# The New EU Product Liability Directive. Interaction with Parallel EU Initiatives: Proposed AI Liability Directive, Digital Services Act and Digital Markets Act

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***Abstract***

*On 18 November 2024, the European Union adopted the new Product Liability Directive – Directive (EU) 2024/2853 – to replace its nearly 40-year-old predecessor (85/374/EEC). This overhaul was driven by the need to update strict liability rules for products in light of digital technologies, artificial intelligence (AI), and new supply chain models. The old regime from 1985 had become "ill-suited to the digital age," leading to gaps and legal uncertainty (for example, whether standalone software is a "product" under the law). The new Directive aims to ensure that injured persons enjoy the same level of protection irrespective of the technology involved, while businesses benefit from clearer rules and a level playing field. It introduces significant changes: expanding the definition of "product" to include digital and intangible items, broadening the range of liable persons beyond traditional manufacturers, and easing the burden of proof for claimants in complex cases. This modernized framework not only strengthens consumer protection in the internal market but also seeks to maintain fairness by balancing innovation incentives with accountability for harm. The essay that follows provides an overview of the key provisions of the new Product Liability Directive ("PLD"), analyzes its legal and doctrinal innovations, and examines its interplay with parallel EU initiatives such as the proposed AI Liability Directive, the Digital Services Act (DSA) and Digital Markets Act (DMA). Detailed footnotes and a consolidated bibliography are included to support the analysis of this important development in European product liability law.*

***Keywords:*** *EU Product Liability Directive, AI Liability Directive, Digital Services Act (DSA), Digital Markets Act.*

***JEL Classification:*** K15, K22, K24

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## 1. Introduction

After nearly forty years under the 1985 Product Liability Directive (Directive 85/374/EEC), the European Union has enacted a sweeping reform of its product liability framework. The original directive introduced a regime of *strict liability* for defective products, meaning a producer could be held liable for damage caused by a defect in its product irrespective of fault. While path-breaking for its time, the 1985 framework increasingly struggled to keep pace with technological and market developments in subsequent decades. Questions arose as to whether intangible digital products like software were covered, how to assign responsibility in complex global supply chains, and how injured persons could overcome evidentiary hurdles posed by emerging technologies (such as AI "black box" systems). The need for reform was broadly recognized by EU institutions and commentators alike. In 2022, the European Commission proposed a new Product Liability Directive to "modernise liability rules for the digital age" and address gaps in victim protection and legal clarity[2]. Following negotiations, Directive (EU) 2024/2853 on liability for defective products was adopted on 23 October 2024, published in the Official Journal on 18 November 2024, and entered into force in December 2024[3]. EU Member States now have until 9 December 2026 to transpose the new rules into national law[4].

The new PLD repeals the 1985 Directive and retains the core principle of *no-fault liability* of producers for defective products causing damage. However, it significantly updates and expands the scope of that regime. The reform reflects several policy objectives: ensuring the rules are fit for the digital age (covering software, AI and other digital products), fit for global value chains (ensuring an EU-domiciled defendant is available to consumers even when products come from abroad), and providing better protection for victims with le-

[2] Michael G. Faure, 'Product Liability and Product Safety in Europe: Harmonization or Differentiation?' *Kyklos,* 53 (2000) 4: 467-508, pp.498-499; Jacquemin, Z., 'Product Liability Directive: Disclosure of Evidence, the Burden of Proof and Presumptions', *Journal of European Tort Law*, 2024, 126–139; Koch, B. A., 'Product Liability on the Way to the Digital Age', *Journal of European Tort Law*, 2024, 109–125.

[3] Piovano, Ch., Hess Ch., *Das neue europäische Produkthaftungsrecht – EU-Produkthaftungsrichtlinie (ProdHaftRL).* Nomos Verlagsgesellschaft, 2024, p. 25; See also Tahoora Heydari, 'A Review of the Product Liability Directive and the Proposal for a Directive of Liability for Defective Products', (2024) *Al-Zaytoonah University of Jordan Journal for Legal Studies*, Special Issue, 962-971, 968-969; Rohrießen B., *Die EU-Produkthaftungs-RL 2024: Der „final compromise text" Verschärfte Produkthaftung plus Product Compliance-Pflichten im Zeichen von Digitalisierung, KI und Globalisierung,* accessible on: https://www.nomos.de/wp-content/uploads/ 2024/02/NL-Product-Compliance_Februar-24_Zeitschriften-Archiv_Rohrssen_GesamtPDF.pdf#:~:text=mehrfach %20verschärft,dem%20Parlament%20übersandt%2C%20nachdem (last access (02.05.2025).

[4] Gitta Veldt, 'The New Product Liability Proposal – Fit for the Digital Age or in Need of Shaping up?', *EuCML* 1 2023, 24-31, 26.

gal certainty for industry (through tools like evidence disclosure and presumptions to alleviate the burden of proof)[5]. In parallel, the EU has been advancing other legal frameworks relevant to digital markets and AI. Notably, the Digital Services Act (Regulation (EU) 2022/2065) and Digital Markets Act (Regulation (EU) 2022/1925) came into force in 2022, reshaping platform obligations and competition in the digital economy. Moreover, the EU adopted the AI Act (Regulation (EU) 2024/1689) – a comprehensive product safety regulation for AI systems – and considered a complementary AI Liability Directive for fault-based liability in AI contexts[6]. The new PLD forms part of this broader landscape of EU digital regulation, addressing the civil liability dimension of harms caused by products in a technology-driven world.

This essay proceeds to analyze the new Product Liability Directive in a structured manner. First, it highlights the major legal and doctrinal innovations introduced, contrasting them with the prior regime. It then examines specific substantive changes, including the expanded definition of "product" and the enlarged circle of liable actors (such as online platforms and fulfilment service providers)[7]. Next, it discusses the Directive's new provisions on burden of proof and disclosure of evidence, which aim to rebalance informational asymmetries in complex cases. The analysis will also consider the interplay between the PLD and the proposed AI Liability Directive, as well as its relationship with the DSA and DMA – situating the Directive within the EU's wider digital governance framework. Finally, the essay addresses challenges and considerations for implementation, including potential uncertainties, the Directive's impact on innovation and litigation, and the steps needed for a smooth transposition into national laws. The goal is to provide legal scholars with a cohesive, in-depth understanding of Directive 2024/2853 and its significance for European product liability doctrine and practice.

## 2. Legal and Doctrinal Innovations

Directive 2024/2853 introduces a number of legal and doctrinal innovations that mark a new era in EU product liability law. At its core, the Directive preserves the fundamental principle of strict liability for producers of defective products – a hallmark of the 1985 regime – but it modernises the scope, definitions, and procedural mechanisms around this principle. One key innovation is the Directive's full harmonisation approach. Whereas the 1985 Product Liability

[5] Masnada M., Pacciti A., Ecanova C., *EU introduces comprehensive digital-era Product Liability Directive*, 2024, accessible on: https://www.hoganlovells.com/en/publications/eu-introduces-comprehensive-digitalera-product-liability-directive#:~:text=when%20online%20platforms%20function%20solely,once%20again%2C%20consistently%20with%20the (last access: 02.05.2025).

[6] See also Tahoora Heydari, *op. cit.,* p. 968-969.

[7] See also Gitta Veldt, *op. cit.,* p. 26; Piovano, Ch., Hess Ch., *op. cit*., p. 30.

Directive allowed certain Member State derogations (most notably on the "development risks" or state-of-the-art defense)[8], the new PLD seeks maximum harmonization by preventing Member States from enacting national provisions that are either more or less stringent than the Directive's rules[9]. The Directive thus aims to create a uniform standard of liability across the EU, enhancing legal certainty and fairness in cross-border cases.

The new PLD also updates the *doctrinal understanding of what constitutes a product defect and who qualifies as a producer*. It explicitly addresses technological developments by recognizing that products may have digital components and software that evolve after being placed on the market. For example, Article 6 of the Directive expands the criteria for defectiveness: when assessing whether a product is defective (i.e. does not meet the safety one is entitled to expect), courts must now take into account factors such as the product's ability to learn or adapt after deployment (as in AI systems), the influence of other products (including software or connectivity) on the product, and compliance with any relevant cybersecurity or safety requirements[10]. This means that the concept of "defect" is no longer frozen at the moment of sale[11]; if a product later acquires new functions or risks (say, via a machine-learning update), those can be considered in determining defectiveness. The relevant point in time for judging defectiveness may extend to when a product was *put into service* or when it *left the manufacturer's control*, rather than only when it was first placed on the market[12]. Doctrinally, this adapts the strict liability model to products whose characteristics change over time, ensuring the law remains effective for technologies like AI and IoT (Internet of Things) devices.

Another significant innovation is the introduction of procedural mechanisms to better balance the interests of injured persons and defendants. The Directive builds on the observation that information asymmetry and scientific complexity have made it excessively difficult for consumers to prove defects and causation under the old regime. In response, the PLD incorporates two novel tools common in some national systems but unprecedented at the EU level for product liability: court-ordered disclosure of evidence and rebuttable presumptions that ease the burden of proof for claimants. These mechanisms, discussed in detail in

[8] Gitta Veldt, *op. cit.,* p. 26; J. Triaille 'The EEC Directive of July 25, 1985 on Liability for Defective Products and Its Application to Computer Programs' (1993) Computer Law and Security Report, 215, at 215 and 220; Lawrence C. Mann and Peter R. Rodrigues, 'The European Directive on Products Liability: The Promise of Progress? (1988) 18 391 *Georgia Journal of International and Comparative Law,* 391-426, pp. 404-405.

[9] Jacquemin, Z., *op. cit.*, p. 126–139; Koch, B. A., *op. cit*., p. 109–125.

[10] V. Burgsdorff Christoph, *Increased liability due to the new EU Product Liability Directive: what does this mean for the medical and pharmaceutical industry?*, accessible on: https://www.ibanet.org/increased-liability-eu-product-directive (last access: 02.-5.2025); Piovano, Ch., Hess Ch., *op. cit*., p. 40.

[11] See also for the old ''status-quo'': Lawrence C. Mann, Peter R. Rodrigues, *op. cit.*, p. 404-405.

[12] Masnada M., Pacciti A., Ecanova C., *op. cit.*

a later section, represent a shift in doctrine towards facilitating *private enforcement* of product liability claims[13]. They reflect a policy choice to tilt the scales somewhat in favor of consumers (claimants) in recognition of the complexity of modern products. This is a notable evolution from the 1985 Directive, which left burdens of proof entirely to national rules and did not contemplate such evidentiary aids.

The new Directive also doctrinally extends the *protective purpose* of product liability law to cover new forms of harm. Notably, it expressly includes damage to data as a compensable harm caused by defective products. Under the 1985 regime, recoverable damage was basically limited to death, personal injury, and property damage (with certain exclusions and thresholds)[14]. The 2024 Directive adds "destruction or corruption of data" as a category of material damage for which compensation can be sought[15]. This acknowledges that in the digital era, a defective product (e.g. a malfunctioning software update or IoT device) might wipe out or compromise important data, causing real economic loss. The Directive makes clear that such data loss is to be treated akin to property damage (with the caveat that if the data can be restored or recovered at no cost, or if it is used for professional purposes, compensation under the Directive may be limited)[16]. Doctrinally, this inclusion of data damage signals an expansion of the traditional scope of product liability to intangible interests, aligning the law with the realities of modern consumer harm.

Finally, the PLD demonstrates a re-calibration of the balance between innovation and accountability. EU lawmakers have emphasized that while the law must protect consumers, it should also "give legal clarity and a level playing field to producers" and not unduly stifle innovation[17]. One area where this balance is evident is the treatment of the "development risks" defense (also known as the state-of-the-art defense). The 1985 Directive allowed Member States to decide whether or not to permit a producer to escape liability if the scientific and technical knowledge at the time was insufficient to discover the defect (thus, some countries like France disallowed this defense to favor consumers, while others allowed it)[18]. The new Directive moves to harmonize this: it generally allows the development-risk defense across all Member States, meaning a producer is *not liable* if it proves that the objective state of scientific and technical knowledge when the product was under its control was not such that the defect could be discovered[19]. This EU-wide acceptance of the defense has raised concern among some commentators that consumers in jurisdictions which previously barred this

[13] Jacquemin, Z., *op. cit.*, p. 126–139; Koch, B. A., *op. cit*., p. 109–125.
[14] J. Triaille op. cit., p. 215 and 220.
[15] Jacquemin, Z., *op. cit.*, p. 126–139; Koch, B. A., *op. cit*., p. 109–125.
[16] Gitta Veldt, *op. cit.,* p. 26.
[17] Jacquemin, Z., *op. cit.*, p. 126–139; Koch, B. A., *op. cit*., p. 109–125; Rohrießen B., *op. cit.*
[18] Jacquemin, Z., *op. cit.*, p. 126–139; Koch, B. A., *op. cit*., p. 109–125.
[19] V. Burgsdorff Christoph, *op. cit.;* Rohrießen B., *op. cit*.

defense may lose a layer of protection. However, the Directive also carves out important exceptions: a producer cannot invoke the development-risk defense if the defectiveness of the product is due to a related service, software (including updates), lack of required software updates, or a substantial modification of the product[20]. In other words, for certain modern scenarios – such as unsafe software or failure to update AI systems – the producer *will* be held liable even if the risk was not discoverable at the time, effectively prioritizing consumer safety in those contexts. This nuanced approach illustrates the Directive's doctrinal attempt to balance fostering innovation (by not imposing liability for truly unknown risks in core areas) against ensuring accountability when foreseeable digital-related risks are at play.

In sum, the legal innovations of Directive 2024/2853 can be seen as a comprehensive update of the EU's strict product liability model. They preserve the fundamental risk-allocation logic (the producer is in principle the best bearer of the risk of product defects), while updating definitions, scope of damages, and procedural rules to address the challenges of new technologies and complex supply chains. The next sections delve into several of these changes in greater detail, beginning with the expanded notion of what constitutes a "product" under the Directive.

### 3. Expanded Definition of Product

One of the cornerstone changes in the new Product Liability Directive is the expanded definition of "product." The 1985 Directive defined "product" in fairly narrow, tangible terms – essentially as movable goods (and electricity)[21]. This left ambiguity over whether intangible items like software could be considered products, especially when supplied independently of any physical medium. Divergent interpretations emerged across Member States over the years as software and digital content became ubiquitous, leading to legal uncertainty. Directive 2024/2853 addresses this gap decisively by broadening the definition to include digital and intangible elements. According to Article 4(1) of the new Directive: *"'Product' means all movables, even if integrated into or inter-connected with another movable or an immovable; it includes electricity, digital manufacturing files, raw materials and software."*[22]. This clarifies that software is expressly included as a product for liability purposes, whether it is embedded in a physical good or provided as a standalone. "Digital manufacturing files" (for example, CAD files or design files used in 3D printing) are also included – these

[20] Masnada M., Pacciti A., Ecanova C., *op. cit.*; Rohrießen B., *op. cit.*

[21] Shu Li and Beatrice Schutte, 'The Proposal for a Revised Product Liability Directive: The Emperor's New Clothes? (2023) *Maastricht Journal of European and Comparative Law* 30 (5): 573-596, 592.

[22] Jacquemin, Z., *op. cit.*, p. 126–139; Koch, B. A., *op. cit*., p. 109–125.

are essentially data files that can be used to produce a tangible item, and the Directive treats them as products because a defect in such a file could yield a defective physical product[23].

By expanding "product" in this manner, the Directive ensures that the regime of strict liability extends to the kinds of digital products and software that play a central role in today's economy. For instance, a standalone software application that causes damage (say, a medical diagnosis app giving dangerously wrong advice, or malware-like behavior causing data loss) can now trigger producer liability just as a defective physical device could. This was a deliberate response to earlier uncertainty; the Commission and legal experts had noted that excluding software from the product definition was a significant shortcoming of the old framework[24]. The inclusion of AI systems follows as a consequence – AI software is now a product, and if an AI system (e.g. an autonomous driving algorithm) is defective and causes damage, the PLD applies. The Directive's recitals emphasize that even software provided in exchange for personal data (rather than a monetary price) should be covered, as long as it is provided in the course of a commercial activity[25]. This means that the increasingly common business model of "free" digital services paid for with user data does not escape product liability if the software is defective; it closes a loophole where a company might argue no "product sale" occurred.

Importantly, the Directive also speaks to products that have related digital services and embedded software. Recital provisions clarify that integrated or interconnected digital services that are essential for a product's functioning and safety are within scope[26]. For example, consider a smart thermostat that relies on a cloud service to regulate temperature: that cloud service is an integral part of the product's overall safety. If a defect in the service (say, a server outage or error) causes damage (e.g. pipes burst from lack of heat), it would be treated as part of the product's defect. Similarly, the Directive ensures that open-source software components, when integrated into commercial products, do not fall through the cracks of liability – the commercial entity that integrated the open-source component can be treated as a producer of the overall product[27]. The broad message is that the form of the technology (tangible or intangible) is irrelevant to the application of strict liability; what matters is the product's role in causing damage.

Another aspect of the expanded scope is recognizing components and

[23] Gitta Veldt, *op. cit.,* p. 26.
[24] Masnada M., Pacciti A., Ecanova C., *op. cit.*; Wachter S. „Limitations and Loopholes in the EU AI Act and AI Liability Directives: What This Means for the EU, the US, and Beyond", *Yale Journal of Law & Technology*, vol. 26, no. 3, 2024, accessible on: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4924553 (last access: 02.05. 2025).
[25] Shu Li, Beatrice Schutte, *op. cit*., p. 592.
[26] Jacquemin, Z., *op. cit.*, p. 126–139; Koch, B. A., *op. cit*., p. 109–125; Wachter S., *op. cit.*
[27] Shu Li, Beatrice Schutte, *op. cit*. p. 592.

raw materials more explicitly. While the old directive implicitly covered components (by making their manufacturer liable as a producer if the component was defective), the new PLD is clearer in covering "components of products" in the definition of product[28]. This dovetails with provisions on liable actors (discussed below) which explicitly include component manufacturers. Likewise, raw materials – say chemicals or ingredients – are listed as products, ensuring that if a raw material is defective and causes harm when incorporated into a final product, the raw material supplier could be held liable.

Additionally, as part of being "fit for the circular economy," the Directive considers cases of products that are remanufactured or significantly modified after initial production. While this is addressed more directly in the context of who is liable (the person who substantially modifies a product can become the new 'producer' of that modified product), it also ties into the definition of product in a temporal sense. A product may undergo upgrades or refurbishments; the law needs to capture its state post-modification. The Directive doesn't change the definition of product per se to include services or modifications, but by extending liability to modifiers, it effectively treats the modified item as a new "product" under the responsibility of the modifier[29]. The definition of product is also tied to the notion of when a product is "put into circulation." The old directive's use of that term led to ambiguities (e.g. is a product in circulation when it leaves the factory, when it's sold to a distributor, or to a consumer?). The new Directive uses updated terminology – "placed on the market or put into service" – and even notes that if a manufacturer retains control (such as the ability to update or withdraw a product remotely), the relevant time for defect assessment can be when it left the manufacturer's control[30]. While not exactly part of the *definition* of product, this temporal extension reinforces that products are seen as potentially dynamic and subject to post-sale changes.

In conclusion, the expanded definition of "product" under Directive 2024/2853 ensures that the EU product liability regime comprehensively covers the modern spectrum of goods and digital products. By explicitly including software, digital files, and related services, the law closes a long-recognized gap and brings intangible products into parity with traditional goods in terms of liability exposure. This change aligns with parallel legal developments (such as the inclusion of software as a "product" under the EU's emerging AI and digital regulations) and ensures that consumers are not left unprotected simply because a defective "product" came in the form of code or data rather than plastic or metal. It also gives manufacturers and developers clear notice that quality and safety duties extend to their digital offerings. Having considered what products are covered, we turn next to *who* can be held liable – as the Directive also broadens the range of liable actors in response to global and platform-based supply chains.

[28] Jacquemin, Z., *op. cit.*, p. 126–139; Koch, B. A., *op. cit*., p. 109–125.
[29] Masnada M., Pacciti A., Ecanova C., *op. cit.*
[30] Shu Li, Beatrice Schutte, *op. cit*., p. 592.

### 4. Liable Actors, Including Platforms and Fulfillment Services

The new Product Liability Directive expands the circle of **liable actors** (or "economic operators" in product distribution) to ensure that an injured person can always find at least one solvent defendant within the EU from whom to claim compensation[31]. Under the 1985 Directive, the primary liable party was the *producer* of the defective product, defined to include the manufacturer of a finished product, the producer of any raw material or component, and anyone who presents themselves as producer by putting their name or brand on the product (the so-called "own-brand" or quasi-producer)[32]. Importers of products into the EU were also held liable if the manufacturer was outside the EU. While that scheme worked for many scenarios, the globalization of supply chains and rise of e-commerce left certain liability gaps – for instance, products directly shipped from non-EU producers to consumers, or scenarios involving online marketplaces and fulfillment centers that were not clearly covered by the old definitions. Directive 2024/2853 addresses these issues by introducing a graduated system of liable persons in Article 7, which can be summarized as follows:

- **Manufacturers and Quasi-Manufacturers:** The manufacturer of the defective product remains primarily liable, as before. This includes not only the maker of the final product but also the manufacturer of a defective component or ingredient that is integrated into a final product[33]. If a company puts its trademark or name on a product made by someone else, it is treated as a manufacturer (quasi-producer) and is liable. A significant addition is that any person who substantially modifies a product after it has been placed on the market or put into service is now considered a manufacturer of the modified product[34]. This targets "circular economy" scenarios: for example, a company that refurbishes or upgrades a used machine (outside the original manufacturer's control) and in doing so introduces a defect can be held liable as a producer of the new version. This incentivizes those who remanufacture or heavily alter products to ensure safety, since they cannot simply point back to the original producer.

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[31] Jacquemin, Z., *op. cit.*, p. 126–139; Koch, B. A., *op. cit*., p. 109–125; Merryl Hervieu, *Point sur la nouvelle directive européenne (UE) 2024/2853 relative à la responsabilité du fait des produits défectueux*, Dalloz, 2025, accessible on: https://actu.dalloz-etudiant.fr/a-la-une/article/point-sur-la-nouvelle-directive-europeenne-ue-20242853-relative-a-la-responsabilite-du-fait-de/h/256e035c15335593d9c1bb38f7809c83.html?utm_source=chatgpt.com (last access: 02.05.2025); Sylvie Gallage-Alwis and Gaetan de Robillard, *Product regulation and liability in France* (Signature Litigation, 2024) accessible on: https://www.signaturelitigation.com/sylvie-gallage-alwis-and-gae tan-de-robillard-discuss-product-regulation-and-liability-in-france-in-lexology (last access: 02.05. 2025).

[32] V. Burgsdorff Christoph, *op. cit*.

[33] Jacquemin, Z., *op. cit.*, p. 126–139; Koch, B. A., *op. cit*., p. 109–125. For the previous state of play compare the reamarks of Michael G. Faure, *op. cit.,* pp. 498-499.

[34] Shu Li, Beatrice Schutte, *op. cit*., p. 592.

- **Importers and Authorized Representatives:** If the manufacturer is outside the EU, the **importer** of the product into the EU is liable, as under the old regime. The new Directive extends equal liability to the manufacturer's *authorized representative* in the EU[35]. An authorized representative is defined as any person or entity established in the EU with a written mandate from the manufacturer to act on the manufacturer's behalf in relation to specified tasks (often this concept appears in product safety regulations). Now, such representatives – for example, an EU-based agent responsible for EU compliance – can be directly sued if the product they represent is defective. This is logical given that many modern regulations (like the EU Machinery Regulation or Medical Devices Regulation) already require non-EU manufacturers to designate an EU representative. The PLD leverages that by making the representative share liability, which ensures non-EU companies cannot evade liability by hiding abroad.

- **Fulfilment Service Providers:** A major innovation is the inclusion of *fulfilment service providers* as potentially liable parties, on a subsidiary basis. Article 7 provides that if neither the manufacturer, nor an importer, nor an authorized representative is present in the EU, then a fulfilment service provider (FSP) involved can be held liable[36]. Fulfilment service providers are defined as entities offering at least two of the following services: warehousing, packaging, addressing, and dispatching of products, without having ownership of the products[37]. This category is clearly aimed at scenarios like Amazon's "Fulfillment by Amazon" or third-party logistics companies that handle distribution for foreign sellers. Under the old law, if a consumer bought a product from outside the EU via an online marketplace, and there was no EU importer (the consumer effectively imported it themselves), they might find no one to sue in the EU if the product was defective. Now, the company that facilitated getting that product to the consumer – the FSP – can be on the hook if the upstream producer/importer cannot be identified in the EU. The policy rationale, as noted in commentary, is to avoid a liability vacuum and to compel those who profit from enabling market access to shoulder responsibility when needed[38]. However, observers have noted a potential concern: some fulfilment providers are essentially logistics firms with no technical knowledge of the products they handle. Imposing liability on them might seem harsh since they cannot easily assess product safety. The counterargument is that this pressure will encourage fulfilment providers to deal only with suppliers who have EU-based responsible entities or to insure against such risks.

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[35] See also 7 (2) of Proposal for a Directive of the European Parliament and of the Council on Liability for Defective Products, COM (2022) 495 FINAL.

[36] See European Parliamentary Research Service, 'Revised Product Liability Directive' (Briefing, European Parliament, February 2025) accessible on: https://www.europarl.europa.eu/ thinktank/en/ document/EPRS_BRI(2023)739341 (last access: 02.05.2025).

[37] Sven Förster, Dardan Gashi (2024), *The EU's new Product Liability Directive (from a German perspective)*, https://www.clydeco.com/en/insights/2024/04/the-eu-s-new-product-liability-directive.

[38] Michael G. Faure, *op. cit.*, p. 498-499.

It also complements the Market Surveillance Regulation (EU) 2019/1020, which already requires an "economic operator" in the EU for certain imports and names fulfilment service providers as a fallback responsible party for compliance issues[39].

- **Distributors and Online Platform Providers:** Finally, the Directive allows that distributors of the product and online platforms can be held liable *under certain conditions* as a last resort[40]. This applies when no manufacturer, importer, authorized representative, or fulfilment provider can be identified in the EU. In such a case, a victim can potentially turn to the distributor who sold the product or the online platform that facilitated the sale, provided certain additional conditions are met. The Directive's text and recitals indicate that online platforms are liable only when they *effectively act as an economic operator* in the chain, rather than a neutral intermediary. If an online marketplace presents itself as the seller, or otherwise does more than just enable a third-party sale (for example, if it handles fulfillment and marketing to a degree that it "assumes the role" of a distributor), it can be treated as such for liability purposes[41]. Conversely, if the online platform truly acts only as an intermediary – a passive hosting service for others' listings – then its liability is governed not by the PLD but by the Digital Services Act (which preserves the e-commerce safe harbor for mere intermediaries)[42]. In essence, the PLD says to online platforms: if you behave like a seller or distributor, you will be treated as one; if you are genuinely just a broker, you won't be liable under this Directive (though you must still abide by the DSA's requirements, such as vetting sellers). This nuanced approach prevents undermining the DSA's intermediary liability protections[43], while also preventing platforms from escaping liability when they are in practice deeply involved in the transaction. A practical example might be instructive: If a consumer buys a gadget from an online marketplace and that gadget is defective and causes harm, and it turns out the manufacturer is outside the EU and no importer or rep is present, then if the marketplace stored and shipped the item (fulfilment role) or presented it under its own branding, the consumer could sue the marketplace under the PLD. If the marketplace only connected the buyer and seller and the item was sent directly by a third-party seller, the marketplace might invoke the DSA safe harbor – though the consumer might then look to any fulfilment provider or ultimately face the difficulty of having no EU defendant (which is exactly the scenario the Directive tries to minimize). The DSA also imposes a "Know Your Business Customer" obligation on online marketplaces to obtain seller information and mandates a system for notice and takedown of dangerous products[44]. Compliance with

[39] Masnada M., Pacciti A., Ecanova C., *op. cit*.
[40] Ibid.
[41] Ibid.
[42] Ibid.
[43] Shu Li, Beatrice Schutte, *op. cit*., p. 592.
[44] Ibid, p. 592.

these DSA duties by a platform should make it easier to identify the manufacturer or importer. If the platform fails to disclose an identifiable producer in response to a legitimate request, one might argue that it effectively stepped out of its neutral role, potentially opening itself to PLD liability by "acting like" a distributor (though the legal threshold for that would rely on the Directive's conditions and national implementation).

Collectively, these expansions in liable actors are designed to fulfill the Directive's goal that there is always an EU-based entity responsible[45] for a defective product that causes harm in the EU. This protects consumers from being left remediless when dealing with global e-commerce. It also spreads the incentives for product safety across all players: manufacturers must design safe products; importers and reps must ensure the safety of what they bring in; fulfilment providers and platforms must exercise due diligence in the products they choose to handle or list (or ensure the foreign trader has an EU address for liability). Some companies may find themselves newly exposed – for example, logistics companies and online marketplaces now face potential strict liability suits. This is a notable policy choice, effectively treating certain service providers in the distribution chain as if they were producers in order to protect consumers. It will be interesting to see how these provisions are interpreted by courts – especially what it means for a platform to "create the impression of being the seller or an authorized representative"[46], which triggers liability, versus merely acting as a host. In any event, the PLD's framework clearly aligns with the DSA's philosophy: larger platforms, particularly, should not be able to avoid responsibility when they play a decisive role in transactions. (Indeed, many of the biggest online marketplaces are also designated "gatekeepers" under the DMA, reflecting their powerful position in the market; the PLD ensures that power comes with legal responsibility for product safety in appropriate cases.)

### 5. Burden of Proof and Disclosure

One of the most practical barriers victims faced under the old product liability regime was the burden of proof – specifically, proving that the product was defective and that the defect caused the damage. With increasingly complex products (like AI-driven devices, pharmaceuticals, or IoT systems), these elements can be technically challenging to demonstrate in court. The new Directive tackles this issue head-on by introducing two significant procedural innovations: (1) a mechanism for disclosure of evidence held by the defendant, and (2) a set of rebuttable presumptions that ease the claimant's burden of proof for defect and causation under certain conditions. These changes are inspired in part by analogous developments in other areas of EU law (such as competition law damages

[45] Jacquemin, Z., *op. cit.*, p. 126–139; Koch, B. A., *op. cit*., p. 109–125.
[46] Masnada M., Pacciti A., Ecanova C., *op. cit*.

and consumer protection litigation) and aim to put claimants and defendants on a more equal footing[47].

**A. Disclosure of Evidence.** Article 8 of Directive 2024/2853 (numbered Article 9 in some commentaries referencing the proposal) establishes an obligation for defendants to disclose relevant evidence in their possession when certain conditions are met. In a product liability lawsuit, a national court can, at the request of the claimant, order the defendant to disclose evidence that is relevant to the claim **if** the claimant has already presented facts and evidence sufficient to support the plausibility of the claim[48]. This is a notable shift for many EU jurisdictions that do not have broad pre-trial discovery in civil cases. The Directive essentially creates a tailored discovery mechanism: the claimant must first make a plausible case (not mere speculation – they need some indicia of defect or causation), and then the court can compel the producer (or other defendant) to provide information that could be crucial to substantiating the claim (such as internal test reports, design specifications, incident data, etc.).

Defendants are also allowed to request evidence from claimants, symmetrically, if they need it to defend themselves (for instance, if a component maker needs access to the damaged product in the claimant's possession to analyze it)[49]. However, the primary rationale of this provision is addressing the *information asymmetry*: the manufacturer typically knows far more about the product's design and risks than the consumer does. By enabling courts to order disclosure, the Directive prevents manufacturers from completely hiding behind technical secrecy. There are safeguards: any disclosure order must be necessary and proportionate and must consider the legitimate interests of all parties, especially confidentiality and trade secrets[50]. Indeed, the Directive explicitly references the EU Trade Secrets Directive to ensure that courts protect sensitive know-how – for example, by using confidentiality clubs or redaction as needed[51].

If a defendant fails to comply with a court's evidence disclosure order, the new PLD introduces a punitive consequence: a rebuttable presumption of defectiveness can be applied in favor of the claimant in such a case[52]. In other words, if the manufacturer refuses to produce the evidence that the court has ordered, the court may presume that the product was defective (or that causation is established, depending on what the evidence pertained to), unless the defendant rebuts that presumption. This provides a strong incentive for defendants to comply with disclosure orders – non-compliance could practically hand victory to the claimant. It also prevents stonewalling; a claimant will not be prejudiced by a defendant's refusal to share information uniquely in its control. This presumption

[47] Shu Li, Beatrice Schutte, *op. cit*., p. 592.
[48] Ibid, p. 592.
[49] Jacquemin, Z., *op. cit.*, p. 126–139; Koch, B. A., *op. cit*., p. 109–125.
[50] Shu Li, Beatrice Schutte, *op. cit*., 592.
[51] Jacquemin, Z., *op. cit.*, p. 126–139; Koch, B. A., *op. cit*., p. 109–125.
[52] Shu Li, Beatrice Schutte, *op. cit*., p. 592.

for failure to disclose is codified in Article 10(2)(a) of the Directive[53] and is one of several presumptions discussed below.

**B. Rebuttable Presumptions Easing Burden of Proof.** Perhaps the most striking innovation of the Directive is found in Article 10, which sets out several rebuttable presumptions of fact that can assist claimants in proving a defect or causation. Under the traditional 1985 regime, the claimant had to prove defect, damage, and causal link with no special evidentiary presumptions (aside from whatever national evidence rules might allow, like *res ipsa loquitur analogies* in some cases). The new Directive harmonizes specific presumptions across all Member States, which is a significant step toward claimant-friendly harmonization[54]. These presumptions are as follows:

**- Presumption of Defectiveness in Certain Circumstances:** Article 10(2) provides that a product shall be presumed defective (i.e., not meeting the required safety) if *any one* of the following conditions is demonstrated by the claimant: **(a)** the defendant has failed to comply with a court's disclosure order (as noted above); **(b)** the product does not comply with mandatory safety requirements that were intended to protect against the risk of the damage that occurred; or **(c)** the damage was caused by an obvious malfunction of the product under normal use[55]. Condition (a) targets disclosure refusal. Condition (b) essentially means that if a product violated specific safety regulations (for example, it failed to meet an EU safety standard or was subject to a recall by a regulator), and that violation is relevant to the harm suffered, the court can presume the product was defective. This aligns with common sense: a product breaching safety laws is likely defective. Condition (c) addresses situations where a product obviously fails in a way that ordinarily it should not – for instance, a new appliance exploding or a car's brakes failing without explanation. In such cases, rather than requiring the victim to prove the precise technical defect, the law presumes defectiveness *because* such accidents don't happen absent a defect. The term "obvious malfunction" is meant to capture incidents that speak for themselves (a concept akin to *res ipsa* in tort law), and it limits it to foreseeable use or ordinary circumstances to exclude misuse scenarios.

**- Presumption of Causation:** Article 10(3) adds a presumption for the causal link between defect and damage. It states that causation shall be presumed where it is established that the product is defective and the damage is of a kind typically consistent with that defect[56]. In other words, if the claimant proves (or

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[53] Jacquemin, Z., *op. cit.*, p. 126–139; Koch, B. A., *op. cit*., p. 109–125.

[54] Nynke E. Vellinga, 'Rethinking Compensation in light of the Development of Al', *International Review of Law, Computers & Technology,* 38 (3) 2024, 391-412, 393.

[55] Ibid, p. 392.

[56] Becker M., Bell A., Meyer H., *Product Risks Today: How the new Product Liability Directive facilitates private enforcement,* 2025, accessible on**:** https://riskandcompliance.freshfields.com/post/102k71h/product-risks-today-how-the-new-product-liability-directive-facilitates-private#:~:text=with%20the%20defect%20in%20question,in%20order%20to%20allow (last access: 02.05.2025); Shu Li, Beatrice Schutte, *op. cit*., p. 592.

benefits from a presumption) that the product had a defect, and the harm that occurred is the kind of harm that defect would normally be expected to cause, the court can presume that the defect caused the harm. For example, if a defect in a car's airbag is established and the harm was the car occupant's injury in a crash (the kind of injury an airbag defect would contribute to), then causation between the defect and injury is presumed. This prevents defendants from exploiting uncertainties about exact causal chains when the general link is evident. It's then up to the defendant to rebut by showing the injury was actually caused by something else unrelated to the defect.

**- Presumption of Defectiveness and/or Causation under High Complexity ("excessive difficulties")**: Article 10(4) introduces a broad and somewhat groundbreaking presumption: if the claimant faces excessive difficulties in proving defect or causation due to technical or scientific complexity, the court may presume the product is defective or/and that it caused the damage (as relevant), *provided the claimant has demonstrated that it is likely so*[57]. This essentially lowers the standard of proof to a "likelihood" when things are too complex to expect full proof. The claimant must show a plausible case that the product was likely defective or likely the cause of harm, and that obtaining more evidence is excessively difficult (perhaps because of the complexity of the AI algorithm, or multi-factor causality in a medical device's effect). If the court is convinced of those points, it can presume defect and causation. This is a powerful tool, aimed at scenarios like AI systems[58], pharmaceuticals, or other advanced tech where a victim might be at a huge disadvantage in pinpointing the exact failure. However, it is also the most debated because it verges on a partial reversal of the burden of proof. As Clyde & Co commentators noted, it's unclear when exactly a court will deem something "excessively difficult" – this will depend on national courts and could vary[59]. There's concern that entire categories of products (say, all AI-driven systems or all complex medical devices) might be routinely treated under this presumption, effectively considering them presumptively defective unless proven otherwise[60]. The requirement that the claimant show "likelihood" of defect or causation is also a relatively low threshold, significantly lower than "balance of probabilities" in practice[61]. Defendants worry this creates a near-automatic liability for cutting-edge technologies where courts might sympathize with the complexity argument[62].

All these presumptions are rebuttable. Article 10(5) allows the defendant to rebut any of the above presumptions with evidence to the contrary[63]. In theory,

[57] Becker M., Bell A., Meyer H., *op. cit.,* 2025.
[58] Nynke E. Vellinga, *op. cit.*, p. 393.
[59] Becker M., Bell A., Meyer H., *op. cit.,* 2025.
[60] Ibid.
[61] Ibid
[62] Becker M., Bell A., Meyer H., *op. cit.,* 2025.
[63] Becker M., Bell A., Meyer H., *op. cit.,* 2025.

this preserves fairness by not making the presumptions absolute. In practice, however, once a presumption is triggered, the burden of evidence shifts to the defendant, which can be outcome-determinative if the defendant cannot muster sufficient proof. For instance, how would a producer rebut an "obvious malfunction" presumption? Perhaps by showing the product was tampered with or misused by the consumer. How to rebut the complexity presumption? Possibly by arguing the case is not as complex as claimed or by actually proving the product was not defective. The Freshfields analysis points out that these presumptions may lead to a "de facto reversal" of the burden of proof in many cases[64]. From a doctrinal perspective, this is a noteworthy shift: EU product liability was traditionally strict on *liability* (no fault needed) but neutral on burden of proof, whereas now it leans towards helping the claimant prove the defect and causation.

It is worth noting that prior to this Directive, some national courts and laws in Europe had already been exploring ways to ease proof in complex product cases (for example, French courts in some drug liability cases inferred defects, and the EU Court of Justice in *Boston Scientific* (2015) allowed inference of defect for a whole product line if one product had a defect). The PLD essentially codifies a harmonized approach, ensuring all Member States will now offer at least these presumptions in product cases. This harmonization can prevent "forum shopping" and ensure a high level of consumer protection uniformly.

**Trade-offs and Safeguards:** While claimant-friendly, these rules try not to go too far. They do not reach the point of outright strict liability with no need to prove defect at all; the claimant still must do some work (plausibility for disclosure; triggering conditions for presumptions). They also explicitly leave it to national courts to evaluate circumstances. For instance, the "excessive difficulty" presumption is discretionary ("courts may presume") and case-by-case. The Directive's recitals encourage careful application to avoid automatic presumptions for broad categories without analysis[65]. Over time, jurisprudence (and possibly guidance from the Court of Justice of the EU) will likely refine the boundaries of these concepts.

In sum, the PLD's provisions on disclosure and burden of proof represent a significant development in product liability procedure. They align with a wider trend in EU law of enhancing private enforcement by empowering claimants (seen also in competition law damages directives and the Representative Actions

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[64] Becker M., Bell A., Meyer H., *op. cit.,* 2025.

[65] Civatte, E., Winckler, B., O'Sullivan, J., & Dunne, S. *A new liability framework for products and AI-An update on the new EU Product Liability Directive and the proposed AI Liability Directive,* 2025, accessible on: https://kennedyslaw.com/en/thought-leadership/article/2024/a-new-liability-framework-for-products-and-ai/ (last access: 02.05.2025); Narayanan, S., & Potkewitz, M., *A Risk-Based Approach to Assessing Liability Risk for AI-Driven Harms Considering EU Liability Directive, 2023*, accessible on: arXiv. https://arxiv.org/abs/2401.11697 (last access: 02.05.2025); Buiten M.C., 'Product Liability for defective Al', *European Journal of Law and Economics* 57 (2024), 239-273, p. 241.

Directive for consumers). For legal scholars, these changes raise interesting questions about the interaction with national civil procedure (which will have to accommodate these orders and presumptions) and about whether the balance struck is optimal. Producers have voiced concerns that easier litigation could lead to more claims and higher insurance costs, potentially discouraging innovation in high-tech sectors[66]. On the other hand, consumer advocates argue these measures are necessary to make rights effective – a liability regime that exists on paper but is impossible to use in practice (because consumers can't prove complex defects) fails its purpose. The success of these provisions will ultimately be measured by whether they indeed improve access to justice for injured persons without unduly burdening courts or causing defensive innovation. They will certainly make product liability trials more dynamic, as parties will battle not just on substance but on whether presumptions should apply and what evidence must be disclosed.

### 6. Interplay with AI Liability Directive

In parallel with updating the Product Liability Directive, the European Commission in 2022 proposed a separate directive on AI-related civil liability – commonly referred to as the AI Liability Directive (AILD) – with the intent to complement the PLD in addressing harms caused by artificial intelligence systems. The rationale was that while the PLD (even as revised) covers *defective AI products* under strict liability, there could be situations where an AI system causes damage without a product defect per se, or where a fault-based claim against an AI system's provider or user is more appropriate. The proposed AILD sought to harmonize certain aspects of fault-based liability in relation to AI, ensuring that victims are not worse off in cases involving AI than in traditional cases. Understanding the interplay between the PLD and the AILD is important for a full picture of the EU's approach to AI risks – although, as will be discussed, the AILD's fate has become uncertain[67].

**Scope and Purpose of the AI Liability Directive:** The proposed AILD (European Commission proposal COM(2022) 496) would establish harmonized rules for non-contractual civil liability for damage caused by AI systems. Unlike the PLD, which is a strict liability regime focused on defective products, the AILD was envisioned as a fault-based regime applying to any "AI system" (as

[66] Civatte, E., Winckler, B., O'Sullivan, J., & Dunne, S., *op. cit,* 2025; Narayanan, S., & Potkewitz, M., *op. cit.,* 2023; Hacker, P., *The European AI Liability Directives: Critique of a Half-Hearted Approach and Lessons for the Future*, 2022, Accessible on: arXiv. https://arxiv.org/abs/2211.13960 (last access: 02.05.2025); Spindler G., *Different Approaches for Liability of Artificial Intelligence – Pros and Cons – the New Proposal of the EU Commission on Liability for Defective Products and AI Systems, – Comparative analysis of the 2022 PLD and AI Liability proposals, advocating stricter AI liability*, 2023, available on: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4354468.#:~:text=The%20EU%20Commission%20has%20published,for%20a%20stricter%20liability%20model, (last access: 02.05.2025); Wachter S., *op. cit*.

[67] Buiten M.C., *op. cit.,* p. 241.

defined in the AI Act) that causes damage, even if not embodied in a product or not defective. It targeted two main issues: the *opacity of AI ("black box" problem)*, which makes it hard for victims to prove fault/negligence, and the *autonomy of AI*, which can make causal link determination difficult[68]. To alleviate these issues, the AILD proposed two key measures: a rebuttable presumption of causality in fault-based AI claims, and a right of access to evidence about high-risk AI systems for claimants[69].

Under the proposal, if a claimant sued an operator or user of an AI system for fault (negligence), and the claimant could show that the defendant likely failed to comply with a certain duty of care (for instance, violated the AI Act's requirements) and that this failure could reasonably be linked to the AI output that caused harm, then a presumption would arise that the defendant's fault caused the harm[70]. This is somewhat analogous to the PLD's presumptions, but in the AI context for fault: it spares the claimant from the near-impossible task of proving the exact chain of causation inside an AI algorithm. The defendant could rebut by showing, for example, that the damage would have occurred even without their fault[71]. Additionally, the AILD would allow a victim to request disclosure of relevant information about high-risk AI systems (those designated as high-risk in the AI Act) from the supplier or user of that AI[72]. This complements the PLD's disclosure by focusing specifically on AI context and including users, not just manufacturers.[73]

**Complementarity with the PLD:** The PLD and AILD were designed to complement each other. The PLD covers strict liability for defective products, including AI systems considered as products (e.g., a robot or software that is defective). The AILD would cover scenarios not covered by PLD – mainly where no product is defective.[74] For instance, if an AI-powered decision system (say an AI medical diagnosis tool) is not defective per se (it meets all safety requirements and functions as intended), but a hospital or developer was negligent in its use or training (leading to harm), a victim might not succeed under PLD (no defect) but could sue under fault principles. The AILD presumptions would assist in that fault-based case. Similarly, the AILD would apply to pure software services or AI outputs not embedded in products – e.g., a financial trading AI causing pure economic loss (which wouldn't be covered by PLD at all, as PLD doesn't cover pure economic loss or non-material damage like discrimination harms, etc.).

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[68] Nynke E. Vellinga, *op. cit.*, p. 393; Spindler G., *op. cit*., 2023; Wachter S., *op. cit*.

[69] Civatte, E., Winckler, B., O'Sullivan, J., & Dunne, S., *op. cit.* 2025; Tiago Sergio Cabral (2020) 'Liability and Artificial intelligence in the EU: Assessing the adequacy of the Current Product Liability Directive', *Maastricht Journal of European and Comparative Law*, 27 (5): 615-635, p. 621-622; Hacker, P., *op. cit*., 2022; Buiten M.C., *op. cit.*, p. 241.

[70] Narayanan, S., & Potkewitz, M., *op. cit.,* 2023.

[71] Nynke E. Vellinga, *op. cit.*, p. 393; Spindler G., *op. cit*., 2023.

[72] Civatte, E., Winckler, B., O'Sullivan, J., & Dunne, S., *op. cit.,* 2025; Tiago Sergio Cabral, *op. cit.*, p. 621-622.

[73] Buiten M.C., *op. cit.,* p. 241.

[74] Nynke E. Vellinga, *op. cit.*, p. 393; Buiten M.C., *op. cit.,* p. 241.

Furthermore, the PLD and AILD both include disclosure and presumptions, but targeted differently. The PLD's disclosure is against manufacturers; the AILD's is specifically for AI and could target users. There is a conscious parallel: both aim to make litigation feasible despite complexity. In legislative debates, it was stressed that the AILD would *not* impose new bases of liability, but rather harmonize certain procedural aspects. This means a claimant still needs a cause of action under national law (like negligence) to use the AILD's tools. The PLD, by contrast, creates a direct cause of action EU-wide for defective products.

**Interactions in Practice:** Suppose an AI-powered autonomous vehicle causes an accident. If the accident is due to a defect in the vehicle or its AI software (e.g., a coding error, sensor failure – something making it unsafe beyond expectations), the victim can sue under PLD (strict liability against the car manufacturer). If the accident is due to no defect but perhaps the human overseer's operational error, or maybe an inherent limitation of the AI that is not a "defect" but arguably someone was negligent in deploying it in that situation, then a fault-based claim might be appropriate – for example, against the operator of the AI or the developer, depending on circumstances. The AILD would help by presuming causation if the AI likely played a role and by allowing access to logs from the AI to see if it malfunctioned. A claimant could conceivably pursue both in the alternative: a PLD claim against the manufacturer (saying the AI car was defective) and a fault claim (with AILD aids) against, say, the fleet operator for not properly monitoring the AI. The law is designed so that these avenues aren't mutually exclusive or contradictory but offer a comprehensive net of liability.

**Current Status – AILD Withdrawal:** As of early 2025, it's important to note that the proposed AI Liability Directive has encountered political headwinds. In the European Commission's Work Program for 2025, the Commission announced an intention to withdraw the AILD proposal due to lack of progress and concerns raised during negotiations[75]. Some industry stakeholders argued that the AILD might create legal uncertainty and overlap with existing laws, and that the new PLD along with existing national tort law might suffice for AI cases[76]. On 11 February 2025, the Commission listed the AILD for withdrawal, which has led to debate in Parliament and among member state[77]s. Several Members of European Parliament and commentators criticized this move, suggesting that it was premature to abandon the AI-specific liability harmonization and that doing so could leave gaps or inconsistencies in protection (especially since the AI Act is moving forward, one would expect a liability counterpart)[78]. As of this writing, it remains to be seen if the withdrawal will be finalized or if parts of the

[75] Duffourc M.N. (2025), *The Withdrawal of the AI Liability Directive: A Critical Reflection on AI Liability in the EU*, accessible on: https://www.maastrichtuniversity.nl/blog/2025/02/withdrawal-ai-liability-directive-critical-reflection-ai-liability-eu (last access: 02.05.2025).
[76] Ibid.
[77] Ibid.
[78] Ibid.

AILD will be salvaged (possibly its content could be integrated into the AI Act or other legislation).

If the AI Liability Directive does not proceed, the interplay simplifies: the PLD (as now adopted) becomes the primary EU-level tool for AI-caused harm insofar as a defect can be identified, and otherwise victims must rely on national liability laws (with no special EU presumptions for AI, unless Member States adopt their own). Some Member States might fill the gap by national legislation or by creative judicial interpretation. The PLD itself, as we have detailed, already goes a long way to address AI issues by including software/AI as products and by presumptions that help in complex cases (including those involving technical complexity – which certainly covers AI). Additionally, the AI Act (Regulation (EU) 2024/1689, expected to fully apply in 2025-2026) will impose strict obligations on providers and users of high-risk AI systems; non-compliance with those obligations could be used as evidence of fault in national tort claims. It's notable that the AILD's presumptions of causality would have kicked in if an AI provider/user violated the AI Act requirements[79]. Without AILD, a national court could still potentially infer causation or fault if it sees AI Act violations, but that will depend on national doctrine.

In summary, the new Product Liability Directive and the (now uncertain) AI Liability Directive were conceived as two pillars of the EU's approach to AI accountability: one rooted in strict liability for defective products (technology-neutral but AI-inclusive), and one supplementing fault-based liability to deal with AI's peculiarities. Together, they would have ensured that whether a harm from AI was due to a product defect or some other failing, the victim had a clear path to compensation. With the PLD now in force, consumers are better protected when AI systems turn out to be defective products. If the AILD does not materialize, some risk remains that in cases of pure algorithmic decision-making harm (without a defect), victims will face the traditional difficulties in proving negligence, albeit with some help from the AI Act's transparency and record-keeping rules. European legal scholars will be watching closely how national courts handle such cases and whether the PLD's generous presumptions might sometimes be stretched to cover scenarios that AILD would have addressed (for instance, using the "excessive difficulty" presumption in a borderline case to achieve justice even absent an obvious defect). The *interplay*, therefore, might become an internal one – between the PLD and creative national fault liability – rather than between two EU directives.

## 7. Relationship to the DSA and DMA

The *Digital Services Act (DSA)* and *Digital Markets Act (DMA)* are two major EU regulations that came into force in 2022, fundamentally reshaping the

[79] Ibid.

legal framework for online intermediaries and large digital platforms. While their primary focus is not product liability, they establish duties and parameters that influence how online platforms operate, including in relation to the sale of products. The new Product Liability Directive intersects with these Acts in terms of platform responsibility and market fairness. This section explores how Directive 2024/2853 relates to the DSA and DMA, highlighting complementarity and potential tensions.

**A. Digital Services Act (DSA) – Platform Liability and Due Diligence.** The Digital Services Act (Regulation (EU) 2022/2065) is a comprehensive framework for regulating the moderation of online content and the responsibilities of "intermediary services," including online marketplaces. One of the DSA's key features is that it maintains the conditional liability exemptions (safe harbors) for intermediaries that were established under the old e-Commerce Directive (2000/31/EC)[80]. For online platforms like marketplaces, this typically means they are *not liable for illegal content or products sold by third parties via their platform* so long as they play a neutral, passive role (merely hosting the listings) and act expeditiously to remove or disable access when they obtain actual knowledge of illegal content[81]. The DSA elaborates this by saying if platforms do not "create the impression" they are the seller, and if they comply with certain transparency duties, they can avoid liability for the underlying conduct of the selling third party[82].

Directive 2024/2853, as discussed in the Liable Actors section, introduces potential liability for online platforms *when they go beyond a neutral role* – for example, when the platform effectively controls the fulfillment or presents itself as a seller (an "active role"). There is an inherent tension to manage: the PLD cannot simply override the DSA's safe harbor which is a directly applicable Regulation; nor does it attempt to make platforms strictly liable for every defective product sold by others on their site. Instead, the PLD and DSA regimes are designed to complement each other: the PLD attaches liability to platforms *only in situations where the platform behaves like an operator in the supply chain* (manufacturer, importer, distributor, etc.)[83]. This is consistent with the DSA, which implies that if a platform is no longer an impartial intermediary but rather presenting itself as part of the transaction, it should not enjoy the safe harbor at all. In fact, Recital 27 of the DSA clarifies that the liability exemptions do not apply when the online platform has an active role, particularly "by presenting the content or by otherwise facilitating the transaction in a way that would lead a consumer to believe that the information or product is provided by the platform

[80] Barnes P., Kelly C., *Navigating the New EU Product Liability Directive*, 2024 accessible on: https://www.clydeco.com/en/insights/2024/11/navigating-the-new-eu-product-liability-directive (last access: 02.05.2025).
[81] Ibid.
[82] Ibid; V. Burgsdorff Christoph, *op. cit.*
[83] Barnes P., Kelly C., *op. cit.,* 2024; V. Burgsdorff Christoph, *op. cit.,* 2025.

itself."[84] The PLD effectively leverages that principle by explicitly stating that in cases where no manufacturer/importer can be identified, a platform can be held liable if it creates the impression of being the seller or otherwise fails to identify the actual producer[85].

Moreover, the DSA imposes due diligence obligations on online marketplaces which dovetail with the PLD's aims. Under Article 24 of the DSA, online marketplaces must collect and display certain information about the traders using their platform (a "Know Your Business Customer" requirement) and must inform consumers when they become aware that a product sold may be unsafe (this aligns with EU product safety law requirements)[86]. If marketplaces comply diligently, then in theory, for every product sold, there should be an identifiable manufacturer or importer. This greatly assists the functioning of the PLD: the injured person can find the manufacturer's identity from the platform's records and sue the manufacturer (or importer) directly, obviating the need to sue the platform. Conversely, if a platform fails to obtain or provide that information, then the consumer is left without an obvious defendant except the platform. The PLD's subsidiary liability for platforms in cases where no one else is identified thus provides a backstop and an incentive for platforms to follow the DSA's mandates. We can see a policy synergy: the DSA pushes platforms to be transparent and responsible in vetting traders, and the PLD says, if you don't, you might end up liable yourself. In practice, large platforms will likely tighten compliance with DSA obligations to avoid falling into that trap.

Another point of intersection is how the DSA's notion of "illegal content" might encompass defective or dangerous products. The DSA mostly concerns illegal content (hate speech, IP infringement, etc.), but an unsafe product could be considered illegal to sell (for example, a banned toy due to safety reasons). The DSA's notice-and-takedown system would require a platform to remove a listing for a product that is notified as unsafe/illegal. If a platform fails to do so and a consumer is harmed by that product, questions arise: could the platform be liable due to negligence (outside the PLD) or under the PLD as a de facto distributor? The PLD would likely regard the platform as liable if it was effectively the only entity in the EU involved, though proving the platform had the role might involve showing it didn't act on knowledge of danger (blurring into fault). Even outside strict PLD liability, a platform that ignores its DSA obligations could face regulatory fines and perhaps national tort claims.

In summary, the relationship with the DSA is that the new PLD complements the DSA by covering the civil liability aspect that the DSA deliberately did not fully address (since DSA kept the safe harbor). The PLD's nuanced approach to platform liability is carefully crafted not to conflict with the DSA: it does not make a compliant, purely intermediary platform liable for defects of third-party

[84] Barnes P., Kelly C., *op. cit.,* 2024; V. Burgsdorff Christoph, *op. cit.,* 2025.
[85] Barnes P., Kelly C., *op. cit.,* 2024; V. Burgsdorff Christoph, *op. cit.,* 2025.
[86] Barnes P., Kelly C., *op. cit.,* 2024; V. Burgsdorff Christoph, *op. cit.,* 2025.

products (thus preserving the safe harbor principle), but it closes the loophole of platforms acting as sellers with impunity. The DSA and PLD together ensure that online marketplaces either identify the true seller/producer or answer to the consumer themselves. This advances consumer protection in e-commerce while still protecting platforms from unreasonable burdens when they are genuinely just passive conduits.

**B. Digital Markets Act (DMA) – Gatekeepers and Market Fairness.** The Digital Markets Act (Regulation (EU) 2022/1925) targets the largest digital platform companies (designated "gatekeepers") with obligations to ensure fair competition and to curb abusive practices. At first glance, the DMA is about antitrust-like regulation and does not directly deal with product liability or consumer protection. However, the **context** it creates is relevant: many gatekeepers under the DMA (for instance, major online marketplace operators, app stores, search engines) are also players through which products reach consumers. The DMA requires gatekeepers to refrain from certain self-preferencing or tying practices and to ensure interoperability in some cases.

While the DMA doesn't impose duties related to product safety or liability, one can argue that it complements the product liability regime by maintaining a fair environment in which competition on product safety can take place. A gatekeeper platform cannot, for example, unfairly down-rank or block third-party services that might offer better safety features (that would violate DMA's fairness rules), which indirectly ensures consumers can access safer products or services. Additionally, the DMA's goal of opening up platform ecosystems might mean a broader range of intermediaries and services, which in turn could affect how liability is distributed (for instance, if Apple and Google must allow alternative app stores, those alternative stores might take on roles that include liability for app defects, etc., similar to how the main platform would under PLD if acting as distributor).

Another indirect relationship is that the big gatekeeper firms are likely to be the ones most affected by the PLD's new provisions on platforms and modifications. For example, Amazon is both a gatekeeper (under DMA) and will likely be targeted by PLD suits as a fulfilment provider or distributor if it doesn't ensure EU-based sellers. The DMA doesn't say anything about liability, but it ensures Amazon cannot, say, favor its own products and hide third-party risk information, etc., which overall contributes to a level playing field in assuming liability. Similarly, gatekeepers might be in the best position to absorb or manage the risks of product liability (given their resources), and the PLD effectively forces them (when no one else is in the EU chain) to do so. This aligns with the DMA's theme that gatekeepers have a responsibility not to exploit their position in ways that ultimately harm consumers or competition. One could argue that *holding gatekeeper platforms liable for defective third-party products in certain scenarios is consistent with the idea that they cannot have all the advantage of being central marketplaces without any of the corresponding responsibility*.

It is also possible that DMA compliance could provide platforms with defenses or at least goodwill arguments in liability cases. For instance, if a gatekeeper platform is following DMA obligations and providing access/data to business users, it might claim it has done what is required on transparency and that any defect is purely on the manufacturer – though this wouldn't exempt liability under PLD if the conditions for platform liability are met, but could influence courts' view of whether the platform "acted like an operator" or just as a neutral venue.

In essence, the DMA's relationship to product liability is more contextual and indirect than the DSA's. The DMA ensures the digital market isn't monopolized or distorted, which means no single company can avoid consumer pressure to maintain safety. It also means if a gatekeeper does incur liability (under PLD or otherwise), it cannot unfairly shift that cost to others or block rivals who might be safer. There's also a philosophical alignment: both the DMA and the PLD revision are part of the EU's strategy to rein in big tech companies and ensure they operate under European standards of fairness and safety. One targets economic power, the other targets responsibility for harm. Both together send a message that large platforms operating in Europe must be accountable in various dimensions – to regulators, competitors, and consumers alike.

Finally, we note that none of the new laws (DSA, DMA, PLD) explicitly override the others; they must be read in harmony. The PLD specifically references the DSA in recitals to clarify the boundary of platform liability[87]. While it does not reference the DMA (understandably, as DMA is about competition), the practical effect of DMA is simply that some platforms will have to adjust business models (for example, separating certain services) which could marginally affect how product liability risk is managed. For instance, if a gatekeeper must allow data portability and interoperability, third-party services could help consumers track product provenance or safety issues – aiding in liability claims or prevention. These are second-order effects but part of the holistic EU digital regulation ecosystem.

In conclusion, the DSA and DMA form the backdrop of rules governing platform behavior, with the DSA focusing on what platforms must do to protect users and when they are exempt from liability, and the PLD stepping in to impose liability when those conditions are not met or when the platform's role goes beyond mere conduit. The DMA ensures that these rules play out in a competitive environment without gatekeepers exploiting their position to evade new obligations. Together, these instruments demonstrate the EU's twin aims of fostering a *safe digital marketplace* and a *fair digital marketplace*. The Product Liability Directive's contribution is squarely in the safety realm, but it is carefully coordinated with the DSA's liability framework and sits conceptually comfortably

[87] Piovano, Ch., Hess Ch., *op. cit*., p. 45; Jacquemin, Z., *op. cit.*, p. 126–139; Koch, B. A., *op. cit*., p. 109–125.

alongside the DMA's ethos of accountability of powerful actors.

## 8. Challenges and Implementation

The adoption of the new Product Liability Directive ushers in a host of challenges and considerations for implementation. While the Directive promises a more robust and future-proof liability regime, translating its provisions into practice will require careful navigation by Member States, courts, businesses, and consumers. This section discusses some of the key challenges, including legal uncertainties in interpretation, potential impacts on innovation and insurance, and practical issues in transposition and enforcement.

**A. Transposition into National Law.** Member States have a two-year window (until December 2026) to transpose Directive 2024/2853 into their national legal systems[88]. Despite the Directive's full harmonization intent, transposition will not be entirely uniform in practice, because national legal systems differ in procedural law and may exercise limited discretion in areas the Directive leaves open (such as determining specific procedures for evidence disclosure). One challenge is integrating the Directive's disclosure and presumption mechanisms into national civil procedure. Many EU countries historically do not have U.S.-style discovery; courts will need to be empowered (or reminded of existing powers) to order evidence disclosure consistent with Article 8 PLD. National legislators might have to clarify what "facts sufficient to support plausibility" mean in their context and set rules to prevent fishing expeditions[89]. Similarly, the rebuttable presumptions of Article 10 will represent a change for judges – training and guidance may be needed so that judges know when to apply these presumptions. Some legal systems might incorporate these presumptions by an explicit statutory language, while others might rely on courts to infer them directly from the transposed text.

Another transposition issue is dealing with the interplay with existing national liability regimes. All Member States have some form of product liability law (many simply implemented the 1985 Directive into national statutes; some had parallel tort claims). Those national laws will now be replaced or amended. For example, Germany's Produkthaftungsgesetz and France's Civil Code provisions on product liability will be updated to reflect the new definitions (like including software as product), new liable parties, etc. This is mostly straightforward, but some countries had taken divergent approaches on points the 1985 Directive left optional. For instance, Spain and Finland had opted *not* to allow the development risks defense, whereas the UK (when it was under the EU) and Germany allowed it in full or part[90]. Now, the Directive mandates a harmonized ap-

[88] See also V. Burgsdorff Christoph, *op. cit*.
[89] Jacquemin, Z., *op. cit.*, p. 126–139; Koch, B. A., *op. cit*., p. 109–125.
[90] Piovano, Ch., Hess Ch., *op. cit*., p. 65; Wybitul T., Sikora T., *New EU Product Liability Directive*

proach to development risks (i.e., generally allowing the defense except for specified circumstances). Those Member States will have to introduce the defense into their law, which could be politically sensitive – consumer advocates in those countries may resist, seeing it as a step backward in consumer protection. However, because it's an EU full harmonization, they have no flexibility on that point. We might see some Member States emphasizing the exceptions (software, etc.) to narrow the defense as much as allowed, or providing for strict judicial scrutiny when a producer invokes it.

Conversely, Member States will remove things like the €500 property damage threshold and the exclusion of business property damage, which were in the old directive. Now *any* level of property damage is compensable and not limited to private use[91]. This is a clear improvement for claimants (no small claims bar), but for insurers and businesses it means more potential low-value claims to handle. Implementing this could lead to a higher volume of claims for minor damage (e.g., a defective kitchen appliance slightly damages a countertop – previously under €500 not claimable via PLD, now it is). National rules might need to adapt their small claims procedures or encourage alternative dispute resolution for very low-value claims to avoid court overload.

One practical implementation challenge is creating the infrastructure for evidence disclosure. Courts must be ready to handle sensitive information, possibly using confidentiality measures. This may be new for some civil law courts. Additionally, businesses might need to adjust record-keeping: knowing that they could be ordered to disclose internal data on products years later (remember the long liability period can be up to 10 or even 25 years for latent injuries[92]), manufacturers should maintain archives of design documents, test results, and incident reports in a retrievable form. Member State lawmakers might also decide which courts (e.g., specialized chambers or commercial courts) should handle such cases given the technical complexity – some might channel product liability claims to courts that already handle complex litigation.

**B. Interpretative Uncertainties.** Despite the detailed provisions, some terms in the Directive will likely require judicial interpretation, potentially by the Court of Justice of the EU (CJEU) to achieve uniformity. We have already flagged "excessive difficulties… due to technical or scientific complexity" as one such term regarding the burden of proof presumption[93]. National courts will have to determine on a case-by-case basis when to apply this. One can foresee early cases where defendants argue that claimants are too quick to invoke complexity

*Comes into Force*, Latham & Watkins Privacy & Cyber Practice 23 December 2024 | Number 3319, accessible on: https://www.lw.com/en/offices/admin/upload/SiteAttachments/New-EU-Product-Liability-Directive-Comes-Into-Force.pdf#:~:text=of%20proof,Expanded%20Product%20Definition (last access: 02.05.2025).

[91] Piovano, Ch., Hess Ch., *op. cit*., p. 50, 75; Jacquemin, Z., *op. cit.*, p. 126–139; Koch, B. A., *op. cit*., p. 109–125.

[92] Wybitul T., Sikora T., *op. cit.,* 2024.

[93] Masnada M., Pacciti A., Ecanova C., *op. cit.*; Piovano, Ch., Hess Ch., *op. cit*., p. 77.

without trying to prove their case, and claimants arguing that any AI or pharmaceutical case should qualify. Over time, precedent will likely set some thresholds (perhaps complexity in the sense of requiring expertise beyond normal human ken, etc.). The CJEU might be asked via preliminary reference: for example, "How should 'excessive difficulty' in Article 10(4) be assessed? Must the claimant first attempt standard proof, or can the presumption be applied from the outset?"

Another likely point of contention is the liability of online platforms. The Directive text states platforms can be liable "under certain conditions" when acting beyond mere intermediaries[94]. What exactly creates the "impression" of being a seller (as referenced in Hogan Lovells commentary) and thus voids the safe harbor? Is offering a payments service or guarantee enough to consider the platform as a direct party? Some platforms provide warranties or guarantees that make them appear responsible. National courts, guided by DSA language and the PLD, will draw these lines. There may also be arguments about conflict of laws: e.g., if a platform is protected by DSA at EU level, can national implementation of PLD impose strict liability? The likely resolution is as discussed: no conflict because PLD only targets when DSA doesn't apply. But we could see initial legal friction if, say, a platform is sued and claims immunity under DSA Article 6 (safe harbor), and the claimant says, "But under PLD you're a distributor." Courts might need to reconcile those; perhaps the CJEU will clarify that the PLD as a later measure effectively defines when the safe harbor doesn't apply in product cases.

Additionally, the concept of "significant modification" of a product (making one a new manufacturer) could be tested. What changes qualify as substantial enough? Software updates could be contentious – e.g., if a third party hacks a product to change its functionality, are they a modifier (likely yes, but then they probably won't be identifiable or solvent)? Or if a user just swaps out a part, they wouldn't normally be "manufacturing," but a business refurbishing multiple units might be. The Directive recitals probably give examples, but national courts will have to delineate so that, for instance, repair shops know if they risk liability.

## 9. Impact on Innovation and Business Practices

**A. The business' feedback.** The new Directive has elicited mixed reactions regarding its impact on innovation and business. On one hand, it increases exposure to liability for producers and even peripheral actors (like fulfilment providers). This likely means higher insurance costs for product liability coverage. Insurers will assess that claims might be easier to bring (due to presumptions) and

[94] Wybitul T., Sikora T., *op. cit.,* 2024; Piovano, Ch., Hess Ch., *op. cit*., p. 85.

that more entities are insured (logistics companies might now buy product liability insurance). Particularly, the extension of liability up to 25 years for certain latent personal injuries (for example, if someone is harmed by a product but the harm is discovered much later, as with some medical implants) means underwriters have to consider a longer "tail" risk. Businesses dealing in AI and emerging tech may see insurers raising premiums or asking for specific risk mitigation (such as rigorous record-keeping and compliance with standards to have defenses).

Some industry voices worry that the combination of strict liability and easier proof will create a litigation-friendly environment that could "discourage innovation," especially in AI and pharmaceuticals where unknown risks are a fact of development[95]. The development risk defense being mandatory might alleviate some concerns (since producers know they have that escape for unknown risks), but the carve-outs (software, etc.) mean for many tech products that defense isn't available. Firms might respond by investing more in testing and compliance (which is a positive outcome for safety) or by hesitating to introduce products in the EU until they are very certain of safety (which could slow deployment of new tech in EU relative to elsewhere). The EU consciously accepts a bit of that trade-off, prioritizing safety and consumer trust – which, arguably, in the long run also benefits innovation by avoiding scandals that erode public confidence.

Small and medium enterprises (SMEs) might face challenges, as they have fewer resources to handle litigation or compliance. The Directive, however, does not differentiate by company size (except that micro-enterprises might rarely be fulfilment providers for global trade). One might see increased reliance by SMEs on insurance and perhaps on contractual agreements – e.g., a small manufacturer might contractually require its authorized representative to share liability or a supplier to indemnify them if a component is defective. The Directive prohibits contractual exclusion of liability towards the injured person[96], but it doesn't prevent internal indemnity deals among companies[97]. Indeed, it states liability cannot be excluded by contract vis-à-vis the victim, ensuring, for example, a platform cannot make a consumer waive their rights. But business-to-business contracts allocating the final financial burden are still possible. We may see those adjustments as companies in a supply chain negotiate who will bear the risk and cost if something goes wrong.

**B. Enforcement and Litigation Landscape.** From the perspective of injured persons and their advocates (lawyers, consumer organizations), the new PLD offers more levers to succeed in claims. However, awareness and effective use of these tools will be essential. Judicial training and information for legal professionals will be needed so that, for example, a judge in a Member State who's

[95] V. Burgsdorff Christoph, *op. cit.*
[96] Ibid.
[97] Jacquemin, Z., *op. cit.*, p. 126–139; Koch, B. A., *op. cit*., p. 109–125; Merryl Hervieu, *op. cit.,* Sylvie Gallage-Alwis and Gaetan de Robillard, *op. cit*.

never had discovery can manage a disclosure order, or a claimant's lawyer knows to plead the conditions for presumptions (rather than just asserting defect). The European Commission and national authorities will likely engage in outreach.

Moreover, the Representative Actions Directive (EU) 2020/1828 is coming into force around the same time (by end of 2022, Member States needed to transpose it). This allows qualified entities (like consumer associations) to bring collective actions for consumers, including for damages in mass harm situations. The PLD could see synergy with that: if a defective product injures many consumers, a representative action could be brought on their behalf. The new PLD's rules would apply in such a lawsuit. For instance, if a certain model of appliance has a defect causing fires, a consumer organization could sue the manufacturer on behalf of a class of consumers for damages, and they could invoke the presumptions (like if it obviously malfunctioned causing fire, defect is presumed). This is a new avenue that was not effectively available under the old regime (some countries had class actions, many didn't). So, one challenge is how courts will handle collective redress in product liability – something relatively novel in Europe. It could lead to more large-scale settlements or court rulings holding companies liable to many claimants at once.

Regulatory coordination is another factor: product safety regulators (under the General Product Safety Regulation 2023/988 and various sectoral laws) will continue to do market surveillance and order recalls of dangerous products. Information from regulators (like recall notices, safety test failures) could serve as evidence in product liability litigation. Conversely, the outcomes of product liability cases might flag issues to regulators. Ideally, there should be feedback loops – something the Directive doesn't explicitly provide, but national practice could develop. If a court finds a product defective and causing harm, that info could be passed to market surveillance authorities to take broader action, protecting others. Also, the Directive's requirement for the Commission to set up a database of judgments (Article 17 of the Directive mentions a public database of relevant judgments)[98], will over time create a resource where trends and precedents can be tracked across the EU. This can help identify problem products and also help harmonize interpretation as courts may look to see how others decided similar cases.

**C. Balancing Consumer and Industry Interests.** Critics from industry point out the potential for what they term "over-deterrence" – if companies are too fearful of liability, they might hold back beneficial products, or pass on increased costs to consumers. Consumer advocates, on the other hand, argue that the prior regime under-compensated victims and allowed companies to externalize costs of defects. The new Directive tries to balance these by measures like the development risk defense (to not punish unknowable risks) and by keeping the

[98] Becker M., Bell A., Meyer H*., op. cit.*, 2025; Jacquemin, Z., *op. cit.*, p. 126–139; Koch, B. A., *op. cit*., p. 109–125; Merryl Hervieu, *op. cit.*; Sylvie Gallage-Alwis and Gaetan de Robillard, *op. cit*.

scope to material damages (including data) and personal injuries – it does not cover pure economic loss or privacy violations, etc., which some had discussed but ultimately remained outside, as those are handled by other laws (e.g., GDPR for data breaches). Non-material harm (like pain and suffering) is only compensable if national law allows for it for personal injury (most do), which is consistent with existing practice[99]. So psychological harm from injury is in, but say, loss of enjoyment or fear without physical injury remains generally out.

One challenge for consumers will be proving damages, especially data loss. The Directive says data destruction should be compensated including the cost of recovery[100]. How do we quantify, for example, the loss of a family photo archive versus the cost to maybe attempt recovery? These are new frontiers for courts, and claimants will need expert evidence to value data. Some jurisdictions may have difficulty with the idea of compensating data loss if there's no direct economic value; others may analogize it to property.

## 10. Conclusions

The EU will undoubtedly monitor the effects of the new Directive. The text likely includes a review clause after some years. If it turns out that, for example, certain presumptions are not working as intended (perhaps courts rarely use the complexity presumption, or conversely, it's used too freely), the Commission could issue guidance or propose tweaks in the future. The fate of the AI Liability Directive also hangs in the balance: if not enacted now, perhaps elements of it will resurface or be integrated into national laws. Additionally, as technology evolves (e.g., biotech, IoT, etc.), the product liability regime might need further calibration. For instance, if "services" (like pure services causing harm) become a bigger issue, there might be pressure in future to extend strict liability to certain services, which the PLD still doesn't do except where a service is part of a product's functioning.

In implementing the PLD, stakeholders such as business associations and consumer groups will likely publish guidelines or best practices. Manufacturers may develop internal protocols for compliance: for example, ensuring any software updates have rigorous safety checks (knowing that lack of an update can't be used as a defense, they must supply updates responsibly or face liability). Platforms will refine their terms with sellers to ensure they get the info needed to identify manufacturers (perhaps even requiring foreign sellers to have EU importers or else they won't list them, to avoid being saddled with liability).

Finally, a challenge worth noting is the transitional period: products placed on the market before 9 December 2026 remain governed by the old rules, even if litigation happens after that date[101].

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[99] Becker M., Bell A., Meyer H., *op. cit,* 2025.
[100] Nynke E. Vellinga, *op. cit.*, p. 393.
[101] Wybitul T., Sikora T., *op. cit.,* 2024; Jacquemin, Z., *op. cit.*, p. 126–139; Koch, B. A., *op. cit.*,

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p. 109–125; Merryl Hervieu, *op. cit.;* Sylvie Gallage-Alwis and Gaetan de Robillard, *op. cit*.

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