NEW PRODUCT LIABILITY DIRECTIVE - Q4 2020

CONTENT

On 28 September 2022, the European Commission published its proposal for a directive on liability of defective products revising the existing Product Liability Directive (PLD) that was adopted nearly 40 years ago. The proposal aims to bring the EU’s product liability regime up to speed with the digital age, the circular economy business models, the global value chains, and the need to ease the burden of proof for consumers seeking compensation for damages suffered because of defective products.

At the time the PLD was adopted in 1985, the Commission saw a need to harmonize the fragmented legal protection on damage caused by defective products. The PLD introduced a common set of rules enabling harmonization and an equal level of protection of consumers throughout the single market using the concept of no fault-based liability of producers for damage caused by defective products.

No fault-based liability means that the liability does not depend on fault or negligence of the manufacturer (also called ‘strict liability’, where producers are responsible for defective products, regardless of whether the defect is their fault). This form of liability differs from fault-based liability regimes where an injured person can make a claim for damages caused by products and services based on a person’s conduct by generally proving (i) the existence of a damage, (ii) a fault of the liable person, and (iii) a causality between that fault and the damage.

To be compensated under the PLD no-fault liability regime, the burden of proof for the injured person consists in showing only that

- the product was defective.
- he/she suffered a damage.
- there is a casual link between the damage and the product’s defectiveness.

Among its main provisions, the proposal revising the existing PLD:

- clarifies that software must be considered a product in the scope of the directive;
- considers as product defectiveness the lack of software updates under the manufacturer’s control as well as the failure to address cybersecurity vulnerabilities;
- introduces liability for defective products when refurbished and placed back on the market as well as when manufactured outside the European Union;
• alleviates the burden of proof for victims under certain circumstances; and
• extends the nature of damage to medically recognized harm to psychological health and loss or corruption of data.

With the aim of not hampering innovation (i) free and open-source software developed or supplied outside the course of commercial activity as well as (ii) the source code of software are excluded from the definition of products covered under the proposal.

In Parliament, the file has been assigned jointly (under Rule 58) to the Committee on Internal Market and Consumer Protection (IMCO) and the Legal Affairs Committee (JURI). Vlad Botoș ( Renew, Romania) and Pascal Arimont (EPP, Belgium) have been appointed as rapporteurs. The co-rapporteurs unveiled their draft report on 5 April 2023. Their amendments to the Commission proposal inter-alia concern:

• The notion of damage - co-rapporteurs removed the loss or corruption of data from the scope because they considered it already covered under other EU laws (e.g. GDPR). In addition, the draft report clarified that medically recognized harm to psychological health should be confirmed ‘by a court-ordered medical expert’.
• Concept of defectiveness - co-rapporteurs specified that cybersecurity vulnerabilities in a product qualify as a defect only when the product does not comply with mandatory cybersecurity requirements set in the EU or national law.
• Reversal of the burden of proof - co-rapporteurs opposed a general reversal of the burden of proof for highly complex products (e.g. AI systems) by removing the presumptions and adding that the defendant must prove that it is highly likely that ‘the product was defective in such a way that the defectiveness is highly likely the cause of the damage’.
• Collection of evidence - co-rapporteurs narrowed down the conditions for court-ordered disclosure of evidence putting safeguards to assure confidentiality of the information. In addition, the draft report gave the manufacturers the possibility to request access to the evidence of the claimant.

The vote in committee is planned on 19 September 2023.

The Council adopted its negotiating mandate for a new EU law on liability for defective products on 14 June 2023. Some of the amendments introduced by the Council include:

• clarifying the presumption of defectiveness of a product by national courts when claimants are facing excessive difficulties in proving a defect, in particular due to the technical or scientific complexity of the case.
• leaving the exemption afforded to manufacturers for scientifically and technically undiscoverable defects subject to member state derogations as under the existing PLD;
• extending the expiry period from 15 to 20 years for the compensation which the injured person is entitled to in cases where the symptoms of a personal injury are slow to emerge;
• adding raw materials (such as gas and water) within the definition of a product; and
• explicitly excluding electronic communications services from the scope of related services.
The European Economic and Social Committee (EESC) adopted its opinion on 24 January 2023. It supported the inclusion of AI through a no-fault liability regime and asked for a clarification of the notion of 'substantial modification' of the product in line with the Blue Guide.

References:

- EP Legislative Observatory, Liability for defective products, 2022/0302 (COD)
- European Economic and Social Committee, EESC Opinion: Revision of the Product Liability Directive, 24 January 2023

Further reading:

- European Parliament, EPRS, Updating liability rules for defective products, Initial appraisal, January 2023
- European Parliament, EPRS, Aligning the Product Liability Directive with the circular economy and emerging technologies, Implementation appraisal, October 2022

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