

## EUROCHAMBRES CONTRIBUTION TO THE COMMISSION CONSULTATION ON “ADAPTING LIABILITY RULES TO THE DIGITAL AGE AND ARTIFICIAL INTELLIGENCE”

More than 35 years after the entry into force of the Product Liability Directive, Eurochambres welcomes the opportunity to provide input to the European Commission’s consultation on the matter.

In our view the two subjects the Commission is seeking feedback on, the product liability rules and liability rules for Artificial Intelligence (AI), should be considered separately. Due to the specific nature of the issues arising from AI, we believe that the subject merits its own standalone legislative initiative.

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For the purpose of the consultation, Eurochambres has the following recommendations:

### General remarks

In light of the technological progress achieved since the entry into force of the legislation at hand, we would welcome a revision of the PLD and the introduction of new rules to regulate AI liability.

The 2018 evaluation of the PLD overall concluded that the current law contributes to a level playing field in the Single Market and ensures an adequate level of consumer protection. This is also our own assessment.

From the onset it should be made very clear which law businesses have to comply with, either the regulatory framework on product liability rules or the law regulating autonomously acting AI.

Whereas an update of the current rulebook is desirable, we refer as well to the conclusions of the 2018 evaluation of the PLD which states that *“there do not seem to have been a significant number of incidents where the Directive was unable to apply”*. We therefore urge the Commission to be careful in its approach and to refrain from reforming what is not broken.

The assumption that consumers systematically are at a disadvantage when trying to enforce their rights has become a well-accepted but overly simple assumption, which does not do justice to the many SMEs which do not hold the financial means and legal knowledge that bigger enterprises might have.

Access to justice is a noble cause that consumers legitimately ask for. In light of, among others, the new Directive on Collective Redress, we ask the Commission to keep the right balance. An overextension of consumer rights does not necessarily lead to more access to justice but, on the contrary, to frivolous actions and the establishment of a litigation

culture.

### Review of the Product Liability Directive (DIR 85/374 EEC)

- The Chambers do not support the extension of **liability to other areas such as services**. It is our view that the current law is still applicable in the case that software is integrated in a such a way in the product that it achieves a direct technical effect.
- We support the Commission in its **ongoing evaluation of the responsibilities to be taken up by online marketplaces**, when the manufacturer or importer does not have an office or commercial representative in the EU. However, this cannot be limited to the protection of consumers and it must be ensured that this does not lead to distortions of competition in favour of online marketplaces based outside the EU. The Commission's proposal for a Digital Service Act rightly addresses this issue through article 22 on the traceability of traders.
- The Commission seems to suggest in its consultation that the revised product liability regime might include **an extension of the scope of liability**. Inevitably, this will lead to an increased liability risk for producers and suppliers, which will need to be counterbalanced by supplementary company provisions or by taking up extra insurance. These costs are typically deflected on consumers, who will be confronted with price inflation. Moreover companies, in order to remain competitive, will be pushed into resorting to cheaper supplies coming from third countries. Additionally, it can be expected that consumers will subsequently resort to cheaper products from companies in third countries. This would put European enterprises at a competitive disadvantage compared to companies from third countries who are not subjected to the regime.
- The PLD in its current form covers material and physical damage. Courts can usually relatively easily determine such damages. **Non-material damages** however are far more difficult to assess, and are characterised by a high degree of uncertainty and subject to arbitrary consideration. General rules could potentially be drafted, but Chambers warn of an increase in litigation if such damages were to be introduced.
- With regards to **environmental damages**, these can already be invoked by individual consumers if they can prove the causality between the defect of a product and the alleged personal damage incurred. The existing legal system thus already allows the consumer to bring a case in front of a court. The Chambers are concerned about the introduction of new rules for environmental damage (such as air pollution) incurred by common goods. Claim compensation for individuals who might have suffered from common goods damages, should not be handled through tort law. The protection of common goods is appropriately only regulated by public law and environmental criminal law.
- We are not in favour of a possible **extension of time limits** of civil liability. Provability of alleged damage becomes increasingly difficult to assess after the passing of time and witness statements become less reliable as well. Furthermore, there is no clear indication why the current time limits would need to be extended.
- The rules on the **burden of proof** should not be revised. For all companies, but SMEs in particular, a reversal of the burden of proof, in essence implying that all products

are by nature defective, would incur considerable and unfair costs.

## Rules on AI

- The new regulatory framework for AI **should only apply to AI products**, and not go beyond that scope, clearly excluding products that are sometimes wrongly considered as AI.
- Akin to the approach chosen for the AI Act, **a risk-based approach** is preferred. This automatically entails that higher liability requirements should be set for AI applications that have a higher risk of having a negative impact on a person's integrity.
- Requirements should be **adequate and proportionate**. As a majority of AI systems are used to assist humans in their decision-making, with humans taking the final decisions, there is no need to impose new liability rules for such AI systems. Only if the potential risk is high, which can be the case with autonomous decision-taking AI systems, then new rules should be considered. In order to have a system that works in practice, we ask the Commission to define very precisely the different types of AI in such a way that only the AI that have a potential to cause real harm is covered by new civil liability rules. Blanket liability rules for any AI are not useful.
- The rules should be **consistent with the various legal acts** that are now on the table, in particular the AI Act. In order to ensure legal certainty, the areas of application of the various legal acts must be clearly differentiated and unambiguous definitions must be established. It should be clear what area of law each act regulates.

Further information: Mr Erwan Bertrand, Tel. +32 2 282 08 67, [bertrand@eurochambres.eu](mailto:bertrand@eurochambres.eu)  
Press contact: Ms. Karen Albuquerque, Tel. +32 2 282 08 72, [albuquerque@eurochambres.eu](mailto:albuquerque@eurochambres.eu)

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