

The Consumer Voice in Europe

## REVISION OF THE PRODUCT LIABILITY DIRECTIVE

Time to ensure effective and comprehensive protection for consumers damaged by defective products.



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## Why it matters to consumers

Defective products may cause severe damage to consumers. For instance, a hair dryer that overheats and catches fire may cause personal injuries or destroy property. In 1985, the EU legislator adopted the Product Liability Directive (PLD) that allows consumers to claim compensation for damage caused by defective products. However, after almost forty years the PLD urgently needs to be adapted to the risks and challenges associated with digital technology increasingly surrounding consumers.

## Summary

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On 28 September 2022 the European Commission published a proposal for a revision of the Product Liability Directive (PLD).<sup>1</sup> BEUC welcomes this long-awaited initiative to update the PLD. BEUC supports many elements of the European Commission's proposal but would also like to make recommendations how to further improve it. Below we present our main comments on the European Commission's proposal, which we elaborate in more detail in this paper.

1. BEUC welcomes the proposal to broaden the scope of the PLD by including **software**. The definition of product should explicitly state that software, including AI, is covered as component of a product, as standalone product and as a service.
2. BEUC welcomes the proposal to include "related digital services". In addition to "related digital services", "**related digital content**" should be covered by the scope of the PLD.
3. BEUC welcomes the proposal to include **digital manufacturing files** in the definition of a product.
4. Products should be considered **defective** whenever they are not in compliance with the law or deviate from the functioning consumers are entitled to expect. BEUC welcomes the proposal that the general understanding of "defect" should be complemented by a non-exhaustive list of circumstances that must be taken into account when assessing whether a product is defective. In this regard BEUC welcomes the proposal to extend the existing non-exhaustive list of circumstances. Well-founded concerns that products from the same product series are defective, for instance presented by a consumer organisation, should be added to the list of circumstances that have to be taken into account when assessing whether a product is defective.
5. BEUC welcomes the proposal to clarify that medically recognised harm to **psychological health** is recognised as personal injury under the PLD if it was caused by a defective product.

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<sup>1</sup> COM(2022) 495 final.

6. BEUC welcomes the proposal that damage to all **property** items is compensable under the PLD, unless they are exclusively used for professional purposes.
7. BEUC welcomes the proposal to recognise loss and corruption of **data** as compensable damage. Theft and unauthorised copying of data should also be recognised as compensable damage.
8. BEUC welcomes that the proposal does not contain any **lower or upper liability limits**.
9. All kinds of material damage, including **pure economic loss**, should be compensable under the PLD.
10. **Non-material damage** should be compensable under the PLD as it is already the case under other pieces of EU legislation, such as the GDPR or the Package Travel Directive.
11. Consumers should be allowed to request the **disclosure of evidence** before filing a lawsuit for compensation. Economic operators should be obliged to provide the disclosed information in a way that is understandable for consumers. The **burden of proof** regarding the defect and the causal link should be reversed. Consumers should only have to prove the damage. Economic operators should have to prove that the product was not defective and that it therefore could not have caused the damage in question.
12. BEUC regrets that the proposal establishes a strict order in which consumers can hold economic operators liable. Consumers should be able to hold any economic operator that is involved in the supply chain **jointly and severally liable**, if the manufacturer is based outside the EU, or if the addressed economic operator fails to identify the manufacturer.
13. The proposed conditions for the liability of **online marketplaces** are far too narrow. Consumers should be able to hold online marketplaces liable if the manufacturer or third-party vendor is based outside the EU, or if the online marketplace fails to identify the manufacturer or third party vendor.
14. BEUC welcomes that **substantial modifiers** of products are added to the list of liable economic operators.
15. The **regulatory-compliance defence** and the **development-risk defence** should be removed.
16. The **maximum limitation period** for claims based on the PLD should be abolished.
17. The European Commission should be obliged to set up a **public data base** with EU and national case law on the application of the PLD.

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## 1. Introduction

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The Product Liability Directive (PLD) sets out conditions under which consumers can claim compensation for damage caused by defective products. To obtain compensation, consumers have to prove the defect, the damage, and the causal link between defect and damage. Since the PLD establishes strict liability for defective products, harmed consumers do not need to prove fault of the manufacturer of the product.

The products the EU legislator had in mind when adopting the PLD in 1985 were traditional tangible items. However, since then the world of products has drastically changed. Everyday items such as watches, toys, or household appliances have become equipped with sensors, are connected to the internet, and may increasingly be driven by self-learning Artificial Intelligence (AI) systems. In addition, more and more products have become intangible. Instead of buying CDs or books, consumers are downloading music files, software or e-books to their connected devices. Consequently, digitalisation is increasingly blurring the line between products and services.

Defects may no longer only be caused by defective components but also by software bugs, integrated biased AI, loss of connectivity or cybersecurity vulnerabilities. Digital technology may cause a much broader range of damage than traditional products, such as damage to digital property or privacy. At the same time, the features of digital technology, such as its complexity and opacity, makes it almost impossible for consumers to prove a defect and a causal link with the damage as highlighted in the European Commission's expert report on "Liability for Artificial Intelligence and other emerging digital technologies".<sup>2</sup> Furthermore, new economic operators, such as online marketplaces, have become an important part of the supply chain and should bear their share of responsibility for defective products.

In light of these developments and new challenges, **the PLD urgently needs to be updated to close loopholes and to provide consumers with the protection they need.** On 28 September 2022 the European Commission published its long-awaited proposal for a revision of the PLD (the proposal).<sup>3</sup> This proposal builds *inter alia* on the 2018 PLD evaluation report<sup>4</sup> and the aforementioned expert report on "Liability for Artificial Intelligence and other emerging digital technologies". BEUC welcomes this initiative and would like to comment on the European Commission's proposal.

## 2. Notion of "product"

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### 2.1. Software including AI systems

#### The proposal

Like the current version of the PLD, the proposal defines products in general as movable items.<sup>5</sup> However, the proposal states that software, which by its nature is intangible, shall also be understood as a product.<sup>6</sup> Following the same logic, the proposal further states

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<sup>2</sup> European Commission Expert Group on Liability and New Technologies, report on liability for artificial intelligence and other emerging digital technologies, page 43 f., <https://op.europa.eu/en/publication-detail/-/publication/1c5e30be-1197-11ea-8c1f-01aa75ed71a1/language-en>.

<sup>3</sup> COM(2022) 495 final. On the same day, the European Commission also published a proposal for an AI Liability Directive [COM(2022) 496 final], which is discussed in a separate BEUC position paper.

<sup>4</sup> SWD(2018) 157.

<sup>5</sup> Article 4(1) proposal.

<sup>6</sup> Idem.

that the components of a product could be tangible or intangible items.<sup>7</sup> Hidden in the recitals the proposal explains that software is covered by the scope of the proposal irrespective of whether software is stored on a device or accessed through cloud services.<sup>8</sup> In our understanding, this means that software is covered by the proposal as an intangible component of a tangible product, for instance the operating system of a smart device, as standalone software, for instance a smartphone app, or as a service, for instance cloud computing. The same recital also states that the term software includes AI systems,<sup>9</sup> which is why we understand that AI is also covered by the proposal, be it a component of a product, a standalone system or provided as a service.

### BEUC's position

**BEUC welcomes the proposal to broaden the scope of the PLD by including software**, such as AI systems. However, BEUC suggests to explicitly state in the definition of product, not only in the recitals, that software, including AI, is covered as a component of a product, as a standalone product or as a service. Software is increasingly present in the daily lives of consumers, be it in the form of a pre-installed operating system on their smart devices, an app that they download or a service that they access via the internet. As such software may cause damage to consumers, for instance a battery saving app may cause a smartphone battery to overheat and ignite, thereby damaging other property or causing even physical damage. AI-driven products may come with particular risks for consumers, *inter alia* because of their autonomy and unpredictability. Therefore, software including AI should be covered by product liability rules.

#### **BEUC recommendation:**

The definition of product should explicitly state that software, including AI, is covered as component of a product, as standalone product and as a service.

## 2.2. Related digital services and related digital content

### The proposal

The proposal states that a digital service shall be considered as a component of a product if it is integrated into or connected with a product by the manufacturer or within the control of the manufacturer in such a way that the absence of the service would prevent the product from functioning.<sup>10</sup>

### BEUC's position

**BEUC welcomes the proposal to include "related digital services"**. Digital technologies often blur the lines between products and services since some products are provided as a service (see section 2.1. on software as a service) or depend on a constant supply of certain services to function. However, while some digital services may be essential for the functioning of a product, some digital content may be so as well. For instance, the supply of traffic data for a navigation system may be considered as a related service. However, the supplied traffic data itself should also be covered as a product by the PLD as the data may be incomplete, incorrect, or otherwise unfit for purpose and may thus cause damage. Therefore, **any kind of data that is essential for the functioning of a product should be covered by the scope of the PLD**, for instance as "related digital content" to use a

<sup>7</sup> Article 4(3) proposal.

<sup>8</sup> Recital 12 proposal.

<sup>9</sup> Recital 12 proposal.

<sup>10</sup> Article 4(3, 4) proposal.

similar term as “related digital services” that is already part of the proposal. To include digital services as well as digital content that is essential for the functioning of a product in the scope of the PLD would ensure consistency with the Digital Content and Digital Services Directive that provides rules on the supply of these items.<sup>11</sup>

### **BEUC recommendation:**

In addition to “related digital services”, “related digital content” should be covered by the scope of the PLD.

## **2.3. Digital manufacturing files and private users of 3D printers**

### The proposal

The proposal states that the notion of a product includes digital manufacturing files.<sup>12</sup>

### BEUC’s position

**BEUC welcomes the proposal to include digital manufacturing files in the definition of a product.**<sup>13</sup> 3D printers and similar tools allow consumers to generate movable items out of data and raw material. While raw material is already explicitly covered by the PLD,<sup>14</sup> data for the manufacturing of products with 3D printers is currently not mentioned. However, data that is incorrect, incomplete or otherwise unfit for purpose may cause a defect of the produced item and should thus be covered by the PLD. **Nevertheless, consumers who generate products with a 3D printer for their private use should not be liable as a manufacturer under the PLD** in case these products damage another person. Therefore, BEUC also welcomes that the proposal clarifies that the PLD should only apply to products put on the market or into service in the course of a commercial activity.<sup>15</sup>

## **3. Notion of “defect”**

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### **3.1. “Safety” as benchmark**

#### The proposal

The proposal states that a product shall be considered defective when it does not provide the safety which the public at large is entitled to expect.<sup>16</sup> The proposal clarifies that the reference to “safety” intends to protect the physical well-being and property of consumers.<sup>17</sup>

#### BEUC’s position

BEUC believes that the current narrow definition of defect, which is limited to safety expectations, unduly restricts the potential of the PLD. Instead, **the notion of defect should be understood in a broader way.** EU and Member States have adopted a waste

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<sup>11</sup> Article 6 ff. DCDS sets conformity requirements for digital content and digital services.

<sup>12</sup> Article 4(1) proposal.

<sup>13</sup> Article 4(1) proposal.

<sup>14</sup> Article 3(1) PLD.

<sup>15</sup> Recital 20 proposal.

<sup>16</sup> Article 6(1) proposal.

<sup>17</sup> Recital 22 proposal.

framework of provisions that apply to products and at the same time aim at protecting consumers, not only their safety, for instance the GDPR. The PLD should complement those provisions by allowing consumers who suffered damage from non-compliant products to claim compensation. Therefore, products should be considered defective under the PLD whenever they are not in compliance with such provisions that apply to products and aim at protecting consumers. However, since legal requirements do not necessarily cover all potential risks for consumers, products should also be considered defective if they deviate from the functioning consumers are entitled to expect. In particular, AI driven products may develop malfunctions that do not necessarily present non-compliance with applicable law. The revised PLD should cover such risks by establishing a broad understanding of the notion of defect.

### **BEUC recommendation:**

Products should be considered defective whenever they are not in compliance with the law or deviate from the functioning consumers are entitled to expect.

## **3.2. Criteria to assess whether a product is defective**

### The proposal

The proposal states that all circumstances must be taken into account when determining whether a product is defective.<sup>18</sup> To provide guidance the proposal also contains a non-exhaustive list of circumstances that shall be taken into account.<sup>19</sup> Compared to the current version of the PLD the proposal extends this list.

### BEUC's position

**BEUC welcomes the proposal that the general understanding of “defect” should be complemented by a non-exhaustive list of circumstances that must be taken into account when assessing whether a product is defective. In this regard BEUC welcomes the proposal to extend the existing non-exhaustive list of circumstances** because it increases legal certainty for consumers and provides incentives for manufactures to consider these additional circumstances when developing products to reduce potential liability risks. BEUC particularly agrees with the proposal that the following circumstances should be taken into account:

- Installation, use and maintenance instructions<sup>20</sup> should be taken into account when assessing whether a product is defective because a product may become defective in case installation, use or maintenance are done incorrectly due to misleading instructions. For instance, a piece of furniture may become unstable, fall apart and thereby injure a consumer because of a faulty or unprecise assembly instructions.
- Foreseeable misuse<sup>21</sup> should be taken into account when assessing whether a product is defective since consumers should not be deprived of the possibility to claim compensation in case they use a product incorrectly in a way that could happen to anyone else or in case a product is misused by a malicious third party.

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<sup>18</sup> Article 6(1) proposal.

<sup>19</sup> Article 6(1) a-h proposal.

<sup>20</sup> Article 6(1) a proposal.

<sup>21</sup> Article 6(1) b proposal.



- The self-learning ability of AI systems<sup>22</sup> should be taken into account when assessing whether a product is defective because, contrary to the positive connotation of the concept of “learning” and due to the complexity and unpredictability of AI systems, the autonomous process of self-learning may not necessarily improve the performance of an AI system but may also lead to unwanted output, for instance a smart assistant whose recommendations increasingly deviate from the interests of its user.
- The interactions between different products,<sup>23</sup> for instance between two smart home devices such as a smart heating system and the app that allows the user to control the system, should be taken into account when assessing whether a product is defective because on the Internet of Things the malfunction of one connected device may easily cause a defect of another connected device.
- Product safety requirements including cybersecurity requirements<sup>24</sup> should be taken into account when assessing whether a product is defective to strengthen the link between product safety rules and the PLD. In view of digital technologies it is particularly necessary to consider cybersecurity requirements because connected devices are often lacking adequate cybersecurity features as illustrated by tests performed by BEUC’s members.<sup>25</sup> In this context BEUC welcomes that the proposal states that the liability of an economic operator should not be reduced if the damage is caused by the defectiveness, for instance the non-compliance with cyber security requirements, and an act of a third party, for instance the exploitation of this very cybersecurity vulnerability by a cyber-criminal.<sup>26</sup>
- Interventions by regulatory authorities<sup>27</sup> such as product recalls by market surveillance authorities should be taken into account to strengthen the link between market surveillance rules and the PLD. If a market surveillance authority identifies that a product presents a risk for consumers and recalls the product, this intervention should suffice to consider the product as defective if it has caused damage.

Furthermore, BEUC believes that **well-founded concerns that products from the same product series are defective**, for instance presented by a consumer organisation, **should also be considered** when assessing whether a product is defective and therefore added to this list.

#### **BEUC recommendation:**

Well-founded concerns that products from the same product series are defective, for instance presented by a consumer organisation, should be added to the list of circumstances that have to be taken into account when assessing whether a product is defective.

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<sup>22</sup> Article 6(1) c proposal.

<sup>23</sup> Article 6(1) d proposal.

<sup>24</sup> Article 6(1) f proposal.

<sup>25</sup> BEUC position paper “Product Liability 2.0”, page 8, [https://www.beuc.eu/sites/default/files/publications/beuc-x-2020-024\\_product\\_liability\\_position\\_paper.pdf](https://www.beuc.eu/sites/default/files/publications/beuc-x-2020-024_product_liability_position_paper.pdf).

<sup>26</sup> Article 12(1) proposal.

<sup>27</sup> Article 6(1) g proposal.

## 4. Notion of “damage”

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### 4.1. Damage to psychological health

#### The proposal

The proposal states that damage caused by a defective product means material loss resulting *inter alia* from death or personal injury, including medically recognised harm to psychological health.<sup>28</sup>

#### BEUC’s position

**BEUC welcomes the proposal to clarify that medically recognised harm to psychological health is recognised as personal injury** under the PLD if it was caused by a defective product. Death or personal injuries are explicitly mentioned in the current version of the PLD.<sup>29</sup> However, it is unclear whether psychological health is covered by the PLD as well. The proposal therefore increases the protection of consumers for instance in case they suffer from a post-traumatic stress disorder as a consequence of an accident caused by a defective product.

### 4.2. Damage to mixed used property items

#### The proposal

The proposal states that damage to any property item is recognised as compensable damage under the PLD, unless the item is exclusively used for professional purposes.<sup>30</sup>

#### BEUC’s position

**BEUC welcomes the proposal that damage to all property items is compensable under the PLD, unless they are exclusively used for professional purposes.** The current version of the PLD only covers property if it is mainly used for private purposes.<sup>31</sup> However, nowadays property items are often used both for private and professional purposes, for instance laptops and mobile phones. It might thus be difficult to determine for which purpose a property item is mainly used. The proposal would thus ensure that consumers are not left unprotected in case they use products both for private and professional purposes.

### 4.3. Damage to data

#### The proposal

The proposal states that material loss resulting from the loss or corruption of data that was caused by a defective product is also recognised as compensable damage.<sup>32</sup>

#### BEUC’s position

**BEUC welcomes the proposal to recognise loss and corruption of data as compensable damage.** Defective connected devices may not only cause damage in the physical world but may also cause damage to data that is stored on a device. Loss and corruption of data should thus be recognised as compensable damage under the revised PLD. However, insufficient cybersecurity, which in our view should be considered as a defect, may allow malicious third parties to access connected devices and steal or copy sensitive data.

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<sup>28</sup> Article 4(6) a proposal.

<sup>29</sup> Article 9 PLD.

<sup>30</sup> Article 4(6) b iii proposal.

<sup>31</sup> Article 9 b ii PLD.

<sup>32</sup> Article 4(6) c proposal.

Stolen or copied credentials could be used to cause financial damage while stolen or copied personal data, such as private messages, could be used to cause non-material damage for instance in the form of reputational damage. Compensating only loss or corruption of data, but not theft or unauthorised copying of data would thus leave consumers partly unprotected. Therefore, theft and unauthorised copying of data should also be recognised as relevant damage.

#### **BEUC recommendation:**

Theft and unauthorised copying of data should also be recognised as compensable damage.

### **4.4. Lower and upper liability limits**

#### The proposal

Unlike the current version of the PLD the proposal does not contain any lower or upper liability limits.

#### BEUC's position

**BEUC welcomes that the proposal does not contain any lower or upper liability limits.** Under the current PLD, consumer may only seek compensation for damage to property if the worth of the damage surpasses an amount of €500.<sup>33</sup> This provision is highly problematic for several reasons. First, it is incoherent with the Representative Actions Directive which lists the PLD in its annex and which aims at facilitating consumer claims regardless of their amount. Secondly, the provision has been interpreted differently across the EU. In some Member States, the amount of €500 is regarded as deductible, which means that in case of success, the amount of damages awarded to the claimant is reduced by €500, while in other Member States €500 represents a threshold, below which no damages can be claimed.<sup>34</sup> Depending in which Member State they live, consumers may therefore not get full compensation or even no compensation at all, which is both completely arbitrary. As a result, **the €500 threshold has impeded access to justice in four out of five cases** because the damage was below €500.<sup>35</sup> In addition to the lower limit of €500, the current version of the PLD also allows Member States to introduce upper limits of at least €70m for product liability claims.<sup>36</sup> However, such upper limits may also impede consumers from getting full compensation and thus should not be included in the revised PLD.

### **4.5. Pure economic loss**

#### The proposal

The proposal states that only material loss, which results from death, personal injury, harm to or destruction of property and the loss or corruption of data, is compensable under the PLD,<sup>37</sup> but the proposal does not recognise pure economic loss as compensable damage.

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<sup>33</sup> Article 9 b PLD.

<sup>34</sup> SWD(2018) 157, page 25.

<sup>35</sup> SWD(2018) 157, page 25.

<sup>36</sup> Article 16(1) PLD.

<sup>37</sup> Article 4(6) proposal.

## BEUC's position

BEUC believes that **all kinds of material damage, including pure economic loss, should be compensable under the PLD**. Material damage in the form of unwanted expenditures often is the consequence of another harm. For instance, a medical bill might be the consequence of a personal injury and repair costs may be the consequence of a damage to property. However, defective products may also cause pure economic loss. For instance, insufficient cybersecurity may allow malicious third parties to access a connected devices and to steal valuable data that cannot be restored. Defective smart devices, such as voice assistants or smart household applications, may order goods or services online without the consent of consumers thereby causing financial loss in case an order cannot be revoked. Therefore, pure economic loss should be included in the list of compensable damage.

### **BEUC recommendation:**

All kinds of material damage, including pure economic loss, should be compensable under the PLD.

## 4.6. Non-material damage

### The proposal

The proposal states that only material loss is compensable under the PLD, but not non-material damage.<sup>38</sup>

### BEUC's position

**BEUC strongly regrets that the proposal does not cover compensation for non-material damage.** In particular personal injuries may cause non-material damage such as a shock, temporary physical limitations, for instance as consequence of a fracture, or persistent pain. But defective products may also cause other types of non-material damage. For instance, the violation of privacy by a defective smart device may in itself present a non-material damage or may lead to reputational damage if personal data is accessible for third parties. However, as under the current PLD,<sup>39</sup> the proposal leaves it to Member States to decide whether compensation for non-material damage can be claimed.<sup>40</sup>

To ensure a high protection of consumers across the EU, the revised PLD should cover both material and non-material damage. **This is already the case under other pieces of EU legislation**, for instance under the General Data Protection Regulation,<sup>41</sup> the Package Travel Directive,<sup>42</sup> the Directive on the enforcement of intellectual property,<sup>43</sup> and the Directive on the protection of trade secrets.<sup>44</sup> There is no reason why victims of non-material damage should be entitled under EU law to claim compensation if damage was caused by a privacy infringement, by a breach of a package travel contract, by a violation of intellectual property or by a violation of trade secrets, but should depend on the goodwill of Member States if non-material damage was caused by a defective product.

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<sup>38</sup> Article 4(6) proposal.

<sup>39</sup> Article 9(2) PLD

<sup>40</sup> Recital 18 proposal.

<sup>41</sup> Article 82(1) General Data Protection Regulation (2016/679) covers "material and non-material damage".

<sup>42</sup> Recital 34 Package Travel Directive (2015/2302) covers "non-material damage, such as compensation for the loss of enjoyment of the trip or holiday".

<sup>43</sup> Recital 26 Directive on the enforcement of Intellectual Property (2004/48) covers "any moral prejudice caused to the rightholder".

<sup>44</sup> Recital 30 Directive on the protection of trade secrets (2016/943) covers "any moral prejudice caused to the trade secret holder".

### **BEUC recommendation:**

Non-material damage should be compensable under the PLD as it is already the case under other pieces of EU legislation, such as the GDPR or the Package Travel Directive.

## **5. Disclosure of evidence and burden of proof**

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### The proposal

Like the current version of the PLD, the proposal places the burden of proof for the damage, the defect and the causal link between the defect and the damage on the consumer.<sup>45</sup> To alleviate the burden of proof the proposal empowers courts to order the disclosure of evidence on the request of a claimant, but only to the extent that confidential information and trade secrets are not concerned.<sup>46</sup> Furthermore, the proposal introduces several rebuttable presumptions. It states that the defect shall be presumed if the defendant fails to disclose evidence, the product does not comply with relevant safety requirements or that the damage was caused by an obvious malfunction.<sup>47</sup> In addition, the proposal states that the causal link between the defect and the damage shall be presumed if the damage is of a kind that is typically consistent with the defect.<sup>48</sup> Furthermore, the proposal empowers courts to presume the defect and the causal link between the defect and the damage if consumers face excessive difficulties, due to technical or scientific complexity.<sup>49</sup>

### BEUC's position

BEUC regrets that the proposal places the burden of proof for the damage, the defect and the causal link on the consumer. In practice **the burden of proof presents the main obstacle for consumers to get compensation.** According to the 2018 report on the evaluation of the PLD, 32% of all product liability claims are rejected because consumers are not able to prove the defect while 21% of all product liability claims are rejected because consumers are not able to prove the link between the defect and the damage.<sup>50</sup> This means that in total, **consumers are refused compensation in 53% of all cases because of the burden of proof** regarding the defect and the causal link.<sup>51</sup>

These figures clearly show how placing the burden of proof on consumers undermines their fundamental right of access to justice. And the situation is getting even worse, since in 2019, the European Commission Expert Group on liability and new technologies found that the features of new technologies such as autonomy, opacity and unpredictability widen the information asymmetry between consumers and manufacturers and may result in unreasonable difficulties and costs for consumers to establish the applicable safety requirements and the non-compliance with these requirements.<sup>52</sup>

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<sup>45</sup> Article 9(1) proposal.

<sup>46</sup> Article 8 proposal.

<sup>47</sup> Article 9(2) proposal.

<sup>48</sup> Article 9(3) proposal.

<sup>49</sup> Article 9(4) proposal.

<sup>50</sup> SWD(2018) 157, page 27.

<sup>51</sup> Idem.

<sup>52</sup> European Commission Expert Group on Liability and New Technologies, report on liability for artificial intelligence and other emerging digital technologies, page 42, <https://op.europa.eu/en/publication-detail/-/publication/1c5e30be-1197-11ea-8c1f-01aa75ed71a1/language-en>.

The proposed **disclosure of evidence** and the **rebuttable presumptions** seem to be steps in the right direction. However, BEUC is convinced that they **are not enough to counterbalance the information asymmetry**<sup>53</sup> between consumers and economic operators and thus will not ensure full access to justice for consumers.

Since the proposed rules on disclosure of evidence speak of “claimant” and “defendant”,<sup>54</sup> they would only apply in case consumers had already filed a lawsuit. Therefore, consumers would not be able to request the disclosure of evidence, for instance whether and what kind of an AI system was involved, and to assess the disclosed information before deciding whether a lawsuit to claim compensation would have chances to succeed.

Economic operators might refuse any disclosure of evidence by invoking confidential information and trade secrets.<sup>55</sup> The dispute about whether certain information is confidential, or a trade secret would increase the length and costs of the proceedings. Where economic operators would finally be ordered to disclose evidence, consumers would need to hire expensive experts to interpret the obtained information, in particular in view of AI driven products, because the proposal does not require economic operators to provide the information in a way that is understandable for consumers.

But even if consumers had access to, and understood certain information, it is highly likely that they would still not be able to prove the defectiveness of a complex product such as a smart device.<sup>56</sup> To enable **consumers** at least to better assess the success chances of a lawsuit, they **should be allowed to request the disclosure of evidence before filing a lawsuit** for compensation. **Economic operators should be obliged to provide the disclosed information in a way that is understandable for consumers.**

The conditions for triggering some of the presumptions are so high, that consumers would have great difficulties meeting them. For instance, how should a consumer establish that a complex product with digital components “does not comply with mandatory safety requirements laid down in EU or national law”<sup>57</sup> without engaging not only a product safety lawyer but also a highly specialised IT engineer? And would the burden of proof really be alleviated by a presumption that requires consumers to prove “excessive difficulties, due to technical or scientific complexity” to prove the defect or the causal link, and to present “sufficiently relevant evidence”.<sup>58</sup> The conditions for triggering other presumptions are so narrow that they would only apply to very few cases. For instance, the presumption that requires an “obvious malfunction” of a product<sup>59</sup> may apply to a simple case like an exploding glass bottle,<sup>60</sup> but would not help consumers in complex cases where help is needed the most. And finally, some key words in the presumptions are formulated so vaguely that consumers would not know what conditions they would actually have to fulfil to trigger the presumptions. For instance, how should consumers prove that a damage is “of a kind typically consistent with the defect in question”?<sup>61</sup>

Therefore, **BEUC continues to call for a full reversal of the burden of proof** regarding the defect and the causal link. Consumers should only have to prove the damage. Economic operators should have to prove that the product was not defective and that it therefore could not have caused the damage in question.

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<sup>53</sup> The issue of information asymmetry is explicitly recognised in Recital 30 proposal.

<sup>54</sup> Article 8(1) proposal.

<sup>55</sup> Article 8(3) proposal.

<sup>56</sup> The difficulties of proving the defectiveness of a smart device has been well illustrated by a recent ruling of the Italian Council of State.

<sup>57</sup> Article 9(2) b proposal.

<sup>58</sup> Article 9(4) proposal.

<sup>59</sup> Article 9(2) c proposal.

<sup>60</sup> Recital 33 proposal.

<sup>61</sup> Article 9(3) proposal.

### **BEUC recommendation:**

Consumers should be allowed to request the disclosure of evidence before filing a lawsuit for compensation. Economic operators should be obliged to provide the disclosed information in a way that is understandable for consumers. The burden of proof regarding the defect and the causal link should be reversed. Consumers should only have to prove the damage. Economic operators should have to prove that the product was not defective and that it therefore could not have caused the damage in question.

## **6. Liable economic operators**

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### **6.1. Joint and several liability of economic operators**

#### **The proposal**

The proposal establishes an order (liability cascade), in which harmed consumers may hold economic operators liable (1. manufacturer, 2. importer/authorised representative, 3. fulfilment service provider, 4. distributor, 5. online marketplace).<sup>62</sup>

#### **BEUC's position**

BEUC welcomes that the proposal aligns the list of liable economic operators under the PLD with the terminology of the new General Product Safety Regulation since it is important to ensure coherence between the two legal acts.

BEUC also welcomes that the proposal aims to ensure that there is always one economic operator based in the EU who can be held liable under the revised PLD.<sup>63</sup> Seeking compensation from a manufacturer or another economic operator that is based outside the EU, for instance in China, presents consumers with enormous, if not insurmountable difficulties.

However, **BEUC regrets that the proposal establishes a strict order in which consumers can hold economic operators liable.** In practice, this means that consumers may seek compensation only from one of the listed economic operators. However, consumers may have difficulties in getting compensation from a particular economic operator, for instance because the economic operator does not have the financial means to compensate for the damage.

This could easily happen in case a consumer would, according to the proposal, only be able to hold an authorised representative liable. Currently, there are no EU rules on financial or qualitative requirements for authorised representatives. It is not even necessary to establish a legal person,<sup>64</sup> which in some Member States would require to have a certain share capital as security for clients or business partners.<sup>65</sup> Therefore, literally anyone can become an authorised representative regardless of their ability to bear liability under the PLD.

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<sup>62</sup> Article 7 proposal.

<sup>63</sup> Page 2 proposal.

<sup>64</sup> Article 3(12) Market Surveillance Regulation.

<sup>65</sup> For instance, in Germany the establishment of a limited liability company (GmbH) requires a share capital of at least € 25,000.



To avoid such difficulties **consumers should be able to hold any economic operator that is involved in the supply chain jointly and severally liable**, be it the importer, authorised representative, the fulfilment service provider or any distributor, if the manufacturer is based outside the EU, or if the addressed economic operator fails to identify the manufacturer.

### **BEUC recommendation:**

Consumers should be able to hold any economic operator that is involved in the supply chain jointly and severally liable, if the manufacturer is based outside the EU, or if the addressed economic operator fails to identify the manufacturer.

## **6.2. Liability of online marketplaces**

### The proposal

The proposal states that online marketplaces can be held liable if all the following conditions are met: (1) the manufacturer cannot be identified or is established outside the EU, (2) an importer, authorised representative or fulfilment service provider cannot be identified, (3) the online marketplace fails to identify the supplier of the product and, (4) the conditions of Article 6(3) of the Digital Services Act are fulfilled, which means that the online marketplaces presented the product in a way that would lead an average consumer to believe that this product is provided either by the online marketplace itself or by a third party acting under its authority or control.<sup>66</sup>

### BEUC's position

BEUC has continuously called for holding online marketplaces subsidiarily liable under the PLD,<sup>67</sup> and therefore welcomes that the proposal lists online marketplaces as one of the liable economic operators.<sup>68</sup>

However, **the proposed conditions for the liability of online marketplaces are far too narrow**. Online marketplaces would only be liable as last resort if no other economic operator listed in the liability cascade could be held liable. Nevertheless, online marketplaces would still be able to escape liability simply by identifying the third-party vendor, even if the third party vendor is based outside the EU, and by informing consumers that the third-party vendor is not acting under their authority or control.

This is not acceptable, given that online marketplaces provide the infrastructure for the dissemination of millions of defective products. Mystery shopping by BEUC's members has shown that, out of 250 products sold at online marketplaces, 165 products did not meet EU product safety standards.<sup>69</sup> At the same time, online marketplaces greatly benefit from growing online demand. Therefore, online marketplaces should carry their share of responsibility for damage caused by defective products, even if they only act as intermediaries. In this regard inspiration should be drawn from recent *Louboutin* ruling of the Court of Justice of the EU, which confirms that online marketplaces can be held liable.<sup>70</sup> Consumers

<sup>66</sup> Article 7(5 and 6) proposal.

<sup>67</sup> See the following BEUC papers: [https://www.beuc.eu/sites/default/files/publications/beuc-x-2020-024\\_product\\_liability\\_position\\_paper.pdf](https://www.beuc.eu/sites/default/files/publications/beuc-x-2020-024_product_liability_position_paper.pdf), [https://www.beuc.eu/sites/default/files/publications/beuc-x-2022-002\\_response\\_to\\_public\\_consultation\\_on\\_pld\\_and\\_civil\\_liability\\_for\\_ai.pdf](https://www.beuc.eu/sites/default/files/publications/beuc-x-2022-002_response_to_public_consultation_on_pld_and_civil_liability_for_ai.pdf), [https://www.beuc.eu/sites/default/files/publications/beuc-x-2022-002\\_response\\_to\\_public\\_consultation\\_on\\_pld\\_and\\_civil\\_liability\\_for\\_ai.pdf](https://www.beuc.eu/sites/default/files/publications/beuc-x-2022-002_response_to_public_consultation_on_pld_and_civil_liability_for_ai.pdf).

<sup>68</sup> Article 7(6) proposal.

<sup>69</sup> <https://www.beuc.eu/press-releases/two-thirds-250-products-bought-online-marketplaces-fail-safety-tests-consumer-groups>.

<sup>70</sup> CJEU, joined cases C-148/21 and C-184/21.



need to be able to hold online marketplaces liable to incentivise them to prevent the circulation of potentially dangerous products.

To avoid loopholes in the revised PLD, consumers should be able to hold online marketplaces liable, like any other economic operator involved in the supply chain (see section 6.1.), if the manufacturer or third-party vendor is based outside the EU, or if the online marketplace fails to identify the manufacturer or third-party vendor.<sup>71</sup>

### **BEUC recommendation:**

Consumers should be able to hold online marketplaces liable if the manufacturer or third-party vendor is based outside the EU, or if the online marketplace fails to identify the EU based manufacturer or third party vendor.

## **6.3. Substantial modifiers of products**

### The proposal

The proposal states that any natural or legal person that modifies a product that has already been placed on the market or put into service, shall be liable like the manufacturer of the product, where the modification is considered substantial under relevant Union or national rules on product safety and is undertaken outside the original manufacturer's control.<sup>72</sup>

### BEUC's position

**BEUC welcomes that substantial modifiers of products are added to the list of liable economic operators.** In the circular economy, the refurbishment or the remanufacturing of products becomes increasingly important.<sup>73</sup> However, consumers damaged by refurbished or remanufactured products currently are not able to hold the original manufacturer liable since the latter may claim that the defect only occurred after the original product was placed on the market. To avoid consumers being left uncompensated, the PLD should establish the liability of economic operators who place substantially refurbished or remanufactured products on the market.

## **7. Exemptions from liability**

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### The proposal

Like the current PLD, the proposal provides the defendant with several defences to escape liability, *inter alia* the development-risk defence and the regulatory-compliance defence. The development-risk defence provides that a manufacturer is not liable if the objective state of scientific and technical knowledge at the time when the product was placed on the market, or in the period during which the product was within the manufacturer's control,

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<sup>71</sup> The obligation to inform consumers about the identity of a third-party vendor is an obligation under the Directive (EU) 2019/2161 on better enforcement and modernisation of Union consumer protection rules.

<sup>72</sup> Article 7(4) proposal.

<sup>73</sup> The terms "refurbishment" and "remanufacturing" are defined in Article 2(16 and 18) of the proposal for a Ecodesign for Sustainable Products Regulation, COM(2022) 142. The 'Blue Guide' on the implementation of EU product rules 2022 (2022/C 247/01), page 17, contains a list of criteria to assess whether a product has been modified substantially.

was not such that the defectiveness could be discovered.<sup>74</sup> The regulatory-compliance defence provides that an economic operator is not liable if the defectiveness is due to compliance of the product with mandatory regulations issued by public authorities.<sup>75</sup>

### BEUC's position

**BEUC believes that the development-risk defence<sup>76</sup> and the regulatory-compliance defence<sup>77</sup> are particularly problematic and should be abolished.**

Compared to the current version of the PLD,<sup>78</sup> the proposal slightly improves the position of consumers regarding the development-risk defence because the proposal no longer limits the liability to the time until the product was placed on the market but extends liability for the period during which the product remained within the control of the manufacturer. In our understanding, this means that, for instance, a provider of software would remain liable as long as it can provide updates for the software. However, in the case of traditional products that cannot be updated, the development-risk defence would allow, for instance, a manufacturer of a toy to escape liability if the objective state of scientific knowledge at the time when the toy was placed on the market did not allow it to realise that the chemical composition of the toy could cause physical harm to babies. The development-risk defence, regardless of the improvement that the proposal would bring, thus burdens consumers with the risk of gaps in the available scientific and technical knowledge.

Because of the regulatory-compliance defence consumers cannot claim compensation if a product was defective because the manufacturer followed the relevant product rules. This in turn means that the relevant product rules inadvertently do not reflect or deliberately ignore the risk that has materialised in the damage. The regulatory-compliance defence thereby burdens consumers with the risk of gaps in the regulatory framework.

**Consumer should neither carry the risk of gaps in scientific and technical knowledge, nor the risks caused by the regulatory framework.** Consumers have no means to protect themselves from the risks emanating from unsafe products and should therefore not be left without compensation in case of damage. In turn, economic operators benefit from placing potentially dangerous products on the market and can insure themselves against liability risks. This is why the risk of gaps in the available scientific and technical knowledge and in the regulatory framework should be placed on economic operators, not on consumers.

#### **BEUC recommendation:**

The regulatory-compliance defence and the development-risk defence should be removed.

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<sup>74</sup> Article 10(1) e proposal.

<sup>75</sup> Article 10(1) d proposal.

<sup>76</sup> Article 10(1) e proposal.

<sup>77</sup> Article 10(1) d proposal.

<sup>78</sup> Article 7 e PLD.

## 8. Limitation periods

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### The proposal

Like the current PLD, the proposal stipulates that proceedings for claiming compensation cannot be initiated after three years, counting from the day on which the harmed consumer became aware or should have become aware of the damage, the defect and the identity of the liable economic operator.<sup>79</sup> Like the current PLD, the proposal further states that initiation of proceedings for claims is excluded in principle ten years after the product has been placed on the market.<sup>80</sup> However, as an exemption to this rule the proposal states that the maximum limitation period should be 15 years in case an injured person has not been able to initiate proceedings within ten years due to the latency of a personal injury.<sup>81</sup>

### BEUC's position

**BEUC believes that the maximum limitation period should be abolished.** The proposal to extend the maximum limitation period from 10 to 15 years for certain personal injuries was certainly inspired by the "Howald Moor" ruling of the European Court of Human Rights that found that a limitation period of 10 years violates the fundamental right of access to justice.<sup>82</sup> However, latent personal injuries may occur with a greater delay than 15 years. At the same time products may also have hidden defects that only occur long after they have been placed on the market. To avoid that consumers lose their right to claim compensation even before they know that they are affected by a latent personal injury or by a hidden defect the maximum limitation period should be abolished.

#### **BEUC recommendation:**

The maximum limitation period for claims based on the PLD should be abolished.

## 9. Transparency

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### The proposal

The proposal states that Member States shall publish in an easily accessible and electronic format any final court ruling based on the PLD.<sup>83</sup> The proposal further states that European Commission "may" set up a public data base containing the national caselaw on the PLD.<sup>84</sup>

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<sup>79</sup> Article 14(1) proposal.

<sup>80</sup> Article 14(2) proposal.

<sup>81</sup> Article 14(3) proposal.

<sup>82</sup> ECHR, Howald Moor and Others/Switzerland, March 2014, 52067/10 and 41072/11.

<sup>83</sup> Article 15(1) proposal.

<sup>84</sup> Article 15(2) proposal.

## BEUC's position

**BEUC believes that the European Commission should be obliged to set up a public data base on PLD related caselaw.** Such an EU data base should also contain rulings of the Court of Justice of the EU. The 2018 report on the evaluation of the PLD noted that it was "very difficult" to obtain comprehensive data on the application of the PLD in national courts.<sup>85</sup> As one of the reasons, the report mentioned that only some Member States had public databases on court decisions.<sup>86</sup>

### **BEUC recommendation:**

The European Commission should be obliged to set up a public data base with EU and national case law on the application of the PLD.

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<sup>85</sup> SWD(2018) 157, page 20.

<sup>86</sup> Idem.

