

Eurosmart's feedback

Product Liability Directive - Adapting liability rules to the digital age, circular economy and global value chains

The Product Liability Directive has proven its value during the past three decades to ensure the victims' right to compensation, even without fault on the part of the producer (strict liability). This directive oversees significant aspects of the European Single Market; it complements the safety requirements for placing a product on the Market with the right to compensation in case a product is still defective, i.e. it does not provide the safety that a person is entitled to expect. Today, this approach is challenged by the emergence of new technologies and security-related concerns.

The new proposal includes elements regarding software liability. Software solutions could be considered as building blocks of digital products. Moreover, software could be standalone elements placed on the Market. Eurosmart welcomes the proposal providing clear definitions for Digital products that could be tangible or intangible. To complement the future horizontal rules for placing products with digital elements on the Market, the updated product liability approach shall be an incentive to make (digital) product's value-chains more resilient.

The proposal for a directive includes additional provisions extending the scope of the 1985 Product Liability Directive. These provisions address the complex and continuously evolving ecosystem of digital products. However, depending on their national implementation, these new elements could also end up fuelling legal uncertainty. Eurosmart would draw the attention of the legislator to the following specific matters:

Disclosure of evidence

This proposal provision aims to achieve a fair balance between industry and consumer interests by placing consumers on an equal footing with manufacturers. This aspect is crucial for the overall digital security industry, which is placing its products on the European Market.

In this respect, the manufacturer is required to disclose evidence: if the claimant presents facts and evidence sufficient to support the plausibility of the claim for compensation, the defendant may be ordered to disclose relevant evidence at its disposal. This approach lays a significant burden and risk for the industry.

As provided by the proposal, disclosure of evidence shall be strictly limited to what is **necessary** and **proportionate**. This concept remains too vague and remains under the appreciation of national courts. Eurosmart recommends refining this provision to bring more legal certainty for manufacturers.

Moreover, the “legitimate interest of all parties” shall be considered, especially about protecting confidential information and trade secrets.

Protection of confidential information and trade secrets must be more protected. The proposal is unclear on how the need for disclosure and the interest to keep trade secrets secret shall be kept in balance. The proposal should provide explicit provisions for the analysis and divulgation of information related to confidentiality and trade secrets.

The current provision could be detrimental to producers that placed their products on the European Market. With no clear definition of “necessity” and “proportionality”, national courts may be outmoded by defendant’s competitors acting behind a claimant. In worst-case scenarios, the Product Liability Directive could be hacked to force such disclosure of evidence and request access to sensitive data, including intellectual property and trade secrets.

Burden of proof

The new proposal alleviates the burden of proof for victims in **complex cases of excessive difficulties due to technical or scientific complexity**. If the claimant has demonstrated sufficient relevant evidence that the product contributed to the damage; and it is likely that the product was defective or that its defectiveness is a likely cause of the damage, or both. Then the defectiveness of the product or causal link between its defectiveness and the damage, or both, shall be presumed.

This provision leaves a lot of room for interpretation: “complex cases”, “relevant evidence” could be interpreted in several manners, which brings a high level of legal uncertainty for manufacturers.

Moreover, this proposal totally reshapes the current burden of proof as laid down in the 1985 Directive. It intends to ensure a “fair balance between the legitimate interests of manufacturers, injured persons and consumers in general”. But, from theory to facts, this approach could become the default principle for most issues involving “defective” digital products. In most European countries, courts lack time and expertise to assess such complex cases brought by digital products and the complexity of their value chain. Here the burden of proof would often weigh on the manufacturer.

