Council of the European Union
General Secretariat



**Interinstitutional files:**
**2022/0302 (COD)**

**Brussels, 14 December 2022**

**WK 16575/2022 ADD 1**

**LIMITE**

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**WORKING DOCUMENT**

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| From:<br>To: | General Secretariat of the Council<br>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: | Directive of the European Parliament and of the Council on liability for defective products<br>- Comments by DE delegation on first two Chapters |

Delegations will find in the Annex comments from DE delegation on first two Chapters of the above proposal.

**German Non Paper**

**Product Liability Directive**

This paper presents the first comments and questions of the German delegation on the first two chapters (Articles 1-10) of the Commission's proposal for a revised directive on liability for defective products (PLD – COM(2022) 495 final).

We generally appreciate that the PLD will be modernized and adapted to the digital age, circular economy and global value chains. It is important to ensure a high level of consumer protection and at the same time avoid unreasonable burdens for the economy.

We hold a general scrutiny reservation for this proposal and would like to point out that the subsequent comments are only a preliminary assessment and not intended to be exhaustive. The consultations within our government and with stakeholders will continue for some time and our position is still evolving and might be subject to change.

## A. Scope

- Article 2 para. 3 (d) states that the PLD "shall not affect any rights which an injured person may have under any special liability system that existed in national law on 30 July 1985." It should be clarified that such a "special liability system" does not (only) apply in addition to the PLD, but is considered as *lex specialis.* This means that as far as the special liability regime is applicable, it overrides the more general provisions of the PLD and can be subject to further amendments. The German liability regime for pharmaceuticals (sections 84 et seqq. of the Pharmaceutical Products Act (Arzneimittelgesetz – AMG) is in place since 1976 and has undergone a number of changes since then. The liability regime provides for a particularly high and product-specific level of protection by carefully balancing the interests of injured parties as well as pharmaceutical entrepreneurs and enabling a risk-benefit analysis that makes specific allowance for the risks entailed by pharmaceutical products for human use. In our view, recital 10 of the PLD should also be further clarified in this respect to enable a further development of the national system.
- Furthermore, we see the need for further clarifications on the differences and commonalities between the PLD and AI Liability Directive especially with regard to cases where both directives are applicable.

- According to Article 1 and Article 5 para. 1, only “natural persons” are entitled to compensation. We suggest a further examination on whether the right to compensation should be extended to legal persons that do not use their property exclusively for professional purposes [Article 4 para. 6 (b) (iii)], e.g. if spouses hold their house in a civil law partnership.

## B. Software and related services

- We appreciate that software will fall within the scope of the PLD, irrespective of the mode of its supply or usage, and therefore irrespective of whether the software is stored on a device or accessed through cloud technologies.
- However, the meaning of software within the PLD is in some cases still unclear, especially regarding the differentiation between software, software updates, digital manufacturing files, related services and source codes.
- We would be grateful for a further explanation on “related services” within the meaning of Article 4 para. 4, which, in our understanding, could in many cases also qualify as software under para. 1. We are also not sure of the consequences if the related service consists of providing data. The example of the continuous supply of traffic data in a navigation system (recital 15) raises the question whether the defectiveness would be seen in the supply of incorrect case-by-case data or rather the failure to supply any data at all.
- We wonder how long the period is in which the product is “within the manufacturer’s control” and how this is determined (Article 10 para. 1 (e), Article 10 para. 2; Article 4 para. 5). This question concerns software updates in particular.
- What is the reason why the source code is excluded (recital 12)? In our understanding, a source code may have significant influence on the functionalities of software. Hence, it should be clear that defects in source code that lead to the defectiveness of software do not exclude the liability under the PLD even though a source code by itself might not be considered as a product. Liability should not be circumvented by stating that the defectiveness lies solely in the source code.

## C. Damage

- With respect to the definition of damage as “material losses” (Article 4 para. 6), it should be clarified that the PLD does not affect national provisions relating to non-material damage, as stated in recital 18 (e.g. by deleting the word “material” or by an inclusion of Article 9 sentence 2 of the current PLD [Directive 85/374/EEC] in Article 4 para. 6).
- As regards the inclusion of damages resulting from loss or corruption of data [Article 4 para. 6 (c)], the question arises who would be entitled to compensation – anyone having authorized access to the data?

## D. Disclosure of evidence and burden of proof

In principle, we support regulations to facilitate claimants' access to evidence and for burden of proof. However, with regard to Articles 8 and 9, we think some clarifications and adjustments are necessary:

- Many Member States currently have no pre-trial discovery phase in their national laws. Therefore, we would be keen to understand why the Commission has not proposed disclosure obligations under substantive law but felt the need to involve the courts and civil procedure. The formulation of substantive law obligations would have made the assertion by claimants and the implementation task for Member States without pre-trial discovery, in our view, much easier. The need to go to court in order to get substantive information about the product might pose a significant burden for natural persons to claim their rights. During the upcoming negotiations we would like to help finding a workable solution that would fit Member States' substantive and procedural law as well as the challenges especially the digitalisation poses for consumers.
- A substantive law obligation would ensure that an injured person can make the decision on whether or not to file a claim for damages dependent on the information provided by the defendant.
- The proposal should provide an incentive to comply with the obligation to disclose evidence as well as with documentation requirements in general. It has to be ensured that the presumption in Article 9 para. 2 also applies where a defendant has not complied with documentation requirements and thus does not have evidence "at its disposal". This could be achieved by clarifying that "mandatory safety requirements" within the meaning of Article 9 para. 2 (b) include documentation requirements (e.g. under the AI Act or the Product Safety Regulation).