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'I/A' ITEM NOTE

From: General Secretariat of the Council
To: Permanent Representatives Committee/Council

Subject: Draft DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE
COUNCIL on liability for defective products and repealing Council Directive
85/374/EEC (**first reading**)
- Adoption of the legislative act
= Statement

Statement by Estonia

Estonia supports the aim of the Directive and can agree with most of its solutions. However, the Directive regulates procedural law in a way that leads to fundamental concerns of the basic principles of a Member State law.

Namely, the Directive has a maximum harmonisation clause, thus regulating exhaustively also the disclosure of evidence in matters of liability for defective products. Maximum harmonization leads to a worrisome special regime in our law where different rules apply. More specifically, it would be more difficult for a plaintiff to request the court's assistance in gathering evidence in cases of liability for defective products than in other legal proceedings, both in those where inequality of the parties is assumed and in those where equality of the parties is assumed.

Estonia has throughout the negotiations explained that the content of procedural actions should not be unreasonably different based on the specific content of the dispute. This would lead to fragmentation of law, lack of legal clarity and, most importantly, different treatment of the parties to the proceedings. That could lead to a problem with our Constitution. We have drawn the attention to the fact that the procedural law of a Member State is a unified system where different parts of procedural law are connected and balanced with other parts of procedural law. Thus, in order to ensure legal clarity and equal treatment of parties to the proceedings, we should consider changing the general rules for disclosure of evidence in our domestic civil procedural law to what it is in the Directive. However, we do not consider it possible as such an interference with national law should not be the purpose of the EU law.

Additionally, the legal basis for regulating civil court proceedings in the European Union is Article 81 of the TFEU, which regulates cross-border judicial cooperation. In the case of this legal basis, it is always very carefully monitored that the created rules would not interfere with national procedural law of the Member States. The legal basis of the Directive at hand is Article 114 of the TFEU, which regulates the establishment and functioning of the internal market. We believe the same careful considerations should be given, when applying this legal basis and at the same time regulating procedural law of the Member States. For example, one existing Directive with an internal market legal basis, which deals with civil court proceedings and contains the clause of disclosure of evidence as well, has only a minimum harmonizing effect (Representative Actions Directive). That allows Member States to base their rules on national law and their legal traditions.

Lastly, Union law may not go beyond what is necessary to achieve the objective. However, the wording of the rules on disclosure of evidence (in the operative part and the recital) indicate that the aim is to intervene in the procedural law of the Member State, while creating a special regime for gathering evidence only in the specific area of matters of liability for defective products. It has remained incomprehensible how the maximum harmonization in this case would be justified (including how is it justified to regulate it differently than in other fields where inequality of parties is also assumed). Furthermore, the actual impact of such maximum harmonization to national procedural law and legal systems of the Member States have not been assessed. In our view, it is not proportionate to achieve the objective at hand with the above-explained solution.

To sum up, Estonia believes the chosen approach on the disclosure of evidence in this Directive is not appropriate and we will carefully follow other proposals that such an approach would not be repeated.
