

The Consumer Voice in Europe

## REVISION OF THE PRODUCT LIABILITY DIRECTIVE

### BEUC recommendations for trilogue negotiations



**Contact: Urs Buscke – [consumer-rights@beuc.eu](mailto:consumer-rights@beuc.eu)**

**BUREAU EUROPEEN DES UNIONS DE CONSOMMATEURS AISBL | DER EUROPÄISCHE VERBRAUCHERVERBAND**  
Rue d'Arlon 80, B-1040 Brussels • Tel. +32 (0)2 743 15 90 • [www.twitter.com/beuc](http://www.twitter.com/beuc) • [www.beuc.eu](http://www.beuc.eu)  
EC register for interest representatives: identification number 9505781573-45



Co-funded by the European Union

Ref: BEUC-X-2023-141 – 06/11/2023

## Why it matters to consumers

Defective products can 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. The ongoing EU legislative process to revise the PLD has the potential to significantly increase consumer protection.

## Summary of BEUC's trilogue recommendations

---

On 28 September 2022, the European Commission published its long-awaited proposal for a revision of the Product Liability Directive (PLD).<sup>1</sup> In 2023, the two co-legislators adopted their positions. First, on 14 June 2023, the Council of the EU adopted its general approach on the revision of the PLD<sup>2</sup>, and second, on 9 October 2023, the European Parliament adopted its report on the European Commission's proposal.<sup>3</sup>

On one hand, BEUC very much welcomes that all three EU institutions agree that **standalone software** should be included in the definition of 'product' under the revised PLD. On the other hand, BEUC deplores that the three EU institutions were not more ambitious, especially regarding the notion of damage, the concept of defectiveness, the liability of online marketplaces, and the burden of proof.<sup>4</sup>

However, the Council's general approach and the European Parliament's report each contain positive elements which would improve the European Commission's proposal, e.g., by mentioning 'a high level of consumer protection' as an objective of the revised PLD and by lowering the conditions for triggering the presumption in case of 'excessive difficulties'. BEUC therefore calls upon the co-legislators to include these positive elements in the final text of the revised PLD.

At the same time, BEUC urges the co-legislators to discard other amendments that would weaken the European Commission's proposal, e.g., the amendments to narrow down the notion of harm to psychological health and to introduce a €1000 threshold for damage to data.

BEUC therefore makes the following recommendations for the trilogue:

1. The revised PLD should state that one of its **objectives** is to ensure a high level of consumer protection, as proposed in amendment 48 of the European Parliament's report.
2. The revised PLD should neither require **harm to psychological health** to be 'certified by a court ordered medical expert', nor limit the notion of harm to

---

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

<sup>2</sup> Council document 10694/23

<sup>3</sup> European Parliament report A9-0291/2023

<sup>4</sup> For more information please see our [position paper](#) on the revision of the PLD.

psychological health to 'serious adverse effects on the victim's psychological integrity', contrary to amendment 18 of the European Parliament's report in order not to make it even more difficult for consumers to claim compensation.

3. The revised PLD should not contain a lower threshold for material loss resulting from **damage to data**, contrary to amendment 68 of the European Parliament's report.
4. The revised PLD should not allow defendants to request the **disclosure of evidence** from the claiming consumer, contrary to amendment 86 of the European Parliament's report.
5. The revised PLD should not allow to refuse the disclosure of evidence if the requested information is merely confidential, but only if the information is a trade secret in the meaning of the Trade Secret Directive (EU) 2016/943, as proposed in amendment 32 of the European Parliament's report.
6. The revised PLD should state that defendants must disclose evidence 'without undue delay' and in an 'easily accessible and easily understandable manner', as proposed in amendment 89 of the European Parliament's report.
7. The **presumption of defectiveness** should apply if the damage was caused by an obvious malfunction of a product during 'reasonably foreseeable use', as proposed in the Council's general approach.
8. The **presumption in case of 'excessive difficulties'** should not be limited to 'technical or scientific complexity' but should simply mention these potential causes 'in particular', as proposed in the Council's general approach.
9. In case of 'excessive difficulties' to prove the defectiveness, the causal link, or both, consumers should only be required to provide evidence that it is 'possible' that the product contributed to the damage, and that it is 'possible' that the product is defective or that its defectiveness is a 'possible cause' of the damage, or both, as proposed in amendment 96 of the European Parliament's report.
10. The **regulatory compliance defence** should only apply if an economic operator 'exercised all reasonable due care required in the circumstances', as proposed in amendment 101 of the European Parliament's report.
11. The revised PLD should allow Member States to derogate from the **development risk defence**, as proposed in the Council's general approach.
12. The maximum **limitation period in case of latent personal injuries** should be extended to 30 years, as proposed in amendment 110 of the European Parliament's report.
13. The **transposition period** of the revised PLD should be 12 months after its entry into force, as proposed by the European Commission.

## Contents

<b>1. Objectives of the PLD .....</b>	<b>4</b>
<b>2. Damage .....</b>	<b>4</b>
2.1. Harm to psychological health.....	4
2.2. No threshold for damage to data.....	5
<b>3. Disclosure of evidence .....</b>	<b>5</b>
3.1. No right to request disclosure of evidence for defendants.....	5
3.2. No refusal in case of confidential information.....	6
3.3. Disclosing evidence in an easily understandable and accessible way .....	6
<b>4. Burden of proof .....</b>	<b>7</b>
4.1. Obvious malfunction.....	7
4.2. Excessive difficulties.....	7
<b>5. Exemptions from liability.....</b>	<b>8</b>
5.1. Regulatory compliance defence only in case of due care.....	8
5.2. Derogation from the development risk defence .....	9
<b>6. Limitation period in case of latent personal injuries .....</b>	<b>9</b>
<b>7. Transposition.....</b>	<b>10</b>

## 1. Objectives of the PLD

---

According to the EU Treaties, the EU is obliged to ensure a high level of consumer protection when adopting legislation.<sup>5</sup> The Product Liability Directive (PLD) is of great importance for consumers as it sets out the conditions under which consumers can claim compensation for damage caused by defective products. BEUC therefore supports the European Parliament's report that the revised PLD should explicitly state that one of its objectives is to ensure a high level of consumer protection.<sup>6</sup> Such a statement would have legal implications as this objective would have to be taken into account by courts when interpreting provisions of the PLD.

### **BEUC recommendation:**

The revised PLD should state that one of its objectives is to ensure a high level of consumer protection, as proposed in amendment 48 of the European Parliament's report.

## 2. Damage

---

### 2.1. Harm to psychological health

To ensure comprehensive protection for consumers, the revised PLD should cover all kinds of damage. Regarding personal injuries, this means that all material loss resulting not only from harm to physical health but also from harm to psychological health should be covered. Unfortunately, the wording of the current PLD does not specify whether material loss resulting from harm to psychological health is covered.<sup>7</sup> BEUC therefore welcomes that both the Council's general approach<sup>8</sup> and the European Parliament's report<sup>9</sup> are aligned with the European Commission's proposal<sup>10</sup> that material loss resulting from medically recognised harm to psychological health should be covered by the revised PLD. However, BEUC disagrees with the European Parliament's report, that harm to psychological health should have to be 'certified by a court ordered medical expert' and should be limited to 'serious adverse effects on the victim's psychological integrity'<sup>11</sup> as this would make it even more difficult for consumers to claim compensation. Instead, material loss resulting from any kind of harm to psychological health confirmed by an approved doctor should be covered by the revised PLD.

---

<sup>5</sup> Article 169(1) Treaty on the Functioning of the EU

<sup>6</sup> Amendment 48 European Parliament report

<sup>7</sup> Article 9a) PLD

<sup>8</sup> Article 5a(1)a) Council general approach

<sup>9</sup> Amendment 68 European Parliament report

<sup>10</sup> Article 4(6)a) European Commission proposal

<sup>11</sup> Amendment 18 European Parliament report

### **BEUC recommendation:**

The revised PLD should neither require harm to psychological health to be 'certified by a court ordered medical expert', nor limit the notion of harm to psychological health to 'serious adverse effects on the victim's psychological integrity', contrary to amendment 18 of the European Parliament's report.

## **2.2. No threshold for damage to data**

Defective connected devices may not only cause damage in the physical world but also cause damage to data that is stored on such devices or somewhere in the cloud. Material harm resulting from damage to data should thus be recognised as compensable damage under the revised PLD. BEUC therefore welcomes that both the Council's general approach<sup>12</sup> and the European Parliament's report<sup>13</sup> are in principle aligned with the European Commission's proposal<sup>14</sup> that material losses resulting from harm to data should be covered by the revised PLD. However, to ensure access to comprehensive compensation for material loss caused by damage to data, it should not be restrained by any lower threshold. This would align the revised PLD with case law of the Court of Justice of the EU according to which the right to claim compensation under the GDPR is not limited by a certain threshold.<sup>15</sup> BEUC therefore recommends rejecting amendment 68 of the European Parliament's report that material loss caused by damage to data should only be compensable under the revised PLD if the material loss exceeds EUR 1000.<sup>16</sup>

### **BEUC recommendation:**

The revised PLD should not contain a lower threshold for material loss resulting from damage to data, contrary to amendment 68 of the European Parliament's report.

## **3. Disclosure of evidence**

---

### **3.1. No right to request disclosure of evidence for defendants**

The right to request disclosure of evidence aims at easing the burden of proof. Since consumers bear the burden of proof for all conditions for compensation under the PLD, they should be able to request disclosure of evidence if they rely on this evidence to meet their burden of proof. In contrast, defendants do not have the burden of proof unless they claim that a liability exemption applies in their favour. However, all liability exemptions under the revised PLD will depend on circumstances relating to the sphere of the defendant, e.g., that he or she did not place the product on the market, or to the public sphere, e.g., that it was not possible according to the objective state of scientific knowledge to recognise that the product was defective when it was placed on the market. Conversely, there will be no liability exemptions under the revised PLD referring to circumstances related to the

<sup>12</sup> Article 5a(1)c) Council general approach

<sup>13</sup> Amendment 68 European Parliament report

<sup>14</sup> Article 4(6)c) European Commission proposal

<sup>15</sup> Judgement of the Court of Justice of the EU in case C-300/21 – Österreichische Post

<sup>16</sup> Amendment 68 European Parliament report

sphere of the consumer. Therefore, there is no reason why defendants should have a right to request consumers to disclose information. Such a possibility would only be abused by defendants to obstruct court proceedings. BEUC therefore disagrees with the European Parliament's report that defendants should be able to request consumers to disclose information.<sup>17</sup>

**BEUC recommendation:**

The revised PLD should not allow defendants to request the disclosure of evidence from the claiming consumer, contrary to amendment 86 of the European Parliament's report.

### 3.2. No refusal in case of confidential information

The right to request disclosure of evidence might be essential for consumers to be able to meet their burden of proof. Therefore, any restrictions to this right should be limited to what is strictly necessary and appropriate and should be clearly defined to ensure legal certainty. According to the European Commission's proposal<sup>18</sup> and the Council's general approach,<sup>19</sup> courts may refuse the disclosure of evidence in case of confidential information and trade secrets. However, while trade secrets are defined in the European Commission's proposal<sup>20</sup> and the Council's general approach,<sup>21</sup> confidential information is not defined. Therefore, BEUC supports amendment 87 of the European Parliament's report to delete confidential information as a limit to the right to request disclosure of evidence so that the disclosure of evidence may only be refused in case of trade secrets.

**BEUC recommendation:**

The revised PLD should not allow to refuse the disclosure of evidence if the requested information is merely confidential, but only if the information is a trade secret in the meaning of the Trade Secret Directive (EU) 2016/943, as proposed in amendment 32 of the European Parliament's report.

### 3.3. Disclosing evidence in an easily understandable and accessible way

To uphold information asymmetry<sup>22</sup> between consumers and economic operators, the latter may be tempted to disclose information in a way that is hardly accessible or understandable for consumers. Depending on the type of evidence, for instance in cases related to AI, consumers may have to hire expensive experts to be able to analyse the obtained information. BEUC therefore supports the European Parliament's report that defendants have

<sup>17</sup> Amendment 86 European Parliament report

<sup>18</sup> Article 8(3) European Commission proposal

<sup>19</sup> Article 8(3) Council general approach

<sup>20</sup> Article 8(3) European Commission proposal

<sup>21</sup> Article 8(3) Council general approach

<sup>22</sup> The issue of information asymmetry is explicitly recognised in Recital 30 of the European Commission's proposal.

to disclose evidence not only without undue delay but also in an easily accessible and easily understandable manner.<sup>23</sup>

**BEUC recommendation:**

The revised PLD should state that defendants must disclose evidence 'without undue delay' and in an 'easily accessible and easily understandable manner', as proposed in amendment 89 of the European Parliament's report.

## 4. Burden of proof

---

The burden of proof presents the main obstacle for consumers to get compensation under the current PLD. According to the 2018 report on the evaluation of the PLD, 53% of all product liability claims are rejected because consumers are not able to prove the defect or the causal link.<sup>24</sup> Therefore, the presumptions in the revised PLD regarding the defectiveness of a product and regarding the causal link should be formulated in a way that eases the burden of proof as much as possible.

### 4.1. Obvious malfunction

Whether a product is defective or not should not depend on the assessment of the manufacturer but on the expectations average consumers are entitled to have. Consequently, the European Commission's proposal,<sup>25</sup> the Council's general approach<sup>26</sup>, and the European Parliament's report<sup>27</sup> are aligned that the 'reasonably foreseeable use' of a product, not the 'use intended by the manufacturer', should be taken into account when assessing whether a product is defective or not. To ensure consistency of the revised PLD, the defectiveness of a product should be presumed if the damage was caused by an obvious malfunction of a product which occurred during 'reasonably foreseeable use' and not only during 'normal use as intended by the manufacturer'.

**BEUC recommendation:**

The presumption of defectiveness should apply if the damage was caused by an obvious malfunction of a product during 'reasonably foreseeable use', as proposed in the Council's general approach.

### 4.2. Excessive difficulties

The chances of consumers to successfully claim compensation under the revised PLD will greatly depend on how the horizontal presumption in case of 'excessive difficulties' will be formulated.<sup>28</sup> While 'technical or scientific complexity' may often lead to 'excessive difficulties' to meet the burden of proof, they may not be the only causes for such difficulties.

---

<sup>23</sup> Amendment 89 European Parliament report

<sup>24</sup> SWD(2018) 157, page 27

<sup>25</sup> Article 6(1)b) European Commission proposal

<sup>26</sup> Article 6(1)b) Council general approach

<sup>27</sup> Amendment 73 European Parliament report

<sup>28</sup> Article 9(4) European Commission proposal



BEUC therefore supports the Council's general approach to add the words 'in particular' between 'excessive difficulties' and 'due to technical or scientific complexity'.<sup>29</sup>

Furthermore, to counterbalance the fact that the burden to prove the existence of 'excessive difficulties' would be on the consumer, the standard of proof should be significantly lowered compared to the normal standard of proof. BEUC therefore supports the European Parliament's report that it should be sufficient for the consumer to prove that it is 'possible' that the product contributed to the damage, and that it is 'possible' that the product is defective or that its defectiveness is a 'possible cause' of the damage, or both.<sup>30</sup>

### **BEUC recommendations:**

The presumption in case of 'excessive difficulties' should not be limited to 'technical or scientific complexity' but should simply mention these potential causes 'in particular', as proposed in the Council's general approach.

In case of 'excessive difficulties' to prove the defectiveness, the causal link, or both, consumers should only be required to provide evidence that it is 'possible' that the product contributed to the damage, and that it is 'possible' that the product is defective or that its defectiveness is a 'possible cause' of the damage, or both, as proposed in amendment 96 of the European Parliament's report.

## **5. Exemptions from liability**

---

### **5.1. Regulatory compliance defence only in case of due care**

The assessment whether products have to be considered as defective under the PLD does not depend on whether they comply with legal requirements but on whether they provide the safety average consumers are entitled to expect. Products can therefore be found to be defective under the PLD although they comply with the law. If such compliant products cause harm, consumers should be able to claim compensation under the revised PLD. Compliance with the law should therefore not suffice to exempt economic operators from liability. Instead, economic operators should be obliged not only to ensure compliance with the law but also to exercise all reasonable due care required in the circumstances. BEUC therefore supports the European Parliament's report that the regulatory compliance defence should only apply if an economic operator exercised all reasonable due care required in the circumstances.<sup>31</sup>

---

<sup>29</sup> Article 9(4) Council general approach

<sup>30</sup> Amendment 96 European Parliament report

<sup>31</sup> Amendment 101 European Parliament report

**BEUC recommendation:**

The regulatory compliance defence should only apply if an economic operator 'exercised all reasonable due care required in the circumstances', as proposed in amendment 101 of the European Parliament's report.

## 5.2. Derogation from the development risk defence

The development risk defence allows economic operators to escape liability even though a product was found to be defective and caused harm, if the objective state of scientific and technical knowledge at the time when the product was placed on the market was not such that the defectiveness could be discovered.<sup>32</sup> In practice this means for instance that the manufacturer of a toy that contains dangerous chemicals which harmed a baby would not have to pay compensation for medical treatments if it was scientifically impossible to foresee that the chemical composition of the toy could cause such harm. The development risk defence thus burdens consumers with the risk of gaps in the available scientific and technical knowledge. This should not be the case. Consumers have no means to protect themselves from the risks caused by unsafe products and should therefore not be left without compensation in case of harm. 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 should be placed on economic operators, not on consumers. BEUC therefore supports the Council's general approach that Member States should be able to derogate from the development-risk defence under the revised PLD.<sup>33</sup>

**BEUC recommendation:**

The revised PLD should allow Member States to derogate from the development risk defence, as proposed in the Council's general approach.

## 6. Limitation period in case of latent personal injuries

---

The symptoms of a latent personal injury may emerge only long after consumers have been exposed to unsafe products. For instance, in the 'Howald Moor' case decided by the European Court of Human Rights<sup>34</sup> a man developed fatal cancer 26 years after he was no longer exposed to asbestos. An extension of the limitation period for latent personal injuries from 10 to 15 years as proposed by the European Commission is thus clearly not enough to ensure that consumers who suffered latent personal injuries are protected under the PLD. BEUC therefore supports the European Parliament's report to extend the limitation period in case of latent personal injuries to 30 years.<sup>35</sup>

---

<sup>32</sup> Article 10(1)e) European Commission proposal

<sup>33</sup> Article 15 Council general approach

<sup>34</sup> ECHR, Howald Moor and Others/Switzerland, March 2014, 52067/10 and 41072/11

<sup>35</sup> Amendment 110 European Parliament report

**BEUC recommendation:**

The maximum limitation period in case of latent personal injuries should be extended to 30 years, as proposed in amendment 110 of the European Parliament's report.

## 7. Transposition

---

The currently ongoing substantial revision of the PLD to address its shortcomings in particular regarding consumer issues in the digital age was long overdue. Once the revised PLD is adopted by the co-legislators, consumers should not have to wait years before the new rules start to apply. BEUC therefore supports the European Parliament's report which is aligned with the European Commission's proposal<sup>36</sup> that Member States should transpose the revised PLD within 12 months after its entry into force.

**BEUC recommendation:**

The transposition period for the revised PLD should be 12 months after its entry into force, as proposed by the European Commission.

---

<sup>36</sup> Article 18(1) European Commission proposal

