Revision of EU Product Liability Rules

The consumer view

IMCO Public Hearing, 22 January 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).

6 millions IoT connections expected for 2020
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.

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

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

29/09/2019
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 Safety
- Cybersecurity
- Services
- Enforcement
- AI initiatives
- Liability of intermediaries
- Other liability regimes
ISSUES

• “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 entitle 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.*
• **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 multicentred defects, with many concurring causes).
  ▪ Too heavy burden for the injured party.
  
  ➢ *Need for a reversal of the burden of the proof.*

• **Liable 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)
Thank you for your attention

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