The Consumer Voice in Europe

PROPOSAL FOR AN AI LIABILITY DIRECTIVE

BEUC position paper

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Why it matters to consumers

While the widespread use of AI may provide many benefits, it also presents significant challenges and risks to consumers from which they are insufficiently protected. A key question is who to hold responsible if something goes wrong and a consumer suffers damages from an AI system. For example, what happens if an AI system used by an insurance company refuses to grant an insurance policy because it has used biased or incorrect data? It is essential that the EU's product liability rules establish a clear and enforceable legal framework that gives consumers access to justice.

Summary

The classical approach to consumer protection in products under the Product Liability Directive (PLD) has been to "only" require the proof of a defect in a product, the damage and the causal link between the defect and the damage. There is no need to prove the fault of an entity to establish its liability.

Though still a very high threshold to pass, this regime facilitates consumers' access to compensation when compared to a fault-based liability system.

This is why with the fault-based liability approach adopted in the Proposal for a Directive on adapting non contractual civil liability rules to artificial intelligence (AILD), the European Commission is taking a step back in the level of protection granted to consumers for products using new technologies. For example, consumers will be better protected if a lawnmower shreds their shoes in the garden (because such a scenario falls under the scope of the PLD) than if they are unfairly discriminated against through a credit scoring system (which only falls under the scope of the AILD proposal).

Unless important improvements are made to the proposal by the European Parliament and Council during the legislative process, consumers will hardly be in a position to make successful compensation claims under the AILD.

Key recommendations:

1. The AILD proposal relies on a fault-based liability approach. This means that to claim compensation for damages caused by an AI system, consumers need to prove fault (intent or negligence) of the operator of the AI system in the application of a duty of care. BEUC opposes this fault-based approach as it makes it very difficult, if not impossible, for consumers to benefit from their right to compensation for damages.

   Instead, for claims from consumers due to harm caused by an AI system, a **non fault-based liability regime** should be the default option.

2. According to Recital 15 AILD proposal, the proposal only applies to fully automated decisions, in which humans have not been involved from the output onwards. In a matter of such importance for consumers and for their right to redress, the applicability of a law should not be dependent on whether a decision is fully automated or not.

For this reason, the **limitation of the scope to fully automated decision making should be deleted**.

3. Under the AILD proposal, the defendant can be a consumer. In a scenario where non fault-based liability would be the default rule under the AILD, considering consumers 'operators' could be highly problematic, decrease the level of protection they are entitled to, and place an unjustifiable burden on them.

   For this reason, the AILD proposal should **not regulate consumer liability**. As such, Article 4 (6) should be deleted.

4. The European Commission proposes a new **disclosure of evidence** mechanism in Article 3 AILD proposal to enable claimants or potential claimants to request national courts to order AI operators to disclose relevant evidence about a specific high-risk AI system that has caused damage. Unfortunately, this tool will be of very limited use to the large majority of consumers. As such, we propose that:

   - AI operators should be given a deadline to get back to requests by potential claimants under Article 3 (1) AILD proposal.
   - Article 3 and the disclosure of evidence mechanism should apply to all AI systems, not only high-risk AI systems.
   - The application of Article 3 should not be subject to consumers having to prove the plausibility of the claim. Disclosure of evidence should be ordered when consumers provide evidence of damage and involvement of an AI system.
   - AI operators should be obliged to provide the disclosed information in a way that is understandable for consumers' legal representatives (e.g. machine-readable format).

5. Merely alleviating the burden of proof will not solve the problems consumers face when claiming compensation for harm caused by an AI system. Even if consumers benefit from the presumptions introduced in Article 3 and 4 AILD, they will still face significant challenges to substantiate their claims.

   A **reversal of the burden of proof** should be introduced. Consumers should only have to prove the damage they suffered and the involvement of an AI system.

6. The AILD should **harmonise both material and non-material harm**. This is already the case under other pieces of EU legislation, such as the GDPR or the Package Travel Directive. The denial of a loan based on discriminatory grounds can cause stress, anxiety or affect someone's reputation. It is essential that all types of harm, including non-material harm (such as pain, loss of an opportunity or inconvenience), are compensated.

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1. Introduction

Artificial Intelligence (henceforth 'AI') is increasingly present in consumers' daily lives and is expected to bring many benefits to them. It can power new products and services and help make daily life easier and less burdensome, for example through personalised services, augmented reality applications, AI-powered healthcare tools that can help detect diseases quicker, or automated vehicles.

However, the widespread use of AI also presents significant challenges and risks to consumers. One of them is the key question of who to hold responsible if something goes wrong and a consumer suffers damages from an AI system. Because of the special characteristics of AI, such as its complexity, opacity, autonomy but also the number of players involved in their lifecycle, consumers will struggle to claim compensation for any harm caused by an AI system.

Consumers might struggle to identify harm caused by an AI system e.g., the refusal to grant an insurance at a lower price because of biased criteria of an AI system is not visible to consumers. Consumers might not even be aware that an AI system has played a role in a specific decision and that it is the cause of harm.

The current EU Product Liability Directive[1] (hereafter 'PLD') is not fit to address the challenges posed by new technologies, including AI. This directive was first adopted in 1985 at a time where the products on the market were very different from those of today.

To address these problems, the European Commission published in September 2022 two proposals to adapt the EU liability rules to the digital environment: a proposal to revise the Product Liability Directive[2] (hereafter 'PLD proposal') and a proposal to adapt national liability rules to the challenges posed by AI[3] (hereafter 'AILD proposal'). BEUC is addressing these two proposals in two separate position papers.

This paper focuses on the AILD proposal. Our position on the PLD proposal can be read here. In both position papers, we make several policy recommendations to ensure that the two proposals create a coherent legal framework that provides a high level of protection for consumers.

[1] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31985L0374&qid=1663577471701

[2] Proposal for a Directive on liability for defective products, https://single-market-economy.ec.europa.eu/system/files/2022-09/COM_2022_495_1_EN_ACT_part1_v6.pdf

[3] Proposal for a Directive on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive), https://commission.europa.eu/system/files/2022-09/1_1_197605_prop_dir_ai_en.pdf

2. Interplay between the AILD and PLD proposals

The PLD and AILD proposals will apply in parallel and are complementary. This means that, whenever there is an overlap (e.g., products that operate with AI systems), consumers harmed will have to choose between the legal regime of the PLD or AILD as transposed into national laws.

In this regard, for consumers seeking to file a compensation claim for harm caused by an AI system, the PLD proposal has one major problem: its limited scope.

First, the PLD proposal does not include the possibility for consumers to claim compensation against the *business user* for harm caused by an AI system. The PLD proposal contains a list of liable economic operators which are typically involved in the supply chain such as the manufacturer, importer, authorised representative or the distributor but does not establish the liability of *business users* of a product, such as an AI system, as defined in Article 3 (4) of the AI Act proposal.

Second, the PLD proposal only covers *material* damages caused by an AI system such as damages to property, death or personal injury and data loss. *Non-material* damages, such as loss of privacy, reputational harm or remaining in a state of uncertainty, do not fall under the scope of the proposed PLD. This limitation is particularly important as AI systems are prone to cause non-material damages. For example, due to the output of an AI system, a bank may refuse to grant a loan to a consumer. This decision will have material e.g. income loss, and non-material implications e.g. stress and anxiety for lack of financial stability or inability to pay for your children's education.

In both these situations, a claim against a business user and a claim for non-material damages, the only solution for consumers would be to submit a claim under the AILD. Unfortunately, this would not be an easy path for consumers for the reasons explained below.

3. Fault-based vs non fault-based liability

Unlike the PLD, the AILD proposal relies on a fault-based liability approach. This means that to claim compensation for damages caused by an AI, consumers harmed need to prove *fault* (intent or negligence) of the operator of the AI system in the application of a duty of care.

BEUC opposes this fault-based approach as it makes it very difficult, if not impossible, for consumers to benefit from their right to compensation for damages.

First, considering the characteristics of AI systems, and in particular their opacity, complexity and autonomy, consumers will struggle to substantiate their claims in practice and prove the fault of the AI operator. AI systems remain a 'black box' for most consumers and, when problems arise, very few individuals have the knowledge, skills or resources that are needed to file a compensation claim that can prove fault. For example, in a situation where a bank uses a biased AI system to assess the creditworthiness of consumers, consumers very likely would not be able to prove the discriminatory nature of the AI system and that the AI operator acted with intent or negligence.

The proposal puts forward new legal tools such as a duty of the AI system operator for the disclosure of evidence[4] and a presumption of causality[5] to help consumers overcome this challenge. However, as explained below in Chapters 5 and 6, these tools will be of limited added value for consumers since the barriers to their use are prohibitively high.

Second, in the AILD proposal, the concept of fault is associated with the non-compliance of the AI system with EU or national rules.[6] For example, in the case of high-risk AI systems, fault is associated to non-compliance with one (or more) of the requirements of the AI Act.[7] In the bank example mentioned above, fault would only exist if the consumers harmed i.e. those who would have had their credit rejected on the basis of a biased AI output, would be able to prove that the AI developer or the bank (business user) had violated the requirement of the AI Act which is aimed at preventing biases.[8] Consumers do have neither the legal nor the technical expertise and would have major difficulties to establish such claims because it would require paying expensive experts and that is if they can find them. Thus, such a requirement is likely an unsurmountable barrier for compensation claims.

Importantly, this understanding of fault does not take into consideration the possibility of harm occurring *even when an AI system is compliant with EU law*.[9] If fault is limited to non-compliance with the AI Act, consumers harmed by a *compliant* high-risk AI would not be able to claim compensation for the harm suffered since the AILD proposal would not apply for lack of fault.

Unlike in a fault-based regime, in a non fault-based liability regime like the one of the PLD, consumers harmed do not need to prove the fault of the AI operator. They only need to prove the defect, the damage and the causal link between the two. Such an approach makes life easier for consumers. But it would also have a positive impact on the market. A non fault-based liability regime for AI works as a deterrence and would strongly encourage companies to only develop safe technology. This would contribute to social acceptance of the technology.[10]

Also, the current lack of consistency between the AILD proposal's fault-based regime and PLD proposal's non fault-based framework may lead to unacceptable and unfair results for consumers, where the level of protection of consumers will be determined by the possible application of the PLD. For example, consumers will be better protected if a lawnmower shreds their shoes in the garden (because such a scenario falls under the scope of the PLD) than if they are unfairly discriminated against through a credit scoring system (which only falls under the scope of the AILD proposal).

In 2020, the European Parliament adopted a Resolution on Civil Liability for AI.[11] In this Resolution, the European Parliament called for strict liability for high-risk AI systems.

We welcome the European Parliament's call for a strict liability approach but recommend that it goes further by requiring the application of strict liability to all AI systems, and not only high-risk.

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[4] Article 3 AILD proposal;
[5] Article 4 AILD proposal;
[6] Article 2 (9) and Article 4 (1) a) AILD proposal ;
[7] Article 4 (2) AILD proposal;
[8] Articles 10 (2) f) and 10 (3) AI Act proposal;
[9] The possibility of harm caused by a compliant AI system is envisaged by the Commission under the AI Act proposal. Article 67 of the AI Act proposal (Compliant AI systems which present a risk) recognises the possibility that compliant AI systems may still present a risk to health or safety of persons as well as their fundamental rights.
[10] Herbert Zech, *Liability for AI: public policy considerations*, 2021, p. 6;
[11] European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence, https://www.europarl.europa.eu/doceo/document/TA-9-2020-0276_EN.html

From the consumer perspective, it does not matter if harm is caused by a high-risk AI system or not. Consumers have a right to get compensation and to have access to an effective process. This is already very difficult under the specific product liability regime of the PLD, but it becomes nearly impossible to achieve under a fault-based regime as the AILD currently stands.

The classical approach of the EU's product liability law was non fault-based liability as this increases chances for consumers to have access to compensation. With the AILD proposal's fault-based approach, the European Commission is taking a step back in the level of protection granted to consumers for products using new technologies which come with new risks and ways to suffer damage.

BEUC recommendations:

- For claims from consumers due to harm caused by an AI system, a non fault-based liability regime should be the default option.

4. Scope

4.1. Fully automated decision making (Recital 15 AILD)

The Commission's proposal only applies to fully automated decisions, in which humans have not been involved from the output onwards. This is stipulated by Recital 15 of the AILD proposal, which states that "*There is no need to cover liability claims when the damage is caused by a human assessment followed by a human act or omission, while the AI system only provided information or advice which was taken into account by the relevant actor*".

The danger of limiting the applicability of a provision to fully automated decision-making is well known from Article 22 of the General Data Protection Regulation (GDPR). Despite its potential to protect consumers, the application of this provision is still rare due to its strict conditions and vague wording.

First, the limitation of the AILD proposal to fully automated decisions might encourage companies to circumvent the rule by having an AI output rubberstamped by humans who blindly follow the machine advice to avoid falling under the scope of the directive.[12]

Second, it remains to be seen how this provision will interact with Art. 14 of the AI Act proposal, which requires high-risk AI systems to put in place *human* oversight. If compliance with Article 14 AI Act proposal and human oversight occurs after the output has been generated, then that specific high-risk AI system would fall out of the scope of the AILD proposal. If, however, the intervention of a human, in accordance with the AI Act proposal, happens prior to the output, then Recital 15 would not apply and that specific AI system would fall under the scope of the AILD proposal.

In a matter of such importance for consumers and for their right to redress, the applicability of a law should not be dependent on whether a decision is fully automated or not. For this reason, the limitation of the scope to fully automated decision making should be deleted.

[12] Philipp Hacker, *The European AI Liability Directives -Critique of a Half-Hearted Approach and Lessons for the Future*, November 2022, p. 26, https://ssrn.com/abstract=4279796

BEUC recommendations:

- The limitation of the scope to fully automated decision making in Recital 15 AILD should be deleted.

4.2. High-risk AI systems (Art. 2 (2) AILD)

When it comes to the definitions contained in the legislation, the AILD proposal relies heavily on the AI Act. For example, the definitions of 'AI system', 'high-risk AI system', 'provider' and 'user' are referred to the relevant provisions of the AI Act.[13]

While we understand the European Commission's intention to ensure consistency between the AI Act and the AILD proposals, when it comes to the definition of 'high-risk AI systems', it is too early to argue whether the AILD proposal should be limited to the high-risk definition of the AI Act.

The AI Act proposal is still being negotiated by the EU co-legislators and it cannot be said whether its high-risk category will be adequate from the perspective of the AILD proposal and consumers who seek to claim compensation.[14]

Under the Commission's AI Act proposal, the 'high-risk AI' category was too narrowly defined, excluding from its scope AI systems that can cause serious harm if misused. For example, AI systems likely to be used by children, AI used in home assistants, AI systems used by insurance companies or emotion recognition systems are not classified as 'high-risk'.

The AILD proposal applies to all AI systems and not only high-risk. However, certain tools which are deemed critical for an effective right to compensation under the proposal are limited to high-risk AI systems e.g. disclosure of evidence under Article 3, and that should not be the case.

Access to the disclosure of evidence procedure should be granted to consumers harmed by all AI systems. AI systems are complex technologies which are difficult to comprehend by most consumers. Unless important information regarding their use, for example how the system works, the logic used, the category or group to which consumers have been classified, how it took a decision, etc., is disclosed, consumers' chances of actually receiving compensation are very limited.

Even if the high-risk classification under the AI Act is broadened during the negotiation phase, it will never cover most AI systems capable of causing harm to consumers.

Also, importantly, according to Article 7 (2) b) of the AI Act proposal, one of the conditions for an AI system to be classified as high-risk is the risk of harm it poses to the health and safety, or a risk of adverse impact on fundamental rights, that is, in respect to its *severity* and *the probability of occurrence,* equivalent or greater than the risk of harm or of adverse impact posed by the high-risk AI systems already mentioned in Annex III of the AI Act. This means that an AI system would only be classified as high-risk if, inter alia, it causes severe harm, and such harm is likely to repeat itself. However, when it comes to compensation claims, the severity and probability of occurrence of harm caused by an AI

[13] Article 2 AILD proposal;
[14] Council of the European Union adopted a general approach on 6 December 2022. European Parliament is still working on its own Report;

system should not be key factors to determine consumers' access to documentation and eventually an effective right to compensation. [15]

BEUC recommendations:

- Article 3 should also apply to AI systems not classified as 'high-risk' under the European Commission's AI Act proposal, such as AI systems used in insurance services and emotion recognition systems.

- Articles 4 (2) and 4 (3) AILD should be amended to also cover these systems.

4.3. Claims against consumers

Unlike the PLD, under the AILD proposal, the defendant can be a consumer. The proposal even clarifies that the presumption of causality of Article 4 would apply against consumers only where the consumer materially interfered with the conditions of the AI system or if the consumer was required and able to determine the conditions of operation of the AI system and failed to do so.[16] This would be the situation, for example, where a consumer is piloting a drone that ends up harming a passer-by.

However, in a scenario where non fault-based liability would be the default rule under the AILD[17], considering consumers 'operators' could be dangerous, decrease the level of protection they are entitled to, and place an unjustifiable burden on them.[18]

BEUC recommendations:

- The AILD proposal should not regulate the liability of consumers towards other consumers. As such, Article 4 (6) should be deleted.

5. Burden of proof

5.1. Disclosure of evidence (Article 3)

As mentioned above, the European Commission proposes a new disclosure of evidence mechanism in Article 3. According to this provision, claimants or potential claimants can request that national courts order AI operators to disclose relevant evidence about a specific high-risk AI system that has caused damage. The objective is to allow claimants or potential claimants to assess the merits of their case before or during a complaint.

It is important to underline that if a defendant fails to comply with an order from the court to disclose evidence, the national court will presume the defendant's non-compliance with a relevant duty of care.[19]

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[15] "*If, in a given society of one million citizens, only five individuals stand to be significantly damaged by a certain AI application, this may not be enough to categorize the application as high-risk under the AI Act. However, such an individually pronounced risk must nevertheless be addressed by an effective system of liability and compensation."* Philipp Hacker, p. 21;

[16] Article 4 (6) AILD proposal;

[17] For more information, see Chapter 3;

[18] "*It would be very difficult to make frontend operators strictly liable as these parties would have to constantly monitor the development of legislation and adapt their insurance coverage accordingly. Private parties can hardly be expected to do so or can only be expected to do so on very rare occasions when an entirely new technology enters the market. Thus, if the decision were made to hold the frontend operator liable, this should normally not affect consumers, but only professional frontend operators*", C. Wendehorst, *Strict liability for AI and other emerging technologies*, Journal of European Tort Law, December 2020;

[19] Article 3 (5) AILD proposal;

While we welcome the reasoning behind this provision, unfortunately, as mentioned by our German[20] and Austrian[21] members, vzbv and AK Europa respectively, this tool will be of very limited use to the large majority of consumers.

First, the disclosure of evidence is limited to high-risk cases. As mentioned in Chapter 4.2, when it comes to the definition of 'high-risk AI systems', the AILD proposal should not be limited to the high-risk definition of the AI Act proposal. AI systems prone to creating significant harm might not be qualified as high-risk under the AI Act.

Furthermore, for consumers who have suffered damages, it will be difficult to identify whether the damages they have suffered were caused by a high-risk AI system or not.

Second, regarding a potential disclosure of evidence *before* a complaint has been filed, Article 3 (1) requires that the potential claimant has unsuccessfully asked the provider to disclose the relevant evidence before going to court. This formality is likely to prolong the procedure indefinitely.

Third, in a scenario where the AI operator refuses to disclose the evidence, the potential claimant must present sufficient facts and evidence to support the plausibility of the claim (Art. 3 (1), last sentence).[22] Naturally, there are situations where the plausibility of the claim will not be difficult to prove. For example, if an AI based lawn mower runs over someone's foot, it would not be difficult for the harmed person to provide facts/evidence to show that physical damage was caused by a malfunction of the lawn mower.

However, there are cases where the plausibility of the claim will be very difficult, if not impossible, for consumers to prove. If an AI system used by an insurance company to detect insurance fraud discriminates against dark-skinned people or women because the input data was biased, it will be practically impossible for laypeople to prove the malfunctioning and discriminatory behaviour of the AI system.[23]

Fourth, the disclosure is limited to evidence which is "at the disposal" of the provider of the high-risk system. This will be difficult to assess for consumers. It might also be the case that AI operators should have had at their disposal certain information under the AI Act proposal but did not. Article 3 (1) AILD should reflect this by enabling the disclosure of evidence at the disposal, or which should legally be, of the AI operator.[24]

Fifth, and finally, even if the request for disclosure of evidence is successful, it is very likely that the information and documentation provided to the potential claimant or claimant is too technical and complex for most consumers to be able to understand without the help of a computer scientist. As mentioned by the Commission[25], the documentation and evidence provided by AI operators should be the one created in the context of the AI Act proposal. However, the original recipients of this documentation under the AI Act proposal (regulators, authorities, AI experts) are very different from the recipients under the AILD proposal (consumers, most of whom do not have a technical expertise). Without external help (and the costs that come with it), most consumers will not be able to understand the documents provided to them.

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[20] Position paper of the Verbraucherzentrale Bundesverband (vzbv) on the European Commission's proposal for a directive on AI liability (COM (2022) 496): https://www.vzbv.de/sites/default/files/2022-12/EN_2022-06-12_vzbv_AILD_Positionpaper.pdf

[21] Position paper of the Austrian Federal Chamber of Labour (AK Europa) on the AI Liability Directive: https://www.akeuropa.eu/en/ai-liability-directive

[22] Article 3 (1) last sentence AILD proposal;

[23] Verbraucherzentrale Bundesverband (vzbv) position paper;

[24] Philipp Hacker, p. 36;

[25] "*The limitation of disclosure of evidence as regards high-risk AI systems is consistent with the AI Act, which provides certain specific documentation, record keeping and information obligations for operators involved in the design, development and deployment of high-risk.*" (Recital 18 AILD)

For all these reasons, we can assume that - due the complexity and the many barriers that the process of disclosure of evidence comes with as explained in this chapter - it is likely that most consumers will *not* be able to make good use of it.

BEUC recommendation:

- AI operators should be given a deadline to get back to the request of potential claimants under Article 3 (1) AILD proposal.

- Article 3 and the disclosure of evidence mechanism should apply to all AI systems, not only high-risk AI systems.

- The application of Article 3 should not be subject to consumers having to prove the plausibility of the claim. Disclosure of evidence should be ordered by national judges when consumers provide evidence of damage and involvement of an AI system.

- AI operators should be obliged to provide the disclosed information in a way that is understandable for consumers' legal representatives (e.g. machine-readable format).

5.2. Presumption of causality between the fault and the output (or failure to produce and output) of the AI system (Article 4)

In Article 4, the Commission puts forward another legal mechanism (presumption) to help claimants receive compensation for harm caused by an AI system. According to this provision, national courts would presume a causal link between the fault of the defendant and the output produced by the AI system or the failure of the AI system to produce output. Certain conditions, further detailed in this article, need to apply to trigger the presumption.

However, similar to the remarks made in the previous chapter about the disclosure of evidence, the presumption of causality comes with so many hurdles and costs that it will be almost impossible for the large majority of consumers to benefit from it.

The presumption can only be triggered if the claimant, for example the consumer, demonstrates the fault of the defendant, for example an AI operator.[26] Under the AILD proposal, fault is defined as non-compliance of a duty of care which is set by national or Union law.[27] For example, in the case of a high-risk AI system, fault is limited to the breach of the AI Act's requirements.[28]

This means that if an AI system used by a bank to assess consumers' creditworthiness[29] is biased, consumers would have to demonstrate, first, that the AI system is biased and, second, that such discriminatory treatment is a breach of the AI Act to prove fault of the AI operator.

This is an impossibly high barrier for most consumers, who, in the case of high-risk AI systems, would have to resort to the disclosure of evidence under Article 3 to obtain relevant documentation that can eventually help them to prove fault of the AI operator. But, as we have seen in the previous chapter, without legal and technical help, consumers will not be able to interpret and make good use of this documentation.

[26] Article 4 (1) a) AILD proposal;
[27] Article 2 (9) AILD proposal;
[28] Article 4 (2) AILD proposal;
[29] Which is a high-risk AI system under Annex III, 5.b. of the AI Act proposal.

In its impact assessment, the European Commission recognises the need for experts to provide evidence. However, involving external technical expertise entails high financial costs for consumers, which reduces their chances to get compensation down to a thread.

These remarks underline our observation that Art. 4 is tailored to professional claimants, such as companies, and not to consumers.[30]

5.3. Reversal of the burden of proof

As explained in the previous chapter, merely alleviating the burden of proof will not solve the problems consumers face when claiming compensation for harm caused by an AI system. Even if consumers benefit from the presumptions introduced in Article 3 and 4 AILD, they will still face significant challenges to substantiate their claims.

Requesting professionals to disclose the technical information will not help, as consumers may not have the expertise and sufficient skills to interpret the data while traders may avoid complying with this obligation on the pretext it is a trade secret. In turn this will significantly increase the costs and the length of the proceedings. Shifting the burden of proof is therefore clearly justified on the ground of both fairness and access to justice.

BEUC recommendation

- A reversal of the burden of proof should be introduced. Consumers should only have to prove the damage they suffered and the involvement of an AI system.

6. Damages

The European Commission did not propose to harmonise the types of damage covered by the AILD. As a result, it is up to each Member State to decide which types of damages, material and non-material, can be claimed by consumers.

It is essential that all types of harm, including non-material harm (such as pain, loss of an opportunity or inconvenience), are compensated. For example, if a chess robot grabs and breaks the arm of a toddler and leaves him permanently disabled for life, this may cause non-material damage such as loss of quality of life. An injury caused by a defective lawnmower to a gardener may cause material damages (related to the physical injury) but also non-material damages (pain related to the injury). The denial of a loan based on discriminatory grounds can cause stress, anxiety or affect someone's reputation.

Also, the harmonisation of non-material damages is particularly relevant for generative AI systems like ChatGPT. For example, recently, ChatGPT wrongly said that an US professor had touched a student inappropriately on a class trip to Alaska. Not only did the trip never take place but the chatbot even cited a non-existent article form the media.[31] This type of outputs from generative AI systems can create significant non-material harm to the person (reputational damage, anxiety, etc.) and it's only fair that harmed consumers are compensated for it.

While some Member States already cover non-material damages, only through a harmonisation of the damages covered will the AILD achieve a high-level of consumer protection across the EU. Importantly, there is a precedence of harmonisation of damages at EU level. For instance, the General Data Protection Regulation (GDPR)[32], the Package

[30] Verbraucherzentrale Bundesverband (vzbv) position paper;
[31] The Washington Post, ChatGPT invented a sexual harassment scandal and named a real law prof as the accused, 5 April 2023
[32] Article 82(1) General Data Protection Regulation (2016/679) covers "material and non-material damage"

Travel Directive[33], the Directive on the Enforcement of Intellectual Property[34] and the Directive on the Protection of Trade Secrets[35] all cover both material and non-material harm.

There is no reason why victims of non-material harm should be entitled to claim compensation if harm was caused by a privacy infringement, by a breach of a package travel contract, by a violation of intellectual property or by a violation of trade secrets but may have to depend on Member States if non-material harm was caused by flawed AI system.

BEUC recommendation

- The AILD should harmonise both material and non-material harm. This is already the case under other pieces of EU legislation, such as the GDPR or the Package Travel Directive.

7. Representative Actions Directive (Article 6)

BEUC welcomes the addition of the AILD into the annex of the EU Representative Actions Directive in Article 6 AILD proposal.

The European Union adopted the Representative Actions Directive (RAD) in November 2020 to strengthen consumers' ability to collectively enforce their rights both through injunctive and/or collective redress measures. Representative actions can be used both to order traders to stop illegal and harmful practices and/or to claim compensation for harmed consumers. Representative actions are possible in many sectors and under various EU legislations which are listed in the Annex of the RAD.

[33] Recital 34 Package Travel Directive (2015/2302) covers "non-material damage, such as compensation for the loss of enjoyment of the trip or holiday"
[34] Recital 26 Directive on the enforcement of Intellectual Property (2004/48) covers "any moral prejudice caused to the rightholder"
[35] Recital 30 Directive on the protection of trade secrets (2016/943) covers "any moral prejudice caused to the trade secret holder"

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