

RECOMMENDATIONS FOR TRILOGUES ON THE REVISION OF THE PRODUCT LIABILITY DIRECTIVE

Supporting innovation and maintaining liability balance

November 2023

Since the European Commission proposed the revision of the Product Liability Directive (PLD) in September 2022, the Computer & Communications Industry Association (CCIA Europe) has stressed the need to keep this framework balanced between the protection of consumers and the competitiveness of the European economy.

In an increasingly digital world, the revision aims to ensure that Europeans can ask for compensation when a defective product causes them damage. **This goal of providing a safety net should not be confused with creating incentives for litigation, which would ultimately impede innovation available to Europeans.**

One key change in the revision is the inclusion of software in the definition of a “product”. While this has been dubbed as a mere clarification, this is a novelty insofar as the PLD will cover situations which were out of scope until now. To limit the negative impacts - such as increased insurance costs - on software developers and producers of products containing software, several adaptations of the revision of the PLD are needed. Adapting this liability framework to the realities of software will help preserve innovation and prevent excessive litigation. With the interinstitutional negotiations starting in October 2023, now that the [European Parliament](#) and [Council of the European Union](#) have respectively adopted their positions on the revision of the PLD, CCIA Europe respectfully draws your attention to a few developments where adaptations are needed.

Recommendations:

1. Balance the inclusion of software
2. Circumscribe the new harms to measurable damage
3. Ensure safeguards for disclosure of evidence
4. Limit the alleviation of the burden of proof
5. Adapt to the specificities of software

I. Balance the inclusion of software

Both the European Parliament and the Council have decided to include software in the definition of “product”, with some indispensable caveats and carve outs. While it would have been more effective to remove all standalone software from scope, some adaptations to the inclusion of software are necessary in the final text to avoid harming the development of software and AI.

Recital 12 should maintain the clarification that the revision of the PLD should cover software’s risk of damage proportionately to the extent to which software is essential to the functioning of a product into which it is embedded or with which it is interconnected. The changes brought to Article 4 to specify that inter-connected movables and embedded

software are in scope also bring clarity to the liability regime. Similarly, the carveout provided by the Council regarding information, i.e. the content of digital files, should be kept.

The exclusion of open-source software (OSS) in Article 2a of the Parliament's mandate is a welcome addition to the exclusion in recital 13.

II. Circumscribe the new harms to quantifiable damage

The expansion of the list of damages to include both “psychological health” and “loss or corruption of data” should be well-defined. Ensuring these new damages are quantifiable is key to avoiding a situation where companies and judicial authorities are inundated with excessive legal proceedings.

To achieve that, the amendments brought to Article 5a by the European Parliament should be part of the final text. Data loss and corruption should at minimum be limited to irreversible damages amounting to over 1,000 euros. This limit would shield economic operators from frivolous legal actions, while consumers would retain the possibility to seek compensation under other liability regimes or the General Data Protection Regulation. Psychological harm should be limited to medically recognised damage, certified by experts, and demonstrated serious adverse effects on the claimant's psychological integrity. The certification from medical experts is key to avoid costly and lengthy litigation, as proposed in the European Parliament's amendments to recital 17.

III. Ensure safeguards for disclosure of evidence

The disclosure obligations should set a higher threshold to make sure they safeguard trade secrets, reduce excessive litigation, and protect commercially sensitive data. The current disclosure obligations lack adequate safeguards against abusive discovery exercises, posing a significant legal and financial risk to companies that might be forced to settle weak claims instead.

Article 8 should contain measures to achieve this higher threshold. First, a reciprocal right for defendants to request pertinent information from the claimant should be established. Second, the relevance of the evidence should be assessed and considered under the potential unintended consequences of disclosure, in order to ensure that the request is necessary and proportionate. This assessment should consider the protection of trade secrets and the need to prevent non-specific searches for information. If trade secrets are disclosed, specific measures to preserve confidentiality should be ordered by the Courts. Finally, it should be clearly stated that Article 8 should not apply to cases whereby the relevant party does not have the information to disclose “at its disposal”, as suggested by the European Parliament in recital 31.

IV. Limit the alleviation of the burden of proof

A fundamental element of the PLD regime is the burden of proof, which means that the claimant must prove the damage and the defect, as well as the causality between them. In upcoming interinstitutional negotiations, the alleviation of the burden of proof

should be limited to what is strictly necessary, to again avoid excessive litigation and potentially unfounded claims.

Article 9 should be improved so that the alleviation of the burden of proof cannot be only contingent on a product's complexity, as this approach would *de facto* reverse the burden of proof for technological products and AI. To uphold the neutrality of the PLD, it is imperative to introduce safeguards for the presumption of defectiveness. Thus, the claimant should be required to demonstrate both excessive technical or scientific complexity and a substantial likelihood of defectiveness. Lowering these notions to excessive difficulties or potential defectiveness would only incentivise litigation and increase costs for companies, without responding to a clear need from consumers. The courts should restrict access to only the information that is necessary and proportionate to substantiate a claim and establish the presence of a defect or a causal link.

V. Adapt to the specificities of software

Manufacturing software or a good remains two very different realities. Several adaptations to the specificities of software are needed to maintain the neutrality of the PLD. If not, software developers will face disproportionate legal and insurance costs. These adaptations are essential for the continual promotion of innovation in the EU.

Software manufacturers must not be forced to assume liability extending beyond the anticipated software lifecycle and taking into account inherent bugs. Given the considerable diversity in software lifecycles, ranging from sports apps to smart product software, it is imperative to confine the liability of software manufacturers to the intended lifecycle.

To that end, software updates or upgrades should be provided for a reasonably expected product lifetime (Article 10) and should not restart the limitation period (Article 14). Further, article 12 should make it a prerequisite for invoking the liability of the software developer that the installation of upgrades and updates be done by users.

About CCIA Europe

The Computer & Communications Industry Association (CCIA) is an international, not-for-profit association representing a broad cross section of computer, communications, and internet industry firms.

As an advocate for a thriving European digital economy, CCIA Europe has been actively contributing to EU policy making since 2009.

CCIA's Brussels-based team seeks to improve understanding of our industry and share the tech sector's collective expertise, with a view to fostering balanced and well-informed policy making in Europe.

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