Artificial Intelligence (AI)

Key messages on civil liability and artificial intelligence

Insurance Europe's position in a nutshell

Insurers support the European Commission's aim of promoting safe AI

European insurers support the European Commission's aim of promoting artificial intelligence (AI) that is safe and can be used by everyone. Insurers can facilitate and contribute to this aim by:

- providing insurance products and services for producers and users of AI; and,
- exploring ways of harnessing the potential of AI to more accurately forecast risk and develop new products that are in line with constantly evolving market demands and realities.

The PLD works well in practice for technologies such as AI

Insurance Europe believes that the existing liability regime at European level, the Product Liability Directive (PLD[1]), in conjunction with national tort law, works well in practice for new and emerging technologies such as AI.

- Producer liability is, and should continue to be, covered exclusively by the PLD, as any overlap in liability may result in a conflict of statutes.
- The term "operator" is increasingly used in EU institutional discussions about liability for AI, however the meaning of this term — and how it fits into existing legal frameworks — is not yet widely understood, at least not by the insurance industry.

Changes to the existing liability framework could result in challenging insurability issues

Major changes to the existing liability framework — for instance creating a separate liability regime for AI, removing exemptions to liability or making any changes to the burden of proof — could result in challenging insurability issues. As AI encompasses a set of technologies that are still at an early stage of development, legislating on liability for such highly advanced systems should be deferred until their specific risk potential can be better understood in the context of their use in different lines of business and the needs of those sectors. Any new rules at EU level would be useful and appropriate only to address any potential gaps where current rules and regulations are found to be insufficient. Insurance Europe is of the view that this is currently not the case.

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1 See https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31985L0374

The existing liability regime is fit for purpose

In the experience of European insurers, **the existing liability regime at European level, the PLD, in conjunction with national tort law, works well in practice** for new and emerging technologies such as AI.

A well-balanced system of liability

The PLD constitutes a **well-balanced system of liability** that provides a high level of protection to consumers while taking into account manufacturers' legitimate interests, thereby encouraging growth and innovation. Any change to this balance could negatively impact the cost and availability of insurance, as existing product liability insurance products have been devised and priced to reflect the delicate balance between consumer and producer obligation that is provided for under the liability regime currently in force (PLD and national liability laws).

Technology neutral

The PLD is **technology neutral** and therefore fully applies to manufacturers of emerging technologies. Specific questions of design, production and the use of products that incorporate emerging digital technologies should be addressed by product safety regulations, industry standards and technical norms.

Ensures the victim receives compensation

Under the present regime, insurance can lessen the negative consequences of accidents involving AI by **ensuring that the victim receives compensation**. There are already many such insurance solutions available in the European insurance market. Protection against material damage incurred by AI generally falls within the remit of general liability insurance policies. Existing product liability policy wordings are adequate to cover risks arising out of new digital technologies.

How to address perceived challenges posed by AI

Non-legislative guidance

While the PLD is a well-functioning piece of legislation that has provided protection to European consumers for 30 years, it could be strengthened by additional **non-legislative guidance** on the interpretation of certain of its key concepts in the context of new and emerging technologies. Such guidance should focus on clearly identified areas in which perceived gaps exist.

Track software updates

The ability to **track software updates** is also worthy of consideration. This function would assist in determining the version of software that was installed and in use at specific points in time and would help to determine liability.

Access to data

Access to data stored by these systems will be key for allocating responsibility for damage either to the producer (if caused by a product defect), to the user (if caused by the circumstances of use) or another party (eg maintenance, repair, overhaul). Questions of data recording, storage and access should be addressed by regulations outside liability legislation.

What should be avoided

Avoid establishing a separate civil liability regime for AI

This would be burdensome for consumers and businesses alike, and liability for producers under different regimes would lead to legal uncertainty and possible conflicts of statutes for producers.

Do not remove existing defence mechanisms

Including exemptions from liability, as this would deter technological innovation and hinder economic development.

Do not extend the current framework to include immaterial harm that results in "verifiable economic loss"

Liability insurance commonly covers personal injury and property damage (material damage). Insurers tend to either completely exclude "pure financial loss", ie loss that does not derive from personal injury or property damage (not consequential) or cover it only to a very limited extent. How "pure financial loss" is dealt with also depends on whether a claim is made based on tort or contractual liability.

Do not confuse legal liability and contractual remedies

Liability law provides compensation for injury or damage that is consequential to a harmful event. If a product simply does not function as intended or as agreed, but with no further injury or damage resulting, all member states provide remedies under contract law, such as the right to a replacement product, repair, price reduction or contract annulment. These do not constitute legal liability, nor are they covered by liability insurance. If necessary, any adjustments should be made within contract law.

Moreover, extending liability to violations of fundamental rights is unnecessary because this is already covered by EU legislation.

Do not pair strict liability with compulsory insurance

Strict liability schemes only work when the risks to be covered are sufficiently similar and when specific market pre-conditions are met (availability of sufficient data, adequate competition, insurers' interest in providing cover and sufficient reinsurance capacity).

This is not the case for AI, which covers a very wide range of different appliances and uses. Without these conditions in place, making product liability insurance mandatory could end up doing more harm than good, at national level and especially at EU level, potentially resulting in:

- A lack of underwriting/contractual freedom, stifling insurance product innovation. Compulsory insurance could have an adverse effect on market penetration if, depending on 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.
- Insufficient prevention, as policyholders feel the burden is on the insurer.
- 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 the vehicle registers for motor insurance).