The Consumer Voice in Europe

REVIEW OF PRODUCT LIABILITY RULES

BEUC Position Paper

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EC register for interest representatives: identification number 9505781573-45

Co-funded by the European Union

Ref: BEUC-X-2017-039 - 25/04/2017

Why it matters to consumers

Defective products may cause harm to the consumer, such as personal injuries or damage to property. In order to protect consumers from such damage, product liability law has been created to mitigate the risks that arise from defective products and compensate injured persons from any damage they suffer. Rules on product liability are to protect not only the individual, but also society so that citizens live in a safe environment. It is therefore essential that injured persons have effective rights at hand to seek compensation and receive help from consumer organisations when they need it.

Summary

There is a need to update EU product liability law so that it extends to digital content products and services. The update should also cover compensation and safety provisions. As a principle, consumers should always be protected if products, digital content, or services cause harm or damage to their property, including in the digital environment. At the same time, other shortcomings of the current Product Liability Directive, such as the problematic threshold for compensation or the burden of proof on the victim should be remedied or adapted.

In order to ensure coherence with related areas of law and to prevent harm or damage from occurring, there should also be an update of general product safety legislation and sector specific safety legislation where necessary.

1. BEUC supports the update of the Product Liability Directive

BEUC welcomes the launch of the Fitness Check of the Product Liability Directive, as the legislation is somewhat outdated and does not cover dangers stemming from new technologies, such as autonomous driving cars and 3-D printing. Liability without fault ('strict liability'), for situations where defective products cause harm to a person or damage to her property, is a very important principle which protects both the interest of consumers and society.

> *"Whereas liability without fault on the part of the producer is the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production."*

The 1985 Directive explained that product liability must be seen in the context of new technologies and risks apportionment. However, the Directive has not been updated for more than 30 years[1], which is why it is high time to carry out a fully assessment and adapt the Directive to recent technological advances.

1.1. Other shortcomings: no fair apportionment of risks

In this respect, other well-known shortcomings of protection for consumers under the current liability rules should dealt with. There are clear gaps in terms of scope and obstacles for consumers to get redress if they suffer damage because of defective products. It is unfortunate that the once envisaged 'fair apportionment of risks' has not been realised and the Directive has in many respect failed to be an effective instrument for consumers.

Our main concerns are outlined below. We call on the Commission to ensure that the exposure of the society to known and unknown risks will finally translate into legislative actions.

2. New Technologies – New Risks

2.1. Urgent need to act quickly

Product liability law is a legislative response to the risks that arise from defective products. The principle of liability without fault for situations where defective products cause harm to a person or damage to his or her property fulfils a compensatory function. It follows the rationale that the one who makes a profit from dangerous activities should be held accountable if this danger materialises. Complementary to product safety law, rules on product liability aim at protecting not only the individual or their property, but also the public and collective interest of a society to live in a safe environment. Public authorities, as well as producers, must minimise potential risks to consumers that are caused by a product which is brought to the market.

As far as rules of tort law are concerned, it is logical that the legislator establishes the principle of strict liability for situations where defective products cause harm to a person or damage to her property. However, since old products are replaced by new technologies, tort law rules governing the safety and liability standards for such products must be replaced or updated, where necessary. This is all the more important if one considers that

[1] Except for the extension of the scope to cover agricultural products in 1990 by adopting the Council Directive 1999/34/EC, 1999 OJ L 141/20.

the 1985 Product Liability Directive is largely based on full harmonisation. It is important that the legislator acts quickly to respond to risks that come along with new technologies, such as automated cars or digital services.

We call on the Commission to analyse whether the Directive effectively tackles the problems created by technological advancements, including mobile internet, automated and autonomous products, cloud technology, advanced robotics, drones, or 3D-printing. Some challenges with the current rules are explained below.

2.2. Outdated concept of liability when it comes to digital technologies

The producer shall be liable for damage caused by a defect in his product (Article 1)

The scope of application of the 1985 Product Liability Directive is proof that EU law is in need of an update. The Directive applies to movable products only, excluding services. It is therefore unclear whether it would apply to digital technologies, such as embedded software, cloud services, or automatic systems:

- The concept of a 'producer' reaches its limits when it comes to (re)production systems, such as 3-D printing.
- A software which is not provided on a physical mobile data carrier cannot be understood, at least not without succumbing to an extensive interpretation, as a product, which is legally defined as covering 'movables' (Article 2).
- Digital services are not covered by the scope of the Directive at all.

There are no obvious reasons why the liability regime, focusing on the need for compensation of loss or the fair allocation of risks, should not apply to intangible goods such as software or digital content. Data should be considered a product whereas making them available, for example on a tangible data carrier or the internet, should be considered as bringing the product into circulation.[2]

There are **many other concepts and terms which are in need of clarification**, among others:

- A product is 'defective' when it does not provide the 'safety which a person is entitled to expect' (Article 6). Yet, this safety concept is imprecise, all the more for digital goods which may be in need of updates; this also against the backdrop that the EU product safety rules are not fit for digital products.
- The same problem occurs with the definition of 'damage' (Art. 9), which currently focuses on the destruction of another item of property, without taking into account the damage to the digital environment and without covering non-material damage.

[2] Machnikowski in Machnikowski (ed.) *European Product Liability* (2016) 701.

- Furthermore, it is unclear how the exceptions for liability apply to digital products. This Directive provides that the producer is exonerated if he proves the existence of certain facts, such as the state of scientific or technical knowledge at the time when the producer put the product into circulation not allowing him to detect the existence of the defect (Article 7(e)). Yet, what is the 'state of scientific and technical knowledge' when it comes to digital products?
- The definition of liable persons under the Directive is inappropriate when it comes to the internet of things. As a principle, the Directive should also apply to any professional in the product supply chain, including creators of digital content or software, when his activities have affected the safety of a product which was then placed on the market. Then, there is a problem about how to identify the liable person when the same product is made by several producers and contributors. There should be joint liability of professionals in the product supply chain. Since the consumer has the onus of burden of proof, the victim will have otherwise no possibility of recourse under the current Directive.

BEUC demands:

- Any professional in the product supply chain should be liable for defects when his activities have affected the safety of a product which was then place on the market;
- Extension of the scope to all types of products, digital content products, and (digital and other) services;
- New definition for damages which should compromise non-material damage and damage to the digital environment of the victim;
- Abolition of the development-risks exceptions for liability;
- Analyse the merits to introduce a mandatory insurance system, particularly for risk sectors.

2.3. Outdated Product safety rules

In the absence of modern safety requirements, the Directive on Product Safety can hardly be used as a point of reference to interpret the Product Liability Directive. Product safety law faces the same difficulties in dealing with modern technologies as product liability law. Therefore, an update of both is needed. Safety standards and safety expectations must be seen as tandem criteria which encourage producers to place only safe products on the market. Therefore, there must be a smooth interplay between the Product Liability Directive and the Product Safety Directive, taking into account both curative and preventive considerations.

2.4. Other digital initiatives

For the update of the Product Liability Directive, the Commission should take into account other initiatives in the digital area. For example, the Proposal for a Digital Content Directive, already includes digital content and services. It is crucial for protecting consumers in the digital environment.[3] There are various other initiatives, such as the 'free

[3] This proposal is loosely based on existing digital content provisions in the UK's Consumer Rights Act 2015.

flow of data', 'internet of things' or 'advanced robotics' which should be taken as a point of reference and impetus for modern product liability rules.

3. General problems of consumer protection under the current rules

3.1. Lack of effectiveness

The current rules on liability for defective products have turned out to be ineffective in reaching their objectives. There are several aspects of the EU's product liability rules which deserve attention. Amendments are needed to adequately protect victims against damage caused by a defective product and discouraging the marketing of dangerous product. Besides the aspects discussed above, the lack of effectiveness relates to the following issues:

3.2. Reconsidering the Concepts of Defect, Burden of Proof & Causality

Under the current system of product liability, it is **too much a burden for the injured party to prove that the product was defective.** This makes the Directive highly impractical and unattractive for affected individuals. The victim of the damage has to prove that

- a damage has occurred;
- the product was defective, and
- there is a causal relationship between the defect and the damage suffered.

In practice, it is **very difficult for the injured party to prove the causal link between the defect and the damage.**[4] While the damage as such can be demonstrated relatively easy, it does not serve as proof that the product was defective. Since the defect derives from the safety a person is entitled to expect, the burden of proof requires a burdensome and costly investigation by the injured person as to whether there was a violation of minimum safety standards. This is due to the technical complexity of some products. Then, there are no proper safety standards that may serve as a reference for the safety expectations of consumers when it comes to digital products. The problem of evidence, will also give rise to conflicting judgments and legal uncertainty for affected individuals.

The burden of proof is particularly delicate in the realm of medicines or medical devices. This was recently recognised by the Court of Justice of the European Union in *Boston Scientific*[5], which concerned the liability for an implantable pacemaker belonging to a defective batch. As the Advocate General considered:

[4] That consumers in many Member States face considerable difficulties in proving that the damage was caused by the product's defect is confirmed by the fourth Commission report COM(2011) 547 final, at 7. See also Italian Supreme Court, No 15851/2015; No 13458/2013, No 6007/2007.
[5] Joined Cases C-503/13 and C-504/13, ECLI:EU:C:2015:148.

> '**making proof of a lack of safety subject to the actual occurrence of damage would disregard the preventive function assigned to EU legislation on the safety of products** […] which manifestly pursues a preventive function by imputing liability to the person who, having created the risk most directly by manufacturing a defective product, is in the best position to minimise it and to prevent damage at the lowest cost.'[6]

In line with this reasoning, the Court of Justice decided that patients using such devices were in a 'particularly vulnerable situation' wherefore 'the safety requirements for those devices which such patients are entitled to expect are particularly high'. Therefore,

> 'where it is found that products belonging to the same group or forming part of the same production series, such as pacemakers and implantable cardioverter defibrillators, have a potential defect, such a product **may be classified as defective without there being any need to establish that that product has such a defect'**.

This judgment follows the logic that in situations where one pacemaker is defective but not necessarily another one from the same product series, it would be unacceptable to let the individual bear the potential risk of defect. This calls, not only for a **reconsideration of the burden of proof, but also for the concept of damage** as such. A broader interpretation of what makes a 'defect' could encourage producers to also improve the *ex-ante* supervision of their quality management system[7]. Here, again, the relationship between product liability law and product safety law becomes apparent: particularly where product safety and market forces fail to prevent a damage to consumers, product liability law is called upon to unfold preventive effects.[8]

> Recognising that **compensation** may be awarded in respect of damage caused by action intended to avert a risk of much more serious damage **is likely to prompt producers to improve the safety of their products** and to create a better balance between the need for compensation for injured persons and the objective of preventing damage.[9]

These considerations and other problems in practice call for a new understanding of product liability rules. What is needed is an extended concept of 'defect' for all types of products, covering potential defects. Product liability law must be considered a complementary safety instrument and it should follow the idea of protective law of putting the onus on the person that has access to the relevant information and the technical means to investigate the cause of the damage. At the very least, the existence of damage should always be considered as prima facie proof.

[6] Opinion of Advocate General Bot delivered on 21 October 2014 to joint Cases C-503/13 and C-504/13, ECLI:EU:C:2014:2306, para 38.
[7] Van Leeuwen & Verbruggen, *Resucitating EU Product Liability Law*? ERPL 5-2015, 899 (912).
[8] Cf. Reich, *Product Liability and Beyond: An Exercise in 'Gap-Filling'*, ERPL 3&3-2016, 619 (626-627).
[9] Opinion of AG Bot to joint Cases C-503/13 and C-504/13, para 74.

BEUC demands:

- It should be sufficient for the injured party to prove the existing of damage resulting from a product. It should be up to the producer to provide proof that the product was safe where a damage occurred;
- It should be formulated as a general rule that if products belong to the same group of the same product series, the potential defect should be sufficient to trigger the consequences for liability under the Directive.
- Where the victim needs to provide for evidence, the producer should have the obligation to make all useful documentation and information available.

3.3. Threshold of 500 Euro, Article 9

According to the current Directive, the producer does not have to compensate the victim for damage to property which is lower than 500 Euro. Given the low costs of many goods, for example electrical products such as refrigerators, washing machines, or tumble dryers, the 500 euro cap prevents many consumers from receiving compensation for the damage caused by defective products.[10] Instead of avoiding litigation in an 'excessive number of cases' (Recital 9), this has contributed to the problem that many consumers do not receive compensation at all.

An unfair distribution of risks is also created by the maximum ceiling of EUR 70 million for product liability in the case of damage to persons caused by identical items with the same defect (Article 16). BEUC considers that this limitation should be removed as well in order to respect the fundamental right of redress for damage suffered: damage should always be fully compensated.

BEUC demands:

- The threshold of 500 euro should be removed;
- The maximum cap of EUR 70 million should be removed.

[10] This problem was confirmed by the fourth Commission report on the application of the Directive, COM (2011) 547 final.

3.4. Time Limits, Article 10

The time limit of 10 years for liability for defective products is inappropriate not only for products which typically last longer but also for certain types of products, such as foodstuff or pharmaceuticals where the damage might not manifest itself until long after the product was put into circulation and used by consumers.[11] The same problem may occur when it comes to new technologies where the safety standard is unclear and latent defects may only become apparent after a long period of time.[12] Time limits should also be considered under the aspect of access to justice. In the ECtHR judgment *Moor v Switzerland* where the claims of victims of asbestos exposure were at stake, the Court held that the application of the limitation period in that case had deprived the victim's access to a court.[13]

BEUC demands:

- The 10 years' time limit should be removed or at least be extended for longer-lasting products or products where the damage will typically occur very late.

3.5. Exceptions & Justification, (Article 7)

The fact that the producer is not liable if the level of scientific and technical knowledge does not permit a diagnosis of the defect means that the consumer is unfairly burdened with the risk of scientific advances. The development risks-defence is therefore unjustified, even more so considering that the law deals with safety risks for individuals and society. A person who suffers damage because of a dangerous activity should always be compensated, whether the defect was detectable or not.

Producers benefit from a dangerous activity and may insure themselves against damage risks. Besides, the interpretation of Art 7(e) has given rise to different interpretations between various courts.[14]

BEUC demands:

- The development-risk exception should be abolished

[11] This problem was pointed out in Report from the Commission on the Application of Directive 85/374 on Liability for Defective Products, COM(2000) 893 final, at 21 (referring to a case where a pharmaceutical was taken by pregnant women and which caused physical damage to their children which appeared, however, at the age of sexual maturity).
[12] In a legislative resolution of 5 November 1998 [1998] OJ C-359, 28, the European Parliament suggested a 20 years' time period for hidden defects.
[13] 11 March 2014, *Howald Moor and Others v Switzerland*, 52067/10 and 41072/11.
[14] Fondazione Rosselli Report, 'Analysis of the Economic Impact of the Development Risk Clause as provided by Directive 85/374/EEC on Liability for Defective Product' (2004) (the conclusions by the Report that the clause achieves a fair balance between innovation and consumer's interests is not shared by BEUC).

3.6. Transparency

There are no rules on transparency laid down in the Directive. This makes it difficult to identify defective products which are still on the market. It also makes it more difficult for consumers to take action. Information on defective products and court cases should be made publicly available. The data should be put onto a central EU data base[15] and the data should be presented in a way which makes them easy to handle and allows quick and effective advice to consumers.

3.7. Access to Justice

Where safety risks are concerned, it is of utmost importance that consumer organisations have tools at hand which allow quick remedial action against the producer. However, both, the Product Safety Directive and the Product Liability Directive are excluded from the scope of the Injunctions Directive. Since the Injunction Directive is currently under review, the Commission should use the opportunity and update its annex to bridge this gap of consumer protection.

Many victims will not go to court individually as it is often expensive, complicated, time-consuming and intimidating for many, and even more so in cross-border cases. Collective redress mechanisms would help enabling consumers to obtain compensation for the harm suffered as a result of unlawful practices by traders.

BEUC demands:

- The Injunction Directive should be updated so that consumer organisations are enabled to bring actions against producers based of safety and product liability law;
- In case of mass damage, consumers should be able to act collectively against producers;
- There should be a central EU data base that contains information on defective products and court cases.

END

[15] Databases already exist in other sectors, for example in case of the European's driving licenses (EUCARIS/RESPER).

This publication is part of an activity which has received funding under an operating grant from the European Union's Consumer Programme (2014-2020).