



New EU directive on liability for defective products (2024/2853)

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Since 1985 EU law has provided for a strict liability regime (subject to a development risks defence) that permits those who suffer harm from defective products to claim damages (adopted into domestic legislation as the Consumer Protection Act 1987).¹ The EU has now adopted a new Product Liability Directive (available [here](#)), which replaces and updates the 1985 iteration. The revisions have ostensibly been proposed to update the legislative framework in line with nearly 40 years' worth of technological developments. However, the Commission has also introduced a number of important changes that will generally make it easier for consumers to bring claims against the manufacturers and sellers of defective products. Whilst the UK does not need to adopt the Directive in full, during the King's Speech (17 July 2024), the new Government indicated its intention to revise domestic product liability legislation via a new Product Safety and Metrology Bill, which will adopt aspects of the Directive “*where it is in the best interests of UK businesses and consumers.*”

¹ Directive 85/374/EEC

CONTEXT: THE EXISTING REGIME

1. The 1985 Directive - established in UK 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 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 fault in the heater.² Further, the CPA created a consumer-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 of ten years from the that the product was put into circulation.

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

NEW FEATURES

4. The 2024 Directive aims 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 limitations to compensation claims. In summary, the amendments seek to modernise the legislation and to make it easier to claim for damages.
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 amendments are as follows:
 - a. **Reverse Burden on Defect:** 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 of proving defect will be reversed in certain circumstances where any of the following conditions are met (i) the defendant fails to disclose relevant evidence (considered below) (art.10(2)(a)); (ii) the claimant demonstrates that the product does not comply with mandatory product safety requirements (art.10(2)(b)); or (iii) the damage is caused by an 'obvious malfunction' (art.10(2)(c)).
 - b. **Presumption of Causation:** Causation of damage will be presumed where defect has been established and the damage caused is typically consistent with the defect (art.10(3)).

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- c. **Presumption of Defectiveness and Causation:** Further, and importantly, the Court will “presume the defectiveness of the product” and/or “the causal link between its defectiveness and the damage” where (i) the claimant faces ‘excessive difficulties’ in proving defect or causation due to ‘technical and scientific complexities’ and (ii) it is ‘likely that the product is defective’ or there is a causal link (art.10(4)).
- d. **Disclosure rights:** Linked to the foregoing, in order to balance the playing field, claimants who show a plausible case will be entitled to disclosure of relevant evidence (art. 9). Under the new article 9 a defendant can also make a request for disclosure from a claimant where it is needed to counter a claim for compensation and either party can be required to present disclosed evidence in an “*easily accessible and easily understandable manner*”. 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 9 (if the Directive is implemented in this country) could add weight to pre-action or early/specific disclosure applications. Equally, a court may elect to direct a party to provide an explanation of disclosed evidence in an accessible and understandable manner in a witness statement pursuant to the power under existing civil procedure rules.
- e. **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. 8). Further, manufacturers who integrate defective components into products will also be jointly liable. Resellers who refurbish or repurpose existing products may also be treated as manufacturers and held liable under the Directive (art. 8(2)).

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- f. **Defectiveness:** The defectiveness of the product in question is determined by reference to all the circumstances and a non-exhaustive list of factors, which is much longer than provided for by the existing regime. This includes any product recall (art. 7(2)(g)) and the failure of a product whose purpose is to prevent damage and any product safety requirements (art. 7(2)(i)). Additionally, as noted above, 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. 10(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 (2023/988), which has also recently been revised and will come into force from 13 December 2024. Compliance with those safety requirements will always be relevant to any assessment of defectiveness under the new proposals.
- g. **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 art. 6). However, because the directive’s aim is to protect consumers, property used exclusively for professional purposes should be excluded (art. 6(1)(b)(iii) and (c)). 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. 6(1)(b)(i)).
- h. **Representative Actions:** In keeping with the EU’s other proposals regarding representative actions (see Henderson Chambers’ commentary [here](#)), the proposals make it clear that it does not seek to interfere with any national systems where representative actions can be brought with respect to strict product liability claims (see recital (29)).

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- i. **Definitions:** The definition of “product” is broadened to include software and/or digital content. The recitals explain at length the proposed implications of this, indicating that, for example, a product could be found to be defective as a result of a cybersecurity vulnerability (recital 32). An exception is created for “*free and open-source software that is developed or supplied outside of a commercial context*” (art. 2(2)). Art. 4(1) also confirms that raw materials, such as gas and water, are products within the scope of the directive.
 - j. **Limitation:** The existing longstop period of 10 years is retained, but it will be increased to 25 years in cases where the personal injury is latent. If the court proceeding was initiated within the liability period, the victim of damage will still be able to get compensation after this period (although the primary 3-years limitation period will remain). The longstop period for non-latent damage will remain at 10 years, with time running either from the date the product was placed on the market or put into service – either for the first time or following a “*substantial modification*” as defined in Art. 4(18) (see arts. 16-17).
 - k. **Services:** The 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. Examples of such services are given in the recitals and include voice-assistant services that permit products to be controlled by voice commands and the supply of traffic data in a navigation system (see recital 17).

COMMENT

7. There can be little doubt that the new directive 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. In doing so it potentially

lays bare a tension between this goal and the EU's promotion of a circular economy cited at recital 39, with sellers of refurbished items now potentially exposed to such claims in place of or alongside the original manufacturers. The Directive is 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). 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, Members States will have 24 months to transpose the Directive into their domestic legislation. It remains to be seen whether the updated regime will be adopted into UK legislation. Any UK-based producer and/or exporter of products will nevertheless need to remain mindful of any amendments if they intend to sell or supply products in the EU in the future.

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