FLI Feedback on new EU rules for AI liability

Comments on the "Inception Impact Assessment Adapting liability rules to the digital age and circular economy"

Executive summary

The Future of Life Institute (FLI) welcomes the opportunity to participate in this consultation on the European Commission's Inception Impact Assessment on "Civil liability - adapting liability rules to the digital age and artificial intelligence".

FLI supports revising the Product Liability Directive in a way that protects the rights of consumers in the digital age and that encourages AI developers to make their products safer. FLI recommends that: i) a revised Directive be extended to cover non-material damage, ii) the burden of proof be reversed, and iii) conditions to make claims be eased. FLI further supports iv) harmonising current domestic liability frameworks; v) a ban on non-liability clauses; and vi) the introduction of a right for individuals not to be subjected to prohibited AI systems, which would enable private enforcement of the requirements set out in the Commission's proposed EU AI Act.

I. Introduction

The Future of Life Institute (FLI) is one of the world's leading voices on the governance of artificial intelligence (AI). The institute is an independent non-profit organisation that works on maximising the benefits of technology and mitigating its risks.

For example, FLI helped to organise the creation of one of the earliest and most influential set of principles on the development and governance of AI, the Asilomar AI Principles [1]. FLI has also supported AI safety research and organised conferences bringing together hundreds of the world's top AI researchers to address key challenges. The Institute, alongside the governments of France and Finland, is also the civil society champion of AI-related recommendations in the U.N. Secretary-General's Digital Cooperation Roadmap.

FLI has recently expanded its operations to Europe and is registered in the EU Transparency Register (787064543128-10). In Europe, FLI has two key priorities: 1) promoting the beneficial development of artificial intelligence; and 2) regulating lethal autonomous weapon systems. Previously, FLI has taken part in the public consultations on the European Commission's AI White Paper and a response to the AI Act is forthcoming.

We commend the European Commission for undertaking the adaptation of safety legislation to the digital age because trustworthy AI requires clear rules on liability. FLI is honoured to have an opportunity to participate in this public impact assessment. For the reasons set forth below, **FLI supports policy options 1b, 2.1.b, 2.1.c., 2.1.d., and 2.2.d** as outlined in the Commission's inception impact assessment (Ares(2021) 4266516, 30/06/2021).

[1] https://futureoflife.org/ai-principles/

II. Options to adapt strict liability rules to the digital age and circular economy

FLI supports a revision of the Product Liability Directive as described in 1.a. and its extension to non-material damages (option 1.b.). We believe this option addresses most of the specific challenges posed by digital products today such as the fact that they can be updated after being put in circulation, the complex interactions between different products and services, and the cybersecurity risks. We note that including non-material damages is especially important for digital products, as was explained thoughtfully by the Commission in its prior White Paper. Non-material damages include privacy infringements, consumers' data loss, environmental damage, and loss of chance (e.g. if an algorithmic decision-making system deprived someone of a job opportunity).

III. Other options to address proof-related and procedural obstacles to getting compensation under the Directive

FLI supports reversing the burden of proof (option 2.1.b.), **adapting the notion of defect** (option 2.1.c.), **and easing the conditions for making claims** (option 2.1.d.). Today, the injured person is required to prove the damage they suffered (which has to be material and over 500 euros), the defect in the product, and the causal relationship between the two.

Three types of defects in products have generally been identified: manufacturing defect (when a single item is different from the rest of the batch), information defect (when the risks have not been adequately communicated), and design defect (if the design of the product is not safe enough). Given how opaque AI systems can be, it would be nearly impossible for a consumer to prove a manufacturing or design defect. And even if given access to the model itself, they would still be missing required information on the outcome on others. Taking the example of an algorithmic decision-making tool, a single individual would not be able to prove they were discriminated against if they did not have access to aggregated data concerning other impacted individuals from the same category. **We thus believe it is especially important to reverse the burden of proof** (option 2.1.b.). As consumer organisation BEUC has pointed out in its public response, this would help make EU liability rules more relevant to European consumers. After all and under current rules **only 798 claims** based on EU product liability rules had been identified between 2000 and 2016.

Some digital products present unique features, including continuous learning, which can raise unique issues. For that reason, **we believe it is necessary to revise the notion of defect, as well as remove the development risk defence** (option 2.1.c.). The development risk defence states that companies can avoid liability if the state of scientific and technical knowledge at the time the product was put into circulation was not such as to enable the defect to be discovered. We believe this doctrine could create a significant loophole in the liability of self-learning and continuous AI systems, and should thus be removed. Different member states of the EU (Finland, France, Hungary, Luxembourg and Spain) have adopted the derogation for this clause, which demonstrates the feasibility of limiting its application. Furthermore, in contrast to many other goods, a producer can more cheaply address potential defects in AI systems as the producer becomes aware of them through software updates that are less costly than traditional recalls.

In addition, and for the same reasons, **we also advocate against the later defect defence**. Today, it is recommended that, when assessing the legitimate safety expectations of the public, "later technical developments, as well as subsequent circumstances that may affect the product, should not be taken into account."[2] However, continuous learning systems could escape liability under this reasoning. FLI believes that the defect of continual self-learning AI systems should not be classified as later defect if the defect is tied directly to the fact that the learning done by the system in the product lifecycle produced unanticipated harm. The fact that a system can self-learn while being used by a customer is not a 'later' defect, as self-learning is at the very core of the market value of the product that is known to have possible unintended negative consequences. In addition, it is important to avoid the unpredictability of the behavior of autonomous machines breaking the chain of causation. If a company is building a system with great autonomy, it must acknowledge and accept the risk that their system will perform in ways that are unpredictable, which should not be considered as an unanticipated, later defect.

Finally, we support easing the conditions for making liability claims (option 2.1.d.). We believe there are multiple reasons to lower the 500 euros threshold. Some of the non-material damages caused by digital products can be hard to quantify (e.g. data loss, environmental damage). In addition, a defective AI system could impose a small loss to all the individuals subject to its use, which would amount to a large loss for society at large.

IV. Options to address proof-related challenges posed by AI to national liability rules

In addition to updating the Directive, **FLI believes it is important to harmonise current domestic liability framework in relation to the operators and users of AI systems** (option 2.2.d.). A fault-based regime incentivises companies to make the right decision and prioritise safety over other considerations [3]. FLI therefore supports harmonising domestic laws and reversing the burden of proof given how difficult it could be for consumers to have the necessary information to prove damage from digital products.

V. A rights-based liability regime

In addition to updating the Product Liability Directive, the European Commission is considering creating a separate instrument on civil liability. This is part of a wider effort to adapt European law to the digital age, including through the proposal for a Digital Services Act, the proposal for a Regulation on general product safety, the proposal for a Regulation on machinery products, and the proposal for an AI Act. The legal basis for all of the aforementioned texts is Article 114 of the Treaty on the Functioning of the European Union. This shows the European legislators' intent to promote the proper functioning of the internal market by harmonising the rules and promoting safe innovation.

[2] European Commission. Commission Staff Working Document. Evaluation of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (SWD(2018) 158) of 5 May 2018.
[3] European Parliament Policy Department for Citizens' Rights and Constitutional Affairs. Artificial Intelligence and Civil Liability (PE 621.926) of July 2020.

Fundamental rights play a limited role in this legislative effort. The proposal for a Regulation on general product safety is partly grounded in consumer protection, with "due regard to Article 169." The proposal for an AI Act also contains Article 16 as a legal basis (data protection), but only insofar as the rules on biometric identification are concerned. None of the proposals related to digital products contain articles from the European Union Charter of Fundamental Rights as their legal basis. **We recommend strengthening this corpus by creating a rights-based approach to citizen's safety in the digital age**.

In addition to individuals being able to file a suit in cases of harm from a defective digital product, an approach grounded in individual rights could allow citizens to seek recourse when they have been subjected to certain systems. For instance, **the legislation could include the right for individuals not to be subjected to prohibited AI systems and to AI systems that fail to meet the requirements set forth according to their risk level in the proposed AI Act**. Individuals could sue producers or providers when they have been exposed to either of these in a manner that causes material or non-material harm to the individual.

Enshrining individual rights in the proposed liability instrument completes a system of effective legal protection by ensuring not only public enforcement through the national authorities, but also by providing the possibility for private enforcement. This approach would need to be coupled with a reversal of the burden of proof, in addition to the obligation of transparency by AI producers and providers to users and to all of those affected by it.

VI. Other considerations

The Product Liability Directive is a maximum harmonisation directive, which prevents countries from having stronger regulations in place. While we acknowledge the importance of having harmonised legislation throughout the EU market, we want to make sure that updating the Directive to include digital products does not weaken domestic rules in certain member states.

We also support a ban on non-liability clauses that could have allowed producers to transfer their responsibility to users of AI systems through a contract. Given the asymmetry of information between producers and consumers of digital technology, users often don't yet understand what potential damage could occur when they first use a product or service. They might also consent to a long contract by clicking in order to access a digital service, without realising that they are waiving their rights.

We would also like to use the opportunity offered by this consultation to express our support for the recommendations set forth by the Commission's Expert Group on Liability and New Technologies [4]. We believe that most of the challenges they sought to address would be attended to by the options we are supporting in this document, especially as they relate to the burden of proof. However, we would like to emphasise three recommendations that remain to be incorporated into European or national law:

[4] European Commission Report from the Expert Group on Liability and New Technologies - New Technologies Formation. Liability for Artificial Intelligence and other emerging digital technologies, 2019.

- A person operating a permissible technology that nevertheless carries an increased risk of harm to others, for example AI-driven robots in public spaces, should be subject to strict liability for damage resulting from its operation.
- A person using a technology that does not pose an increased risk of harm to others should still be required to abide by duties to properly select, operate, monitor and maintain the technology in use and – failing that – should be liable for breach of such duties if at fault.
- A person using a technology which has a certain degree of autonomy should not be less accountable or ensuing harm than if said harm had been caused by a human auxiliary.

About the author

This FLI document has been prepared by Claire Boine. Ms Boine is a French national and FLI's in-house expert on AI law. Her research focuses on the law of technology in Canada, the U.S. and Europe. She is a PhD candidate in the law of AI at the University of Ottawa, and has previously obtained a Master in Public Policy from Harvard University, a Master 2 in International and European Law from Nantes Law School and a Master in Political Science from Toulouse University. Claire can be reached for questions or comments through ***claire@futureoflife.org***.