EuroCommerce for retail & wholesale

Position Paper
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Adapting product liability rules to the digital age and Artificial Intelligence

Key Messages

(i) The simple, **technology-neutral and flexible approach** of the Product Liability Directive 85/374/EEC (PLD) has proven successful and has withstood the test of time.

(ii) The **definition of the physical product** in the Directive is interpreted as covering embedded software and needs to be aligned with the Regulation on the Market Surveillance package of 2019.

(iii) The *mere existence* of **AI, connectivity, and other emerging technology** should not be perceived as inherently creating problems and leading to compromising consumer trust.

(iv) **Changes made to digital products** after they are placed on the market (e.g. by software updates) are beneficial: interconnectivity can improve functionality, security and customer experience, and extend product lifetimes.

(v) The **liability of refurbishers and remanufacturers** should be assessed and aligned with Circular Economy Initiative's objective of promoting refurbishment, repair and reuse of products.

(vi) **Stakeholder engagement** and legislative scrutiny of GPSR, the AI Regulation and the Machinery Regulation are vital for charting the future direction for AI and cybersecurity requirements.

(vii) **Extending the PLD to other categories of harm/damage should be assessed very carefully**, given the challenge of finding a causal connection with alleged defects and the difficulty of assessing and quantifying them. However, an extension to environmental damage to public goods (e.g. air pollution) should be left to public and criminal law.

(viii) The PLD should **maintain its current liability framework** to keep the right balance between the interests of consumers and manufacturers.

(ix) Any need for separate and new liability rules for AI should be assessed on the basis of solid evidence and be limited to specific and **high-risk use cases**, to avoid creating unnecessary overlaps and stifling innovation.

Introduction

Consumer trust and safety is extremely important for retailers and wholesalers. Offering safe products and the option to recover damages from a number of parties when injured by the use of a defective product is a prerequisite for consumers and a priority for traders. The Products Liability Directive (PLD) provides for this option. Despite being drafted more than three decades ago, it works effectively and strikes a fair balance in protecting consumers and supporting product innovation**.** Due to its simplicity and product neutrality, it strikes a coherent balance also in sector-specific and product-specific safety law**.** It also provides a safety net to liability claims not covered by national legislation and contractual agreements between parties. We believe that any future changes considered should be evidence-based and maintain the future-proof character of the current legislation. Any changes to the current text of the PLD or new separate liability rules must avoid stifling product innovation and create the legal certainty necessary for innovation and investment in new technologies in Europe. Finally simply because a product is complex, or smart, it should not be assumed that the PLD is not a suitable regime to govern claims arising from harm or damage caused by such products.

Furthermore, it should also be defined how the two regulatory regimes (PLD and AI) can be distinguished from each other. For example, in the case of self-driving vehicles, when do the regulations the PLD apply (e.g. tyre blowouts) and when do the special regulations for AI apply (e.g. steering errors of the software).

No need to expand definition of product

Physical products should remain the basis for application of the Directive. The definition of the physical product in the Directive is seen as also covering embedded software. There is no evidence of a meaningful growth in claims (successful or not) arising from digital products and services or when stand-alone software has caused bodily harm or property damage. Our members experience suggests that there is more a *perceived*, rather than an *actual* problem of defects-related compensation claims in relation to digital products and services. We would therefore endorse and agree with conclusions expressed in the Commission's own Staff Working Document of 2018 that it may be premature to reach conclusions on this topic until more data emerges.

Potential problems in high-risk areas should be addressed by the relevant sector-specific framework We would nevertheless welcome further clarity on the concept of "product" within the framework of the PLD but in the form of a guidance to align with the regulation on the Market surveillance package of 2019 or in the context of the forthcoming update to the Commission Blue Guide for product safety.

Merely very cautious extension of liability

Extension of liability leads to an increased liability risk, which would often be countered with provisions or insurance. In any case, this would have to be passed on to the buyers - and ultimately to the consumers. This means higher prices for consumers and for companies from member states a competitive disadvantage compared to companies from third countries that are not subject to the regime. Finally, it is to be expected that consumers will subsequently resort to cheaper products from companies in third countries. This is easy due to online trading.

The proposed compensation for **environmental damage** (e.g. caused by chemical products) concerns either concrete damage suffered by the consumer (e.g. caused by exhaust gases, noise or waste water) or damage caused by common goods (e.g. air pollution). Insofar as a person can prove a concrete damage in terms of causality and amount, she or he can assert this before civil courts within the framework of the existing legal system (e.g. omission of and damages for immissions).

However, in the case of damage to public goods (e.g. air pollution), it is unclear why damages should be awarded to a specific person who has not been affected more or less than a large number of persons. Insofar as public goods are harmed, the law of damages is an unsuitable legal instrument. For this reason, the proposal for a civil environmental liability was not pursued at the time (cf. Proposal for a Directive on environmental liability with regard to the prevention and remedying of environmental damage [COM (2002)17 final]). Thus and rightly, the protection of common property is therefore only provided in public law (e.g. by the Directive 2004/35/EC on environmental liability

with regard to the prevention and remedying of environmental damage) and in environmental criminal law.

A **temporal extension** of civil liability would be impractical because provability becomes increasingly difficult with the passage of time. An extension would then lead to documents having to be kept longer, which would not only entail costs, but could also be problematic with regard to the GDPR. Moreover, documents are often kept by entrepreneurs only to the extent required by tax law. In addition, many SMEs would be affected by these standards. They do not have the resources to archive all possible relevant data. Witness statements are also extremely unreliable after a long time. For this reason, civil law tends to have short limitation periods in order not to burden legal peace for an unnecessarily long time. This sensible and proven principle should not be departed from.

Ensure legal consistency and avoid overlapping obligations

The draft Digital Services Act addresses online content (also on online marketplaces) and the General Product Safety Regulation (GPSD) proposal provides clarity on the liability for safety of products offered to consumers in the EU. Depending on the final texts which emerge from co-legislators, it would seem that both proposals will serve the purpose, and the Commission should ensure legislative coherence between the PLD and the legislation above currently under negotiation, as well as consistency with the hierarchy of economic operators as established in the Market Surveillance regulation. Other rules also offer protection to consumers that address other aspects of consumer protection (eg. Consumer Rights Directive, NLF, UCPD). The sum of these measures ensures that consumers are sufficiently protected, and do not need yet another set of potentially conflicting rules. Producers and importers should be considered liable in cases of damage caused by defective products, and consumers can make use of the existing national rules to claim compensation.

Consumers are well-protected with current harm definitions in EU law

The definition of damage in the PLD should not go beyond bodily harm and material/property damage. It should not be extended to include damage that cannot be expressed in economic terms or cover 'mere economic loss'. Any change to the definition in the current directive to include other categories of harm/damage should be approached with considerable caution given the difficulty of assessing the damage and connecting them causally to alleged defects. Psychological harm, for instance, raises very significant and obvious evidential and definitional challenges. While these are not necessarily insurmountable from a legislative perspective, the Commission should bear mind that business will need to factor any changes directly into their internal or third-party risk assessment and conformity assessment processes without any internationally recognized or accepted standards for doing so.

The definition of damage is also very broad and flexible and can be applied to cybersecurity vulnerabilities as well as to AI-driven products. Serving as a baseline it could be complimented by sector-specific product safety legislation containing ex-ante safety and cybersecurity obligations. The revised NIS 2 directive for example will complement this with stricter horizontal requirements and reduces the need for consumers to seek compensation under product liability rules.

Lastly, current legislation already covers psychological harm/emotional pain and suffering as compensable if consequential to personal injury; and basic rights infringements (data protection, discrimination and such) already fall within the scope of other legislation, such as the GDPR (Article 82 on the right of compensation and liability). Therefore, we recommend avoiding duplication of these provision, and explicit acknowledgment that the GDPR takes precedence.

Assess position refurbishers and remanufacturers

We encourage the Commission to consider the liability of refurbishers and remanufacturers and how to align this with the objectives of Circular Economy Initiative to promote refurbishment, repair and reuse of products. One option might be the inclusion of "substantial modification" language as seen in the Blue Guide and NLF legislation that treats subsequent actors as manufacturers.

Causality should always be established

The current PLD should maintain its balanced approach between the interests of consumers and

manufacturers, and supporting product innovation. It is vital that actors are liable only if causality can be demonstrated between the damage and the defect, within the product's intended use. This is particularly important, in line with the SME Test and Act, where the company in question is an SME with very little resources. The development risk defence strike a fine balance of interests between customers and businesses as well as their shared interest in product innovation. Producers have rarely had to resort to this defence, but, in instances where the facts show that the risk was not known or foreseeable based on the "state of the art", it is fair and reasonable for the defence to apply, particularly given the otherwise strict liability nature of the PLD regime. The courts of individual member states are well equipped to decide on the facts and whether they support such a defence. Legislators plainly concluded that it was appropriate to include this defence at the time the PLD was enacted and we are not aware of any compelling reason for a different conclusion to be reached today. The provision is also flanked by existing regulatory safeguards. Product composition and design are already subject to the most rigorous checks and balances in the form of the "essential requirements" of product/sector-specific laws and the more generic provisions of the GPSD.

The Burden of proof should not be reversed

Lastly, consumer perception of the complexity of a product provides no valid reason to reverse the burden of proof and of causality on manufacturers. National judiciary systems and Alternative Dispute Resolution solutions have proved to facilitate the burden of proving effectiveness and causality when consumers lack technical expertise. In particular in the case of SMEs, which often lack the capacity to prove that they had no responsibility for any harm and are least able to afford compensation costs.

Liability for AI

Legal certainty needs clear rules. It will be difficult to define which products are complex or which are opaque or highly autonomous AI systems and products. The AI Act contains a definition of prohibited or high-risk applications of AI, but not categories of products. We would not support the reversal of the burden of proof, but rather suggest that PLD principles such as evidence of harm and causality, be applied. In line with this, a potential lack of compliance with a product safety requirement should not automatically trigger liability for harm, unless evidence is provided that such non-compliance caused the harm.

AI is often used in non-critical applications, e.g. in managing the memory of a computer, scheduling, or in purchasing management. However, AI can also be used in very critical areas that are associated with significant risks, e.g. to the life, physical integrity, or health of people. At present, the majority of AI are so-called "weak" systems or assistance systems that either provide recommendations for a final human decision or whose learning and decision-making processes take place in human-determined paths and within predefined limits. As such AI systems do not pose any particular risk potential, there is no need for regulation. This is different for AI systems that make critical decisions autonomously. Thus, the new regulations should be limited to specific and high-risk use cases.

We urge the Commission to consider the broader regulatory landscape, including national laws and EU-level safeguards that cover or will soon cover AI systems such as the AI Act and horizontal rules in the GPSD/R and the Cyber Security Regulation. These EU laws provide ex-ante safeguards that lower potential risks related to products and services placed in the market, including in relation to AI. In particular the AI Act will introduce new certification schemes and harmonised standards aimed at increasing safety.

Contact:
Savvina Papadaki - +32 456 35 6163 - papadaki@eurocommerce.eu Transparency Register ID: 84973761187-60