

The Consumer Voice in Europe

ADAPTING CIVIL LIABILITY RULES TO THE NEW DIGITAL TECHNOLOGIES

Accompanying paper to BEUC's response to the European Commission's public consultation on *Civil liability – adapting liability rules to the digital age and artificial intelligence*



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Why it matters to consumers

The characteristics of new digital technologies, such as artificial intelligence and the Internet of Things, represent a considerable challenge for existing civil liability rules. Confronted to the complexity, opacity and autonomy of digital goods, consumers are often left empty-handed when things go wrong. It is of the utmost importance that the civil liability rules are upgraded to ensure that consumers can trust digital goods and new technologies.

Summary

BEUC welcomes the public consultation on *Civil liability – adapting liability rules to the digital age and artificial intelligence* launched by the European Commission and the possibility to express its views on such an important topic. In 2020, 51% of individuals in the EU declared using smart speakers, home audio system or smart TV. In parallel, the number of vocal assistants is expected to significantly increase in the coming years.¹ Because of their wide dissemination, flaws in digital and AI-powered goods can have large-scale implications for consumers and society at large. It is essential to upgrade the liability rules in order to establish a clear and enforceable legal framework that ensures effective access to justice for all consumers. To achieve this objective, the European Commission needs to fully address all the obstacles that consumers may face to get compensation in case of harm. BEUC welcomes the initiative for a revision of the Product Liability Directive.

BEUC believes that many of the problems relating to digital and AI could be addressed through an ambitious revision of the PLD. The decision to develop an additional liability regime for AI should be carefully considered in light of the issues which may arise from a potential overlap between the regimes. Should the European Commission ultimately decide to propose, on the one hand, a revision of the PLD and, on the other hand, an instrument making targeted amendments to adapt national liability rules to the challenges posed by AI, it will remain essential that the two measures are closely interlinked and streamlined so that they can promote a high level of protection for consumers.

We take the view that several important issues are still insufficiently addressed in the European Commission's public consultation. This short paper complements BEUC's response to the public consultation and draws the European Commission's attention to the following points:

With regard to the revision of the Product Liability Directive:

- Online marketplaces must fully become part of the supply chain and be subsidiarily liable under the PLD.
- The burden of proof should be shifted.
- The PLD should be adapted to the dynamic nature of digital products.
- The notion of "defect" should be revised.
- All harm should be compensated.

¹ https://ec.europa.eu/eurostat/databrowser/view/isoc_iiot_use/default/table?lang=en

With regards to civil liability rules for AI:

- A risk-based approach will not provide the necessary protection to consumers.
- Consumers must not be considered as “operators” of AI systems.
- The burden of proof should be alleviated.
- All harm should be compensated.

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BEUC welcomes the public consultation on *Civil liability – adapting liability rules to the digital age and artificial intelligence*² launched by the European Commission. As the European Commission clearly stressed in its AI White Paper in February 2020, ‘the characteristics of emerging digital technologies like AI, the IoT and robotics may challenge aspects of the liability frameworks and could reduce their effectiveness’.³ It is therefore of the utmost importance that consumers enjoy the same level of protection in the off-line and online environments when things go wrong. In particular, the Product Liability Directive (PLD)⁴, which was adopted 36 years ago, is no longer adapted to the challenges brought by digital products and the new structure of supply chains.

The European Commission is considering two different albeit closely interlinked legislative interventions. The first one intends to make targeted changes into the PLD in order to ensure that it is adapted to the challenges brought by the digital and circular economy. The second one intends to propose targeted amendments into national liability rules with the view to adapt tort law to the challenges brought by artificial intelligence. The later also intends to complement the “AI Act” proposed by the European Commission and currently under discussion.⁵

BEUC believes that many of the problems relating to digital and AI could be addressed through an ambitious revision of the PLD. The decision to develop an additional liability regime for AI should be carefully considered in light of the issues which may arise from a potential overlap between the regimes. Should the European Commission ultimately decide to propose, on the one hand, a revision of the PLD and, on the other hand, an instrument making targeted amendments to adapt national liability rules to the challenges posed by AI, it will remain essential that the two measures are closely interlinked and streamlined so that they can promote a high level of protection for consumers.

To achieve this objective, the European Commission’s initiative needs to fully address all the obstacles that consumers may face to get compensation. Unfortunately, several of these issues are currently not or insufficiently addressed in the European Commission’s public consultation. This short paper, which builds on BEUC’s position paper on the Product Liability Directive of May 2020⁶ and BEUC’s feedback on the Inception Impact Assessment of August 2021,⁷ intends to draw the European Commission’s attention to several important points.

² https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12979-Civil-liability-adapting-liability-rules-to-the-digital-age-and-artificial-intelligence/public-consultation_en

³ COM(2020) 65 final, 19 February 2020 (p.15).

⁴ Council Directive 85/374/EEC, 25 July 1985.

⁵ COM(2021) 206 final, 21 April 2021.

⁶ BEUC, Product Liability 2.0 – How to make EU rules fit for consumers in the digital age, May 2020 (www.beuc.eu/publications/product-liability-20-how-make-eu-rules-fit-consumers-digital-age/html).

⁷ BEUC, Inception impact assessment on civil liability – Adapting liability rules to the digital age and artificial intelligence, August 2021 (www.beuc.eu/publications/inception-impact-assessment-civil-liability-%E2%80%93-adapting-liability-rules-digital-age-and).

1. Revision of the Product Liability Directive

1.1. Online marketplaces must fully become part of the supply chain and be subsidiarily liable under the PLD

We strongly regret that the public consultation does not give more attention to the role of online marketplaces and their responsibilities for the sale and the distribution of defective products. Worst, the workshop organised by the European Commission in December 2021 to present the preliminary findings of the external evaluation report seemed to suggest that the European Commission does not currently intend to fully embrace the issue of defective products distributed by online marketplaces. Should it be the case, this clearly would be a missed opportunity as clarifying the responsibilities and liabilities of online marketplaces is an important issue which policy makers must solve during the revision of the PLD.

- First, the European Commission (DG GROW) tends, in our perspective, to erroneously rely on the “authorized representatives” foreseen under the Market Surveillance Regulation⁸ to ensure compensation for damage caused by defective products coming from non-EU products. Yet experience shows that online marketplaces are today the main gateway to the European market for non-EU defective products. Hence, relying on the authorized representatives will not solve the problem of access to compensation for consumers when things go wrong. This is because the mandate of the authorized representative can be ended from the side of the manufacturer at any time and there is not even a period for which such a representative must be available after the product has been sold. It is therefore likely that there will be no longer an authorized representative available to answer questions to the authorities about product compliance if a problem arises several years after the product has been put on the market. This also means they cannot be the entity to which the consumers take recourse for compensation in case of damage. Furthermore, there is no legal obligation for sellers to advance money on the bank account of the authorised representative from which such compensation for damage could be paid.
- Second, online marketplaces have a very important responsibility when it comes to selling and distributing defective products. Our member organisations have found a wealth of evidence showing that defective products are circulating on online marketplaces.⁹ Hence online marketplaces must minimize the risk of harm and only strong liability rules can perform that role.
- Third, it is wrong to believe that the proposal for a General Product Safety Regulation (GPSR)¹⁰ and the proposal for a Digital Services Act (DSA)¹¹ alone can solve this issue. Both the GPSR and the DSA intend to add new obligations for online marketplaces. However, they do not solve the issue of liability of online marketplaces in case of harms caused to consumers or their property by products purchased through these platforms.

⁸ EU Regulation 2019/1020 of 20 June 2019 on market surveillance and compliance of products.

⁹ BEUC, Unsafe and illegal activities online - Research and evidence from BEUC member organisations (last updates: 12 December 2021), www.beuc.eu/publications/unsafe_and_illegal_activities_online.pdf

¹⁰ COM (2021) 346 final, 30 June 2021.

¹¹ COM/2020/825 final, 15 Decembre 2020.

There is thus a gap that the PLD should bridge and only a consistent reform of all relevant pieces of legislation can ensure that consumers will be kept safe, and markets are fair.

- Fourth, the European Commission should consider the developments happening in other parts of the world which tend to recognize online marketplaces as important actors in the field of product liability.¹²
- Fifth, addressing the issue of liability for online marketplaces does not require to create new legal categories within the PLD. The existing categories, such as the one of “suppliers”, could be adapted and applied to online marketplaces. We therefore strongly encourage the European Commission to consider holding online marketplaces as “suppliers” under the PLD and to adapt the conditions under which suppliers can be held liable. Under the existing rules, “suppliers” bear a subsidiary liability, meaning that they can be held liable if the producer is unknown.¹³ We think that online marketplaces must be subject to similar subsidiary liability but that the conditions should be reviewed. In particular, online marketplaces should be held liable as ‘suppliers’ under the PLD if one of the following conditions is fulfilled:
 - The producer/the importer cannot be identified;
 - If the online marketplace fails to inform the injured person of the identity of the producer/the importer;
 - The marketplace has predominant influence or control in the transaction chain, or if
 - the producer/importer is based outside the EU and does not take any action to remedy the harm.

This must be done in line with changes of definitions in the GPSR to make sure they will be economic operators. For the moment, online marketplaces are not even legally required to only put safe products on the market. This general safety clause is only applying to manufacturers, importers and distributors, and this is still the case in the new draft GPSR unfortunately.¹⁴

1.2. The burden of proof must be shifted

A reversal of the burden of proof should be introduced, especially for complex products. Experience with the PLD shows that the burden of proof has been a major obstacle for getting compensation. In its 2018 report, the European Commission already noted that the impossibility to prove a defect and the link with the damage accounted for 53% of the cases of rejection.¹⁵

¹² On this topic, see *inter alia* C. Busch, ‘Rethinking Product Liability Rules for Online Marketplaces: a Comparative Perspective’, February 2021 (accessible at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3784466).

¹³ Art. 3(3) of the PLD.

¹⁴ BEUC/ANEC, Keeping consumers safe from dangerous products - How to make the General Product Safety Regulation a useful tool to ensure product safety, 15 November 2021 (www.beuc.eu/publications/beuc-x-2021-107-general-product-safety-regulation-a-useful-tool-to-ensure-product-safety.pdf).

¹⁵ SW(2018) 157 final, 7 May 2018.

The Expert Group set up by the European Commission on liability and new technologies also highlighted that the digital context has exacerbated evidentiary difficulties and widened the information asymmetries between claimants and defendants.¹⁶

Merely alleviating the burden of proof will not solve this problem. Although consumers may in certain cases benefit from presumptions (as cleared by the CJEU case law¹⁷), they still may have difficulties to substantiate their claims. Moreover, requesting professionals to disclose the technical information will not help as consumers may not have the expertise and the sufficient skills to interpret the data and traders may be willing to avoid complying with this obligation by pretexting trade secrets. In turn this will significantly contribute to extend the costs and the length of the proceedings. Shifting the burden of proof is therefore clearly justified on the ground of both fairness and access to justice.

1.3. The PLD should be adapted to the dynamic nature of digital products

More and more digital products are dynamic in the sense that they evolve during their lifespan. In parallel, professionals also collect on an ongoing basis data from consumers about the use of their products. Professionals know how their tools are used and may detect problems quickly when they arise. In other words, producers keep a much higher degree of control over their products even after they have been placed on the market. Liability rules must follow and be adapted to this evolution. The risk-development defence or the late defect defence are clearly incompatible with the dynamic nature of digital goods.

1.4. The notion of “defect” should be revised

The public consultation only partially addresses the need to revise the notion of “defect” under the PLD. Under the current rules, a product is deemed defective when it does not provide the safety which a person is entitled to expect.¹⁸

The current notion of defect strictly focuses on the safety expectations of users, which refers to physical risks. It leaves aside other notions that, without being strictly safety-related, remain pivotal in the context of product liability for IoT, robotics and artificial intelligence. For example, it is unclear whether cybersecurity flaws or a loss of connectivity can be regarded as a defect when they do not cause direct physical risks. It should be clear that the product can be deemed defective when the producers does not provide the sufficient cybersecurity updates and when the products take unintended decisions which ultimately cause harm to consumers.

¹⁶ Expert Group on Liability and New Technologies – New Technologies Formation, “Liability for Artificial Intelligence”, November 2019.

¹⁷ in *Boston Scientific* (Joined cases C-503/13 and 504/13, *Boston Scientific*, 5 March 2015 - ECLI:EU:C:2015:148), the Court ruled that products of the same batch or production series with a potential defect may be considered as defective without the need to establish the defect of the actual product. in *Sanofi Pasteur* (case C-621/15, *N.W and Others v Sanofi Pasteur*, 21 June 2017 - ECLI:EU:C:2017:484), the Court cleared national evidentiary rules allowing factual evidence to constitute serious, specific and consistent evidence of a defect and to constitute the causal link with the damage, even in the absence of conclusive scientific evidence.

¹⁸ Art. 6(1) of the PLD.

1.5. All harm should be compensated

Currently, the PLD only covers physical injuries and damage to property arising out in non-professional activities with a lower threshold of €500. This is problematic for several reasons. First, the PLD excludes immaterial damage although IoT products may cause a much wider range of harm than traditional products, including data destruction or losses. Second, the 500€ threshold is arbitrary and in practice has been impairing access to justice for consumers in too many cases. As the European Commission already noted in its 2018 report, “in four out five cases, a compensation is not claimed as the damage is below the threshold”.¹⁹ It is essential that all consumers have access to compensation regardless of the value and the type of their harm.

2. Civil liability rules for AI

2.1. A risk-based approach will not provide the necessary protection to consumers

In the AI Act,²⁰ the European Commission builds on a risk-based approach and proposes differentiated requirements for AI systems depending on their risk profile, choosing then to focus almost exclusively on ‘high risk’ systems. Although a risk-based approach may be suited in the context of the AI Act, it is not in the specific context of liability rules. This is because, from a consumer point of view, liability rules mostly intervene ex post, meaning once the damage has materialised. It is therefore essential that consumers enjoy the same degree of protection regardless of the level of risks which ultimately has materialised. The criteria to classify products as low or high risk are also arbitrary. Even AI systems categorised as “low risk” may cause very significant damage to consumers. Therefore, we recommend that possible rules on civil liability for AI are not based on differentiating between categories of products according to their risk-profiles. The rules should be neutral as to the material scope (products covered) and broad enough so they can be applied following a case-by-case assessment.

2.2. Consumers must not be considered as “operators” of AI systems

One of the options of the European Commission (and also proposed before by the European Parliament in its initiative of October 2020)²¹ would be to create new liability rules for “operators”. This notion however is not clearly defined in the public consultation and there is a lot of uncertainty around it. It is in particular unclear whether consumers themselves could ultimately be considered as “operators” of AI systems given that they benefit from the operation of the AI system. Considering consumers as “operators” could however be dangerous, decrease the level of protection they are entitled to and place an unjustifiable burden upon them. As Professor Wendehorst rightly pointed out: “it would be very difficult to make frontend operators strictly liable as these parties would have to constantly monitor the development of legislation and adapt their insurance coverage accordingly. Private parties can hardly be expected to do so or can only be expected to do so on very rare occasions when an entirely new technology enters the market. Thus, if the decision were made to hold the frontend operator liable, this should normally not affect consumers, but

¹⁹ SW(2018) 157 final, 7 May 2018.

²⁰ COM(2021) 206 final, 21 April 2021.

²¹ European Parliament resolution on a civil liability regime for artificial intelligence (2020/2014(INL)), 20 October 2020.

only professional frontend operators”.²² It should therefore be clear that consumers do not fall under the category “operators of AI system” and that the latter only applies to professionals. For comparison purposes, the AI Act has made it clear that “users” only covers business users and individuals using AI systems in the course of a personal non-professional activity.²³

2.3. The burden of proof should be alleviated

The burden of proof will be the central issue upon which will depend injured parties’ access to compensation. Considering the characteristics of AI systems, and in particular their opacity, complexity and autonomy, consumers will not be able to substantiate their claims in practice. While the disclosure of technical information by professionals can to some extent contribute to alleviate the burden of proof, it cannot alone solve this problem as consumers may not have the sufficient skills to use and interpret the data. For this reason, additional measures are necessary including a reversal of the burden of proof to ensure a levelled playing field. In all liability cases involving automated decision-making or machine-learning, the burden of proving should lie with the professional.

2.4. All harm should be compensated

AI systems may cause a wide range of harm, including immaterial damage. It is essential that all type of harm be compensated. If not, this instrument will remain a limited relevance as a large part of consumer harm will not be compensated. While Member States follow different traditions in this field of law, we consider that harmonisation of the damages victims could be entitled to ask for is necessary to ensure a high-level of consumer protection across the Union. In this regard, material and immaterial damages (such as data loss) should be part of the upcoming rules.

2.5. Mandatory insurance can be a positive step to facilitate compensation

It is positive that the European Commission is considering mandatory insurance as this can contribute to facilitate claimants’ compensation. However, this would require drawing a list of products/systems to which this requirement would apply. Mandatory insurance should come in addition of the harmonised rules.

²² C. Wendehorst, Strict liability for AI and other emerging technologies, *Journal of European Tort Law*, December 2020.

²³ COM(2021) 206 final, Art.3 (4).



Read more about BEUC positions:

➤ ***On the PLD and civil liability for AI***

BEUC, [Product liability 2.0 - How to make EU rules fit for consumers in the digital age](#)

BEUC, [Inception impact assessment on civil liability – Adapting liability rules to the digital age and artificial intelligence](#), August 2021.

➤ ***On the GPSR***

BEUC/ANEC, [Keeping consumers safe from dangerous products - How to make the General Product Safety Regulation a useful tool to ensure product safety, 15 November 2021](#)

BEUC, [Unsafe and illegal activities online - Research and evidence from BEUC member organisations](#) (last updates: 12 December 2021),

➤ ***On the DSA***

BEUC, [The Digital Services Act proposal](#), April 2021

➤ ***On the AI Act***

BEUC, [Regulating AI to protect the consumer](#), October 2021



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