



26 April 2016

Liability for defective products – public consultation

CONTEXT

Directive [85/374/EEC](#) provides a liability for producers in the event of damage caused by malfunctioning products. The Directive has a broad scope: it applies to all products marketed in the European Economic Area and imposes a liability that cannot be contractually excluded.

The Commission has decided to evaluate the functioning of the Directive in the light of technological developments, most notably the Internet of Things (IoT) and advanced robots. The evaluation of the Directive is carried out as a REFIT fitness check, which means the Directive will be evaluated along five broad criteria: 1) effectiveness; 2) efficiency; 3) coherence; 4) relevance; 5) EU added value.

BusinessEurope takes this opportunity to express its views on the way forward. This paper states our key messages on the evaluation of Directive 85/374/EEC and assesses the most relevant questions in the Commission's online public consultation.

KEY MESSAGES

- The Product Liability Directive (85/374/EEC) establishes a common standard of responsibility in the area of product liability. The Directive strikes a good balance between consumer and producer rights.
- The current regulatory framework is generally fit to address liability issues concerning new technological developments, such as the Internet of Things, smart devices and the cloud. Directive 85/374/EEC provides broad principles that are flexible enough to cover these areas.
- The application of the Directive to technologies that operate more as a service than as products, such as the online use of software, should be addressable under the existing legal framework.
- Adapted or dedicated liability rules might only be appropriate for completely autonomous automated systems such as, for example, self-driving cars. We suggest an in-depth analysis of the existing rules to specific cases of autonomous systems to determine if additional regulation or tools are required to address liability challenges.



- In the Communication '[Building a European Data Economy](#)', the Commission identifies two possible ways forward for liability in relation to emerging technologies: risk-management approaches and insurance schemes.
 - Assigning liability to market players 'best placed to avoid the realisation of risk' raises many questions and concerns. It is unclear who could impose such liability and which criteria would be used for this assignment. This should be left to contractual arrangements between parties in order to guarantee enough flexibility and adaption to each particular case.
 - Although a discussion on insurance schemes would be useful, imposing insurance schemes could also produce unexpected effects on businesses as it may imply that data economy services are particularly risky. It should be left to businesses to decide if and how they want to contract insurance schemes.

RESPONSE TO THE PUBLIC CONSULTATION

The consultation questions cover both the functioning of the Directive in general and specific issues with regards to the changing technological developments. The Commission seems to have in mind mainly developments that relate to the IoT, smart devices, advanced robots and automated systems.

Question 10

To what extent do you think the Directive on liability of defective products is effective in guaranteeing consumers that producers are liable for damage caused by defective products?

- *Effective.*

Question 11

Do you think that the Directive on liability of defective products provides for a fair balance between the interest of consumers and those of the producers?

- Yes, to a significant extent
- Yes, to a moderate extent
- No
- Not at all
- I do not know

Please explain why (max. 1000 characters):

While Directive 85/374/EEC gives consumers a rather extensive possibility to claim compensation for damages, there are generally sufficient safeguards for producers, such as the exemptions from Article 7 and the threshold of €500.

Question 12

From your experience, how do you assess the following characteristics of the Directive on liability of defective products to face the needs raised by new technological developments?



	Future-proof	Needs to be adapted	No opinion
The Directive applies to very heterogeneous products (e.g. to damages caused by malfunctioning pacemakers or by defective staplers)	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The producer is considered liable independently of his fault or negligence	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The injured party has to prove the defect to obtain compensation	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The injured party has to prove also the causal link between defect and damage to obtain compensation	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Compensation is granted only for property damage above € 500	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The requirement that only damage caused by defective items intended and used for private purpose can be compensated	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The three year period for the injured party to start the proceeding for the recovery of damages	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The expiry period of ten years from the moment that the producer put the product into circulation	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Further comments (1000 characters max):

In general, Directive 85/374/EEC is sufficiently future-proof, and does not need to be adjusted in the light of technological developments. The application of the Directive to technologies that operate more as a service than as products, such as the online use of software, should be addressable under the existing framework. The threshold of €500 serves an important function in providing a safeguard against frivolous claims brought under the strict liability provisions of the Directive.

Question 13

From your experience with the Directive on liability of defective products to what extent do you agree with the following statements with regard to the Directive?



	Agree	Do not agree	No opinion
It is difficult for an injured party to prove the defect of a product to obtain compensation	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
It is difficult for an injured party to prove the defect of a product interacting with other products or services (e.g. a smartphone malfunctioning because of an app downloaded from the internet)	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
It is difficult for an injured party to prove the link between the defect and the damage to obtain compensation	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
The producer can exclude his liability under certain circumstances, for instance when he proves that at the time when the product was marketed, he was not able to detect the defect due to the state of scientific and technical knowledge	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The producer can exclude his liability under certain circumstances, for instance when he proves that the defect was due to compliance of the product with mandatory rules	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
It is sometimes difficult to distinguish a product from a service, since they are bundled together	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
It is sometimes difficult to distinguish between private and professional use of a product	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
The principle of liability without fault is not appropriate for some innovative products (e.g. smartphones or other connected devices)	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
It is difficult to allocate liability in case of products interacting with other products or services (e.g. a smartphone malfunctioning because of an app downloaded from the internet)	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Property damages are often below € 500	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>



Question 14

Based on your experience, is the Directive on liability of defective products adequate to cover the needs of consumers/users of innovative technological products based on data and interconnectivity, such as smart devices, robots or automated systems?

- *Yes, to a significant extent.*

Please explain why (1000 characters max):

While IoT technologies create interdependencies between multiple product developers, service providers and users of the data, that is also true for other types of technology and services with complex supply and value chains. Liability is assigned in contract terms which provide the necessary legal certainty for parties in the supply chain. In this respect, the existing legal framework is fit to address liability issues in the field of IoT.

However, BusinessEurope does recognize that in specific situations using completely autonomous systems, adapted or dedicated liability rules might be required. We therefore suggest an in-depth analysis of the existing rules to specific use cases of autonomous systems to determine if the existing legal framework is fit for purpose or if new rules or tools are required to address liability challenges.

Question 15

According to your experience, are there products for which the application of the Directive on liability of defective products is or might become uncertain and/or problematic?

- *No.*

Question 16

Based on your experience, is there a need to adapt the Directive on liability of defective products for the products listed in the previous question?

- *No.*

Please explain (max. 1500 characters):

Adapted or dedicated liability rules might only be appropriate for completely autonomous automated systems (such as, for example, self-driving cars). We suggest an in-depth analysis of the existing rules to specific cases of autonomous systems to determine if additional regulation or tools are required to address liability challenges.

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