

PRODUCT LIABILITY

A balancing act

The EC's liability proposals need to tread a fine line that does not disrupt a system that has been working well





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It had been a long wait when, in September 2022, the European Commission presented its proposals to adapt existing liability rules to the digital age. These took the form of proposals for a revised Product Liability Directive (PLD) and an Artificial Intelligence Liability Directive (see side box). While the Commission has made an effort to reconcile the opposing views of consumer groups and businesses, the insurance sector is concerned that the outcome is not as balanced as intended, and this raises concerns. The ball is now in the court of the Council of the EU and the European Parliament, where discussion of the proposals has started.

For years, consumer groups and industry representatives — not only insurers but also product manufacturers and the ICT industries — have been on opposite sides of the table when it comes to the need for updates to the existing product liability regime; consumer groups have defended the need to overhaul the rules to ensure people get what, in their opinion, would be fair compensation in the wake of damage or harm incurred by new and innovative products, whereas industry representatives have warned against excessive changes to the current system — the PLD in conjunction with national tort law — which they believe serve both consumers and producers appropriately.

The stakes from an insurer's point of view

Insurers are in the business of supporting people and businesses should an adverse event occur. They have — by providing liability cover for manufacturers — a long history of compensating consumers that have fallen victim to the consequences of a defective product, including those driven by AI. In order for insurers to continue to offer product liability policies to manufacturers, several core conditions and

requirements need to be in place. These include acceptable minimum financial thresholds and standards relating to the burden of proof to substantiate a claim.

So, while it is important to reflect on whether the existing legal framework functions adequately in today's ever-digitising society, changing those core conditions and requirements will have a direct impact on an insurer's ability to offer product liability cover. This could result in producers being impeded in their ability to innovate or in them having to increase the prices of their products. Insurance Europe therefore engages with policymakers to ensure they have the full picture and are mindful of the fact that some of the Commission proposals that are currently on the table would challenge an insurer's ability to assess risks and provide cover. It is vital that insurers are able to continue to contribute to innovation and consumer protection.



EC proposals to update product liability rules

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Ensuring innovation and consumer protection

The rationale behind the Commission's proposals is to increase consumer protection and to make it easier for consumers to pursue legal action, while encouraging manufacturers to produce safer products. These are very important objectives. However, the proposals could create a number of challenges for manufacturers and insurers, which could ultimately go against the interest of consumers.

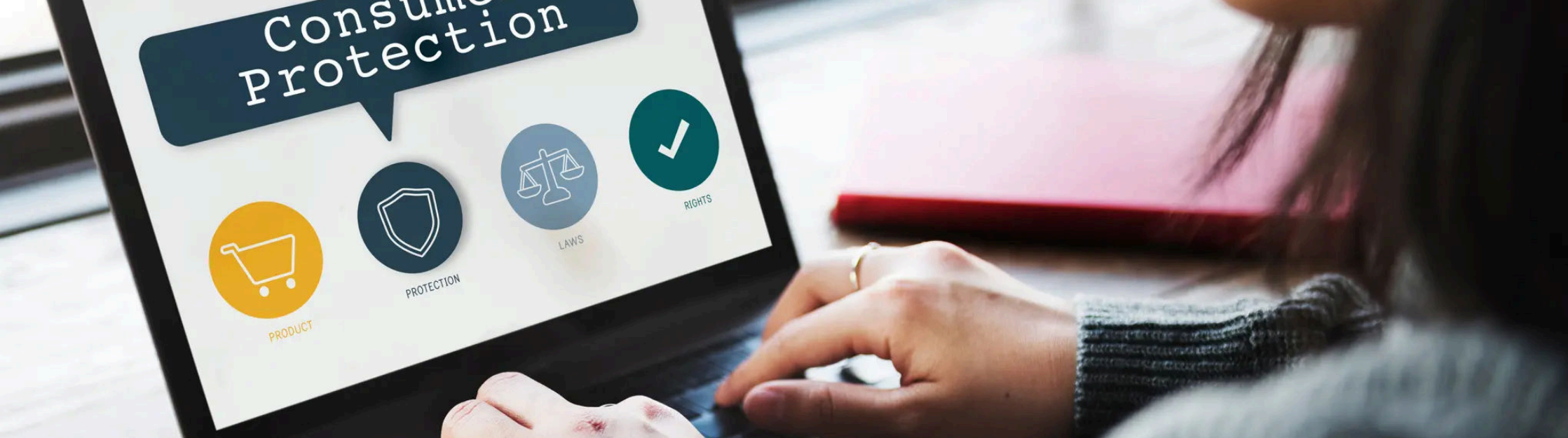
For instance, the proposed alleviation of the burden of proof and the much lower threshold at which consumers can submit claims are likely to mean that insurers will reassess their risk exposure — adapting policy wordings as well as premiums to adequately reflect the risks to which they are exposed. This means that insurance will become less accessible and affordable for businesses that are keen to innovate and develop the kinds of products that consumers expect nowadays. This will not only stifle innovation and economic growth, because manufacturers are likely to be less inclined to bring new products to market, but will also make such products more expensive.

It is therefore important for policymakers to realise that expanding the scope of the framework is likely to result in insurers revisiting existing exclusion clauses in an attempt to manage their risk exposure, rather than extending insurance cover and increasing consumer protection. Particularly problematic is the proposed inclusion of cyber risks. The cyber insurance market is in its early days, and insurers are still exploring the best ways to provide cover for these constantly evolving risks. Integrating cyber risks into product liability policies will be a complex exercise — if it is even possible — and will therefore result in insurers having to adapt their cover significantly.

Divide risk fairly

And, finally, while it is important to make sure that victims of defective products have access to well-functioning and accessible mechanisms for receiving compensation, it is also important to avoid making such good intentions more difficult to achieve in practice. Specifically, the proposed removal of the minimum financial threshold of €500, in combination with the newly proposed and vaguely defined threshold for requiring defendants to disclose evidence in the wake of a claim, would open the door to claims of any value. This would result in an excessive and disproportionate number of litigation cases. The insurance industry therefore continues to call for a fair balance to be maintained between producers' and consumers' interests and, consequently, a fair division of the risk.

A stalemate looks likely. Discussions on the product liability regime have been going on for years, with both sides standing firm. While a complete overhaul of the framework is undesirable, the different views permeating the debate demonstrate that maintaining the status quo is an unrealistic option as well. So, as the discussions continue, the main question is whether it will be possible to find middle ground — a solution that works for all parties — or whether change to a system that has generally worked well in practice may disrupt a carefully calibrated balance. The devil will be in the details and Insurance Europe will be engaging with policymakers and other stakeholders to seek an acceptable outcome.



EC proposals to update product liability rules

■ Revision of the Product Liability Directive

With a revision of the PLD, the Commission aims to modernise existing rules on the strict liability of manufacturers for defective products and bring the current framework more in line with the realities of today's digital economy, thereby strengthening the rights of consumers. This update would pave the way for consumers to claim compensation when software updates and AI systems have rendered products, such as robots or drones, unsafe or when cybersecurity vulnerabilities have not been adequately addressed. The proposed revision would also enable people that have been injured by products manufactured outside the EU to claim compensation from the importer or the manufacturer's EU representative. Furthermore, the Commission proposes new requirements for manufacturers in relation to the disclosure of evidence, which would lower the threshold at which consumers can make claims and alleviate the burden of proof in cases that involve complex (AI-driven) products.

■ A new AI Liability Directive

With this proposed Directive, the Commission aims to harmonise some of the rules for claims that fall outside the scope of the revised PLD. Specifically, it seeks to address the challenges related to high-risk AI systems, notably where damage is caused by wrongful behaviour, such as privacy breaches or lack of safety. In particular, the Commission has introduced two key features: requirements to disclose evidence and a rebuttable "presumption of causality". The former is meant to ease the burden of proof for victims seeking to establish damage caused by a high-risk AI system, notably by facilitating access to evidence from companies and suppliers. The latter would allow victims to receive compensation when a fault has been established and the causal link between the fault and the performance of the AI system seems reasonably likely, without any requirement for victims to explain in detail how harm was caused by a specific fault or omission.

