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STAKEHOLDER CONSULTATION - SYNOPSIS REPORT

Accompanying the document

Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of the Council Directive on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (85/374/EEC)

{COM(2018) 246 final} - {SWD(2018) 157 final}

1. INTRODUCTION

Directive 85/374/EEC on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products (the "Directive") aims at guaranteeing the protection of consumers' health and property, the free movement of goods and undistorted competition among market operators in the Single Market.

The Commission launched an evaluation to judge if the Directive meets its objectives and is fit for purpose vis-à-vis the new technological developments such as Internet of Things or autonomous systems. A stakeholder consultation was part of this evaluation.

2. OBJECTIVES OF THE CONSULTATION

The consultation strategy aimed at gathering information from stakeholders to feed the assessment of its effectiveness, efficiency, relevance, coherence and EU added value.

Relevant stakeholders include producers, importers, suppliers and their industry associations, consumers and consumer organisations, insurers and federations of insurers, technical experts, and public authorities and civil society (e.g. think-tanks, experts, law firms/legal experts).

This document presents an overview of the consultation activities and their results.

3. CONSULTATION METHODS AND TOOLS

Overall, **657 stakeholders** from all Member States (except for Latvia, Portugal, and Slovenia) and all target groups (except for technical experts) contributed to the consultation.

3.1. Public Consultation

An **open public consultation** was launched (10 January – 26 April 2017) in 23 European Union languages, consisting of three online questionnaires addressed to producers; consumers; public authorities and civil society representatives.

113 stakeholders (40 producers, 48 consumers and 23 public authorities/civil society) from 16 Member States[1] replied. 14 position papers were shared by consumers (1), business associations (9) and public authorities/civil society representatives (4).

3.2. Surveys

A **targeted survey** (3 April – 20 May 2017) was carried out through five questionnaires in English addressed to:

- Producers and suppliers and related industry associations (4 responses);
- Consumer associations (11);
- Insurers and related associations (0);
- Public authorities and civil society representatives (11);
- Technical experts active in courts (0).

[1] All except DK, EE, EL, HR, CY, LV, LU, HU, PL, PT, SI, SE.

Responses came from 14 Member States.[2]

A **Computer-assisted telephone (CATI) survey** (29 May – 14 June 2017) covering 11 Member States[3] was addressed to producers, importers, and suppliers. 457 producers responded.[4]

61 **interviews** (3 May – end of July 2017) were held with stakeholders with experience with the Directive (17 producers, 11 consumers, 9 insurers, 24 public authorities and civil society representatives).[5]

The targeted surveys encountered some limitations:

- Low level of participation in the targeted survey: more than 400 stakeholders were contacted, but only 26 replied.
- No representative from technical experts replied.

3.3. Conference on the Evaluation of the Product Liability Directive

The European Commission held a Conference on the evaluation of the Product Liability Directive[6] in Brussels on 20 October 2017, addressed to Member State's representatives and different categories of stakeholders and aimed at exchanging views on the preliminary results of the external study on the evaluation.

4. MAIN RESULTS OF THE CONSULTATION ACTIVITIES

Several stakeholders had experience with the Directive. Most businesses dealt with claims brought by injured persons and paid for insurance; consumer associations were familiar with claims by injured persons; insurers provided specific insurance policies and paid compensations; public authorities and civil society representatives dealt with the needs of specific stakeholder categories, acted in litigation or carried out research on the Directive.

4.1 Effectiveness

The consultation aimed at understanding whether and to what extent the Directive's objectives in terms of protection of consumers, undistorted competition and free movement of goods have been achieved so far at both national and EU levels.

Most stakeholders are aware of the Directive. For most public authorities and civil society representatives, the Directive is effective as consumers benefit from the strict liability of producers, and consumers' and producers' interests are fairly balanced. For these reasons, they also believe that the system of strict liability must be maintained.

Most producers deem the Directive to be effective, as it creates a level playing field across Europe by setting the same liability rules in all Member States and balances consumers' and producers' interests, setting clear rules regardless of the product type.

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2 BE, BG, DK, EL, ES, FR, IT, LT, LU, MT, NL, SI, FI, UK.
3 CZ, DE, ES, FR, IT, LT, NL, AT, PL, SE, UK.
4 From CZ, DE, ES, FR, IT, LT, NL, AT, PL, SE, UK.
5 From BE, DK, DE, EE, ES, FR, HR, IT, CY, LU, HU, MT, NL, FI, UK.
6 See minutes of the Product Liability Conference at https://ec.europa.eu/docsroom/documents/26661:

Finally, for insurers the Directive is effective overall, as it balances consumers' and producers' interests.

However, for most consumer associations the Directive is not fully effective, as it protects producers' interests more than those of consumers.

In particular, some provisions of the Directive are seen as more effective than others:

- ***Products, not services***

For some of the stakeholders (both producers and consumers) the distinction between products and services is not clear anymore and the Directive should also cover the damages caused by services; other producers believe that the Directive should not cover these damages.

For more than half of the public authorities and civil society representatives consulted, the distinction between products and services is not adequate and the Directive's scope should be extended to services.

The vast majority of consumers and their associations underline that it may be difficult to distinguish a product from a service, as they are often bundled together, and they would favour a regime covering both products and services.

On the contrary, for more than half of the businesses, the distinction between products and services is adequate and there is no need to extend the Directive to services.

- ***What about new technological developments?***

The application of the Directive to new technological developments is not straightforward.

The feedback from stakeholders on new technological developments is quite divergent: for some stakeholders (including many producers, some consumers, insurers and public authorities/civil society representatives) there is no need to update the Directive vis-à-vis new technological developments. Others from all consulted categories find it difficult to apply the Directive to these items, given their intangible nature and increasing complexity.

More specifically, for almost half of the public authorities and civil society representatives and almost all consumers, the scope of the Directive should be broadened to new technological developments and balance consumers' safety and innovation, considering the distinction between products and services and the concept of "defect" as not adequate for these developments.

Most businesses consider apps, non-embedded software and IoT components to be "products" pursuant to the Directive, while they have diverging views as to whether the liability is adequately allocated among the different operators. Furthermore, for them defect is adequately defined as to damages caused by an advanced robot or an autonomous system.

For a large majority of businesses the exemptions under the Directive are adequate for new technological developments and the Directive already applies to them; they consider the Directive to be fit-for-purpose and neutral to different technologies.

Similarly, for a large majority of insurer associations there is no need to adapt the Directive to new technological developments.

- ***Burden of proof***

For a large majority of public authorities and civil society representatives the proof of defect and of the link between it and the damage is burdensome to consumers.

Almost all consumer associations see this burden as the most frequent obstacle to obtaining compensation, especially with regard to new technological developments and increasing product complexity.

However, only a few insurers view the burden of proof as onerous in practice.

Most businesses think that removing this burden would be disadvantageous: indeed, the burden of proof upon the injured person is essential as a basis for the claim; removing it would make the Directive unfair.

- ***Damages to property***

For a slight majority of public authorities and civil society representatives, the €500 threshold should be removed to allow compensation of smaller damages. Also, the majority of consumer associations would lower the threshold, as the price of many products has decreased over the years.

While most businesses do not favour a modification of the threshold, a significant share of small firms (24%) favour decreasing the threshold.

For the majority of stakeholders, except for insurers, it is difficult to apply the condition that the item of property is of a type ordinarily intended for private use or consumption and was used by the injured person mainly for his own private use or consumption; they believe it should be removed.

For half the public authorities and civil society representatives this provision should be removed, as it is increasingly difficult to distinguish when an item of property is intended for professional or private use.

Most businesses (63%) and more than half of the consumer associations consider the distinction between private and professional use as not adequate, since products can have both uses, and the removal of such distinction would not cause any problems.

Almost all insurers associations consider the distinction between private and professional use of products as clear enough and no change is needed.

The Conference on Product Liability gave the opportunity to further elaborate on the views obtained through the use of other consultation tools. On effectiveness of the Directive, the majority of manufacturers and insurers considered that the Directive meets its objectives and that it is future-proof for the new technological developments. In their opinion, any revision at this stage would be premature. However, consumers were in favour of a revision of the Directive with a view to facilitate the compensation of the injured party.

4.2 Efficiency

The consultation focused on the balance between the costs borne by the producers to cover the strict liability and the burdens on the injured party to obtain compensation, as well as on aspects making it more or less efficient in ensuring strict liability of the producer.

Data on costs and benefits were expected from the targeted survey: however, the low rate of response hampered proper quantification. Data retrieved from the other consultation activities allowed carrying out only a qualitative analysis.

In particular, for more than half of the businesses, costs and benefits deriving from the Directive are well balanced.

Yet more than two-thirds of consumer associations see costs as higher for consumers: proving the defect and its link to the damage is burdensome due to increasing product complexity. For almost half of the insurers, the burden of proof can be difficult to fulfil in practice.

As a third point of view, for two thirds of the public authorities and civil society representatives, although costs relating to the Directive are acceptable for traditional products, the new technological developments could bring new costs for producers to comply with it.

4.3 Coherence

The consultation focused also on questions relating to the coherence, complementarity and consistency between the Directive and other Union actions, in particular product safety legislation and consumer protection.

The Conference on Product Liability was the occasion for the stakeholders to confirm that the Directive is perceived as coherent and consistent with the EU product safety legislation and with the rules on consumer protection. It was recalled that products placed on the European market must comply with EU safety legislation. In case that they caused damages due to a defect, consumers can bring legal action against the producer in the context of the Directive (extra-contractual liability) but also against the seller according to the contractual liability rules.

4.4 Relevance

The consultation activities aimed at understanding whether the initial needs still correspond to current needs, including needs created by innovative products. They also aimed at investigating whether the definitions of product, producer, defect and damage or the exemptions under the Directive are adequate to the technological and scientific developments.

Outcomes are quite fragmented: for most stakeholders there is a need to update the Directive vis-à-vis new technological developments, even though they have not experienced any issues in applying the Directive.

Overall, for the majority of public authorities and civil society representatives the Directive is future-proof, and the harmonisation it brought across the EU confirms its current relevance; however, they suggest a revision of the Directive in relation to new technological developments. For the vast majority of businesses the Directive is future-proof and relevant due to the harmonisation it brought.

For the vast majority of consumer associations the Directive has harmonised product liability rules. However, they favour a revision of the Directive to take into account the new technological developments, as do public authorities and civil society representatives, because of the lower relevance of the Directive vis-à-vis the new needs and the limited applicability of the concepts of the Directive to new technological developments.

4.5 EU added value

The consultation aimed at gathering feedback on whether strict liability continues to require action at the EU level. Moreover, the consultation focused on understanding the most likely consequences in case of scope reduction or repeal of the Directive or extension of its scope.

Overall, all stakeholders acknowledge the EU added value of the Directive and no stakeholder suggested to repeal it.

A majority of businesses agree that the level playing field achieved would not be possible with individual Member States action. In addition, for almost all consumer associations the protection of consumers achieved would not be feasible with only national action.

The vast majority of public authorities and civil society representatives deem that the Directive added value to the EU legal framework and policies.

The Conference on Product Liability confirmed the positions defended by the different categories of stakeholders. In addition, many participants emphasised: (i) the link between product safety and product liability rules, (ii) the difficulty for victims of undesirable effects of pharmaceutical products to prove the defect and the casual link between defect and damage in order to get compensation, (iii) the lack of evidence on the application of the Directive to the new technological developments, and (iv) the need to maintain a fair balance between the interests of the parties.

5. MAIN CONCLUSIONS

Consultation activities allowed to gather a wide range of views on the Directive in terms of what has worked well and what has not worked so well so far, as well as on expectations for the future.

Overall the Directive was viewed as being generally **effective** in achieving its objectives by public authorities, civil society, businesses and insurers representatives, though consumer organisations were more critical especially on obstacles to obtaining compensation, in particular related to the increasing complexity of providing the burden of proof, a more difficult delineation of products and services as well as the 500€ threshold for material damages.

Most stakeholder categories recognised the **efficiency** of the Directive. In particular, all categories, except for consumer associations, think the costs and benefits due to the Directive for consumers and producers are balanced.

The Directive is seen as **coherent** with the EU legislation protecting consumers, **relevant and future-proof**. Nonetheless, representatives from public authorities, civil society and consumer associations agree there are issues not adequately covered by the Directive with regard to new technological developments, while businesses are more reluctant to amending the Directive.

There was a large consensus among stakeholders that the Directive has **EU added value**.

The Conference on the Evaluation of the Product Liability Directive gave the opportunity to confirm the need to pursue the reflection on the future of the Directive in order to ensure legal certainty, in particular in relation to its application to new technologies, such as Artificial Intelligence systems and advanced robots and Internet of Things.