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4414.311 (PRODUCT LIABILITY)

# European Communities

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## EUROPEAN PARLIAMENT

# Working Documents

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### Report (\*)

drawn up on behalf of the Legal Affairs Committee

**on the proposal from the Commission of the European Communities to the Council (Doc. 351/76) for a directive relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products**

**Rapporteur : Mr Willy G.J. CALEWAERT**

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(\*) This replaces the report (Doc. 246/78) referred to committee on 9 October 1978



By letter of 5 October 1976 from the Secretary-General, the President of the Council of the European Communities consulted Parliament, pursuant to Article 100 of the EEC Treaty, on the proposal from the Commission of the European Communities to the Council for a directive relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

On 11 October 1976 the President of the European Parliament forwarded this proposal to the Legal Affairs Committee as the committee responsible, and to the Committee on Economic and Monetary Affairs and the Committee on the Environment, Public Health and Consumer Protection for their opinions.

On 18 October 1976 the Legal Affairs Committee appointed Mr Calewaert rapporteur.

At its meeting of 25 November 1976, the Legal Affairs Committee held an initial exchange of views; at its meetings of 17 February, 26 April, 26 and 27 May and 21 November 1977, the Legal Affairs Committee considered the proposed directive on the basis of a questionnaire (PE 47.746).

At its meetings of 19 December 1977, 23 January, 20 February, 27 April, 22 and 23 May, 22 June and 5 July 1978, the Legal Affairs Committee continued its consideration of the proposed directive, on the basis of the draft report (PE 51.378).

At the last of these meetings, the Legal Affairs Committee adopted the motion for a resolution, as worded in accordance with an amendment (PE 51.707/1) by Mr Fletcher-Cooke, by 13 votes to 12, and directed its rapporteur to draft the accompanying explanatory statement (see Doc. 246/78).

At the plenary sitting of 9 October 1978, at the request of Sir Derek Walker-Smith, chairman of the Legal Affairs Committee, Mr Calewaert's report (Doc. 246/78) was referred back to committee, in order to enable the Commissioner responsible to put forward proposals likely to meet wider support both among members of the Legal Affairs Committee and in Parliament as a whole.

At its meeting of 26 January 1979, the Legal Affairs Committee decided to resume consideration of this question on the basis of the amendments (PE 56.988) submitted by its rapporteur following the receipt of suggestions from the Commissioner responsible which were forwarded to the chairman of the Legal Affairs Committee; at the same time the committee laid down 16 February 1979 as the time-limit for the submission of new amendments.

Before proceeding to examine these new amendments, the Legal Affairs Committee took decisions on the two Previous Questions, moved respectively by Mr Fletcher-Cooke and the rapporteur.

The Previous Question (PE 57.337) moved by Mr Fletcher-Cooke was rejected by 15 votes to 3 with 3 abstentions; it had been worded as follows:

'The amendments tabled by the rapporteur on the basis of suggestions by Commissioner Davignon are not such as to enable the committee to alter the view expressed in paragraph 1 of the motion for a resolution in Mr Calewaert's report (Doc. 246/76) as to the use of Article 100 as legal basis for this particular directive.'

The Previous Question (PE 56.988, p.2) moved by the rapporteur was adopted by 14 votes to 4 with 5 abstentions; it had been worded as follows:

'Article 100 of the Treaty establishing the EEC constitutes the proper legal basis for the proposal for a directive (Doc. 351/76) relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.'

At its meetings of 1 and 21 March 1979, the Legal Affairs Committee examined the amendments submitted by the rapporteur and those tabled by Members (PE 56.992).

The conclusions reached by the Legal Affairs Committee being different from those contained in the first report, it proved necessary to draw up a second report; the initial report is thus withdrawn from the agenda and therefore it was felt that it would be useful to publish again, in the present report, the opinion of the Committee on Economic and Monetary Affairs and that of the Committee on the Environment, Public Health and Consumer Protection.

On 5 April 1979 the draft report was considered by the Legal Affairs Committee and adopted by 15 votes to 0 with 1 abstention.

Present: Mr Riz, vice-chairman and acting chairman; Mr Broeks, acting rapporteur; Mr Alber, Mr Bayerl, Mrs Ewing, Mr de Gaay Fortman, Mr Luster, Lord Murray of Gravesend, Mr Plebe, Mr Rivierez, Mr Santer, Mr Scelba, Mr Schreiber (deputizing for Mr Radoux), Mr Shaw, Mr Sieglerschmidt, and Mr Vergeer (deputizing for Mr De Keersmaeker).

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The Legal Affairs Committee hereby submits to the European Parliament the following motion for a resolution, together with explanatory statement:

MOTION FOR A RESOLUTION

embodying the opinion of the European Parliament on the proposal from the Commission of the European Communities to the Council for a directive relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products

The European Parliament,

- having regard to the proposal from the Commission of the European Communities to the Council<sup>1</sup>,
  - having been consulted by the Council pursuant to Article 100 of the EEC Treaty (Doc. 351/76),
  - finding that Article 100 of the Treaty establishing the EEC constitutes the proper legal basis for the proposal for a directive,
  - having regard to the report of the Legal Affairs Committee and the opinions of the Committee on Economic and Monetary Affairs and the Committee on the Environment, Public Health and Consumer Protection (Doc. 71/79);
1. Welcomes the proposed directive as a necessary precondition for the achievement of a system of competition and free movement of goods and as an essential component of a Community policy for consumer protection;
  2. Requests the Commission to report to Parliament and Council, five years after the entry into force - in implementation of Article 13 - of the national provisions necessary to comply with the directive, on the advisability of transferring liability - wholly or in part, generally or in respect of certain risks only - from the producer to a guarantee fund, more particularly with a view to protecting consumers and producers against development risks;
  3. Invites the Commission to adopt the following amendments, pursuant to Article 149, second paragraph, of the EEC Treaty.

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<sup>1</sup> OJ No. C 241, 14.10.1976, p.9

Proposal for a Council directive  
relating to liability for defective products

Preamble unchanged

First to fifth recitals unchanged

Whereas liability cannot be excluded  
for those products which at the time  
when the producer put them into cir-  
culation could not have been regarded  
as defective according to the state of  
science and technology (development  
risks), since otherwise the consumer  
would be subjected without protection  
to the risk that the defectiveness of  
a product is discovered only during  
use;

deleted

Remaining recitals unchanged

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.

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.

Article 1

The producer of an article, even  
where it is incorporated in immovable  
property, shall be liable for damage  
caused by a defect in the article,  
whether or not he knew or could  
have known of the defect .

The producer shall not be liable  
if he can produce evidence that the  
article cannot be considered  
defective in the light of the  
state of scientific and techno-  
logical development at the time  
when the article was put into  
circulation .

Article 1a (new)

In the case envisaged in Article 1,  
the producer shall not be liable  
where, as soon as he has become or  
ought to have become cognizant of  
the defect, he has taken adequate  
and timely steps to inform the  
public and adopted furthermore all  
measures which, having regard to  
the circumstances of the case,  
might reasonably help to eliminate  
the injurious effects of the defect.

<sup>1</sup> For complete text see  
OJ No. C 241, 14.10.1976, p. 9



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.

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 person who supplied him with the article.

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

Article 3

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

The burden of proving satisfaction of the obligations referred to in the previous paragraph shall lie with the producer.

Article 2

Unchanged

Paragraph 2 (new)

The producer of an agricultural, craft or artistic product shall not be liable under this directive for damages caused by defects therein where such a product clearly does not present the attributes of industrial production

Unchanged, but becomes paragraph 3

Unchanged, but becomes paragraph 4

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 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.

Article 6

For the purpose of Article 1  
'damage' means:  
(a) death or personal injuries;

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 that, having regard to all the circumstances, either he did not put the article into circulation or it was not defective when he put it into circulation.

Paragraph 2 (new)

In accordance with the laws of the Member States, the producer may raise the defence of contributory negligence on the part of the injured person or of any other person for whom the injured person is responsible by virtue of national law.

Article 6

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

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

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).

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

- in the case of movable property to 15,000 EUA, and
- in the case of immovable property to 50,000 EUA

Paragraph 2 (new)

Claims for payment of compensation for pain and suffering and for non-material damage may be awarded according to the laws of the Member States.

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).

Unchanged

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

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.

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 the second paragraph,  
taking into consideration economic  
and monetary movement in the Community.

Article 8 unchanged

Article 9

The liability of the 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.

Article 9

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.

Articles 10 to 15 unchanged

EXPLANATORY STATEMENTI. Basis of the proposal

1. The Community policy aims of equality of competition and consumer protection make it necessary to approximate the law on liability for defective products in the European Community. As a result of the continual development of new production methods and the ramifications of trade it is often impossible for consumers to judge whether goods are safe or to identify their manufacturer. The traditional law on liability does not satisfy present requirements because it derives from the economic circumstances and production conditions of the nineteenth century. The system of liability for intentional and negligent acts is an unsatisfactory basis for regulating the legal consequences of bodily injury and material damage caused by goods brought into circulation by the producer. More rigorous standards concerning liability are increasingly being developed in the jurisprudence of Member States, though naturally this is not homogeneous. Consumer organizations are urging national legislatures to improve the legal position of the consumer.
2. The acceptance by the producer of liability for defective products seems justified. He is able, by careful organization and supervision of production to minimize the risk of damage or injury. He has the easiest access to information and evidence as to whether goods were defective when they were put on the market. He can make allowance in his price calculation for the necessary operational contingencies and insurance premiums and thus spread the extra cost of his products evenly over all consumers.
3. Differences in national provisions on product liability necessitate the approximation of laws in order to avoid any restriction on competition arising out of the varying costs borne by companies in countries with very close reciprocal trade relations. Whilst in certain states the producer is liable even where he is responsible for the product defect which gave rise to the damage, irrespective of fault, the principle of negligence still applies in most states. Hence the injured person must prove that the producer was at fault for the defectiveness of the object which caused the damage. Generally, however, the consumer is denied the necessary access to the production process particularly where large companies are concerned. Even in cases where there is a rebuttable presumption that the product is at fault, the latter can usually supply proof of having taken every precaution and thus avoid liability. This may be summarized in the following three groups:

- (a) the principle of liability arising from negligence, under which the producer is obliged to pay damages only if the injured consumer is able to prove that he was at fault for the defectiveness of the object causing the damage. This applies to Italy and until the burden of proof was reversed in 1968 also applied to the Federal Republic of Germany;
- (b) reduced liability arising from negligence, under which the producer is presumed to be at fault, but evidence in exculpation is admitted: Denmark, the Netherlands, the United Kingdom, Ireland and, since 1968, the Federal Republic of Germany;
- (c) the system of strict liability excepting contrary evidence to repudiate the presumed fault: France, Belgium and Luxembourg.

4. Apart from certain areas of the law in the other states, the injured person's claim for compensation can only succeed under French, Belgian or Luxembourg law if the damage is shown to have been caused by the defectiveness of the product. The consequence of this difference in the liability laws is to create different cost factors and hence distortion of competition. If a strict law on liability compels the producer to prevent defects from arising in his products, the expenditure involved affects the total production cost and the price calculation. To this must be added the cost (expenditure, contingency reserves, insurance) of any cases of liability which may nonetheless occur. Competition and the free movement of goods could also be jeopardized by trade consumers in particular, but also by subsequent processing firms, giving preference to whichever producer is subject to the strictest form of liability. Again, the choice of location for an undertaking may be influenced by this factor.

5. Under current legislation in the various Member States, the consumer enjoys varying but generally inadequate protection against bodily injury and material loss. Adequate and equal protection for all consumers is, however, a high-priority Community policy objective and the Commission refers in this connection to the Council Resolution of 14 April 1975 (OJ C 92 of 25 April 1975, items 15(a)(ii) on page 5, and 26 and 27 on page 7).

6. Since these differences in the laws governing product liability directly affect the operation of the common market, there is every justification for issuing a directive for the approximation of laws pursuant to Article 100 of the EEC Treaty. Such a directive should be based on whatever best meets the needs of the common market. At the same time the provisions contained in a directive for the

approximation of laws should not be limited to the present state of progress in the development of the law in one or more of the Member States, but should provide solutions which go beyond existing national laws and more accurately reflect modern economic conditions. Obviously the degree of approximation already achieved by Community legislation in some of the areas of law concerned must not be ignored.

7. Finally the directive should be seen in the light of numerous international and national endeavours to obtain the proper regulation of product liability, as reflected for instance in the work of UNCITRAL<sup>1</sup>, the Council of Europe draft convention on the harmonization of the law on product liability, which also makes provision for unlimited liability irrespective of fault in the case of bodily injury, the report by the Law Commission and the Scottish Law Commission in the United Kingdom, both of which also advocate unlimited liability irrespective of fault, and the German 'Gesetz zur Neuordnung des Arzneimittelwesens' of 1976, which took effect on 1 January 1978 and which also provides for liability irrespective of fault, albeit with an overall ceiling of DM 200 million and a ceiling for each case of DM 500,000.

## II. Summary of the proposal

### A. Content of the proposal

8. The directive lays down the principle of the liability of the producer irrespective of fault for bodily injury and material damage caused by a defect in a movable object. An object is thus defective if its measure of safety is not such as may reasonably be expected. The issue here is not whether the producer detected or could have detected the defect in the object. He is also liable even if it could not have been regarded as defective in the light of scientific and technological development at the time when it was put into circulation (development risks). This proposal does not affect claims for compensation for damages caused by a defective object where they are based on other legal grounds. The principle of liability irrespective of fault cannot be overridden.

9. Liability applies to

- (a) the producer of a defective final product, component or raw material, and

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<sup>1</sup>United Nations Commission on Trade Law

- (b) the dealer
- (1) importing from non-Member countries
  - (2) representing himself as the producer
  - (3) in the case of products sold 'anonymously', where the dealer does not identify the producer or supplier.

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

10. Damage includes death, personal injuries and the destruction of an object other than the defective object; the damaged property must be of a type intended for private use or consumption and not used for the commercial or business purposes of the injured person.

11. The burden of proof rests with the injured person to show that the object was defective at the time when the injury was caused and that the defect did cause personal injury or damage to property. The producer must repudiate the presumption that he put the object into circulation and that it was already defective at that time.

12. Total liability is limited to

- 25 million EUA for all personal injuries caused by identical articles having the same defect,
- 15,000 EUA for damage to movable property in the case of each injured person,
- 50,000 EUA for damage to immovable property in the case of each injured person.

13. The limitation period for proceedings for the recovery of damages against the producer on the grounds of product liability begins to run on the day on which the injured person became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer, and expires after three years.

The liability of a producer for all claims is extinguished after 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.

B. Effect of the proposal on costs - Problem of the establishment of funding schemes

14. The principle of liability irrespective of fault may require producers to increase their operational reserves and liability insurance;



the ensuing increased costs will be incorporated in the price calculation. The producer is thus not penalized thereby but is able to pass the increased cost on to the consumer.

On 1 March 1979, Commissioner Davignon submitted two notes to the Legal Affairs Committee containing the views of the European Committee of Insurances on the question of the cost of strict liability insurance (see Annexes I and II); note particularly the opinion expressed by that organization: it is not so much strict liability as such but the system within which it operates which has contributed to the so-called product liability crisis in the States in recent years'; this opinion, on which the Commission's proposal is based, was accepted by the majority of the Legal Affairs Committee (see Annex III, paragraph 7).

15. Your rapporteur would also like to draw attention to the comments made by the same body on the funding schemes (see Annex II, para. 3): 'Funding schemes abandon the flexibility of individual risk assessment in favour of a reduction of all risks to the same common level which effectively reduces any incentive towards improved product safety'.

In this connection it should be noted that such funding schemes could in any case provide for rates of contribution differentiated by sector and subject to revision according to proven efforts made to prevent damage.

It should also be recalled that an amendment (PE 56.992/Ann. p.5) tabled by Mr Riz, Mr Luster and Mr Schwörer, aimed at the creation of a European Fund to guarantee development risks, was rejected by 10 votes to 10, with 4 abstentions; under these circumstances, your rapporteur thinks it will be necessary, when the time comes, to consider whether such a fund should be established on the basis of a Commission report; hence paragraph 2 of the motion for a resolution.

### III. Comments on the articles of the proposal on which the Legal Affairs Committee has adopted amendments

#### Article 1 - Principle of liability for defective products

16. The principle of the liability of the producer irrespective of fault applies to the production of a defective object and also to its having been put into circulation. The manner in which the defect arose is unimportant. The directive thus follows the principle of risk assessment based on objectively determined causation of damage. It takes into account the various developments of legislation and jurisprudence in the Member States with a simple, comprehensive and clear regulation.

This avoids

- the continuation of liability on the basis of negligence in important product liability areas,
- a relapse into the confusing multiplicity of contractual and non-contractual claims and rules on the burden of proof, and
- a deterioration in the position of consumers in some Member States as against the present state of legal development in their countries.

17. The Commission text categorically excludes any regulations on the burden of proof which derive in any case from the civil law or the law on civil procedure of the Member States, the end effect of which is in this respect the same, and also clearly emerge from the "ratio legis" of the present directive. The need would only arise where the present allocation of the burden of proof were to be changed.

18. The Commission's explanatory memorandum (1st subparagraph of paragraph 3) stipulates that 'Liability extends only to movable property. Special rules exist in all Member States to cover defective immovable property such as buildings. Where, however, movable objects are used in the erection of buildings or installed in buildings, the producer is liable in respect of these objects to the extent provided for in this directive'.

The amendment tabled by Mr Masullo and adopted by the Legal Affairs Committee is designed to bring the explanatory memorandum into line with the text of the actual proposal for a directive by stipulating that the producer of a movable object, even if it is installed in a building, is liable under the conditions provided for in the directive.

19. In adopting by 14 votes to 12 with 1 abstention the amendment tabled by Mr Rivierez to the second paragraph of Article 1, the Legal Affairs Committee excluded liability as a result of development risks<sup>1</sup>; such exclusion is justified both from the point of view of equity (how is it possible to justify the manufacturer's liability for a product which at the time it was manufactured was considered perfect in the light of the state of science and technology?) and by economic considerations to which the opinion of the Committee on Economic and Monetary Affairs (in particular paragraph 9) had already drawn attention.

20. These considerations did not convince a large minority who felt that the inclusion of the manufacturer's liability in the case of development risks was essential for consumer protection and was not likely to constitute a bar on innovation, for liability arises not from the newness of a product but from damage.

<sup>1</sup> The sixth recital of the proposal for a directive is therefore to be considered void.