

Product Risk Radar

EU Product Liability Reform

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The EU Product Liability Directive (85/374/EEC) (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.

On 14 December 2023, a [provisional political agreement was reached](#) on a proposed new directive (the "new PLD") to replace the 1985 PLD. The European Parliament adopted the proposed new PLD (see [here](#)) on 12 March 2024 and it is expected that the European Council will do the same. After that, the new PLD will be published in the Official Journal of the European Union.

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 supply chains. The new PLD strikes a more consumer friendly balance between the interests of industry and consumers and may make it easier for consumers to successfully pursue product liability litigation in EU Member States (once the new PLD is adopted and incorporated into the laws of each EU Member State, likely by 2026).

What are the key changes?

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

- **Scope of PLD:** According to the text of the draft legislation, strict product liability claims could be made in respect of personal injury (now expressly including medically recognised damage to psychological health), property damage (other than property used exclusively for professional purposes) or "destruction or corruption of data that are not used for professional purposes". Under the 1985 PLD, claims could only be made for personal injury or property damage.
- **Software/AI:** In the draft legislation, the definition of "product" includes software (the Recitals specify that this includes AI systems), raw materials, and digital manufacturing files (such as those that are used for purposes of 3D printing). In addition, related services (such as a digital service interconnected with a product that is required for the product's functions to be performed, for example, a health monitoring service that relies on sensors of a physical product to track the user's physical activity or health metrics) could be considered a component part of a product. However, in order to help boost innovation, the draft legislation does not apply to free and open-source software that is developed or supplied outside the course of a commercial activity.

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- **Producer or manufacturer:** In the draft legislation, the term “producer” has been replaced with “manufacturer”, and the scope of the definition has been expanded. For example, providers of software could face liability as a “manufacturer” under the new PLD. Also, anyone who substantially modifies a product outside the manufacturer’s control and makes it available on the market or puts it into service will be treated as a manufacturer.
- **Liable operator in the EU:** The draft legislation seeks to ensure that an EU-based business can always be held liable for the damage a product causes to a consumer in the EU.

As a starting point, the manufacturer of a product or a component are to be liable, followed by the importer and/or authorised representative if the manufacturer is established outside the EU.

If the importer is based outside the EU or there is no authorised representative, liability for a defective product may then be attributed to the fulfilment service provider (a company that typically takes care of warehousing, packaging and dispatching).

If one of those economic operators established in the EU cannot be identified, each distributor can be liable if it fails to identify one of those economic operators established in the EU or the distributor which supplied it with the product within one month of a request from an injured person.

An Online marketplace (which is not otherwise an economic operator, such as a manufacturer, importer, fulfilment service provider or distributor) could face liability in similar circumstances to a distributor if it allows consumers to conclude distance contracts with traders but leads consumers to believe the product is provided by the marketplace itself or by a trader acting under its authority or control.

- **Defect - expanded list of factors:** Whilst the test for determining whether a product is defective remains largely the same, under the draft legislation the definition of defect expressly includes where a product does not provide the safety that a person is entitled to expect “or that is required under Union or national law”. The draft legislation contains an expanded non-exhaustive list of factors to take into account when assessing the defectiveness of a product, such as the interconnectedness or self-learning functions of products and the compliance of a product with safety relevant cybersecurity requirements.
- **Scope of liability:** Under the new draft 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, for example, if the defectiveness of a product is due to a software update that is within the manufacturer’s control.
- **Extended compensation period:** Under the new draft PLD, the longstop date (after which claims cannot be made) will remain 10 years for most claims and will be extended to 25 years if an injured person has not been able to start proceedings due to “latency of a personal injury”. However, the longstop period will run from: (i) the date on which the product was placed on the market or put into service; *or* (ii) the date the product was made available or put into service after a *substantial modification* (for example, due to a software update or continuous learning of an AI system).
- **Disclosure:** The draft legislation requires Member States to ensure that a defendant or a claimant can be required to disclose relevant evidence (subject to certain limitations, such as: (i) if the claimant has presented sufficient facts and evidence to support the plausibility of their claim and requests disclosure; and (ii) disclosure is necessary and proportionate).

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- **Burden of proof:** The draft legislation would allow the burden of proof for the injured person to be alleviated in some circumstances. In particular, the draft legislation contains a rebuttable presumption of defectiveness under the following circumstances:
 - Where a defendant fails to disclose relevant evidence if required (see above); or
 - If a claimant demonstrates that the product does not comply with mandatory product safety requirements; or
 - If a claimant demonstrates that the damage was caused by an obvious malfunction of a product during reasonably foreseeable use or under ordinary circumstances.

There is also a rebuttable presumption of the causal link between defect and damage where it has been established that the relevant product is defective and the damage caused is of a kind typically consistent with the defect in question.

Finally, there is a rebuttable presumption of the defectiveness of a product or the causal link between defect and damage or both where, despite the disclosure of evidence (see above) and taking into account all the relevant circumstances of the case: (a) the claimant faces excessive difficulties (in particular due to technical or scientific complexity) in proving defect or causation or both; and (b) the claimant demonstrates that it is likely that the product is defective or that there is a causal link between the defectiveness and damage or both.

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 the destruction 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 consumers than that prevailing under the current regime. Whilst the proposal does not necessarily open the floodgates to a much larger number of claims, the draft legislation is clearly more 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 and covers the 1985 PLD.

What happens next?

The new PLD is expected to be formally adopted by the European Council. EU Member States will then be required to implement the new PLD 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 (likely in 2026).

Manufacturers selling products into the EU and other companies involved in the supply chain should take into account the changes which will be brought into force in the EU (assuming the draft legislation is formally adopted) when assessing and managing their product liability risk.

In its consultation in 2023, the UK Office for Product Safety and Standards (OPSS) asked questions connected with potential reform of the product liability regime in the UK. When considering product liability reform, the UK authorities are likely to pay close attention to the changes on the horizon in the EU.

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