

Revision of EU Product Liability Rules

The consumer view

IMCO *Public Hearing*, 22 January 2020



PRODUCTS IN 1985 vs 2020



6 millions IoT connections expected for 2020

*“Some key concepts underpinning the EU regime, as adopted in 1985, are **today an inadequate match** for the potential risks of emerging digital technologies” (Expert Group on Liability & New Technologies, November 2019).*



German parents told to destroy Cayla dolls over hacking fears

17 February 2017

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Technology

Nest thermostat bug leaves users cold

By Jane Wakefield
Technology reporter

Hackers Found a (Not-So-Easy) Way to Make the Amazon Echo a Spy Bug

Researchers found they could turn the smart speakers into surveillance devices—if they could get their own attack tool on the same Wi-Fi.

KU LEUVEN RESEARCHERS ONCE AGAIN HACK A TESLA MODEL S KEY FOB

29/08/2019

Security

Connected kettles boil over, spill Wi-Fi passwords over London

Pen-tester's killer cuppas made in cracked iKettle

By Darren Pauli 19 Oct 2015 at 05:57 125 SHARE



A security man has mapped and hacked insecure connected kettles across London, proving they can leak WiFi passwords.

Security flaws in a popular smart home hub let hackers unlock front doors

DEFECTIVE DIGITAL GOODS: A DIVE INTO THE UNKNOWN FOR CONSUMERS

Disruptive factors of digital goods

- Complexity
- Opacity
- Autonomy and unpredictability
- Vulnerability



Consequences for EU consumers

- No legal certainty
- Unclear rights
- Harm not compensated
- Fragmented national rules, risks of unequal treatments
- Businesses not incentivized to fully internalize the costs of defective products

A NEED FOR AN INTEGRATED APPROACH TO PRODUCT LIABILITY



- **“Product”** (Art.2 PLD)
 - Movable products only, services excluded.
 - Scope no longer adapted (e.g. what about a standalone software)?
 - *Rules should cover tangible and intangible goods (digital contents).*
- **“Defect”** (Art.6 PLD)
 - Linked to the “safety which a person is entitled to expect”.
 - Focus on “the time when the product was put into circulation”.
 - Yet producers keep control over their products via updates and upgrades.
 - Emergence of new risks (e.g. cybersecurity flaws).
 - *Rules must be adapted to the dynamic nature of digital goods and to new risks.*

ISSUES

- **Burden of proof** (Art.4)
 - The injured party must prove the defect, the damage and the causal link.
 - Yet new technologies have increased evidentiary difficulties (multifaceted and multcentred defects, with many concurring causes).
 - Too heavy burden for the injured party.
- *Need for a reversal of the burden of the proof.*
- **Liabile persons** (Art.3)
 - Liability does not extend to all actors involved in the distribution chain.
 - Yet intervention of a plurality of actors (manufacturers, software developers, creators of digital contents, etc.)
- *Any professional in the product supply chain should be liable when the activity has affected the safety of the product.*

- **Risk development defence** (Art. 7e)

“The producer should be strictly liable for defects in emerging digital technologies even if said defects appear after the product was put into circulation, as long as the producer was still in control of updates to, or upgrades on, the technology. A development risk defence should not apply”

(Expert Group Report, 2019 p.6).

- *The injured party should always be compensated, whether the defect was detectable or not.*

TOWARD RULES THAT WORK FOR CONSUMERS IN THE DIGITAL ERA

- Adapted to the **dynamic features** of digital goods.
- “Products” covering **tangible and intangible** goods (digital contents).
- Built on an extended notion of “**defect**” (including cybersecurity, privacy risks).
- Built on an extended notion of **damage** (e.g. damage to data).
- Reversal of the **burden of proof**.
- Liability of **all actors** involved in the product supply chain.
- Removal of the **development risk** defence.
- Increased **transparency** for defective products (e.g. registry)



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This presentation is part of an activity which has received funding under an operating grant from the European Union's Consumer Programme (2014-2020).