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From:	Presidency
To:	Delegations
N° Cion doc.:	ST 13134/22 + ADD1 - ADD 4
Subject:	Proposal for a Directive of the European Parliament and of the Council on liability for defective products - Complimentary Presidency note

Delegations will find in Annex complimentary Presidency note in view of the JHA Counsellors meeting on 8 December 2023.

Presidency note

7 December 2023

JHA Counsellors meeting on Civil Law Matters (Civil Liability)

Dear Colleagues,

Complementing the presidency note issued yesterday, please find below additional information. The note is the result of the work done on 7 December 2023.

1. Article 8 (3), line 126, recital 31, line 40:

The EP accepted the wording in the Commission compromise proposal for Article 8 (3), line 126, but requested a clarification for “confidential information” in Recital 31.

The Commission compromise proposal for Article 8 (3) and Recital 31:

*“3. When determining whether the disclosure **requested by a party is necessary and 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**”.*

*“(31) It is therefore necessary to facilitate claimants’ access to evidence to be used in legal proceedings, ~~while ensuring that such access is limited to that which is necessary and proportionate, and that confidential information and trade secrets are protected.~~ Such evidence should also include documents that have to be created ex novo by the defendant by compiling or classifying the available evidence. **In assessing the request for disclosure of evidence it should be ensured that such access is limited to that which is necessary and proportionate, inter alia to avoid non-specific searches for information that are not relevant to the proceedings, and to protect confidential information, such as information falling within the scope of legal professional privilege, and trade secrets in accordance with Union and national law.**”*

Changes in the recital are highlighted in turquoise. The wording of “legal professional privilege” comes from case law of the CJEU in the EU competition law and taxation law area and refers to privileged information exchanged between lawyers and clients.

2. Article 8 (4) (a), line 127 a:

New proposal to assess:

“Member States shall ensure that, where a defendant is required to disclose evidence, national courts are empowered, upon a duly reasoned request of the claimant, to require the evidence to be presented by the defendant in an easily accessible and easily understandable manner, if such presentation is deemed proportionate in terms of costs and effort for the defendant”.

This proposal would create a right for the claimant to get edited information under certain conditions:

- You need to have a defendant that is required to disclose information;
- National courts are empowered and not instructed;
- The claimant needs to create a duly reasoned request of the claimant;
- Easily accessible and easily understandable manner, but only if deemed proportionate in terms of costs and efforts for the defendant, which would create an additional safeguard for defendants.

3. Article 10 (1) (e), line 146

As the addition of “the last update” seems to be unnecessary, in so far as it seems covered already by the definition of manufacturer’s control (line 77d), the EP might accept to take it out of their mandate. In the event that the EP insists in having “the last update” in this line, MS are kindly requested to assess whether they could accept the following wording for line 146:

“(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 the last update in the period in which the product was within the manufacturer’s control was not such that the defectiveness could be discovered;”

4. Article 12 (a), lines 158 (a) - 158 (c):

New proposal from the PRES ES based on a new proposal from the EP:

“Where more than one economic operator is liable for the same damage, the economic operator that has compensated the injured person ~~or was ordered to do so by an enforceable judgement,~~ shall be entitled to pursue remedies against the other economic operators liable ~~in the chain of commercial transactions~~ under Article 7, in accordance with national law. ~~The relevant actions and conditions of exercise of this right of recourse, shall be determined by national law.~~”

5. Recital 16, related to Article (5) (a) (1) (c):

New EP proposal:

“(c) ~~destruction or irreversible~~ corruption of data that are not used for professional purposes, provided that the material loss exceeds EUR 1 000.”

Adapted recital 16 from EP-Text:

16) In recognition of the growing relevance and value of intangible assets, ~~the loss or economic loss due to the destruction or irreversible~~ corruption of data, such as ~~content~~ digital files deleted from a hard drive, should also be compensated, ~~including when consumers cannot access data in the way they could before the damage and they have to pay a price for recovering and restoring that data. This should include, where relevant,~~ the cost of recovering or restoring the data. As a result, the protection of consumers requires compensation for material losses resulting not only from death or personal injury, such as funeral or medical expenses or lost income, and from damage to property, but also for ~~loss or~~ destruction or irreversible corruption of data. However, in order to avoid the potential risk of litigation in an excessive number of cases, the destruction or irreversible corruption of data should not be compensated if the economic value of the damage is below EUR 1 000. Nevertheless, destruction or irreversible corruption of data is distinct from data leaks or breaches of data protection rules, and compensation for infringements of Regulation (EU) 2016/679 of the European Parliament and of the Council¹, Directive 2002/58/EC of the European Parliament and of the Council², Directive (EU) 2016/680 of the European Parliament and of the Council³ and Regulation (EU) 2018/1725 of the European Parliament and of the Council⁴ is not affected by this Directive. Destruction or corruption of data does not automatically result in a material loss for the victim if, for example, a back-up of the data exists or the data can be downloaded again, or an economic operator restores or recreates temporarily unavailable data, for example in a virtual environment. In line with the principle of contributory negligence, it should be possible to reduce or disallow an economic operator’s liability where the persons who have suffered the loss or damage themselves have negligently contributed to the cause of the damage, for example if it can be reasonably expected that certain digital files are regularly backed up in a second location.”

6. Recital 15:

Commission new suggestion for amending recital 15, corresponding to the agreed line art. 4 (4) (line 76):

“(15) It is becoming increasingly common for digital services to be integrated in or inter-connected with a product in such a way that the absence of the service would prevent the product from performing one of its functions ~~for example the continuous supply of traffic data in a navigation system~~. While this Directive should not apply to services as such, it is necessary to extend no-fault liability to such digital services as they determine the safety of the product just as much as physical or digital components. Such related services should be considered as components of the product to which they are inter-connected, when they are within the control of the manufacturer of that product, ~~in the sense that they are supplied by the manufacturer itself or that the manufacturer recommends them or otherwise influences their supply by a third party.~~ **Examples of such related services**

include the continuous supply of traffic data in a navigation system, a health monitoring service that relies on sensors of a physical product to track the user's physical activity or health metrics, a temperature control service that monitors and regulates the temperature of a smart fridge, or a voice assistant service, which allows control of one or more products by using voice commands. However, Internet access services should not be treated as related services, since they cannot be considered as part of the product **within the manufacturer's control** and it would be unreasonable to make manufacturers liable for harm caused by shortcomings in such services. Nevertheless, a product that relies on such services and that fails to maintain safety in the event of a loss of connectivity could be found to be defective under this Directive."