



The Center for Data Innovation (Transparency Register #: 367682319221-26) is pleased to respond to the European Commission’s request for feedback on adapting product liability to the digital age, especially artificial intelligence (AI).¹ The Center is a non-profit think tank that formulates and promotes pragmatic public policies designed to maximize the benefits of data-driven innovation in the public and private sectors.

The proposed reforms to the EU’s product liability framework, the Product Liability Directive (PLD), seek to 1) adjust the existing product liability framework to explicitly include digital technologies like AI; and 2) reduce the plaintiff’s burden of proof requirement to demonstrate a causal link between a fault or defect in a product containing AI and the damage suffered.

The Commission’s plans to modify and expand the PLD to account for digital technologies such as AI, needs to be carefully weighed against the risk of unintended and unwelcome effects on the cost and availability of product insurance, and its consequent impacts on technological innovation and consumer welfare in Europe. The value of the PLD lies in its balanced treatment of components like the burden of proof, and the scope of the “product” definition. Unnecessarily changing this framework will weaken the clarity of these well-established concepts.

The Commission has not presented evidence that the PLD is inadequate for products with software components. It is thus not clear why the PLD needs to be proactively amended. Article 1 of the PLD states simply, “the producer shall be liable for damage caused by a defect in his product.”² Expanding this definition to include non-tangible product categories like software and services is a major expansion of the PLD and will have far-reaching consequences for the IT industry and the insurance market. It fundamentally changes the purpose of the PLD, which is to maintain an EU-wide framework for liability in the context of physical damage incurred by a manufactured product with discrete sets of uses. To the extent that such products contain software, the PLD already applies to them. The Commission’s own Expert Group on Liability and

¹ “Civil liability – adapting liability rules to the digital age and artificial intelligence,” European Commission, n.d., https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12979-Civil-liability-adapting-liability-rules-to-the-digital-age-and-artificial-intelligence_en.

² Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, European Council (1985) <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A31985L0374>.

New Technologies found that “the harmful effects of the operation of emerging digital technologies can be compensated under existing laws on damages in contract and in tort in each Member State.”³ The lack of clarity and legal precedent around the applicability of newly expanded “product” definitions will deter innovation as companies will be wary of assuming potential legal liabilities in areas previously regulated by member states’ consumer protection laws. Expanding the PLD into non-tangible products requires concrete evidence that the existing liability framework doesn’t adequately cover the risks caused by products featuring AI. Only once gaps in the current framework are clearly established should PLD reforms be undertaken so that any changes address specific needs.

The idea of reversing the burden of proof in the context of AI-powered products is another substantial change to the status quo. Currently, plaintiffs must prove that defects in a product caused them damage. Turning this model on its head creates an implied assumption that AI products placed on the market are defective until proven otherwise. This would spark a chilling effect on AI adoption in Europe. Insurers stress that the current market for product insurance functions properly and provides a high level of consumer protection. Insurance providers adapt to new technologies by differentiating risk profiles among the population of insured entities and pricing their products accordingly. By forcing changes to insurance premiums through mandated reforms, insurers will be forced to set premiums based on the Commission’s deemed risk profile of AI-powered products, rather than observed risks as is normally the case. This will lead to more expensive premiums for producers, which in turn will be passed on to European consumers in the form of higher prices. Insurers have demonstrated their ability to adapt liability provisions to high-risk products featuring software (such as in medical devices) without the need for additional legislation.

Of the proposed options to change the PLD, the following generate the least amount of disruption and economic cost whilst accounting for some of the risks to consumer rights and safety that the Commissions fear will be undermined by AI-powered products:

³ Expert Group on Liability and Technologies Formation, *Liability For Artificial Intelligence And Other Emerging Digital Technologies*, (Brussels: European Commission, 2019)
https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/JURI/DV/2020/01-09/AI-report_EN.pdf.



Option 1.c.(i) - “Recommendation to Member States of a targeted and risk-based harmonisation of the strict liability of operators/users of AI-systems that enable products and services with a specific risk profile (such as those endangering the lives, health and property of members of the public), possibly coupled with an insurance obligation.”

This option allows member states to engage with producers and insurers to determine particular applications of AI in a product context where they can gauge specific risk profiles and generate suitable insurance options (for example, in autonomous vehicles). Not all products containing AI will incur novel product liability risks, and the inclusion of AI in a product should not *a priori* force strict liability because of the aforementioned costs to insurance and innovation. The concept of strict liability only makes sense where the risk profile of the product in question is appropriate, a topic that insurers (as well as producers and consumers) will be able to comment further on.

Option 2.1.a - “Alleviate the burden of proof by (i) obliging the producer to disclose technical information to the injured party and (ii) 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 when a product clearly malfunctions.”

This option is a reasonable adjustment to the PLD that strengthens plaintiffs’ discovery rights, holds producers accountable, and encourages the maintenance of proper development documentation. It does not create a “guilty until proven innocent” standard for software-powered products.

Option 2.2.a - “Recommendation to Member States of targeted adaptations to the burden of proof.”

This option allows for evidence-driven policy adjustments instead of top-down *ex ante* decisions that could seriously disrupt the normal flow or proceedings in liability cases and negatively impact the provision of AI-powered goods in Europe (in terms of insurance availability, cost, or both).

The Center for Data Innovation is in favour of regulatory reform where the evidence warrants it and where the costs and benefits of changes are properly assessed. We hope this submission sheds light on how we think about these issues in the context of AI and product liability. It is important that the Commission strikes the right balance between protecting consumers and promoting growth and innovation.