

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

- Irish
- Italian
- Latvian
- Lithuanian
- Maltese
- Polish
- Portuguese
- Romanian
- Slovak
- Slovenian
- Spanish
- Swedish

* I am giving my contribution as

- Academic/research institution
- Business association
- Company/business organisation
- Consumer organisation
- EU citizen
- Environmental organisation
- Non-EU citizen
- Non-governmental organisation (NGO)
- Public authority
- Trade union
- Other

* First name

Christoph

* Surname

HARTL

* Email (this won't be published)

c.hartl@gdv.de

* Organisation name

255 character(s) maximum

German Insurance Association (GDV)

* Organisation size

- Micro (1 to 9 employees)
- Small (10 to 49 employees)
- Medium (50 to 249 employees)
- Large (250 or more)

Transparency register number

255 character(s) maximum

Check if your organisation is on the [transparency register](#). It's a voluntary database for organisations seeking to influence EU decision-making.

6437280268-55

* Country of origin

Please add your country of origin, or that of your organisation.

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|---|--|--|--|
| <input type="radio"/> Afghanistan | <input type="radio"/> Djibouti | <input type="radio"/> Libya | <input type="radio"/> Saint Martin |
| <input type="radio"/> Åland Islands | <input type="radio"/> Dominica | <input type="radio"/> Liechtenstein | <input type="radio"/> Saint Pierre and Miquelon |
| <input type="radio"/> Albania | <input type="radio"/> Dominican Republic | <input type="radio"/> Lithuania | <input type="radio"/> Saint Vincent and the Grenadines |
| <input type="radio"/> Algeria | <input type="radio"/> Ecuador | <input type="radio"/> Luxembourg | <input type="radio"/> Samoa |
| <input type="radio"/> American Samoa | <input type="radio"/> Egypt | <input type="radio"/> Macau | <input type="radio"/> San Marino |
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| <input type="radio"/> Angola | <input type="radio"/> Equatorial Guinea | <input type="radio"/> Malawi | <input type="radio"/> Saudi Arabia |
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| <input type="radio"/> Aruba | <input type="radio"/> Faroe Islands | <input type="radio"/> Martinique | <input type="radio"/> Sint Maarten |

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- Bosnia and Herzegovina
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- Bouvet Island
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- Fiji
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- French Southern and Antarctic Lands
- Gabon
- Georgia
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- Grenada
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- Niger
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- Norfolk Island
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- Slovenia
- Solomon Islands
- Somalia
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- South Georgia and the South Sandwich Islands
- South Korea
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- Taiwan
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- Clipperton
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- Isle of Man
- Israel
- Italy
- Jamaica
- Japan
- Jersey
- Jordan
- Kazakhstan
- Kenya
- Kiribati
- Kosovo
- Kuwait
- Kyrgyzstan
- Laos
- Latvia
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- North Macedonia
- Norway
- Oman
- Pakistan
- Palau
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- Panama
- Papua New Guinea
- Paraguay
- Peru
- Philippines
- Pitcairn Islands
- Poland
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- Qatar
- Réunion
- Romania
- Russia
- Rwanda
- Saint Barthélemy
- Saint Helena
Ascension and
Tristan da Cunha
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- Saint Lucia

The Commission will publish all contributions to this public consultation. You can choose whether you would prefer to have your details published or to remain anonymous when your contribution is published. **For the purpose of transparency, the type of respondent (for example, ‘business association’, ‘consumer association’, ‘EU citizen’) country of origin, organisation name and size, and its transparency register number, are always published. Your e-mail address will never be published.** Opt in to select the privacy option that best suits you. Privacy options default based on the type of respondent selected

* Contribution publication privacy settings

The Commission will publish the responses to this public consultation. You can choose whether you would like your details to be made public or to remain anonymous.

Anonymous

Only organisation details are published: The type of respondent that you responded to this consultation as, the name of the organisation on whose behalf you reply as well as its transparency number, its size, its country of origin and your contribution will be published as received. Your name will not be published. Please do not include any personal data in the contribution itself if you want to remain anonymous.

Public

Organisation details and respondent details are published: The type of respondent that you responded to this consultation as, the name of the organisation on whose behalf you reply as well as its transparency number, its size, its country of origin and your contribution will be published. Your name will also be published.

I agree with the [personal data protection provisions](#)

Section I – Product Liability Directive

This section of the consultation concerns Council Directive 85/374/EEC on liability for defective products (“Product Liability Directive”), which applies to any product marketed in the European Economic Area (27 EU countries plus Iceland, Liechtenstein and Norway). See also Section II for more in-depth questions about the Directive and AI.

According to the Directive, if a defective product causes damage to consumers, the producer must pay compensation. The injured party must prove the product was defective, as well as the causal link between the defect and the damage. But the injured party does not have to prove that the producer was at fault or negligent ('strict liability'). In certain circumstances, producers are exempted from liability if they prove, e.g. that the product's defect was not discoverable based on the best scientific knowledge at the time it was placed on the market.

Injured parties can claim compensation for death, personal injury as well as property damage if the property is intended for private use and the damage exceeds EUR 500. The injured party has 3 years to seek compensation. In addition, the producer is freed from liability 10 years after the date the product was put into circulation.

The [Evaluation of the Directive](#) in 2018 found that it was effective overall, but difficult to apply to products in the digital and circular economy because of its outdated concepts. The [Commission's 2020 Report on Safety and Liability for AI, Internet of things \(IoT\) and robotics](#) also confirmed this.

The Evaluation also found that consumers faced obstacles to making compensation claims, due to thresholds and time limits, and obstacles to getting compensation, especially for complex products, due to the burden of proof.

* How familiar are you with the Directive?

- I have detailed knowledge of the Directive, its objectives, rules and application
 - I am aware of the Directive and some of its contents
 - I am not familiar with the Directive
 - No opinion
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Adapting the Directive to the digital age

Digital content such as software, algorithms and data are playing an increasingly crucial role in the safe functioning of many products, e.g. domestic appliances, vehicles, smart lawnmowers and surgical robots.

However, the Evaluation of the Directive found that the Directive was not easy to apply to digital technologies. Above all, it is not clear whether intangible items like digital content, software and data are covered, especially when supplied separately from a tangible product. Therefore, it is not clear whether consumers can get compensation under the Directive in the event that 'digital' defects lead to damage.

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	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Software made available separately via download for use on a tangible product (e.g. domestic robot) that has already been placed on the market	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Software upgrades and updates (e.g. to deliver new functionalities or fix a security flaw)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Software that controls how a product operates (e.g. a car's engine control system, a robot's operating system)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Software that is used on a device but does not drive the device (e.g. a gaming app on a computer or other device)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Bespoke software (e.g. software customised to control the production line in a factory)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Digital services that control how a product operates (e.g. cloud-based service for operating smart thermostat)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Data capable of influencing how a product operates (e.g. training data for an autonomous vehicle)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Data that comprises only information (e.g. a digital map, a menu)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Software that provides immediate decision-triggering information (e.g. blood glucose meter)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

Software that provides only guidance or advice to an end user (e.g. software that interprets medical imaging and provides diagnoses)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
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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.	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The Product Liability Directive needs to be adapted to ensure consumer protection if damage is caused by defective products	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

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

Online marketplaces should be regulated appropriately and take responsibility within their abilities to ensure compliance with regulatory requirements. That is the purpose of the proposed Digital Services Act and General Product Safety Regulation. We recognize it can be difficult for injured persons to claim against producers outside the EU. However, we do not see how online marketplaces could be subsumed under the term “producer” in the PLD’s sense, as they neither manufacture goods nor place them into circulation, but provide an environment where products made by others can be bought and sold. Furthermore, it is questionable how much in need of protection persons are who knowingly purchase products from outside the EU, which may not conform to EU legal standards – either because they are cheaper than compliant products or because the product as such is illegal in the EU.

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	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
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)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
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)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
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)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
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)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Coverage of other types of harm	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

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	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
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	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
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	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

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	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* 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)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

* 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

<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
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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)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
* Define liability rules where there is no EU importer	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
* Other measures	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

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	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Costs for your company	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Consumer protection	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Consumer uptake of products in the digital and circular economy	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Purchase price of products	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Incentives for companies to place innovative products on the market	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Competitiveness of micro, small- and medium-sized enterprises (SMEs)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Ability of producers to obtain product liability insurance	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

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	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Technically complex products	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Pharmaceuticals	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
AI-enabled products	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
IoT (Internet of Things) products	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

Other types of product (please specify):

50 character(s) maximum

Proof may be easy or difficult with any product.

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	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The defence should be removed	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
The defence should not be available for products designed to be influenced by other interconnected products or services (e.g. complex IoT systems)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
The defence should not be available for AI products that continue to learn and adapt while in operation	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
The defence should not be available for any AI products	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

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

1000 character(s) maximum

The development risk defence is appropriate and continues to be relevant. The injured party's position is protected by placing the burden of proof for exemptions from liability on the producer. The ability to exclude liability because a defect was objectively (according to the state of science and technology) impossible to detect at the time the product was marketed is crucial to encourage technological innovation. The relevant test of 'state of scientific and technical knowledge' is the most severe one known to technology law. It contributes to the effectiveness of the PLD to strike an appropriate balance between the fair interests of consumers and producers, which is a guiding principle of the PLD (recitals 1, 2, 7). It also enables insurers to cover innovative technologies by limiting exposure to unforeseeable (and therefore incalculable) liability risks.

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	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Producers are released from liability for property damage 10 years after placing the product on the market	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Consumers have to start legal proceedings within 3 years of becoming aware of the damage	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Consumers can claim compensation only for damage to property worth more than EUR 500	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Consumers can claim compensation only for damage to property intended and used for private purposes	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

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	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* 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).	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* 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.	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
* 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.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

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)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
* Define liability rules where there is no EU importer	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
* Other measures	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

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	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Costs for your company	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Consumer protection	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Consumer uptake of products in the digital and circular economy	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Purchase price of products	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Incentives for companies to place innovative products on the market	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Competitiveness of micro, small- and medium-sized enterprises (SMEs)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Ability of producers to obtain product liability insurance	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

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	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
There is uncertainty as to whether and how liability rules under national law apply to damage caused by AI	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
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	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

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	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
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	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
It is uncertain how national courts will address possible difficulties of proof and liability gaps in relation to AI	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

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

2000 character(s) maximum

The PLD applies equally to products using AI or other innovative digital technologies and to conventional (“mechanical”) products. Software, with the exception of software-as-a-service (e.g. cloud services) is or should be considered a product under the PLD. Even in the case of highly autonomous AI systems, liability for damage caused can be attributed either to the producer (if the product was defective), to the user/operator (if the damage was caused by the circumstances of use) or a third party (e.g. faulty repair or maintenance). A self-learning AI system would be defective under the PLD if, at the time of putting into circulation, it was reasonably foreseeable that such a system can cause damage through its subsequently “learning” to function in a way that was not intended. Existing national law provides adequate and effective redress to persons injured by the operation of AI systems. It is embedded into the general structures and principles of the respective legal system and well understood, regarding both the substantive and procedural law. This coherence promotes legal certainty. Depending on the facts of the individual case, proving defect, fault, causation may be complex or difficult in the case of conventional or AI products alike. These issues should be assessed by the competent courts utilizing expert advice. The current rules on the burden of proof are a cornerstone of the PLD, which aims to balance the legitimate interests of producers and injured persons. Reversing these principles could result in an unequitable situation where producers would be held responsible for any damage without liability having actually been established, which would hamper economic and technological development and must therefore be considered undesirable. The question of how courts will interpret and advance the law is not unique to national law but equally applies to EU law and the EU judiciary.

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	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
The lack of adaptation of the current liability framework to AI may negatively affect the uptake of AI-enabled products and services	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

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

Fair and effective rules on liability are crucial to ensure that losses suffered by injured persons are compensated. We hold that the current system of liability rules, comprising the PLD and national law, meet that test and are fit for purpose. Legislative changes to the existing liability framework should only be contemplated where there is clear empirical evidence of protection gaps. This is, however, not the case. But liability can by definition only ever come into play “after the fact”. To promote trust in emerging technologies, priority should in our view be given to developing an appropriate body of relevant product safety legislation, technical norms and standards, which establish (minimum) standards for the safe design, manufacture and use of AI. The more efficiently the relevant product safety legislation addresses the peculiar risks of AI and other digital technologies, the less loss or damage will occur. Thus, product safety rules act as a gateway for liability and at the same time help to inform the PLD’s “defect” test.

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)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Companies may defer or abandon certain investments in AI technologies	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Companies may refrain from using AI when automating certain processes	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

Companies may limit their cross-border activities related to the production, distribution or use of AI-enabled products or services	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Higher prices of AI-enabled products and services	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Insurers will increase risk-premiums due to a lack of predictability of liability exposures	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
It will not be possible to insure some products/services	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Negative impact on the roll-out of AI technologies in the internal market	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

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

The current liability regime, consisting of the PLD and national law, is balanced, effective and adequate to address compensation for loss or damage incurred in connection with conventional and digital systems alike. It is well understood by all economic actors, who are thereby able to factor the risk of liability into their conduct of business. We do not see how not changing the liability regime could have a negative impact on the production, distribution or use of AI-enabled products or services. We believe the reverse to be more likely: Introducing harmonised rules on liability that are more onerous for producers and deployers than the present system and which would thereby upset the current balanced approach could pose a risk of acting as a barrier to the development and uptake of innovative AI solutions in the EU, ultimately deterring investment in the EU AI sector. SMEs would be especially affected. A negative effect on the competitiveness of EU companies compared to those in other regions could be the unintended result. Currently, liability insurance is widely available for developers, producers and users of AI systems. Expected risk exposure is figured into the design of insurance products and cost of insurance premium. Depending on the specific design of new liability rules, insurers might review their risk appetite for AI-enabled products and services, potentially leading to restricted availability of insurance products, restricted scope of cover and/or higher premiums.

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	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Need for technological adaptations when providing AI-based cross-border services	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Need to adapt AI technologies, distribution models (e.g. sale versus service provision) and cost management models in light of diverging national liability rules	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Companies may limit their cross-border activities related to the production, distribution or use of AI-enabled products or services	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Higher prices of AI-enabled products and services	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Insurers will increase premiums due to more divergent liability exposures	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Negative impact on the roll-out of AI technologies	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

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

Courts are tasked with interpreting (and developing) the law by applying abstract legal provisions to specific cases. This is a normal process occurring all the time, both at the level of national and EU judiciary. Companies (producers and operators) as well as insurers are familiar with the current legal framework. We have no indication of problems connected to this process in general at present or in the past, and neither do we foresee any specific negative impacts of this process specifically relative to AI in the future.

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	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
If the defendant refuses to disclose the information referred to in the previous answer option, courts should infer that the	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

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	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
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	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
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	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
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	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
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	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

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)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
EU action to ease the victim's burden of proof is not necessary or justified	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

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

2000 character(s) maximum

Legislative changes to liability rules should only be considered where there is clear empirical evidence of a protection gap. Currently, this is not the case. The rules on the burden of proof are a cornerstone of any liability regime. They serve to provide a balanced system that reflects the legitimate interests of all parties concerned (producers, operators and injured persons). This principle is enshrined in the PLD (viz. recitals 1 2 and seven). Upsetting this balance by e.g. reversing the burden of proof or assigning compensation obligations purely because a system malfunctioned or damage has occurred, and without demonstrating a product defect or any faulty behavior, would result in obliging the relevant parties to compensate claims without responsibility of the liable actor having been established. This would be unequitable. Establishing liability in law in specific cases may well be complex and difficult both for conventional and innovative digital products. Ultimately, it is up to the judicial system, assisted by the consultation of experts, to determine whether the test for liability is or is not met in any specific case. Noncompliance with applicable safety or other legal obligations is an indicator for a product defect or faulty behavior, but liability should still be determined by judicial process examining all relevant facts of the case, and not be allowed to be automatically be inferred as a matter of course.

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	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
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	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Strict liability for operating AI-enabled products and providing of AI-enabled services should not be harmonised at EU level	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

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 current liability regime, consisting of the PLD and national legislation, is fair, adequate and fit for purpose to address questions of liability posed by AI-enabled products and services. Legislative changes to liability rules should only be considered where there is clear empirical evidence of a protection gap. Currently, this is not the case.

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	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
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	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Insurance solutions (be they voluntary or mandatory) could limit the costs of potential damage for the liable person to the insurance premium	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Insurance solutions (be they voluntary or mandatory) could ensure that the injured person receives compensation	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Please elaborate on your answers:

2000 character(s) maximum

Liability insurance plays a vital role by transferring liability risks from companies and consumers to insurers and thereby, protecting the insureds' economic position as well as ensuring that injured persons are compensated for loss or damage. Currently, liability insurance is widely available to producers, suppliers and users of AI systems of all kinds, whether corporate or consumer. However, new legislation significantly increasing those actors' liability exposure may cause insurers to review their risk appetite and underwriting guidelines, potentially resulting in reduced scope of cover, higher premiums and/or restricted access to insurance for certain kinds of activity relating to AI. The insurer's liability is limited by special exclusions from cover, deductibles (if agreed) and the policy limit. Voluntary insurance is usually the best solution as it enables insurers and insureds to agree cover that is tailored to individual needs (risk profile). By contrast,

mandatory insurance prescribes fixed minimum requirements that may exceed a particular insured's requirements and are therefore uneconomical, or may not be adequate to cover certain risks and thereby pose a moral hazard (because the lower level of cover is still compliant). Introducing new mandatory insurance requirements would result in eliminating the existing cover in voluntary insurance policies and creating new dedicated insurance products tailored to the specific requirements of the mandatory insurance in question. That is because mandatory insurance is subject to specific legislative requirements that do not apply to voluntary insurance products, which will as a result not be fully compliant with the mandatory insurance requirements. The insured would thereby be obliged to purchase additional insurance cover for risks previously covered under their voluntary insurance policy as a matter of course.

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	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

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

As will be stated again below, new mandatory insurance requirements for damage caused by certain AI systems should be avoided. These would be counterproductive to the further development of technological innovation by potentially restricting availability of insurance products. Mandatory insurance can only work for homogeneous and mature markets, as is the case, for example, for motor liability. By contrast, AI-enabled technologies are highly heterogenous. Their insurability requires individual risk appraisal and the ability of insurers and insureds to be free to agree insurance terms and conditions suited to the insured's individual

risks. As already stated above, voluntary insurance is usually the best solution as it enables insurers and insureds to agree cover that is tailored to individual needs (risk profile). By contrast, mandatory insurance prescribes fixed minimum requirements that may exceed a particular insured's requirements and are therefore uneconomical, or may not be adequate to cover certain risks and thereby pose a moral hazard (because the lower level of cover is still compliant). Introducing new mandatory insurance requirements would result in eliminating the existing cover in voluntary insurance policies and creating new dedicated insurance products tailored to the specific requirements of the mandatory insurance in question. That is because mandatory insurance is subject to specific legislative requirements that do not apply to voluntary insurance products, which will as a result not be fully compliant with the mandatory insurance requirements. The insured would thereby be obliged to purchase additional insurance cover for risks previously covered under their voluntary insurance policy as a matter of course.

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	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
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	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
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	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Option 4: option 3 + mandatory liability insurance for operators subject to strict liability	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Option 5: option 1 + option 2	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>				
Option 6: option 1 + option 2 + option 3	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>					
Option 7: option 1 + option 2 + option 4	<input type="radio"/>	<input checked="" type="radio"/>						
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	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

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

The answer requires a ranking, but for the record we wish to repeat our view that no legislative changes to the current liability framework (PLD and national law) is required as the current system is adequate and fit for purpose. Further, introducing new mandatory insurance obligations is unnecessary as the voluntary insurance market works well in providing actors of all kinds with appropriate liability insurance. On the contrary, new mandatory insurance would be detrimental (see answer to question above).

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)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Loss of or damage to data (not covered by the GDPR) resulting in a verifiable economic loss	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Immaterial harm like pain and suffering, reputational damage or psychological harm	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Loss of or damage to data (not covered by the GDPR) not resulting in a verifiable economic loss	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
All the types of harm mentioned above	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

Please specify any other types of harm:

500 character(s) maximum

Only personal injury and property damage should be compensated as the most relevant loss categories. Pure economic loss is not relevant to consumers. Immaterial harm consequential to personal injury is already compensated under national law. Basic rights infringements (data protection, discrimination, privacy etc.) should continue to be dealt with exclusively by existing EU legislation. Loss of data that does not result in a loss would amount to a penalty and should therefore not be compensable.

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	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Such contractual clauses should be prohibited vis-à-vis consumers	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Such contractual clauses should be prohibited vis-à-vis consumers and between businesses	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
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	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

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

Outside the PLD, consumers suffering loss or damage inflicted by a third party will usually not be in a contractual relationship with that party. In a B2B context, the parties should be free to negotiate contracts. We see no practical relevance for contractual restrictions.

Additional information

Are there any other issues that should be considered?

3000 character(s) maximum

We would like to re-emphasise the following key concerns from a liability insurance perspective to ensure that the currently wide availability of insurance to producers and users of AI systems can be preserved in the future:

The PLD's well balanced approach, enshrined in recitals 1, 2, 7, should be preserved. Its scope should continue to be limited to personal injury and property damage as the main relevant categories of loss. Pure financial loss is irrelevant to consumers and there is very little insurance cover available for it. Immaterial damage in the form of emotional pain and suffering is already covered by the PLD if consequential to personal injury. Beyond that, immaterial damage in the form of basic rights violations should continue to be regulated by dedicated EU legislation such as the GDPR. Environmental damage to soil or water that is subject to ownership rights already falls under property damage. Damage to the environment in its capacity as a public good is regulated by the ELD and cannot be included in the PLD, as by its very nature, there can be no injured person.

The current rules on burden of proof and exemptions from liability should be maintained. Otherwise a producers would become "guarantors" for all kinds of losses even where defect and/or causation cannot be established and in cases where the defect was objectively undiscoverable at the time marketing. This would severely restrict the development of the AI market in the EU and imperil continued coverage under Product Liability insurance. This is especially pertinent to cyber risks (damage caused by malicious hacking attacks from third parties) which is a fast-evolving risk and producers should not be held responsible for cyber damage that was unforeseeable at the time of marketing.

New mandatory insurance requirements for damage caused by certain AI-systems should be avoided. These would be counterproductive to the further development of technological innovation by potentially restricting availability of insurance products. Mandatory insurance can only work for homogeneous and mature markets, as is the case, for example, for motor liability. By contrast, AI-enabled technologies are highly heterogenous. Their insurability requires individual risk appraisal and the ability of insurers and insureds to be free to agree insurance terms and conditions suited to the insured's individual risks.

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?

Yes

No

Contact

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