

Review of the Product Liability Directive

Position Paper

Key messages

On September 2022, the European Commission published a proposal for the review of the Public Liability Directive (PLD) under which consumers can claim compensation for damages caused by defective products. The French Association of Large Companies (AFEP) welcomes this review of the European liability regimes in view of the developments related to the digital age and new technologies -with defects no longer being only caused by tangible products or components- changes in business models and practices, including the circular economy, and the globalisation of supply chains. Its objective of harmonisation is moreover very much welcomed.

However, AFEP wishes to underline the following points:

- It is essential for the European liability framework to provide clear, coherent, and unambiguous definitions and legal certainties for all parties. In that view, several definitions should be clarified;
- Legally sound criteria should be provided to assess the defective nature of a product, taking into account existing European and national liability rules;
- The principle of the 1985 Directive that the burden of proof remains on the claimant is key, especially when balanced with easier access to proof and repair. These provisions should be kept in the proposal, especially considering the proposed rebuttable presumptions;
- Sufficient time for the transposition of the new provisions in national civil regimes should be given.

AFEP has identified several recommendations on how to address these existing concerns in order to reach a better-balanced approach for this Directive.

AFEP's comments on the proposal for a review of the Product Liability Directive

1. Definitions - Article 4

The Directive as proposed by the Commission lacks legal certainty and clearer definitions are needed to avoid any confusion likely to lead to differences in interpretation in Member States and create sources of legal unclarity and litigations. AFEP therefore calls for several clarifications in the definitions:

- **a component** should be described as a product itself rather than an item, as it can also be defective. It should also be clarified that it can be integrated by a third party into a product ;
- **manufacturer's control** should mean that the manufacturer of a product **instructs** rather than authorizes, to better reflect the notion of control, the integration of a component into the product, the inter-connection of a component with the product or the supply by a third party of a component ;
- **the notion of "putting into service"** should be consistent with the 2022 Commission's Blue Guide on the implementation of product rules. It should indeed take place at the moment of first use within the Union **by the end user** for the purposes for which it was intended. Such a definition would ensure that the prescription deadlines are also clarified accordingly.

2. Defectiveness - Article 6

The Commission proposes a non-exhaustive list of criteria to assess the defective nature of a product and extends the list of the current version of the PLD. Defectiveness criteria should be clear and objective to allow for legal certainty and the proposed provisions should be hence specified to avoid too much administrative burden or potential litigations between parties, notably regarding:

- the **notion of "public at large"**: AFEP considers it too vague and not a legally used notion. For this reason, it suggests retaining the notion of an "average person, who is reasonably well-informed and reasonably observant and circumspect", as used in Directive 2009/29/EC on unfair business to consumer commercial practices (average consumer) and as clarified the Court of Justice,¹ notably in deceptive commercial practice related decisions,

¹ Judgments C-195/14 of 4 June 2015, Teekanne (42: "the referring court to carry out an overall examination of the various items comprising the fruit tea's labelling in order to determine whether an average consumer who is reasonably well informed, and reasonably observant and circumspect, may be misled as to the presence of raspberry and vanilla-flower or flavourings obtained from those ingredients") and C-266/19 of 14 May 2020, EIS GmbH v TO.

- the ***reasonably foreseeable use and misuse of a product***: AFEP proposes to delete the mention of misuse as it cannot be expected for a product to be considered defective and a manufacturer liable based on the potential misuse of a product when all the information regarding its proper use has been communicated,
- the ***reasonably foreseeable effect on the product of other products***: the addition of the word “inter-connected” is intended to clarify the wording and to reflect the recitals (see recital 23) of the Directive, as the effect of “other products” is legally unclear and the scope should hence be clarified,
- ***product safety requirements***: their scope should be clarified as those legally and regulatorily provided, and not as set by the manufacturer itself. AFEP proposes that they should be clarified as the ones covered “under Union and national law”,
- the criteria relating to ***“any intervention by a regulatory authority or an economic operator referred to in Article 7 in relation to product safety”***. AFEP calls for its scope to be specified: not all safety-related interventions should be a circumstance to be taken into account to determine whether a product is defective. It should be limited to a relevant recall by the authority related to the damage suffered,
- ***“specific expectations of the end users for whom the product is intended”***: this very broad proposal is also very subjective and legally unclear. The safety that an end user should expect should be better assessed through objective characteristics and properties of the product. Thus, in the Article 6 (h), AFEP proposes to replace the vague and subjective notion of “expectation” by “need” of “category of end-users”.

3. Economic operators liabilities and exemption- Articles 7, 10 and 12

The proposal establishes an order in which claimants may hold economic operators liable. AFEP welcomes these clarifications, especially in regards to economic operators located outside of the Union.

However, several comments are to be made regarding the notion of “substantial modifications” which could impact economic operators’ liabilities. This notion is essential, especially regarding new circular economy practices, and AFEP proposes to specify that, where relevant Union or national rules on product safety lay down no threshold, it should be considered substantial where it changes the product’s original performance, purpose or type, without this change being foreseen in the initial risk assessment, and where it changes the nature of the hazard or increases the level of risk in relation to the relevant Union harmonization legislation.

In addition, AFEP proposes wording in line with the current PLD to clarify the conditions of exemptions from liability provided to the defendant: an exemption that existed within the previous version of the PLD should be reintroduced, namely “that the product was neither manufactured by him for sale or any form of distribution for

economic purpose nor manufactured or distributed by him in the course of his business”. The PLD should moreover be compatible and without prejudice to the provisions of national laws concerning the right of contribution or recourse. Finally, AFEP underlines that development-risk regarding reduction of liability is particularly interesting and should be maintained through the negotiations, especially in view of cybersecurity risks given the evolution of the state of scientific and technical knowledge.

4. Disclosure of evidence and burden of proof - Articles 8 and 9

The proposal maintains the burden of proof of the damage, the defect, and the causal link between the two on the claimant. This is balanced with the alleviation of the burden regarding the disclosure of evidence at the request of the claimant, especially in regard to complex and technical cases.

This alleviation of the burden of proof should be carefully dealt with so as not to lead in practice to a reversal of burden on the defendant. This is particularly the case when looking at the disclosure of evidence, which could prove very far-reaching, and at the rebuttable presumptions of defectiveness.

AFEP therefore recommends several modifications to Article 8 to:

- specify the conditions related to disclosure of evidence (i) to avoid any vague or non-legal notions, such as the notion of plausibility, which should be replaced by the notion of credibility; (ii) to ensure that such disclosure is ordered by a court provided that the conditions are fulfilled and circumscribed to the necessity of the claim, as it is, for example, the case in the French civil procedure code (Article 145) which provides a mechanism whereby “if there is a legitimate reason to preserve or establish, before any trial, the proof of facts on which the solution of a dispute may depend, the legally admissible measures of instruction may be ordered at the request of any interested party, upon request or through an interim procedure”
- recall the necessity to preserve trade secrets in the disclosure of evidence procedure. The provisions proposed by the Commission do contain some protection for confidential information and trade secrets but remain too vague and could result in different approaches of national courts. The drafting should hence be tightened and the scope clarified so as to cover information that is necessary and relevant to the claim;

Regarding the presumption of product defectiveness in Article 9, AFEP recommends that it should be better defined. There might for example be cases in which a failure to disclose evidence is legitimately justified, such as in the event that such evidence does not exist. Likewise, the notion of “obvious malfunction”, which is too vague, should be clarified in the sense that a presumption of defectiveness should only include malfunctions inherent/attribution to the product itself and not malfunctions which are caused by third-party.

Regarding cases where the claimant would face excessive difficulties accessing evidence, due to the technical complexity of the product, the principle that the claimant has to prove the defect, the damage and the causal link between the two should always remain. Moreover, Member States have legal procedures in place for appointing legal appraisal, private expertise as well as insurance experts. AFEP therefore calls for Article 9 paragraph 4 to be deleted.

5. Transparency- Article 15

Modifications could be proposed to preserve the principle of anonymity of the economic operators and their suppliers/clients. By exception, the judge should have the opportunity to decide on a publication of the judgment as a sanction.

6. Transposition - Article 18

AFEP proposes a delay of transposition by the Member States aligned with that set out in the proposal on AI liability: 24 months is a common delay for this exercise.

ABOUT AFEP

Since 1982, AFEP brings together large companies operating in France. The Association, based in Paris and Brussels, aims to foster a business-friendly environment and to present the company members' vision to French public authorities, European institutions and international organisations. Restoring business competitiveness to achieve growth and sustainable employment in Europe and tackle the challenges of globalisation is AFEP's core priority. AFEP has 117 members. More than 8,6 million people are employed by AFEP companies and their annual combined turnover amounts to €2,692 billion. AFEP is involved in drafting cross-sectoral legislation, at French and European level, in the following areas: economy, taxation, company law and corporate governance, corporate finance and financial markets, competition, digital, intellectual property and consumer affairs, labour law and social protection, environment and energy, corporate social responsibility and trade.

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