

PRODUCT LIABILITY

Proposal COM(2022) 495 of 28 September 2022 for a **Directive** of the European Parliament and the Council **on liability for defective products**.

cepPolicyBrief No. 2/2023

SHORT VERSION [[Go to Long Version](#)]

Context | Objective | Interested Parties

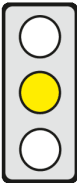
Context: Product liability law provides that manufacturers of products and, in certain cases, other actors, e.g. distributors, have to pay compensation regardless of fault if damage occurs due to a defect in the product. The existing Product Liability Directive dates back to 1985 and the Commission sees a need for it to be revised because the way in which products are manufactured, distributed and operated has changed significantly over time.

Aim: To adapt product liability law to new developments, such as digitalisation, and to facilitate the enforcement of claims for damages.

Affected parties: Manufacturers, traders, online platforms, fulfilment service providers – i.e. companies that offer at least two of the following services: warehousing, packaging, addressing and dispatching –, natural persons.

Brief Assessment

Pro

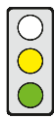
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- ▶ The Commission proposal will help to ensure that safer products are placed on the market.
 - ▶ Clarification that the term "product" includes software increases legal certainty.
 - ▶ Damage can now also result from the loss or corruption of data, which is appropriate given the increasing importance of data.
 - ▶ Extending liability to, inter alia, fulfilment service providers and online platforms, if the manufacturer cannot be held liable, makes claims for damages easier to enforce. This is appropriate as any rights to claim must also be enforceable.
 - ▶ Abolition of the € 500 threshold facilitates the assertion of small claims. This may lead to increased litigation but a permanent excess of claims is not expected.
 - ▶ With the minimum update period, the Commission proposal provides an incentive to keep software current by way of updates. This can extend the useful life of products, e.g. smartphones, and save vital resources, e.g. rare earths.

Contra

- ▶ The envisaged duty to disclose evidence in court proceedings disproportionately encroaches upon the sovereign rights of the Member States and violates the principle of equality of arms in court proceedings, because only claimants can request disclosure.
- ▶ Key concepts in the procedural provisions are not adequately defined.
- ▶ The envisaged minimum update period differs from the periods proposed in the Cyber Resilience Act (CRA) and in the ecodesign requirements (ESPR) for smartphones, tablets and mobile phones. This will lead to uncertainties that should be avoided.
- ▶ Easier enforcement of claims could increase insurance premiums and individual product prices.

Changes to the definition of the terms product and damage [Long Version A.3, C.1]

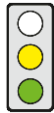
Commission proposal: The definition of the terms product and damage will be extended. Software and digital manufacturing files will be expressly defined as products. Damage can now also result from the loss or corruption of data. Furthermore, the term "personal injury" now clearly includes harm to psychological health.



cep-Assessment: Until now, software has not been recognised unanimously as a product within the meaning of the Product Liability Directive. In this respect, the Commission proposal contributes to legal certainty. The proposed changes to the definition of the terms product and damage reflect a change in social and economic circumstances and are therefore appropriate. How the value of data is to be determined in the event of data loss requires further clarification.

Who bears liability? [Long Version A.4, C.1]

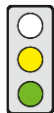
Commission proposal: In principle, the manufacturer of a product is liable. If the manufacturer is not established in the EU, the importer of the product and the authorised representative of the manufacturer are liable provided they are established in the EU. If this is not the case, the so-called fulfilment service provider is liable – with the exception of postal and parcel delivery services and freight transport services. If no fulfilment service provider can be identified either, the distributor or the provider of any online platform used will be liable.



cep-Assessment: The Commission proposal aims to ensure that there is always a party in the EU that can be held liable. This is appropriate in view of the fact that any claims must also be enforceable – especially in the case of products from third countries. This will provide a meaningful incentive for all actors to give greater scrutiny to the safety of products from third countries, and thus ensures a level playing field.

Threshold and maximum liability limits [Long Version A.3, C.1]

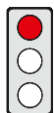
Commission proposal: The existing € 500 threshold and the maximum liability limit of not less than € 70 million are to be abolished.



cep-Assessment: Thresholds discourage injured parties from actually making relatively small claims. The abolition will counteract this. This may lead to increased litigation but a permanent excess of claims is not expected. Abolishing maximum liability limits will mean that the existing variation in maximum liability limits will be harmonised EU wide, which is appropriate with regard to the rights of injured parties. The abolition will also increase the incentive to design safer products.

Duty of disclosure [Long Version A.6, A.1, C.2.2]

Commission proposal: Courts may order a defendant to disclose relevant evidence that is at its disposal if the claimant has submitted facts and evidence that sufficiently support the plausibility of the claim for damages. No derogation from this in national law is permitted even if it would be more advantageous for injured parties.



cep-Assessment: The duty of disclosure disproportionately encroaches upon the sovereign rights of the Member States as it leaves them no freedom to determine how the duty of disclosure should be integrated into national procedural law. Moreover, the core concept of plausibility is not defined in more detail. And, in addition, the duty of disclosure violates the principle of equality of arms in court proceedings because only defendants can be obliged to effect disclosure of evidence.

Minimum update period [Long Version A.5, A.6, C.2.3]

Commission proposal: Manufacturers are liable for defects that occur after the product has been placed on the market if such defects are due, inter alia, to a lack of or faulty updates or upgrades, e.g. to maintain safety, and they are within the manufacturer's control. A minimum update period arises indirectly as claims for damages become statute-barred after ten years from the date on which the product was placed on the market.



cep-Assessment: The Commission gives manufacturers a welcome incentive to provide updates which may extend a product's useful lifespan and save resources such as rare earths. The ten-year period contrasts with the proposals for the CRA and the ESPR for smartphones, tablets and mobile phones. These provide for a period of five years from the date of placing the device on the market (CRA) or from the end of placement on the market (ESPR). The periods should be harmonised.

Burden of proof [Long Version A.6, C.2.3]

Commission proposal: In principle, the claimant must prove the damage, the defectiveness of the product and the causal link between the defectiveness and the damage. However, defectiveness, causation or both are presumed, inter alia, if, among other conditions, (1) the claimant faces "excessive difficulties" in providing proof "due to technical or scientific complexity" and (2) it is "likely" that the product was defective and/or it is "likely" that its defectiveness caused the damage.



cep-Assessment: The Commission's proposal does not give any indication as to what constitutes "excessive difficulties" in proving defectiveness and/or causality, or what is meant by "likely". Thus, key concepts in the rules on the burden of proof are not sufficiently defined. This must be remedied as a matter of urgency. Overall, easier enforcement of claims is likely to lead to an increase in product safety, but also to a rise in liability insurance premiums and individual product prices.