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Orgalim comments on public consultation on the Product Liability Directive

Executive summary

The Product Liability Directive, thanks to its technology-neutral provisions, has created legal certainty while enabling technological innovation over the past years. We do not see a need to revise the Directive at this point in time.

The Product Liability Directive has significantly strengthened consumers' rights and still fulfils this aim. The Directive is balanced, since the consumer does not need to prove the fault of the producer while the consumers need to prove the damage, the defect and the causal relationship between defect and damage. This balance must be maintained.

We believe that the Directive is fit for purpose and will continue to meet its objective of setting a balanced and fair framework, in terms of liability, for damage caused by a defective product.

We are pleased to provide our views on the Product Liability Directive (85/374/EEC – hereafter referred to as the Directive), in particular on the questions raised during the latest workshop on the revision of the Directive on 23 June 2021.

1. Should manufacturers/providers of digital content, software, algorithms, data, and of digital services necessary for the operation of a product potentially be held strictly liable for damages caused by defects?

Embedded software is clearly part of a product within the meaning of the Directive and should also be considered as such in the future. According to our understanding, embedded software already falls under the scope of the Directive. The technology of such products may be new, but they remain products within the meaning of the Directive. Thanks to the Directive's technology-neutral provisions, it can also be applied to smart products. This will, as in the past, provide legal certainty in the future and, in addition, enable technological innovation in the years to come. Therefore, we do not see a need to revise the Directive at this point in time.

In particular, the Directive should not be revised to define stand-alone software or pure data as a "product". This would unduly broaden the scope of the Directive and completely change its logic. The fact that the Directive does not cover

services was recently confirmed in the European Court of Justice case C-65/20¹. Moreover, defining stand-alone software as a product would raise many practical issues related to other concepts of the Directive, in particular the concept of “defect”. The Directive defines a product as defective “when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including (a) the presentation of the product; (b) the use to which it could reasonably be expected that the product would be put; (c) the time when the product was put into circulation” (see Article 6 of the Directive). It would be difficult to apply this definition, conceived for physical products, to stand-alone software.

In addition, the European Commission has just proposed an AI Regulation and the NIS2 Directive on cybersecurity. It is essential that we wait for these two new pieces of legislation to be fully developed and published before considering making any changes to the Directive. It is imperative that all legislation dealing with emerging technologies is dealt with in a coherent manner. Amending the Directive in parallel with developing the AI Regulation and NIS2 Directive risks the different pieces of legislation becoming incoherent and must be avoided.

2. Should producers of products with cybersecurity vulnerabilities potentially be held strictly liable for damages caused by cyber-attacks?

Manufacturers of products with embedded software comply with different sectorial legislation (Machinery Directive and in the future Machinery Regulation, Radio Equipment Directive, Low Voltage Directive ...) requiring that the products they place on the market are secure. We believe it would not be fair to hold producers complying with relevant safety/conformity requirements strictly liable for damages caused by potential cyberattacks initiated by third parties, or by consumer misuse of the products that creates cybersecurity vulnerabilities.

3. Should damages other than physical injury and property damage be compensable under the Directive, such as destruction of data, psychological harm, privacy breaches or environmental damage?

The Directive should not be revised and should continue to cover only personal injuries/death and material damage to private property (see Article 9 paragraphs a and b of the Directive). It should be highlighted that for other damages, the claimant can request compensation based on the national tort law (see Article 13 of the Directive) or based on the terms of the contract.

4. Should online marketplaces be treated as “suppliers” under the Directive, like offline sellers? Who should be liable in the absence of an importer?

Online traders should be considered suppliers according to Article 3.3 of the Directive. This could be clarified in the guidelines.

5. Should companies that remanufacture or refurbish products potentially be held liable for damages caused by defects?

Normally, the refurbishers and the repairers are not producers in the sense of the Directive. However, if the refurbishers and repairers substantially modify the product, they should be considered producers according to the Directive. This could be clarified in the guidelines.

¹ C-65/20 KRONE – Verlag Gesellschaft mbH & Co KG

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=242561&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=811712>

6. Should the burden of proving defectiveness and causality be eased? If so:

- a. how (presumptions of defectiveness, reversal of burden of proof); and**
b. on what conditions (e.g. on the basis of product type, product features, product risk profile)?

The burden of proof is an essential counterbalance to the strict liability for the producer. This balance should not be changed as it has been proven successful since the implementation of the Directive. It also supports innovation. We need to preserve our manufacturers' ability to innovate as foreseen by the Directive. Also, the European Union needs to remain competitive with regard to other countries and regions in the world by supporting innovation.

7. Can the notion of defectiveness (level of safety that the public at large are entitled to expect) be applied to emerging technologies, like IoT and AI?

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8. Should compensation for property damage below EUR 500 be allowed? Should there be a limit at all?

Maintaining a €500 threshold is necessary. Furthermore, the threshold prevents litigation relating to very small claims.

9. Should producers be liable for physical injuries/property damage for longer than the current 10 years?

In the absolute majority of the cases, the ten year period is appropriate. If life or health are involved, the time limit is often longer than ten years in many Member States.

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