The Legal 500 Country
Comparative Guides
Hot Topic

Introductory Chapter - Product Liability: An evolving legal landscape
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In a world of driverless cars, electronic devices with speech and facial recognition and household appliances which can be activated remotely from a mobile phone, whether the current (decades old) product liability laws are still fit for purpose remains a hot topic. Of course, longstanding dangers like overheating batteries, excess levels of chemicals and small parts in children’s toys still remain a risk, even in this modern world. But new risks and potential hazards are emerging in line with technological developments, and therefore it is not a surprise that the legal framework underpinning product liability has also begun to evolve.

Take the EU as an example. For many years there have been calls for the 1985 Product Liability Directive (PLD), a directive that introduced statutory liability for defective products, to be updated. Following an evaluation and public consultation, the European Commission accepted that the legal understanding of certain concepts in the PLD should be clarified. We have outlined some examples below.

- **Meaning of “product”** – The PLD applies to products but does not specify the circumstances in which software could be a product. This is hardly surprising given that the PLD entered into force about 35 years ago, before smart devices became part of our everyday lives. However, this has created some uncertainty about the scope and application of the PLD, which can pose significant challenges for companies in increasingly complex supply chains that wish to understand and manage their product liability risks.

- **Definition of “defect”** – Under the PLD, a product is ‘defective’ when the safety of the product is not as people are generally entitled to expect. Opinions about the current definition are divided. Some groups have called for the definition to be broadened to make it less challenging for claimants successfully to show that a product is defective. One view is that the definition can encompass a notion of risk-utility of a product (i.e. a product may bring an overall benefit to society while causing unavoidable harm in some circumstances). Some groups, notably medical patient associations, say that medical products are lawfully entering the market earlier and earlier in their development cycle, increasing the risk factor involved. If the definition of defect is changed, it will ultimately have a significant impact on product liability claims in the future.

- **Burden of proof** – Currently a claimant (i.e. the injured party) is required to prove the damage, the defect and the causal link between the two. There is no national harmonisation on the burden of proof, with evidential burdens varying greatly across EU Member States. Healthcare patient organisations, in particular, have criticised the difficulty in proving a defect, damage, and the link between them, and a number of experts consider that the current system is particularly onerous in respect of pharmaceuticals. If the burden of proof were to be amended then this could result in a rise in product liability claims.
The European Commission was expected to produce guidance to clarify the meaning of certain concepts in the PLD. It is possible, however, that we may instead find that more extensive proposals are put forward which involve an overhaul of EU product liability legislation. For example:

- In November 2019, an expert group set up by the European Commission published a report on liability for artificial intelligence and other emerging technologies. The expert group concluded that the existing liability regime should be amended and adapted to address the risks posed by artificial intelligence and emerging technologies. The expert group’s report contains general recommendations (for example, about the circumstances in which strict liability should be imposed on the operators of technology) but does not set out specific proposals for how the liability regime should be amended.

- In February 2020, the European Commission published a White Paper on artificial intelligence and a report on the safety and liability implications of artificial intelligence. The European Commission has launched a public consultation on the proposals set out in the White Paper, which is open until 19 May 2020. One overarching theme from the White Paper and the report is that the European Commission is committed to making Europe a world leader in AI, the internet of things (IoT) and robotics. However, to achieve this, a clear and predictable legal framework addressing the technological challenges is required. It is interesting that the European Commission recognised the importance of companies knowing their liability risks throughout the value chain, so that they can manage those risks. The European Commission concluded that amendments to the PLD may be required as well as new AI specific legislation. For example:
  
  - the European Commission commented that the definition of product could be clarified to better reflect the complexity of emerging technologies; and
  
  - the European Commission is seeking views on the extent to which it may be necessary to adapt the burden of proof for damage caused by the operation of AI applications.

Another important point to consider is how the current laws protect consumers using IoT, which can be hacked or otherwise compromised, if that then results in a safety risk or damage being caused. Of course, IoT products, if defective, can have a wide impact on consumers and the damage caused is by no means limited to personal injury. From the manufacturer’s perspective, risk of significant data and security breaches may arise which can put consumers at risk. One leading view is that a digital product is arguably unsafe if the underlying software is vulnerable to attack, communications on the software are not secure, personal data inputted into the products is unprotected and the IT system is not resistant to hacking or other device malfunctions.

Another important development which could impact on the product liability risks of companies relates to collective redress. The European Parliament, Council and Commission are considering a draft directive on collective redress, which could expand the scope for class actions by consumer groups across the EU, including product liability class actions.
For years European legal systems have been perceived by consumer interest groups as claimant unfriendly, in part because they offer insufficient access to justice, especially when compared to the US approach. In response to this, the proposed directive provides for qualified non-profit entities designated by Member States (so called “qualified entities”) to launch representative actions on behalf of consumers. The qualified entities would be able to:

(i) seek an injunction to stop infringement of certain EU legislation, including the PLD and certain requirements in the General Product Safety Directive (such as the requirement to only place safe products on the market); and

(ii) seek redress such as compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid.

If implemented in its current form, the proposed collective redress directive could lead to consumer groups seeking injunctions to stop alleged breaches of certain product safety requirements while regulatory investigations remain ongoing (i.e. effectively a privatisation of regulatory enforcement).

The proposed corrective redress directive was listed as a “priority pending proposal” in the European Commission’s 2020 Work Programme. However, we may find that the progress of negotiations between the European Parliament, Council and Commission about the proposed directive is delayed as the European institutions and Member States focus on addressing the COVID-19 pandemic.

We can expect further developments over the remainder of 2020 on product laws that will impact the rights of the consumer and the risk profile of corporate defendants.

The above explanation of current issues being considered within the EU is indicative of the head scratching and ruminating which is going on across the world about how best to protect users from the dangers which can be posed by defective modern technology. For now, we still need to wait and see where these discussions end up and the impact they end up having on product liability regimes.