

The new Product Liability Directive: fireworks or fizzle?

IN BRIEF

► The European Commission's proposed updates to the Product Liability Directive include a focus on bringing liability rules up to date for the digital era, and easing the burden of proof in complex cases.

► However, it is unclear what impact the proposed reforms will have in practice—particularly in the UK post-Brexit.

Don't get your hopes up?
Sarah Moore & Stuart Warmington
consider the European Commission's
proposals for a claimant-friendly
overhaul of the PLD

At the end of September, the European Commission published its proposal for an updated Product Liability Directive (PLD) (bit.ly/3faZgIV). In principle, the commission's proposals promise a claimant-friendly overhaul of the existing PLD. In practice however, particularly for product liability litigators practising in the UK, there are good reasons to suspect that the proposed amendments may result in more of a fizzle than a firework.

The proposals

The original PLD was first adopted by member states almost 40 years ago, in 1985. Since that date much has changed, and will continue to change, with what the commission terms, 'green and digital transitions' now underway. These transitions demand significant statutory reform that will ensure that the PLD remains relevant to a world in which 'smart' products and AI-enabled products will increasingly dominate, while also ensuring that those who have suffered harm, as a result of increasingly complex defective products, are properly enabled to assert their legal rights.

In publishing its proposals, the commission has explained that the proposed reforms are intended to:

- (1) ensure liability rules reflect the nature and risks of products in the digital age and circular economy;
- (2) ensure that there is 'always a business based in the EU that can be held liable for defective products brought directly from manufacturers outside the EU'; and
- (3) ease the burden of proof in complex cases and ease restrictions on making claims 'while ensuring a fair balance between the legitimate interests of manufacturers, injured persons and consumers in general'. This 'burden of proof' problem was widely recognised by respondents to the commission's 2018 consultation, with 77% of

respondents noting that technically complex products, whether they be pharmaceutical or consumer goods, created difficulties in respect of the injured person's burden of proof.

The commission intends to achieve these objectives through a significant overhaul of the existing PLD.

Perhaps the most significant changes proposed pertain to the 'burden of proof' problem, which the commission seeks to address by creating a rebuttable presumption of defectiveness, where a series of conditions are met, ie essentially reversing the existing 'burden of proof'. These conditions are listed in Article 9 of the proposal and include:

- Article 9(2)(a): where the defendant has failed to comply with an obligation to disclose relevant evidence at its disposal;
- Article 9(2)(b): where the product does not comply with mandatory safety requirements laid down in Union law or national law; or
- Article 9(2) (c): where the claimant can establish that the damage was caused by an 'obvious malfunction' of the product during normal use.

Additionally, the proposed Article 9(3) provides a potential shortcut to proving a causal link between the defectiveness of the product and the damage caused by imposing a rebuttable presumption of a causal link in circumstances where the damage caused is 'of a kind typically consistent with the defect in question'.

Other, potentially significant, proposed amendments include an increase in the statutory limitation period imposed under the PLD in personal injury cases, under Article 14(3), from ten years to 15 years in circumstances where the latency of certain types of injury (eg a cancer) has rendered it not possible for an injured person to initiate proceedings within the usual ten-year period.

Perspective needed?

While these proposed amendments are potentially revolutionary in theory—particularly in their recognition that in cases involving technical or scientific complexity, statutory interventions are necessary in order to redress the asymmetry in risk apportionment between the claimant and defendant—there are good reasons to doubt their impact in practice, particularly in the UK.

- First, post-Brexit, any confirmed amendments to the PLD will have no direct impact on the UK's statute book. While the Consumer Protection Act 1987 (CPA 1987) was derived directly from the original PLD, there will be no legal requirement for CPA 1987 to be amended despite member states embracing a newly updated PLD. The Law Commission is currently consulting on CPA 1987, and it is hoped that the issues diagnosed by the European Commission and the remedies now set out in the commission's proposals, even if imperfect, will prompt the UK's statute-makers to look at a parallel process of amendment in the UK.
- Second, while the European Commission's proposals reflect an acknowledgment that those injured by defective products across the EU have a disproportionately difficult task in demonstrating causation and defect, questions will be asked about what impact the proposed reforms will have in practice. The only way to truly test this out will be by litigating cases under the reformed PLD—this will doubtless require an appetite for risk and access to litigation funding in member states that may still prove elusive in jurisdictions where access to 'opt-out' collective redress mechanisms does not extend to product liability, despite the enforcement of the Representative Actions Directive.

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