

Updated key messages on the Artificial Intelligence Liability Directive (AILD)

Insurance Europe's position in a nutshell

Insurance Europe appreciates the European Commission (EC)'s intention to make it easier for victims of damage related to artificial intelligence (AI) to get compensation. However, the framework, as currently drafted, would result in legal uncertainty and discourage technological development. The recently adopted Product Liability Directive (PLD) already covers AI and its impact should therefore be awaited. Therefore, Insurance Europe calls for a withdrawal of the proposal.

A withdrawal of the proposal would be in line with the EC's commitment to reduce the regulatory burden on EU businesses and bolster the EU's competitiveness.

In summary, the insurance industry's concerns are:

- The proposed AI liability framework, if adopted, could create legal uncertainty, rather than increasing consumer protection, because its scope of application and interplay with the AI Act and the revised PLD is unclear, resulting in an increase in compliance burden for businesses and in confusion at the side of consumers, about their rights.
- With the enhanced evidentiary burden placed on AI providers and users, the proposal in its current form would harm, rather than support, innovation. The vague evidentiary thresholds will increase the likelihood of litigation, which will – in addition to disincentivising AI providers and users from innovating – deter insurers from providing cover and could impact the competitiveness of the EU. Taken in conjunction with the newly adopted PLD, which introduces several mechanisms alleviating a claimant's evidentiary (rebuttable) presumptions, these risks to innovation and competitiveness are even greater. As the AILD introduces similar (overlapping) mechanisms, the effects of the PLD on liability for damage caused by AI and AI innovation should be awaited, before introducing further mechanisms.

If the proposal is maintained and an eventual review, five years after its transposition, favours mandatory insurance, contractual freedom should be maintained now and in the future. Mandatory insurance can only work for mature and homogenous markets. This is not currently the case. Insurers can only support AI innovation within a framework guaranteeing contractual freedom.

Scope

European Commission's proposal

The AILD harmonises certain national, non-contractual, fault-based liability rules to facilitate compensation in claims for damage caused by an AI system, as defined in the AI Act.

Insurance Europe's assessment

- The revised PLD broadens the scope of products and organisations covered by product liability law – encompassing software, AI and supply chains – while at the same time increasing consumer rights and access to justice. Notably, the definition of a product is extended to include software and digital manufacturing files, while strict liability will now also apply to defects from software updates and Artificial Intelligence (AI). The definition of defect is also extended to include safety-relevant cyber security requirements and software updates.

- Taken together, these changes will make for a very different product liability and litigation environment going forward. Consumers will have wider grounds to sue, find it easier to litigate, and do so collectively. As a result, product liability litigation in the EU is almost certain to increase, both in the number of claims, their value, and cost.
- The scope of application of the Directive is unclear, particularly in cases of malfunctioning, non-high-risk AI systems, where both the revised Product Liability Directive and the AILD could apply. This could give rise to conflicting requirements, which would add complexity and financial costs for producers as well as undermining legal certainty.
- Regarding the interplay with the AI Act, the scope of the Directive goes beyond what is intended and translates the requirements placed on providers and users of high-risk AI systems under the proposed AI Act into a sort of obligation of result, i.e., a breach of one of the obligations of the Act will constitute in itself a failure even if there is no “fault” as defined at national level.
 - European businesses will be torn between two opposite scenarios: establishing very granular and prescriptive conduct rules and documentation requirements as part of the AI Act, as well as likely having to face increased litigation.
- The AI system’s definition of the original EC’s AI Act proposal was narrowed down following the OECD’s latest definition. It de facto narrows down the scope of the AI Act and therefore the scope of the AILD which uses the same definition of an AI system as the AI Act. However, the welcome amendment of the definition will not result in a positive impact for liability insurers as more general systems, techniques and approaches such as software still fall under the scope of the PLD.
- Given the broader scope of the PLD and the similarity of the liability rules laid down both in the AILD and the PLD, we question the need for and added value of the AILD. Limiting the number of pieces of legislation stakeholders have to comply with would contribute to the EC’s objective of reducing red tape.
- However, the AILD and the PLD have conflicting liability approaches. The PLD’s no-fault system contrasts with the AILD’s fault-based approach, potentially complicating AI-related claims. For instance, the PLD could lead to faster compensation for victims of defective products, while the AILD’s focus on fault may complicate claims related to AI systems, especially in determining who is at fault.
- Overlapping directives may also create uncertainty for victims seeking compensation. For instance, if an AI system is considered a product under the PLD, victims may be unsure whether to pursue claims under the no-fault regime or the fault-based regime of the AILD.
- Varying liability approaches could result in uneven protection levels. The no-fault system aims to provide easier access to compensation for injuries caused by defects, while the fault-based system may create barriers for victims if they are unable to prove fault, even if the AI system caused harm.
- Linked to the possible overlap between the AILD and the PLD, due consideration should be given to the (negative) impact on the competitiveness of European companies. Companies could be faced with legal claims, the success of which is uncertain, due to the lack of legal certainty in the current AILD text and the general increase in a litigious culture – compounded by the significant increase in the (often) unregulated litigation funding in the EU.
- Coupled with the AI Act, which could hinder innovation and the development of a digital economy, the AILD could deter companies even further from developing and deploying AI tools in the EU, further decreasing competitiveness.
- Damages that have not been addressed by the PLD are usually dealt with by the means of the law of torts of the member states. There is no proof that these damages are in the centre of future AI claims and therefore, it is disproportionate to change member states’ procedural laws for these damages.
- Even assuming a change of procedural laws by the AILD, there will be still forum-shopping tendencies as the law of torts is not the same in all member states.

Key messages

- The AILD proposal should be withdrawn if it does not provide any added value to the AI Act and the PLD. Many jurisdictions already have well-established legal frameworks that can address liability issues arising from AI technologies without the need for a new directive. Existing laws may adequately cover negligence and product liability making an additional directive redundant or unnecessarily complex.
- This withdrawal would also align with the EC’s commitment to simplify rules and cut overregulation.
- Alternatively, to ensure legal certainty and consistency with other pieces of legislation, the scope of the AILD should be restricted to only high-risk systems and limited to actual failures of such systems.

Directive or Regulation

European Parliament rapporteur's proposal

At the JURI Committee meeting on 5 December, MEP Axel Voss (EPP, DE), the rapporteur on the AILD, argued that the proposal for a directive should be turned into a regulation. In his views, the flexibility that a directive gives to member states to transpose principles into national law, would result in a fragmented transposition of the AILD. He highlighted the added value of a full harmonisation of the liability rules on AI to ensure a consistent and coherent legal framework across member states.

Insurance Europe's assessment

- The negotiations around the PLD highlighted the will from member states to maintain control over their national legislation on liability and protect their tort law traditions. Turning the AILD into a regulation would be seen as an attempt by the EU to force the member states to standardise their civil law, disregarding their legal history and traditions.

Key messages

- The AILD proposal should not be turned into a regulation. It would disregard its close link with the PLD, the need to align its transposition to the transposition of the PLD, in line with the specificities of member states' civil law.
- Existing EU legal frameworks, particularly the General Data Protection Regulation (GDPR) and the revised PLD, already offer robust protection for consumers in AI-related liability matters. Introducing an additional regulation is not only unnecessary but could potentially lead to legal complications and uncertainty. The proposed AILD, if implemented as a fault-based regulation, would create inconsistency with the PLD's non-fault directive approach, further complicating the regulatory landscape.
- Maintaining the AILD and turning it into a regulation would contradict the EC's commitment to reduce overregulation for companies.

Disclosure of evidence

European Commission's proposal

The proposal introduces requirements to disclose evidence and a rebuttable presumption of non-compliance in cases of claims for damage caused by high-risk AI systems.

Insurance Europe's assessment

- The threshold triggering the disclosure of the evidence is too vague and could establish, de facto, a discovery approach. This may increase the risk and burden of litigation, which will, in addition to disincentivising AI providers from innovating, deter insurers from providing cover and lead them to have to increase premiums.
- The unintended consequences, when combined with the revised PLD (which is expected to increase the frequency and severity of claims and facilitates litigation) and the Representative Actions Directive (RAD) (which enables mass consumer claims), mean that the AILD will likely lead to an increase in litigation, including potentially abusive litigation.

Key messages

- If the proposal is maintained, the AILD should include a set of specific requirements to limit recourse to this disclosure of evidence tool. Such an approach would enhance legal certainty and discourage unfounded claims.

Rebuttable presumption of a causal link

European Commission's proposal

The proposal sets out a rebuttable presumption of causality to help victims establish the causal link between non-compliance with the duty of care and the output produced by an AI system that gives rise to the relevant damage.

Insurance Europe's assessment

- In its current form, the proposed text, in a similar way to the revised PLD, would place a significant evidentiary burden on the defendant. This, in combination with the RAD, may result in an increased risk of liability and litigation, which is likely to reduce producers' incentives to innovate.
- This provision could also give rise to legal uncertainty, as it is unclear how courts should assess causality. Such uncertainty will further hinder innovation and is likely to lead to costly legal cases – when combined, this is likely to have a cooling effect on the EU's competitiveness.

Key messages

- If the proposal is maintained, it should include objective criteria for better assessing the likelihood of the causal link. This, in turn, would ensure legal certainty and reduce the number of unfounded claims, as well as the likelihood of litigation.

Evaluation & mandatory insurance

European Commission's proposal

The proposal foresees a targeted review whether additional measures are needed, such as introducing a strict liability regime and/or mandatory insurance.

Insurance Europe's assessment

- Strict liability schemes coupled with mandatory insurance only work when the risks to be covered are sufficiently similar and when specific market preconditions are met (availability of sufficient data, adequate competition, insurers interested in providing cover, sufficient reinsurance capacity). This is not the case for AI, which covers a very wide range of different appliances and uses.
- Without these preconditions, making AI liability insurance mandatory at national level would do more harm than good, and doing so at EU level would be even worse. Mandatory insurance could also lead to policyholders taking insufficient prevention measures, as they would expect the insurer to provide compensation in any case. A mandatory scheme could also potentially result in:
 - A lack of underwriting/contractual freedom, stifling innovation in insurance products.
 - An adverse effect on insurance coverage if, depending on the 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.
 - 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 vehicle registers for compulsory motor insurance).

Key messages

- The AILD must not introduce mandatory insurance, as the framework covers a wide range of different AI appliances and uses. In fact, by the time the Directive is reviewed, it is highly likely that more AI systems will be available, making it even more complicated for insurers to provide compulsory coverage.
- Legislating for mandatory insurance does not mean that insurers are able to offer such products, since insurers depend on risk-relevant data to design and price their products. Demand, similarly, is dependent on customer appetite – which will be influenced by product features, coverage and pricing. Insurers must continue to be permitted to determine, on commercial grounds, what markets to enter and on what terms. Freedom contract must remain a feature of the EU market.

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