

LIABILITY FOR DEFECTIVE PRODUCTS AND AI SYSTEMS: PEOPIL'S ROLE IN DEVELOPING EU RULES

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Dublin, Friday 29 September 2023

PEOPIL in the digital world

18 July 2023

António Guterres, the United Nations Secretary-General:

“The malicious use of AI systems for terrorist, criminal or state purposes could cause horrific levels of death and destruction, widespread trauma, and deep psychological damage on an unimaginable scale. [...] Both military and non-military applications of AI could have very serious consequences for global peace and security”.

TWO PROPOSALS BY THE EUROPEAN COMMISSION

**European
Commission**
28 Sept 2022

Proposal for a Directive of the European Parliament and of the Council on liability for defective products
COM(2022) 495 final
Procedure 2022/0302/COD
(revision of the 1985 Product Liability Directive)

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)
COM(2022) 496 final
Procedure 2022/0303/COD

TWO PROPOSALS BY THE EUROPEAN COMMISSION

- ❖ the new notion of «*products*» includes **artificial intelligence systems** (Recital 12: «*operating systems, firmware, computer programs, applications or AI systems*»)
- ❖ both proposals are linked to the (next?) future of the Proposal for a regulation of the European Parliament and of the Council on laying down harmonised rules on artificial intelligence (**Artificial Intelligence Act**) and amending certain Union legislative acts (COM(2021)0206 – C9-0146/2021 – 2021/0106(COD)), advanced by the European Commission on 21 April 2021, ordinary legislative procedure Procedure 2021/0106/COD

PEOPIL'S ROLE IN THE ONGOING DEBATE



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IMBALANCE



PEOPIL'S ROLE IN THE ONGOING DEBATE

- opposite groups of stakeholders with different capabilities in the way they can impact on the future provisions
- the ones who govern the economy and the tech sector have all the resources to influence the path leading to new legislative assets
- citizens at risk of becoming victims of traditional, new and futuristic products/services have lower powers in this process
- imbalance between the two categories of lobbyists is huge
- Draft Report on the “PLD Proposal” (5 April 2023) of the rapporteur of the European Parliament’s Committee on the Internal Market and Consumer protection and the Committee of Legal Affairs: apart from three Member States and a consumer organization, the list of the entities who provided inputs was composed for the vast majority by insurance companies, multinationals like Google, eBay and Amazon, representatives and associations of the industry

PEOPIL'S ROLE IN THE ONGOING DEBATE

HIGH LEVEL OF UNSATISFACTION TOWARDS THE TWO PROPOSALS



PEOPIL'S ROLE IN THE ONGOING DEBATE

PEOPIL's previous position papers:

- ❑ PEOPIL Submissions on the Product Liability Directive Guidance (October 2018)
- ❑ Response to the EU Consultation on artificial intelligence liability and insurance for personal injury and death damages caused by AI artefacts/systems (September 2020)
- ❑ PEOPIL Response to the planned revised Product Liability Directive (December 2022)

PEOPIL'S ROLE IN THE ONGOING DEBATE

THE NEW POSITION PAPER

General policy: no compromises on liability and compensation for violations of fundamental rights!

We are aiming at:

- ❖ **Higher standards of protection**
- ❖ **Strict liability rules and reversals of the burden of proof**
- ❖ **No caps on compensation**
- ❖ **Mandatory insurances for high-risks cases + national funds in relation to cases where the risk development defence applies and accidents involving untraced or uninsured AI systems, or insolvency of the defendant/insurer**
- ❖ **No absolute time limits + actual date of knowledge**

EXAMPLES OF DISAGREEMENTS WITH THE PROPOSALS

- 320. First of all, as already anticipated, we disagree with Article 4 because:
 - [?] its scope is limited (it does not provide for a proper liable regime like the PLD one);
 - [?] it is focused on “human fault” which, being it also conceived in a restricted way, not only is in contrast with the functioning of AI systems , but anyway does not permit to properly address the claimants’ problems with establishing liability in general and causation in relation to damages caused by AI.
- 321. Secondly, we disagree with the Commission’s approach since, even if one accepts the limited scope of approximation (presumptions “only”), the proposed model of rebuttable presumption of causality (rectius, the suggested model of liability based on human fault) puts the injured parties before several new burdens of proof and many hurdles. The difficulties for the claimants under Article 4 are increased instead of reduced, this comparing with what happens in relation to claims pursued under the general rules on extracontractual liability that can be found in the vast majority of the Member States .

EXAMPLES OF DISAGREEMENTS WITH THE PROPOSALS

PLD Proposal

Article 4 Definitions

For the purpose of this Directive, the following definitions shall apply:

[...]

(6) ‘damage’ means material losses resulting from:

[...]

PEOPIL Proposal

Article 4 Definition

For the purpose of this Directive, the following definitions shall apply:

[...]

(6) ‘damage’ means **pecuniary and non-pecuniary** losses resulting from:

[...]

2. This Article shall be without prejudice to national provisions relating to non-pecuniary losses.

EXAMPLES OF DISAGREEMENTS WITH THE PROPOSALS

PLD Proposal	PEOPIL Proposal
Article 4 Definitions	Article 4 Definition
For the purpose of this Directive, the following definitions shall apply:	For the purpose of this Directive, the following definitions shall apply:
[...]	[...]
(a) death or personal injury, including medically recognised harm to psychological health;	(a) death or personal injury, including medically—recognised harm to the psychological/emotional/moral sphere ;

EXAMPLES OF DISAGREEMENTS WITH THE PROPOSALS

PLD PROPOSAL, Presumption of defectiveness Article 9 Burden of Proof

PLD Proposal

Article 9 (2) (c)

(c) the claimant establishes that the damage was caused by ~~an obvious malfunction~~ of the product during normal use or under ordinary circumstances.

PEOPIL Proposal

Article 9 (2) (c)

(c) the claimant establishes that the damage was caused by **an objective difference between the product's expected performance and its actual performance (or non-performance)** during normal use or under ordinary circumstances.

EXAMPLES OF DISAGREEMENTS WITH THE PROPOSALS

PLD PROPOSAL

Article 9 Burden of Proof - Causation

PLD Proposal

Article 9 (3)

The causal link between the defectiveness of the product and the damage shall be presumed, where it has been established that the product ~~is defective~~ and the damage caused is of a kind typically consistent with ~~the defect in question~~.

PEOPIL Proposal

Article 9 (3)

The causal link between the **alleged** defectiveness of the product and the damage shall be presumed, where it has been established that the product **was involved in the damaging event** and the damage caused is of a kind typically consistent with **the alleged defectiveness** of the product.

EXAMPLES OF DISAGREEMENTS WITH THE PROPOSALS

AILD PROPOSAL, Article 4 “*Rebuttable presumption of a causal link in the case of fault*”

- its scope is limited: it does not provide for a proper liable regime like the PLD one
- it is focused on “human fault” which not only is in contrast with the functioning of AI systems, but anyway does not permit to properly address the claimants’ problems with establishing liability in general and causation in relation to damages caused by AI. Recital 15 expressly adds that «*this Directive should only cover claims for damages when the damage is caused by an output or the failure to produce an output by an AI system through the fault of a person, for example the provider or the user under [AI Act]*»
- even if one accepts the limited scope of approximation (presumptions “only”), the proposed model of rebuttable presumption of causality puts the injured parties before several new burdens of proof and many hurdles; the difficulties for the claimants under Article 4 are increased instead of reduced

Further Issues

WHICH LIABILITY FOR NATIONAL BODIES, AUDITORS AND CERTIFICATION ENTITIES?

EU and national authorities responsible for managing the surveillance of the safety of products/services, as well as of notified bodies, auditors, certification entities, conformity assessment bodies, etc., are becoming more and more important in granting that products are safe

there are products and services entering into the European Union's market only because they are certified as safe and quality-checked

the importance of such entities is confirmed by the pending proposal for the Artificial Intelligence Act, whereby authorities at the EU and national levels, notified bodies and "conformity assessment bodies" are called to play a relevant part in guarantying the quality of the AI systems

should such bodies, irrespective of being public or private, be taken into consideration besides the liability of manufacturers and the other "economic operators", at least when the producer no longer exists or has no adequate insurance?

in such cases, should claimants be entitled to sue these defendants separately as well as jointly with the other "economic operators" listed by the "PLD Proposal"?

Finally

We need your

