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Subject: Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive)
- Commission Services analysis of the links between the proposal for AI Liability Directive, the revised Product Liability Directive and the AI Act

Delegations will find in Annex a Commission Services analysis of the links between the proposal for AI Liability Directive, the revised Product Liability Directive and the AI Act.

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Introduction

The proposals for the AI Liability Directive (AILD) and the revision of the Product Liability Directive (PLD) were adopted by the Commission as a liability package on 28 September 2022. They form part of the coordinated European approach on AI, together with the AI Act.

The PLD creates a regime that gives eligible victims the right to claim compensation. The AILD does not create a new claim to compensation but makes it easier for victims to assert any such claim they may have under national tort law. The two proposals employ the same legal tools (disclosure of evidence and rebuttable presumptions) to address the difficulties with the burden of proof that victims might face in the respective compensation claims.

This paper presents the main elements that link the three pieces of legislation mentioned. Not all elements are relevant for all three or not to the same extent.

Personal scope

The **AI Act** applies to operators of AI (provider, product manufacturer, deployer, authorised representative, importer or distributor), certification entities, affected persons and authorities with supervisory powers.

Personal scope: liable persons

The **AILD** applies to all liability claims based on the fault of **any person** (regulated under AI Act or not): *deployers, providers, hackers etc.*, meaning anybody who committed a fault.

The **PLD** applies to claims against the **manufacturer, or other economic operators in absence of an EU-based manufacturer**. In the case of AI-related damage, this means the manufacturer of an AI system (developer, provider), regardless of their level of risk. Moreover, it should be noted that the PLD does not rely on any definition for the concept of software including all AI systems.

Example: if an AI equipped mobile street cleaning robot hits a baby stroller and the child gets hurt, the parents of the child could claim compensation:

- ***under the PLD**, against the manufacturer of the robot by claiming that the robot was defective.*
- ***under national tort law (with the AILD easing the burden of proof)**, against the cleaning company operating the cleaning robot fleet, the producer or any other person who committed a fault.*

Personal scope: victims

The **AILD** – applies to fault-based claims initiated by **any type of victim that is eligible under national tort law**: individuals in private capacity, professionals, companies, organisations etc. that suffered damage caused by AI.

The **PLD** – applies only to claims initiated by **natural persons**.

In the same example, if the cleaning robot damages a car owned by a legal person such as an SME or by the police, the AILD would apply to both a claim for fault filed by the legal person or the State.

The PLD would not apply as it can only be invoked by victims who are natural persons.

Material scope

The **AI Act** applies to AI systems and general-purpose AI models, defining what is an AI system and a general-purpose AI model and providing obligations and requirements for the placement on the market, putting into service and use of AI systems and the placing on the market of general-purpose AI models in the EU.

The **AILD** applies to claims for damages caused by any type of AI systems, based on the fault of a liable person.

The **PLD** applies to claims for damages caused by defective products, against the producer of the product, regardless of the existence of a fault or not.

Material scope: Type of products, services, activities

The **AI Act** introduces certain rules, the most relevant for liability being the following:

- Prohibition for the placing on the market and use of certain AI systems with unacceptable risk.
- Conditions under which **certain categories of high-risk AI systems** can be placed on the market, put into service or used, notably introducing obligations for providers and deployers and rights for affected persons.

AI systems classify as high-risk in the following cases:

- a) AI systems that are a safety component in a product that is subject to third-party conformity assessment required by legislation in Annex I section A¹ or that constitute such products, or
- b) AI systems intended to be used for one of the high-risk use-cases listed in Annex III and only as long as they are not excluded from the application of these requirements by the filter in Article 6 (3).

¹ That means safety components of products that are covered by Union legislation listed in section A of Annex I (such as legislation dealing with machinery, lifts, toys, pressure equipment, radio equipment, etc.). At the same time, safety components of products covered by Union legislation mentioned in section B of Annex I (such as motor vehicles or aircrafts) would qualify as high-risk but they would not be subject to the obligations set by AI Act for providers and deployers.

- **Obligations** regarding the placing on the market, putting into service or use of certain AI systems related to transparency and information of affected natural persons.
- Conditions for the placing on the market of **general-purpose AI models as components of AI systems**, notably introducing horizontal transparency obligations for providers and, for certain highly capable models (that meet a capability threshold or have been designated by the Commission as such), additional risk management and reporting obligations (see for more details the section on general-purpose AI models in the document ‘List of issues’).

The **AILD**: applies to claims concerning **any wrongful act or omission**, amounting to fault **by reference to** a duty of care under Union law or national law by a person which may have influenced **any type of AI system** that caused the damage.

This could be the case when the deployer or provider did not comply with obligations meant to prevent harm when developing, operating or using AI systems.

For example, the AILD would apply:

- *To AI systems classifying as high-risk under the AI Act and subject to its requirements: a deployer of an AI system screening CVs for recruitment that does not comply with the instructions of use in respect of quality of input about applicants.*
- *To AI systems not classifying as high-risk under the AI Act: a provider of an AI system used for setting prices for car insurance policies when it did not train it on relevant data, which is considered negligent according to national law.*

The **PLD**: applies to claims concerning **defective products** and **related services**² that caused damage, including any type of AI system.

For example, the PLD and the AILD would apply:

- *To AI systems classifying as high-risk under the AI Act and subject to its requirements: producer of an AI operating construction cranes;*
- *To AI systems not classifying as high-risk under the AI Act: a producer of an AI system predicting water demand and ensuring optimised water distribution in personal homes, factories, offices, farms etc.³*

Material scope: Damage

The **PLD**: a claim under the PLD is available when one of the heads of damage exists:

- damage to life, health, or property, but not property used exclusively for professional purposes and
- the destruction or corruption of data, but not data used for professional purposes.

In addition to these heads of damage, the victim can then also claim losses resulting from it:

- all material losses
- non-material losses resulting from the types of damages listed above, to the extent that these non-material losses are compensable under national law.

² ‘Products’ includes software (including AI systems) and ‘related service’ means an integrated or inter-connected digital service without which the product could not perform one of its functions.

³ The AI Act requirements are [most likely] not applicable as this type of device equipped with AI would not be subject to third-party conformity assessment under existing safety legislation and thus not subject to requirements under AI Act.

However, the PLD does not cover infringements of personality rights such as privacy (including informational privacy), one's own picture or honour or the right to non-discrimination.

The **AILD**: applies to claims for compensation of **any damage**, when compensable under national tort law.

Several of the high-risk AI systems listed in Annex III of the AI Act are likely to cause other types of damage than those that can trigger the liability under the PLD, for instance, damage to personality rights like privacy or the right to non-discrimination. For instance, infringements to the right to non-discrimination caused by AI used in access to education and learning, access to employment and self-employment, credit worthiness and credit scoring is likely to take the form of economic loss. In these cases, the victim would typically have a right to claim compensation for the harm caused, either under Union or national law. The AI Act reinforces this protection by providing a right to an explanation of individual decision-making for affected persons.

Example: the AILD would apply:

- *To AI systems classifying as high-risk under the AI Act and subject to its requirements: If a natural person applies for life insurance and the decision communicated by the insurance company about the level of the premium of the insurance policy is made by an AI that discriminates against this person (e.g. due to incorrect training data), thus causing economic loss, they could bring a claim against the provider of the AI system based on fault, using the AILD. In the same example, if the discrimination is due to incorrect input data about the person that the insurance company introduced in the AI system, the victim could claim compensation from the insurance company (which is the deployer of the AI system) based on their fault under the EU or national legislation, using the AILD. The victim could not claim compensation under PLD, because economic loss is not a head of damage covered by that directive.*
- *To AI systems not classifying as high-risk under the AI Act: If a person applies for any type of insurance other than life and health, for instance car insurance, and the decision communicated by the insurance company about the level of the premium of the insurance policy is made by an AI that discriminates against this person, thus causing economic loss, the person could claim compensation from the provider of the non-high-risk AI system used for setting prices for car insurance policies when this provider did not train it on relevant data, which is considered negligent according to national law, using the AILD for proving their claim. They could also bring a claim against the insurance company (deployer of the AI system) if the discrimination is due to incorrect input data about the person provided in the AI system by the insurance company.*

Material scope: General-purpose AI models

The **AI Act** – chapter V sets the rules for the placing on the market of general-purpose AI models, which are common components of AI systems.

It sets rules for classifying and publishing a list of general-purpose AI models with systemic risks in the EU.

It sets obligations for providers of general-purpose AI models, mainly to draw up technical documentation, to make information about the model available to providers that want to integrate the model into their AI systems, to put in place a policy to comply with Union law on copyright and related rights and make public a summary about the content used for training the model.

The providers of general-purpose AI models classified as having systemic risks must also perform model evaluations, assess and mitigate possible systemic risks, document serious incidents and corrective measures and ensure adequate cyber-security protection.

The **AILD**: applies to damage caused by an AI system, including if that system is based on a general-purpose AI model. As it is applicable to claims against any person that committed a fault that influenced the AI system, it can also be used for fault-based claims against the provider of a general-purpose AI model used for building the AI system.

The **PLD**: applies to damage caused by any defective products (including AI systems). The notion of product covers all software and AI systems, regardless of whether they are integrated or standalone. A manufacturer of a GPAI model is liable under the PLD like any other manufacturer for the GPAI models as his/her product, also if integrated into another product by another manufacturer.

Examples:

- *AI system integrating a GPAI model that classifies as high-risk and is therefore subject to requirements of the AI Act: This could be an AI system developed to be deployed by academic institutions using GPAI models to identify the probability that a text is AI-generated with the objective to detect cheating. Such a use case would correspond to Annex III point 3 d) (AI system intended to be used for monitoring and detecting prohibited practices of students during tests in the context of or within educational and vocational training), hence the AI system would classify as high-risk. If the GPAI model has not been well-trained or finetuned, it could lead to such AI system falsely identifying a paper as AI-generated with implications for access to education of an individual.*
- *AI system integrating a GPAI model and not classifying as high-risk: This could be an AI system deployed in banking institutions which uses numerous GPAI models to prevent, detect and manage suspicious and malicious activity and engage in fraud prevention. Fraud detection is excluded from being high-risk pursuant to Annex III point 5 b). However, an inaccurate output that is a result of poor training of a GPAI model could have serious consequences for an individual and potentially lead to economic loss.*
- *Any AI system integrating a GPAI model, no matter of the risk, that is then integrated into another product or standalone e.g. in a smartphone that could impact the functioning of the battery making it explode and hurting a person or destroying the data on it. The PLD will be applicable for a claim against the manufacturer that integrated the AI system, against the manufacturer of the AI system itself or the manufacturer of the GPAI model as a component of the AI system, without having to determine the reasons of the output of the system or because it was due to wrongful data.*