

NEW PRODUCT LIABILITY DIRECTIVE CREATES RISK FOR MORE PRODUCTS AND PLAYERS

In the 1980's, video recorders, pocket calculators, fax machines and floppy disks were considered cutting-edge consumer technology. Consumer products were objects that could be seen and touched and were generally purchased in a local brick-and-mortar shop.

Fast-forward 40 years and the consumer experience is significantly different. The breadth of available products has expanded exponentially. Not only is there more choice, but the nature of products has also changed in ways that were unimaginable four decades ago. Now consumers are presented with highly-sophisticated products, which commonly employ cutting-edge technology and often interact with other products. Some even have artificial intelligence (AI) capabilities.

The global supply chain and the way in which products are purchased have also changed dramatically. Making online purchases is routine and products can be bought directly from suppliers all over the globe.

All of these changes have prompted questions for EU legislators about how to best ensure that products are safe and that consumers who suffer loss from an unsafe product are able to seek adequate redress. Over the past few decades, the [General Product Safety Directive](#) or its equivalent sectorial legislation and the [Product Liability Directive](#) have provided complementary frameworks to ensure that products are safe and that individuals can seek no-fault compensation for loss caused by a defective product.

However, over time, the concepts contained in these Directives have become outdated. This has resulted in legal uncertainty and consumers have voiced concerns over whether the existing regimes meet the current needs and reflect today's products and buying habits.

Those in the consumer electronics supply chain can expect significant changes in the EU legislative landscape over the coming years. Regulation and market surveillance

will strengthen, and the future liability regime is likely to encompass many more products and commercial players.

Revisions to the General Product Safety Directive that were proposed last year continue to be debated at EU level. More recently, the European Commission published a [proposal to revise the Product Liability Directive](#) (PLD) (the Proposal).

The current PLD came into force in 1985, when products and distribution chains were significantly simpler. As technology has advanced and the global supply chain has become more complex, the concepts introduced by the PLD's strict liability regime have come under increased scrutiny. What is considered a "product" in this high-tech age? Is software covered? What about products that need digital services to function? Can consumers be expected to prove defect in cases where the evidence may be technically or scientifically complex? How can consumers be assured that they will be compensated when those that supplied the products are outside the EU?

These legal uncertainties in the current PLD laid the foundations for the Proposal. The aim of the new PLD is to provide clarity and legal certainty, but also to create a fair balance between consumers and others involved in the manufacture and supply of consumer products.

The current PLD will be repealed in its entirety and entities who are currently involved in the manufacture or supply of consumer electronics should familiarise themselves with the Proposal. New types of products will be covered, liability can attach to a greater number of players in the supply chain and the types of losses recoverable are wider in scope. The risk profile of particular entities may change

significantly when the final version of the Proposal comes into force.

Consumer electronic businesses should start to prepare themselves now. Entities which previously considered that they – and their products – would not be caught by the PLD's no-fault regime could find themselves facing claims.

As companies reassess their risk profile, internal procedures and insurance position, there are six key factors found in the new PLD that should be considered:

1. The Wider Variety of Products Covered – Hardware manufacturers, software providers and providers of digital services that affect how a product works may now all be held liable for defects. Both tangible and digital products will be covered under the new PLD. The scope of digital products is far-reaching and will certainly evolve over time. For example, digital manufacturing files which contain functional information to produce a tangible item are covered, as is software including operating systems, firmware, computer programmes and Apps. Software is covered whether it is a standalone product or integrated into another product. The new PLD will also apply whether the software is stored on a device or accessed through cloud technology. Both AI systems and AI-enabled goods are encompassed by the new regime. If there are changes that are made to products after they are placed on the market, such as software updates or machine learning, these will also be covered.

When digital services determine the safety of a product, they will be covered by the new regime in the

same way that physical and digital components would be. This is true even though in general the new PLD will not apply to other types of services.

2. Greater Scope of Potential Defendants – Potential defendants under the current PLD are manufacturers, importers, own-branders and, in particular circumstances, suppliers of products. The proposed new PLD regime extends the scope of potential defendants to also include service providers, businesses that make substantial modifications to products and, if there is not an importer into the EU, authorised representatives and fulfilment service providers. The latter is defined as companies that do not have ownership of a product but offer at least two of the following commercial services: warehousing, packaging, addressing and dispatching. Distributors could also find themselves liable if they fail to identify others further up the supply chain. If certain conditions are fulfilled, online platforms may also be liable.

Consumers therefore have a much wider pool of potential defendants to pursue and those that could not previously be at risk may now find themselves involved in legal proceedings.

3. Broader Range of Recoverable Losses – Given the importance attached to digital content, recoverable losses now also extend to material losses due to the loss, destruction or corruption of data. Personal injury will also include medically-recognised damage to psychological health. Whilst this may already have been recognised in some EU jurisdictions, this will now apply across all member states.



4. Greater Access to Evidence – Although companies defending cases in the UK and U.S. are accustomed to having to provide a wide range of documents to claimants in litigation through the “disclosure” or “discovery” process, this concept is not as prevalent in many EU member states. The new PLD significantly alters some existing procedural rules by empowering member states to order necessary and proportionate disclosure of relevant material when a claimant has presented facts and evidence sufficient to support a plausible claim.

5. The Alleviation of the Burden of Proof – By and large, claimants will still be required to prove defect, causation and damage in order to be successful in their claim. However, the new PLD sets out circumstances in which defectiveness of a product will be presumed, including where a product does not comply with mandatory safety requirements, where disclosure obligations are not complied with and when the claimant establishes that the damage was caused by an obvious malfunction of the product during normal use or under ordinary circumstances.

Where a judge considers that a claimant faces excessive difficulties due to scientific or technical complexities in proving defect or proving that the defect caused the damage, these will be presumed, if the claimant demonstrates that the product contributed to the damage and it is likely that the product was defective or that the defectiveness is a likely cause of the damage, or both. Such a presumption would be rebuttable by the defendant on the basis that it is the defendant who holds the scientific or technical data to be able to do so.

6. More Considerations When Assessing Defectiveness – Until now, assessing defectiveness has been a case of considering the safety which a person is entitled to expect, taking “all circumstances into account.” The list of circumstances in the current PLD is not exhaustive, but it is relatively short: the presentation of the product, the use to which the product could reasonably be expected to be put and the time when the product was put into circulation.

Under the new PLD, assessment is still according to what the public-at-large is entitled to expect. However, a greater range of considerations that reflect the changing nature of products and the supply chain are included in the list. The list is, once again, non-exhaustive and includes: the presentation of the product, including instructions for installation, use and maintenance; the reasonably foreseeable use and misuse of the product; the effect on the product of any ability to continue to learn after deployment, or effect on the product of other products that can reasonably be expected to be used with it, the moment in time that the product was put into circulation or – where the manufacturer retains control of the product after this time – when the product left the control of the manufacturer, the product safety requirements, including safety-relevant cybersecurity requirements, any intervention by a regulatory authority and the specific expectations of end-users for whom the product was intended.

It should be noted that even though interventions by regulatory authorities, such as recalls, can be taken into account in assessing defectiveness, they do not create a presumption of defect.

Debate will continue about this Proposal at the EU level. The fact that the new PLD seems to have tipped in favour of claimants is especially noteworthy. What is unlikely to remain static, however, is the scope of products and the new types of defendants that will be covered by the new PLD.

The legislation will be affecting a greater pool of potential defendants. It is time for companies to prepare.