



Marco Visser
Chair, Liability/Insurability Working Group, Insurance Europe
Head of wordings & reinsurance, HDI Global, Germany

NEW LIABILITIES

Same again

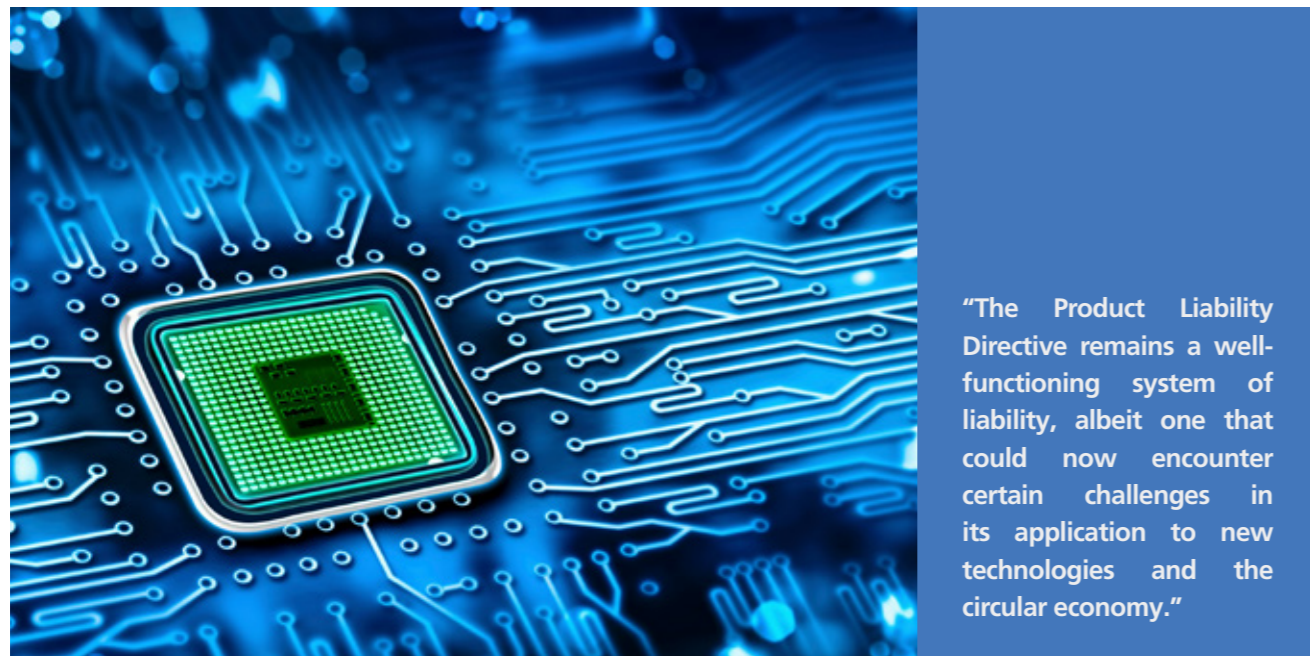
Risks from new technologies can be dealt with under existing EU liability legislation

As new risks emerge, so too do new liabilities for those who attempt to turn those risks into opportunities. For insurers, new liabilities open the door to developing new kinds of products and exploring new kinds of coverage. The new risks may also give rise to discussion of new protection gaps and the need for new liability rules.

Among the most prominent new risks are those posed by new and emerging technologies — particularly artificial intelligence (AI) — which raise many questions about established standards of safety, ethics and liability, as well as about how those standards are applied in an ever-evolving digital world. The European Commission is acting swiftly to address its concerns in this regard and has proposed an AI Act to regulate “high-risk” sectors and promote the ethical use of the technology in European society. (See p38 for an opinion article by EY on AI.)

As part of its work on AI, the EC is considering introducing new rules on liability. Before commenting on this, it is important to stress that, when it comes to liability, rules are defined first and foremost at national level, and national tort law has evolved to reflect EU member states’ distinct histories and legal systems, each with its own specific characteristics and precedents.

Over time, certain emerging risks have generated a discussion at EU level about the need to amend liability rules in order to



address imbalances in the rights and obligations of consumers and producers. This has led to the harmonisation of producers’ liability under the 1985 Product Liability Directive (PLD).

Liability for new and emerging risks falls under the framework of harmonised producer liability under the PLD, working in conjunction with the law of tort at national level.

A well-balanced liability regime

The PLD provides the legal basis for consumers to claim compensation in the case of a defective product. Under the Directive, producers are held strictly liable for damage caused by their defective products, while in order to claim compensation, consumers must demonstrate a product’s defect, the resulting damage and the causal link between the two. This system of liability places obligations on both consumers and producers, delicately balancing the former’s protection with the latter’s legitimate interests. As a directive, the PLD establishes full harmonisation at EU level but leaves

“Any substantial revision of the Product Liability Directive is likely to impact the cost and availability of product liability insurance.”

questions of damages and compensation to be defined by national courts.

Insurers fit into this landscape by offering liability insurance cover to lessen the negative consequences of accidents involving defective products. For consumers, this ensures that they receive compensation when accidents occur, while for producers it means a safety net to continue innovating in new areas through (a degree of) risk transfer to the private (re)insurance sector. General liability insurance is standard for all companies, no matter their country, size or sector. It tends to be written on an “all-risks” basis, covering every risk associated with an insured’s business unless expressly excluded. Products incorporating new technologies are no exception and policy wordings apply in the same way as to any “traditional” risk.

No time for major change

As the PLD dates from 1985, over the course of its lifetime it has been subjected to scrutiny as new types of products have come to market. However, consecutive evaluations have found that it remains a well-functioning system of liability, albeit one that — according to a 2018 evaluation — could now encounter certain challenges in its application to new technologies and the circular economy. Because of the findings of that most recent evaluation, the EC has initiated a

revision of the Directive; one that insurers think goes beyond the problems identified in the evaluations.

Insurers believe that any challenges can be addressed by non-legislative guidance clarifying the interpretation and scope of key concepts, such as the definitions of “product”, “producer” and “defect”. In relation to “defect”, it is worth recalling that the PLD operates in tandem with EU product safety legislation, which helps to determine if a product does not provide the safety a consumer may reasonably expect and can therefore be considered defective under the PLD.

Any substantial revision of the PLD is also likely to impact the cost and availability of product liability insurance. The liability insurance market has developed to reflect the balance of interests established by the PLD. This balance is a cornerstone of the Directive, creating an environment in which producers can innovate in the development of new products, including new technologies. Modifying the building blocks of the PLD — lowering the standard of proof, extending the scope of damages covered or modifying limits on and exemptions from liability — will upset this balance of interests and is likely to lead to insurers re-evaluating the products they offer.

In addition to an overhaul of the PLD, the EC is exploring the need to harmonise liability at EU level for operators of high-risk AI systems, as well as to impose on them a requirement to take out mandatory liability insurance. However, sector-specific legislation already exists for many of the AI systems that might be considered high-risk by the EC — such as motor vehicles under the Motor Insurance Directive and aircraft under the Regulation on Liability Insurance for Air Carriers. Any further harmonisation of liability rules must fit into the landscape of existing liability frameworks if it is to have any benefit for society. In Insurance Europe’s view, it is questionable whether there is any need for additional rules in this area.

An ecosystem of trust

The EC says that it is committed to implementing an “ecosystem of trust” when it comes to AI and new technologies. Insurers welcome this and stress that they have an important role to play in this ecosystem by providing compensation and supporting innovation. However, insurers must be granted the freedom to explore new kinds of coverage and develop new products as AI systems come to market and more data becomes available on which to assess the risks. Introducing a requirement to take out liability

Limits to compulsory insurance

Inappropriate compulsory insurance schemes can do more harm than good. There are only limited situations in which compulsory insurance can be appropriate because the following basic conditions — at the very least — must be met:

- Sufficient data for insurers to assess the expected frequency and size of claims, so that they can price policies correctly.
- Sufficient similarity in the risks being covered. If risks are very different, complex or not well known, insurers instead need to have the flexibility to tailor their underwriting to specific risks.
- A variety of insurers interested in offering cover, so that there is:
 - sufficient insurance capacity; and,
 - adequate competition.
- Enough reinsurance capacity to allow risks to be sufficiently spread, particularly large and long-term ones.

insurance would be counterproductive. Indeed, mandatory insurance schemes only work when the risks to be covered are all sufficiently similar and specific market pre-conditions are met (see box above). This is not the case for AI, which covers a broad range of uses in a host of different areas.

Harmonising liability rules at EU level can be an effective tool for correcting differences between EU member states and furthering the aims of the single market. However, as a tool that has far-reaching consequences, it should only be used when there is clear evidence of protection gaps and/or obvious issues at national level that warrant shifting the focus to the EU level. When it comes to the PLD, consecutive evaluations and studies mandated by the EC have failed to demonstrate that major changes to the Directive are needed, and harmonising liability rules at EU level for operators of high-risk AI seems premature, given that their associated risks are already covered by existing, sector-specific legislation, complemented by the joint framework of the PLD and national tort law. Major changes to the existing liability regime — which is what the EC’s plans would amount to — should only be made if they are backed by clear evidence of need. ■