

Product Liability

Key messages on the revision of the Product Liability Directive



General

- The existing liability regime for defective products at European level – the Product Liability Directive (PLD), in conjunction with national tort law – works well in practice, including for new and emerging technologies, such as artificial intelligence (AI). The regime constitutes a well-balanced system of liability by providing a high level of protection to injured people while at the same time taking into account producers' legitimate interests and thereby encouraging European technological innovation and promoting economic growth.
 - The status of the PLD as a well-balanced system of liability was further confirmed by the Commission's 2018 evaluation report, which shows that, in the years evaluated, a clear majority of cases (68%) were settled through extra-judicial arrangements, such as direct negotiation with the person or entity held liable, or alternative dispute resolution methods.¹ The fact that a minority (32%) of cases went to court does not point to the ineffectiveness of the PLD as a legal instrument but is rather evidence of a well-functioning legal system.
- **Legislative changes to the existing liability framework should therefore only be considered where a clear protection gap is demonstrated. This is currently not the case.**

Scope and definitions

- The **PLD is technology-neutral** and therefore applies to AI in the same way as to conventional technology.
 - "Embedded software" is already seen by insurers as a "product" under the PLD, which circumvents potential difficulties around determining whether it has been the product or a service that caused damage.
 - The relevant level of safety to which the public are entitled should be determined by taking into account the state of technology, product safety legislation, technological norms and standards, etc.
 - This would also apply in the case of "self-learning" products. While it is foreseeable that a self-learning system can cause damage through its "learning" to function in a way that was not intended, in such a case, it can be argued that the product is defective.
- The universal definition of "defect" is crucial to the PLD's technology-neutral character and there is no need for change to make it applicable to emerging technologies. Under the PLD, a product is defective when it does not provide for a level of safety that a person may legitimately expect. **In the case of the security of products with cybersecurity vulnerabilities, liability would depend on the extent to which the product was designed and manufactured to a level of resilience against cyberattacks that could be reasonably expected at the time of marketing.** In this regard, it is important to look at the nature of the product, its intended use, and the state of technology at the time of marketing.
 - Applicable product safety and product security legislation act as a filter for liability and help to determine whether a product does not provide the safety a person may expect. Consequently, rather than altering the existing product liability system, evaluating current product safety legislation should be prioritised. Insurance Europe therefore welcomes the proposed review of the General Product Safety Directive.

¹ [Evaluation of Council Directive 85/374/EEC on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products](#)

- The **PLD should continue to be restricted to personal injury and property damage**.
 - The scope of the PLD is already very broad and, for instance, psychological harm/emotional pain and suffering are already compensable if consequential to personal injury. In a similar vein, damage to soil and water that are privately owned constitutes property damage and, as such, is already compensable. **Destruction of data may also fall under property damage**, especially data embedded in a physical object which is either physically impaired, or the use of which is impaired.
 - Extending the scope of damages to include damages other than physical injury or property damage is likely to result in legal uncertainty and/or provoke a conflict between provisions:
 - Damage to the environment in the sense of a public good is governed by the Environmental Liability Directive, and there is no scope for this under the PLD because, by definition, there can be no injured person.
 - Basic rights infringements (data protection, discrimination, privacy etc) should continue to be dealt with exclusively by existing dedicated EU legislation, such as the General Data Protection Regulation. Coherence across legislation should be ensured.



Burden of proof

- In the experience of insurers, there is no protection gap resulting from injured persons being unable to obtain the compensation to which they are entitled because of a burden of proof regime that is perceived to unfairly allocate responsibility. Furthermore, a lack of court cases does not constitute evidence of a protection gap. In fact, the Commission's 2018 evaluation report found that "most cases are settled out of court", and that, of those cases that make it to court, a majority — around 60% — are settled in favour of the claimant.² When assessing the effectiveness of the burden of proof under the PLD, it is therefore crucial to draw on factual evidence, experiences, and court rulings. This is especially important before proposing any adjustments to the burden of proof regime.
- A number of European Court of Justice (CJEU) judgements demonstrate that there can be a degree of flexibility in the application of the burden of proof regime under the PLD:
 - The [Judgment of the CJEU in Case C-621/15](#) implies that, in those circumstances where it is impossible for the claimant to establish a causal link between damage and defect (in this particular case the link between the vaccination against hepatitis B and the occurrence of multiple sclerosis) and where the effectiveness of the PLD is undermined, the provision of "serious, specific and consistent evidence" would suffice.
 - In [Case C-310/13](#), the CJEU concludes that national rules that facilitate, for the injured person, the establishment of producer liability, by granting consumers the right to require the manufacturer of a product to provide them with information on the adverse effects of that product, can be accepted as they fall outside the scope of the PLD.
- In light of the above, insurers do not believe that the burden of proof should be altered, because it continues to fairly balance the protection of consumers and the legitimate interests of producers, constituting a precondition for producers' strict liability (no fault required to trigger liability). Furthermore, there is a demonstrable degree of flexibility in the application of the burden of proof regime in situations where courts deem it to be necessary.
- However, there are changes in other areas that could be considered, aside from the burden of proof. In particular:
 - The ability to track software updates would allow to determine the version of software that was installed and in use at specific points in time and would help to determine liability.

² [Evaluation of Council Directive 85/374/EEC on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products](#)

Existing exemptions should be maintained

- Existing exemptions to liability, for which the producer bears the burden of proof, counterbalance producers' strict liability. Removing them may stifle technological innovation by making producers liable for defects that either, according to the standard of science and technology (the strictest standard known in technology law) were objectively unidentifiable, or only appeared after the product was put into circulation, when the producer had no control over the product anymore.

The responsibilities of online marketplaces should be clarified

- The responsibilities of online marketplaces should be clearly defined, notably in terms of what these marketplaces are expected to do to supervise those that sell products on their platforms.

Why mandatory insurance should be avoided

- Strict liability schemes only work when the risks to be covered are sufficiently similar and when specific market pre-conditions are met (ie the availability of sufficient data, adequate competition, insurers' interest in providing cover and sufficient reinsurance capacity). This is not the case for new technologies, including AI, which covers a very wide range of different appliances and uses. Without these conditions in place, making product liability insurance mandatory could do more harm than good at national level and especially at EU level, potentially resulting in:
 - A lack of underwriting/contractual freedom, stifling of insurance product innovation — Compulsory insurance could have an adverse effect on market penetration if, depending on minimum legal requirements, the insurance market was unable to provide sufficient cover for the whole spectrum of affected producers at terms that are economically viable for insurance buyers.
 - Higher premiums.
 - Insufficient prevention, as policyholders feel the burden is on the insurer.