



Submission to Public Consultation on the EU Proposal for a Directive on Liability for Defective Products

Department of Enterprise,

Trade and Employment

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Coimisiún um
Iomaíocht agus
Cosaint Tomhaltóirí

Competition and
Consumer Protection
Commission

1. Introduction

The Competition and Consumer Protection Commission ('the CCPC') welcomes the opportunity to respond to the public consultation on the EU Proposal for a Directive on Liability for Defective Products ('the proposed PLD') repealing 85/374/EEC ('the existing PLD').

The CCPC is the statutory authority with responsibility for promoting compliance with, and enforcing, competition and consumer protection law in Ireland. We have functions to promote competition and the interests and welfare of consumers¹. We strive to improve consumer welfare across the economy by enforcing over 40 legislative instruments, including product safety legislation. The CCPC recognises the positive role which the existing and proposed PLD has in reinforcing product safety, by incentivising economic operators to place safe products on the market in order to avoid a claim for no-fault liability.

¹ Section 10 Competition and Consumer Protection Act 2014. See, [Competition and Consumer Protection Act 2014 \(irishstatutebook.ie\)](#). Under this section, the CCPC also has various functions in relation to the relevant statutory provisions contained in Schedule 1 of the Consumer Protection Act 2007 ('the 2007 Act'). The Liability for Defective Products Act 1991, which transposed the existing PLD, is contained in Part 1 of Schedule 1 of the 2007 Act. However, this submission is offered in the context of the rights granted to consumers under the proposal to repeal and replace the existing PLD.

2. Observations

Chapter I – General Provisions

The CCPC welcomes the updated definition of ‘product’ in Article 4 of the proposed PLD, which clarifies the application of the revised PLD to non-tangible products such as software and ensures that consumers have equal access to redress regardless of whether the product which caused the damage is tangible or digital. As noted separately by the European Commission ‘Non-Paper on Digital Elements of the Proposal for a new Product Liability Directive’, Recital 12 of the proposed PLD explains that any software, no matter how it is used or supplied, or how it is integrated or interconnected, considered to be a product². This broadly aligns with the adopted text of the General Product Safety Regulation (‘GPSR’), which includes within the definition of a ‘product’ any item, whether or not it is interconnected to other items³.

The CCPC notes that the updated definition of ‘manufacturer’ in the proposed PLD is not identical, but contains elements which are similar to the definitions of ‘manufacturer’ in Decision 768/2008/EC⁴, the GPSR and the Proposal for a Regulation of the European Parliament and of the Council on Machinery Products⁵.

The CCPC notes the proposed PLD will remove a limit in the existing PLD of a lower threshold of €500 for property damage. In the existing PLD this was placed to avoid excessive numbers of cases. However, the CCPC notes that the 2018 evaluation of the existing Directive⁶ found the threshold overly limited claims for property damage, which undermined the effectiveness of the existing PLD in protecting consumers. The CCPC also notes commentary⁷ that the threshold is at odds with Directive (EU) 2020/1828 of the

² See European Commission, 2023, <https://data.consilium.europa.eu/doc/document/ST-6201-2023-INIT/en/pdf>

³ See European Parliament and European Council, 2023, <https://data.consilium.europa.eu/doc/document/PE-79-2022-INIT/en/pdf>

⁴ Decision No 768/2008/EC of the European Parliament and of the Council of 9 July 2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC (OJ L 218, 13.08.2008, p. 82).

⁵ Referencing the text adopted by the European Parliament’s legislative resolution of 18 April 2023. See, European Parliament, 2023, [Texts adopted - Machinery - Tuesday, 18 April 2023 \(europa.eu\)](https://www.europarl.europa.eu/media/default.do?op=operation&do=getText&language=en&text=Texts+adopted+-+Machinery+-+Tuesday,+18+April+2023)

⁶ European Commission, 2018, Evaluation of Product Liability Directive, SWD(2018)157.

⁷ BEUC, 2020, Product Liability 2.0 - How to make EU rules fit for consumers in the digital age. BEUC-X-2020-024 - 07/05/2020, p. 16.

European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC ('the Representative Actions Directive'), which seeks to ensure an effective remedy for infringements that harm the collective interests of consumers, especially where individual claims might be considered small in isolation. The CCPC supports the removal of such a threshold, as it would allow consumers to seek redress for lower costs, so that no consumer would be left behind.

This issue aligns with that of the limit for claims brought to the Small Claims Court. The CCPC has advocated for consideration to be given to increasing the upper limits for claims that can be brought by consumers to the Small Claims Court, which remains at €2,000, in order that consumers can seek their own redress for higher value products and services⁸. For example, the European small claims procedure, which allows for a claim to be made in civil or commercial matters against a trader based in another Member State, had its limit increase to €5,000 in 2017.

Chapter II – Specific provisions on liability for defective products

The CCPC notes that although the test for determining whether a product is defective under the proposed PLD is largely aligned with the existing PLD, Article 6 of the proposed PLD has added to the non-exhaustive list of circumstances to be taken into account under the existing PLD in considering whether a product will be considered defective. The expanded list includes factors which reflect the changing nature of products in the digital age, such as the interconnectedness or self-learning functions of products. Most notably from the perspective of the CCPC, Articles 6(f) and (g) provide that product safety requirements, including safety-relevant cybersecurity requirements and any intervention by a regulatory authority or by an economic operator relating to product safety, should be considered in an assessment of the defectiveness of a product. This reflects the importance of product safety and market surveillance legislation in an assessment of the level of safety that the public at large is entitled to expect from a product. Recital 24 states that such interventions should not of themselves create a presumption of defectiveness

⁸ The CCPC notes that the small claims procedure covers claims for damage to property but excludes claims for personal injury.

and this acknowledges that assessing defectiveness under the PLD is distinct from assessing safety under product safety legislation.

Article 6(h) provides that ‘the specific expectations of the end-users for whom the product is intended’ should be taken into account in a consideration of defectiveness. This appears to introduce an element of subjectivity that may not be fully consistent with the overarching objective test for defectiveness set out in the first line of Article 6, i.e. that defectiveness is to be assessed by reference to the safety that the public at large is entitled to expect. It is noted that Recital 22 attempts to address both elements in the test for defectiveness by stating that “The safety that the public at large is entitled to expect should be assessed by taking into account, inter alia... the specific requirements of the group of users for whom the product is intended”, however additional guidance may be needed in the Recitals to clarify how these objective and subjective elements should be interpreted.

Article 7 of the proposed PLD seeks to expand the range of economic operators that can be liable on a no-fault basis for damage caused by a defective product, to include not only manufacturers of products and components, and importers, but also distributors, authorised representatives, fulfilment service providers, third parties making substantial modifications to products and certain online platforms. It takes a layered approach to liability, depending on the qualification of the economic operator⁹. The CCPC particularly welcomes, in light of the significant number of non-EU products on the EU market, that this expansion seeks to ensure that an injured party can identify an EU-based liable person for a defective product manufactured outside the EU. The CCPC is further of the view that the possibility for an injured person to hold the person who made a substantial modification to a product liable as a manufacturer of the modified product is of benefit to consumers, particularly in the context of a greater number of businesses participating in the circular economy and the impact that modifications to software, including upgrades, can have on certain products. This aligns with those provisions of the GPSR which shift responsibility for the safety of a product on to persons making substantial modifications to that product¹⁰.

⁹ As noted by the European Parliament Briefing, see European Parliament, 2023, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/739341/EPRS_BRI\(2023\)739341_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/739341/EPRS_BRI(2023)739341_EN.pdf)

¹⁰ See Article 13(2), European Parliament and European Council, 2023, <https://data.consilium.europa.eu/doc/document/PE-79-2022-INIT/en/pdf>

In tort law, where damage is caused because of a faulty product, the burden of proof for fault or negligence usually rests with the consumer. Article 9(1) of the proposed PLD will retain the no-fault liability exception to ordinary tort law and, in making a claim under the proposed PLD, a consumer must only demonstrate the damage suffered, the defect in a product and the causal link between them.

Article 9(2) eases the burden of proof on a consumer in certain circumstances by allowing for the defectiveness of the product to be presumed where one of the following three conditions are met: the defendant has failed to comply with an obligation to disclose relevant evidence at its disposal under Article 8(1)¹¹, the claimant establishes that the product does not comply with mandatory safety requirements in Union or national law that are intended to protect against the risk of damage that has occurred¹², or the claimant establishes that the damage was caused by an obvious malfunction of the product during normal use or under ordinary circumstances¹³. Additional presumptions are provided for under Article 9(3) and 9(4) of the proposed PLD and the defendant's right to rebut any of the presumptions is set out in Article 9(5).

In general, the CCPC supports the rebuttable presumption approach as a reasonable balance to strike to ease the burden on consumers, who cannot be expected to be technical experts or have access to technical or scientific information about products.

It is noted that the specific presumptions of defectiveness under Article 9(2) are subject to question within the consultation and the CCPC offers the follow observations on that provision:

- The application of a presumption of defectiveness under Article 9(2)(a) acts as a powerful incentive for defendants to comply with an order for disclosure, in addition to those already existing in law.
- Article 9(2)(b) recognises the close relationship between an unsafe product and a defective product, by providing that the burden of proof should pass to the defendant where a product has been proven not to comply with mandatory safety requirements. It is understood by the wording in Article 9(2)(b) 'that are intended

¹¹ Article 9(2)(a)

¹² Article 9(2)(b)

¹³ Article 9(2)(c)

to protect against the risk of the damage that has occurred' that this presumption will require a relationship between the objective of the product safety law relied on and the damage which the injured person claims has occurred.

- While the CCPC agrees that it would be unnecessarily burdensome to require a claimant to prove defectiveness 'when the circumstances are such that its existence is undisputed', as set out in Recital 33, the lack of definition of 'obvious malfunction' in the Article 9(2)(c) of the proposed PLD might lead to a lack of clarity which would undermine a claimant's ability to rely on this presumption.

Article 10(1) of the proposed PLD sets out a number of exemptions from liability for a defendant, many of which it is noted align with the existing PLD, although referring to the expanded list of economic operators coming within the scope of the proposed PLD. It is noted that the existing PLD provided that the producer would not be liable if he proved that he did not put the product 'into circulation', although that term was not defined. The proposed PLD brings clarity in this space by defining the terms 'making available on the market', 'placing on the market' and 'putting into service'.

The CCPC believes that it is reasonable, as per the new Article 10(1)(g) for a person that modifies a product to avail of an exemption from liability where the modification was unrelated to the defectiveness that caused the damage.

Article 10(2) includes an important derogation from Article 10(1)(c) by providing that economic operators should remain liable for defectiveness that comes into being after a product is placed on the market, made available on the market or put it into service and is due to software or a related service that is within the manufacturer's control. This includes defectiveness which is caused by software upgrades or a lack of software upgrades which are within the control of the manufacturer. The CCPC considers it a positive development that Article 10(2) of the proposed PLD recognises that digital technologies can allow manufacturers to exert control over a product during its lifespan and therefore keeps pace with technological change, for the benefit of the consumer.

Chapter III: General Provisions on Liability

The CCPC notes the retention within the proposed PLD of the concept of joint and several liability, subject to national laws concerning contribution or recourse between two or

more economic operators. The CCPC views this concept as an important mechanism for enabling consumers to access redress for defective products, as it allows a consumer to recover the full amount of damages from any defendant found liable, even if that defendant did not bear full responsibility for the injuries.

Article 14 of the proposed PLD sets out a 3 year limitation period for the initiation of proceedings for claiming compensation, dating from the date on which the person is aware of the damage, the defectiveness and the identity of the liable trader. This aligns with the existing liability period in the PLD and in the Liability for Defective Products Act 1991 ('the 1991 Act'). Section 7 of the 1991 Act sets out a limitation period of three years for an action for the recovery of damages. This provision is aligned with the Statute of Limitations (Amendment) Act 1991. A right of action under the 1991 Act shall be extinguished ten years from the date on which the producer put into circulation the actual product which caused the damage unless the injured person has in the meantime instituted proceedings against the producer.

The CCPC notes that the proposed PLD will retain these limitation periods. However, in addition, the proposal at Article 14(3) of the PLD includes an exception from the provisions relating to a right of action, where an injured person has not been able to initiate proceedings within 10 years due to the latency of a personal injury, in which case the rights conferred upon the injured person pursuant to the proposed PLD shall be extinguished upon the expiry of a limitation period of 15 years. The CCPC notes observations in the European Commission Impact Assessment Report accompanying the proposed PLD that some products may be capable of damage to health that becomes evident only after a long time¹⁴. The proposal to extend the limitation period could be a valuable provision for consumers that have suffered such harms.

Chapter IV Final provisions

The CCPC understands that Article 17(2) of the revised PLD will replace the reference to the existing PLD in Article 2(1) and Annex I of the Representative Actions Directive and therefore, subject to the conditions in the Representative Actions Directive and

¹⁴ See European Commission, 2022, https://single-market-economy.ec.europa.eu/document/348b3e35-7d1a-43df-8e9d-296fc09e2c3c_en

transposing legislation, a representative action may be brought in respect of an action relating to a defective product under the PLD.

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