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DOT Europe position paper

on the Product Liability Directive

DOT Europe acknowledges the recent revision of the Product Liability Directive (PLD) by the European Commission and understand the motivation behind updating the text. For more than 30 years, the PLD provided an instrument for compensation to people who suffer physical injury or damage to property caused by defective products. However, the digital transformation has created new challenges which warrant a revision of the existing legislation. DOT Europe and its members support the goal of the Commission to improve the level of protection for consumers in the EU and to establish a system of compensation that is fit for the digital age.

To truly improve the level of consumer protection in the EU, the revised PLD must put in place rules that are clear and coherent with the existing EU legal framework. Failure to do so, would only create legal uncertainty and limit the level of protection granted to consumers. At the same time, the PLD must also uphold existing protections for manufacturers and retailers such as intellectual property and the right to conduct business. To create the appropriate framework DOT Europe believes that the following key criteria need to be met.

Application of the Directive to software and services

DOT Europe supports the Commission's goal to clarify that embedded software is included in the scope of the PLD. However, we believe that including generalized category of standalone software in the scope of the PLD and making it subject to strict liability is not justified given the unique characteristics of software that distinguish it from the risk profile of physical goods. In particular, software is more easily repairable through updates while, as a result of its intangible state, it is less likely to cause physical harm than hardware. Importantly, users also already benefit from a protection framework in a case of defective software. In particular, the Sale of Goods Directive and the Digital Content Directive as well as GDPR and existing national rules already provide an extensive framework of protection. In addition, software is not defined in the directive, which raises questions as to its exact scope. We also strongly disagree with a broad definition of 'related services' (esp. like that of the EC in its non-paper), covering e.g. SaaS, backup of data via cloud. Indeed, services are by principle not covered by the PLD (Rec. 15).

Recommendation: DOT Europe believes that standalone software, as well as software as a service should be excluded from the scope of the proposal due to their fundamentally different risk profile from physical goods as well as the existing legislation establishing a consumer protection framework for software. For the same reasons, we caution against an expansion of the directive to services. We would welcome further clarity on the definition of "software" and "related services" so that online services such as SaaS solutions, hosting services, online platforms and search engines (as defined by the Digital Services Act) shall not be considered as software within the scope of the revised PLD. The DSA and GDPR, among other laws already implement the proper framework to address potential harm that may be caused by these services.

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Exclusion of immaterial harm from the scope of damage

The inclusion of immaterial harm with the loss or corruption of data within the scope of the definition of damage is concerning. Strict liability is suited for situations where damages or personal harm, linked to product's safety are clearly cut out and can be easily identified to have direct and severe consequences for the individual in question. However, immaterial harms raises challenges in terms of establishment of causality or quantification of damage. Extending the strict liability regime to psychological harm as well as the loss or corruption of data may significantly expand the scope of liability to cover losses that are very distant from the original defect, and makes companies subject to potentially unlimited damages, especially with the introduction of the collective redress Directive. The measurement of material damage resulting from loss of data can be challenging. However, the Commission's proposal does not define what constitutes material damage in this case and does not provide specific guidance on how to measure material damage resulting from loss of data. Without clear definitions and thresholds, this extension of the scope could lead to waves of compensation claims against economic operators on illegitimate grounds. As an example, a student may be able to hold a software developer liable for a software crash that has caused them to lose data and fail a class. This scenario could potentially escalate to the student claiming compensation for having to take an additional year of studies. All the while it remains unclear how far the software crash was actually connected to the failing of the class. In addition, existing EU legislations such as the GDPR already provide redress mechanisms for consumers for many types of non-material damage with right to obtain compensation for both material and non-material damage. Providing a separate, potentially overlapping basis for compensation here and elsewhere can create confusion, could lead to forum shopping to double claims for a single harm.

Recommendation: DOT Europe believes that immaterial harm should not be included in the scope of the PLD as the notion of damage should be primarily linked to the safety of product and to avoid creating a situation where EU businesses have potentially limitless liability.

Avoiding the reversal of the burden of proof

DOT Europe is concerned about the significant impact that the PLD proposal could have on the burden of proof. While the proposal only foresees a presumption of defectiveness under specific conditions, the vague language used in Article 9 may lead to situations in which, effectively, the burden of proof will be reversed. Especially concerning are the references to "obvious malfunction", which is not clearly defined and lacks appropriate guidance, and the reference to cases that are scientifically or technically complex. This especially applies to online marketplaces and fulfilment service providers who, as a result of their role as intermediaries, may lack additional information to rebut the presumption of defectiveness. In technically complex cases, this vagueness could lead to a situation where it would be much easier in certain scenarios to simply assume a defect rather than to investigate and find out the truth.

Recommendation: DOT Europe supports the European Commission's approach to implement a presumption of defectiveness rather than a full reversal of the burden of proof. However, in order to ensure that this approach is successful, it is critical that the connected definitions, such as "obvious malfunction" are very clear and that sufficient limitations are in place to prevent the abuse of the system by bad-faith actors. Clarifying what the claimant must do and prove, and setting sufficient safeguards, before alleviating the burden of proof is essential to overcome excessive burden and potential non legitimate claims.

Finding a balance on disclosure obligations

As it stands, a potential claimant under the PLD proposal must only be able to show that a damage claim is plausible in order to be potentially granted access to information under the disclosure obligations. This is a very low bar which, across the chain of responsibilities, could open the door to "fishing expeditions" where it is suggested that a damage claim is plausible in order to obtain otherwise confidential information and establish a claim based on that. Moreover, confidential information and trade secrets are not sufficiently protected, and better safeguards should apply in this regard.

Recommendation: DOT Europe believes that clear and appropriate limitations must be put in place against unwarranted disclosure requests as otherwise such a system would very easily be abused by bad faith actors, aiming to unjustly claim compensation. We would recommend clarifying the article to better protect trade secrets and avoid diverging legal interpretations among Member States Access request should remain limited to information required to assess whether the product was defective, who was the liable actor (manufacturer, repairer, …) or the causal link.

Clarifying the chain of liability & allocation of liability responsibilities

DOT Europe supports the Commission's approach that producers and importers should be the parties who face liability in case of damages caused by defective products they manufactured or imported into the EU. These entities have the most control over the manufacturing and import process of a product, putting them in a better position to monitor the flow of products in different jurisdictions. In contrast, business entities such as online marketplaces (when they are not acting as retailers or importers) lack this access and DOT Europe supports the proposal's recognition that they should not be considered as strictly liable in cases of damage caused by defective products they have no control over. Instead, a relevant economic operator (manufacturer or importer) from whom to seek redress should be identified, which will be eased by the GPSR and the DSA (mandatory information on traders, removal of safe harbours for marketplaces in certain circumstances). Under the current proposal, fulfilment service providers are placed in a more onerous position that is arguably more demanding than that of retailers. which is not warranted.

Recommendation: DOT Europe believes that Article 7(3) should be rephrased and instead refer to Article 7(5), for fulfilment service providers to be treated similarly to distributors. In line with this change, Article 7(6) should be removed. We would additionally recommend maintaining the allocation of liability responsibilities across the value chain through contractual agreements. Software and AI systems rely on complex supply chains that include multiple actors throughout its lifecycle, including developers, deployers and other actors (producer, distributor, importer, professional or private user) and for which the allocation of responsibilities is usually done through contractual agreements.

Structuring the authorized representatives system

The PLD proposal includes a reference to the authorized representative as a possible operator to face liability for defective products. While DOT Europe supports this approach, the concept of authorized representative must be meaningful and verifiable to prevent rogue actors from potentially abusing the system. However, it is also crucial to guarantee that small businesses in need of such a service could afford it. Finally, it must be possible for an authorized representative to change during the lifetime of a product.

Recommendation: The authorized representative should be verifiable and have access to personnel with sufficient and relevant knowledge and experience to have a meaningful impact.

Maintaining thresholds

The existing PLD contained thresholds for the minimum (€500) and maximum (€70m) damage covered. These thresholds have played an important role, which is as relevant today as it was in 1985. A minimum threshold prevents frivolous claims whereas a maximum threshold allows for insurable risks.

Recommendation: DOT Europe is concerned that the removal of both lower and upper thresholds will remove these beneficial aspects without creating any significant benefit for consumers in the EU.

Clarifying timelines

Specifically on software, the 10-year limitation period for liability that is foreseen in the PLD proposal is not feasible in view of the implied update obligations and the life expectancy for software. In addition, more clarity and certainty are needed with regards to the impact that software updates have on this period. While the Commission notes that only updates which substantially modify a software to the extent that the result could be considered a new product would refresh the 10-year limitation period, this approach is very vague and could still capture a lot of regular updates within its scope. This could potentially extend the limitation period for software indefinitely, especially when taking into account the obligation to provide software updates.

Recommendation: DOT Europe believes that the limitation period for software in Article 14 should be aligned with existing EU legislations (Digital Content Directive, Sales of Good Directive, Ecodesign requirements, Cybersecurity Resilience Act requirements). It should also be clarified that releasing a software update does not constitute a fresh placing on the market for the purposes of the limitation period.