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. The PLD introduces 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 (e.g. producers are responsible for defective products, regardless of whether the defect is their fault).

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.

The European Economic and Social Committee (EESC) adopted its opinion on 24 January 2023 and supported the inclusion of AI through a no-fault liability regime.

The Council adopted its common position in June 2023. The Council proposes, inter alia to:
• Scope of application - add raw materials (such as gas and water) within the definition of a product.
• Damages - keep the Commission proposal for damages including loss or corruption of data.
• Presumption of defectiveness - clarify that the defectiveness of a product is determined by reference to the safety that the ‘public at large’ is entitled to expect and that warnings or other information provided with a product cannot by themselves make an otherwise defective product safe.
• Cascade of attributable liability - further establish that manufacturer includes any person who presents themselves as the manufacturer by affixing, or authorising a third party to affix, their name, trademark or other distinguishing feature.
• Development risk defence - leave the exemption subject to Member State derogations as under the existing PLD.
• Compensation period - extend 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.

In Parliament, the file was assigned jointly (under Rule 58) to the Committee on Internal Market and Consumer Protection (IMCO) and the Committee on Legal Affairs (JURI), with Vlad Botoş (Renew, Romania) and Pascal Arimont (EPP, Belgium) appointed as rapporteurs. The joint committees adopted a report on 9 October 2023 and decided to enter into negotiations with the Council. Parliament confirmed the decision at the plenary session of 16 October 2023. Parliament’s amendments to the Commission’s text includes:

• Scope of application – adding raw materials in the definition of a product similarly to the Council.
• Damages - clarifying that medically recognised harm to psychological health should be confirmed 'by a court-ordered medical expert' and that the destruction or irreversible corruption of data that is not used for professional purposes should not be compensated if the economic value of the damage is below €1000 (e.g. setting a threshold to limit the potential risk of excessive litigations).
• Assessment of defectiveness - considering a product defective when it does not provide the safety that an average person (instead of the ‘public at large’) is entitled to expect, taking into consideration in particular the standard of safety applicable to the product in question.
• Cascade of attributable liability - allowing Member States to compensate persons who suffered damage caused by defective products via national schemes (which should not be funded by public revenues) when victims fail to obtain compensation because no economic operator is held liable, is insolvent or have ceased to exist.
• Micro or small enterprises producing software exemption - introducing a new exemption from liability in the case of a manufacturer of software that, at the time of the placing on the market of that software, was micro or small enterprise provided that another economic operator would be liable for damaged caused by that software.

The co-legislators reached a provisional agreement on this file on 14 December 2023. Most of the agreed changes include:

• Extending the definition of ‘product’ to digital manufacturing files and software. Free and open-source software that is developed or supplied outside the course of a commercial activity is excluded from the scope of the directive.
• Including medically recognised damage to psychological health as well as destruction or irreversible corruption of data in the definition of damage.
• Including non-material losses resulting from the damage within the right to claim compensation.
• Alleviating the burden of proof which would remain on the injured person.
• Extending the liability period to 25 years in exceptional cases when symptoms are slow to emerge.
• Introducing a cascade of attributable liability for the economic operators.

The text still needs to be formally adopted by the Parliament and the Council before it can be published in the EU's Official Journal and enter into force.

References:

• EP Legislative Observatory, Liability for defective products, 2022/0302 (COD)
• European Commission, Proposal for a Directive on Liability of Defective Product, COM(2022) 495
• European Parliament, Deal to better protect consumers from damages caused by defective products, Press release, 14 December 2023.
• European Economic and Social Committee, EESC Opinion: Revision of the Product Liability Directive, 24 January 2023

Further reading:

• European Parliament, EPRS, New Product Liability Directive, Briefing, November 2023
• 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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