AI application:

2000 character(s) maximum

Additional information

Are there any other issues that should be considered?

3000 character(s) maximum

The PLD should continue to be restricted to personal injury and property damage only. Adding damages other than physical injury or property damage is likely to provoke a conflict of statutes. Basic rights infringements (data protection, discrimination, privacy etc.) should continue to be dealt with exclusively by existing dedicated EU legislation such as the General Data Protection Regulation. Coherence across legislation should be ensured.
Psychological harm/emotional pain and suffering are already compensable if consequential to personal injury.
Damage to soil and water that are privately owned constitutes property damage and, as such, is already compensable.
Damage to the environment in the sense of a public good is governed by the Environmental Liability Directive, and there is no scope for this under the PLD because, by definition, there can be no injured person.
Destruction of data may fall under property damage, for example, if a computer goes on fire resulting in data loss.

You can upload relevant quantitative data, reports/studies and position papers to support your views here:

Only files of the type pdf,txt,doc,docx,odt,rtf are allowed

Do you agree to the Commission contacting you for a possible follow-up?

- [x] Yes
- [ ] No

Contact

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