

RECOMMENDATIONS FOR A CONSUMER-FRIENDLY PRODUCT LIABILITY DIRECTIVE (PLD)

Recommendations of the Federation of German Consumer Organisations (Verbraucherzentrale Bundesverband, vzbv) on the Product Liability Directive trilogue negotiations (COM(2022) 495 (final))

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Legal information

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The Federation of German Consumer Organisations (Verbraucherzentrale Bundesverband e.V.) is registered in the German Lobby Register and in the European Transparency Register. You can view the relevant entries [here](#) and [here](#).

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I. INTRODUCTION

The European Commission's proposal for a new directive for defective products (PLD) of 28 September 2022 recognises the urgent need to adapt the rules to the digital age. vzbv greatly regrets that neither the European Commission nor the European Parliament (Parliament)¹ and the Council of the European Union (Council)² were able to agree on a reversal of the burden of proof in favour of consumers in their respective positions. Easing the burden of proof is not enough, but if alleviations are introduced, they must at least be consumer-friendly and effective.

In addition, there were unfortunately lengthy discussions on whether software should be considered a product and thus fall within the scope of the directive. Fortunately, this is the case. vzbv also welcomes the fact that the importance of AI has been taken into account and machine learning is included as a criterion for assessing defectiveness of a product.

Since Parliament and Council adopted their respective positions to start trilogue negotiations with the Commission, the Federation of German Consumer Organisations (vzbv) publishes recommendations for the following negotiations in order to highlight consumer interests and to clarify critical aspects in the proposals and positions. From a consumer protection point of view, a combination of the various proposals of the Council and the Parliament would be useful and advisable.

For the substantive justification and explanation of the recommendations, please see vzbv's position paper of 8 December 2022.³

II. RECOMMENDATIONS

1. OBJECTIVE

- ❖ vzbv strongly supports the Parliament's addition to include a high level of consumer protection as an objective of the directive in Art. 1(1)(a).

2. DEFINITIONS

- ❖ vzbv supports the Parliament's and Council's position to follow the European Commission's proposal and define software as a product (Art. 4(1)), also if supplied through a software-as-a-service model as clarified by the Council's proposal (recital 12).
- ❖ vzbv welcomes the Council's proposal to broaden the definition of „manufacturer's control“ (Art.4(5)).

¹ Committee on the Internal Market and Consumer Protection, Committee on Legal Affairs: Report on the proposal for a directive of the European Parliament and of the Council on liability for defective products: https://www.europarl.europa.eu/doceo/document/A-9-2023-0291_EN.html, 12/10/2023.

² Council of the European Union, Proposal for a Directive of the European Parliament and of the Council on liability for defective products. Mandate for negotiations with the European Parliament: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_10694_2023_INIT, 15/06/2023.

³ See: <https://www.vzbv.de/sites/default/files/2023-01/22-12-21%20vzbv%20position%20paper%20PLD-P.pdf> (last accessed 16/10/2023).

3. DAMAGE

- vzbv rejects the Parliament's precondition that the psychological damage not only has to be diagnosed by a medical expert but by a court ordered one (recital 17). But vzbv in principle welcomes that all three negotiation parties include medically recognised damage to psychological health as a damage.
- vzbv strongly rejects the threshold of EUR 1000 proposed by the Parliament (Art. 5a(1)(c)) and supports the Council's position which follows the European Commission's original proposal.

4. DEFECTIVENESS

- vzbv recommends to follow the European Commission's original proposal to include "reasonably foreseeable misuse" as a criterion for assessing defectiveness in Art. 6(1)(b).
- vzbv supports the Council's proposal to include "any failure of the product to fulfil its purpose of preventing damage" as a criterion for assessing defectiveness, Art. 6(1)(i).

5. LIABLE ECONOMIC OPERATORS

- vzbv regrets that all three negotiating parties have not been bold enough to make the operators of online marketplaces liable in the event of damage if no other economic operator is tangible – without limitations.
- vzbv supports that the Council's has replaced the word "claimant" with "injured person" in Art. 7(5)(a).

6. DISCLOSURE OF EVIDENCE AND BURDEN OF PROOF

- vzbv greatly regrets that the Parliament and the Council were unable to agree on a parallel to the proposal of the AI Liability Directive, which provides for a potential claimant.⁴
- vzbv rejects the Parliament's proposal to provide that not only the consumer but also the defendant may request the national courts to order a disclosure of relevant evidence (Art. 8(1a)), as the defendant is only obliged to provide evidence for the purpose of exemption from liability.
- vzbv strongly supports the Parliament's position to delete "confidential information" in Art. 8(3), as the term is not legally defined and a restrictive condition.
- vzbv rejects the addition "as intended by the manufacturer" in the Parliament's position on Art. 9(2)(c) and recommends to follow the Council's position to replace "normal use" with "reasonably foreseeable" use, as in Art. 6(1)(b).
- vzbv supports the Council's position to insert "in particular" in Art. 9(4)(a), thereby recognising that "excessive difficulties" may arise due to various factors.
- vzbv supports the Parliament's proposal to demand possibility instead of likelihood concerning that the product contributed to the damage and that the product is defective or that its defectiveness is a cause of the damage (Art. 9(4)(1)(b)).

⁴ Art. 2(7) and Art. 3(1) of the Proposal for a directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022PC0496> (last accessed 18/10/2023).

7. EXEMPTIONS FROM LIABILITY

- vzbv supports the Parliament's position to narrow the exemptions from liability, (Art. 10(1)(d)).
- vzbv supports the Council's position to prevent an exemption from liability if there was a substantial modification made within the manufacturer's control (Art. 10(2)(d)).
- vzbv strongly supports the Council's position for a derogation from the development risk defence for the Member States (Art. -15).

8. LIMITATION PERIOD

- vzbv calls for the length of the limitation period to be lifelong, based on the average product life and to be at least 20 years. vzbv supports the Parliament's position to raise the limitation period to 30 years in cases of latency of a personal injury (Art. 14(3)).