

New EU AI Liability Regime

How do the proposed new Product Liability Directive, the AI Liability Directive and the AI Act fit together?

On 28 September 2022 the EU Commission published:

1. [Proposed amendments to Product Liability Directive \(PLD\)](#), which will include AI
2. [New AI Liability Directive \(AILD\)](#)

These proposals now sit alongside the EU's proposed EU AI Act ([AIA](#)).

According to the EU, these proposals will “*adapt liability rules to the digital age*”, particularly in relation to AI.

We summarise in this document this new tripartite regime and explain how these three laws fit together.

Background to the proposals

- In the February 2020 White Paper on AI, the European Commission President, Ursula von der Leyen, laid out a coordinated European approach on AI to both promote innovation and its uptake, but also to address the risks associated with its use.
- On 21 April 2021, the EU Commission proposed the AIA. That focuses on safety and prevention of AI harm, whereas the PLD and AILD focus on redress following harm caused by AI. The three laws are intended to operate as a tripartite model where “*safety and liability are two sides of the same coin*”.
- The Commission's reasons for the new developments
- We may even see a “[European convention on artificial intelligence, human rights, democracy and the rule of law](#)” in due course, which would supplement the AIA but potentially be open to non-EU member states to join.

Our AI Group is experienced in advising businesses on legal, regulatory and ethical issues arising out of the use of AI. Please [contact us](#) if you would like to discuss these developments with us.

AI Act and Product Liability Directive



AI Act

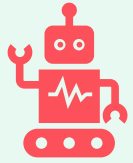
- **Summary:** AIA proposes risk-based approach comprising prohibited AI uses, “high-risk” AI uses (HRAIS) and other AI uses.
- EU focused on **protecting citizens from AI harm: AIA focuses on harm prevention** (i.e. ensuring AI is developed safely), rather than cure (which is focus of PLD and AILD).
- Majority of **AIA deals with substantive and procedural requirements for HRAIS**. Consistent with EU product safety framework (which is lens through which EU views AI), greater regulatory burden on developers than users. AIA also lays down enforcement framework.
- **Timing:** AIA expected to come into force late 2023/2024, with 2 year grace period to allow organisations to comply.
- For more detail, please see our [‘Quick Guide’ to the AIA](#) and our [on-demand webinar](#).



Product Liability Directive

- **Summary:** Existing PLD comprises strict liability regime giving redress to consumers who suffer certain types of harm from defective product. PLD has an extraterritorial effect as non-EU manufacturers can be held indirectly liable for defective Products through authorised representatives and importers.
- Major changes proposed by EU:
 - **Definition of ‘Product’ expanded** to include intangible items e.g. software, including AI systems.
 - Claimant with a plausible claim can seek **order for defendant to disclose relevant evidence**. Failure to comply results in presumption of defect.
 - **‘Defect’ can take into account “effect on the product of any ability to ‘continue to learn after deployment’”**, future-proofing regime against increasingly sophisticated AI models which learn and develop post-deployment.
 - **Definition of ‘damage’ expanded to include ‘loss and corruption of data’** provided not used “exclusively for professional purposes”
 - If claimant faces excessive difficulties in proving defect and/or causation due to ‘technical or scientific complexity’, then **defect / causation presumed** on basis of sufficiently relevant evidence
 - **Current 10 year longstop for claims extended from time of any substantial modifications**, likely including software updates
- **Timing:** member states to bring AILD into law 1 year after the modifying directive is passed.
- For more detail, please see our [separate note on the proposed new PLD](#).

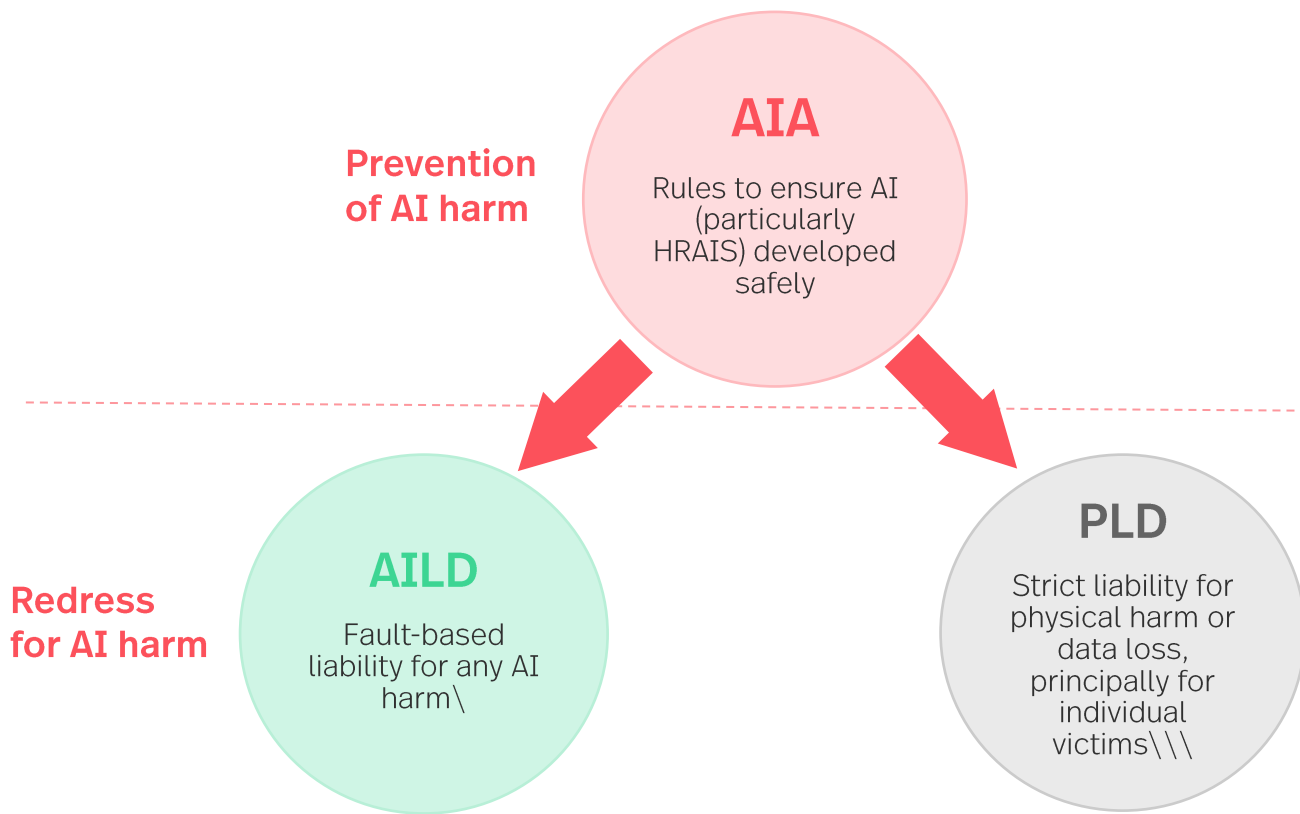
AI Liability Directive



AI Liability Directive

- **Summary:** AILD provides common rules for non-contractual, fault-based liability regime for damage caused by AI, particularly HRAIS. AILD has an extraterritorial effect as it applies to the providers and/or users of AI systems that are available on or operating within the Union market.
- **Origin:** EU sees difficulty and uncertainty in claims for AI harm under current fault-based liability regimes due to complexity, autonomy and opacity of AI. AILD is intended to “adapt private law to the needs of the transition to the digital economy” and make it easier to bring claims for harm caused by AI.
- **Key provisions:**
 - **Article 1 (Scope):** clarifies that regime intended to **compensate for damage caused intentionally or negligently**
 - **Article 2 (Definitions):** ensures **consistent definitions with AIA**; clarifies that **claim can be brought by subrogated party** (e.g. insurer) or representative (e.g. on behalf of class). **EU expressly contemplates class actions** in AILD Explanatory Memorandum; clarifies that **claim can be brought by individual or legal entity against another individual or legal entity**
 - **Article 3 (Disclosure of evidence and rebuttable presumption of breach of duty for HRAIS):**
 - to help claimants identify potentially liable defendants and relevant evidence for damage caused by HRAIS, **court may order provider or user to disclose necessary and proportionate evidence about HRAIS suspected of having caused** damage (subject to safeguards around confidential information)
 - where defendant fails to comply with order to disclose or preserve evidence in claim for damages, **rebuttable presumption that defendant breached relevant duty of care**
 - **Article 4 (Rebuttable presumption of causation for HRAIS and non-HRAIS):**
 - **rebuttable presumption of causal link between defendant fault and act or omission of AI system giving rise to damage** where: (a) breach of duty (proven or presumed), (b) reasonably likely that fault has ‘influenced’ relevant act or omission of AI system, and (c) claimant proves that such act or omission has given rise to damage
 - rebuttable presumption does not apply to HRAIS where “*sufficient evidence and expertise reasonably accessible for the claimant to prove causal link*”
 - rebuttable presumption only applies to non-HRAIS where “*excessively difficult for the claimant to prove the causal link*”
 - where damages claim against HRAIS provider, breach of duty only established if, taking into account HRAIS risk management system, provider breached AIA obligations relating to data, transparency, human oversight, accuracy, robustness and cybersecurity, or provider failed to take corrective actions to remedy other breach or withdraw / recall HRAIS
 - where damages claim against HRAIS user, breach of duty established if user breached obligation to use / monitor AI system in accordance with accompanying instructions of use or, where appropriate, suspend or interrupt its use
- **Timing:** member states to bring AILD into law 2 years after AILD passed

The tripartite model



What should organisations do now?

- The PLD and AILD will now go through the EU legislative process (which the AIA is already going through). If adopted, each Member State will need to implement the PLD and AILD into their respective national law.
- Despite the fact that these are only draft laws, it is important for organisations to start thinking now about compliance. These regimes (the AIA in particular) require steps to be taken at the AI development stage, so any AI systems being developed or procured now should take account of these regimes in order to ensure future compliance.
- The AILD makes compliance with the AIA even more crucial. We are starting to see organisations undertake risk assessment against the AIA (i.e. establishing whether their AI use cases are subject to the AIA and, if so, whether they are HRAIS) and implement appropriate governance (e.g. AI inventories, processes to ensure compliance etc.). We can assist with this.
- Aside from compliance, various other issues should be considered e.g. contractual protection (especially for any AI procurement) and insurance.

Case study 1

AI system used to dispense medication to patient allegedly malfunctions causing physical harm to patient

Patient (C) could bring claim under **PLD** against defendant (manufacturer / developer of AI system) (D):

- **Scope:** AI system is “Product”
- **Evidence:** C likely to be able to seek order for D to disclose relevant evidence
- **Fault:** No need for C to demonstrate any intention or negligence by D
- **Defect:** C will be able to benefit from presumption of defect if: (i) D fails to comply with disclosure order, (ii) C demonstrates that product breaches mandatory safety requirements, (iii) C demonstrates damage caused by obvious malfunction during normal use, or (iv) C finds it is excessively difficult to prove defect (and produces sufficiently relevant evidence that product contributed to the damage and was likely to have been defective/a cause of the damage), otherwise C will need to establish defect
- **Causation:** C will be able to benefit from presumption of causal link between defect and damage if: (i) defect presumed / proven and damage is of kind typically consistent with that defect, or (ii) C finds it is excessively difficult to prove causal link (and produces sufficiently relevant evidence that product contributed to damage and was likely to have been defective/a cause of the damage), otherwise C will need to establish causation
- **Damage:** Physical harm is damage under PLD (personal injury)
- **Defences:** D may be able to rebut presumptions or even liability depending on circumstances

Patient (C) could bring claim under **AILD** against defendant (provider / developer of AI system) (D):

- **Scope:** AI system is “AI system” or potentially even HRAIS under AIA
- **Evidence:** If C establishes that AI system is HRAIS that may have caused damage, then C likely to be able to seek order for D to disclose relevant evidence.
- **Fault:** If D fails to comply with disclosure order, then presumption that D breached duty of care. Otherwise, C will have to prove breach of duty under national law (e.g. intentional or negligent act or omission which led to malfunction). Note that, if AI system is HRAIS, only breach of duty if, taking into account HRAIS risk management system, D breached AIA obligations relating to data, transparency, human oversight, or accuracy, robustness and cybersecurity, or D failed to take corrective actions to remedy other breach or withdraw / recall HRAIS
- **Defect:** No need for C to demonstrate defect in AI system arising out of breach of duty
- **Causation:** C will be able to benefit from presumption of causal link between fault and damage if: (i) breach of duty proven or presumed, (ii) reasonably likely that fault has ‘influenced’ relevant act or omission of AI system, and (iii) claimant proves that such act or omission has given rise to damage, except that: (a) if AI system is HRAIS, rebuttable presumption will not apply where sufficient evidence and expertise reasonably accessible for C to prove causal link, and (b) if AI system is non-HRAIS, rebuttable presumption only applies if excessively difficult for C to prove causal link
- **Damage:** C will have to prove damages in usual way under national law
- **Defences:** D may be able to rebut presumptions or even liability depending on circumstances

Case study 2

AI system used by organisation in recruitment process for new staff allegedly rejects candidate on basis of unlawful discrimination

Candidate cannot bring claim under **PLD** against defendant – whether organisation or manufacturer of AI system – because discrimination not actionable damage under PLD (unless the candidate suffers psychological harm as a result of discrimination caused by a defect in the AI system).

Candidate (**C**) could bring claim under **AILD** against organisation/user (**D**) (C could also bring claim under **AILD** against provider of an AI system (as defined in the AIA) but may be easier against user):

- **Scope:** AI system is HRAIS under AIA
- **Evidence:** C likely to be able to seek order for D (as HRAIS user) to disclose relevant evidence
- **Fault:** If D fails to comply with disclosure order, then presumption that D breached duty of care. Otherwise, C will have to prove breach of duty under national law (e.g. intentional or negligent act or omission which led to malfunction). As HRAIS, breach of duty will be established against D (HRAIS user) if D breached obligation to use / monitor AI system in accordance with accompanying instructions of use or, where appropriate, suspend or interrupt its use
- **Defect:** No need for C to demonstrate defect in AI system arising out of breach of duty
- **Causation:** C will be able to benefit from presumption of causal link between fault and damage if: (i) breach of duty proven or presumed, (ii) reasonably likely that fault has 'influenced' relevant act or omission of AI system, and (iii) C proves that such act or omission has given rise to damage, unless sufficient evidence and expertise reasonably accessible for C to prove causal link
- **Damage:** C will have to prove damages in usual way under national law
- **Defences:** D may be able to rebut presumptions or even liability depending on circumstances

How we can help you

We have a dedicated AI Group, comprising lawyers across various practice areas and jurisdictions, which regularly advises clients on AI legal, regulatory and ethical issues. Our recent experience includes:

- Advising one of the world's largest developers of biometric technology on a response to the European Commission's EU AI Act.
- Advising a developer of AI technology on its standard form contractual documents.
- Advising a financial institution on a dispute arising out of the allocation of proprietary rights to an AI system.

We are one of the leading law firms in AI:

- We are regularly invited to speak to national governments (including the UK and UAE governments).
- Our Global AI Lead, Minesh, is Chair of the Society for Computers and Law (SCL) AI Group (and a former member of the CBI's Working Group on AI).

We are at the forefront of developments in AI law and involved in cutting-edge projects. For example, in collaboration with Best Practice AI (comprising a member of the World Economic Forum's Global AI Council), we recently advised on [the world's first AI explainability statement](#), working alongside the UK Information Commissioner's Office.

Through [Simmons Wavelength](#), we have numerous in-house data scientists who have day-to-day experience of developing AI models. We are therefore able to offer both legal advice and a practical insight into AI-related legal issues.

AI GROUP KEY CONTACTS

Please get in touch if you have any queries or would like to arrange a discussion or training session with our AI Group



Minesh Tanna

Global AI Lead
Partner

E minesh.tanna@simmons-simmons.com

[LinkedIn](#)



Christopher Goetz

Partner
Corporate & Commercial

E christopher.goetz@simmons-simmons.com

[LinkedIn](#)



David Kidman

Partner
Insurance & Construction

E david.kidman@simmons-simmons.com

[LinkedIn](#)



Benedict Beltrami

Trainee
Disputes & Investigations

E benedict.beltrami@simmons-simmons.com

[LinkedIn](#)



Liz Pelle

Trainee Solicitor
Disputes & Investigations

E liz.pelle@simmons-simmons.com

[LinkedIn](#)



Samuel Wilson

Trainee Solicitor
Disputes & Investigations

E samuel.wilson@simmons-simmons.com

[LinkedIn](#)