



Proposed EU directive on liability for defective products

By Prashant Popat KC and George Mallet

Earlier this month the European Commission published its proposal for a new Product Liability Directive (available [here](#)). The Proposal seeks to update the existing Directive, which, since 1985, has provided a strict liability (subject to a development risks defence) regime that permits those who suffer harm from defective products to claim damages.¹ The revisions have ostensibly been proposed to update the legislative framework in line with 37 years' worth of technological developments. However, the EC has also sought to introduce a number of important changes that, if implemented, will generally make it easier for consumers to bring claims against the manufacturers and sellers of defective products. The amendments are proposed alongside associated proposals regarding both representative actions (see Henderson Chambers' [Alert](#)) and non-contractual liability for artificial intelligence (see [here](#)).

CONTEXT: THE EXISTING REGIME

- I. The existing Directive - established in domestic legislation by virtue of the Consumer Protection Act 1987 ("CPA") - created a strict liability (i.e. no fault) regime to enable claimants to sue for losses occasioned by defective products. Liability will be established if harm was caused by a defect in the product, subject to the producer being able to demonstrate that the defect was the result of complying with a

¹ Directive 85/374/EEC

requirement of UK law or that the state of scientific knowledge at the time when the product was put into circulation was not such that the producer could be expected to discover the defect.

2. By way of example, the CPA would allow a consumer who suffered personal injuries from a domestic fire caused by faulty electric heater to claim damages without having to pinpoint the root cause of the fire.² Further, the CPA created a user-friendly route to recovery by imposing liability not only on the manufacturer of the product but also on the importer on a joint and several basis (which, in turn, allowed most claimants to sue and enforce against businesses domiciled within the jurisdiction) and in certain circumstances a supplier can be held liable as a producer if they fail to identify the relevant party higher up the supply chain.
3. Compensatory damages for personal injuries and property damage are available in cases where the quantum exceeds £275 (although damages are not available for any damage caused to the defective product itself). Claims must be brought within three years of the date on which the claimant became aware (or should reasonably have become aware) of the damage, the defect and the identity of the producer, although there is a longstop date of ten years from the date that the product was put into circulation.

KEY PROPOSALS

4. The Proposed Directive states that its objectives are to: (a) update the legislation in light of the numerous technological advancements that have occurred since 1985 (in particular, with regards to the modern digital and circular economy); (b) to make it easier for claimants to bring a claim in complex cases; and (c) remove excessive

² As was the case in *Al-Iqra v DSG Retail Ltd* [2019] EWHC 429 (QB)

limitations to compensation claims. In summary, the proposals seek to modernise the legislation and to make it more claimant friendly.

5. Commentators might be forgiven for presuming that that the EU's decision to repeal and replace the legislation – rather than to provide simple amendments – indicates an overhaul of the fundamentals of the regime. In fact, the key aspects of the existing legislation will remain. In particular, liability will still remain strict, claimants will still be able to hold both producers and suppliers jointly liable for any defects and defendants will still be able to rely on the 'development risks' defence.
6. However, the key proposed amendments are as follows:
 - a. **Reverse Burden:** The current position is that the burden of proof is on the claimant to prove that they have suffered damage caused by a defective product. In light of the perceived difficulties that this places on consumers in highly technical cases, the burden will be reversed where the claim raises scientific or technically complex matters (i.e. where it would be excessively difficult for the claimant to prove the case due to technological complexities). Similarly, a rebuttable presumption in favour of defects will arise where the defendant fails to comply with disclosure obligations, the claimant can prove that a product failed to comply with applicable product safety obligations or where the damage was caused by an 'obvious malfunction' (art. 9).
 - b. **Disclosure rights:** Linked to the foregoing, in order to balance the playing field, claimants who show a *prima facie* case will be entitled to disclosure of relevant evidence (art. 8). In England and Wales, this is unlikely to add much to the existing disclosure rights under the Civil Procedure Rules, although the express wording of article 8 (if the Proposed Directive is implemented in this country) could add weight to pre-action or early disclosure applications.



- c. **Defendants:** In keeping with the existing regime, a range of ‘economic operators’ can be held liable for defects (including the producers and suppliers, on a joint and several basis). The reforms seek to ensure that claimants always have recourse against a business domiciled within the EU by bringing ‘fulfilment service providers’ (i.e. someone who does at least two of packaging, warehousing, addressing and dispatching the product) and online marketplaces into the strict liability regime in certain circumstances (art. 7). Presumably this means that e-commerce and social media platforms may be brought within the ambit of the legislation. Further, manufacturers who integrate defective components into products liable will also be jointly liable.
- d. **Defectiveness:** The defectiveness of the product in question is determined by reference to all the circumstances and a non-exhaustive list of factors, including product safety requirements (art. 6). Under the new proposals, defectiveness will be presumed in cases where a claimant can prove that the product breaches mandatory safety requirements (as such, the emphasis is moved from ‘fitness for purpose’ to public safety considerations) (art. 9(2)(b)). In practice, the EU product safety legislation aims to ensure that only safe products are placed on the internal market by enacting sectoral legislation (e.g. for pharmaceuticals or toys) or, where no bespoke sectoral legislation exists, by reference to the General Product Safety Directive (Directive 2001/95/EC). Compliance with those safety requirements will always be relevant to any assessment of defectiveness under the new proposals.
- e. **Damages:** In addition to claims for personal injuries and property damage, claims can now be brought for compensation for psychiatric harm and damages to digital content (see the definitions at art. 4). However, because the directive’s aim is to protect consumers, property used exclusively for professional purposes should be excluded (art. 4(6)(b)(iii)). The minimum threshold of EUR500 for damage to property will be removed. As with the

existing directive, claimants cannot sue for the damage to the defective product itself (art. 4(6)(b)(i)).

- f. **Representative Actions:** In keeping with the EU's other proposals regarding representative actions (see Henderson Chambers' commentary [here](#)), the proposals make it clear that representative actions can be brought with respect to strict product liability claims (see recital (21)).
- g. **Definitions:** The definition of "product" is broadened to include software and/or digital content.
- h. **Limitation:** The longstop of 10 years will be increased to 15 years in cases involving latent personal injuries (although the primary 3-years limitation period will remain): see art. 14.
- i. **Services:** The Proposed Directive will not apply to services as such, but the no-fault regime will be extended to certain ancillary digital services that affect or concern the safety of the product.

COMMENT

- 7. There can be little doubt that, if implemented, the proposals will make it easier for consumers to bring product liability claims and, as such, they will tip the balance in their favour. In particular, the reverse burden of proof in technical cases and automatic disclosure rights demonstrate the EU's determination to allow claimants a smoother route to recourse. The proposals are likely to be met with some consternation by manufacturers and suppliers. However, 77% of respondents cited difficulties in proving defectiveness in complex cases as a deficiency of the existing regime. One factor that will come as a relief to producers is that the 'development risks' defence will remain (i.e. that the defect could not reasonably have been known at the time of manufacture). The recitals state that it has been preserved in order not

to hamper innovation and research. Likewise, Courts will be able to control disclosure where trade secrets and/or confidentiality matters are in play. Defendants will also be alleviated from any liability where they can prove either the existence of specific exonerating circumstances or that the defectiveness did not exist when the product was placed on the market.

8. In terms of next steps, the proposed directive will be subject to further consultation and, once implemented, Member States will have 12 months to transpose it into their domestic legislation. The finalised directive will not have direct application within the UK, although it is understood that the Law Commission intends to review the CPA in the near future. It is expected that the Law Commission will adopt the aspects of the proposed Directive that prove to be beneficial. Any UK-based producer and/or exporter of products will nevertheless need to remain mindful of any amendments if they intend to sell products in the EU in the future.

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