Ecommerce Europe position paper on the Product Liability Directive

Introduction

In September 2022, the European Commission published a proposal to review the Product Liability Directive (PLD). With this revision, they aim to adapt the current legislative framework to the digital age and the circular economy, ensure liability for defective products bought directly from non-EU manufacturers, ease the burden of proof in complex cases, and align it better with other product safety rules. Ecommerce Europe, representing the European digital commerce sector, welcomes the proposal and commends the European Commission on their objectives.

Ecommerce Europe fully supports the proposal's aim to guarantee a right to remedy for individuals who suffer harm due to defective products. To successfully achieve this, it is paramount that the PLD does not create obstacles to such claims and allows for a fair remedy. However, it should be noted that the PLD is, and should remain, a fall-back regime within an elaborate framework of national and European liability regimes and should not become the primary means of seeking remedies.

In this paper, Ecommerce Europe will outline its views on the Commission's proposal for a revised Product Liability Directive. In general, we believe that the existing product liability rules have been very effective for over three decades by protecting consumers and supporting innovation through its simplicity and product and channel neutrality. While we believe these key features should be maintained, we support the aim to update the legislation to the current retail reality. We are committed to constructively collaborating with EU policymakers to assess if there are any legal gaps, potential improvements to the rules, or enforcement problems that can be addressed to improve the effectiveness of the current regulatory framework.

Scope and definitions

Article 4(1) proposes a new definition of a product. It states that a "'product' means all movables, even if integrated into another movable or into an immovable. 'Product' includes electricity, digital manufacturing files and software". In contrast, the existing PLD focuses on physical products, even if it is generally recognised that the current definition also includes embedded software (including AI). Ecommerce Europe would like to ensure that the new PLD is aligned with existing definitions (e.g., in the Market Surveillance Regulation) as well as with concepts in upcoming legislation such as the AI Act. We believe the PLD should maintain a technology-neutral approach, and potential issues with certain product categories areas would better be addressed by sector-specific legislation (e.g., on toys, chemicals, etc.). In addition, we ask co-legislators to clarify the term 'software' to understand whether "Software as a Service" and providers of digital services would be covered and consider excluding standalone software from the scope. We believe its inclusion could make it more difficult for consumers and businesses alike to indicate the correct economic operator.

Furthermore, we have concerns that the definition of "related services" in Article 4(4) is too vague and requires further clarification. In general, we have reservations about the inclusion of "related services" within the scope of the PLD. Recital 15 of the proposal states that "this Directive should not apply to services," yet the broad definition of related services could encompass many digital services interacting with technology products. This would result in an inconsistent liability regime whereby providing a service digitally could lead to strict liability, whereas providing the same service in a non-digital manner would not fall within the

scope of the PLD. Therefore, we urge the co-legislators to reconsider the inclusion of related services within the PLD scope and provide more clarity on its definition, including clear examples to facilitate the application of the law.

Article 4(6) proposes to broaden the definition of 'damage' to include material losses resulting from "death or personal injury, including medically recognised harm to psychological health". Ecommerce Europe is cautious about the inclusion of medically recognised harm to psychological health as this concept is not clearly defined. We are concerned that, without providing further clarity, there is a risk of diverging interpretations across EU Member States. Additionally, the proposed concept of 'damage' now also includes "loss or corruption of data that is not used exclusively for professional purposes". We believe the relation to the General Data Protection Regulation (GDPR) that is outlined in Recital 16 could be better clarified. To avoid duplication of rules, we suggest explicitly mentioning that the PLD's liability framework is only applicable when the GDPR does not apply. Further, we ask the co-legislators to clarify further the fact that pure economic damage caused by data loss (e.g., the loss of stored cryptocurrencies or digital tokens) is not covered by the PLD.

Removal of thresholds

Ecommerce Europe is concerned about the proposed changes to the current thresholds of the PLD. The removal of both the minimum (€500) and maximum (€70 million) thresholds, as well as the extension of the product definition and scope of damages, risk having far-reaching implications for the functioning of the current system. We strongly believe that the existing thresholds are essential in preventing trivial claims and providing the necessary conditions for offering insurance protection for risks. The proposed changes would allow claims for small amounts that SMEs and microbusinesses, in particular, may find challenging to manage and could potentially lead to insolvency. We strongly urge policymakers to maintain in particular the €500 threshold as it would provide a backstop for the regime. At the same time, we would also like to raise concerns about current divergences across Member States with regards to implementation of thresholds. For instance, in The Netherlands, retailers are responsible for compensating claims up to €500, while manufacturers are liable for claims above €500. We would like to ensure that EU countries cannot go beyond European rules by placing additional burdens on retailers. We therefore recommend maximum harmonisation of these rules to prevent unjustly placing a burden on retailers where it should be placed on the manufacturers and avoid creating further fragmentation of the Single Market

Reference to Collective Redress

Article 5.2(b) states that Member States shall ensure that claims for compensation may also be brought by "a person acting on behalf of one or more injured persons in accordance with Union or national law". Ecommerce Europe believes that there is a need to clarify the connection to Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers ("Collective Redress Directive''). In its current form, we foresee a risk that non-approved actors according to the Collective Redress Directive can bring class actions against companies based on product liability claims. We fear this could lead to frivolous litigation, which burdens both companies and the public sector. Ecommerce Europe therefore suggests including a reference in Article 5.2(b) and Recital 21 to the Collective Redress Directive. Finally, the Parliament's recommendations to the Commission on responsible private financing of litigation needs to be taken into account[1].

[1] DRAFT REPORT with recommendations to the Commission on Responsible private funding of Litigation (2020/2130(INL)) Committee on Legal Affairs Rapporteur: Axel Voss www.europarl.europa.eu/doceo/document/JURI-PR-680934_EN.pdf

Defectiveness

Article 6 states that a product is considered "defective when it does not provide the safety which the public at large is entitled to expect". Instead of focusing on the 'public at large', Ecommerce Europe believes that it would be more reasonable to focus on the 'average natural person' for the intended target audience's expectations. In addition, we ask co-legislators to adopt a case-by-case approach to considering when a product is defective instead of dealing with a wholesale determination that an entire category of products might be defective. We believe that would maintain proper protection of consumers, while at the same time making the provision more workable for businesses, notably small and microbusinesses. The Article also includes several new circumstances which should be taken into account to establish the defectiveness of a product. Ecommerce Europe finds that these circumstances raise some questions, as it is not always clear how they would help to define what defectiveness means. In order to determine whether a product is defective, Article 6(e) requires consideration of "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". We ask policymakers to clarify how this should be taken into account when establishing defectiveness and what potential considerations would be. Furthermore, Article 6(b) refers to "the reasonably foreseeable use and misuse of the product". Ecommerce Europe is concerned about the practical implications of this addition, as it will be very complicated to foresee the risk related to misuse. In our view, businesses can only be held responsible for a "normal or reasonably foreseeable" use of their products. We therefore recommend removing the word "misuse" from the article. Finally, Article 6(h) proposes to consider "the specific expectations of the end-users for whom the product is intended". This seems a rather subjective criterion and we ask policymakers how that would be applied in different situations. Overall, we ask the co-legislators to ensure that it is clear how these 'circumstances' should be considered, and how they contribute to the assessment of defectiveness of a product.

Refurbished and upcycled products

Article 7 describes the scenarios in which the different economic operators can be held liable for defective products. In Article 7(4) it is stated that 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, where the modification is considered substantial and is undertaken outside the original manufacturer's control. This means that the proposal extends the PLD to remanufacturers or businesses that substantially modify products. Ecommerce Europe fully understands that this change is proposed in light of developments in the circular economy. While we welcome that the applicability remains limited to substantially modified products, we would like to raise a few observations.

We would like to draw attention to the rapid pace at which legislative changes are suggested to address the challenges related to the circular economy. First, legislators are currently discussing rules addressing the design and reparability of products (Eco-design for sustainable product regulation, Battery Regulation, etc) as well as awaiting upcoming initiatives such as the Right to repair. We urge policymakers to ensure a coherent legislative framework, in which definitions and obligations are aligned. Second, we see room for further clarifications on the concept of 'substantial modification' and better alignment with the GPSR. It should be safeguarded that overly strict legislation does not end up hindering the development of new business models and services aimed at repairs, refurbishments, upcycling, etc. We therefore believe that the revised PLD needs to differentiate between modifications that could impact a product's safety requirements or functionality due to a substantial modification, and repairs or refurbishments that only reinstate the manufacturer's intended functions. We believe it may be helpful to clarify that the act of refurbishment corresponds to the testing of the functionalities of a product, and, if needed, the maintenance

and repair of a good or waste by a professional, including the use of compatible spare parts or components, before it is made available on the market again. Refurbishment does not entail modifying a product, but simply consists of returning a product to a condition where it fulfils its intended use. It is important to clarify that a refurbished product does not lead to a new product being created. In that sense, we believe that there should be a clear distinction between refurbishment and remanufacturing.

In addition, where a product has been substantially modified to create a whole new product (as is the case in upcycling or remanufacturing), it should be clarified that liability only arises for defects in the final product as it is now being sold as, not for the original object. For example, a computer taken apart and re-created to be sold as art cannot be considered a defective computer as the use/purpose of the product is a whole new one. Finally, Ecommerce Europe believes that in the case of damages from software, the limitation periods proposed are already very long. It is therefore very important to clarify that a software update that does not amount to a substantial modification does not trigger or restart the already existing limitation period.

Liability of economic operators

Ecommerce Europe welcomes that the PLD proposal maintains the emphasis on holding producers and importers responsible for damages caused by defective products they have manufactured or imported into the EU. We believe those actors have control over the manufacturing/importing process, and are therefore best placed to carry the relative liability. Additionally, we appreciate the reference to the Digital Services Act (DSA) in Article 7(6) and Recital 28 to ensure alignment between the various relevant legislations.

Article 7(2) states that when the manufacturer is established outside the EU, the authorised representative can be held liable. While we understand the importance of the presence of an entity in the EU that can be held liable, it should be ensured that the authorised representative is capable of carrying that responsibility. We therefore suggest closely monitoring the implementation of the Market Surveillance Regulation and the upcoming General Product Safety Regulation to see where the role of the authorised representative (i.e., responsible person) could be further strengthened for all actors involved. In line with streamlining the authorised representative role, it is also important to offer equal and fair access to all players in the market: small and microbusinesses in particular already face significant challenges and lack the resources to find, appoint, or pay a representative based in the EU. In order to ensure a level playing field, and make sure small players are not forced to leave the EU market, it is crucial to offer concrete guidance, legal advice, and financial support to small and microbusinesses to help them assess who they may appoint as an authorised representative. For example, we believe a cost-friendly infrastructure for non-EU microbusinesses could be provided in the framework of the Enterprise Europe Network. Ultimately, ensuring a well-functioning system of authorised representatives, affordable and accessible to all players, will help improve compliance, increase legal certainty for businesses and create the safest market for consumers.

Where there is no manufacturer, importer or authorised representative within the EU, Article 7(3) places the liability on fulfilment service providers. However, neither the fulfilment service provider nor the distributor has power over the manufacturing process or safety of the products and should therefore be treated equally. The proposal should rephrase Article 7.3 and instead refer to Article 7.5 for fulfilment service providers, so that fulfilment service providers are on the same footing as distributors.

Disclosure of evidence

Article 8 proposes provisions on the disclosure of evidence and empowers national courts, upon request of the claimant, to order the defendant to disclose relevant evidence that is at its disposal. Ecommerce Europe finds this obligation quite far-reaching. We fear that the extended competence of national courts risks

exposure of business secrets, within the meaning of Article 2(1) of Directive (EU) 2016/943 ("Directive on Trade Secrets") in connection with court proceedings. If such far-reaching obligations to provide evidence are to be imposed on businesses, we believe it should be clarified that, in relation to trade secrets, the courts should be clearly obliged to apply the provisions of Directive (EU) 2016/943. Additionally, we urge policymakers to be more precise on what can be understood as evidence "necessary and proportionate" within Article 8(2). Finally, it should be noted that the disclosure mechanism might not fit all business models. Some companies are not in the possession of the product or are not part of the distribution chain in a way that they could provide additional information. In particular, Article 8 (1) in conjunction with Article 9 (1) could lead to the assumption that the product is defective in cases where the defendant does not disclose information simply because they do not have it (e.g., second-hand goods). We ask policymakers to consider the limitations companies may have to provide certain information, in particular when defectiveness is presumed as per Article 9 (2)(b).

The burden of proof

Article 9 lays down the rules on the burden of proof. Specifically, Article 9(2) states that a product's defectiveness can be presumed if the defendant fails to disclose relevant evidence pursuant to Article 8, if the claimant established that the product does not meet safety requirements, or if the claimant established that the damage was caused by an obvious malfunction during normal use. Ecommerce Europe believes that a failure to disclose certain information should not automatically amount to a presumption of defectiveness. Instead, it should be treated like any other non-compliance with an obligation to disclose information. We also ask for clarification of the concept of 'obvious malfunction'.

Ecommerce Europe believes that the current Product Liability Directive strikes an appropriate balance between protecting consumer interests and fostering innovation. This balance is maintained through the requirement for consumers to demonstrate causality between a product defect and any resulting damage when claiming compensation. We are therefore concerned about the implications of Article 9(4) of the proposed directive, which empowers courts to presume the defectiveness of the product, the causal link between the defectiveness and the damage or both when claimants face excessive difficulties due to the technical and scientific complexity of the product. Recital 34 clarifies that courts should determine technical or scientific complexity on a case-by-case basis, considering factors such as the complex nature of the product (e.g., innovative medical device), technology used (e.g., machine learning), information/data to be analysed by the claimant, and causal link complexity (e.g., between a product and health condition or requiring explanation of inner workings of an AI system). We are concerned that this presumption could be applied too broadly, potentially including all AI systems, which could lead to unnecessary litigation and hinder innovation. We urge policymakers to better define the criteria for what constitutes technical complexity to ensure that the presumption only applies in cases where it is impossible for the claimant to prove the defectiveness or causal link.

For the next steps of the negotiations, we urge co-legislators to avoid the reversal of the burden of proof. We believe that the requirement to show causality between a product defect and damage does not deprive consumers of adequate protection, but would place a disproportionate burden on companies, in particular SMEs and microbusinesses, which lack the resources to provide evidence to support themselves.

Conclusion

Ecommerce Europe believes the revision of the Product Liability Directive represents a unique opportunity to build on the successes of the existing rules while updating them to the current reality in retail, taking into account developments in the circular economy and rapid digitalisation of businesses. We fully support the

objective of the Commission to guarantee a right to remedy for consumers that suffered harm due to a defective product. At the same time, we need to ensure that all changes are sufficiently clear, channel-neutral and remain workable for businesses.

We also urge co-legislators to keep in mind the broad existing regulatory landscape, which includes national laws on liability, but also other EU safeguards focusing on more specific areas such as artificial intelligence, data, cybersecurity, and product safety. It must be ensured that regulatory changes are limited to what is necessary and avoid regulatory overlap. Finally, we would like to stress that the proposal for the AI Liability Directive should only be finalised once the AI Act has been adopted. In general, Ecommerce Europe is not opposed to having specific legislation governing AI liability. However, it is concerning that the AI Liability Directive is being presented without a clear understanding of the final content of the AI Act. We consider it crucial that the AI Act is adopted to be able to assess the impact of the AI Liability Directive in relation to the risks regulated in the AI Act. Therefore, we urge policymakers to finalise the AI Act before proceeding with negotiations on the AI Liability Directive, and to ensure that both pieces of legislation are fully aligned.