

Product Liability

Reform in the EU and UK



Overview

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About Osborne Clarke

The EU

The EU is replacing the Product Liability Directive 1985 on the basis that the old directive:

- Was not designed to address digital products.
- Contains definitions including "product", "defect" and "damage" which need reassessment.
- Is no longer fit for purpose in complex cases.

The European Parliament formally adopted the new directive on 12 March 2024. Following adoption by the Council, the new directive will apply to products placed on the market 24 months after entry into force of the new directive.



The UK

The UK government ran a consultation on reforming product safety regulations which concluded in October 2023. The review implicitly reflected the EU's position, by:

- Seeking views on reforming the UK's product liability regime in light of technological developments.
- Noting that definitions, such as "product" and "defect", may be out of date.
- Suggesting that liability related to complex and sophisticated products is unclear.

As at March 2024, the Office for Product Safety and Standards is considering the feedback from the consultation. Meanwhile, the UK Law Commission has noted that the Consumer Protection Act 1987 was not designed to accommodate software and technological developments and that reform is due.



Actions to take:

- Review the upcoming changes to the law.
- Assess manufacturing and marketing systems and processes.
- Consider potential litigation defence strategies.
- Review supply chain contracts that allocate liability risks.
- Monitor interpretation of the new directive by the Courts.
- Await reform in the UK – which may follow key elements of the EU approach.
- Monitor developments in related sector specific legislation (for example artificial intelligence).



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The new Product Liability Directive will:

- Bring software, AI systems and digital services within the scope of product liability law.
- Allow consumers to sue importers, manufacturers' authorised representatives, service providers and distributors.
- Bring remanufacturers into scope that make substantial modifications to products.
- Widen the scope of circumstances relevant to determining if a product is defective; including product recalls and compliance with safety regulations.
- In some cases, increase the "long stop" limitation period from 10 to 25 years, which applies after a product is placed on the market.
- Expressly include medically recognised psychological harm as an actionable injury.
- Allow consumers to seek compensation for damage in the form of destroyed or corrupted data.
- Give claimants enhanced rights to seek disclosure of documents.
- Allow courts to presume products are defective in complex cases, placing the onus on defendants to prove otherwise.
- Ensure that there is always an entity in the EU that can be held liable for a product; primarily a manufacturer, importer or authorised representative, failing which a fulfilment service provider (for example, warehousing) or distributors or online platforms.



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The change: claimants to have enhanced rights over disclosure

 **Action**

Ensure disclosable materials are fit for disclosure, including:

- Design files.
- Evidence of safety testing in design phase.
- Policies on vigilance and corrective actions.

Early disclosure demonstrating compliance and safety record can assist early resolution of case.



The change: presumption of defect in complex cases

 **Action**

Make sure you can explain your product, including:

- Product safety performance.
- Design rationale.
- Manufacturing record.

Beware of "black box" products (where the manufacturer cannot fully explain how a complex product works).



The change: extended "long stop" limitation period in exceptional cases where symptoms are slow to emerge, from 10 years to 25 years

 **Action**

- Assess your product for latent risks.
- Consider whether insurance needs to be reviewed to cover a longer timeframe.
- Be prepared to review litigation strategies, particularly where there is a risk of multi-claimant litigation over the long term.

When facing personal injury litigation, assess limitation periods at an early stage.



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