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## COMMISSION OF THE EUROPEAN COMMUNITIES

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AMENDMENT OF THE PROPOSAL FOR A COUNCIL DIRECTIVE  
RELATING TO THE APPROXIMATION OF THE LAWS, REGULATIONS  
AND ADMINISTRATIVE PROVISIONS OF THE MEMBER STATES  
CONCERNING LIABILITY FOR DEFECTIVE PRODUCTS

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(presented by the Commission to the Council, pursuant  
to the second paragraph of article 149 of the EEC Treaty)

COM(79) 415 final







Amendment of the Proposal for a Council Directive  
relating to the approximation of the laws, regulations  
and administrative provisions of the Member States  
concerning liability for defective products (presented  
by the Commission to the Council pursuant to Article 149,  
second paragraph of the EEC Treaty)

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### Explanatory Memorandum

#### I. Introduction

The amendments of the following text reflect certain requests formulated in the Opinion of the Economic and Social Committee<sup>1)</sup> and in the Resolution of the European Parliament<sup>2)</sup>.

#### II. Commentary on Articles

##### Article 1

§ 1: The proposal of the European Parliament to mention expressly in the text of the directive itself that the liability of the producer remains where the defective article is incorporated in an immovable, has been followed, but in a new sentence so that the principle of liability described in the first sentence should be kept intact.

§ 2: The European Parliament had suggested that "development risks" should be excluded i.e. that the manufacturer should not be liable for damage caused by defects existing at the time when the defective product was put into circulation but whose existence could not be discovered by anybody, given the state of advancement of science and technology at that time.

The Commission does not feel able to accept this proposal. If liability for damage occasioned by development risks were excluded - and such risks are in any event extremely rare - the effect would be to require the consumer to bear the risk of the unknown. The only satisfactory solution for the consumer is to make the rule of liability irrespective

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1) of 13 July 1978, O.J. No. C 114, p.15  
2) of 26 April 1979, doc. PE 57.516/fin.

of fault apply to these cases as well. Moreover, information received from the "European Committee of Insurers" indicates that insurance cover for these risks is not likely to lead to appreciably greater costs of insurance than those payable following the introduction of liability irrespective of fault (Article 1(1)).

§ 3: The suggestion made by the European Parliament to exclude agricultural, craft and artistic products (Art. 2 § 2 European Parliament text) has been followed.

Nevertheless it is more correct to include this exemption from liability in Article 1, which establishes liability than in Article 2 which defines "producer".

It appears justified to exclude primary agricultural products (by way of contrast to agricultural products industrially produced) because strict liability for defects in such products which have been caused by factors extraneous to the activities of agricultural producers could be too onerous. Such an exemption is even admissible from the point of view of consumer protection. The formulation of the amendment ("under the present directive") when read with Article 11 does not exclude liability for fault, which, generally speaking, will not be impossible to attribute.

The same considerations are applicable to the exemption of craft products "when it is clear that they are not industrially produced". "The fact that the producer comes into direct contact with it", as the European Parliament explains, and the fact that in the case of craft products, it is normally a question of production item by item and not of serial production, can justify the continuance of traditional fault liability.

Article 1 b (new)

It was extremely difficult to follow this proposal of the European Parliament for the following reasons:

- a) This article attempts to regulate a problem which is related to product liability, but which, intentionally, was not regulated in the directive: What are the obligations of the producer if he knew of the defect in his product before damage occurred? Is he obliged to try everything to warn the users of the products and to withdraw them from the market ("recall")? What are the consequences if he does nothing? None of these questions were ever discussed in the working groups of the Commission or in the Legal Affairs Committee. The proposal for the amendment was made at the last minute. In addition, insurers have let it be known that the insurability problems of a "recall" are enormous.
- b) The proposal is to a certain extent contradictory. It refers to "the case envisaged in Article 1" but enjoins the producer to adopt "all measures which ..... might reasonably help to eliminate the injurious effects of the defect". But article 1 provides for liability to pay compensation for damage which has happened. On the other hand, how can a producer take steps to inform "as soon as he ... ought to have become cognizant of the defect"?
- c) The content of the proposal would appear to be debatable. In law, nobody can relieve himself from liability simply by advertising that he knows of possible causes of damage. The opposite is the rule: he who creates a risk ought to bear the consequences if the risk is the cause of damage.

For the above reasons the Commission was unable to follow the suggestion in question.

### Article 3

Without modifying the substance of the original proposal, the Commission was able to follow the suggestion of the European Parliament, the right of recourse, including the extension of the field of application of freedom of contract, being left to the laws of the Member States. The addition does not mean that as a matter of law each person always retains a right to obtain compensation from other persons who are liable for the same damage. The availability of such recourse will depend upon the legal relationship, normally contractual, between the persons in question.

### Article 4

It appeared useful to take up the amendments suggested by the Legal Affairs Committee of the European Parliament. The Committee would require the Court to "take into account all the circumstances" of the particular case. This formulation has the advantage, moreover, of approximating to that used to define defect in the draft convention on the matter prepared by the Council of Europe.

These circumstances include in particular the presentation of the defective article and the time at which it was put into circulation. The first addition shows that the category of defects stemming from insufficient information given to the user is included in the notion of defect. The reference to time makes it clear that the user of an old product cannot expect the same degree of safety from such a product as from a product which has just been put into circulation. In addition, it is clear that the appearance on the market of a product which has been improved by the producer himself does not render defective the old product which remains on the market.

The insertion of the phrase "for the purpose for which it (the article) is apparently intended" does not add anything to the initial proposal as use contrary to such purpose would involve contributory negligence on the part of the user of the product. It would appear to be clearer to express this limitation on the liability of the producer in the notion of the defect itself. The word "apparently" means that the use is determined by public opinion and not by the producer himself.

Article 5

§ 1: The suggestion made by the Legal Affairs Committee of the European Parliament to add the phrase "having regard to all the circumstances" has been taken over. While the question remains open whether the defect which caused the damage existed or not at the time of putting into circulation by the producer, the draft directive creates a presumption against the producer, a solution which was hotly debated. To make it possible to rebut this presumption, it is necessary, in effect, to invite the Court to take account of the complexity of the proof involved and to take "all the circumstances" into consideration.

On the contrary, it did not appear to be necessary to insert this reference to the circumstances in the case envisaged by Article 5 § 1 a), the factual situation being much more easy.

In the course of discussing the original proposal, it was suggested to add by way of clarification that the system provided for by the directive should only be applicable if the defective article has been produced for commercial purposes, thus excluding all private activities. The formulation of the new version allows the clarification of the text in this respect, which indeed was never otherwise understood. Art. 5 § 1 a) has been taken from the text of the Council of Europe Draft Convention.

§ 2: At the request of the European Parliament and at that of the "Comité Européen des Assureurs" it would appear to be opportune to provide expressly in the text of the directive itself for the defence of contributory negligence on the part of the plaintiff and of all persons for whom the plaintiff is responsible, even though this is perhaps superfluous because the principle exists in the law of all member states.

In the formulation of this paragraph, it appeared nevertheless more appropriate to omit all express reference to the legal provisions in Member States and to confine it to a declaration that the defence was available to the producer. The application of a particular legal system in any particular case will be decided according to rules falling outside the directive. A reference could have been interpreted as a rule of private international law.

#### Article 6

The Commission has followed the suggestion made by the Economic and Social Committee and, repeated by the European Parliament, of indicating more clearly the borderline between use for business purposes and private use by adding to the former the word "exclusively". In effect, this addition allows borderline cases to be more clearly demarcated, which, without such clarification, would be susceptible of not very satisfactory solution.

The Commission has also taken up the suggestion to include damages for pain and suffering and other compensation for other non material damage in the definition of "damage". The fact that such damages had not been mentioned in the definition gave rise to the impression that they were excluded. The reference to national law has been omitted for the reasons already given in relation to Article 5 § 2.

#### Article 7

The amendment of paragraphs 1 and 7 had been suggested by the Commission itself in the course of the discussions in the Legal Affairs Committee and was taken up by the latter. It introduces flexibility into the difficult problem as to whether or not the strict liability should have a ceiling. The new formula tends towards a compromise acceptable to proponents and opponents of limited liability, as the report of the Legal Affairs Committee rightly emphasizes.

Paragraphs 2 and 4 stem from the fact that compensation for pain and suffering and other non-material damage are expressly mentioned in Article 6 c).

The new definition of European Unit of Account in paragraph 5 merely brings the former definition up-to-date.



Article 9

The Commission has taken up the suggestion made by the European Parliament to start the cut-off period for liability in an identical manner for all products by taking the date of putting into circulation as the starting point instead of from the end of the calendar year following this date which would have rendered the calculation easy in case of litigation.

Articles 8 and 10 - 15

remain unchanged.

## C O M M I S S I O N

Amendment of the Proposal for a Council Directive relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. (1)

### Original Version

### New Proposal\*)

The Council of the European Communities,

- unchanged

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100 thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Parliament,

Having regard to the Opinion of the Economic and Social Committee,

Whereas the approximation of the laws of the Member States concerning the liability of the producer for damage caused by the defectiveness of his products is necessary, because the divergencies may distort competition in the common market; whereas rules on liability which vary in severity lead to differing costs for industry in

- unchanged

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(1) J.O. n° C 241/9, 14.10.1976

\*) The modifications of the original version are underlined.

Original Version

New Proposal

the various Member States and in particular for producers in different Member States who are in competition with one another;

Whereas approximation is also necessary because the free movement of goods within the common market may be influenced by divergencies in laws; whereas decisions as to where goods are sold should be based on economic and not legal considerations;

- unchanged

Whereas, lastly, approximation is necessary because the consumer is protected against damage caused to his health and property by a defective product either in differing degrees or in most cases not at all, according to the conditions which govern the liability of the producer under the individual laws of Member States; whereas to this extent therefore a common market for consumers does not as yet exist;

- unchanged



Original Version

New Proposal

Whereas an equal and adequate protection of the consumer can be achieved only through the introduction of liability irrespective of fault on the part of the producer of the article which was defective and caused the damage; whereas any other type of liability imposes on the injured party almost insurmountable difficulties of proof or does not cover the important causes of damage;

- unchanged

Whereas liability on the part of the producer irrespective of fault ensures an appropriate solution to this problem in an age of increasing technicality, because he can include the expenditure which he incurs to cover this liability in his production costs when calculating the price and therefore divide it among all consumers of products which are of the same type but free from defects;

- unchanged

Whereas liability cannot be excluded for those products which at the time when the producer put them into circulation could not have been regarded as defective according to the state of science and technology ("development risks"), since otherwise

- unchanged

Original Version

New Proposal

the consumer would be subjected  
without protection to the risk that  
the defectiveness of a product is  
discovered only during use;

Whereas liability should extend only  
to moveables; whereas in the interest  
of the consumer it nevertheless  
should cover all types of moveables,  
including therefore agricultural  
produce and craft products; whereas  
it should also apply to moveables  
which are used in the construction  
of buildings or are installed in  
buildings;

Whereas liability should extend only  
to moveables which have been industrially  
produced; /22 words omitted/ that as a  
result it is appropriate to exclude  
liability for agricultural craft and  
artistic products; that the liability  
provided for by this directive should  
also apply to moveables which are used  
in the construction of buildings or  
are installed in buildings;

Whereas the protection of the consumer  
requires that all producers involved  
in the production process should be  
made liable, in so far as their  
finished product or component part  
or any raw material supplied by them  
was defective; whereas for the same  
reason liability should extend to  
persons who market a product bearing  
their name, trademark or other  
distinguishing feature, to dealers

- unchanged

Original Version

New Proposal

who do not reveal the identity of producers known only to them, and to importers of products manufactured outside the European Community;

Whereas where several persons are liable, the protection of the consumer requires that the injured person should be able to sue each one for full compensation for the damage, but any right of recourse enjoyed in certain circumstances against other producers by the person paying such compensation shall be governed by the law of the individual Member States; - unchanged

Whereas to protect the person and property of the consumer, it is necessary, in determining the defectiveness of a product, to concentrate not on the fact that it is unfit for use but on the fact that it is unsafe; whereas this can only be a question of safety which objectively one is entitled to expect; - unchanged



Original Version

New Proposal

Whereas the producer should no longer be liable when the product has not been made in the course of business activities;

Whereas account should be taken of the contributory negligence of the plaintiff in the apportionment of damages.

Whereas the producer is not liable where the defective product was put into circulation against his will or where it became defective only after he had put it into circulation and accordingly the defect did not originate in the production process; the presumption nevertheless is to the contrary unless he furnishes proof as to the exonerating circumstances;

- unchanged

Whereas in order to protect both the health and the private property of the consumer, damage to property is included as damage for which compensation is payable in addition to compensation for death and personal injury; whereas compensation for damage to property should nevertheless be limited to goods which are not used for commercial purposes;

Whereas in order to protect both the health and the private property of the consumer, damage to property, nonmaterial damage and compensation for pain and suffering is payable in addition to compensation for death and personal injury; whereas compensation for damage to property should nevertheless be limited to goods which are not used for commercial purposes;

Original Version

New Proposal

Whereas the damage recoverable should also include compensations for pain and suffering and other nonmaterial damages;

Whereas compensation for damage caused in the business sector remains to be governed by the laws of the individual States;

- unchanged

Whereas the assessment of whether there exists a causal connection between the defect and the damage in any particular case is left to the law of each Member State;

- unchanged

Whereas since the liability of the producer is made independent of fault, it is necessary to limit the amount of liability; whereas unlimited liability means that the risk of damage cannot be calculated and can be insured against only at high cost;

Whereas if the liability of the producer is not based on fault, it is not appropriate to establish indemnity ceilings which the Council can revise and eventually eliminate in relation to personal injuries.

Whereas since the possible extent of damage usually differs according to whether it is personal injury or damage to property, different limits should be imposed on the amount of liability; whereas in the case of personal injury the need for the damage to be calculable is met where an overall limit to liability is provided for; whereas the stipulated

Whereas since the possible extent of damage usually differs according to whether it is personal injury or damage to property, different limits should be imposed on the amount of liability; whereas in the case of personal injury the need for the damage to be calculable is met where an overall limit to liability is provided for;

/77 words omitted/

Original Version

limit of 25 million European units of account covers most of the mass claims and provides in individual cases, which in practice are the most important, for unlimited liability; whereas in the case of the extremely rare mass claims which together exceed this sum and may therefore be classed as major disasters, there might be under certain circumstances assistance from the public;

Whereas in the much more frequent cases of damage to property, however, it is appropriate to provide for a limitation of liability in any particular case, since only through such a limitation can the liability of the producer be calculated; whereas the maximum amount is based on an estimated average of private assets in a typical case; whereas since this private property includes moveable and immoveable property, although the two are usually by the nature of things of different value, different amounts of liability should be provided for;

New Proposal

Whereas in the much more frequent cases of damage to property, however, it is appropriate to provide for a limitation of liability in any particular case, since only through such a limitation can the liability of the producer be calculated; whereas the maximum amount is based initially on an estimated average of private assets in a typical case; whereas since this private property includes moveable and immoveable property, although the two are usually by the nature of things of different value, different amounts of liability should be provided for;



Original Version

New Proposal

Whereas the limitation of compensation for damage to property, to damage to or destruction of private assets, avoids the danger that this liability becomes limitless; whereas it is therefore not necessary to provide for an overall limit in addition to the limits to liability in individual cases;

Whereas by Decision 3289/75/ECSC of 18 December 1975 (1) the Commission, with the assent of the Council, defined a European unit of account which reflects the average variation in value of the currencies of the Member States of the Community;

Whereas the movement recorded in the economic and monetary situation in the Community justifies a periodical review of the ceilings fixed by the directive;

- unchanged

Whereas the European unit of account is defined in Article 10 of the financial regulation of 21 December 1977 (1);

Whereas the Council should proceed every three years to examine the amounts fixed by the directive to see whether, having regard to economic and monetary movement in the Community,

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(1) OJ L 327 of 19.12.1975. Also the Council Decision of 21.4.1975 on the definition and conversion of the European unit of account used for expressing the amounts of aid mentioned in Article 42 of the ACP-EEC Convention of Lomé, OJ L 104 of 24.4.1975.

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(1) OJ n° L 356 of 31 December 1977, page 1.

Original Version

New Proposal

it is appropriate to revise or even  
eliminate the ceiling established for  
liability for personal injuries and  
to revise that provided for liability  
for damage to property;

Whereas a uniform period of limitation - unchanged  
for the bringing of action for com-  
pensation in respect of the damage  
caused is in the interest both of  
consumers and of industry;  
it appeared appropriate to provide  
for a three year period;

Whereas since products age in the - unchanged  
course of time, higher safety stan-  
dards are developed and the state of  
science and technology progresses,  
it would be unreasonable to make the  
producer liable for an unlimited  
period for the defectiveness of his  
products; whereas therefore the  
liability should be limited to a  
reasonable length of time; whereas  
this period of time cannot be  
restricted or interrupted under  
laws of the Member States,  
whereas this is without prejudice  
to claims pending at law;

Original Version

New Proposal

Whereas to achieve balanced and adequate protection of consumers no derogation as regards the liability of the producer should be permitted;

- unchanged

Whereas under the laws of the Member States an injured party may have a claim for damages based on grounds other than those provided for in this directive; whereas since these provisions also serve to attain the objective of an adequate protection of consumers, they remain unaffected;

- unchanged

Whereas since liability for nuclear damage is already subject in all Member States to adequate special rules, it has been possible to exclude damage of this type from the scope of the directive,

HAS ADOPTED THIS DIRECTIVE:

Article 1

The producer of an article shall be liable for damage caused by a defect in the article, whether or not he knew or could have known of the defect.

Article 1

The producer of an article shall be liable for damage caused by a defect in the article, whether or not he knew or could have known of the defect.  
This provision applies also if the article has been incorporated in immovable property.

Original Version

New Proposal

The producer shall be liable even if the article could not have been regarded as defective in the light of the scientific and technological development at the time when he put the article into circulation.

- unchanged

The producer is not liable under the provisions of this directive if the defective article is a primary agricultural product, a craft or an artistic product when it is clear that it is not industrially produced.

Article 2

Article 2

"Producer" means the producer of the finished article, the producer of any material or component, and any person who, by putting his name, trademark, or other distinguishing feature on the article, represents himself as its producer.

- unchanged

Where the producer of the article cannot be identified, each supplier of the article shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the article.



Original Version

Any person who imports into the European Community an article for resale or similar purpose shall be treated as its producer.

Article 3

Where two or more persons are liable in respect of the same damage, they shall be liable jointly and severally.

Article 4

A product is defective when it does not provide for persons or property the safety which a person is entitled to expect.

Article 5

The producer shall not be liable if he proves that he did not put the article into circulation or that it was not defective when he put it into circulation.

New Proposal

Article 3

Where two or more persons are liable in respect of the same damage, they shall be liable jointly and severally, each person retaining the right to compensation from the others.

Article 4

A product is defective when, being used for the purpose for which it is apparently intended, it does not provide for persons or property the safety which a person is entitled to expect, taking into account all the circumstances, including its presentation and the time at which it was put into circulation.

Article 5

The producer shall not be liable if he proves

- a) that he did not put the article into circulation,
- b) that, having regard to all the

Original Version

New Proposal

circumstances, it was not defective when he put it into circulation

- c) that the article was neither produced for sale, hire or any other kind of distribution for the commercial purposes of the producer nor produced and distributed within the course of his business activities.

If the victim or any person for whom he is liable has by his fault contributed to the damage the compensation payable may be reduced or no compensation may be awarded.

Article 6

Article 6

For the purpose of Article 1 "damage" means:

- a) death or personal injuries;
- b) damage to or destruction of any item of property other than the defective article itself where the item of property
  - i) is of a type ordinarily acquired for private use or consumption; and

For the purpose of Article 1 "damage" means:

- a) unchanged
- b) damage to or destruction of any item of property other than the defective article itself where the item of property
  - i) is of a type ordinarily required for private use or consumption; and

Original Version

ii) was not acquired or used by the claimant for the purpose of his trade, business or profession.

New Proposal

ii) was not acquired or used by the claimant exclusively for the purpose of his trade, business or profession.

c) damages for pain and suffering and other non-material damage.

Article 7

The total liability of the producer provided for in this directive for all personal injuries caused by identical articles having the same defect shall be limited to 25 million European units of account (EUA).

Article 7

The total liability of the producer provided for in this directive for all personal injuries caused by identical articles having the same defect may be limited to a maximum amount which is to be determined by a qualified majority of the Council acting on a proposal from the Commission. Prior to any such determination by the Council this amount shall be fixed at 25 million European units of account (EUA).

This amount also includes the damages specified in article 6 c) when they are related to death or personal injury.

Original Version

New Proposal

The liability of the producer provided for by this directive in respect of damage to property shall be limited per capita

- unchanged

- in the case of moveable property to 15 000 EUA, and
- in the case of immoveable property to 50 000 EUA.

This amount also includes the damages specified in article 6 c) when they are related to material damage.

The European unit of account (EUA) is as defined by Commission Decision 3289/75/ECSC of 18 December 1975.

The European unit of account (EUA) is as defined by Article 10 of the Financial Regulation of 21 December 1977.

The equivalent in national currency shall be determined by applying the conversion rate prevailing on the day preceding the date on which the amount of compensation is finally fixed.

- unchanged

Original Version

The Council shall, on a proposal from the Commission, examine every three years and, if necessary, revise the amounts specified in EUA in this Article, having regard to economic and monetary movement in the Community.

Article 8

A limitation period of three years shall apply to proceedings for the recovery of damages as provided for in this directive. The limitation period shall begin to run on the day the injured person became aware, or should reasonably have become aware of the damage, the defect and the identity of the producer.

The laws of Member States regulating suspension or interruption of the period shall not be affected by this directive.

New Proposal

The Council shall, on a report from the Commission, examine every three years the amounts specified in this Article. Where necessary, the Council shall, acting by a qualified majority on a proposal from the Commission, revise or cancel the amount specified in paragraph 1 of this Article or revise the amounts specified in paragraph three, taking into consideration economic and monetary movement in the Community.

Article 8

- unchanged

Original Version

New Proposal

Article 9

Article 9

The liability of a producer shall be extinguished upon the expiry of ten years from the end of the calendar year in which the defective article was put into circulation by the producer, unless the injured person has in the meantime instituted proceedings against the producer.

The liability of the producer shall be extinguished if an action is not brought within ten years from the date on which the producer put into circulation the individual product which caused the damage.

Article 10

Article 10

Liability as provided for in this directive may not be excluded or limited.

- unchanged

Article 11

Article 11

Claims in respect of injury or damage caused by defective articles based on grounds other than that provided for in this directive shall not be affected.

- unchanged



Original Version

New Proposal

Article 12

Article 12

This directive does not apply to injury or damage arising from nuclear accidents.

- unchanged

Article 13

Article 13

Member States shall bring into force the provisions necessary to comply with this directive within eighteen months and shall forthwith inform the Commission thereof.

- unchanged

Article 14

Article 14

Member States shall communicate to the Commission the text of the main provisions of internal law which they subsequently adopt in the field covered by this directive.

- unchanged

Article 15

Article 15

This directive is addressed to Member States.

- unchanged