Proposal for a new EU Product Liability Directive

What's likely to come?

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As we approach the fortieth anniversary of Directive 85/374/EEC of 25 July 1985, to harmonize the laws, regulations, and administrative provisions among Member States regarding liability for defective products (hereinafter referred to as "**the 1985 Directive**"), several pressing questions have emerged. While the 1985 Directive was groundbreaking at the time of its enactment, it is increasingly viewed as lacking modern relevance.

In response to this concern, the European Commission initiated an assessment of the Directive in 2018, aiming to preserve its foundational elements while reimagining its framework for contemporary needs. This evaluation process included various consultations and impact assessments, ultimately leading to the European Commission's proposal (2022/0302) for a new Directive on liability for defective products, presented on 28 September 2022.

This proposal has generated significant discussion and is currently under review by the European Parliament and Council. On 12 March 2024, the European Parliament adopted an amended version of this proposal at its first reading, and now the text awaits the Council's position (hereinafter "**the New PLD**").

This article aims to outline the key changes anticipated by manufacturers and other economic operators as defined in the New PLD.

Firstly, the New PLD places the system of liability for defective products in line with the other major European texts on product safety[1]. Its aim is to ensure harmonisation and consistency of concepts at European level, and to guarantee the complementarity of the different regimes. In particular, it is interesting to note that the New PLD has been drawn up in parallel with the Regulation on digital services (Regulation 2022/2065 of 19 October 2022, which came into force gradually and in full from 17 February 2024), which regulates online platforms in particular, and also the Regulation on artificial intelligence (Regulation 2024/1689 of 13 June 2024), which governs the use of artificial intelligence in the European Union (hereinafter "**EU**").

It is therefore clear from the New PLD that it provides an additional and complementary level of safety for European consumers. Whereas other European texts govern the safety of products before they are placed on the market, the system of liability for defective products comes into play downstream when a product, although placed on the market and therefore in principle safe, is defective and causes damage.

Secondly, the New PLD aims to achieve total harmonisation of the applicable national regimes, unlike the 1985 Directive, which left some room for manoeuvre to the Member States. The Commission felt it necessary to reform the system of liability for defective products after noting that the national systems did not offer the same guarantees of consumer protection.

Finally, the New PLD states that it has three main objectives:

- Resolve the legal uncertainty over how to apply "*decades-old*" definitions and concepts to digital economy and circular economy products (**1**);
- Rebalance the burden of proof between the parties to ensure that consumers have easier access to complex information (**2**);
- Guarantee that there is always a company established in the EU that can be held responsible for defective products purchased directly from manufacturers located outside the EU (**3**).

In order to gain a better understanding of these three objectives and to understand in more detail the changes that the New PLD will make to the existing legal regime, we will address them in turn.

1 See in particular Regulation (EU) 2023/988 of 10 May 2023 on general product safety; or Decision No. 768/2008/EC on the new legislative framework for safety.

1. The scope of the New PLD and the transition to the modern era

The issues and needs of 1985 are obviously not those of 2024, but the New PLD marks an awareness on the part of the European authorities of the need to modernize the current legal regime.

On the one hand, this requires a new definition of the concept of "product" (**1.1**), but also an extension of the scope of compensable damage (**1.2**).

This is confirmed by an update of the criteria for assessing whether a product is defective (**1.3**).

1.1. The notion of 'product' in the digital age

The first change introduced by the New PLD concerns the scope of the word "***product***".

As a reminder, Article 2 of the 1985 Directive states that: "'*product' means all movables, with the exception of primary agricultural products and game, even though incorporated into another movable or into an immovable. 'Primary agricultural products' means the products of the soil, of stock-farming and of fisheries, excluding products which have undergone initial processing. 'Product' includes electricity.*".

This definition left some uncertainty as to the application of the Directive to products resulting from digital production, such as software or digital files[2] . The clarification should provide greater legal certainty.

The New PLD, as amended by the Parliament, now defines a "product" as " *all movables, even if integrated into, or inter-connected with, another movable or an immovable; it includes electricity, digital manufacturing files, raw materials and software*" (Article 4.1)[3] .

The concept of "*product*" would therefore cover all tangible movable property as well as a wide range of intangible movable property.

Intangible products therefore include **software**, which is not defined in the New PLD. However, Recital 13 refers, by way of example, to "*Software, such as operating systems, firmware, computer programs, applications or AI systems*". It should also be noted that software would qualify as a "*product*" irrespective of how it is supplied or used, and therefore irrespective of whether it is installed/embedded in or on another product, accessible in a dematerialised form, or supplied as a service.

However, the New PLD does not apply to "*free and open-source software, whereby the source code is openly shared and users can freely access, use, modify and redistribute the software or modified versions thereof*" (Recital 14)[4]. The aim of this exclusion is not to hinder innovation or research by allowing the development of software that is open to all and that can be freely copied, distributed, modified or improved, without the risk of strict liability.

The New PLD should also exclude "***information***" that could be transmitted in electronic form.

Thus, not all digital files should be qualified as "*products*". Digital files that transmit information, such as media files, e-books or software source code, should not qualify as "*products*" within the meaning of the New PLD. Only "*digital manufacturing files*" should fall within the scope of the New PLD.

These files are defined as: " *a digital version of, or digital template for, a movable which contains the functional information necessary to produce a tangible item by enabling the automated control of machinery or tools*" (Article 4.2). For example, Recital 16 refers to digital files that contain the functional information necessary for the automated control of drills, milling machines or 3D printers. Thus, a defective digital manufacturing file used to create a good that causes damage should engage the liability of the file's manufacturer under the New PLD.

Finally, the New PLD should also extend its scope to so-called "*related service*", which are digital services integrated into or interconnected with a product in such a way that their absence would prevent the product

2 It should be noted that software was already identified as a product within the meaning of the 1985 Directive (reply to written question no. 706/88 from the European Commission, 15 November 1988, 89/C1114/76).

3 It should be noted that the articles quoted are those taken from the proposal for a Directive amended by Parliament, issued on 12 March 2024.

4 This is the result of an amendment by Parliament.

from performing one or more of its functions (Article 4.3). These services are not products as such, but they engage the liability of the manufacturer of the product to which they have been integrated or with which they are interconnected whenever their defect has caused damage to the product, and they were under the control of the manufacturer of the product[5] . Recital 17 provides some examples of "*related services*": the continuous supply of traffic data within a navigation system; health monitoring which relies on sensors in a physical product to track a user's physical activity or health measurements; temperature control in an intelligent appliance (e.g., a refrigerator); voice assistance which enables one or more products to be controlled remotely. However, "*related services*" do not include Internet access services.

Apart from the new digital products, it should be noted that the proposal for a Directive as amended by Parliament also intends to classify "***raw materials***" as products in their own right. In addition to electricity, gas, water and any other material that could be used in the composition of another product would themselves be described as "*products*" (recital 16).

1.2. The concept of 'damage' in the age of the immaterial

For the same reasons that justified the updating of the concept of "product", the proposed Directive envisages a broadening of the damages that can be repaired.

Whereas Article 9 of the 1985 Directive limited the damages that could be compensated to personal injury and damage to property, Article 6 of the New PLD would now provide, in addition to these damages, for the possibility of claiming compensation for medically-recognised psychological damage and the destruction or corruption of data (intangible property).

Although all of these types of damage were already compensable in some Member States, such as France, the clarification is once again welcome and provides a degree of predictability.

However, there is a major difference here between the proposal for a Directive as submitted by the European Commission in 2022 and that adopted at first reading by the European Parliament on March 12, 2024. Whereas the Commission's proposal defines the concept of "damage" as "material loss", excluding as a matter of principle immaterial loss (e.g., suffering, pain and suffering, non-material damage, etc.), the proposal as amended by the Parliament rejects this reference to "material loss" and refers back to national law in order to determine the reparability of immaterial loss resulting from damage covered by the Directive (Article 6.2).

While non-material loss is currently compensable in France under the heading of product liability, under specific circumstances, it would be possible, if the Commission's proposal were to be adopted without Parliament's amendments, for non-material losses to be excluded from compensation from now on. Member States would still be likely to maintain their practices, but it cannot be ruled out that some might take advantage of this to reduce the scope of compensation and leave compensation for immaterial losses to other areas of liability (e.g., extra-contractual liability for fault or negligence).

In addition, the New PLD abolishes the €500 excess previously applicable to obtain compensation. Any damage, even under €500, should therefore be able to be compensated.

Finally, the proposed Directive maintains the exclusion of compensation for damage caused to property used exclusively for professional purposes. Properties used for mixed purposes should be covered by the Directive (recital 25). However, while Article 6 appears to apply this rule to the destruction and corruption of data, Recital 22 specifies that "*in order to address a potential risk of litigation in an excessive number of cases, the destruction or corruption of data that are used for professional purposes, even if not exclusively so, should not be compensated under this Directive*". Thus, mixed-use data should not be covered by the Directive unlike other goods, but this would contradict Article 6. In the absence of clarification, Article 6 should take precedence.

5 See the definition of "control" (Article 4.5).

1.3. The concept of "defect" in the era of new product safety requirements

One of the major contributions of the PLD relates to the way in which the defectiveness of a product is to be assessed.

Firstly, the proposal confirms the objective assessment that must be made and reiterates the applicable standard: a product is defective "*if it does not provide the safety that a person is entitled to expect or that is required under Union or national law*" (Article 7.1).

However, the Parliament has added to this standard by specifying that a product is also considered defective when it does not offer the safety "*required under Union or national law*". In this way, the Parliament seems to want to bring the proposal for a Directive firmly into line with the other texts applicable to product safety, by suggesting that any failure to comply with the safety obligations laid down in a European or national text would lead to a presumption that the product is defective. This is confirmed by Article 10 of the proposed Directive on the burden of proof.

Secondly, unlike Article 6 of the 1985 Directive, which identified only a few criteria for assessing whether a product is defective, Article 7.2 of the proposed Directive is intended to be more exhaustive, while recalling that "*all circumstances must be taken into account*". Once again, this is a useful contribution to greater legal certainty and predictability.

This document does not list all the criteria that may be taken into account. Only certain criteria will therefore be detailed below.

There is nothing new about the first criterion, which concerns "***the presentation and the characteristics of the product***". However, Recital 31 specifies that "*warnings or other information provided with a product cannot be considered sufficient to make an otherwise defective product safe, since defectiveness should be determined by reference to the safety that the public at large is entitled to expect. Therefore, liability under this Directive cannot be circumvented simply by listing all conceivable side effects of a product*". This comment thus seems to limit the protective scope of product presentation, which could only be used to the detriment of the manufacturer.

However, the presentation of a product plays an important role in assessing the safety that a person may legitimately expect. The scope of recital 31 therefore remains to be confirmed and monitored, bearing in mind that it is the result of an amendment by Parliament and could be dropped from the final Directive.

Moreover, recital 46 states that the **reasonably foreseeable use of a product**, which is the second criterion for assessing whether a product is defective, "*overs the use for which a product is intended in accordance with the information provided by the manufacturer or economic operator placing it on the market, the ordinary use as determined by the design and construction of the product, and use which can be reasonably foreseen where such use could result from lawful and readily predictable human behaviour*". Thus, the information provided by the manufacturer about the product appears to remain essential in assessing whether it is defective, in particular by making it possible to assess whether the use of the product was reasonably foreseeable.

With regard to the second criterion in particular, it seems useful once again to look at the recitals added or amended by Parliament. Recital 31 states that "reasonably foreseeable use *also encompasses misuse that is not unreasonable under the circumstances, such as the foreseeable behaviour of a user of machinery resulting from a lack of concentration or the foreseeable behaviour of certain user groups such as children*". Recital 46 adds that it is the "*use which can be reasonably foreseen where such use could result from lawful and readily predictable human behaviour*".

The third and fourth criteria, which refer respectively to "***the effect on the product of its ability to continue to learn or acquire new features***" and "***the reasonably foreseeable effect on the product other products that can be expected to be used together with the product, including by means of inter-connection***", are particularly innovative and form part of the drive to modernize the system of liability for defective products.

Recital 32 provides some further details. The purpose of these criteria is to ensure that a manufacturer who designs a product capable of developing unexpected behaviour, either through its autonomous learning capabilities or through its interactions with other related products or services, remains liable for that behaviour. Thus, the manufacturer of a self-learning product must be able to maintain the safety of the product throughout

its learning or evolution; and the manufacturer of an interconnected product must be able to maintain the safety of its product in the foreseeable interactions that it carries out with other products.

Finally, the New PLD reaffirms the principle that "*a product shall not be considered to be defective for the sole reason that a better product, including updates or upgrades to a product, has already been or is subsequently placed on the market or put into service*". It was worth pointing this out.

The new PLD provides clarifications and some more details on what should be understood from broad concepts. These clarifications mainly reflect existing case law, but they are welcomed, even if most give us a hint as to how even more difficult it will be for a manufacturer not to have a defect recognized and how much it will have to anticipate its users' behaviour.

2. The burden of proof or the hunt for product complexity

The second objective of the New PLD is, according to the EU authorities, to rebalance the burden of proof between consumers and manufacturers, in particular by taking account the increasing complexity of certain products. Although, like the New PLD as a whole, this objective is part of the desire to update the system of liability for defective products, it is the objective which will make manufacturers' life a nightmare.

It is worth remembering that the 1985 Directive provided that the burden of proof of a defect, damage and causal link lied on the plaintiff. However, in practice, in jurisdictions like France for instance, this burden of proof was many times reversed. The European case law also ruled on some occasions that the burden of proof of a lack of defect should be borne by the manufacturer.

The New PLD implements the increasing trend to have the manufacturer bear all the burden of proof. In order to do so, the New PLD introduces an obligation for manufacturers or other economic operators concerned to disclose information (**2.1**); an obligation to present the information disclosed in an easily accessible and comprehensible manner (**2.2**); and finally, several presumptions generally linked to the level of complexity of the product and the information disclosed (**2.3**).

2.1. New European-style duty of disclosure

One must remember that the EU is mostly composed of Civil law jurisdictions with no discovery mechanism.

The New PLD is based on the following observation: "*Injured persons, are, however, often at a significant disadvantage compared to manufacturers in terms of access to, and understanding of, information on how a product was produced and how it operates. That asymmetry of information can undermine the fair apportionment of risk, in particular in cases involving technical or scientific complexity. It is therefore necessary to facilitate claimants' access to evidence to be used in legal proceedings*" (recital 42).

In order to "improve" the access of plaintiffs to justice, the New PLD establishes a new obligation on manufacturers (or any other defendant in proceedings before national courts) to "*disclose relevant evidence*" in their possession.

This obligation meets several criteria (Article 9):

i.) Disclosure of the evidence must be sought before the national courts in proceedings for compensation for damage caused by a defective product;

ii.) The plaintiff must present sufficient facts and evidence to support the plausibility of the claim for compensation or the claim to contest compensation;

iii.) Disclosure must be limited by the national court to what is necessary and proportionate.

First of all, as the disclosure obligation serves the private interests of the parties, it should not be possible for national courts to order disclosure of their own motion and should necessarily be the subject of a special request. It is interesting to note that the claim may be brought by the person who considers himself to have been injured, but also by the manufacturer (or any other defendant). The possibility for the defendant to benefit from the disclosure obligation is an addition by the European Parliament (Article 9.2), surely to rebalance the

European Commission's proposal, which opened up the benefit of this new right only to consumers. It remains to be seen whether this rebalancing will be maintained in future amendments to the New PLD and if in practice it is ever needed.

It is interesting to note the difference in wording between the Commission's proposal and that amended by the Parliament. Whereas the Commission had opted for the following wording: "*Member States shall ensure that national courts are empowered* [...] *to order the defendant to disclose relevant evidence that is at its disposal*". However, Parliament amended this wording to read: "*Member States shall ensure that* [...] *the defendant is required to disclose relevant evidence that is at the defendant's disposal* ". Parliament has therefore removed any reference to national courts, which raises questions about the scope of such an amendment. Should the request for disclosure be addressed directly to the defendant, without going through the national court? The change in wording is somewhat perplexing, but it would seem that the aim is not to divert such a request from the courts[6] , but rather to reinforce the idea that disclosure of evidence is an obligation for the defendant and that a national court cannot therefore refuse to grant such a request on grounds other than those set out in the New PLD.

The new disclosure obligation therefore creates a true European-style "*discovery*" procedure, in which the parties to the proceedings can each request that information held by the other party be disclosed to them in order to facilitate the proof of the arguments they are putting forward.

However, such a request can only be made on condition that it is sufficiently proven that there is a need for additional evidence for the purposes of supporting its claims for liability or rejection of liability. The New PLD does not provide any details on this point, which suggests that this will have to be assessed by the Member States and national courts.

In jurisdictions where processes similar to this exist, it is likely that their conditions will be adopted in product liability cases. For example, in France, given that the new PLD does not affect national rules on pre-trial disclosure of evidence (Article 9.7), it would be desirable for the legislator or case law to adopt (in part) the conditions for application of Article 145 of the Code of Civil Procedure applicable prior to any trial. In particular, the notion of "*legitimate reason*" would be useful in characterising a party's sufficient need to access additional evidence, and therefore as a basis for the disclosure obligation. Thus, a request for disclosure of evidence should be granted where it is necessary to establish or preserve facts or elements that are relevant and useful to the resolution of the dispute, provided that it is not obvious that the party's requests would be doomed to failure (e.g. because of prescription or extinction of the right of action).

However, the standard of proof has yet to be determined and this could be a source of divergence between the various Member States, particularly in terms of their varying degrees of interest in the practice of discovery.

It should also be noted that, unlike the measures that can be taken on the basis of Article 145 of the French Code of Civil Procedure, it should only be possible to take measures aimed at disclosing evidence. It should therefore not be possible to make a request for an expert opinion under this proposed Directive, which in France accounts for around 90% of requests for investigative measures. On the other hand, it remains to be determined whether such an obligation of disclosure could be used by a party in the context of an expert opinion ordered by the judge, when we know that the expert already has the power, with the help of the court, to order the production of elements and information necessary to carry out his mission.

Finally, the obligation to disclose is limited to what is necessary and proportionate (Article 9.3). Recital 42 of the New PLD states that this limit has been set to "*avoid non-specific searches for information that is not relevant to the proceedings, and to protect* confidential information, *such as information falling within the scope of legal professional privilege* and trade secrets *in accordance with Union and national law*". Thus, it is interesting to note that the protection of business secrets has been clearly enshrined, particularly in Article 9.4, where the New PLD provides that: "*national courts consider the legitimate interests of all parties concerned, including third parties, in particular in relation to the protection of confidential information and trade secrets*". This protection should be exercised in particular within the scope of Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against unlawful obtaining, use and disclosure (Article

6 See in particular Article 6.4, which deals specifically with the case where a court is called upon to rule on an application for disclosure of evidence.

4.17), but also within the limits set by national law. In all cases, national courts should be empowered to order all measures necessary to preserve the secrecy and confidentiality of evidence disclosed by the parties (Article 9.5).

The duty to disclose is therefore completely innovative in the area of product liability, even though other national procedures may already make it possible to achieve (at least in part) this result (e.g., in France, the expert assessment procedure, the procedure under Article 145 of the Code of Civil Procedure). The question therefore arises as to the place that this new procedure could take alongside existing procedures, and even whether it would be useful.

In addition, this new obligation is likely to significantly increase the time taken to process cases at first instance, as the parties may oppose each other's requests for disclosure and contest them.

2.2. The accessible and comprehensible nature of the information disclosed or the obligation to make it accessible to the general public

In addition, the Parliament has empowered national courts (so there is no obligation) to require that evidence disclosed "***to be presented in an easily accessible and easily understandable manner***" (Article 9.6). This may be done at the reasoned request of a party, or *ex officio* where the court considers it "appropriate".

This potential new obligation creates a high degree of uncertainty and we can anticipate many debates at Court level. It does not specify what is meant by "easily accessible and easily understandable", and above all what standard should be used to assess this. Does the information disclosed have to be "easily accessible and easily understandable" to an average consumer? His lawyer? The judge? An expert the consumer would have hired?

This new obligation would be created to combat overly complex evidence, but it raises real questions about its scope. What level of simplification should be required? What about when simplification is simply impossible? Some information is inherently complex and cannot be simplified without the risk of being distorted. What about simplification which creates gaps in information?

Moreover, the complexity of a given situation generally justifies the appointment of an expert to assist the court. In France, this is the case in around 90% of cases. So isn't it the role of the expert to resolve the complexity and settle or explain a factual situation?

Unfortunately, there is as yet no answer to these questions, and this obligation should lead to extensive litigation if it is maintained until the New PLD is adopted.

In addition, like the duty to disclose, it should lead to a significant increase in the length of proceedings at first instance. One can also already assume that the plaintiffs will rather fight at proving that the information is complex, no easily accessible and not easily understandable in order to benefit from presumptions in their favor (see below), rather than working on understanding the data shared. If Courts are excessively favorable to plaintiffs, it will come a time when it will be better for manufacturers not to share anything anymore as disclosing information may not help them win their case, so why expose information that plaintiffs would otherwise not have access to?

2.3. Presumptions or reversing the burden of proof as a sanction

Finally, it is worth pointing out that the New PLD does not provide for any direct penalty for breach of the disclosure obligation. Recital 43 specifies that this penalty is to be determined by the Member States.

However, the New PLD provides for a far worse "indirect sanction" for breach of the disclosure obligation, including the obligation to present the information disclosed in an "accessible and comprehensible" manner. This sanction is that of a reversal of the burden or rebuttable presumption in favor of the plaintiff. The defect and causal link will be presumed.

Firstly, it should be noted that this sanction only benefits the plaintiff for compensation and not the defendant who, under Article 9.2, would also benefit from the right to request disclosure of certain information held by the plaintiff.

Secondly, the presumption applies in two ways. On the one hand, it applies to product defects where the

defendant fails in its duty of disclosure (Article 10.2.a).

On the other hand, it applies to the defectiveness of the product or to the causal link, or to both, even if the defendant has fully complied with his obligation to disclose, when (Article 10.4):

- The plaintiff faces excessive difficulties, in particular due to technical or scientific complexity, in proving the defectiveness of the product or the causal link between this defectiveness and the damage, or both; and
- The plaintiff demonstrates that it is probable that the product is defective or that there is a causal link between the defect and the damage, or both.

The two conditions are cumulative.

The first presumption is explained by the desire to encourage compliance with the obligation to disclose information (recital 46). Such a sanction for non-compliance with an obligation is not uncommon, and national courts frequently reverse the burden of proof in complex cases.

However, the second presumption is more worrying. While a manufacturer or any other defendant would have complied with all its disclosure obligations, the plaintiff could nevertheless obtain a reversal of the burden of proof of the defect, or of the causal link with the damage, or of both, where the evidence would be too complex. This means that despite its good faith, the defendant could still be sanctioned.

Worse still, the New PLD does not require proof of undue hardship on the part of the plaintiff, but only a set of arguments demonstrating the existence of such hardship. Thus, not only could the defendant be sanctioned even though it has complied with all the court's requirements, but, what is more, this could be done on the basis of mere allegations on the part of the plaintiff.

This is a major red flag.

The New PLD justifies this position as follows: " *given that manufacturers have expert knowledge and are better informed than the injured person, and in order to maintain a fair apportionment of risk while avoiding a reversal of the burden of proof, that claimant should be required to demonstrate, where the claimant's difficulties relate to proving defectiveness, only that it is likely that the product was defective, or, where the claimant's difficulties relate to proving the causal link, only that the defectiveness of the product is a likely cause of the damage*" (recital 48).

In addition, the proposal for a Directive specifies that the application of this presumption is a matter of casuistry and that it is up to the national courts to take account of all the circumstances of the case. These circumstances include, for example: the complexity of the product, the complexity of the technology used, the complexity of the information and data to be analysed by the plaintiff, or the complexity of a causal link (recital 48).

It is therefore difficult to predict the impact that these presumptions might have in practice, and in particular whether the second presumption mentioned might not simply render useless the efforts that a manufacturer might make to disclose information to the other party, especially that one knows that if you provide data in a jurisdiction, it is hard to fight against the discovery of such data in the United States or any other jurisdiction with a discovery process.

The question will therefore have to be asked, when the time comes, whether it is not more appropriate for the defendant not to respond to requests for disclosure and to deal with the reversal of the burden of proof in other ways.

Finally, it is worth mentioning the other presumptions in favor of the plaintiff:

- Product defectiveness is presumed when the plaintiff demonstrates that the product does not comply with the mandatory product safety requirements of EU and national law (Article 10.2.b). This is another example of the link between the liability regime for defective products and the other regimes applicable to product safety.
- Defects are still presumed when the plaintiff demonstrates that the damage was caused by a manifest malfunction of the product during reasonably foreseeable use or in normal circumstances (Article 10.2.c). We refer here to the analysis above (**1.3**).

- The causal link between the defectiveness of the product and the damage is presumed when it has been established that the product is defective and that the damage caused is of a nature generally peculiar to the defect in question (Article 10.3). This presumption seems to be based on the concept of serial defects, i.e., cases where the same product from the same batch is affected by a defect. Plaintiffs should therefore benefit from cases similar to their own in order to obtain a reversal of the burden of proof.

With all these new provisions, the new PLD is truly innovative. Although certain forms similar to the mechanisms created by this new PLD can already be found in national laws and practices, the fact remains that it aims to unify all existing regimes around the standards it lays down. It is however a pity that this harmonization is only one-sided against manufacturers.

The question that therefore arises is what impact this harmonization will have on local practices, and in particular whether these new mechanisms could be integrated into the existing framework of the product liability regime under French law, for example.

3. The scope of those liable or the strict liability of the distribution chain

The final objective of the New PLD is to ensure that there is always an entity established in the EU that can be held liable in the event of defective products.

While the principle of responsibility for the distribution chain already exists in the 1985 Directive (Article 3), this principle is very broadly extended and clarified by the New PLD, which pushes the principle of strict liability to its extreme (Article 8).

The principle remains that the manufacturer (and no longer "*producer*") is in principle liable for the defect in his product (**3.1**). However, where the manufacturer is established outside the EU, the New PLD identifies several other economic operators who could be liable in his place (**3.2**). Where none of these economic operators can be identified or is established in the EU, liability could shift to distributors and/or online platform providers (**3.3**).

Finally, it will be useful to recall the cases of exoneration from liability available to persons identified as liable (**3.4**); as well as to specify the rules for extinction of the action for damages (**3.5**).

3.1. Product liability updated

The principle whereby the manufacturer of a defective product is liable for damage caused by that product is maintained by the New PLD, while replacing the concept of "*producer*" with that of "*manufacturer*" (Article 8).

The manufacturer is defined as (Article 4.10): "*any natural or legal person who:*

a) develops, manufactures or produces a product;

b) has a product designed or manufactured, or who, by putting their name, trademark or other distinguishing features on that product, presents themselves as its manufacturer; or

c) develops, manufactures or produces a product for that person's own use".

This definition is not particularly innovative.

It should also be noted that the manufacturer of a defective component, when this component has been incorporated into a product or interconnected with it under the control of the manufacturer of this component, who has caused the defect in the product is liable, without prejudice to the liability of the manufacturer of the product in which this component was incorporated or with which it was interconnected.

A component is defined as "*any item, whether tangible or intangible, or raw material or any related service, that is integrated into, or inter-connected with, a product*". (Article 4.4).

Thus, where the defect in a product is caused by the defect in one of its components, the respective manufacturers of the product and of the component should be able to be held liable for the damage, unless the manufacturer of the component proves that the defect in the product into which the component has been incorporated or with which it has been interconnected is due to the design of that product or to the instructions given to it by

the manufacturer of that product (Article 11.1.e).

Lastly, any person "who substantially alters a product beyond the control of the manufacturer and then makes it available on the market or puts it into service" is also to be considered a manufacturer (Article 8.2). This addition to the proposed Directive is welcome, as it puts an end to the uncertainty that may have existed regarding products from the circular economy or reconditioned products, for example.

Parliament has defined the concept of "*substantial modification*" as (Article 4.18): "*a modification of a product after it has been placed on the market or put into service:*

a) that is considered substantial under relevant Union or national rules on product safety; or

b) where relevant Union or national rules on product safety lay down no threshold on what is to be considered a substantial modification, that:

   i) *changes the product's original performance, purpose or type, without that change being foreseen in the manufacturer's initial risk assessment; and*

   ii) *changes the nature of the hazard, creates a new hazard or increases the level of risk*".

Thus, any substantial modification to a product already in circulation is considered to be a new placing on the market or putting into service, and the substantially modified product is therefore considered to be a new product. The person who carried out the substantial modification must therefore logically be qualified as the manufacturer, and any defect in the new product exonerates the manufacturer of the unmodified product from liability, unless the person who carried out the substantial modification proves "*that the defectiveness that caused the damage is related to a part of the product not affected by the modification*" (Article 11.1.g).

On the other hand, when a substantial modification is made to a product under the control of the original manufacturer, i.e., when he makes the modification himself or allows or authorises the modification to be made by a third party[7], that manufacturer remains liable for damage caused by the defectiveness of the modified product (Article 11.2).

However, where the substantial modification is not directly covered by the rules applicable to the products, this concept is likely to give rise to major disputes over interpretation in order to determine the applicable standard.

3.2. Subsidiary liability of other economic operators: an initial extension

In addition to the manufacturer, other economic operators may be liable for damage caused by a defective product. This liability is necessarily subsidiary, since it can only be sought in the case of a manufacturer established outside the EU (Article 8.1.c).

The manufacturer is never exonerated from its liability in the presence of other subsidiary responsible parties. He shall be jointly and severally liable with the other economic operators responsible (Article 12.1).

Nevertheless, it is up to the plaintiff to determine against which persons he intends to take action. The proposed Directive, based on the 1985 Directive, merely allows the plaintiff to take action against an economic operator established in the EU, but does not impose any choice as to the defendant, where several of these operators may be liable.

Where the manufacturer is not established in the EU, the following are liable in a subsidiary capacity:

- The importer of the defective product or component, defined as any natural or legal person who places a product from a third country on the EU market (Article 4.12);
- The manufacturer's authorised representative, defined as any natural or legal person established in the EU who has received a written mandate from the manufacturer to act on his behalf in order to carry out specific tasks (Article 4.11)[8].

7 See the definition of "control" (Article 4.5).

8 It should be noted that the requirement to be established in the EU only applies to the agent, contrary to the Commission's proposal for a Directive.

However, if there is no agent, and if there is no importer established in the EU, then liability should also be borne by the order fulfilment service provider, which is defined as: "*any natural or legal person offering, in the course of commercial activity, at least two of the following services: warehousing, packaging, addressing and dispatching of a product, without having ownership of that product, excluding postal services as defined in Article 2, point (1), of Directive 97/67/EC of the European Parliament and of the Council, parcel delivery services as defined in Article 2, point (2), of Regulation (EU) 2018/644 of the European Parliament and of the Council, and any other postal services or freight transport service*" (Article 4.13).

It remains to be seen to whom this definition refers, given that it excludes services consisting of the collection, sorting, forwarding and distribution of parcels[9].

Although the scope of persons liable is already broad under Article 3 of the 1985 Directive, the proposed Directive clarifies the levels of liability and brings legal certainty up to date. Thus, the proposed Directive puts an end to the grouping of all responsible persons behind the qualification of "*producer*", and clearly distinguishes the roles of each economic operator and the conditions under which their liability may be incurred.

From now on, there will be only one precisely defined manufacturer, and the other economic operators responsible will have their own specific identification criteria and conditions for incurring liability.

3.3. The liability of distributors and online platforms: liability at all costs?

Once again based on the 1985 Directive, the New PLD creates a new level of liability.

Where none of the economic operators referred to above can be identified or is established in the EU, liability extends to the distributor of the defective product.

A distributor is defined as "*any natural or legal person in the supply chain that makes a product available on the market, other than the manufacturer or importer of that product*" (Article 4.14).

Nevertheless, the distributor's liability, in addition to being subsidiary to that of other economic operators, is subject to specific conditions, since it is necessary that (Article 8.3):

a) "*the injured person requests that distributor to identify an economic operator from among those referred to in paragraph 1 and established in the Union, or its own distributor that supplied it with that product; and*

b) *that distributor fails to identify an economic operator or its own distributor, as referred to in point (a), within one month of receiving the request referred to in point (a).*"

These conditions are almost similar to those already applicable under the 1985 Directive (Article 3.3), but it is worth noting that the "*reasonable period*" imposed on the distributor to respond to the applicant has been changed to "a period of one month from receipt of the request".

However, where the New PLD breaks new ground is when it extends the conditions of distributor liability to online platform providers (Article 8.4). The concept of online platform is defined by reference to Article 3(i) of Regulation (EU) 2022/2065 : "*a hosting service that, at the request of a recipient of the service, stores and disseminates information to the public, unless that activity is a minor and purely ancillary feature of another service or a minor functionality of the principal service and, for objective and technical reasons, cannot be used without that other service, and the integration of the feature or functionality into the other service is not a means to circumvent the applicability of this Regulation*".

The New PLD notes that online sales have grown steadily and have given rise to new business models and new players on the market, which must therefore be taken into account in order to ensure that any damage caused by a defective product to a European consumer can be fully remedied (recital 38). These new players include online platforms.

9 See Directive 97/67/EC, Article 2(1), and Regulation (EU) 2018/644, Article 2(2).

However, this exemption should not apply in two cases provided for in the New PLD:

i) when the supplier of an online platform acts as an economic operator within the meaning of the proposed Directive, i.e. as one of the persons identified above (e.g. a manufacturer, importer, agent, distributor, etc.). In this case it will be liable under the conditions applicable to its capacity; or

ii) under the conditions set out in Article 6.3 of Regulation (EU) 2022/2065, i.e. in cases where the online platform presents the product or otherwise enables the specific transaction in question in such a way that an average consumer may be led to believe that the product is supplied either directly by the online platform or by a trader acting under its authority or control. In this case, the supplier of the online platform will be liable under the conditions applicable to a distributor, subject to its failure to designate the relevant economic operator established in the EU within one month.

This extension of product liability to online platforms could represent an abuse of the no-fault liability principle. Indeed, depending on how Regulation (EU) 2022/2065, which has only been applicable in its entirety since February 17, 2024, is interpreted and applied, particularly with regard to the exemption from liability of online platforms described as "*hosts*", it is possible that the status of host will be interpreted restrictively and that platforms could therefore incur liability for various breaches of the safety of the products they sell.

This should therefore create an additional burden on online platform providers, who nevertheless remain intermediaries, and who should therefore be able to exclude their liability by designating the economic operator responsible for the product. This should require platforms to be able to guarantee the proper traceability of the products they put on sale.

3.4. Renewed exemptions from liability

The previous sections have already dealt with certain grounds for exoneration from liability defined in Article 11 of the New PLD.

In addition, there are a number of other grounds on which a defendant may rely to avoid liability.

Firstly, in the case of a manufacturer or importer, liability is waived if it can be proved that the product was not placed on the market or put into service (Article 11.1.a). In the case of a distributor, it must be proved that he did not make the product available on the market (Article 11.1.b).

Making available on the market is defined as "*any supply of a product for distribution, consumption or use on the Union market in the course of a commercial activity, whether in return for payment or free of charge*" (Article 4.7). Placing on the market means making available for the first time (Article 4.8). Putting into service is defined as "*the first use of a product in the Union in the course of a commercial activity, whether in return for payment or free of charge, in circumstances in which that product has not been placed on the market prior to its first use*" (Article 4.9).

Secondly, the defendant may be exempted from liability if he proves that "*it is probable that the defectiveness that caused the damage did not exist at the time the product was placed on the market, put into service or, in the case of a distributor, made available on the market, or that that defectiveness came into being after that moment*" (Article 11.1.c). Thus, as has been the case since 1985, it is clear that the defendant can only be held liable for defects that existed before the product was put into circulation.

However, in order to take account of new practices, and in particular to adapt to the requirements of new technologies and the circular economy, this exemption is not applicable where the defect is due either to an associated service of the product, software and in particular its update or upgrade, a failure to update or upgrade software necessary to maintain the safety of the product, or to a substantial modification of the product; and provided that these elements were under the control of the manufacturer.

With these exceptions, the New PLD intends to maintain the defendant's liability as long as the manufacturer has maintained control over the product, and the product defect is due to the exercise of this control. In the case of software, for example, the manufacturer frequently updates the software after the product has been placed on the market or put into service. If the defect in the product arises from the manufacturer updating it, the defendant cannot be exonerated on the grounds that the defect appeared after the product was put on the market or put into service.

Nor should the defendant be liable where the defect in the product is due to the product's compliance with legal requirements.

Finally, the development risk is once again enshrined in the New PLD, as it was in 1985. Thus, the defendant is not liable for a defective product if "*the objective state of scientific and technical knowledge at the time the product was placed on the market or put into service or during the period in which the product was within the manufacturer's control was not such that the defectiveness could be discovered*" (Article 11.1).

It is interesting to note that the Commission's proposal meant at deleting this exemption. Indeed, pursuant to Article 15 of the 1985 Directive, Member States may provide that defendants will not be able to avoid liability by proving that the defectiveness of the product is due to a development risk. This possibility was removed by the Commission, but was reinstated by the Parliament in Article 18, with specific conditions resulting in particular from the fact that such a derogation would have to be justified by a public interest, would have to be limited to certain specific products, and would have to be proportionate to the objectives pursued (Article 18.3).

In addition, it is also interesting to note that the New PLD expressly recognises the right of manufacturers of software intended to be a component of a product to contractually agree with the manufacturer of the product that the latter waives its right to take action against the manufacturer of the component software, even if it is this software that is defective and has caused the product to be defective (Article 12.2.b). The manufacturer of the component software can therefore validly exclude his liability towards the manufacturer of the product in which the software is integrated.

On the other hand, it remains impossible to exclude or limit its liability to the consumer (Article 15).

This exclusion of liability is also extended to all manufacturers of component software who, at the time of placing the product on the market or putting it into service, can be qualified as a micro or small enterprise within the meaning of European law (Article 12.2.a).

Parliament's addition is justified by the fact that "*A high degree of innovation is particularly necessary in the software sector*" (Recital 54), and that this exclusion should therefore make it possible to support the companies concerned in their capacity for innovation and development.

This remains to be demonstrated, particularly in view of the fact that a contractual exclusion is negotiated and that the product manufacturer could regularly be in a position to set aside such a stipulation.

3.5. Extending the limitation and extinction periods for actions for damages

This section concludes with a discussion of the limitation periods and the time limits for bringing an action for damages caused by a defective product.

Firstly, it should be noted that the New PLD should not change the applicable limitation period, which therefore remains 3 years from the date on which the plaintiff knew or ought reasonably to have known of the damage, the defect and the identity of the economic operator concerned who may be held liable for the damage (Article 16).

The main limitation period is also unaffected and remains 10 years from the time the product is placed on the market or put into service (Article 17.1).

On the other hand, the New PLD creates a new, longer time limit for bringing an action in cases where an injured party is unable to bring an action within the 10-year time limit because of the latency period of the bodily injury (Article 17.2).

To simplify, the New PLD intends to take into account the case of non-consolidated or progressive personal injuries, which cannot form the basis of an action for compensation until they have consolidated. Thus, to take account of the potential evolution of personal injury, the time limit for extinction has been raised to 15 years by the Commission, and then increased to 25 years by the Parliament. It is legitimate to ask what would justify such an extension of the limitation period, as this would create a degree of uncertainty for economic operators.

In addition, the New PLD specifies that in the event of substantial modification of the product, the time limit for extinction of the action starts to run again from the time the product is made available on the market or put into

service; the modified product effectively becomes a new product (Article 17.1.b). Updates or upgrades that do not constitute substantial modifications should not affect the time limit for terminating the action (Recital 58).

Although the New PLD does not overturn the principles applicable to liability for defective products, it nevertheless pushes the cursor of strict liability to a higher level than the 1985 Directive, in particular by including online platform providers in the scope of those potentially liable. On the other hand, the effort made to clarify the levels of liability and the conditions under which it may be sought must be appreciated.

As the 1985 European Directive on liability for defective products approaches its fortieth anniversary, it is undergoing significant revisions. The New PLD aims to implement changes that, unfortunately, may not align with the interests of manufacturers. How so? By creating obstacles for courts to dismiss future product liability cases.

One notable example is that the complexity of a product or case appears to benefit plaintiffs, making it easier for them to secure compensation. Scientific uncertainty is increasingly viewed as an advantage for those seeking damages. Furthermore, the New PLD may pave the way for new data disclosure processes, which could require manufacturers to share information without reaping the benefits—especially when product liability cases are becoming increasingly global.

Given these changes, it is reasonable to question the potential impact of the New PLD, if adopted in its current form, on the marketing and development of new products within the EU market. The expansion of the Directive's scope, combined with the heightened risk of liability for professionals, could deter many—including foreign companies—from entering the European market with their products.

This concern is particularly pronounced for products based on, or incorporating, emerging technologies such as AI, which continually evolve and improve with use. Subjecting these innovative products to current liability standards imposes a considerable burden on manufacturers, even in cases where there is no evidence of a defect.

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