

The Consumer Voice in Europe

## INCEPTION IMPACT ASSESSMENT ON CIVIL LIABILITY – ADAPTING LIABILITY RULES TO THE DIGITAL AGE AND ARTIFICIAL INTELLIGENCE

BEUC's feedback



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## Why it matters to consumers:

Consumers are surrounded by digital goods and services in their daily lives. Yet current EU product liability rules fall short to protecting them in case of harms or damage caused by the malfunctioning of these products. This is because these rules were adopted more than three decades ago with a focus on “offline” products and traditional business models. The PLD should be adapted to cope with the challenges brought by new technologies as well as with new ways to sell and distribute goods (e.g., via online marketplaces).

## Summary

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*BEUC welcomes the possibility to give feedback on the European Commission’s Inception Impact Assessment on “Civil liability – adapting liability rules to the digital age and artificial intelligence”. BEUC recommends a comprehensive upgrade of the EU Product Liability Directive, which was adopted 36 years ago and is therefore no longer adapted to cope with the challenges brought by new technologies. In addition, online marketplaces have been playing an ever-growing role in the circulation of defective products and, as such, should fully fall within the scope of the PLD. Ultimately, BEUC stresses the importance of establishing a clear and coherent legal framework allowing consumers to obtain compensation when things go wrong and incentivizing traders to take sufficient precaution to avoid harm from happening in the first place.*

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BEUC, the European Consumer Organisation, welcomes the European Commission’s Inception Impact Assessment on *Civil liability - adapting liability rules to the digital age and artificial intelligence*,<sup>1</sup> and in particular its intent to update the 36-year-old Product Liability Directive (“PLD”). In its position paper “*Product liability 2.0 – how to make EU rules fit for consumers in the digital age*” of May 2020,<sup>2</sup> BEUC provided detailed recommendations on how the PLD should be upgraded to ensure that the rules fully deliver on the ground for consumers. In this response to the Commission’s Inception Impact Assessment, BEUC would like to shed light on the cornerstone issues that the European Commission should address in the context of its initiative.

As a preliminary remark, we urge the European Commission to shield against the ungrounded fears which already plagued the adoption of the PLD back in the 1980s. 36 years of experience and the available evidence have shown that none of these fears have materialised in practice. Through the successive evaluation reports on the PLD,<sup>3</sup> it has become clear that the PLD has neither led to a proliferation of frivolous cases, nor to an increase in insurance premium, nor has had clear detrimental consequences on businesses’

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<sup>1</sup>[https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12979-Civil-liability-adapting-liability-rules-to-the-digital-age-and-artificial-intelligence\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12979-Civil-liability-adapting-liability-rules-to-the-digital-age-and-artificial-intelligence_en)

<sup>2</sup> [https://www.beuc.eu/publications/beuc-x-2020-024\\_product\\_liability\\_position\\_paper.pdf](https://www.beuc.eu/publications/beuc-x-2020-024_product_liability_position_paper.pdf)

<sup>3</sup> [https://ec.europa.eu/growth/single-market/goods/free-movement-sectors/liability-defective-products\\_en](https://ec.europa.eu/growth/single-market/goods/free-movement-sectors/liability-defective-products_en)

competitiveness. Yet what is clear is that the PLD has not managed to fully deliver on the grounds for consumers. Therefore, BEUC calls on the European Commission to use this opportunity to turn the PLD into a useful instrument for consumers for obtaining compensation when things go wrong.

## 1. Turning the PLD into a useful instrument for obtaining compensation

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In its 2018 evaluation report, the European Commission noted that the PLD “continues to be an adequate tool”.<sup>4</sup> Yet the same report also highlighted that, between 2000 and 2016, **only 798 claims** based on EU product liability rules had been identified. This low number shows that, in practice, claimants have relied on EU product liability rules rather occasionally. Many still prefer to use other routes and national tort rules to obtain compensation. Although different reasons may explain this situation, several of them are worth highlighting as they directly relate to the scope, structure, and the wording of the PLD:

- **First, the scope of the PLD is currently too narrow and vague, which raises many uncertainties.** The PLD was adopted well before the emergence of digital technologies. Products that the drafters of the PLD had in mind in the 1980s are only a far-cry of those surrounding consumers nowadays. The current scope of the PLD leaves many issues unresolved and multiplies the risk of unjustifiable unequal treatments between harmed individuals. **It is thus essential to review and update the key notions of “product”, “defect” and “damage” for the rules to be the same for all European consumers. It is also important that the time when a product is placed on the market no longer serves as the key moment for assessing the defectiveness of products.** The PLD should follow the dynamic nature of digital goods and adapt to the fact that producers may nowadays keep a much higher degree of control over their products **even after they have been put on the market.**
- **Second, the burden of proof on consumers as currently foreseen under the PLD is too heavy for claimants, thereby undermining the fundamental right to access justice.** In its 2018 report, the European Commission noted that the impossibility to prove a defect and the link with the damage accounted for **53% of the cases of rejection**.<sup>5</sup> As the expert Group set up by the European Commission on liability and new technologies clearly highlighted,<sup>6</sup> the digital context has exacerbated evidentiary difficulties and widened the information asymmetries between claimants and defendants. This situation calls for a reversal of the burden of proof in the interest of claimants.
- **Third, the PLD has impaired access to justice in too many cases.** Consumers groups have for long stressed that the 500€ minimum threshold unduly restrains consumers’ access to justice. As the European Commission noted in its 2018 report, “in four out five cases, a compensation is not claimed as the damage is below the threshold”.<sup>7</sup> This monetary threshold also explains the lack of appetite of claimants for product liability rules and their use of other routes where such a monetary limit is absent.

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<sup>4</sup> COM/2018/246 final, 7 May 2018 (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2018:246:FIN>)

<sup>5</sup> SW(2018) 157 final, 7 May 2018 (<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=SWD%3A2018%3A157%3AFIN>)

<sup>6</sup> Expert Group on Liability and New Technologies – New Technologies Formation, “Liability for Artificial Intelligence”, November 2019 (<https://op.europa.eu/en/publication-detail/-/publication/1c5e30be-1197-11ea-8c1f-01aa75ed71a1/language-en>)

<sup>7</sup> *idem*

BEUC has further detailed these recommendations in its Position Paper "*Product liability 2.0 – how to make EU rules fit for consumers in the digital age*".

## 2. Ensuring that online marketplaces are included within the scope of the PLD

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The PLD was originally drafted with the traditional linear supply chain in mind and at a time where online marketplaces did not exist. The reality is however very different today as online marketplaces have been responsible for the circulation of millions of defective products potentially causing harm to millions of consumers.

In February 2021, six members of the BEUC and the International Consumer Research and Testing (ICRT) – Test Achats/Test Aankoop, Altroconsumo, Consumentenbond, Forbrugerrådet Tænk, Stiftung Warentest and Which? – published the results of a testing showing that, out of 250 products bought on online marketplaces, 66% of them did not meet the EU safety standards.<sup>8</sup> In November 2020, our Swedish member organisation Sveriges Konsumenter published the results of a study on unsafe direct imports via online marketplaces and found that, out of the 28 products investigated, 26 of them (i.e., 93%) turn out to be dangerous for consumers.<sup>9</sup>

In parallel, consumers today expect marketplaces to ensure that the products that they sell are safe. In November 2020, a study published by our German member organisation vzbv found that 93% of respondents expect rather online marketplaces to make sure that EU safety rules are respected.<sup>10</sup> In parallel, online marketplaces are often in the best position to minimize the harm arising out from the circulation of defective products.

Finally, whereas online platforms have the capacity to prevent the circulation of defective products, in practice, in many situations, they are still not incentivized to do it on a regular basis. A 2020 report from Which? highlighted that online marketplaces have been failing to remove banned products even after consumers report them.<sup>11</sup>

As a consequence, **online marketplaces must be fully liable for the products that they sell on their platforms when they have a predominant role in the supply of goods.**<sup>12</sup> This is also in line with other developments happening in other parts of the world, which also aim at including online marketplaces within the scope of product liability rules.<sup>13</sup>

**BEUC considers therefore that online marketplaces should be included explicitly in the scope of the PLD.** There are **several options** to do this:

- First, online marketplaces may be held liable as "**suppliers**" under the PLD. This means that online marketplaces would be liable in the event the producer is not known. Although this would already represent a significant improvement compared to the existing situation, it may not entirely solve the problem as, in many cases, the producer may be known but located in a third country (e.g., in China). In such a situation, it remains very complex (if not impossible) for the harmed individuals to claim and obtain compensation. If the liability of online marketplaces as "suppliers" is ultimately retained, BEUC takes the view that it should be

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<sup>8</sup> [https://www.beuc.eu/publications/beuc-x-2021-004\\_is\\_it\\_safe\\_to\\_shop\\_on\\_online\\_marketplaces.pdf](https://www.beuc.eu/publications/beuc-x-2021-004_is_it_safe_to_shop_on_online_marketplaces.pdf)

<sup>9</sup> [www.sverigeskonsumenter.se/vara-projekt/privatimportens-faror/slutrapporten/](http://www.sverigeskonsumenter.se/vara-projekt/privatimportens-faror/slutrapporten/)

<sup>10</sup> [www.vzbv.de/pressemitteilungen/grenzenloser-aerger-statt-bequemere-online-kauf](http://www.vzbv.de/pressemitteilungen/grenzenloser-aerger-statt-bequemere-online-kauf)

<sup>11</sup> <https://press.which.co.uk/whichpressreleases/online-marketplaces-fail-to-remove-banned-products-even-after-consumers-report-them-which-finds/>

<sup>12</sup> [www.beuc.eu/publications/beuc-x-2021-032\\_the\\_digital\\_services\\_act\\_proposal.pdf](http://www.beuc.eu/publications/beuc-x-2021-032_the_digital_services_act_proposal.pdf)

<sup>13</sup> See e.g., in California (United States)

[https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=20210220AB1182](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=20210220AB1182).

accompanied by a “fall-back plan” where online marketplaces may be held liable in situations where the producer is known but fails to take action to remedy the harm.

- Alternatively, online marketplaces may be held liable as “**importers**” under the PLD. This would allow harmed individuals to directly turn to the online marketplaces in case of harm to obtain compensation. All actors involved in the supply chain would be jointly and severally liable. The online marketplaces and the producer would apportion liability as they wish via contractual arrangements.

BEUC calls on the European Commission to carefully consider these two options to include online marketplaces in the scope of the PLD.

### **3. Considering the need for an additional instrument laying down liability rules based on the risk-profile of AI products and ensuring consistency with ongoing EU initiatives**

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BEUC believes that many of the problems relating to digital and AI may be addressed via an ambitious revision of the PLD. However, the European Commission seems willing to develop a separate and complementary instrument on civil liability for AI. We called on the Commission to carefully consider the need to build new liability rules based on the risk profile of AI systems. This is because a risk-based approach is not in the interest of consumers without a solid safety net provided by the PLD. From the perspective of consumers, **it does not matter whether the AI system causing the harm has been classified as low or high risk, what matters for consumers is a fair compensation for the damage suffered, regardless of what type of risk ultimately materialized.**

BEUC also believes that a very limited number of AI systems may ultimately fall within the “high-risk” category leaving thus the bulk of products as “low risks” with the risk of having different set of rules at national levels, which could ultimately contribute to fragmenting the EU Single Market. **That is why we urge the Commission to ensure consistency between the revised PLD and this additional instrument on civil liability for AI.**

Finally, we call on the Commission to **carefully consider the connections between, on the one hand, the different initiatives on civil liability, and, on the other hand, current pending EU legislations,** and inter alia the proposal for a Digital Services Act, the revision of the General Product Safety Directive and the proposal for an AI Act. All these initiatives are closely intertwined in practice. They must be taken together as each one will impact the others.

### Other relevant BEUC publications

- BEUC position paper, [Product Liability 2.0 – how to make EU rules fit for consumers in the digital Age](#), May 2020.
- BEUC position paper, [The Digital Services Act Proposal](#), April 2021
- BEUC report, [Is it safe to shop on online marketplaces?](#) February 2021
- BEUC position paper '[AI Rights for consumers](#),' October 2019.



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