

## Product Risk Radar

### EU Product Liability Reform

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Following the European Commission's proposal in September 2022 for a new directive (the "**PLD**") to replace the EU Product Liability Directive (85/374/EEC) (the "**1985 PLD**"), the European Parliament and European Council have been developing draft legislation. On 5 April 2023, the European Parliament issued a draft report addressing its concerns on the proposal for the new PLD. Following this, on 14 June 2023 the European Council adopted its negotiating mandate and published its amendments to the proposal for the new PLD. On 14 December 2023, the European Council, European Parliament and European Commission reached a **provisional political agreement** on the proposal.

The 1985 PLD established a strict (no fault) liability regime for defective products. Since then, technology has developed rapidly but the law has not kept pace. The new PLD aims to update the EU's product liability regime to adapt to the changes of the digital age, the circular economy, and global value chains. The new PLD is likely to have a considerable impact on product manufacturers and increase the volume of product liability litigation.

#### What are the key changes?

The new PLD provides for extensive changes to the status quo. Key proposed changes include:

- **Scope of PLD:** The new PLD may allow strict product liability claims to be made for defective products that cause "loss or corruption of data" in certain circumstances. Previously, the scope of liability was limited to personal injury and property damage. This proposal may be removed on the basis that the loss or corruption of data is already covered by other EU laws, such as the GDPR.

According to the text of draft legislation, it will be also possible to claim against not only physical damage but also medically recognised psychological damage (confirmed 'by a court-ordered medical expert'), and the destruction or irreversible corruption of data that is not used for professional purposes in circumstances where the economic loss exceeds 1000 euro.

- The Parliament, while making amendments to the Commission's text, added "raw materials" in the definition of a product,
- **Software/AI:** The definition of "product" may be expanded to apply to software, AI systems, raw materials, and digital manufacturing files (such as those that are used for purposes of 3D printing). In

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addition, related services (such as a digital service interconnected with a product that is required for the product's functions to be performed) could be considered a component part of a product.

- **Exemption for micro or small enterprises producing software:** A new exemption will be introduced for micro or small enterprises that manufacture software. A micro or small enterprise will not be liable if, at the time of placing the software on the market, another economic operator would be liable for damage caused by that software.
- **Producer or manufacturer:** The term “producer” will be replaced with “manufacturer”, and the scope of the definition will be expanded. For example, providers of software, digital services, and online marketplaces can now face liability under the new PLD.
- **Liable operator in the EU:** The draft legislation seeks to ensure that even when a defective product is bought outside the EU, there is an EU-based business that can be held liable for the damages it causes to a consumer in the EU. If the importer and authorized representative are based outside the EU, liability for a defective product may be attributed as a last resort to the fulfilment service provider (a company that typically takes care of warehousing, packaging and dispatching).
- **Cascade of attributable liability:** Member States will be able to compensate persons who suffer damage caused by defective products via national schemes, when victims fail to obtain compensation because no economic operator is held liable, the operator is insolvent or has ceased to exist.
- **Expanded concept of defect:** Whilst the test for determining whether a product is defective remains substantively the same, factors such as the interconnectedness or self-learning functions of products and a product's cybersecurity vulnerabilities have been added to the non-exhaustive list of factors to be taken into account by courts when assessing defectiveness. The European Parliament has suggested that a product's cybersecurity vulnerabilities should only qualify as a defect where it does not comply with cybersecurity requirements in EU or national law.
- **Scope of liability:** Under the new PLD, liability may no longer be assessed simply by reference to when a product was put into circulation. The time after circulation, including once the product has been placed on the market, can be considered if a manufacturer retains control of a product, for example via software updates.
- **Extended compensation period:** The new PLD proposes to extend the longstop date up to 20 years in exceptional cases when symptoms of a personal injury are "slow to emerge". However, in order to help boost innovation, this extension does not apply to free of charge open-source software.
- **Disclosure:** The draft legislation also allows individuals who have suffered harm to request a court order that the operator disclose evidence that may assist with the individual's compensation claim.
- **Burden of proof:** The new PLD may allow the burden of proof for the injured person to be alleviated in some circumstances. In particular, there is a proposed rebuttable presumption of defectiveness under the following circumstances:
  - Where a defendant fails to comply with its (new) obligation to disclose the evidence necessary for the claimant to be able to understand how a product was produced and how it operates.
  - If a claimant can establish that the product does not comply with mandatory safety requirements.
  - If there is an obvious malfunction in a product.

There is also a rebuttable presumption of the causal link between defect and damage in cases where (i) it is established that the product is defective and the damage caused is of a kind typically consistent with the defect,

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and (ii) where the claimant faces excessive difficulties in proving defect or causation due to the technical or scientific complexity of a claim. The European Parliament has opposed a general reversal of the burden of proof in this second kind of case, and instead suggested that the injured person must prove that “it is highly likely that the product was defective in such a way that the defectiveness is highly likely the cause of the damage”.

## Key takeaways for businesses

Some of the proposed amendments to the 1985 PLD, such as the expansion of the definition of “product” to include intangible products, have been anticipated for a number of years. However, other changes, such as extending the scope of the PLD to cover claims for loss or corruption of data and proposals to recast the burden of proof, are more interesting.

The proposed changes clearly intend to strike a different balance between the interests of industry and consumer than that prevailing under the current regime. Whilst the proposal does not necessarily open the floodgates to a much larger number of claims, the position taken by the European Commission is clearly consumer friendly. The proposals are especially noteworthy given that the recent EU Directive 2020/1828 enabling representative actions to be brought on behalf of claimants across the EU, has a wide application covering 66 consumer protection focused legislation, including the 1985 PLD.

## What happens next?

The provisional agreement now requires formal adoption by the European Parliament and the European Council. Once the new PLD makes its way through the legislative process, EU Member States will be required to implement it into their own national laws and the new rules will apply to products placed on the market 24 months after the PLD's entry into force.

Although no longer in the EU, given the global nature of the products market, the UK will need to consider whether to follow suit to avoid significant divergence. Until then, UK-based manufacturers selling products into the EU will need to ensure compliance with the EU's 1985 PLD, as well as any equivalent UK rules.

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