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European Commission's Proposal for a Revised Product Liability Directive

Feedback of the European Law Institute

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The European Law Institute

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Introduction

On 28 September 2022, the European Commission published two draft instruments: a proposed new Product Liability Directive (DPLD)[1] as well as a draft AI Liability Directive (DAILD).[2] For the former, a public consultation was launched.[3] The European Law Institute (ELI) has drafted this document in contribution to this debate.

Recent publications of the ELI have already addressed the challenges of the current Product Liability Directive (PLD)[4] and suggested ways to enhance and modernise the existing regime. In January 2021, the ELI published the 'Guiding Principles for Updating the EU Product Liability Directive for the Digital Age' (hereinafter: ELI Guiding Principles),[5] authored by Christian Twigg-Flesner, which set out concrete propositions for updating the EU Product Liability Directive with a view to adapting it to the digital age. In autumn 2021, the European Commission had already launched another public consultation on 'Adapting liability rules to the digital age and Artificial Intelligence', in which the ELI also participated. A small working group, tasked with drafting the 'ELI Response to the European Commission's Public Consultation on Civil Liability' (hereinafter: ELI Response),[6] led by Bernhard A Koch, produced recommendations on the way forward and answered the questions specifically posed by the European Commission. The same group was subsequently mandated to discuss and develop a proposal for a new directive based upon a tentative draft by one of its members (Christiane Wendehorst). The Project Team, led by Bernhard A Koch and Jean-Sébastien Borghetti, submitted the 'ELI Draft of a Revised Product Liability Directive' (hereinafter: ELI Draft PLD) to the ELI Council, which approved it on 5 July 2022.[7] The black-letter text of said proposal is reproduced in the Annex to this document below.[8]

Upon publication of the Commission proposals mentioned above, the Project Team reconvened (with the exception of Christian Twigg-Flesner) and jointly drafted the response to the current consultation. This text was submitted to and approved by the ELI Council on 1 December 2022.

In this document, we provide some general feedback on the DPLD and compare it to the ELI Draft PLD, where relevant. The main part of our contribution consists of comments to select articles of the DPLD (with the exception of those that we deem require neither change nor adjustment), structured according to the Commission's draft Directive itself. The interaction of the DPLD and the DAILD will also be addressed, since the ELI Draft PLD attempted to suggest an alternative solution in this regard. A further part will therefore highlight the key aspects of the ELI Draft PLD and put it into perspective with the dual directive approach as currently chosen by the Commission. We thereby hope to further contribute to a fruitful and constructive debate on these promising legislative projects.

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[1] Proposal for a Directive of the European Parliament and of the Council on liability for defective products, COM(2022) 495 final, available at < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2022%3A495%3AFIN&qid=1664465004344> accessed 21 December 2022.

[2] Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive), COM(2022) 496 final, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0496> accessed 21 December 2022.

[3] <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12979-Product-Liability-Directive-Adapting-liability-rules-to-the-digital-age-circular-economy-and-global-value-chains_en> accessed 21 December 2022.

[4] Council Directive 85/374/EEC of 25 July 1985, as amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products; Official Journal of the European Union (OJ) L141/42 <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31999L0034&from=EN> accessed 21 December 2022.

[5] European Law Institute, Guiding Principles for Updating the Product Liability Directive for the Digital Age (ELI Innovation Paper Series, 2021) <https://europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Guiding_Principles_for_Updating_the_PLD_for_the_Digital_Age.pdf> accessed 21 December 2022.

[6] European Law Institute, European Commission's Public Consultation on Civil Liability: Adapting Liability Rules to the Digital Age and Artificial Intelligence (Response of the European Law Institute, 2022) <https://europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Public_Consultation_on_Civil_Liability.pdf> accessed 21 December 2022.

[7] European Law Institute, ELI Draft of a Revised Product Liability Directive. Draft Legislative Proposal of the European Law Institute (2022) <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Draft_of_a_Revised_Product_Liability_Directive.pdf> accessed 21 December 2022.

[8] Infra pp 24 ff.

Comments on the European Commission's Proposal by Article

The ELI welcomes the current proposal for a new Product Liability Directive and is happy to see that the calls for reform, inter alia made by the ELI itself,[9] have been heard and acted upon. In particular, we strongly support the extension of the liability regime to digital products (including AI) as well as the recognition of the need to adjust the 1985 text to peculiarities of modern-day products such as continued updates provided (or at least authorised) by the original manufacturer after the finished product was put into circulation.

The proposal addresses the most important challenges identified with regard to the existing PLD and provides for a predominantly balanced solution with a justified update to and a cautious expansion of the current liability regime. While there is still room for clarification in some of the wording used as well as for further improvement with regard to certain specific aspects, the present proposal is a solid foundation for finalising the plans to replace the present PLD with a modernised liability regime for defective products.

Nonetheless, the following comments and suggestions for improvement or clarification are considered by the ELI as important points to improve the draft Directive, to ensure that it is coherent and that it covers all problems intended to be addressed by this draft. The ELI underlines therefore the importance of the following remarks and comments to achieve the goal set by the Commission in revising the PLD.

Chapter I: General Provisions

Article 1 DPLD

Subject matter

This Directive lays down common rules on the liability of economic operators for damage suffered by natural persons caused by defective products.

Article 2 DPLD

Scope

1. *This Directive shall apply to products placed on the market or put into service after [OP, please insert the date: 12 months after entry into force].*

2. *This Directive shall not apply to damage arising from nuclear accidents in so far as liability for such damage is covered by international conventions ratified by Member States.*

3. *This Directive shall not affect:*

   (a) *the applicability of Union law on the protection of personal data, in particular Regulation (EU) 2016/ 679, Directive 2002/58/EC, and Directive (EU) 2016/680;*

   (b) *national rules concerning the right of contribution or recourse between two or more economic operators that are jointly and severally liable pursuant to Article 11 or in a case where the damage is caused both by a defective product and by an act or omission of a third party as referred to in Article 12;*

   (c) *any rights which an injured person may have under national rules concerning contractual liability or concerning non-contractual liability on grounds other than the defectiveness of a product, including national rules implementing Union Law, such as [AI Liability Directive];*

   (d) *any rights which an injured person may have under any special liability system that existed in national law on 30 July 1985.*

[9] See the documents cited in fn 5 to 7 above.

ELI Comments

Exclusion of liability for nuclear accidents (Article 2(2) DPLD)

The express exclusion of liability for harm caused by nuclear accidents continues to disregard the fact that not all Member States have ratified at least one of the two international liability regimes addressing nuclear risks. This is true for Austria, Cyprus, Ireland, Luxembourg and Malta. In these countries, the DPLD would therefore still have to be implemented with regard to products that may trigger nuclear accidents. The wording of the exclusion is furthermore not limited to products with radioactive materials, but instead merely names 'damage arising from nuclear accidents', which seemingly includes accidents caused by non-radioactive products as long as they trigger risks of radiation.

Exclusion of rules on contribution or recourse (Article 2(3)(b) DPLD)

Like the current PLD, the DPLD excludes from its scope rights of contribution or recourse and leaves them to the laws of the Member States to regulate. However, this is no longer addressed in combination with the provisions foreseeing joint and several liability (currently Articles 5 and 8(1) PLD). Instead, the latter is now expressed by Articles 11 and 12(1) DPLD, whereas the exclusion of recourse questions as such was moved to the beginning into Article 2(3)(b) DPLD.

While we welcome this legislative technique per se inasmuch as it better reflects the structure of the regulatory regime, we still think that leaving these important questions entirely to the Member States has been and – by retaining it in the current draft – continues to be highly unfortunate. The laws of the Member States deviate substantially in this regard, and foregoing the chance to at least provide for minimum convergence misses out on an opportunity to approximate the rules governing this secondary stage of product liability litigation, which is equally important for the proper allocation of product risks as the primary stage. As a minimum, the ELI strongly suggests that such crucial points as disclosure and burden of proof as well as prescription should at least be addressed at the recourse level in the new PLD, which would still leave the bulk of the questions relating to the rights of recourse to the laws of the Member States and thereby inter alia avoid complications arising out of different qualifications of such rights throughout the EU.

In its own draft, the ELI has therefore proposed three important amendments to the right of recourse that should be included in a revised PLD:

1. Article 14(1) ELI Draft PLD highlights that the conditions for exercising the right of recourse 'must not be less favourable to the claimant than in comparable domestic cases'. This may seem self-evident, but clarifying it expressly prevents, for example, the right of recourse from being interpreted more narrowly in cases of liability for defective products.

2. As suggested in the comment to Article 14(2) ELI Draft PLD, it is important that the liability of the economic operator (whose liability was established by the victim) and the liability of the operator from whom recourse is sought by the former should not be established on the basis of significantly different rules of evidence. By leaving the requirements for such recourse at the full discretion of the Member States, one runs a significant risk of having two entirely different standards in those liability regimes, especially where there is no presumption or alleviation of the burden of proof at the recourse stage. It is therefore necessary to provide for a level playing field at EU level. This does not necessarily require a full extension of the rules proposed by Articles 8 and 9 DPLD to the parties of a recourse action, which is why Article 14(2) of the ELI Draft PLD suggests applying any such rules only 'as appropriate' in light of the different players involved at that secondary stage of litigation. Unlike the victim at the primary stage, those meeting at recourse level may often be professionals with better insight into the technicalities of the facts and/or different resources to investigate or pursue their claims. Thus, while leaving the legal grounds for such recourse to the Member States and setting the principle for similar evidentiary rules at EU level, it seems useful to grant judges some discretion when applying those rules to adapt to the great variety of scenarios where a right of recourse may arise.

3. By leaving the right of recourse entirely outside the scope of the draft Directive, the EU fails to ensure a coherent regime of limitation periods in recourse cases despite very specific rules concerning the

primary claims in Article 14 DPLD. It would be preferable instead to have a provision aligning the limitation periods applicable for claims against the economic operator liable at the first stage and the periods applying in cases of recourse. Article 17(3) ELI Draft PLD was intended to ensure that recourse is both an effective remedy and handled in similarly fair ways by the Member States.

For all these reasons, the ELI suggests that the right of recourse should not be excluded from the scope of application in its entirety (as currently proposed by Article 2(3)(b) DPLD). Instead, some minimal but mandatory provisions should be introduced as suggested by Articles 14 and 17(3) ELI Draft PLD.

Article 3 DPLD

Level of harmonisation

Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more, or less, stringent provisions to achieve a different level of consumer protection, unless otherwise provided for in this Directive.

ELI Comments

The ELI welcomes the express clarification that this instrument is aimed at full harmonisation within its field of application. This avoids uncertainties in this regard as inter alia evidenced by the European Court of Justice (ECJ) rulings in the first cases on the original PLD.[10]

Article 4 DPLD

Definitions

For the purpose of this Directive, the following definitions shall apply:

(1) 'product' means all movables, even if integrated into another movable or into an immovable. 'Product' includes electricity, digital manufacturing files and software;

(2) 'digital manufacturing file' means a digital version or a digital template of a movable;

(3) 'component' means any item, whether tangible or intangible, or any related service, that is integrated into, or inter-connected with, a product by the manufacturer of that product or within that manufacturer's control;

(4) 'related service' means a digital service that is integrated into, or inter-connected with, a product in such a way that its absence would prevent the product from performing one or more of its functions;

(5) 'manufacturer's control' means that the manufacturer of a product authorises a) the integration, inter-connection or supply by a third party of a component including software updates or upgrades, or b) the modification of the product;

(6) 'damage' means material losses resulting from:

(a) death or personal injury, including medically recognised harm to psychological health;

(b) harm to, or destruction of, any property, except:

(i) the defective product itself;

(ii) a product damaged by a defective component of that product;

(iii) property used exclusively for professional purposes;

(c) loss or corruption of data that is not used exclusively for professional purposes;

(7) 'data' means data as defined in Article 2, point (1), of Regulation (EU) 2022/868 of the European Parliament and of the Council;

(8) 'placing on the market' means the first making available of a product on the Union market;

(9) 'making available on the market' means any supply of a product for distribution, consumption or use on the Union market in the course of a commercial activity, whether in return for payment or free of charge;

[10] Cf, eg, ECJ Cases C-52/00 *Commission v France* [2002] ECR I-3827 (no 16); C-154/00 *Commission v Greece* [2002] ECR I-3879 (no 12); C-183/00 *González Sánchez* [2002] ECR I-3901 (no 25).

(10) 'putting into service' means the first use of a product in the Union in the course of a commercial activity, whether in return for payment or free of charge, in circumstances in which the product has not been placed on the market prior to its first use;

(11) 'manufacturer' means any natural or legal person who develops, manufactures or produces a product or has a product designed or manufactured, or who markets that product under its name or trademark or who develops, manufactures or produces a product for its own use;

(12) 'authorised representative' means any natural or legal person established within the Union who has received a written mandate from a manufacturer to act on its behalf in relation to specified tasks;

(13) 'importer' means any natural or legal person established within the Union who places a product from a third country on the Union market;

(14) 'fulfilment service provider' means any natural or legal person offering, in the course of commercial activity, at least two of the following services: warehousing, packaging, addressing and dispatching of a product, without having ownership of the product, with the exception of postal services as defined in Article 2, point (1), of Directive 97/67/EC of the European Parliament and of the Council, of parcel delivery services as defined in Article 2, point (2), of Regulation (EU) 2018/644 of the European Parliament and of the Council, and of any other postal services or freight transport services;

(15) 'distributor' means any natural or legal person in the supply chain, other than the manufacturer or the importer, who makes a product available on the market;

(16) 'economic operator' means the manufacturer of a product or component, the provider of a related service, the authorised representative, the importer, the fulfilment service provider or the distributor;

(17) 'online platform' means online platform as defined in Article 3, point (i), of Regulation (EU) 2022/2065 of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act).

ELI Comments

Definition of 'product' (Article 4(1) DPLD)

As said in the Introduction, we welcome the express inclusion of software within the scope of the DPLD. However, it remains unclear whether other digital products that do not qualify as 'software', such as digital content as defined by the Digital Content Directive 2019/770[11] are also included. While we assume that mere information supplied in digital form was meant to be excluded,[12] other digital content may be functionally equivalent to software as a product despite not executing specific tasks on its own. The list provided by Recital 12 does not specify such questions either.

Furthermore, it should be expressly stated whether SaaS (software as a service) is also a 'product' within the meaning of Article 4(1) DPLD. This should indeed be the case – after all, from the (decisive) perspective of product safety, it does not make a difference (certainly not for a victim) whether the software was bought as a standalone application subject to continuous updating, or whether the same product was sold on the basis of a subscription model. The fact that some parts of the SaaS may remain in the cloud and will not be locally installed is equally true for software packages bought as such, where certain components acquired may only be available as downloads. There is no justifiable distinction between software as a one-time acquired product and SaaS from the perspective of the concerns addressed by the DPLD, particularly in light of the fact that 'related digital services' are expressly included.

It is also deplorable that the current draft is silent on certain specific types of products whose inclusion

[11] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, available at < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32019L0770> accessed on 21 December 2022.

[12] This is currently supported by the recent ruling of the ECJ in Case C-65/20 Krone ECLI:EU:C:2021:471.

into the strict liability regime of the PLD is already being debated in the Member States, such as waste, or products based on human body parts, such as blood, cells, or tissue. It is therefore still unclear, for example, whether a kidney of the Veedfald kind[13] is a 'product' of the donor or of the hospital, or not a product within the meaning of the draft Directive at all.

Definition of 'digital manufacturing file' (Article 4(2) DPLD)

While we acknowledge the product quality of digital manufacturing files for purposes of this draft Directive, it is not entirely clear why these deserve to be singled out expressly even though they would invariably fall under the notion of 'digital content' were such term also be used here, in alignment with the Digital Content Directive 2019/770.

Definition of 'component' (Article 4(3) DPLD)

While we generally agree with the definition of 'component' in substance, it would have been preferable to not only clarify whether raw materials are also 'components' (as they should be), but also to include the definition of 'digital elements' used by the Digital Content Directive 2019/770, as this seemingly was intended anyhow. The definitions foreseen in Article 3(1)–(3) ELI Draft PLD seem preferable in comparison, also in order to contribute to a harmonious interplay of legal instruments.

Definition of 'damage' (Article 4(6) DPLD)

What was previously placed in a separate (substantive) provision (Article 9 PLD) has now been shifted into the list of definitions, which underplays the relevance and significance of this crucial element required to establish liability.

More troublesome is, however, the express limitation on 'material losses' without at least a complementing clarification as currently contained in the last sentence of Article 9 PLD with regard to immaterial harm. A mere indication to that end in Recital 18 DPLD is insufficient. Admittedly, the ECJ has made it clear[14] that types of harm and losses that are not covered by Article 9 PLD are outside the scope of the instrument, meaning that Member States are free to organise the compensation of such harm or losses as they wish, including by extending the PLD regime to them – which, incidentally, significantly reduces the harmonising effect of the PLD. The DPLD implicitly carries over this solution. 'Material losses' in Article 4(6) clearly mean pecuniary losses, as opposed to non-pecuniary losses such as pain and suffering (which are referred to as 'non-material' damage in Article 9 PLD). Yet, it cannot be the case that the DPLD intends to forbid the compensation of non-pecuniary losses in product liability cases in those Member States (a vast majority) where such losses are normally compensated. Rather, even though this is not stated explicitly as it is in Article 9 of the current PLD, the idea behind Article 4(6) DPLD is undoubtedly that non-material losses do not fall within the scope of the instrument and can therefore be regulated by Member States as they wish, as is the case under the current PLD. The same solution presumably applies to losses suffered by third parties because of the immediate victim's death or personal injury, the compensation of which is accepted in certain legal systems. And, in the absence of any distinction made in that respect by the DPLD, the solution should also apply to types of harm that are not covered by Article 4(6) DPLD, such as damage to professional property.

It is right that the PLD should indeed allow Member States to regulate the compensation of non-pecuniary losses as they wish, in view of the different legal traditions in that respect and of the comparatively limited financial impact of the compensation of such losses. On the other hand, to allow Member States to bring back types of primary harm that the PLD decided not to cover within the scope of the PLD regime is open to criticism. This limits the harmonising effect of the PLD, as mentioned earlier, and thwarts the logic behind such exclusion, which is to limit the financial impact of product liability for economic operators.

It is therefore suggested that the DPLD should: (1) expressly allow for the compensation of non-pecuniary losses if Member States so wish; and (2) exclude the compensation of those types of primary

[13] This alludes to the first substantive case on the PLD, ECJ Case C-203/99 *Veedfald* [2001] ECR I-3569 (even though the defective product at stake in that case was not the kidney donated by the claimant's brother).
[14] ECJ Case C-285/08, *Moteurs Leroy Somer* [2009] ECR I-4733.

harm (and of the consequential losses resulting thereof) that are not covered by Article 4(6) DPLD. Article 9 PLD or Article 6(2) of the ELI Draft could be used as a model for point (1). As for point (2), the exclusion could either (and preferably) be made explicit, or it could simply be hinted at by including a provision on point (1): if this were the case, one could conclude on an a contrario basis that, by explicitly allowing Member States to include non-pecuniary losses but not saying anything about the inclusion of primary harm not covered by the instrument, the DPLD implicitly forbids such inclusion.

As far as damage to property is concerned, the suppression by Article 4(6)(b) DPLD of the €500 threshold currently found at Article 9(b) PLD is most welcome, as this threshold is an unnecessary source of complication. The exclusion of damage to the defective product itself, which is better handled by contract law, is a confirmation of existing law. On the other hand, we do not regard the exclusion of damage caused to a product by a defective component of that product as a good solution. For its owner, the final product is a separate product from the component part, and it is difficult to see why they should not be compensated for the damage caused to their product by a separate product. The rule in the DPLD may furthermore lead to absurd results. If a car is damaged because it is equipped with a defective set of tyres, the owner of the car will be able to seek compensation from the manufacturer of the tyres if they purchased them themselves (either at the same time as they purchased the car or as a replacement for a previous set of tyres), but not if the tyres were part of the car's original equipment. It would be better to recognise that the owner of the finished product always has a claim against the manufacturer of the component part (or any other person liable under the DPLD) when the component part has caused damage to the owner, regardless of how the component part was 'integrated' into the finished product. This would also limit the number of actions, by reducing the number of claims between manufacturers of finished products and manufacturers of component parts. While we would have preferred to abolish the exclusion of property damage incurred by an enterprise altogether, we understand the political and strategic concerns obviously leading to prolonging the current exclusion of such losses (reinforced by the fact that only natural persons are eligible to claim property loss). As a minimum, we acknowledge the effort to address (and suitably resolve) the problem of dual use – limiting the exclusion of damage to property that is 'exclusively' used for professional purposes ensures that consumers using products both in private and professionally are equally protected.

Finally, Article 4(6)(c) DPLD includes loss or corruption of data that is not used exclusively for professional purposes. This is a logical consequence of the inclusion of digital products within the scope of the DPLD. However, unlike the ELI Draft, the DPLD does not include the leakage of data within the definition of damage, even though it can be seen as the flipside of loss or corruption of data. In certain cases, leakage of data will be covered by Article 82 General Data Protection Regulation (GDPR)[15], but this is not the case where the data is simply stored on the victim's device and there was no intervention of a controller or processor.

Definition of 'making available on the market' (Article 4(9) DPLD)

The ELI welcomes the clarification that any commercial activity placing the product on the market is covered, even if not for payment. This avoids current debates in the Member States whether, for example, sample products given away for free to potential clients can trigger product liability.

Definition of 'manufacturer' (Article 4(11) DPLD)

The definition of manufacturer does not address refurbishment. As further discussed below (see comments to Article 7 DPLD), the ELI considers that refurbishment should be included and properly addressed. Reference in Article 7(4) DPLD to the person who substantially modifies a product that has been placed on the market or put into service does not clearly address refurbishment, even if intended by the drafters of the DPLD. In fact, it is highly doubtful that a substantial modification should be regarded as refurbishment and vice versa. Either the

[15] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R0679&qid=1673360464141> accessed on 21 December 2022.

definition of a manufacturer is expanded accordingly, or a separate definition of a 'refurbisher' is introduced, eg as Article 4(11a) DPLD.

Definitions of 'authorised representative' and 'importer' (Article 4(12) and (13) DPLD)

Unlike the 1985 PLD, the definition of an importer is narrower in Article 4(13) DPLD inasmuch as the importer now has to be 'established within the Union', whereas in the original PLD, no such restriction was added (with Recital 4 of the 1985 PLD equating the importer with the component manufacturer and persons merely presenting themselves as producers). In the current draft, the definitions of the 'importer' as well as of the newly introduced 'authorised representative' in Article 4(12) DPLD are geographically limited.

While the underlying reasoning seems to be that consumers should be able to avail themselves of the benefits of the Brussels Ia regime,[16] there is no convincing reason to absolve importers established outside of the Union from liability for the mere fact that they are not equally within the reach of EU jurisdiction, which would even create the adverse incentive for those economic operators currently domiciled within the EU to leave the it in order to escape product liability.

Furthermore, the definitions in Article 4(12) and (13) DPLD are inconsistent with Article 7(3) DPLD, which is triggered if 'neither of the economic operators referred to in paragraph 2 is established in the Union'. If the importer and the authorised representative (that are named in paragraph 2) by definition always have to be established in the Union, the case of Article 7(3) DPLD can never arise.

Definition of 'fulfilment service provider' (Article 4(14) DPLD)

Apart from concerns relating to the ranking of the fulfilment service provider in the list of potentially liable parties in Article 7(3) DPLD, its definition should be reconsidered. The current wording excludes postal or parcel delivery as well as freight transport services from the notion of 'fulfilment service provider' even if these provide additional services, such as warehousing or packaging, while it may be that such was not intended. If the idea was to exclude mere transportation service providers, this should have been expressed as such.

Furthermore, we think such economic operators should only be liable under Article 7 (and this is the only place where this definition is relevant in this draft Directive) if they are closely linked to the manufacturer and/or importer in the supply chain, which requires more than just a one-time commitment for a single transaction, but rather a continuing and lasting business relationship which effectively makes the fulfilment service provider the 'long arm' of the manufacturer, enabling the export of the latter's products into the EU. The policy reason for holding the fulfilment service provider liable (though only subsidiarily) is the fact that they may serve as de facto distributors in the EU, though only by providing services facilitating the distribution in the Single Market. Nevertheless, a company that stores products manufactured outside of the Union in a Member State enables the manufacturer to more easily (and more quickly) distribute the products to consumers, which may be an important factor in their decision to purchase such products in the first place (while they would have to wait much longer for delivery in the absence of a local fulfilment service provider). However, this reasoning does not extend to someone providing such services only ad hoc without an ongoing business relationship with the manufacturer, eg only for the fulfilment of a single order by a single consumer. The definition of a 'fulfilment service provider' should therefore be clarified (and narrowed) accordingly.

[16] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32012R1215> accessed on 21 December 2022.

Chapter II. Specific provisions on liability for defective products

Article 5 DPLD

Right to compensation

1. *Member States shall ensure that any natural person who suffers damage caused by a defective product ('the injured person') is entitled to compensation in accordance with the provisions set out in this Directive.*

2. *Member States shall ensure that claims for compensation pursuant to paragraph 1 may also be brought by:*

   (a) a person that succeeded, or was subrogated, to the right of the injured person by virtue of law or contract; or

   (b) a person acting on behalf of one or more injured persons in accordance with Union or national law.

ELI Comments

In accordance with Article 1 DPLD, Article 5 DPLD restricts the scope of potential claimants to natural persons. This is presumably a consequence of the types of harm that are covered by the DPLD. Death and personal injury can only be suffered by natural persons, and property or data that are not used at all for professional purposes will usually be those of natural persons. However, natural persons cannot be equated with private purposes, nor can legal persons be equated with professional purposes. For example, it may be discussed whether property belonging to non-profit organisations is used for private or professional purposes. The issue is even more acute for property belonging to family companies set up for tax purposes, as exist in some Member States. For example, in some countries, it is common for members of a family to own a building through a family company. In that case, the property is not used for professional purposes, but belongs formally to a legal person. Damage to this property caused by a defective product would therefore not be compensated under the DPLD. It is suggested that this is too restrictive, and that the exclusion of property or data used solely for professional purposes is enough to limit the scope of product liability. The reference to natural persons should therefore be deleted from Articles 1 and 5 DPLD.

Article 6 DPLD

Defectiveness

1. *A product shall be considered defective when it does not provide the safety which the public at large is entitled to expect, taking all circumstances into account, including the following:*

   (a) the presentation of the product, including the instructions for installation, use and maintenance;

   (b) the reasonably foreseeable use and misuse of the product;

   (c) the effect on the product of any ability to continue to learn after deployment;

   (d) the effect on the product of other products that can reasonably be expected to be used together with the product;

   (e) the moment in time when the product was placed on the market or put into service or, where the manufacturer retains control over the product after that moment, the moment in time when the product left the control of the manufacturer;

   (f) product safety requirements, including safety-relevant cybersecurity requirements;

   (g) any intervention by a regulatory authority or by an economic operator referred to in Article 7 relating to product safety;

   (h) the specific expectations of the end-users for whom the product is intended.

2. *A product shall not be considered defective for the sole reason that a better product, including updates or upgrades to a product, is already or subsequently placed on the market or put into service.*

ELI Comments

We consider this definition of a product defect in Article 6 DPLD to be correct and a step forward from the current provision (Article 6 PLD). By extending the list of factors that should be taken into account when assessing product defectiveness, the proposal inter alia aptly draws attention to phenomena

specific to digital products or those containing digital components. These are, first and foremost, the ability of the product to interact with other products, the ability of the product to evolve after its launch, and the retention by the manufacturer of a degree of control over the product's characteristics while he is in control.

In our view, further factors identified by Articles 7(1) and 7(2) of the ELI Draft PLD are also worth mentioning and should at least in part be considered for inclusion into the list of Article 6(1) DPLD.

Furthermore, the meaning of Article 6(1)(g) DPLD is not entirely clear. It appears from the Recital that it refers to mandatory and voluntary recalls. In our view, such facts should be considered in the context of proving defects and not set a standard for assessing product defectiveness. In addition, inferring defectiveness from a product recall may discourage manufacturers from voluntarily recalling products of unsatisfactory quality.

Changing the phrase 'a person is entitled to expect' to 'the public at large is entitled to expect' rightly emphasises the objective, rather than subjective, nature of safety assessment. However, it raises some doubts when combined with the circumstance listed in Article 6(1)(h) DPLD concerning the specific expectations of the intended users of the product. As we understand it, in the case of products intended for specific categories of users (in particular for users that are specifically protected by the legal systems of the Member States such as children, the elderly, the sick, etc), the relevant safety standard is not that set in a general way by the safety expectations and needs of 'the public at large', but a more sophisticated standard. The latter is defined by the objective safety needs of the persons belonging to that specific category, which are, as a rule, higher than the general safety requirements. These, in turn, must take into account the fact that the actual safety expectations of these persons themselves (especially children) and the caution corresponding to these expectations may be lowered due to a lack of knowledge or cognitive deficits. All this must be taken into account when designing products for them.

The proposed definition fails to facilitate the assessment of defectiveness in the case of so-called manufacturing defects, though. It should be clarified that a mere deviation from the safety requirements of the product design constitutes a defect (see Article 7(1) of the ELI Draft PLD).

Article 7 DPLD

Economic operators liable for defective products

1. *Member States shall ensure that the manufacturer of a defective product can be held liable for damage caused by that product.*

   Member States shall ensure that, where a defective component has caused the product to be defective, the manufacturer of a defective component can also be held liable for the same damage.

2. *Member States shall ensure that, where the manufacturer of the defective product is established outside the Union, the importer of the defective product and the authorised representative of the manufacturer can be held liable for damage caused by that product.*

3. *Member States shall ensure that, where the manufacturer of the defective product is established outside the Union and neither of the economic operators referred to in paragraph 2 is established in the Union, the fulfilment service provider can be held liable for damage caused by the defective product.*

4. *Any natural or legal person that modifies a product that has already been placed on the market or put into service shall be considered a manufacturer of the product for the purposes of paragraph 1, where the modification is considered substantial under relevant Union or national rules on product safety and is undertaken outside the original manufacturer's control.*

5. *Member States shall ensure that where a manufacturer under paragraph 1 cannot be identified or, where the manufacturer is established outside the Union, an economic operator under paragraph 2 or 3 cannot be identified, each distributor of the product can be held liable where:*

   (a) the claimant requests that distributor to identify the economic operator or the person who supplied the distributor with the product; and

   (b) the distributor fails to identify the economic operator or the person who supplied the distributor with the product within 1 month of receiving the request.

6. *Paragraph 5 shall also apply to any provider of an online platform that allows consumers to conclude distance contracts with traders and that is not a manufacturer, importer or distributor, provided that the conditions of Article 6(3) set out in Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) are fulfilled.*

ELI Comments

Structure

The cascade-like liability model under Article 7 DPLD does not differ radically from the model proposed by ELI in its reply to the Commission's consultation and as subsequently suggested in the ELI Draft PLD.

However, there are two significant points of disparity. First, the way the cascade is organised, and second, the unclear treatment of refurbishment, as further elaborated upon below.

The liability of fulfilment service providers is explicitly provided for in Article 7(3) DPLD, where neither the manufacturer nor the importer of the defective product or the authorised representative of the manufacturer are established in the Union (see also our comments supra on the flawed definitions of importers and authorised representatives in Article 4(12) and (13) DPLD). While we understand the logic of introducing another possible defendant, the activities carried out by fulfilment service providers, as defined in the text, might not solidly and decisively justify the allocation of liability. In particular, the liability of the fulfilment service provider is immediately triggered when the primarily liable economic operators are located outside the EU. The fact that they are not identified is not (apparently) covered by this provision. More importantly, the 'ranking' of fulfilment service providers in the cascade of liability precedes online platforms, even if the latter may indeed perform activities that not only include those of the fulfilment service providers (in which case they are liable as such), but others that are more relevant for the purposes of defective product liability. Indeed, due to the obligations of traceability of business users (as per the Digital Services Act), online platforms may not only be in a better position to identify the producer, the importer or the representative, than fulfilment service providers that perform pure handling activities throughout the supply chain, but typically are also able to predetermine the handling of recourse claims upstream.

Besides, a distinction should be made between fulfilment service provides that are closely connected to the importer, and which in effect play the same role as an importer, and those that work with the producer on an occasional basis, and may not even know what products they are handling.

We therefore believe that the cascade should be ordered as follows:

1. The manufacturer of the finished product or the manufacturer of the defective component (as currently foreseen by Article 7(1) DPLD).

2. Where the manufacturer of the defective product and/or component is established outside the Union, the importer or authorised representative of the manufacturer should also be liable alongside the manufacturer(s) irrespective of whether the latter are established within the Union (as currently foreseen by Article 7(2) DPLD, though subject to the flawed definition of those economic operators in Article 4(12) and (13) DPLD). It should be made expressly clear that they may already be liable on the primary level if they market the product under their name or trademark (which fulfils the definition of a manufacturer according to Article 4(11) DPLD).

3. Where the manufacturer of the defective product and/or component as well as the importer and the authorised representative are all established outside the Union, an online platform that allows consumers to conclude distance contracts with traders as defined by Article 6(3) Digital Services Act[17] and which is not already liable as an economic operator on the previous levels (eg by presenting

[17] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), available at < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R2065&qid=1666857835014> accessed on 21 December 2022.

itself as the producer or by acting as the importer) should not only be liable like a distributor, but like the importer as their role is comparable: by enabling 'the specific transaction at issue in a way that would lead an average consumer to believe that the … product … that is the object of the transaction, is provided either by the online platform itself or by a recipient of the service who is acting under its authority or control', they not only act as intermediaries replacing the importer, but generate trust in the consumer which typically contributes to the latter's decision to buy the product from the economic operator using the platform for distributing its products.

4. Where the manufacturer of the defective product and/or component as well as the importer, the authorised representative, and the online platform are all established outside the Union, the fulfilment service provider that is closely linked to the manufacturer (see the amended definition of Article 4(14) DPLD suggested supra).

5. If none of the economic operators listed so far can be held liable, the backup liability of the distributor as suggested by Article 7(5) DPLD should apply (which by and large corresponds to the current Article 3(3) PLD (though subject to further qualifications).

The future PLD should also expressly make clear that all economic operators in that cascade remain liable alongside those on the preceding levels.

We therefore suggest the following wording of Article 7:

1. 'Member States shall ensure that the manufacturer of a defective product can be held liable for damage caused by that product.

   Member States shall ensure that, where a defective component has caused the product to be defective, the manufacturer of a defective component can also be held liable for the same damage.

   Any natural or legal person that modifies a product that has already been placed on the market or put into service and places it on the market or puts it into service as modified shall be considered a manufacturer of the product, where the modification is considered substantial under relevant Union or national rules on product safety and is undertaken outside the original manufacturer's control.

2. Member States shall ensure that, where the manufacturer of the defective product or defective component is established outside the Union, the importer of the defective product and the authorised representative of the manufacturer, if neither of them are manufacturers themselves and therefore liable under paragraph 1, can also be held liable for damage caused by that product.

3. Member States shall ensure that, where neither of the economic operators referred to in paragraphs 1 and 2 is established in the Union, an online platform that allows consumers to conclude distance contracts with traders and that is not a manufacturer, importer or distributor, shall also be liable for damage caused by that product, provided that the conditions of Article 6(3) set out in Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) are fulfilled.

4. Member States shall ensure that, where neither of the economic operators referred to in paragraphs 1 to 3 are established in the Union, the fulfilment service provider who is neither a manufacturer, importer or distributor, or an online platform, can also be held liable for damage caused by the defective product.

5. Member States shall ensure that, where a manufacturer under paragraph 1 cannot be identified or, where the manufacturer is established outside the Union, an economic operator under paragraph 2 or 3 cannot be identified, each distributor of the product can be held liable where:

   (a) the claimant requests that distributor to identify the economic operator or the person who supplied the distributor with the product; and

   (b) the distributor fails to identify the economic operator or the person who supplied the distributor with the product within one month of receiving the request.'

Refurbishment and modification

The Commission draft unfortunately does not explicitly address refurbishment. Article 7(4) DPLD includes any natural or legal person within the notion of a 'manufacturer' that modifies a product that has already been placed on the market or put into service, as long as the modification is considered substantial ('under relevant Union or national rules on product safety') and is undertaken outside the original manufacturer's control.

It is highly doubtful that the term 'substantial modification' refers to refurbishment, even if that had been the intention of the drafters. Refurbishment is aimed at returning or reinstating the original quality of the product, whereas a modification, in particular a substantial one, pursues fundamentally different goals. A 'substantial modification' includes, for example, the tuning of a motor vehicle by adding accessories which impact upon its safety, or by adjusting its performance. A refurbishment of a car, on the other hand, is merely the repairing of deteriorations since the original placing on the market, often with the express advertisement that it is now comparable to a brand new product of the same kind, in particular with respect to its safety features.

Refurbishment is attracting attention in the market and plays a relevant policy-promoting role for a circular economy, greener economy, etc. Therefore, we deem it imperative to expressly address this phenomenon in the black-letter text of the future PLD, even if the final political decision were to exclude it from the Directive's scope altogether.

The ELI recommends that the PLD explicitly deals with and includes within its scope of application any refurbished products. This requires, however, that the definition of a producer or manufacturer is adapted accordingly. It also triggers the need to clarify the distinction between refurbishment and modification. Furthermore, the position of the original manufacturer and their relation to the refurbisher has to be defined (eg similar to a component manufacturer, which would also allow a distinction to be made between defects included in the original product before refurbishment and flaws added by the latter process). This would also entail an adaptation of the defences in Article 10(1) DPLD by inserting a separate defence between (f) and (g) mirroring the latter (see also the comments infra to Article 10).

Under the current wording of Article 7(4) DPLD, it is furthermore unclear whether a person who substantially modifies a product is treated as a manufacturer only if, or to the extent that, they make the product available on the market anew after modification, or whether this is not a requirement. In the latter case, the consequences may be unexpected or at least uncertain (cf a repair shop).

Article 8 DPLD

Disclosure of evidence

1. *Member States shall ensure that national courts are empowered, upon request of an injured person claiming compensation for damage caused by a defective product ('the claimant') who has presented facts and evidence sufficient to support the plausibility of the claim for compensation, to order the defendant to disclose relevant evidence that is at its disposal.*

2. *Member States shall ensure that national courts limit the disclosure of evidence to what is necessary and proportionate to support a claim referred to in paragraph 1.*

3. *When determining whether the disclosure is proportionate, national courts shall consider the legitimate interests of all parties, including third parties concerned, in particular in relation to the protection of confidential information and trade secrets within the meaning of Article 2, point 1, of Directive (EU) 2016/ 943.*

4. *Member States shall ensure that, where a defendant is ordered to disclose information that is a trade secret or an alleged trade secret, national courts are empowered, upon a duly reasoned request of a party or on their own initiative, to take the specific measures necessary to preserve the confidentiality of that information when it is used or referred to in the course of the legal proceedings.*

ELI Comments

Article 8 DPLD contains provisions on the disclosure of evidence. This is one of the methods used to facilitate proving the victims' case which can substantially improve their sometimes challenging situation in such cases. The sanction of adverse inference (Article 9(2)(a) DPLD) is severe but will ensure the effectiveness of the victim's right. The proposed solution generally deserves a positive assessment. However, the wording of the provision suggests that it applies only to claimants in already initiated compensation proceedings. Yet, it is not uncommon that access to information is needed to make the decision on whether to file a claim in the first place – to identify the actual liable person (the defendant) and to assess the chances of success. It is therefore worth considering extending the proposed mechanism to preliminary proceedings in order to secure evidence at the pre-trial stage.

Article 9 DPLD

Burden of proof

1. *Member States shall ensure that a claimant is required to prove the defectiveness of the product, the damage suffered and the causal link between the defectiveness and the damage.*

2. *The defectiveness of the product shall be presumed, where any of the following conditions are met:*

   (a) the defendant has failed to comply with an obligation to disclose relevant evidence at its disposal pursuant to Article 8(1);

   (b) the claimant establishes that the product does not comply with mandatory safety requirements laid down in Union law or national law that are intended to protect against the risk of the damage that has occurred; or

   (c) the claimant establishes that the damage was caused by an obvious malfunction of the product during normal use or under ordinary circumstances.

3. *The causal link between the defectiveness of the product and the damage shall be presumed, where it has been established that the product is defective and the damage caused is of a kind typically consistent with the defect in question.*

4. *Where a national court judges that the claimant faces excessive difficulties, due to technical or scientific complexity, to prove the defectiveness of the product or the causal link between its defectiveness and the damage, or both, the defectiveness of the product or causal link between its defectiveness and the damage, or both, shall be presumed where the claimant has demonstrated, on the basis of sufficiently relevant evidence, that:*

   (a) the product contributed to the damage; and

   (b) it is likely that the product was defective or that its defectiveness is a likely cause of the damage, or both.

   The defendant shall have the right to contest the existence of excessive difficulties or the likelihood referred to in the first subparagraph.

5. *The defendant shall have the right to rebut any of the presumptions referred to in paragraphs 2, 3 and 4.*

ELI Comments

Another innovative feature of the proposal in relation to matters of proof is the introduction of presumptions of defectiveness and causation. This closes the gaps that currently exist in the protection of aggrieved parties as a result of the burden of proof being placed entirely upon them. In fact, three slightly different legislative techniques are used here: the determination of the existence of a defect as a sanction for failure to comply with the duty to disclose evidence (Article 9(2)(a) DPLD); the presumption of defect if the claimant proves certain facts (Article 9(2)(b) and (c) as well as Article 9(3) DPLD); and the lowering of the standard of proof to the level of mere likelihood if it is excessively difficult to fully prove defectiveness and/or causation (Article 9(4) DPLD). This diversity may cause some difficulties for national legislators at the implementation stage, but the substantive content of the proposed measures should be viewed positively.

However, we believe that Article 9(4) DPLD needs to be reconsidered or at least rephrased. The requirement of 'excessive difficulties' is unclear, in particular with regard to the point of reference – for whom and with regard to what does it have to be 'excessively difficult'? The claimant individually under the specific circumstances or objectively? Also, the presumption

in this paragraph requires that 'the claimant has demonstrated, on the basis of sufficiently relevant evidence,' that the product was involved in causing harm and that it was 'likely' (sic!) that the product was defective, or that its defect was a 'likely cause'. While it may already be difficult for the claimant to prove that the 'defectiveness is a likely cause of the damage' without proving that the product was defective (note the word 'or'!), the standard of proof remains unclear. If it is just 'likelihood' that needs to be shown, a probability of 51% would suffice. However, according to the current draft wording, this needs to be demonstrated 'on the basis of sufficiently relevant evidence', which, in most jurisdictions, means more than just a mere preponderance of the evidence.

Article 10 DPLD

Exemption from liability

1. An economic operator referred to in Article 7 shall not be liable for damage caused by a defective product if that economic operator proves any of the following:

(a) in the case of a manufacturer or importer, that it did not place the product on the market or put it into service;

(b) in the case of a distributor, that it did not make the product available on the market;

(c) that it is probable that the defectiveness that caused the damage did not exist when the product was placed on the market, put into service or, in respect of a distributor, made available on the market, or that this defectiveness came into being after that moment;

(d) that the defectiveness is due to compliance of the product with mandatory regulations issued by public authorities;

(e) in the case of a manufacturer, that the objective state of scientific and technical knowledge at the time when the product was placed on the market, put into service or in the period in which the product was within the manufacturer's control was not such that the defectiveness could be discovered;

(f) in the case of a manufacturer of a defective component referred to in Article 7(1), second subparagraph, that the defectiveness of the product is attributable to the design of the product in which the component has been integrated or to the instructions given by the manufacturer of that product to the manufacturer of the component; or

(g) in the case of a person that modifies a product as referred to in Article 7(4), that the defectiveness that caused the damage is related to a part of the product not affected by the modification.

2. By way of derogation from paragraph 1, point (c), an economic operator shall not be exempted from liability, where the defectiveness of the product is due to any of the following, provided that it is within the manufacturer's control:

(a) a related service;

(b) software, including software updates or upgrades; or

(c) the lack of software updates or upgrades necessary to maintain safety.

ELI Comments

Most defences proposed by Article 10 DPLD are already well known from the original PLD, and most of them are unproblematic.

Development Risk Defence (Article 10(1)(e) DPLD)

While we still question the need for a development risk defence in its current form (currently Article 7(e) PLD, now Article 10(1)(e) DPLD), we acknowledge that a complete abolition may not be politically feasible for many Member States, even though some have already opted for such. If this defence were to be retained, however, we repeat our call to reconsider its wording.[18]

To begin with, it is unclear why only the manufacturer should have the opportunity to escape liability under the conditions foreseen and not, for example, the importer. Under the original PLD, the importer was

[18] See ELI Guiding Principles (fn 5) 10; ELI Response (fn 6) 18.

liable 'as a producer' according to Article 3(2) PLD and therefore could also avail themself of the defence of Article 7(e) PLD, which – without restrictions – spoke of the 'producer' as the one who should escape liability. However, with the express definitions used in the current DPLD, the 'importer' is not a 'manufacturer' and shall also be liable as such and not 'as a manufacturer'. Nevertheless, also the importer should be able to raise the same defences as the person from whom they will subsequently need to seek recourse.

It is also inexplicable to us why the current option for Member States to exclude the development risk defence (Article 15(1)(b) PLD) was not at least preserved in the current draft, which would require Finland, France, Luxembourg and Spain to introduce it (or to extend it to all products) against their current choices.

When it comes to the actual wording of the defence, the insertion of the word 'objective' as a qualification of the 'state of scientific and technical knowledge' is a very nominal improvement, considering the massive changes to the availability of information as compared to 1985 and to the substantial improvements of electronic translations, making even remote languages now accessible. The paper of an academic in Manchuria published in Chinese[19] will nowadays be accessible via SSRN or otherwise via Google and converted into English automatically. The 'objective state' of science and technology is therefore a much higher challenge for manufacturers to keep track of. There is consequently a need to specify what they need to show in order to successfully avail themselves of the defence.

The definition of the relevant point in time in Article 10(1)(e) DPLD was weakened as compared to the current version of Article 7(e) PLD. The intentions behind expanding it to 'the time when the product was placed on the market, put into service or in the period in which the product was within the manufacturer's control' are obvious, but the wording as it stands seems to suggest three different options from which a court may choose, which clearly cannot have been the underlying idea. As is also evident elsewhere, the original 'magic moment' when the product was put into circulation needs to be defined elsewhere for the entire draft Directive, so that the same term can be reused at all places without leading to misunderstandings triggered by incomplete references.

Adaptations necessary for expressly including refurbishment into the scope of the PLD

As already explained above in our comments to Article 7 DPLD, we deem it imperative to expressly address refurbished products in the future PLD. If the refurbisher is held liable as a manufacturer, either only for defects added in the course of the refurbishment or for the original defects of the product as well (which is typically returned to the market 'as new'), the relationship between the manufacturer of the original finished product and the refurbisher needs to be clarified. With the current wording of Article 10(1)(c) DPLD, the former can (rightly) escape liability by showing 'that the defectiveness … did not exist when the product was placed on the market' originally (ie before refurbishment). However, a new defence would need to be inserted as suggested above, mirroring the defence in Article 10(1)(g) DPLD ('in the case of refurbishment, that the defectiveness that caused the damage is related to a part of the product not affected by the refurbishment').

[19] This alludes to the argument by AG Tesauro in Case C-300/95 *Commission v UK* [1997] ECR I-2649 (no 23), where he argued with regard to the accessibility of information at the time that 'the circulation of information is affected by objective factors, such as, for example, its place of origin, the language in which it is given and the circulation of the journals in which it is published. To be plain, there exist quite major differences in point of the speed in which it gets into circulation and the scale of its dissemination between a study of a researcher in a university in the United States published in an international English-language international journal and, to take an example given by the Commission, similar research carried out by an academic in Manchuria published in a local scientific journal in Chinese, which does not go outside the boundaries of the region.' This may still have been true in 1997, but certainly no longer 25 years later.

Chapter III: General provisions on liability

Article 11 DPLD

Liability of multiple economic operators

Member States shall ensure that where two or more economic operators are liable for the same damage pursuant to this Directive, they can be held liable jointly and severally.

Article 12 DPLD

Reduction of liability

1. *Member States shall ensure that the liability of an economic operator is not reduced when the damage is caused both by the defectiveness of a product and by an act or omission of a third party.*

2. *The liability of an economic operator may be reduced or disallowed when the damage is caused both by the defectiveness of the product and by the fault of the injured person or any person for whom the injured person is responsible.*

ELI Comments

Competing third party causes

The ELI agrees on most points encapsulated in the proposed text of Article 12(1) DPLD, which corresponds to a large extent to the ELI Draft PLD (see Article 13(2) ELI Draft PLD).

It should, however, be modified with regard to two important aspects:

1. Exclusion of liability: Article 12(1) DPLD only mentions the reduction of liability. Instead, it would be better to align this with Article 12(2) DPLD, and therefore to also mention the 'exclusion' of liability, as has been done in Article 13(2) ELI Draft PLD ('reduced or excluded'). The reason is not just a formal one, but is at the heart of a sufficient level of protection for consumers. Even if the cause of damage attributable to a third party contributed in such an important way to the damage that it could exclude the liability of the economic operator, in the relation between the third party and the economic operator, the liability of the latter towards the consumer should not be excluded. The absence of any reference to the case of exclusion of liability might be an important source of differences between Member States, and therefore a limitation of the channelling principle. The consumer should be in a position to reach any economic operator, without having to determine which economic operator is more or especially exclusively liable. Article 12(1) DPLD should therefore provide as follows: 'is not reduced or excluded'.

2. The source of liability of the third party: the latter is too restrictive. The liability of the third party may not only by caused by an act or omission of such party, it might (and will most of the time) be the result of events attributable to such third party, but potentially caused by agents or other causes legally attributable to such third party. Article 13(2) ELI Draft PLD should therefore be preferred ('an event attributable to a third party') to Article 12(1) DPLD. This would also contribute to more coherence in the draft between Article 12(1) DPLD and Article 12(2) DPLD, which relies on the 'attributable events'.

Subparagraph 1, however, is an improvement with regard to the current version of Article 8(1) PLD, which entails a default rule over which derogating provisions of Member States law prevail ('Without prejudice to the provisions of national law concerning the right of contribution or recourse'). The proposed formulation ensures a greater level of harmonisation than the current one, given that all Member States shall ensure the same result, while remaining free as to how to achieve it.

Contributory or comparative negligence

Article 12(2) DPLD intends to harmonise, at EU level, aspects that tackle issues dealt with similarly in the non-product liability laws on delict in the Member States. While the draft wording essentially copies the current Article 8(2) PLD, we deem it preferable that Member States treat these situations in the same way, ensuring at least the same level of protection for consumers under the regime of product liability as afforded by the remaining tort laws in each Member State. This could be achieved by adding wording as suggested by Article 13(3) ELI Draft PLD: '[…] shall be determined by Member State law. These conditions must not be less favourable to the victim than those relating to similar domestic claims.'

Furthermore, the use of the expression 'fault of the injured person or any person' in Article 12(2) DPLD is inappropriate, even though it may have been used in the past (but equally wrongly). It is correct to include in Article 12(2) DPLD conduct or events attributable to the injured person as grounds for reducing or excluding liability. The contributory conduct from within the victim's own sphere should, however, not be qualified as 'fault', as it might not always be such, especially if it is related to an event attributable to the injured person, but not to an act or omission of their own. Whether the attributable events should only be taken into account if they qualify as fault should not be dealt with here, but left to the Member States' discretion to ensure internal coherence of tort law at the Member States' level. A more objective description would therefore be the wording proposed by Article 13(3) ELI Draft PLD: 'where conduct attributable to the victim […]'.

Article 13 DPLD

Exclusion or limitation of liability

Member States shall ensure that the liability of an economic operator pursuant to this Directive is not, in relation to the injured person, limited or excluded by a contractual provision or by national law.

ELI Comments

The ELI agrees with the mandatory nature of an economic operator's liability pursuant to this draft Directive.

The title of Article 13 DPLD should, however, be more precise. It is a provision on the 'mandatory nature' of the provision, and it should therefore say so, as Article 15 ELI Draft PLD does. This would be clearer than the current title, which seems to imply that this provision adds further defences for the claimant.

Article 14 DPLD

Limitation periods

1. *Member States shall ensure that a limitation period of 3 years applies to the initiating of proceedings for claiming compensation for damage falling within the scope of this Directive. The limitation period shall begin to run from the day on which the injured person became aware, or should reasonably have become aware, of all of the following:*

   (a) the damage;

   (b) the defectiveness;

   (c) the identity of the relevant economic operator that can be held liable for the damage in accordance with Article 7.

   The laws of Member States regulating suspension or interruption of the limitation period referred to in the first subparagraph shall not be affected by this Directive.

2. *Member States shall ensure that the rights conferred upon the injured person pursuant to this Directive are extinguished upon the expiry of a limitation period of 10 years from the date on which the actual defective product which caused the damage was placed on the market, put into service or substantially modified as referred to in Article 7(4), unless a claimant has, in the meantime, initiated proceedings before a national court against an economic operator that can be held liable pursuant to Article 7.*

3. *By way of exception from paragraph 2, where an injured person has not been able to initiate proceedings within 10 years due to the latency of a personal injury, the rights conferred upon the injured person pursuant to this Directive shall be extinguished upon the expiry of a limitation period of 15 years.*

ELI Comments

The ELI agrees with the inclusion of current Article 10 PLD as Article 14(1) of the proposed DPLD. This ensures harmonisation of prescription periods at least for the risks covered by this draft Directive.

However, as already elaborated in our response to the Consultation,[20] we strongly object to the prolongation of an extinction of claims in paragraph 2, which is alien to the tort laws of most Member States. The fundamental error of the original Directive in this regard should be corrected and replaced by a long-stop limitation period, which is substantially

[20] ELI Response (fn 6) p 19.

different from an extinction of claims. Even in the few jurisdictions that historically foresaw the 'extinction' of claims, such as France or Italy, the current perception supports the prevailing view in the rest of Europe.[21]

As to the extension of the long-stop period to 15 years for a select group of cases in paragraph 3, evidently attempting to correspond to the Howald Moor ruling of the European Court of Human Rights (ECtHR),[22] it is doubtful that 15 years is long enough to satisfy the requirements highlighted by that Court. Also, when it comes to personal injury in general, the trend in Europe is towards substantial extension if not full abolition of long-stop limitation periods, therefore pointing in the exact opposite direction as now proposed by the DPLD. This should therefore also be reconsidered.

Chapter IV: Final provisions

[…]

ELI Comments

The provisions of Chapter IV (Articles 15–20) DPLD are of a purely technical character and do not require any comments from our side.

[21] See Borghetti, *Prescription in Tort Law: France*, no 5 f (solution identical to the rest of Europe since damages paid cannot be reclaimed: no 6); Comandé/Occhipinti, *Prescription in Tort Law: Italy*, no 7 ('extinction does not actually extinguish rights, but merely operates to attenuate their efficacy'); both in Gilead/Askeland (eds), *Prescription in Tort Law: Analytical and Comparative Perspectives* (Intersentia 2020).
[22] *Howald Moor and Others v Switzerland*, App nos 52067/10 and 41072/11 (ECtHR 11 March 2014).

The Relationship Between Strict Liability and Liability for Non-Compliance with Certain Obligations, in Particular with Regard to AI Risks

In its own Draft PLD, the ELI had suggested inserting a separate Chapter III on **liability for non-compliance with obligations under product safety and market surveillance law**, which does not have any predecessor in the current PLD. The obligations resulting from product safety or market surveillance law are manifold, ranging from ensuring conformity with essential safety requirements in the first place, to monitoring the product, to taking corrective measures in case safety issues arise (eg an over-the-air update or product recall), to cooperating with market surveillance authorities. In principle, a breach of any such obligation could potentially result in harm to victims. In light of slightly diverging views as to the requirements of fault and as to who bears the burden of proof, the ELI Draft PLD had suggested not to mention fault as a requirement, but to exclude liability, inter alia, where the non-compliance is due to an impediment beyond the defendant's control. This moves the suggested regime of liability very **close to fault liability** as it exists under national laws, but provides for a fully harmonised regime that can replace the slightly diverging regimes of fault liability that are currently in place.

Liability for non-compliance with market surveillance and similar obligations was previously dealt with under national tort law, such as under general rules of liability for negligence or under rules that attach liability to particular unlawful behaviour. The fact that the current PLD does not cover non-compliance with post-market product monitoring obligations was one of the main reasons why it was essential to allow claims under national tort law in parallel to claims under harmonised product liability law. This has led to **fragmentation of the internal market**, with the extent to which victims of harm were able to be granted compensation depending, to a significant extent, on the applicable national law. If the revised PLD is to achieve a **higher degree of harmonisation** among Member States and more of a level playing field within the Union, efforts should be made to also harmonise liability for breach of obligations under product safety and market surveillance law. At the same time, inserting provisions on liability for non-compliance with obligations under product safety and market surveillance law serves to **enhance consistency of the acquis** by clarifying how non-compliance with obligations under other Union law can translate into private law liability.

These provisions become **highly relevant for victims**, in particular where the defendant has a defence under product liability law. For example, where a defect was due to compliance with mandatory legal requirements or with mandatory regulations issued by public authorities, but where the producer failed to take any corrective measures as required by the General Product Safety Regulation[23] when the problem became apparent and publicly known, the producer would not be liable under product liability law. However, due to the fact that the producer failed to comply with product safety law, it would still be liable. Even more importantly, such a regime of liability may be relevant for victims where economic operators other than the producer violated any specific obligation they have under relevant product safety or market surveillance legislation but would not be jointly and severally liable under product liability law. For example, where the operator of an online marketplace received an order under Article 14(4)(k) of the Market Surveillance Regulation[24] from the

[23] General Data Protection Regulation, fn 15.

[24] Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20 June 2019 on market surveillance and compliance of products and amending Directive 2004/42/EC and Regulations (EC) No 765/2008 and (EU) No 305/2011, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019R1020&qid=1673361259190 accessed on 21 December 2022.

competent authority to remove content referring to an unsafe product from an online interface, but fails to comply with that order, that online marketplace would not be liable under product liability law but might become liable under the suggested additional regime.

Given that the future Artificial Intelligence Act (AIA)[25] will also be a product safety law, such a new regime of liability would also close a gap as there has been considerable debate about the absence of liability provisions in the AIA. It is suggested that this gap will be filled by the proposed DAILD. As important as it may be to address certain problems which victims of harm caused by AI may have with regard to the burden of proof, the question arises as to why there should be an extremely complex set of provisions specifically for AI whereas the victims of technology that is as complex and opaque as AI, or maybe even more complex and opaque, are left unprotected. For this reason, it seems **preferable to introduce a technology-neutral solution** in the PLD itself.

An **illustration** of how such a new regime could work with AI would be the following: A credit scoring AI system has been on the market for some time when it turns out that there is an unusually high number of cases where credit was denied to creditworthy customers. It further transpires that 30% of the employees normally entrusted with the task now outsourced to AI by credit institutions have difficulties understanding particular limitations of the system and fail to intervene where human intervention would be called for. Where the producer of the AI fails to take appropriate corrective measures (see Article 21 AIA Proposal) against this non-conformity with the requirements under Article 14 of the AIA Proposal, the producer may become liable to a creditworthy customer suffering pure economic loss from a denial of credit (provided causation can be established). Under the new liability regime which we suggest integrating into the PLD, the victim could benefit from very similar alleviations of the burden of proof as are now suggested to be introduced into the PLD anyway. Thus the outcome for victims would be similar, and victims of AI and of other technologies would be treated in the same manner.

The illustration demonstrates that liability for non-compliance with obligations under product safety or market surveillance law could cover types of damage not covered by strict liability where the purpose of the obligation is to prevent harm of the type suffered by the victim and the failure to comply with the obligation has specifically enhanced the risk of causing such harm. In its own Draft PLD, the ELI had suggested to extend liability for non-compliance at least to **pure economic harm**. However, it would theoretically be possible – if a policy choice were made to that end – to extend the types of harm covered still further, including to harm resulting from **risks to fundamental rights** (such as discrimination).

[25] Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0206> accessed on 21 December 2022.

Annex

European Law Institute

Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on liability for defective products, repealing Council Directive 85/ 374/ EEC[26]

Chapter I: General Provisions

Article 1: Subject Matter

This Directive lays down a harmonised regime of liability for defective products. It complements Union and Member State law on product safety and market surveillance as well as on extra-contractual liability, providing for compensation and a high level of protection for the victims of unsafe products. It shall also encourage investment in innovation and enhancement of product safety.

Article 2 ELI Draft PLD: Scope

1. This Directive shall apply to products as defined in Article 3(1) that were made available on the market, whether new, used, repaired or reconditioned.

2. This Directive shall not apply to services other than digital services within the scope of Directive (EU) 2019/770, regardless of whether digital forms or means are used by the service provider to produce the output of the service or to deliver or transmit it to the addressee.

3. This Directive is without prejudice to the rules laid down by Union or Member State law on liability based on grounds of attribution other than the making available on the market of a defective product or the failure to comply with obligations under product safety or market surveillance law, such as contractual liability, fault liability, or strict liability of the operator of a device.

Article 3: Definitions

For the purposes of this Directive the following definitions apply:

1. 'Product' means:

   (a) any tangible movable item, with or without a digital element, whether incorporated into or coupled with another movable or immovable item or not;

   (b) any digital product.

2. 'Digital product' means digital content and digital services within the scope of Directive (EU) 2019/770.

3. 'Digital element' means any digital product or digital service that is incorporated into, or is inter-connected with, a tangible movable item in such a way that the absence of such digital product would prevent the item from performing the functions ascribed to the item by or with the consent of its producer.

4. (a) 'Finished product' means any product which is made available on the market by, or with the assent of, its producer for use without further modifications by another producer. This includes products which have undergone a process of professional refurbishment once they are made available on the market again by the refurbisher.

   (b) A product which needs to be assembled or installed or which requires the installation of a digital element is a finished product where assembly or installation is to be undertaken by the end user or by a distributor or under the latter's control before it reaches the end user.

   (c) A digital product or a product with a digital element is a finished product notwithstanding the subsequent provision of an authorised update.

5. 'Component' means any raw material or product that is incorporated into, or coupled with, a finished product.

[26] Full text of the proposal with comments available at <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Draft_of_a_Revised_Product_Liability_Directive.pdf> accessed 21 December 2022.

6. 'Authorised update' means an update to a finished digital product (paragraph (2)) or to a digital element (paragraph (3)) of a finished product which is made available by or with the consent of the producer of the digital element or of the producer of the finished product.

7. 'Making available on the market' means any supply of a product for distribution, consumption or use on the market in the course of a commercial activity, whether in return for payment or free of charge.

8. 'Producer' means a natural or legal person who:

   manufactures, produces, develops, or fully refurbishes a finished product;

   (a) has a product developed, manufactured, produced, or fully refurbished and markets it under their name or trademark, thereby presenting themselves as a producer;

   (b) manufactures, produces, develops, or fully refurbishes a component.

9. 'Authorised representative' means any natural or legal person established within the Union who has been appointed by a producer to act on their behalf for the purpose of Union product safety or market surveillance legislation.

10. 'Importer' means any natural or legal person established within the Union who first makes a product from a third country available on the Union market.

11. 'Distributor' means any natural or legal person in the supply chain, other than the producer, the importer, or the authorised representative, who makes a product available on the market.

12. 'Online marketplace' means an online platform which allows users to conclude distance contracts with traders.

13. 'Fulfilment service provider' means any natural or legal person offering, in the course of commercial activity, at least two of the following services: warehousing, packaging, addressing and dispatching, without having ownership of the products involved, excluding postal services, parcel delivery services and any other postal services or freight transport services.

14. 'Economic operator' means the producer, the authorised representative, the fulfilment service provider, or any other natural or legal person who is subject to obligations in relation to the development or manufacture of products or to making them available on the market.

15. 'End user' means any natural or legal person residing or established in the Union, to whom a product has been made available.

16. 'Victim' means any natural or legal person having suffered relevant harm within the meaning of Article 6, either as an end user or as a third party ('innocent bystander').

17. 'European standard' means a European standard as defined in Article 2(1) point (b) of Regulation (EU) No 1025/2012.

Article 4: Level of Harmonisation

1. Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of compensation for victims, unless otherwise provided for in this Directive.

2. Unless a matter has been addressed by this Directive, Member States are free to apply their general rules and principles of non-contractual liability to liability under this Directive, or any special rules and principles.

3. This Directive shall not affect any rights which a victim may have according to law that remain unaffected by this Directive according to Article 2(3).

Chapter II. Strict liability for harm caused by defective products

Article 5: Right to Compensation

Victims of relevant harm (Article 6) caused by a defective product (Article 7) shall be entitled to receive compensation from the liable economic operators (Article 8) under the conditions laid down in this Chapter.

Article 6: Relevant Harm

1. Relevant harm means any of the following:

   (a) death or personal injury, including damage to psychological health, that has materialised, or is likely to materialise, in a recognised state of illness;

   (b) damage to tangible property, other than the defective product itself;

   (c) damage to files;

   (d) leakage of personal or other data.

2. This Article shall be without prejudice to Member State law relating to non-economic harm, in particular pain and suffering, resulting from relevant harm within the meaning of paragraph (1), and to harm suffered by third parties as a consequence of the immediate victim's death or personal injury within the meaning of paragraph (1) point (a). The conditions, in particular time limits, for reparation of loss or damage laid down by Member State law must not be less favourable than those relating to comparable domestic claims and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation.

3. The conditions under which third parties can claim compensation for harm suffered by the immediate victim shall be determined by Member State law.

Article 7: Defective Products

1. A product is defective if, under normal or reasonably foreseeable conditions of use or misuse, including the expected life-span of the product, it does not provide the safety which it should provide according to its design or which a person is entitled to expect, considering in particular the standard of safety required by applicable rules of Union or Member State law on product safety.

2. In assessing the safety of a product, the following aspects shall be taken into account:

   (a) the characteristics of the product, including its design, technical features, composition, packaging, instructions for assembly, use, installation, and maintenance;

   (b) the effect on other products as well as the effect that other products might have on the product, where it is reasonably foreseeable that it will be used with other products, including by interconnecting multiple products;

   (c) the presentation of the product, the labelling, any warnings and instructions for its safe use and disposal, and any other indication or information regarding the product;

   (d) the appearance of the product;

   (e) the categories of end users or other parties at risk when using the product, in particular vulnerable persons such as children, older people, and persons with disabilities;

   (f) the appropriate security features necessary to protect the product against external influences, including by malicious third parties, when such an influence might have an impact on the safety of the product;

   (g) the evolving, learning and predictive functionalities of a product.

Article 8: Liable Economic Operators

1. The parties primarily liable for the relevant harm caused by a defective product are:

   (a) the producer of the finished product; and

   (b) if the producer is located outside the Union, the importer and the producer's authorised representative also.

2. (a) If, in cases covered by point (b) of paragraph (1), both an importer as well as an authorised representative are established within the Union, they are jointly and severally liable with the producer of the finished product.

3. (b) If, in cases covered by point (b) of paragraph (1), neither an authorised representative nor an importer exists in the Union or cannot be identified, but where there exists an online marketplace where such an online marketplace presents the product or otherwise enables the specific transaction at issue in a way that would lead a consumer to believe that the product that is the object of the transaction is provided either by the online marketplace itself or by a trader who is acting under its authority or control, the online marketplace will be deemed an economic operator which has enabled the making available of the product on the Union market, and shall also be liable.

4. Any producer of a defective component or digital element shall also be liable if the defect in the component or digital element has caused the defect in the finished product, unless the defect is attributable to the design of the product into which the component or digital element has been incorporated or to the instructions given by the producer of that product.

5. Where the producer or, in the case of a producer located outside the Union, a party referred to in point (b) of paragraph (1) and in paragraph (2), cannot be identified, each distributor shall be treated as the producer unless the distributor informs the victim, within a reasonable time, of the identity of the producer or, in the case of a producer located outside the Union, a party referred to in point (b) of paragraph (1), or of the party who supplied the distributor with the product.

Article 9: Burden of Proof

1. The party who has suffered the relevant harm has to prove that this harm was caused by a defect of the product.

2. Member States shall ensure in their national laws that requirements for proving the defect and causation are not too onerous for a victim, in order not to undermine the purpose of this Directive as referred to in Article 1. In doing so, they shall take into account at least the following factors:

   (a) the likelihood that the product at least contributed to the relevant harm;

   (b) the likelihood that the relevant harm was caused either by the product or by some other cause attributable to the defendant;

   the risk of a known defect within the product if it would be excessively difficult to prove a defect in a particular item;

   (c) asymmetry in the parties' access to information about processes within the defendant's sphere that may have contributed to the harm and to data collected and generated by the product or by a connected service. Any producer of a defective component or digital element shall also be liable if the defect in the component or digital element has caused the defect in the finished product, unless the defect is attributable to the design of the product into which the component or digital element has been incorporated or to the instructions given by the producer of that product.

3. The burden of proving a defect or causation within the meaning of paragraph (1) shall shift to the defendant where:

   (a) there is an obligation under Union or Member State law to equip a product with means of recording information about the operation of the product (logging by design) if such an obligation has the purpose of establishing whether a risk exists or has materialised, and where the product fails to be equipped with such means, or where the economic operator controlling the information fails to provide the victim with reasonable access to the information; or

   (b) the following types of provisions or legally binding standards exist and the product fails to conform to those provisions or standards in relation to the risk or risk category that has potentially materialised:

      (i) relevant Union or Member State product safety law, including on cybersecurity, together with implementing acts adopted in accordance with such law;

      (ii) relevant European standards or, in the absence of European standards, health and safety requirements laid down in the law of the Member State where the product is made available on the market.

Article 10: Defences

An economic operator within the meaning of Article 8 shall not be liable under Article 5 if they prove that the defective product was not a finished product or that the defect which caused the damage:

(a) neither existed at the time when they made the product available on the market, nor originated in any authorised update, nor was due to their failure to provide an update as required by Union or Member State safety laws; or

(b) is due to compliance with mandatory legal requirements or with mandatory regulations issued by public authorities; or

(c) could not have been discovered with the scientific and technical knowledge available at the time they made the product or the last authorised update available on the market.

Chapter III: Liability for Non-compliance with Obligations under Product Safety and Market Surveillance Law

Article 11: Right to Compensation

1. Without prejudice to liability under Article 5, a victim of relevant harm within the meaning of Article 6 or of pure economic loss caused by a defective product within the meaning of Article 7 shall be entitled to receive compensation from an economic operator where:

   (a) that economic operator failed to comply with its obligations under Union or Member State product safety or market surveillance law, a list of which is attached in Annex I to this Directive;

   (b) one of the specific purposes of the obligation referred to under point (a) is to prevent harm of the type suffered by the victim;

   (c) the failure to comply with the obligation has specifically enhanced the risk of causing harm of the relevant type suffered by the victim, and that risk has materialised.

2. The economic operator shall not be liable under paragraph (1) if that economic operator proves that:

   (a) the harm would also have been caused if the obligation referred to under point (a) of paragraph (1) had been complied with; or

3. (b) the economic operator was not able to comply with the obligations referred to in paragraph (1) due to an impediment beyond their control and which they could not reasonably be expected to have avoided or overcome.

4. Article 6(2) and (3) shall apply accordingly with regard to compensation for non-economic harm and harm suffered by third parties.

Article 12: Burden of Proof

1. In cases covered by Article 11, the victim has to prove that their damage was caused by a defect of the product within the meaning of Article 7 and that the requirements under paragraph (1) points (b) and (c) of Article 11 are met. It is for the defendant to prove that their obligations resulting from product safety or market surveillance law were complied with.

2. Article 9(2) to (3) shall apply accordingly with regard to proving defect and causation.

Chapter IV: General Provisions on Liability

Article 13: Joint and Several Liability, Reduction and Exclusion of Liability

1. Where more than one economic operator is liable for compensation of the same relevant harm suffered by a victim, the latter can claim compensation from each of them. Overall, the victim can only recover for the total relevant harm suffered.

2. The liability of an economic operator shall not be excluded or reduced where the harm is caused both by a defect in the product and an event attributable to a third party.

3. The conditions under which liability may be reduced or excluded where conduct attributable

to the victim contributed to the harm shall be determined by Member State law. These conditions must not be less favourable to the victim than those relating to similar domestic claims.

Article 14: Right of Recourse

1. Where more than one economic operator is liable for compensation of the same relevant harm suffered by a victim, any economic operator that has indemnified the victim or was ordered to do so by an enforceable judgment has a right of recourse against another jointly and severally liable economic operator. Member States shall provide the conditions for exercising such right of recourse, which must not be less favourable to the claimant than in comparable domestic cases.

2. Article 9(2) and (3) shall apply as appropriate when claiming such right of recourse against any other jointly and severally liable economic operator.

Article 15: Mandatory Nature

The liability of an economic operator arising from this Directive may not, in relation to the victim, be limited or excluded by a contractual term limiting the liability of that economic operator or exempting that economic operator from liability.

Article 16: Liability Caps

Member States may provide that the total liability of economic operators resulting from identical products with the same defect shall be limited to an amount which may not be less than [amount adapted to enhanced risks and inflation].

Article 17: Limitation Period

1. Member States shall provide in their legislation that a limitation period of three years shall apply to proceedings for the recovery of compensation as provided for in this Directive. The limitation period shall begin to run from the day on which the victim became aware, or should reasonably have become aware, of the harm, the defect and the identity of the liable economic operator.

2. Member States shall provide in their legislation that compensation for harm other than that referred to in Article 6(1) point (a) can no longer be recovered from the liable economic operator after ten years from the day on which:

   (a) they made the actual product which caused the harm available on the market;

   (b) the last authorised update for this product was made available;

   (c) they should have made available or authorised an update for this product in order to bring it into conformity with product safety requirements under Union or Member State law but failed to do so; whichever is the latest. The ten-year limitation period shall not apply if the defect was inherent in or caused by machine learning or similar further developments of a digital product or of a digital element of a product and the liable economic operator cannot prove that this defect was not attributable to the product as made available on the market or as subsequently modified by an authorised update.

3. The right of recourse amongst jointly and severally liable economic operators shall not be affected by the above limitation periods. Instead, Member States shall provide in their legislation that a limitation period of one year shall apply to proceedings for the recovery of a contribution as provided for in Article 14. This limitation period shall begin to run from the day on which the economic operator seeking recourse agreed to or was ordered by an enforceable judgment to indemnify the victim, or from the day they became aware, or should reasonably have become aware, of the identity of the other liable economic operator, whichever is later.

4. The laws of Member States regulating suspension or interruption of a limitation period shall not be affected by this Directive.

Chapter V: Final Provisions

Article 18: Repealing of Council Directive 85/374/EEC

Council Directive 85/374/EEC is repealed.

Article 19: Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by *[the date of …after the entry into force]* at the latest. They shall apply these laws, regulations and administrative provisions to all products made available on the market on or after *[the date of …after the entry into force]*.

2. The liability of an economic operator shall not be excluded or reduced where the harm is caused both by a defect in the product and an event attributable to a third party.

3. The conditions under which liability may be reduced or excluded where conduct attributable to the victim contributed to the harm shall be determined by Member State law. These conditions must not be less favourable to the victim than those relating to similar domestic claims.

Article 20: Review

The Commission shall, not later than on *[the date of five years after entry into force]* review the application of this Directive and submit a report to the European Parliament and the Council.

Article 21: Entering into Force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 22: Addressees

This Directive is addressed to the Member States.

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