

10 January 2022

Adapting liability rules to the digital age and Artificial Intelligence

KEY MESSAGES

- BusinessEurope generally finds that the Product Liability Directive 85/374/EEC (PLD) establishes a future-proof, technology-neutral and flexible framework for product liability.
- Physical products should remain the basis for the application of the Directive and clarity on the coverage of embedded software could be enhanced through clearer guidance.
- The PLD should remain technology neutral and be consistent with the proposed Artificial Intelligence Act.
- The EU legal framework on product safety establishes sufficient rules to ensure consumer protection as regards products bought online.
- Only physical and property damage should continue to be covered under the Product Liability framework.
- We support the concept of “*substantial modification*”, in which case the responsibility for the safety of the product or part of a product, shifts to the economic operator making the modification.
- The PLD should maintain its balanced liability framework between the consumers and manufacturers.
- The need to introduce separate and new liability rules for AI should rely on solid evidence and be limited to specific and high-risk use-cases, to avoid creating unnecessary overlaps and stifling innovation.

COMPENSATION AND LIABILITY FOR INTANGIBLE ITEMS

The application of the PLD to technologies that operate more as a service than as products, such as the online use of software, should mainly be addressable under the existing framework and be consistent with the Artificial Intelligence Act. A better understanding of the existing possibilities under the PLD is needed in order to provide clarity on the concept of “product” – this could happen for example by continuation of the existing expert group on the PLD. More clarity on the coverage of embedded software could also be enhanced through clearer guidance, including the incoming update to the Commission Blue Guide for product safety.

In all cases, software or data should not be defined as a ‘product’ as understood in the Product Liability Directive. This would broaden the scope of the Directive and change its logic. Not only would it raise many practical issues related to other concepts in the



COMMENTS

Directive, most notably that of 'defect', what is key is that the consumer can effectively address the producer of the tangible product, who in turn will have recourse to other parts of the supply chain. Very little evidence has been established of cases where stand-alone software would have caused bodily harm or property damage. Potential problems in high-risk areas should be addressed by the relevant sector-specific framework.

While we see a certain trend where consumers are increasingly using services in addition to or instead of acquiring manufactured tangible goods, these services will still require a physical infrastructure in their execution. Therefore, we recommend that physical products remain the basis for the application of the Directive and that any possible initiatives do not explicitly define services as a product. In most cases the relationship between provider and end-user is already covered by a contractual relationship, while services that are inherently dangerous or pose specific risks to the users are usually already regulated by sector-specific legislation (e.g., healthcare, or legal services).

ROLE OF ONLINE MARKETPLACES

The role of online marketplaces and their responsibilities is well established under the current and proposed EU legal framework, in particular the Digital Services Act, the General Product Safety Regulation, the Market Surveillance Regulation, and the Platform to Business Regulation. In our opinion, these (proposals for) regulations are sufficient to ensure consumer protection as regards products bought through online marketplaces.

Furthermore, new provisions under the proposed Digital Services Act (Art. 14 and 22) and the General Product Safety Regulation (Art. 20) provide for strict due diligence and traceability obligations on online marketplaces. These requirements are completed by the new obligation for economic operators to appoint an EU representative for high-risk products sold in the EU where there is no EU-based producer or importer, recently applicable in the framework of the Market Surveillance Regulation, which is sufficient to ensure the same level of protection for the purchases of products online. Holding online marketplaces strictly liable for products of which they are not the producer, seller or importer would make them liable for products which are not under their control. We should be careful not to impose large barriers for new intermediaries to enter the market. Therefore, the impact of these new regulations should be carefully assessed before considering any further change to the EU liability framework to ensure that it remains consistent.

NEW CATEGORIES OF RISKS

BusinessEurope recommends that only physical and property damage should continue to be covered under the Product Liability framework.



COMMENTS

We stress that the EU product safety legal framework provides sound safety and cybersecurity obligations ex-ante that will be complemented with stricter horizontal requirements in the framework of the announced EU Cyber Resilience Act, based on the principles of the New Legislative Framework for products. To the extent that safety legislation ensures the safety of products on the market, it will reduce the need for consumers to seek for compensation under product liability rules. While issues with cybersecurity may indeed result eventually in a ‘defect’ as understood by the Directive, the consumer can find recourse with the producer of the physical product, who can then in turn recover the costs further up in the supply chain through contractual relations. Therefore, we do not see the need to explicitly widen the concept of ‘defect’ to include cybersecurity. In addition, cyberattacks usually involve economic damages, which are not and should not be covered by strict liability. If software is used to control safety critical applications, the relevant safety standards should be addressed by special legislation.

Furthermore, it is difficult to quantify to what type of damages it would lead, and how harmful the impact is for consumers. It is important to ensure legal certainty for businesses and to balance strict liability for damages linked to poor cyber-hygiene practices by users. Since infringements of data privacy and personal rights are already sanctioned in data privacy law, anti-discrimination law and tort liability, we see no gaps in legal protection. In addition, a risk-oriented approach to liability also means that there should not be multiple liability for any damage under the same conditions. We should be cautious not to limit innovation because manufacturers are potentially exposed to unlimited damage claims that go beyond property damage/physical injury.

CIRCULAR ECONOMY

BusinessEurope agrees that when substantial modifications are made to a product after they are placed on the market, new risks may occur. We therefore support the concept of “*substantial modification*”, in which case the responsibility for the safety of the product or part of a product, shifts to the economic operator making the modification (in this case the repairer, or refurbisher). The definition of “*substantial modification*” must be clearly defined, based on robust criteria, and be consistent with the proposed Machinery Regulation, the Artificial Intelligence Act and the General Product Safety Regulation.

COMPENSATION CLAIMS

The current PLD should maintain its balanced liability framework between the consumers and manufacturers. It is vital that actors are liable only when causality between damage and defect can be demonstrated within the remit of the product’s intended use, irrespective of whether the product is equipped with or without digital content (data, software, algorithms). Otherwise, this could be costly for SMEs and start-ups who both lack the capacity to prove that they had no responsibility for any harm and are least able to afford compensation costs. Complexity of products from the consumer perspective is



COMMENTS

not a valid reason to reverse the burden of proof and causality on manufacturers. In addition, national judiciary systems have proved to facilitate the burden of proving defectiveness and causality when consumers lack technical expertise. Any mechanism to reverse the burden of proof should be carefully assessed and focus on potential high-risk areas aligned with the relevant sector-specific framework and the Artificial Intelligence Act. A blanket approach is not consistent with a risk-based approach and would greatly undermine the uptake of new technologies in the EU.

The use of the development risk defence should remain available without any change. BusinessEurope is concerned that discussions seem to be driven by concerns which are misconceived and based on an overvaluation of the capabilities of AI systems. None of the case studies from the Commission's Staff Working Document on liability for emerging digital technologies for example demonstrates that existing safeguards were insufficient to deal with the scenarios outlined. We should allow leeway for innovation and not impose a de facto indefinite liability for the producer in case of systems that operate with a degree of autonomy. Instead, the defences should be interpreted in such a way that they also apply for such systems, where it may be equally possible that the defect did not exist or could not be discovered when the product was put into circulation.

The 10-year time limit also provides important certainty about producers' claims risk and is important for insurance purposes. It provides legal certainty for industry and other stakeholders as well (e.g., healthcare professionals). Additionally, providing an expiry period of 10 is five times as long as most warranties, which are typically around 2 years.

LIABILITY FOR AI

The simplicity and technology-neutral character of the PLD already ensure that rules apply to any product, including AI-enabled products. In addition, the proposed Artificial Intelligence Act will introduce new responsibilities for users and providers in the supply chain and mandatory requirements that will help address possible issues around opacity and complexity of high-risk AI systems as well as additional safeguards for consumers – further complemented by the General Data Protection Regulation and the Data Governance Act in relation to data. These (proposals for) regulation provide strong ex-ante safeguards that lower potential risks related to AI-enabled products and services. Therefore, the need to introduce separate and new liability rules for AI should rely on solid evidence, and, in any case, be limited to specific and high-risk use-cases not covered yet, to avoid creating unnecessary overlaps and stifling innovation.

Nevertheless, BusinessEurope recognizes that new technologies create interdependencies between multiple product developers, service providers and users of the data, in specific situations due to the complex supply and value chains. As a matter of principle, all parties involved along the value chain should be covered, according to their individual contribution. The aim should be to fill unacceptable liability gaps in such



COMMENTS

a way that no party is unfairly burdened. In case of new AI-specific liabilities, it could be appropriate to cover next to “producers” (manufacturers) other potential players along the value chain, consistently with the proposed Artificial Intelligence Act.

This in no way should make them solely liable for any incident that arises. Demonstrating a line of causality between the businesses defect in the performance of the digital content, software, algorithms, data, and of digital services, and the harm caused by the high-risk AI system would remain crucial. As a result, we should only give the possibility to seek either economic operator liable if the causality between the damage and defect can be demonstrated within the remit of the products intended use (just as the status quo for manufacturers). Otherwise, an unlevel playing field will grow where the manufacturer becomes the only possible actor to be found liable for a product on the market when an incident arises, even if out of their control.