



## Commission proposal for new EU product liability directive.

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A proposal for a new, revised product liability directive has been published by the European Commission on September 28th. As this piece of legislation has a potentially high impact on EU product liability, we would like to give you a short overview of the proposal and its implications.

### Current EU product liability directive

The current EU product liability directive dates back to 1985 and has since been the foundation of product liability in the EU. Due to the directive, all European Member States had to implement strict liability for defective products into their national legal systems, and consumers have since been able to claim compensation for damages caused by defective products based on strict liability throughout the EU.

#### Evaluation results

In the run-up to the new proposal the European Commission had been conducting an evaluation of the current directive, considering statements from a wide range of stakeholders from product manufacturing industry to consumer protection organisations as well as expert opinions. While, as a result of the evaluation, the current directive was found to be generally effective and fit for purpose, it was found to show several shortcomings (e. g. lack of clarity regarding emerging technologies such as AI and intangible products in general; high burden of proof for claimants in complex cases).

The Commission recommends repealing the current directive and **proposes** a new, revised version.

### New product liability directive – summary of proposed changes

The **Commission proposal** contains several important changes:

- **Definition of product (Art. 4 (1))**  
Digital manufacturing files and software are added to the scope of the directive (also including intangible products like AI systems and AI-enabled goods; the new directive will apply to integrated as well as to non-integrated software and digital manufacturing files).
- **Definition of damage (Art. 4 (6))**  
The definition of damage now includes 'loss or corruption of data' as a parallel to the new definition of product. Damage from death or injury is covered as before, with a new (clear) reference to include 'medically recognised harm to psychological health'. Damage to property is included as before, but the 500 EUR threshold has been removed.
- **Disclosure of evidence (Art. 8)**  
Where an injured person has presented facts and evidence sufficient to support the plausibility of their claim, according to the new directive defendants can be ordered by national courts **to disclose relevant evidence that is at their disposal**. According to the European Commission this addresses the asymmetry of information between the manufacturer and consumer.

Although the courts are to ensure that they limit the disclosure of evidence to what is necessary and proportionate, this will increase the burden of disclosure on manufacturers which is relatively limited in most Member States now.

- **Burden of proof (Art. 9)**

The proposal introduces several new legal presumptions into the directive. The defectiveness of the product will be presumed, if

- the defendant has failed to comply with an obligation to disclose relevant evidence (cf. above),
- the product does not comply with mandatory safety requirements intended to protect against the risk of the occurred damage
- the damage was caused by an obvious malfunction of the product during normal use/ordinary circumstances.

There is a new specific presumption in cases of **technical or scientific complexity**:

Where the claimant faces excessive difficulties to prove the defectiveness of the product due to technical or scientific complexity, the defectiveness will be presumed (under certain circumstances, to be established by the claimant); the same applies where the difficulty relates to the causal link or the damage. The new presumption will be of particular concern to manufacturers (the presumption can be contested in court, but certainly increases their burden of proof).

While the articles of the directive do not define 'technical or scientific complexity' or give a list of industries or products this is aiming at, some of the commission's considerations can be found in recitals 3, 30 and 34 of the proposal. Among the examples given here are medical devices, pharmaceuticals and AI systems.

- **Defect (Art. 6)**

Similar to the current directive, a product shall be 'considered defective when it does not provide the safety which the public at large is entitled to expect'. The proposal's (non-exhaustive) list of circumstances to be considered when establishing the defectiveness adds a few aspects to the list of the current directive, for example:

- the effect on the product of any ability to continue to learn after deployment.
- product safety requirements including safety-relevant cybersecurity requirements.
- the specific expectations of the end-users for whom the product is intended.

Despite the possibility of exculpation for a defendant (e. g. where he or she proves that it is probable that the defectiveness did not exist when the product was placed on the market (Art. 10 paragraph 1. c)), there will be no exemption from liability where the defectiveness of the product is due to a related service, software, including software updates or upgrades or the lack of software updates/upgrades necessary to maintain safety (Art. 10 paragraph 2. a and b), where these are in the manufacturer's control.

- **'Manufacturer' instead of 'producer' (Art. 4 (11) and (16), Art. 7)**

Instead of the term 'producer' the new proposal introduces the term 'manufacturer'. Under certain circumstances where the manufacturer cannot be held liable, other 'economic operators' are held liable by the new proposal. The scope of the directive is widened in this respect, including providers of software or digital services, online marketplaces, fulfilment service providers and authorised representatives of non-EU manufacturers as liable persons/entities.

- **Time limits (Art. 14)**

As in the current directive, a limitation period of three years (initiation of proceedings 3 years after awareness of the damage) and a longstop period of 10 years (expiration of rights of the injured person 10 years after placing the product on the market) apply. Where an injured person has not been able to initiate proceedings within 10 years due to the latency of a personal injury, **the new directive extends the longstop period to 15 years.**

The time of placing the product on the market is also the basis for determining the defectiveness of a product under the proposed directive (cf. 'Defect' above).

But for products requiring frequent software updates/upgrades the proposal extends the responsibility of the manufacturer to a later date: the manufacturer remains responsible for the products' faultlessness as long as the manufacturer retains control in the form of providing/authorising software updates or upgrades for the product (cf. Art. 6 1. (e), Art. 4 (5)).

## Probable impact on product liability insurance

While the Commission proposal does not introduce the requirement of compulsory insurance or an obligatory financial security for manufacturers, it widens the scope of European product liability.

The proposal extends the directive to include intangible products like software. Manufacturers of these products – if they have not done so yet – might want to make sure to buy product liability insurance to cover possible bodily injury/property damage caused by these products.

As data loss is included in the new definition of damage as well, coverage solutions for this kind of damage will be asked for as well.

The new duty to disclose evidence as well as the new presumptions of liability, especially where complex technologies or complex science are involved, lead to an increased risk for manufacturers to be successfully sued to pay damages in case of defective products.