



NEW EUROPEAN PRODUCT LIABILITY AND AI LIABILITY RULES ON THE WAY

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INTRODUCTION

New rules on product liability and liability for *artificial intelligence* (AI) are set to be introduced in the European Union (EU). On September 28, 2022, the European Commission – the executive body of the EU – proposed two new directives on these subjects. While EU directives are not directly applicable law, it is mandatory for the national legislators of the EU member states to incorporate the content of the directives in their national law.

One directive relates to the strict liability of manufacturers and other parties for damage as a result of defective products (COM(2022) 495 final). This proposal relates to the revision of a currently existing EU directive on product liability. The other directive relates to liability for damage caused by AI systems (COM(2022) 496 final). There is no such AI directive at present.

Although the two proposed directives have to be approved by the European Parliament and by the Council of Ministers and may yet be amended, the proposal of the two new directives means that liability law is likely to change significantly within the

EU in the near future. This new liability law will be of great importance for U.S. companies selling products within the EU market.

In this article, we will briefly discuss the content of the two new proposed directives and the consequences they will have for U.S. companies with a sales market in the EU, for example.

THE PROPOSAL FOR A NEW DIRECTIVE ON PRODUCT LIABILITY

In the EU, there has been a directive on product liability (85/374/EEC) since 1985. EU member states adapted their national product liability law in line with the standards in this directive. The European Commission now deems it the right time to improve this directive in order to promote legal certainty within the EU market and the legal protection of EU consumers. Four objectives are put forward in the proposal:

- (1) To bring EU product liability law up to speed with the current “digital age” and “circular economy.”
- (2) To have a liable company within the EU in the case of a defective product, even if the product is sold directly by manufacturers outside the EU.

- (3) To ease the burden of proof for consumers in complex cases and relax restrictions on bringing actions.
- (4) To improve alignment with modern EU legislation and codification of EU case law.

The core of this directive is that, in line with the current situation, any natural person who suffers damage due to a defective product is entitled to compensation. We will discuss some of the highlights of this new product liability directive.

First and foremost, it is important – naturally – that this product liability directive only relates to products. The scope of this term is broad and also includes medicines. In the new directive, it is explicitly made clear that it also covers electricity, software and *digital manufacturing files*. The latter relates to digital versions or a digital template of a movable that is used in 3D printing, for example. AI systems and software updates also come under this new definition of a product, even if they are integrated into another product. The term ‘product’ also covers digital services which are integrated into – or connected with – a product in such a way that the product is unable to fulfill its functions without them,

such as the continuous provision of traffic data in a navigation system, for example. Secondly, it refers to strict liability for a defective product, which means that it is not required for the defendant to be at fault for causing the damage or defect. In principle, it is sufficient for liability that the product has a defect that caused damage. Even under the new directive, whether there is a defect remains a consideration based on all the circumstances of the case, which requires that the product does not provide the safety that the general public is entitled to expect. For products with AI systems, one of the things that will be relevant is the effect on the product of the ability to keep learning after it has been placed on the market or put into service.

Thirdly, product liability only relates to personal injury, property damage and the loss or corruption of data. This may also include objects or data that have been partly used professionally. The current minimum for property damage of at least EUR 500 will lapse, as well as the possibility for member states to limit liability.

Compared with the current directive, the new directive contains an expanded circle of liable persons. The liable party system is tiered. The basic principle is that the manufacturer of a defective product is liable and that if the product is defective on account of a defective component, the manufacturer thereof is also liable too. In the context of the circular economy, anyone who substantially modifies a product that has already been placed on the market or put into service is also going to be regarded as such a manufacturer, provided that the original manufacturer had no control over it. If the manufacturer is based outside the EU, the importer and the authorized representative of the manufacturer, such as a commercial agent, are regarded as liable parties. If that importer or authorized representative is not based in the EU either, the fulfillment service provider is regarded as the liable party. In short, the fulfillment service provider is the party that stored and packaged, addressed and dispatched the product. And if a fulfillment service provider cannot be designated either, it is the (online) distributor of the product that is liable unless they designate the party that delivered the product to them. Thus the new directive aims to ensure that there is always a liable party in the case of a defective product within the EU.

In addition, the new directive provides the injured party with certain evidentiary benefits. In principle, the burden of proof with regard to the defect, damage and causal link rests with the injured party.

However, in certain cases, a product is deemed defective and/or the causal link to the damage is assumed. In addition, at the request of the injured party, a court may order the defendant to disclose relevant evidence in their possession.

This new directive will apply to products that are placed on the market or put into service at least 12 months after this directive comes into force. Within that period, EU member states will have to adapt their national law in line with this directive.

THE PROPOSAL FOR A DIRECTIVE ON LIABILITY FOR AI

At the same time as the new product liability directive, a directive was proposed regarding non-contractual liability for AI. The aim of this directive is to provide legal certainty and the same legal protection within the EU for damage as a result of using AI systems. The idea behind this is that AI systems are extremely complex, autonomous and opaque, which means that it is not always easy for an injured party to prove that the damage they have suffered was caused by the violation of a duty of care in relation to an AI system. This directive has been proposed in order to improve the position of an injured party in terms of information and proof. This directive does not provide a basis for liability itself but seeks to alleviate the problems of injured parties in terms of furnishing proof by providing a right to the disclosure of evidence and rebuttable presumptions of a violation of a duty of care and causal link.

This directive is linked to the proposal for an AI regulation currently under negotiation within the EU proposed by the European Commission in 2021 (COM(2021) 206 final). This regulation is going to bring rules that apply to AI in the field of human rights and health and safety within the EU. Violation of those rules may lead to delictual liability. This new directive relating to AI will help the position of parties claiming such liability in terms of information and proof.

First and foremost, the directive provides the option for a court – at the request of injured parties – to order the providers or users of a “high-risk” AI system to furnish evidence relating to the AI system which is suspected to have caused the damage. However, this is subject to several conditions, such as the claimant having to have done everything reasonably possible to obtain the relevant evidence from the defendant and a demonstration of the credibility of the claim for compensation. The court may order that certain evidence must be kept and will allow the disclosure thereof

only insofar as it is necessary and commensurate in support of a potential claim. If a trade secret were to be disclosed as a result, the court will have to take measures to ensure that confidentiality is maintained.

The directive also provides the option of a rebuttable presumption of a causal link between the fault of the defendant and the output generated by the AI system. This requires, among other things, the claimant to have demonstrated the fault of the defendant, namely that the defendant violated a duty of care and that the damage was caused by the output of the AI system. In the case of a “high-risk” AI system, a presumption is more likely to be accepted.

CONCLUSION

Both directives are still only at the proposal stage. However, they will mean that liability law changes significantly in countries within the EU in the near future. That will have legal consequences for U.S. companies selling products on the European market. It is therefore important to have an understanding of these product liability and AI liability directives and to take them into account now. Although amendments and minor changes are still possible, the main features seem to have been fixed already.



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