



Council of the European Union
General Secretariat

Brussels, 28 November 2023

Interinstitutional files:
2022/0302 (COD)

WK 15975/2023 INIT

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From:	Presidency
To:	Delegations
N° Cion doc.:	ST 13134 2022 ADD 1 + ST 13134 2022 ADD 4 + ST 13134 2022 INIT + ST 13134 2022 ADD 2 + ST 13134 2022 ADD 3
Subject:	Proposal for a Directive of the European Parliament and of the Council on liability for defective products - Information by the Presidency

Delegations will find in Annex a Presidency note on the fourth technical meeting with the European Parliament on the above mentioned directive.

Presidency Flash note

28 November 2023

JHA Counsellors meeting on Civil Law Matters (Civil Liability)

Dear Colleagues,

In preparation for the Counsellors meeting on 30 November, find attached the last information obtained in the fourth ITM with the Parliament and points to be discussed:

1. Agreements reached in the 4th ITM:

- Line 75- Article 4 (3). Component definition

EP accept the Council text but links the deletion of the last part (“by the manufacturer of that product or within that manufacturer’s control”) to the final discussion of article 7.

- Line 88- Article 4(10) “putting into service”

Agreed with the inclusion of the **Council text**. Still, the EP requested to clarify recital 20.

Commission proposal for recital 20 (to be assessed and agreed by the co-legislators):

(20) This Directive should apply to products placed on the market or, where relevant, put into service in the course of a commercial activity, whether in return for payment or free of charge, for example products supplied in the context of a sponsoring campaign or products manufactured for the provision of a service financed by public funds, since this mode of supply still has an economic or business character. ***The concept of putting into service is relevant for products that are not placed on the market prior to their first use, as can be the case in the field of lifts, machinery or medical devices.***

➤ **MS are requested to assess whether this proposal for the recital can be accepted.**

- Lines 89 to 89 c)- Manufacturer definition.

We accepted the EP structure. Therefore, **lines 89, 89 a) and 89 c)** are **green**.

For **line 89 b)** we insisted on maintaining our wording. The EP is still checking it (“distinguishing features”). We highlighted the reasons and the case law in this regard. They have concerns because of the legal uncertainty of using this expression.

- Lines 100 and 101- Article 5(2) point a) and b) “right to compensation”

EP accepted Council text. **Green**

- **Article 6, 'Defectiveness':**

We accepted the EP **structure** given their flexibility on article 5 a) structure.

Line 105: green (Council text).

Line 109: green (Council text, adding "relevant")

"The **relevant** product safety requirements, including safety-relevant cybersecurity requirements".

2. Pending agreements where we need your feedback:

- **Article 1- Subject matter and objective (lines 60 and 60 a)**

Commission compromise proposal:

1. This Directive lays down common rules on the liability of economic operators for damage suffered by natural persons caused by defective products and ~~is aimed at ensuring on compensation for that such damage~~ **to the extent provided in this Directive**. ~~persons are entitled to compensation~~
2. The objective of this Directive is to contribute to the proper functioning of the internal market, while ensuring a high level of ~~consumer~~ protection **of consumers and other natural persons**, and to remove divergences between the legal systems of Member States related to the liability of economic operators for damage suffered by natural persons caused by defective products.

In the last councillors meeting we had **flexibility from MS to accept the Commission proposal** but we do not have the feedback from all MS.

EP can accept Commission proposal.

- **For those MS that didn't have a position in the last WP, we kindly ask you to assess if the Commission proposal is acceptable.**
- **All MS are requested to assess if adding "to the extent provided in the Directive" and moving the last sentence of paragraph 2 (in the EP position but deleted in the Commission proposal) could acceptable.**

- **Line 88e "hazard"**

EP to check if "hazard" is acceptable. They suggested using "risk". They think it is more understandable for consumers, Judges and practitioners. The Commission propose the following in a recital to maintain the word "hazard":

(recital 29)...Whether a modification is substantial is determined according to criteria set out in relevant Union and national safety legislation, **which typically refer to** ~~such as~~ modifications that change the original intended functions **in such a way that changes or creates a new hazard or increases the level or risk, or thus affecting** the product's compliance with applicable safety requirements....

The intention here is to anchor the notion of hazard more firmly in other existing legislation.

- **MS are requested to assess whether this proposal for the recital can be accepted.**

- **Line 90- “authorised representative”**

As announced in the last Counsellors meeting, the EP propose to come back to the Commission proposal as a compromise solution.

- **For those MS that didn't have a position in the last WP, we kindly ask you to assess if the Commission proposal is acceptable.**

- **Article 5a Damage**

- Structure: EP flexible to follow our structure but proposing some amendments in lines 101 b) and 101 i).

- Line 101c. “damage to psychological health”; EP will come back on our proposal for Recital 17:

- **For those MS that didn't have a position in the last WP, we kindly ask you to assess if the Presidency proposal for recital 17 is acceptable.**

- Destruction or irreversible corruption of data

EP wants to ensure we talk about destruction or irreversible corruption, not data loss like a leak. Destruction refers to the situation when data is totally lost and gone. Irreversible corruption is when data is corrupted, and you can't use it anymore. However, they will come back with a proposal regarding the irreversible corruption of data because they understand that if there are costs to recover the data, that would be a material damage resulting from irreversible corruption of data.

- **Based on the explanations given, regarding the destruction of data, would be acceptable for MS to use “destruction” instead of “loss”?**

- **Article 6, ‘Defectiveness’:**

We accepted the EP structure following their flexibility to accept the structure on article 5a.

- **Line 102a:** pending the final position of the EP and Council on the Commission Proposal.

As a reminded, this is the Commission proposal, shared with you last Friday:

Art. 6(-1) based on EP text

-1. A product shall be considered defective when it does not provide the safety that **a person** is entitled to expect or that is required under Union or national law.

Recital 22 based on EP text (bold shows EP amendments; bold-italic shows COM input)

In order to protect the health and property of consumers, the defectiveness of a product should be determined by reference not to its fitness for use but to the lack of the safety that that ~~an average~~ **person** is entitled to expect **or that is required under Union or national law**. The assessment of defectiveness should involve an objective analysis **of the safety that the public at large is entitled to expect**, and not refer to the safety that any particular person is entitled to expect. The safety that ~~an~~

~~average person~~ **the public at large** is entitled to expect should be assessed by taking into account, inter alia, **the intended purpose, reasonably foreseeable use, the presentation**, the objective characteristics and the properties of the product in question, **including its expected lifespan**, as well as the specific requirements of the group of users for whom the product is intended..

- **For those MS that didn't have a position in the last WP, we kindly ask you to assess if the Commission proposal is acceptable.**

Line 104: pending the Council's position. EP can accept COM compromise proposal

Compromise proposal:

- (a) The **presentation** and characteristics of the product, including its labelling, design, technical features, composition, packaging, ~~any other information regarding the product~~, and the instructions for assembly, installation, use and maintenance.
- **MS are requested to assess whether this proposal is acceptable.**

Line 110: Commission proposal:

Art. 6(1)(g) - based on EP text

(g) any **recall of the product or any other relevant** intervention by a ~~regulatory~~ **competent** authority or by an economic operator referred to in Article 7 relating to product safety;

- **MS are requested to assess whether, in a spirit of compromise, it can be accepted. Otherwise, we need to know the reasons to work on this basis. EP can accept it.**

Line 111 a- article 6(1) point (ha)

Commission proposal (easier to read; drafting to address confusion at "its purpose"+ a recital with further clarifications).

- (i) **in the case of a product whose very purpose is to prevent damage**, any failure of the product to fulfil its ~~that~~ purpose of preventing damage.

Recital for Art. 6.1.i

New Recital 24a: **In order to reflect the nature of products whose very purpose is to prevent damage, such as a warning mechanism like a smoke alarm, it should be clarified that the assessment of such a product's safety should also take into account its failure to fulfil that purpose.**

- **MS are requested to assess whether this proposal can be accepted.**
- **Article 8, 9 and 16 the Commission proposals were distributed last week (24 November)**
- **For those MS that didn't have a position in the last WP, we kindly ask you to assess if the Commission proposals are acceptable.**

3. To reflect and assess internally in the spirit of compromise (as a last resource in exchange of other points. To analyse possible solutions and the strategy):

To assess whether as a last resort we could be flexible on the following points:

- **Line 94- “economic operator” Article 4** (Online platforms in the definition)

EP to come back. We insisted in our position.

MS who didn't have a position in the last counsellors meeting are requested to assess whether the deletion of providers of an online platform from the definition would be an option to be explored. The Commission will come back with an alternative solution.

- **Lines 101 k and 101m ‘Guidance’ Article 5b** – COM compromise proposal

New Commission proposal for a recital (EP could accept the proposal with the deletion of line 101m but with a clarification in a recital)

Recital for Art. 5b, based on EP text (only yellow highlighted text is new compared to version of 17.11)

(20b) ***In order to better enable persons injured by defective products to effectively exercise their right to compensation under this Directive***, ~~Taking into account in particular in light of the increased complexity of products, of business models and of supply chains, and considering that the aim of this Directive is to ensure that consumers can easily exercise their right to get compensation in case of damage caused by defective products,~~ Member States should ensure that ***encourage*** competent national consumer protection authorities and bodies ***to*** provide all relevant information and tailored guidance to affected consumers ***concerning their rights and the various means of seeking redress*** ~~to enable them to effectively exercise their right to compensation in accordance with this Directive. National consumer protection agencies and bodies should regularly exchange relevant information they become aware of and closely cooperate with market surveillance authorities.~~ ***In doing so, Member States should have regard to existing obligations for cooperation between national authorities responsible for enforcing consumer protection laws, in particular those under Regulation (EU) 2017/2394 of the European Parliament and of the Council [full ref. to be added in fn].***

- **Art. 7(6a) – Compensation fund** (being a “may” disposition and deleting the references to public revenues)
- **Art. 12a – Right of recourse** – if redrafted

Following the discussions in WP and counsellor's meetings, we understand the following are the most difficult points:

- **Art. 9(4)** – Alleviation of the burden of proof in difficult cases
- **Art. 10(1)(aa)** – Liability exemption for micro and small software undertakings.
- **Art. -15** – Derogation from development risk defence

Regarding the **liability exemption for micro and small software undertakings**, we insisted in our arguments not to have such kind of exemption here (it is a “no go”).

Following the discussions with the EP, the real intention behind this amendment is more related to software produced by a small or micro enterprise when it is going to be used as a component in a product by another manufacturer and there are binding agreements with that other manufacturer, according to which that other manufacturer agrees to assume the liability for any damage caused by that software for the purpose of exonerating the manufacturer of that software from liability under this Directive.

- **MS are requested to assess if, in the spirit of compromise, this approach could be a way to explore a compromise solution. Commission will come back with a proposal.**

We are looking forward to seeing you on 30 November,

The Spanish Presidency team for PLD