



## Proposed Product Liability Directive revision may undermine Europe's competitiveness

For decades, Europe has benefitted from an effective and balanced product liability regime, as set out under the 1985 Product Liability Directive (PLD). These rules have been supplemented by years of EU and member-state case law and jurisprudence. This has further helped maintain the important balance between ensuring manufacturers can innovate and that consumers have fair access to compensation.

It is a testament to the effectiveness of the PLD that only one amendment has been made to the directive (in 1999) since its publication. However, the past 23 years have brought significant change, progress and development; and this transformation has made clear the need for rules to ensure this progress benefits both businesses and consumers.

Unfortunately, Europe today is facing fundamental questions about its ability to compete, particularly against the backdrop of the current economic and geopolitical uncertainty. The PLD revision will only serve to deepen such concerns for European firms, as a rise in litigation and speculative claims is expected as a consequence of the new concepts the revision introduces.

The well-intended nature of the revision of the PLD was meant to bring about targeted changes to factor in new questions around AI and Internet of Things (IoT) devices. Instead, the proposal has brought about a full revision that changes long-standing and balanced rules that function well, resulting in an upheaval of almost 40 years of functioning civil liability law. As a result, a heavy burden will be placed on national judicial and court systems to accommodate the new and unfamiliar rules.

It is likewise to be regretted that such core principles are undergoing excessively rapid discussion by the EU institutions as they try to finalise negotiations. We fear that sub-optimal final rules will have unwanted negative implications for future case law and will not instil confidence in, or incentivise, manufacturing in Europe. This contradicts the commitments made by the Council of the EU to ensure that a competitiveness check is performed for every EU initiative.

We urge legislators to take the following points into consideration and request that the revision of the PLD ensures the following:

- **Liability of software** — The inclusion of software in a strict liability regime brings a host of new questions, such as the relationship to digital services or the application of the concept of defectiveness. We believe more investigation into the effects of this extension is needed, as there is now greater legal exposure for software developers.
- **Sufficient protections against malicious mass-claims and third-party litigation funding** — We have noticed a growing number of unregulated, profit-motivated, third-party claims taking advantage of consumer claims to launch class actions. Such practices must be addressed and prevented, yet the proposed revision of the PLD would, in fact, facilitate them.
- **Narrow key concepts** — The revision’s expansion of the definition of “damage” to include psychological harm and data loss will only cause legal uncertainty as it can lead to misalignment<sup>1</sup> with EU and national law. We also wish to draw attention to the added factors for determining defectiveness, such as reasonably foreseeable misuse or regulatory intervention, which would likewise create legal uncertainty.
- **Safeguards on evidence disclosure orders** — It is essential that Europe avoids creating a widespread culture of “discovery”. Disclosure orders must ensure that the evidence requested is strictly necessary and proportionate to the request.
- **Limiting the alleviation of the burden of proof** — The cornerstone of the PLD is that the claimant must prove the damage, the defect and the causal link between the two. Under the proposed alleviations we would see the exact opposite occurring, creating a reversal of the burden of proof and requiring defendants to prove a negative. We see the scope of the proposed criteria for these alleviations as much too broad; they should be narrowed or removed.
- **Reinstating thresholds** — The monetary upper and lower thresholds present in the 1985 PLD are essential to prevent a backlog of small claims which SMEs have fewer resources to fight, and to allow claims to remain insurable. Their removal completely undermines the goals of consumer protection. We are deeply troubled by the fact that the Commission has ignored the evidence showing the effectiveness of these thresholds.

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<sup>1</sup> National law allows for claims for non-material damages such as pain and suffering if it can be proven physical harm was suffered first. And the EU General Data Protection Regulation already grants sufficient recourse for personal data loss.