

THE EU INTRODUCES NEW RULES ON AI LIABILITY

In a representative survey of 2020, the unclear regulation of liability ranked amongst the top three barriers to the use of artificial intelligence (the "AI") by European companies.¹ Now the EU is aiming to reverse this trend and set clear rules, facilitating the process of determining who is liable for the developing and implementing AI products.

Existing national liability rules, particularly those based on fault, are ill-equipped to address liability claims arising from damage caused by AI-enabled products and services. These rules often require victims to demonstrate a wrongful act or omission by the individual responsible for the damage. This also applies to the Czech legal framework with reference to the provisions of Section 2909 et seq. of Act 89/2012 Coll., the Civil Code, which would currently be used to assess liability for AI. However, the unique attributes of AI, such as its complexity, autonomy, and its opacity, often referred to as the "black box" effect (meaning a lack of clear understanding or transparency regarding its internal processes and decision-making),² can make it challenging or very costly for victims to identify the responsible party and meet the criteria for a successful liability claim. Specifically, when seeking compensation, victims and deployers might face substantial initial costs, legal uncertainty and significantly prolonged legal proceedings compared to cases not involving AI.

A SIMPLER PROCESS FOR SEEKING COMPENSATION FOR AI-INDUCED DAMAGE?

The EU has set forth a goal to regulate AI and manage liability for damages caused by it. Central to this regulatory framework is the Regulation (EU) 2024/1689 laying down harmonised rules on AI (the "AI Act"), which establishes comprehensive guidelines for the development and use of AI systems within the EU. It sets out, in particular, the rules that AI providers and deployers must follow to meet the principle of due care. Failure to comply with this principle is becoming a key concept in the context of imposing liability for AI. The AI Act entered into force on 1 August 2024. While many of the AI Act's provisions start to apply starting on 2 August 2026, certain obligations will become mandatory for companies already from 2 February 2025. Therefore, it is important for deployers to take the AI Act and its requirements into account without delay, as is already apparent from the behaviour of some major players in the market.

Further developing the legal framework are the Directive (EU) 2024/2853 of the European Parliament and of the Council on liability for defective products adopted on 23 October 2024 (the "Revised Product Liability Directive") and the proposed AI Liability Directive, introduced by the European Commission in September 2022 (the "AI Liability Directive"), both designed to work in conjunction with the AI Act, ensuring that AI systems are not only compliant with safety and ethical standards but also that liability for damages caused by faulty AI outputs can be imposed on the providers of the AI systems, as well as its deployers – meaning individuals or entities responsible for implementing and managing artificial intelligence systems in practical applications.

Key Points

- Most national fault-based liability systems struggle with AI-related claims due to AI's complexity and opacity, leading to high costs and legal uncertainty for victims.
- The disclosure obligations and presumptions contained in the Product Liability Directive and AI Liability Directive will place AI providers and deployers in a more vulnerable position during litigation. Claiming AI induced damage should become easier.
- A risk assessment should be carried out to identify areas of potential liability stemming out of providing or contributing to an AI product.

¹ Ipsos Belgium. European enterprise survey on the use of technologies based on AI. 2020. Final report. Available online from <https://op.europa.eu/en/publication-detail/-/publication/f089bbae-f0b0-11ea-991b-01aa75ed71a1>. p. 58.

² European Commission. 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). Available online from <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022PC0496>. p. 1.

REVISED PRODUCT LIABILITY DIRECTIVE

The Revised Product Liability Directive aims to modernise the EU's liability framework to address the complexities of AI and digital technologies. It expands the definition of "product" to include software, explicitly covering AI systems, and broadens the scope of liability to include manufacturers and suppliers of AI. The directive introduces provisions for recovering material losses, including data loss, and updates the concept of defectiveness to consider AI's self-learning capabilities and cybersecurity vulnerabilities. With a 24-month implementation period, the Revised Product Liability Directive aligns with the AI Act, necessitating businesses to prepare for compliance with both frameworks. Key amendments include:

- (i) Expanded Definition of "Product": This now includes software, specifically AI systems, signifying a shift in recognising digital and intangible assets as tangible products under the law. This change acknowledges the significant role that software and AI systems play in modern commerce and their potential to cause harm. By excluding free and open-source software developed outside commercial activities, the Revised Product Liability Directive aims to protect developers who contribute to the software community without profit motives, ensuring that liability is focused on commercial entities that benefit financially from their software.
- (ii) Definition of "Defect": The concept of defect now considers an AI system's ability to self-learn and acquire new features, as well as cybersecurity vulnerabilities. This reflects an understanding that AI systems can change their behaviour post-deployment, potentially introducing new risks. The recitals to the Revised Product Liability Directive explicitly state that consumers can expect AI systems to be designed to prevent hazardous product behaviour. Consequently, manufacturers who create a product that develops unforeseen behaviours will remain liable if such behaviour results in harm.
- (iii) Expansion of Potential Defendants: The scope of liability is broadened to include not only the original manufacturers but also companies and deployers that substantially modify a product or integrate defective components. This means that any entity involved in the deployment of AI systems, which may involve altering the system or incorporating additional elements, can be held accountable if these actions contribute to a defect. By recognising deployers as potential defendants, the legal framework ensures that all parties responsible for the final configuration and operation of AI systems are incentivised to maintain rigorous standards of quality control and safety. This approach aims to protect consumers by ensuring comprehensive accountability throughout the entire lifecycle of the product.

AI LIABILITY DIRECTIVE

The AI Liability Directive seeks to harmonise rules on non-contractual liability for damage caused by AI and implements two significant legal tools, meant to facilitate the determination of liability for AI-induced damage:

- (i) Disclosure Obligation: This provision empowers individuals who claim to have suffered damages as a result of faulty AI output to request disclosure of information from AI providers to identify potential claims and liable parties. The AI providers are obliged to comply with this request.
- (ii) Rebuttable Presumption of Causality: If an AI provider fails to comply with a duty of care, and the AI system's output causes damage, there is a presumption that the breach of duty caused the damage. This presumption is designed to assist claimants in overcoming the technical complexities of proving causation between the failure of the AI provider / deployer to provide due care and the faulty AI output that resulted in the damage.

The AI Liability Directive is currently in the first reading in the European Parliament and proposes a deadline of 2 years to implement the rules into national law. However, further amendments to the directive are currently being debated in the European Parliament, including proposals to include strict liability for certain AI systems, broadening the directive to cover liability for all software errors, not just AI-related damages as well as transforming the directive into a regulation, which would consequently have direct effect and not require transposition.

TAKEAWAYS

The ability of AI systems to self-learn and develop necessitates a broader understanding of liability and fault, simplifying the process of claiming damages caused by AI. The European Commission's efforts to balance the scales for claimants through presumptions and disclosure obligations aim at avoiding disadvantaging end-users due to the opaque nature of AI technology. Businesses providing or contributing to AI products must adapt to the new liability regime and be ready to

explain and defend the technical complexities of their AI products as well as identify potential liabilities under the Revised Product Liability Directive and the AI Liability Directive and implement compliance systems to mitigate risks.

Providers and deployers of AI systems should consider that establishing a robust AI compliance framework is essential to mitigate the risk of substantial fines associated with non-compliance imposed under the AI Act. We will continue to closely monitor developments in AI regulation and liability. Please reach out to us for further guidance and support in navigating these ever-evolving AI legal landscapes.

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