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TAKING EU PRODUCT LIABILITY LAW SERIOUSLY: HOW CAN THE PRODUCT LIABILITY DIRECTIVE EFFECTIVELY CONTRIBUTE TO CONSUMER PROTECTION?

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The 1985 Product Liability Directive (PLD) is currently being revised, with a view to adapting European Union product liability rules to the digital economy and new technologies. The ongoing discussion focuses on technical issues and apparently takes it for granted that the PLD as it stands adequately achieves the policy goals that were initially assigned to it, namely the establishment of a common market and consumer protection. However, a closer analysis shows that harmonising product liability is not needed to create a truly common market and, more importantly, that the PLD is not an effective instrument for consumer protection. A particular cause for concern is that almost no cross-border claims seem to be brought under the Directive, meaning that those injured by defective products are in effect left without a remedy when the producer is not located in the same country as they are. If the new PLD is to be more than mere poster legislation and to contribute effectively to consumer protection, more drastic changes to the current regime are needed than those that are currently being contemplated. The range of potential defendants should be broadened to include suppliers and online marketing platforms as a matter of principle, and the development risk defence as well as the application of a long-stop period in case of bodily injuries should be reconsidered.

I. Introduction[2]

Product liability can be defined as liability in damages for damage caused by products. Such damage is as old as products themselves, but product liability established itself as an iden-

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2. This article was written in May 2023 during a research stay in Oxford, where I was hosted by the Maison Française d'Oxford and the Institute of European and Comparative Law. I wish to thank Profs Pascal Marty and Matthew Dyson, the directors of these institutions, for their hospitality and support. I am also thankful to Solène Semichon from Université Paris-Panthéon-Assas for correcting my English where necessary.

tified and discrete legal topic in the 1960s in most European countries, partly under the influence of the United States (US) and at a time when the number of consumer products in circulation, as well as the number of accidents they caused, was rising sharply.[3] Damage caused by products was then handled with the 'traditional' rules of contract or tort law, often based on fault. However, there existed a strong doctrinal movement favouring a shift from traditional fault-based liability to strict liability[4] or even no-fault compensation schemes. Strict liability for products appeared to many as particularly desirable, especially in view of the tragedies caused by certain products like Thalidomide/Contergan and of legal developments across the Atlantic.[5] It had established itself as the new standard in the US after landmark decisions by the California Supreme Court[6] and the adoption of the Second Restatement of Torts.[7] Academics and courts in different European countries therefore struggled to suggest or develop specific rules on product liability that would make compensation easier. Yet, despite significant evolutions in some countries, the state of the law across Europe generally appeared as patchy and unsatisfactory.[8]

It was in this context that the then European Economic Community (EEC), with its fresh interest in consumer protection,[9] decided to make its first foray into the field of tort law and to establish a harmonised strict product liability regime. This was primarily a political move, but it also made sense from a purely legal perspective, allowing to get several birds stoned at once. For claimants (mostly consumers), strict liability would be an improvement on fault liability. The new regime would achieve what lawyers in several Member States had been trying to do, while at the same time putting the EEC at the forefront of legal innovation. Moreover, European harmonisation appeared as a way to address the international dimension of product liability issues, perhaps best exemplified by Thalidomide/Contergan.[10] However, the realisation of that project proved more difficult than expected.[11]

3. J.-S. Borghetti, *La Responsabilité du fait des produits. Étude de droit comparé* (LGDJ 2004) 149-50; S. Whittaker, 'Introduction to Fault in Product Liability' in S. Whittaker (ed.), *The Development of Product Liability* (Cambridge University Press 2010) 1, 3-9.
4. In this article, as is commonly the case, 'strict liability' will be understood as liability not based on fault, the latter being understood as the breach of a duty to act or not to act in a certain way. See eg J. Stapleton, 'The conceptual imprecision of "strict" product liability' (1998) 6 Torts Law Journal 260; M. Cappelletti, *Justifying Strict Liability* (OUP 2022) 1. While this conception of strict liability seems rather uncontroversial, one should be aware that 'fault' is not understood in the same way in all legal systems (nor at times within one legal system) and is therefore a particularly ambiguous concept in the context of transnational legislation or comparison: M. Dyson, *Explaining Tort and Crime. Legal Development Across Laws and Legal Systems, 1850-2020* (Cambridge University Press 2022), esp. 220-96; S. Whittaker, *Liability for Products: English Law, French Law, and European Harmonization* (OUP 2005) 632-40.
5. Which were known in Europe mostly through German scholars: J.-S. Borghetti, *La Responsabilité du fait des produits. Étude de droit comparé* (LGDJ 2004) 430.
6. *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P. 2d 436 (1944); *Greenman v. Yuba Power Prods. Inc.*, 59 Cal. 2d 57, 377 P. 2d 897, 27 Cal. Rptr. 697 (1963). See also *Henningsen v. Bloomfield Motors*, 32 N.J. 358, 161 A.2d 69 (1960).
7. Restatement (Second) of Torts (1965), Section 402A: '(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.'
8. S. Whittaker, 'Introduction to Fault in Product Liability' in S. Whittaker (ed.), *The Development of Product Liability* (Cambridge University Press 2010) 1, 20-23.
9. S. Whittaker, *Liability for Products: English Law, French Law, and European Harmonization* (OUP 2005) 433.
10. ibid 432.
11. J.-L. Fagnart, 'La directive du 25 juillet 1985 sur la responsabilité du fait des produits défectueux' (1987) Cahiers de droit européen 3, § 5.

A first draft was published in 1976,[12] but it took nearly one decade before Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (the PLD) was eventually adopted.[13] The main reason for the delay was the reluctance of some Member States to move away from fault-based liability, and the fear that this would endanger the economy, by imposing too strong a financial burden (and potentially an unfair one) on industrial firms. The debate crystallised on the issue of the so-called 'development risk' defence, which allows producers to escape (strict) liability if they could not be aware of the risk posed by their products at the time when they were put into circulation.[14] In the end, a compromise was found, which included introducing the defence but allowing Member States to opt out, as well as enabling them to set financial caps on liability, as was then traditional for strict liability regimes in some countries.

In a nutshell, the PLD imposes liability on producers for damage caused by a defect in their product (Article 1). For the purpose of the Directive, a product is any movable, even though incorporated into another movable or into an immovable, and including electricity (Article 2). The producer is defined as the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting their name, trademark or other distinguishing feature on the product presents themselves as its producer (Article 3(1)). Any person importing the product into the EU can also be made liable (Article 3(2)). Where the producer or the importer cannot be identified, each supplier of the product shall be treated as their producer unless they inform the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product (Article 3(3)). According to the PLD, a 'product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account' (Article 6(1)). The types of damage that can be compensated are bodily injuries and – subject to a lower threshold of € 500 – damage to property, provided the item of property (i) is of a type ordinarily intended for private use or consumption, and (ii) was used by the injured person mainly for his own private use or consumption (Article 9(1)). It is for the injured person to prove the damage, the defect and the causal relationship between defect and damage (Article 4). If they do so, various defences are available to the producer, including the existence of a 'development risk' (Article 7). Finally, two limitation periods are applicable to claims under the PLD: a three-year period running from the day on which the claimant became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer (Article 10(1)); and a ten-year 'long-stop' period running from the date on which the producer put into circulation the actual product which caused the damage (Article 11).

Liability under the PLD is regarded as strict, since it is based on the product's defectiveness, and not on the producer's or someone else's fault. The definition of defectiveness given at Article 6 is strongly reminiscent of the 'consumer expectations' test put forward in the Second Restatement of Torts[15] and testifies to the US influence on early European product

12. Proposal to Council for Directive of 9 Sept. 1976, OJ C 241, 14 Oct. 1976, 1.
13. OJ L 210, 7 Aug. 1985, 29.
14. The inclusion of the defence was a demand of the British Conservative Government under Margaret Thatcher: D. Fairgrieve and R. Goldberg, *Product Liability* (3rd edn, OUP 2020) § 13.33.
15. More precisely, the notion of consumer expectations was mentioned in comment g of section 402A of the Restatement Second (Torts). Section 402A advocated strict liability in tort for products 'in a defective condition unreasonable dangerous to the user or consumer' and comment g suggested that a product was unreasonably dangerous when in a condition 'not contemplated by the ultimate consumer'.

liability.[16] The paradox, or irony,[17] is that when the PLD was eventually adopted after a decade of discussion, US courts and lawyers were to a large extent turning their back on the consumer expectations test, which they regarded as ill-fitted for design and instruction defects.[18] At the time of its adoption, the PLD thus reflected an outdated state of legal scholarship, at least from a US perspective. This did not necessarily bid well for the future of product liability in Europe.

As a matter of fact, even though the PLD attracted considerable doctrinal attention and served as a model for product liability legislation in several countries outside the ECC,[19] it initially looked as though its practical relevance would remain very limited. The Member States had three years to transpose the Directive, but most of them seemed in no hurry to do so and exceeded the deadline. Even after the transposition, very few cases were reported in the 1990s and early 2000s in which the PLD regime was applied by national courts.[20] Things have slowly been changing, though. The number of national court decisions applying the regime seems to be on the rise in most European Union (EU) jurisdictions, though it remains quite low, and the Court of Justice of the European Union (CJEU, formerly the Court of Justice of the European Communities or CJEC) has been steadily developing its case law on the PLD. At any rate, the Directive has become an established feature of European private law. The regime it sets out is familiar to (tort) lawyers across the EU and even beyond[21] – they may not always be enthusiastic about it, but they usually accept it as part of the landscape of their legal system.[22] As is often the case, age has brought respectability, so that nearly four decades after the adoption of the PLD, hardly anybody in the EU questions its existence, nor the idea that producers should be strictly liable for damage caused by a safety defect in their products.

16. P. Schlechtriem, 'Presentation of a Product and Products Liability under the EC Directive' (1989) 9 Tel Aviv U. Stud. L. 33.
17. G. L. Priest, 'The Modern Irony of Civil Law: A Memoir of Strict Products Liability in the United States' (1989) 9 Tel Aviv U. Stud. L. 93: 'The irony is that, just at the time that the devastating implications of the strict liability approach are becoming clear in the U.S., the European community has decided to impose strict products liability upon its member states.'
18. On the distinction between different types of defects, see infra III.A.1.b.
19. Countries that have drawn inspiration from the PLD for their own product liability legislation include European nations like Norway (see B. Askeland, 'Norway' in P. Machnikowski (ed.), *European Product Liability. An Analysis of the State of the Art in the Era of New technologies* (Intersentia 2016) 359, 360) and Switzerland (see B. A. Koch and P. Pichonnaz, 'Der Entwurf einer neuen EU-Produkthaftungsrichtlinie aus schweizerischer Sicht' (2023) 119 Schweizerische Juristen-Zeitung 627, 628), but also many non-European ones like Australia (see M. Lunney, 'Product Liability in the Rest of the World' in H. Koziol and others (eds), *Product Liability. Fundamental Questions in a Comparative Perspective* (De Gruyter 2017) 413, 414), Japan (see Y. Shiomi, 'Product Liability in Japan' in H. Koziol and others (eds), *Product Liability. Fundamental Questions in a Comparative Perspective* (De Gruyter 2017) 62, 66), Korea (see K. Y. Yeun, 'Entwicklung und Tendenz der Produkthaftung in Korea' in *Festschrift für Erwin Deutsch* (Carl Heymanns Verlag 1999), 405), Malaysia (see A. Che Ngah, S. Shaik Ahmad Yusoff and R. Ismail, 'Product Liability in Malaysia' in H. Koziol and others (eds), *Product Liability. Fundamental Questions in a Comparative Perspective* (De Gruyter 2017) 120, 122), or Québec (see M.-A. Arbour, 'Canada' in P. Machnikowski (ed.), *European Product Liability. An Analysis of the State of the Art in the Era of New technologies* (Intersentia 2016) 479, 482).
20. This was noted by many authors, and also in the Second Report from the Commission on the Application of Directive 85/374 on Liability for Defective Products, COM (2000) 0893 final.
21. See supra fn. 19. Besides, in the UK, Part I of the Consumer Protection Act 1987 which transposed the PLD has remained in force despite Brexit.
22. There are some exceptions, however: see H. Koziol, 'Introductory Lecture' in H. Koziol and others (eds), *Product Liability. Fundamental Questions in a Comparative Perspective* (De Gruyter 2017) 13, 20-25; D. Nolan, 'Against Strict Product Liability' in *Questions of Liability: Essays on the Law of Tort* (Hart Publishing, forthcoming 2023).

This is confirmed by the reform process of the PLD now under way. With the development of new technologies, including artificial intelligence (AI), and the digitalisation of the economy becoming a major concern at the EU level, the European Commission set up in 2018 an Expert Group on Liability and New Technologies, the task of which was to analyse how to adapt liability rules to the challenges raised by these technologies. Product liability obviously plays a major role in that respect and the idea was originally to draft 'guidelines' that would help the courts apply the PLD to new products, including AI, born out of these new technologies.[23] Despite the Expert Group's hard work,[24] these guidelines never came out. Instead, the Commission decided to embark on a more ambitious project and to officially revise the PLD. After a public consultation and an impact assessment were carried out, the Commission published a Proposal for a new Directive on Product Liability (the Draft PLD) on 28 September 2022.[25]

The Draft PLD has already been the subject of many analyses.[26] From a technical point of view, it is a convincing project. Drawing on the PLD and accompanying case law, as well as on a vast body of pan-European scholarship and previous proposals and recommendations,[27] the Draft 'modernises' product liability by adapting it to the new digital environment. This is not an easy task, as digitalisation has an impact on nearly all aspects of product liability, be it the definition of products, the type of damage that should be compensated or the moment when defectiveness is assessed. Given the complexity of these issues, the modernisation of the PLD comes at the cost of a disconcerting technicality, which stands in marked contrast to the relative straightforwardness of the current Directive. Nevertheless, and subject to some improvements which commentators have suggested, and which

23. The status of these guidelines always remained unclear. Whether or not their nature would have been similar to that of existing guidelines enacted by the European Commission, such as those on the setting of fines in case of breach of competition law rules (the status of which has been at least partially determined by the CJEU: see esp. Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri A/S et al. v. Commission of the European Communities* [2005] ECLI:EU:C:2005:408), guidelines pertaining to the PLD might have achieved an extension of the instrument's field of application (esp. by including software and algorithms within the definition of products) but they could not have adapted the existing regime to the specificities of such products, nor could they have broadened the range of potential defendants or mended the other shortcomings of the PLD (on which see infra II).
24. Materialised by an interesting report: 'Expert Group on Liability and New Technologies – New Technologies Formation, Liability for Artificial Intelligence and Other Emerging Digital Technologies' (2019) <https://data.europa.eu/doi/10.2838/573689> accessed 30 May 2023.
25. Proposal for a Directive of the European Parliament and of the Council on liability for defective products, 28 Sept. 2022, COM (2022) 495 final.
26. See, eg S. Lohsse, R. Schulze and D. Staudenmayer, *Liability for AI* (Nomos 2023); G. Spindler, 'Die Vorschläge der EU-Kommission zu einer neuen Produkthaftung und zur Haftung von Herstellern und Betreibern Künstlicher Intelligenz' (2022) Computer und Recht 689; G. Wagner, 'Liability Rules for the Digital Age – Aiming for the Brussels Effect' (2022) 13(3) J. Europ. Tort L. 191.
27. The European Law Institute (ELI), in particular, has played a major role in mustering European scholarship to react to the European Commission's initiatives on product liability and to provide potential content for the future PLD. See esp. Twigg-Flesner (ed.), *Guiding Principles for Updating the Product Liability Directive for the Digital Age, ELI Innovation Paper* (2021) <https://europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Guiding_Principles_for_Updating_the_PLD_for_the_Digital_Age.pdf> accessed 30 May 2023; ELI, 'Response of the European Law Institute to European Commission's Public Consultation on Civil Liability Adapting Liability Rules to the Digital Age and Artificial Intelligence' (2022) <https://europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Public_Consultation_on_Civil_Liability.pdf> accessed 30 May 2023; ELI, 'Draft of a Revised Product Liability Directive' (2022) <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Draft_of_a_Revised_Product_Liability_Directive.pdf> accessed 30 May 2023; ELI, 'Feedback on the European Commission's Proposal for a Revised Product Liability Directive' (2023) <https://www.europeanlawinstitute.eu/news-events/news-contd/news/eli-provides-feedback-on-the-european-commissions-proposal-for-a-revised-product-liability-directiv/> accessed 30 May 2023.

will hopefully be implemented as a result of the ongoing tripartite negotiations between the European Commission, the European Parliament and national governments, the Draft PLD stands a good chance of giving birth to a new EU Directive on product liability by the Spring of 2024. It is hoped that this new Directive will establish itself as a worldwide benchmark for product liability in the context of a digitalised economy and trigger the so-called 'Brussels-effect',[28] perhaps best exemplified by the General Data Protection Regulation (GDPR),[29] whereby EU legislation imposes itself as a global model.[30]

Strikingly, the discussion around product liability reform and the Draft PLD has focused on technical issues. There has hardly been any debate on the policy objectives of product liability, let alone on the opportunity of strict liability for products. The implicit assumption is clearly that these policy issues have been settled once and for all by the current PLD. Why the European Commission should rely on it is obvious. The Commission understands its task as making, and not unmaking, legislation. It has no interest in questioning the justifications and aims of a directive which it has consistently presented as an 'effective and relevant instrument'.[31] It is perhaps more surprising that academics have not been more critical. Except for a few authors, scholarship on the PLD and product liability reform seems to have been very positivistic.[32] Once adopted, the PLD has generally been taken for granted and the discussions have concentrated on the many technical questions raised by its application; and the same holds true for the reform. Yet, the policy choices which underly the PLD and the Draft PLD deserve discussion.

Modern legislation is typically finalised, in the sense that is intended to achieve a given social, economic, or political goal (or a set of such goals). Its purpose is not to say what the law is, from a jus-naturalist perspective, but to create the law, so as to produce a certain result, which is regarded as socially, economically, or politically desirable. This is particularly true of EU legislation. The EU and its forerunner, the EEC, were created with a view to achieving precise goals, and their (considerable) legislative activity has been geared towards this achievement, either directly or indirectly. Accordingly, each item of EEC or EU legislation is endowed with 'policy' or 'strategic' objectives. These should be understood as the final goals which the piece of legislation seeks to achieve, as opposed to the 'imme-

28. G. Wagner, 'Liability Rules for the Digital Age – Aiming for the Brussels Effect' (2022) 13(3) J. Europ. Tort L. 191.
29. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.
30. For an example of the Draft PLD's echo beyond the EU, see B. A. Koch and P. Pichonnaz, 'Der Entwurf einer neuen EU-Produkthaftungsrichtlinie aus schweizerischer Sicht' (2023) 119(12) Schweizerische Juristen-Zeitung 627.
31. Explanatory Memorandum of the Draft PLD, 7, mentioning European Commission, 'Evaluation of Council Directive 85/374/EEC on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products – Final Report' (2018) <https://op.europa.eu/en/publication-detail/-/publication/d4e3e1f5-526c-11e8-be1d-01aa75ed71a1/language-en> accessed 16 May 2023. The various reports that have been published on the Directive, and which are mostly self-serving prose by or on behalf of the European Commission, are accessible at <https://single-market-economy.ec.europa.eu/single-market/goods/free-movement-sectors/liability-defective-products_en> accessed 10 February 2023. For a detailed analysis of the first reports findings, see S. Whittaker, *Liability for Products: English Law, French Law, and European Harmonization* (OUP 2005) 444-50.
32. Among the most significant exceptions are authors from the common law world: see esp. J. Stapleton, 'Three Problems with the New Product Liability' in P. Cane and J. Stapleton (eds), *Essays for Patrick Atiyah* (Clarendon Press 1991) 257; S. Whittaker, *Liability for Products: English Law, French Law, and European Harmonisation* (OUP 2005).

diate' or 'specific' objectives, which are the technical measures put in place to reach these final goals.[33]

Enunciating the policy objectives of an EEC or EU piece of legislation – something normally done it the recitals – can be seen as a formal exercise, not deserving too much attention. However, legislation should never be an end in itself (although it is too often the case, as the sociology of organisations tells us). The PLD, like any other piece of legislation, only makes sense against a useful and realistic purpose. If it does not, then it should not have been adopted in the first place or it should be repealed. The policy objectives of the PLD must therefore be taken seriously. They cannot be discarded offhandedly when discussing the Directive, as if they were purely decorative. The many technical discussions on the PLD are interesting and useful, but they make sense only if the PLD's aims are valid and can be achieved.

The present article is an attempt to deflect the ongoing discussion on product liability reform from purely technical issues to more basic questions concerning the *raison d'être* of the PLD. What are the objectives of that Directive? Were they reasonable and have they been achieved? And if not, what should be done for the future PLD to achieve them? In the next section, I will try to show that the PLD as it stands cannot and does not achieve the objectives that were assigned to it. These objectives were not realistic in the first place and the PLD has not lived up to them. It should therefore come as no surprise if the PLD's application record is extremely disappointing (II). Based on these findings, I will consider what changes ought to be made in the current EU product liability regime to give the future PLD a better chance to become a truly useful piece of legislation (III). Finally, I will offer some conclusive remarks (IV).

II. Assessing the PLD

The PLD's policy objectives are set out in its first two recitals, which provide:

> 'Whereas approximation of the laws of the Member States concerning the liability of the producer for damage caused by the defectiveness of his products is necessary because the existing divergences may distort competition and affect the movement of goods within the common market and entail a differing degree of protection of the consumer against damage caused by a defective product to his health or property;
> Whereas liability without fault on the part of the producer is the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production'.

The first recital thus sets out three objectives for the PLD: creating a level playing field for producers; facilitating the free movement of goods; and harmonising consumer protection. The second recital sets out a fourth objective, namely 'the fair apportionment of the

33. This distinction is clearly put forward in European Commission, 'Evaluation of Council Directive 85/374/EEC on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products – Final Report' (2018) <https://op.europa.eu/en/publication-detail/-/publication/d4e3e1f5-526c-11e8-be1d-01aa75ed71a1/language-en> accessed 16 May 2023.

risks inherent in modern technological production', and links it to liability without fault, implying that liability for fault does not achieve such a fair apportionment.

The first and third objectives are not distinct, since it can be assumed that if producers are treated the same way with respect to damage caused by their products, so will consumers suffering such damage. The second objective can also be regarded as consubstantial with the first (and third) one, given that the creation of a level playing field between producers appears to be a (necessary but not sufficient) condition of the free movement of goods. The fourth objective, on the other hand, is clearly distinct. Although the expression 'consumer protection' is not used in Recital 2, this idea clearly underlies the latter. Given the background against which the PLD was adopted (namely a situation where, at least on the face of it, liability for fault normally applied to damage caused by products), opting for strict liability means that liability for fault is not considered as striking the right balance between the interests of producers and those of consumers, and that consumer protection therefore needs to be enhanced. This is confirmed by several other recitals, which justify different technical features of the PLD by reference to 'the protection of consumers'.[34]

However, the notion of 'consumer protection' is both misleading and ambiguous. It is misleading insofar as consumers are not the only persons protected by the Directive. Admittedly, the types of damage covered by the instrument mean that, in practice, only natural persons can rely on the PLD. On the other hand, anyone physically injured by a defective product can have a claim against the producer, even if they were not acting as a consumer at the time of the injury (as may be the case of an employee injured by a defective device at work). It would therefore be more accurate to speak of 'protection of injured persons'. However, in keeping with the PLD and common usage, 'consumer protection' will be the expression used in this article.

'Consumer protection' is an ambiguous notion because it can have at least two different meanings. Under the first one, which could be termed the stronger sense, consumer protection refers to the direct protection of consumers (or other potentially injured persons), namely the avoidance of injuries to their interests. In the context of product liability, such direct protection is achieved when damage is avoided. In the stronger sense of the term, consumer protection therefore means fewer defective products and fewer injuries, and collapses into deterrence. In a weaker sense, consumer protection in the context of product liability refers not to the avoidance of damage, but to the facilitation of compensation. In other words, an instrument achieves consumer protection in that sense if it makes it easier for consumers (or injured persons) to be compensated for damage caused by products. The two conceptions are not mutually exclusive. Typically, rules on unfair contract terms aim both at deterring professionals from including such terms in their contracts and at providing redress for consumers if such terms nevertheless find their way into these contracts. As first glance, it is not obvious if the PLD adopts the stronger conception (deterrence) or the weaker conception (compensation) of consumer protection, or both. A critical appraisal of

34. Recital 4 (range of persons liable); Recital 5 (joint and several liability in case of multiple tortfeasors); Recital 8 (lack of incidence of third parties' fault); Recital 9 (types of damage covered); Recital 12 (lack of contractual derogation); Recital 13 (preservation of contractual and non-contractual claims based on other grounds than that of the Directive; and preservation of special national liability regimes in the sector of pharmaceuticals); Recital 15 (possibility to set aside the exclusion of primary agricultural products and game from the scope of the Directive); Recital 16 (possibility to set aside the development risk defence); Recital 17 (conditions under which Member States can set financial limits to the liability established by the Directive).

the PLD's objectives will help to clarify this (A). Whether these objectives have been achieved in practice will be considered next (B).

A. Unconvincing Objectives

The two policy objectives assigned to the PLD are compatible only up to a certain point. If consumer protection were the sole aim of the PLD, the latter should be a minimum harmonisation directive, as is (or was) normally the case with 'true' consumer law directives, and Member States should be allowed to introduce rules that are even more favourable to consumers than those in the PLD.[35] However, to do so would call into question market harmonisation, and would thus run counter to the other objective of the PLD, namely the proper functioning of the common market. It is therefore necessary to rank these two objectives to know which one should be made to prevail in case they come into conflict.

It did not take long for the CJEC to analyse the PLD as a full harmonisation directive, thus clearly picking the establishment of a common market as its prevailing objective. As a consequence, France and Greece were pointed at in 2002 for incorrectly transposing the PLD and had to modify the national implementation provisions in which they had departed from the Directive to grant better rights to consumers and claimants generally.[36] At the same time, the application of a Spanish strict liability regime that afforded greater protection to injured parties than the PLD was barred in the name of full harmonisation.[37] A few years later, some consumer-friendly aspects of the Danish transposition provisions were also found to violate the Directive.[38]

The position taken by the CJEC can hardly be challenged on technical grounds. The PLD is clearly not a minimal harmonisation directive, as is shown for example by the permission granted to Member States to derogate from it on certain points only (Article 15). Besides, the PLD was adopted on the basis of Article 100 of the Treaty establishing the European Economic Community (EEC Treaty),[39] which gave the EEC competence to 'issue directives for the approximation of such provisions (…) as directly affect the establishment or functioning of the common market.' By contrast, there was no provision in the EEC Treaty mentioning consumer protection back in 1985.[40]

Whether the priority given to the establishment of a common market over consumer protection is justified from a policy point of view is another question, the answer to which depends at least partly on how credible these two objectives are. The problem is that neither of them is truly convincing, though for different reasons. To put things bluntly, product

35. Being more favourable to consumers, these rules would presumably have a stronger deterrent effect and make it easier for consumers to be compensated in case of damage.
36. C-52/00 *Commission v. France* [2002] ECR 2002 I-03827, ECLI:EU:C:2002:252; C-154/00 *Commission v. Greece* [2002] ECR 2002 I-03879, ECLI:EU:C:2002:254.
37. C-183/00 *María Victoria González Sánchez v. Medicina Asturiana SA* [2002] ECR 2002 I-03901, ECLI:EU:C:2002:255.
38. C-402/03 *Skov Æg v. Bilka Lavprisvarehus A/S and Bilka Lavprisvarehus A/S v. Jette Mikkelsen and Michael Due Nielsen* [2006] ECR 2006 I-00199, ECLI:EU:C:2006:6.
39. Now Article 114 of the Treaty on the Functioning of the European Union (TFEU).
40. Since the EEC had not been given competence to legislate on consumer protection in 1985, it can be argued that the PLD was not validly adopted: see J.-S. Borghetti, *La Responsabilité du fait des produits. Étude de droit comparé* (LGDJ 2004) 428-29; J. Stapleton, *Product Liability* (Butterworths 1994) 53-60. However, its validity was never challenged in court and consumer protection has since been included within the EU's sphere of competence (Articles 12 and 169 of the TFEU).

liability harmonisation is not needed for the establishment of a common market (1), and the PLD does not take consumer protection that seriously (2).

1. Product Liability Harmonisation Is Not Needed for the Establishment of a Common Market

Article 100 of the EEC Treaty being the only available legal basis for the adoption of the PLD in 1985, heralding the establishment of a common market as the Directive's primary objective may appear as an opportunistic move by the European Commission. This view is supported by the fact that the PLD itself seriously limits its ability to harmonise product liability across Europe by opening some options to the Member States (Article 15) and by excluding different types of damage from its scope. As Simon Whittaker rightly noted: 'the extent to which the Directive itself qualified its own purported purpose in harmonisation is quite remarkable.'[41] As a consequence, the PLD's official objective of establishing a common market should arguably not be taken at face value. On the other hand, what has been written has been written, and the Court of Justice relied on Article 100 to prioritise the establishment of a common market over consumer protection. Besides, the European Commission has chosen to retain both objectives in the Draft PLD (Recital 1). Establishing a common market is therefore an objective that must be taken seriously.

Harmonising product liability for the sake of achieving this objective rests on the idea that product liability can distort competition between economic operators from different Member States. To be more precise, there are two underlying assumptions justifying the adoption of the PLD to establish a truly common market. The first one is that harmonised rules are needed if economic operators are to be treated in the same way when answering for damage caused by their products. The second one, which is more general in nature, is that differences in civil liability, including product liability, can have a significant impact on the costs borne by economic operators, and thus on their performances and on the decisions they take.

Whether the first assumption is justified hinges on private international law. Under EU law, liability for damage caused by defective products is normally governed by the law of the country in which the person sustaining the damage has their residence, or in which the product is marketed, or in which the damage occurs. This is in essence the solution set out by Article 5(1) of the Rome II Regulation,[42] which is very close to the one provided in the Hague Convention of 2 October 1973 on the Law Applicable to Products Liability.[43] Even before the Rome II Regulation was adopted, there was a distinct tendency by courts to sim-

41. S. Whittaker, *Liability for Products: English Law, French Law, and European Harmonization* (OUP 2005) 436. On the limited scope of the harmonisation achieved by the PLD, see also P. Machnikowski, 'Conclusions' in P. Machnikowski (ed.), *European Product Liability. An Analysis of the State of the Art in the Era of New technologies* (Intersentia 2016) 669, §§ 8-23.
42. Regulation (EC) N° 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40. I assume that 'product liability' as understood in the PLD is covered by Article 5 of the Rome II Regulation, even though the scopes of application of the latter and the former do not necessarily coincide: S. Whittaker, 'The Product Liability Directive and Rome II Article 5: "Full Harmonisation" and the Conflict of Laws' (2011) 13 The Cambridge Yearbook of European Legal Studies 435.
43. See esp. Articles 4 and 5. Only five EU countries have ratified this Convention.

ply apply the *lex fori* when confronted with a product liability case with an international dimension.[44]

As a result, when damage is caused by a product in one country, the producer will normally not be treated differently depending on its nationality, or where it has its main place of business, or where the product was manufactured. Save in exceptional cases,[45] the origin or nationality of the producer has no impact on the applicable product liability rules, and producers from one country marketing their products in another Member State do not risk being discriminated against due to their nationality. Product liability is therefore not a source of direct discrimination between economic operators from different Member States.

The second assumption underlying the harmonisation of product liability for the sake of the establishment of a common market does not rest on more solid ground. The extent to which legal rules generally have an impact on costs or the behaviour of economic operators is a matter for debate.[46] At any rate, civil liability constitutes only a small subset of the legal system and, as a rule, its economic impact is most likely very limited. There are very good reasons for that, only some of which can be mentioned here. Civil liability is seldom a certain consequence of a given business decision. It is rather a risk, the materialisation of which may not occur until long after the decision. The magnitude of that risk is also limited, given the general under-enforcement of civil liability rules.[47] It is therefore unlikely that such a remote and limited risk will bear heavily on the decision to, say, develop or market a product. Besides, those who take the decision will often not be affected directly by any liability which may ensue. It is the company that will be made liable, and not its directors or whoever took the decision in its name; and given the delay between the decision and the moment when liability is effectively recognised, the person who took the decision may not have an interest in the company anymore when this occurs. This further reduces the incentive to consider civil liability rules when making business decisions.[48]

Admittedly, in the middle of the 1980s, a fit of panic apparently seized US companies and insurers due to product liability allegedly getting out of control.[49] However, the episode was short-lived,[50] and its importance may have been exaggerated in the wider context of the bitter US debate on tort law reform. Moreover, several features of the US system, like limited social security coverage, the possibility to bring class actions, the availability of punitive damages and the widespread use of contingency fees by lawyers greatly increase the incen-

44. C. Wasserstein Fassberg, 'Products Liability and the Conflict of Laws: Theory and Practice' (1989) 9 Tel Aviv U. Stud. L. 205, 227-30.
45. See Articles 5(1), par. 2, and 5(2) of the Rome II Regulation.
46. See the thought-provoking article of S. Sugarman, 'Doing Away with Tort Law' (1985) 73 California L. Rev. 558. On the lack of clear-cut empirical evidence on the subject, see P. Fenn and N. Rickman, 'Personal injury Litigation' in P. Cane and H. M. Kritzer, *The Oxford Handbook on Empirical Legal Research* (OUP 2010) 235, 253.
47. Given the general under-enforcement that affects civil liability rules, see infra II.B.
48. On the equivocal conclusions that may be drawn from studies carried out in the United States on the effects of product liability rules on business decisions, see G. Schwartz, 'Reality in the economic Analysis of Tort Law: Does Tort Law Really Deter?' (1994) 42 UCLA L. Rev. 377, 405-13. For a more general review of empirical studies on the subject, see M. A. Geistfeld, 'Products Liability' in M. Faure (ed.), *Tort Law and Economics* (Edward Elgar 2009) 287, 301-04.
49. G. L. Priest, 'The Modern Irony of Civil Law: A Memoir of Strict Products Liability in the United States' (1989) 9 Tel Aviv U. Stud. L. 93, 94-96.
50. On the later evolution of product liability case law in the US, see J. A. Henderson and T. Eisenberg, 'The Quiet Revolution in Products Liability: An Empirical Study of Legal Change' (1990) 37(3) UCLA L. Rev. 479.

tives to claim and the potential economic impact of civil liability rules.[51] In Europe, there seems to be no evidence that these rules, let alone product liability ones, have a significant impact on the costs borne by economic operators, or on the decisions they make.[52]

Even if this were the case, the establishment of a common market would be put at risk only if there were significant differences between Member States in that respect. From a common market perspective, the issue is not the 'absolute' level of liability, but the variations of that level within the EEC or the EU. Here again, there is no evidence that there existed such differences when the PLD was adopted.[53] Quite to the contrary, there was already a strong convergence of product liability rules across Europe at that time.[54]

Finally, as Simon Whittaker has observed, 'the ultimate burden of liability for defective products falling on producers and suppliers depends not merely on the legal basis of their liability ("fault", "negligence", "no fault" or "defect") and on such factors as the quantification of damages and social security, but also on the incidence of liabilities in other persons', and 'on the availability and judicial practices of recourse by those other persons held liable for harm caused by defective products.'[55] In other words, the extent to which producers and other potential defendants eventually have to assume the cost of damage caused by products depends not only on the aspects of product liability governed by the PLD, but also on many other rules, starting with those on recourse, which the Directive does not even pretend to harmonise.

It is therefore not the case that the harmonisation of product liability was needed to establish a common market.[56] The economic impact of product liability rules is most likely limited; and even if it were not, the proximity of pre-existing national rules and the limited ability of the PLD to effectively harmonise the burden borne by economic operators due to damage caused by products drastically limit the Directive's potential contribution to the advent of a truly common market.

2. The PLD Does Not Take Consumer Protection So Seriously

Product liability promotes consumer protection, in the stronger sense of the term, if it deters producers or other economic operators from putting defective products on the market, thus reducing the number of accidents. However, it is doubtful if the PLD can have any significant effect in that respect.

51. M. Faure, 'Economic Analysis of Product Liability' in P. Machnikowski (ed.), *European Product Liability. An Analysis of the State of the Art in the Era of New technologies* (Intersentia 2016) 619, §§ 64-66.
52. According to some studies, the cost of product liability insurance in the 1980s accounted for less than 1% as a percentage of sales: G. Eads and P. Reuter, Designing Safer Products: 'Corporate Responses to Product Liability Law and Regulation', Rand Corporation Study R-3022-I C J 1983 46, 91, cited by D. More, 'Re-Examing Strict Products Liability's Goals and Justifications' (1989) 9 Tel Aviv U. Stud. L. 165, 166. The figure obviously needs to be updated, but there seems to be no indication that, in the EU, the cost of product liability insurance has ever been very high, nor that availability of insurance has ever been a problem: M. Faure, 'Economic Analysis of Product Liability' in P. Machnikowski (ed.), *European Product Liability. An Analysis of the State of the Art in the Era of New technologies* (Intersentia 2016) 619, § 25; S. Whittaker, 'Introduction to Fault in Product Liability' in S. Whittaker (ed.), *The Development of Product Liability* (Cambridge University Press 2010) 1, 50.
53. J. Stapleton, 'Three Problems with the New Product Liability' in P. Cane and J. Stapleton (eds), *Essays for Patrick Atiyah* (Clarendon Press 1991) 257, 281.
54. See J.-S. Borghetti, *La Responsabilité du fait des produits. Étude de droit comparé* (LGDJ 2004) 194.
55. S. Whittaker, *Liability for Products: English Law, French Law, and European Harmonization* (OUP 2005) 564.
56. M. Faure, 'Economic Analysis of Product Liability' in P. Machnikowski (ed.), *European Product Liability. An Analysis of the State of the Art in the Era of New technologies* (Intersentia 2016) 619, § 33.

First, it should be kept in mind that the Directive did not arrive in a legal vacuum. Only if it has increased the level of deterrence compared with the previous state of the law has it really improved consumer protection. Economic theory tells us that, in an 'ideal world' with rational economic operators and no transaction costs, strict liability does not increase the level of precaution of potential tortfeasors beyond what is achieved through liability for fault, because it does not make sense, from an economic point of view, to avoid damage if the cost of avoiding it is greater than the cost of compensating for it. Of course, we do not live in an ideal world, and it is very difficult to say if, in practice, a shift from liability for fault to strict liability (which is what the PLD purported to achieve) really has no impact on product safety. However, civil liability rules probably have little influence on the behaviour of economic operators, as has just been said,[57] and whatever empirical evidence there is confirms that the impact of product liability on product safety and the number of accidents is at best very limited.[58] As Bernhard Koch put it nicely: 'Probably the by far most over-estimated effect of tort law is deterrence.'[59] To take just one example, France shifted from a strict to a super-strict liability regime for traffic accidents in 1985[60] but this apparently did not have any significant effect on traffic accidents statistics (which were running very high). By contrast, what did have a major impact was the multiplication of radars and speed controls a few years later. This would suggest that, if one wants to increase the safety of products, one should insist on safety rules and controls rather than on product liability. Furthermore, as shall be seen in more detail below, the PLD did not introduce a radical change from pre-existing national product liability rules. In many cases, liability based on defectiveness is not that different from fault-based liability.[61]

The PLD is therefore not apt to have a significant positive effect on consumer protection, understood as a reduction in the number of damaging products in circulation. If the Directive is to contribute to consumer protection, then it must be the weaker form of such protection, ie making compensation easier. In that sense, consumer protection is an objective that is certainly not out of reach for the PLD. Such an instrument can undoubtedly raise the level of consumer protection beyond what is provided for by national laws. The question is whether the drafters of the PLD ever really wanted to do so.

As we know, the consumer protection objective is subordinated to the establishment of a common market. It is also counterbalanced by the need to consider the interests of producers as well. By its very nature, tort law seeks a balance between the interests of the various stakeholders, starting with potential claimants and potential defendants. Whatever the type of liability that is adopted, protection of the former cannot totally ignore the interests of the latter. This is made clear by Recitals 2 and 7 of the PLD, which explicitly speak of a 'fair apportionment of risk' between injured persons and producers. Consumer protection in the Directive cannot therefore be understood as implying a sacrifice of the producers' interests. In practice, as the many defences available to defendants demonstrate,[62] the desire

57. See supra II.A.1.
58. In the words of two authors who reviewed available empirical studies, '[t]hese studies conclude that product liability has had no noticeable impact on accident rates': A. M. Polinsky and M. Shavell, 'The Uneasy Case for Product Liability' (2010) 123 Harvard L. Rev. 1437, 1455.
59. B. A. Koch, 'Why Tort Law Seems to Fail Sometimes' in H. Koziol and U. Magnus (eds), *Essays in Honour of Jaap Spier* (Jan Sramek Verlag 2016) 137, 144.
60. On which see J.-S. Borghetti, 'Extra-Strict Liability for Traffic Accidents in France' (2018) 53(2) Wake Forest L. Rev., 265.
61. See infra III.B.1.
62. See infra III.B.2.

to limit the burden on producers or other economic operators has led to restricting consumer protection in different ways, quite independently from common market concerns.

The result is a paradoxical and rather uncomfortable situation. The PLD's first objective is not a realistic one since harmonising product liability would likely not have any significant impact on the establishment of a common market. The second objective, if understood as the weaker form of consumer protection, is much more convincing but somewhat of a *trompe-l'œil* since it is subordinated to the first (unrealistic) objective and is also tempered by a strong desire to limit the financial burden on producers. Given this situation, the PLD was doomed to fail, in the sense that there was no way in which it could achieve the objectives assigned to it. Unfortunately, this is confirmed by the (limited) available data on the application of the Directive.

B. Limited Application

No quantitative study has apparently ever been carried out to measure the impact of the PLD on the establishment of a common market and on deterrence, but this would be a formidable enterprise and not worth the effort, given what has just been said on the irrelevance of these objectives. The only thing that could be measured, though with difficulty, is the effect of the PLD on consumer protection in the weaker sense of the term, ie on the compensation of those injured by defective products. From now on, 'consumer protection' will therefore be understood in that second sense only.

To precisely assess the practical impact of the PLD on consumer protection, studies should be carried out to determine the proportion of people injured by defective products receiving compensation based on tort law rules, and whether this proportion has increased thanks to the Directive. Unfortunately, no such study exists, and for very good reasons. For one thing, there seem to be no EU-wide statistics on accidents and damage caused by products, let alone defective ones. Likewise, there are no statistics on the number of people injured by products and receiving compensation.

However, whatever empirical evidence we have suggests that there is a huge number of accidents caused by defective products. In the US, the Consumer Product Safety Commission (CPSC) collects data on product-related injuries and publishes an estimated nationwide number of such injuries. The 2022 estimation is nearly 13 million.[63] Obviously, only some of these injuries are caused by defects in products, and it is impossible to know what proportion they represent. Guessing is not a very scientific approach, but if we make a cautious hypothesis and assume that this proportion is only one in ten, this still leaves more than one million injuries attributable to defective products in the US in 2022. At that same time, the total US population was 337 million, against 447 million in the EU. Assuming that the injury rate and the proportion of defective products are approximately the same in both geographical areas, this would mean that more than 1.5 million accidents are currently caused by defective products in the EU each year.

There are many reasons why this figure has no scientific value, including the fact that product safety rules are possibly more stringent in the EU than in the US, meaning that a lower proportion of all products in circulation could be defective in the former than in the latter. However, the level of product safety in the EU should not be overrated. Several stud-

63. The statistics established by the CPSC are available at <https://www.cpsc.gov/cgibin/NEISSQuery/home.aspx> accessed 6 June 2023. While the figures are still huge, they are lower than in the 1970s: D. G. Owen and M. J. Davis, *Products Liability and Safety* (7th edn, Foundation Press 2015) 11.

ies have shown that a large proportion of products sold online do not comply with EU safety standards. For example, a 2015 online safety sweep by the OECD revealed that 471 out of a selected 693 products that had been banned or recalled (68%) were still available for sale online, and that 33 of 60 selected products did not comply with product safety standards.[64] In 2020, the BEUC, an EU consumer organisation, carried out a study on 250 electrical goods, toys, cosmetics and other products bought from online marketplaces such as Amazon, AliExpress, eBay and Wish, which had been selected based on possible risks. The study found that 66% of them failed EU safety laws with possible consequences such as electric shock, fire or suffocation.[65] Two years later, that same organisation published a follow-up document, compiling several studies by national consumer organisations, with numerous examples of scaringly non-conforming and dangerous products sold online.[66] Since products are increasingly sold online, and even assuming that a larger proportion of products sold in physical stores comply with product safety rules, this means that there is a huge number of products in circulation in the EU that do not meet safety standards and that are probably defective in the sense of the PLD.[67] Not all of them cause damage, fortunately, but even if only a small proportion does, this must represent a very significant number of accidents and injuries every year. Besides, even products conforming to safety standards may be defective. Despite the lack of precise figures, it can therefore be assumed that a huge number of defective products are in circulation in the EU, and that they cause at least several hundred thousand accidents and injuries each year.

This is to be contrasted with the number of cases brought before courts based on the PLD. Here again, there are no precise EU-wide statistics but, even if the number of published cases seems on the rise, it remains ridiculously low in comparison with the likely number of accidents and injuries caused by defective products. Interestingly, this has been confirmed by the latest study on the application of the PLD commissioned by the European Commission, which was carried out by external consultants and published in 2018 (the 2018 Evaluation).[68] It comprises both a quantitative and a qualitative evaluation, only the first one being of interest to us at this stage. This quantitative evaluation covers the 2000-2016 period. It is rather disappointing as it is based on data found in public and commercial databases, the content of which is not comprehensive.[69] Additional data could probably have been obtained from various stakeholders, starting with insurance companies, but there was apparently no attempt to get it.

64. Data available at <https://www.oecd.org/sti/consumer/safe-products-online/> accessed 10 May 2023.
65. See press release of 24 February 2020 <https://www.beuc.eu/press-releases/two-thirds-250-products-bought-online-marketplaces-fail-safety-tests-consumer-groups> accessed 10 May 2023.
66. BEUC, 'Products from online marketplaces continue to fail safety tests. Compilation of research on unsafe products from online marketplaces from 2021 and 2022', 2022 <https://www.beuc.eu/reports/products-online-marketplaces-continue-fail-safety-tests> accessed 10 May 2023.
67. A product that does not conform with mandatory safety requirements normally 'does not provide the safety which a person is entitled to expect' and is therefore defective according to Article 6 of the PLD.
68. The study is available online at <https://op.europa.eu/en/publication-detail/-/publication/d4e3e1f5-526c-11e8-be1d-01aa75ed71a1/language-en> accessed 16 May 2023. The main findings of the Evaluation have been synthetised by the Commission in its Commission Staff Working Document, 7 May 2018, SWD (2018) 157 final.
69. The 2018 Evaluation contains the following precision at 14-15: 'The number of cases resolved judicially in the 28 Member States was retrieved from country fiches filled through desk research at national level. Such information, however, should be treated with caution as each country fiche was completed on the basis of the specific features of national jurisdiction and the public databases available. For instance, the French country fiche reports cases retrieved through the main public legal databases, in which the first instance decisions are not listed. Therefore, the analysis for France is limited to the decisions of the courts of appeal and the Supreme Court between 1 January 2000 and 31 December 2016. As these cases were ➤

The 2018 Evaluation has identified a total of 547 product liability claims brought before the courts in Member States over the 2000-2016 period.[70] The number is so small as to be laughable. This makes an average of 32 cases per year across more than 20 countries! The figure is of course not conclusive, since the 2018 Evaluation has clearly not identified all product liability cases brought to court (especially those which did not go farther than the first instance)[71] and a vast majority of cases are most likely settled out of court. The number of settled cases is even more difficult to apprehend. The 2018 Evaluation indicates, based on the information given by various stakeholders, that 32% of PLD-related cases are resolved in court.[72] This seems very high. In England and Wales, it has been estimated that only around 1% of these claims are resolved in court.[73] The figure is probably higher in many Member States, where the incentives to settle are not so strong, but it seems unlikely that as many as one third of the claims give rise to a judgment. However, if this were the case, then, based on the number of court cases identified by the 2018 Evaluation, only 1709 PLD-related claims would have been brought during the 2000-2016 period across the EU – an average of 95 per year. As a reminder, the overall population of the EU (then including the United Kingdom) during that period was around 500 million people.

While the 2018 Evaluation is not conclusive, other elements confirm that the number of PLD-related claims is indeed very low. Apart maybe from Austria,[74] there seems to be no EU country where such claims are said to be frequent.[75] In the case of France, the little data that is available points in the same direction. Unfortunately, the French Ministry of Justice has discontinued the publication of its Statistical Yearbook (*Annuaire statistique de la justice*), which gave a breakdown of claims brought before French courts based on their legal ground.[76] The section on 'tort and quasi-contract' included a category named 'claims for compensation for damage caused by a defective product or service'.[77] The last available figures date back to 2005, 2006, 2009 and 2010.

retrieved from commercial and public databases of case law which rarely report all cases, it may be assumed that this figure underestimates the real dimension of claims based on product liability rules in Europe (for instance, no published cases were reported for Malta, although the targeted survey has shown that product liability cases are often decided in the country's small claims courts).'

70. 2018 Evaluation, 19.
71. On the other hand, it is not clear if the methodology adopted in the 2018 Evaluation was designed to avoid the double- or even triple-counting of cases that were recorded both at the appellate and the Supreme Court levels (and even possibly at the first-instance level).
72. 2018 Evaluation, 18. Representatives of different industries regularly declare that they face (too) many product liability claims and that most of these are settled out of court, but no figures ever seem to be given, so that such declarations cannot be taken at face value.
73. P. Cane and J. Goudkamp, *Atiyah's Accidents, Compensation and the Law* (9th edn, Cambridge University Press 2018) § 10.1, citing the Report of the Royal Commission on Civil Liability and Compensation for Personal Injury (commonly known as the Pearson Commission), Cmnd 7054, 1978, vol. 2, Table 124. The authors believe the general pattern of the figures given in the Pearson Report to be still valid.
74. See the many cases cited by C. Rabl, *Produkthaftungsgesetz* (LexisNexis 2017).
75. The trend seems to apply even beyond the EU, except in the US (but it should be remembered that the PLD has been copied in many parts of the world, see supra fn. 19): M. Reimann, 'Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard' (2003) 51(4) Am. J. Comp. L. 751, 804-05.
76. The yearbooks are available online at <http://www.justice.gouv.fr/statistiques-10054/annuaires-statistiques-de-la-justice-10304/> accessed 5 June 2023).
77. 'Demandes en réparation des dommages causés par un produit ou une prestation de services défectueux'.

France. Number of claims for compensation for damage caused by a defective product or service

Year	First-instance claims	Appeals
2005	1205	365
2006	1181	340
2009	1253	236
2010*	1252	222

* Annuaire statistique de la justice, Justice civile, Détail des saisines en 2010 <http://www.justice.gouv.fr/statistiques-10054/annuaires-statistiques-de-la-justice-10304/annuaire-statistique-de-la-justice-23263.html> accessed 17 May 2023.

It is not possible to know how many of these claims concerned defective products (as opposed to services), and how many were based on the PLD regime (as opposed to another regime, such as liability for fault). It is not possible either to know precisely how the figures have evolved since then. However, a search carried out on France's probably largest database[78] for the year 2022 turns out 92 judgments by French appellate courts[79] in which the provisions implementing the PLD were invoked (though not necessarily applied). Assuming that the figures do not vary tremendously from one year to another and that a majority of appellate court decisions are recorded on the database, as seems to be the case, this suggests that around 100 PLD-related claims are currently brought before French appellate courts each year, which is not inconsistent with the figures given in the Statistical Yearbooks. Based on the general appellate rate of around 15% for civil judgments,[80] this suggests that the number of PLD-related claims brought before French first-instance courts is around 600 per year. Considering that France accounts for 15% of the EU population, and assuming the rate of accidents caused by defective products is the same across the EU, then this figure is to be contrasted with the possibly more than 100,000 accidents caused by defective products in the country each year. The 'conversion rate' of accidents into judicial claims would thus be less than 1% (France being a country where access to justice is comparatively cheap and where the incentives to settle out of court are not as strong as in some other countries).[81]

In England, Scotland and Wales, the Compensation Recovery Unit (CRU), in charge of recouping social security payments and National Health Service costs from tortfeasors, registers the number of cases and of settlements that are reported to it each year.[82] These cases and settlements are divided into categories, depending on the origin of the death or personal injury. The main categories are clinical negligence, employers' liability, motor accidents and 'public liability' (which involves accidents in public places and on privately owned land).[83] Product liability is included in the 'other' category, which represented 4,743 cases and 6,346 settlements in 2022-23, ie around 1% of the total, as well as around 1% of

78. <https://www.doctrine.fr/> While this database appears to be the most comprehensive one in France, what proportion of all the decisions by French appellate courts is included in it is not known.
79. The figures regarding first-instance judgments are much lower but not significant since most first-instance judgments are not recorded on the database.
80. This is the figure given by the French Ministry of Justice for civil courts in 2019: 'Les chiffres clés de la justice 2021', 7 <http://www.justice.gouv.fr/art_pix/chiffres_cles_2021_web.pdf> accessed 12 June 2023.
81. It should also be remembered that not all cases taken to court end up in the claimant being awarded damages.
82. These are only cases of personal injury and death, but there are probably not many product liability claims for damage to property only.
83. P. Cane and J. Goudkamp, *Atiyah's Accidents, Compensation and the Law* (9th edn, Cambridge University Press 2018) 184.

the sums recovered by the CRU.[84] Unfortunately, the proportion of product liability- (let alone PLD-) related claims or settlements in the 'other' category is not known. However, their number, though undoubtedly much higher than what the 2018 Evaluation suggests, is probably not that important. Besides, other (older) data from the United Kingdom (UK) suggests that only a very small proportion of those suffering personal injuries effectively bring a claim, especially in the case of home accidents – of which defective products are a significant potential source.[85]

Another interesting element is the product categories giving rise to PLD-related claims. The breakdown of court cases identified by the 2018 Evaluation is as follows:

Recurrence of product categories subject of claims over 2000-2016*

Product categories	Total	%
Raw materials	116	21%
Pharmaceutical products	88	16%
Vehicles	83	15%
Nuclear reactors, boilers, machinery and mechanical appliances; parts thereof	68	12%
Miscellaneous manufactured articles	44	8%
Chemicals	40	7%
Agricultural goods	38	7%
Electrical machinery and equipment and others	33	6%
Foods & beverages	16	3%
Clothing and accessories	11	2%
Cosmetics	10	2%
Total	**547**	**100%**

* 2018 Evaluation, 18-19.

Assuming this table reflects the actual breakdown of all PLD-related cases brought to court, including those that have not been identified,[86] it suggests that the litigation rate varies greatly depending on the type of product that causes damage. For instance, it is quite surprising that raw materials account for nearly four times as many cases as electrical machinery and equipment, a category which one would expect to be particularly accident-prone. One possible explanation for these variations could be the difficulty to prove defect (and causation), which is presumably greater for complex products than for simpler ones.[87] On the other hand, the significant proportion of claims involving pharmaceuticals

84. <https://www.gov.uk/government/publications/compensation-recovery-unit-performance-data/compensation-recovery-unit-performance-data> accessed 22 May 2023. For reasons unknown, the total number of claims and settlements has dropped sharply since 2020 and the number of 'other' claims and settlements has varied greatly over the 2010-2023 period. For an analysis of the evolution of personal injury claims at the beginning of the 2000s, see A. Morris, 'Spiralling or Stabilising? The Compensation Culture and Our Propensity to Claim Damages for Personal Injury' (2007) 70(3) Modern L. Rev. 349.
85. P. Cane and J. Goudkamp, *Atiyah's Accidents, Compensation and the Law* (9th edn, Cambridge University Press 2018) 185-86.
86. Which may not be the case, if only because the number of cases identified in the 2018 Study is probably too low to be statistically significant.
87. Moreover, it is possible that electricity is included in the 'raw materials' category. The figures for 2022 indicate that there is a surprisingly large number of cases involving electricity (power surges) at the appellate court level in France.

also suggests that such difficulties, which are notorious in the case of pharmaceuticals, are not the only factor to be taken account.[88] The importance of pharmaceuticals in PLD-related litigation is confirmed when analysing the French appellate court cases for 2022 mentioned earlier. However, with regard to pharmaceuticals, it should be noted that, at least in France, court cases concern a very limited number of products, the defectiveness of which has already been acknowledged in earlier decisions.

Another very significant element in the 2018 Evaluation is the number of cross-border court cases that have been identified: 'over the period 2000-2016, there were only 21 cross-border cases (ie 3% of the total number) for defective products where the injured person summoned a defendant from another Member State. Only four cases (ie 0.05% of the cases) involved a third-country defendant.'[89] These figures are all the more striking as Article 7(2) of the Brussels I Regulation grants jurisdiction, in matters relating to tort, delict or quasi-delict, to the courts of the place where the harmful event occurred or may occur.[90] Someone suffering damage caused by a defective product therefore does not need to go abroad to file a claim for compensation, even when the producer or defendant is not located in the same country as they are. Yet, claims filed against foreign defendants seem almost non-existent in product liability. This is confirmed by the analysis of the French appellate court decisions in 2022. In most of these cases, the claimant(s) and the defendant(s) were all domiciled in France. When a foreign party was involved (always a defendant), it appeared to have been brought into the case by the initial (French) defendant. Besides, there seems to have been only one appellate court case since 2022 where the PLD was invoked, and the defendant was a non-EU company.[91]

These elements of data, however patchy, suggest that the PLD is grossly under-implemented. Only very few cases that could give rise to liability based on the Directive result in the injured person being compensated by the producer or another person liable under it, after either a settlement or a court procedure. As such, the under-implementation of the PLD should not come as a surprise. While it is very difficult to measure the extent to which tort law is generally implemented, studies indicate that under-enforcement is a massive issue,[92] and there is no reason why product liability should be different.

Some reasons for under-enforcement are well known.[93] It may be difficult for someone to know that they have suffered damage caused by a product. In the case of pharmaceuticals, for example, a patient may have no idea, at least initially, that their current condition was triggered by a product taken several years before. When someone knows that their damage was caused by a product, the size of that damage may not be worth the effort of claiming compensation. And when it is, there are innumerable obstacles that must be overcome before the victim can get compensation from the liable person. The most formidable ones

88. Unfortunately, the 2018 Evaluation does not give an indication on the success rate of claims depending on the types of products involved.
89. 2018 Evaluation, 35.
90. Regulation (EU) N° 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351/1.
91. CA Douai, 5 January 2023, n° 21/03184. In that case, one of the defendants was the US producer of the product, but there were also French defendants involved.
92. See eg D. Dewees, D. Duff and M. Trebilock, *Exploring the Domain of Accident Law* (OUP 1996).
93. On the factors which determine the 'transformation' of damage into claims, see eg W. Felstiner, R. Abel and A. Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming and Claiming' (1981) 15 L. & Soc. Rev. 631; H. Genn, 'Who Claims Compensation: Factors Associated with Claiming and Obtaining Damages' in D. Harris and others, *Compensation and Support for Illness and Injury* (Clarendon Press 1984) 45.

are probably non-legal. Seeking redress can be costly both financially and psychologically, and many people do not have the resources, or the minimum level of literacy or self-confidence, that would allow them to do so. Even when they do, they face many legal and practical hurdles: they must identify the producer or another liable party; they must have or gather sufficient evidence showing or at least suggesting that the product was defective and that it caused them harm; they must reach the right person or service at the producer's and face potential delaying or discouraging tactics; they must be ready to hire a counsel and go to court if necessary; they must not be time-barred; etc. These multiple obstacles mean that seeking compensation for minor injuries or damage is usually not worth the effort. Besides, in many Member States, serious damage is often compensated to a large extent through either social security (in case of bodily injuries) or private insurance (for example in case of damage caused to personal property covered by household insurance). This lowers the incentive for those injured to bring tort claims, and social security or insurers may not have the elements of information required, or the time and resources, to bring recourse claims against tortfeasors.

There is no reason to believe that these various hurdles are any lower in product liability than in other fields of tort law.[94] Quite to the contrary, defendants in product liability cases are always professionals, and sometimes very big firms with sophisticated legal counsel and tactics, which have many occasions to use the court system and can be considered as 'repeat players.' By contrast, claimants are typically individuals with no habit of going to court, also called 'one-shotters'[95] (even though private insurance companies are sometimes subrogated in their rights). The cost of going to court, or even to engage in settlement negotiations, is therefore proportionally much greater, in terms of money, time, stress, and affects, for claimants than for defendants.

The problem with the PLD is not under-implementation as such, but its extent. Taking the 1,709 PLD-related claims which, according to the 2018 Evaluation, were brought both in and out of court during the 2000-2016 period, and assuming that 1,000,000 accidents were caused each year by defective products in the EU over that same period (an assumption that has no scientific basis but seems rather conservative in view of the data mentioned earlier in this section), this means that only one out of 10,526 potential product liability cases gave rise to a claim based on the PLD. With such an application rate, the PLD can hardly be termed a success in terms of consumer protection; and the same would be true if the real figure were one hundred times higher. Even taking the French figures, which seem more favourable, the conversion rate of damage into claims probably remains very low. The data on cross-border litigation is even more worrying. It means that, when a defective product is marketed by its producer directly in a foreign country, injured parties are in effect left without a remedy under the PLD and the producer is immune to product liability. Given the importance of cross-border trade, and the EU's efforts to abolish internal economic borders, this cannot be regarded as a minor issue. It contradicts not only consumer protection but also the PLD's primary objective, namely the establishment of a common market. The PLD, far from contributing to such establishment, is acting as an obstacle to it by creating, or at least maintaining, differences between local and foreign producers.

94. For a discussion of the institutional, procedural, and social factors that specifically impact the application of product liability rules, and probably account for the differences between the US and the rest of the world, see M. Reimann, 'Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard' (2003) 51(4) Am. J. Comp. L. 751, 810-35.

95. On the distinction between repeat players and one-shotters, see M. Galanter, 'Why the Haves Come out Ahead: Speculations on the Limits of Legal Change' (1974) 9(1) L. & Soc'y Rev. 95, 97.

Such a situation cannot be accepted. Neither can it be blamed only on the obstacles that impede the application of tort law generally. The conversion rate of accidents into claims is clearly higher in other fields of tort law. For example, the French figures for 2010 indicate that 6,735 claims were brought before civil courts[96] in relation to traffic accidents,[97] for an average of 76,000 traffic accidents per year having caused bodily injuries over the previous three years.[98] The conversion rate is therefore nearly 10%, even though insurers have an obligation to offer a settlement to victims of traffic accidents under French law.[99] Likewise, in the UK, the proportion of injuries giving rise to claims is undoubtedly higher for traffic accidents or industrial accidents that for accidents caused by defective products.[100] The fact that the PLD is much less relied upon than other tort law regimes strongly suggests that there is something wrong with the instrument itself. It is not only the general environment that makes it difficult to apply the PLD, but also the specific features of the liability regime it establishes.

Strikingly, though, neither the 2018 Evaluation nor the European Commission's Report on the application of the PLD based on it[101] seem to see the problem.[102] They draw no conclusion from the appalling figures on the application of the PLD that have just been mentioned. Instead, they rely on the 'qualitative study' carried out by external consultants for the 2018 Evaluation to conclude that the PLD has mostly met its objectives and that nearly all is well with the instrument as it stands. The qualitative study is based on the answers to various questions and on comments made by stakeholders. According to these stakeholders, the PLD 'contributes to a level playing field in the single market and contributes to consumer protection'.[103] Neither the external consultants nor the European Commission seem to regard as a problem that a vast majority of stakeholders involved in the qualitative study were 'businesses, related associations, and insurers' associations' (527 out of 657, ie 80%), which have a vested interest in keeping the level of consumer protection as low as possible. And even if this were not the case, the above-mentioned figures totally forbid that the PLD be considered as a success and as meeting its objectives in terms of consumer protection.

96. Under French law, compensation claims based on tort law rules can also be brought before criminal courts when a criminal offence has been committed, which is often the case in traffic accidents. Unfortunately, the Statistical Yearbook does not give any indication on such claims.
97. Annuaire statistique de la justice. Édition 2011-2012, 61.
98. Data available at <https://www.onisr.securite-routiere.gouv.fr/etat-de-l-insecurite-routiere?field_theme_target_id=638> accessed 5 June 2023. The assumption is that victims of traffic accidents, if they bring a claim in court for compensation, will usually do so within three years of the accident (even though the limitation period in France is much longer for such claims).
99. Article 12 of Loi n° 85-677 du 5 juillet 1985 tendant à l'amélioration de la situation des victimes d'accidents de la circulation et à l'accélération des procédures.
100. P. Cane and J. Goudkamp, *Atiyah's Accidents, Compensation and the Law* (9th edn, Cambridge University Press 2018) 185.
101. 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), 7 May 2018, COM (2018) 246 final.
102. This was also true of earlier reports on the application of the PLD: S. Whittaker, *Liability for Products: English Law, French Law, and European Harmonization* (OUP 2005) 444-50.
103. Commission Staff Working Document, 7 May 2018, SWD (2018) 157 final, 60: 'There is a consensus among stakeholders that overall the Product Liability Directive contributes to a level playing field in the single market and contributes to consumer protection. This is better achieved than could be done at national level. It matches expectations in the sense that consumers are aware of their right to compensation for damage caused by defective products and that it provides a clear legal framework for businesses across the EU.'

The only significant problems which the European Commission identifies in its assessment of the PLD are the burden of proving defect and causation, which lays on the claimant and is sometimes difficult to discharge, especially for complex products, and the need to adapt certain notions, such as 'product', 'producer', 'defect' or 'damage', to new economic conditions.[104] These are real issues, especially the first one. However, the difficulty to prove defect and causation cannot on its own explain why so few people are compensated thanks to the PLD, nor why cross-border redress is almost non-existent.

The ineffectiveness of the PLD is the elephant in the room of EU product liability. It is a major issue which never seems to be discussed. Yet, if the PLD is as ineffective as this section suggests, something radical needs to be done. One possibility would be to simply abrogate the PLD. The idea is not as extravagant as it seems and has recently been forcefully put forward in the UK,[105] though on other grounds than the Directive's ineffectiveness. If the PLD is not relied upon by persons injured by defective products, then why keep this piece of legislation? Ineffective legislation is not innocuous. It makes the state of the law more complicated, which is problematic especially for non-sophisticated players such as one-time claimants. There are also costs associated with such legislation. The time, intelligence and money spent in analysing it, explaining it, and trying to implement it are mostly wasted. Even worse, the PLD has arguably contributed to a lowering of the level of consumer protection in some countries, by preventing injured parties from seeking compensation from suppliers, which are usually easier to reach than producers.[106] It is quite possible that the cost-benefit balance of the PLD is negative, which would make it a defective product and justify its abrogation.[107]

However, this is clearly not an option in the EU context. The EU will never get rid of the PLD, even if this were the soundest move. Doing so would give the impression that the EU sacrifices consumer protection, which, even if not true in practice, would be suicidal from a political point of view. Additionally, both the European Commission and the European Parliament have identified the adaptation of the PLD as a way of signalling their eagerness to address the challenges raised by the development of the digital economy and of AI, meaning that this instrument has acquired additional political relevance. Finally, and despite the recurring discourse about the need to legislate less but better, the EU is structurally a law-producing entity. Suppressing legislation, be it for the sake of clarity and effectivity, runs directly against its deepest nature.

Since the PLD is here to stay, the sensible thing to do would be to reform it so that it becomes more effective and that persons injured by defective products are able to rely on it in practice. There is now a unique opportunity to do so. Unfortunately, the reform that is currently being contemplated does not really tackle the central problem of the PLD's ineffectiveness. The European Commission has been (voluntarily?) blinded by the flawed conclusions of the 2018 Evaluation and considers that the only real issue is to adapt the PLD to the digitalisation of the economy. However, making the PLD applicable to new products such as software is useless if the Directive is not relied upon in the first place. Simply extend-

104. COM (2018) 246 final, 8-9.

105. D. Nolan, 'Against Strict Product Liability' in: *Questions of Liability: Essays on the Law of Tort* (Hart Publishing, forthcoming 2023).

106. See infra III.A.1.

107. Several authors have described the PLD as a defective product, which is of course a tempting classification: see eg M. Faure, 'Economic Analysis of Product Liability' in P. Machnikowski (ed.), *European Product Liability. An Analysis of the State of the Art in the Era of New technologies* (Intersentia 2016) 619, § 27, citing P. Storm, 'Een gebrekkig product' (1985) Maanblad voor Ondernemingsrecht 245.

ing the scope of application of an instrument that cannot achieve the objectives assigned to it will not make that instrument more effective. In fact, given the complexity inherent in digital products, it is likely that applying the PLD to them will be even more difficult than applying it to 'ordinary' products. Adapting the PLD to the digital economy makes sense only if the liability regime it establishes is modified in such a way that it can begin to achieve what it was made for. Otherwise, the PLD reform will only be a public relations operation, intended to show that the EU is 'doing something' about digitalisation.

III. Reforming the PLD

The policy objectives laid out in the first recitals of the Draft PLD are the same as those of the current PLD.[108] The aim therefore remains to help achieve the establishment of a common market and to improve consumer protection. Given what was said earlier about the Directive's limited ability to significantly contribute to either the advent of a truly common market or consumer protection in the stronger sense of the term (ie deterrence), the main concern should be to strengthen the PLD's contribution to consumer protection in the weaker sense of the term. In other words, changes should be made so that persons injured by defective products effectively rely on the PLD to be compensated.[109]

The costs of reforming the PLD, including for consumers, should not be underrated. A new set of rules always generates a degree of complexity and uncertainty, especially when it introduces new legal concepts. Courts and lawyers need a certain amount of time to come to terms with these new rules and concepts, during which it may be difficult for potential claimants and defendants to know precisely what their rights or duties are, and what chances they stand to bring successful claims, or to successfully resist claims. In the case of the PLD, the process of specifying the rules and reducing uncertainty has been rather long and has not yet come to an end. Nearly forty years after the Directive was adopted, there is still a steady (and even possibly growing) flow of interpretation questions referred to the CJEU. Yet, the central issue of defectiveness has hardly been touched upon by the Court so far.[110] Whatever clarification a reform of the PLD may provide in that respect, it will also bring its own share of added complexity and uncertainty.

It is already clear that the projected reform will come with high transition and adaptation costs. The Draft PLD is a very complex piece of legislation, which almost makes the current Directive look like 'product liability for beginners' by contrast. Given the complexity inherent in digital products, most notably their ability to evolve after they were initially put into circulation thanks to software updates, this complexity will remain for the most part, even if the Draft undergoes some simplification, as will hopefully be the case. The introduction of new notions and the change in the scope of product liability, especially due to the inclusion of software within the 'product' category (Article 4(1)) and of related ser-

108. See Recitals 1 and 2 of the Draft PLD, which are almost word-for-word the same as Recitals 1 and 2 of the current PLD.

109. As the European Commission put it in its latest report on the PLD, COM (2018) 246 final, 9: 'To make sure that the single market lives up to its full potential we need to reassure consumers that their rights will be respected.'

110. It has been addressed directly only in Cases C-503/13 and C-504/13 *Boston Scientific Medizintechnik GmbH v. AOK Sachsen-Anhalt – Die Gesundheitskasse and Betriebskrankenkasse RWE* [2015], ECLI:EU:C:2015:148.

vices within the 'component' category (Article 4(3)) will raise new questions, which courts will need time to answer (if they ever do).[111] Moreover, the difficulty of proving defect in relation to products 'powered' by AI should not be underestimated.[112] In the short run, the impact of the reform on the complexity and uncertainty of EU product liability should therefore be negative. And insofar as legal uncertainty deters potentially meritorious claims, it acts as a shield for potential defendants. This is even truer where there is a structural imbalance between the claimant and the defendant, as is often the case in product liability.

Since the costs of reform are inevitable, the real issue is whether, in the middle and long run, a new PLD can make it easier for injured parties to be compensated for product-related damage. If, and only if, the reform addresses the right issues, will the reform be justified, and its benefits dwarf its costs.

If the PLD is to meet as well as possible the objectives that were initially assigned to it, it is necessary to broaden the range of potential defendants (A) and to strike a better balance between the interests of injured persons and those of producers (B).

A. Broadening the Range of Potential Defendants

The most obvious problem regarding the application of the PLD is the near-absence of cross-border redress.[113] The PLD is not to be blamed for the difficulty to bring cross-border claims, which is a much broader issue, but this is not a reason for quietly accepting this situation until the time comes where initiating cross-border litigation will be as easy as bringing a claim in one's own country (assuming this can ever be easy). If there are no cross-border claims in practice, then the PLD should be modified so that those injured can, as much as is possible, seek redress without needing to engage in cross-border procedures. The Draft PLD contains some interesting proposals in that respect, but it has not fully acknowledged the seriousness of the problem (1) and more radical changes are required (2).

1. The Flaws in the PLD and the Draft PLD

The PLD as it stands rests on an idealised vision of the EU as a unified jurisdiction, where internal political borders and differences between Member States are not an obstacle when it comes to seeking redress. Accordingly, it was designed so that someone suffering damage caused by a defective product should always have a defendant against which to turn within the EU. This is the reason why the importer of a product into the EU is liable as the producer (Article 3(2)). By contrast, the drafters of the PLD did not regard as a problem that a potential claimant should not have a defendant against which to claim in their own country. The

111. It should be stressed that the distinction between products and services, which stands at the root of *product* liability as a distinct liability regime, has never been totally clear: W.C. Powers, 'Distinguishing between Products and Services in Strict Liability' (1984) 62(3) North Carolina L. Rev. 415; J. Stapleton, 'Software, Information and the Concept of Product' (1989) 9 Tel Aviv U. Stud. L. 147. The projected extension of the PLD to software and related services further blurs the line between the two notions, and indirectly questions the very justification of the regime established by the Directive: D. Nolan, 'Against Strict Product Liability' in *Questions of Liability: Essays on the Law of Tort* (Hart Publishing, forthcoming 2023).

112. J.-S. Borghetti, 'Civil Liability for Artificial Intelligence: What Should its Basis Be?' (2019) 17 Revue des juristes de Sciences Po 76; G. Wagner, 'Produkthaftung für autonome 'système' (2017) 217 Archiv für die civilistische Praxis 707, 724-48.

113. The available information only concerns cross-border *judicial* redress, but it would be extremely surprising if cross-border settlements were thriving.

liability of suppliers is thus foreseen only as a fallback solution, where the producer (or importer) of the product cannot be identified and the supplier does not inform the injured person, within a reasonable time, of the identity of the producer or of the person who supplied them with the product.

In that respect, the PLD has worsened consumer protection in some Member States. In Denmark[114] and France,[115] for example, professional suppliers used to be strictly liable for damage caused by a product's safety defect, meaning that injured persons could seek redress from these suppliers, usually located in their own country, without having to reach a producer or importer located in another Member State. Such rules have been abandoned due to the implementation of the PLD. This is of course detrimental to injured persons and creates a strong incentive to rely on purely national rules instead of the Directive, where the former accept strict contractual liability of suppliers on another ground than the product's safety defect (for example based on the warranty for latent defects).

Fortunately, the absence of real supplier liability in the PLD is mitigated by the rule in the second limb of Article 3(1) of the PLD, whereby the 'quasi-producer', ie the person presenting itself as the producer by putting its name, trademark or other distinguishing feature on the product, shall answer for the product's defect like the 'real' producer. The CJEU has recently adopted a broad interpretation of that rule, by deciding that 'the concept of "producer", referred to in that provision, does not require that the person who has put his name, trade mark or other distinguishing feature on the product, or who has authorised those particulars to be put on the product, also present himself as the producer of that product in some other way.'[116] In practice, putting one's name or trademark on the product is therefore enough to be regarded as its producer, even if the identity of the real producer is also apparent on the product and even if a reasonable person would not have been led to believe that the person having put its name or trademark on the product had actually manufactured the product. This interpretation is debatable but does make things much easier for injured parties.[117] It is very often the case that, when a product is marketed in a country, a local company will put its name on it. If the product turns out to be defective, the injured party will then be able to sue that company based on the rule in Article 3(1), without having to ascertain the exact relationship of that company to the product (producer, importer, 'own brander', etc). However, when the product has been produced in another Member State (or imported from outside the EU by an importer located in another Member State) and no local company puts its name or trademark on in, the injured party will have no choice but to seek redress from a defendant located in another Member State, something which case law tells us is very difficult to do.

The evolution of marketing processes since the PLD was designed should also be taken into consideration. Forty years ago, products manufactured outside the EEC and sold within it were typically imported, ie bought by a European company from the producer (or another intermediary) and then resold to end-users (or another intermediary), with a transfer of title. Modern marketing techniques and actors, including online retail platforms, now make it possible for non-EU companies to directly market their products in the EU, without

114. As is explained in C-402/03 *Skov Æg v. Bilka Lavprisvarehus A/S and Bilka Lavprisvarehus A/S v. Jette Mikkelsen and Michael Due Nielsen* [2006] ECR 2006 I-00199, ECLI:EU:C:2006:6, at 12.

115. J.-S. Borghetti, 'The Development of Product Liability in France' in S. Whittaker (ed.), *The Development of Product Liability* (Cambridge University Press 2010) 87, 97.

116. C-264/21 *Keskinäinen Vakuutusyhtiö Fennia v. Koninklijke Philips NV* [2022], ECLI:EU:C:2022:536, at 38.

117. If taken literally, the solution laid down by the CJEU would result, for instance, in an airline being regarded as the producer of the plane it puts its name upon.

the need for an intermediary acquiring and then re-transferring ownership of the products. Intermediaries are only needed for the shipment and delivery of the product, and possibly for connecting the producer and the buyer. If a product marketed in that way turns out to be defective and causes damage, the only defendant the injured person can claim against, under the PLD, is the non-EU producer, which will likely be impossible to reach in practice.[118] This means that non-EU producers that directly market their products in the EU without relying on an importer are *de facto* immune to product liability in the EU.

The Draft PLD addresses this problem only partially. It retains the idea of a 'cascade' of defendants. Subject to minor adaptations, Article 7 maintains the list, definition and ranking of potential defendants set out in the current PLD. The producer, renamed the manufacturer, comes first (Article 7(1)).[119] Assimilated to it is the quasi-producer or quasi-manufacturer,[120] defined as 'any person who markets that product under its name or trademark' (Article 7(1)).[121] As is currently the case,[122] this definition should include any person involved in the marketing of the product and putting its name or trademark on it, even if other names or trademarks are also present on the product and if the exact role played by the defendant in the marketing process is not known to third parties. Where the manufacturer of the defective product is established outside the Union, the importer of the defective product and the authorised representative of the manufacturer can be held liable (Article 7(2)).[123] The liability of suppliers, renamed distributors,[124] remains of a subsidiary nature. It only arises where a manufacturer cannot be identified (or, when the manufacturer is established outside the Union, where an economic operator higher up the 'cascade' cannot be identified), provided that (a) the claimant requests that distributor to identify the economic operator or the person who supplied the distributor with the product; and (b) the distributor fails to identify the economic operator or the person who supplied the distributor with the product within one month of receiving the request (Article 7(5)).

118. Given its share in the worldwide manufacturing industry and in the import of products into the EU, China is the country where a non-EU manufacturer is most likely to be established. Suing a Chinese company in China is almost doomed to fail; however: A. Feeney, 'In Search of Remedy: Do State Laws Exempting Sellers from Strict Product Liability Adequately Protect Consumers Harmed by Defective Chinese-Manufactured Products' (2009) 34(2) J. Corp. L. 567, 576. And enforcing a foreign judgment in China does not seem to offer better prospects: W. Zhang, 'Recognition and Enforcement of Foreign Judgments in China: A Call for Special Attention to Both the Due Service Requirement and the Principle of Reciprocity' (2013) 12 Chinese J. Int'l L. 143; K. F. Tsang, 'Enforcement of foreign commercial judgments in China' (2018) 14(2) J. Priv. Int'l L. 262.
119. Article 4(11) defines the manufacturer as 'any natural or legal person who develops, manufactures or produces a product or has a product designed or manufactured'. Since the two notions of 'producer' (PLD) and 'manufacturer' (Draft PLD) are very close, and for the sake of simplicity, I shall keep talking of 'producers' in this section, even in relation to the Draft.
120. Article 4(11) further classes as a producer any person 'who develops, manufactures or produces a product for its own use'. This is presumably intended to capture the solution set out in C-203/99 *Henning Veedfald v. Århus* Amtskommune [2001], ECR 2001 I-03569, ECLI:EU:C:2001:258.
121. Article 4(11). It could be disputed if any person putting its name or trademark on the product should be considered as marketing it.
122. See supra fn. 116.
123. Article 4(12) defines the authorised representative (not mentioned in the current PLD) as 'any natural or legal person established within the Union who has received a written mandate from a manufacturer to act on its behalf in relation to specified tasks'. Article 4(13) defines the importer as 'any natural or legal person established within the Union who places a product from a third country on the Union market'. It is not clear why a person established outside the EU cannot be regarded as an importer, even though the practical chances that such a person would be sued are extremely low.
124. Article 4(15) defines the distributor as 'any natural or legal person in the supply chain, other than the manufacturer or the importer, who makes a product available on the market'. Here again, and for the sake of clarity, I shall keep using the notion of 'supplier', which is used in the PLD and is equivalent.

Interestingly, the Draft PLD adds three categories to the list of potential defendants, only two of which are significant in the context of the current discussion: fulfilment service providers and online platforms.[125] Following the Market Surveillance Regulation,[126] Article 4(14) of the Draft PLD defines a fulfilment service provider as 'any natural or legal person offering, in the course of commercial activity, at least two of the following services: warehousing, packaging, addressing and dispatching of a product, without having ownership of the product', with the exception of postal services, of parcel delivery services, and of freight transport services. An online platform is defined by reference to the Digital Services Act (DSA),[127] according to which it is 'a hosting service that, at the request of a recipient of the service, stores and disseminates information to the public, unless that activity is a minor and purely ancillary feature of another service or a minor functionality of the principal service and, for objective and technical reasons, cannot be used without that other service, and the integration of the feature or functionality into the other service is not a means to circumvent the applicability of this Regulation' (Article 3(i)).

Article 7(3) of the Draft provides that where the manufacturer of the defective product is established outside the EU and neither the manufacturer's authorised representative nor the importer of the product is established in the EU, the fulfilment service provider shall be held liable for damage caused by the defective product. This provision could become very relevant in practice, since fulfilment service providers have come to play a great role in modern marketing techniques, especially when a product is sold online. Those who sell products online can handle the packaging and dispatching of these products themselves, but they often rely on fulfilment service providers, especially when they sell through online retail platforms. Making fulfilment service providers liable under the PLD is thus a way to provide the person injured with a new defendant when the defective product has been bought online, as is increasingly the case. However, there are some serious limits to the improvement brought about by Article 7(3) of the Draft PLD.

Products sold online are often offered on online retail platforms. These platforms can operate under two business models: fulfilment by e-retail marketplaces (FRM) or fulfilment by merchants (FBM).[128] Under the FRM model, sellers send their products to the platform, which then handles the warehousing, packing, shipping, and post-sale customer service. When this is the case, the online retail platform is neither an importer[129] nor a distributor (since it never acquires ownership of the product), but it acts as a fulfilment service provider and could therefore be made liable under Article 7(3) of the Draft PLD if a product sold through it turns out to be defective. When the online retail platform uses the FBM model on the other hand, there may or may not be a fulfilment service provider (since the seller may handle the packing and dispatching by itself), but if there is one, it is not the online retail platform and the buyer may find it difficult or impossible to identify. Unless the online

125. Under Article 7(5), 'any natural or legal person that modifies a product that has already been placed on the market or put into service shall be considered a manufacturer of the product for the purposes of paragraph 1, where the modification is considered substantial under relevant Union or national rules on product safety and is undertaken outside the original manufacturer's control'.

126. Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20 June 2019 on market surveillance and compliance of products [2019] OJ L 169/1, art. 3(11).

127. Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a single market for digital services (Digital Services Act) [2022] OJ L 277/1.

128. On these two models, see E. Büyüksagis, 'Extension of Strict Liability to E-Retailers' (2022) 13(1) J. Europ. Tort L. 64, 69; V. Ulfbeck and P. Verbruggen, 'Online Marketplaces and Product Liability: Back to the Where We Started?' (2022) Eur. R. of Priv. L. 975, 978.

129. The platform normally does not act as the manufacturer's authorised representative either.

retail platform operates under the FRM model and takes on the role of a fulfilment service provider, someone buying a product through a platform normally has no idea who acted as fulfilment service provider for that product. The buyer may or may not know which company handled the delivery, but even if they do, that company may not be the fulfilment service provider (it can be a subcontractor, for example) and they will anyway probably have forgotten its identity by the time they seek redress for damage caused by the product. They may of course ask the seller which company acted as a fulfilment service provider for the sale of that defective product, but whether they will get an answer and be able to reach that fulfilment service provider is doubtful.

In practice, the liability of fulfilment service providers will thus be helpful to persons injured by a defective product where the product was bought through an online retail platform operating under the FRM model, and on the condition that the manufacturer is established outside the EU and there is no authorised representative of the manufacturer or importer of the product established in the EU. This is a significant step forward for consumer protection since many major online retail platforms operate at least partly under the FRM model. Amazon, for instance, operates both under the FRM and the FBM models and could therefore be made liable under Article 7(3) of the Draft PLD where non-EU manufacturers sell defective products through it using the FRM option.

However, the liability of fulfilment service providers will not apply, or will be of little concrete help, in many if not most of the cases where the PLD is deficient because it does not provide the injured person with a defendant located in their country of residence: where the manufacturer, the manufacturer's representative or the importer of the product is located in another Member State (in which cases the fulfilment service provider is not liable); and where there is no manufacturer, manufacturer's representative or importer in the EU, but the product was sold through an online retail platform operating under the FBM model (in which case the fulfilment service provider will be liable in theory, assuming there is such a provider, but it will probably be impossible to identify or to reach).

The liability of fulfilment service providers, as foreseen in the Draft PLD, is therefore far from completely filling the hole in the racket of consumer protection resulting from the lack of accessible defendants. Unfortunately, neither does the liability of online platforms set out at Article 7(6) of the Draft PLD. Under this provision, the 'provider of an online platform that allows consumers to conclude distance contracts with traders and that is not a manufacturer, importer or distributor' shall be liable for damage caused by a defective product sold through it, but only where three cumulative conditions are met: 1) there is no identified manufacturer in the EU, and no identified importer, authorised representative or fulfilment service provider; and 2) the online platform presented the product or otherwise enabled the specific transaction at issue in a way that would have led an average consumer to believe that the product was provided either by the online platform itself or by a person acting under its authority or control; and 3) the claimant requests that online platform to identify the economic operator or the person who supplied the product and the platform fails to identify the economic operator or the person who supplied the product within one month of receiving the request. It is only in exceptional circumstances that these three conditions will be met. The second one is borrowed from Article 6(3) of the DSA and provides online platforms with a remarkably efficient shield against liability since it is easy for them to clearly indicate that they are not providing the products themselves. The third condition, which also applies to the liability of suppliers, is quite restrictive as well, since online platforms should normally be able to indicate what were the suppliers of products sold through them. The liability of online retail platforms as set out in Article 7(6) of the

Draft PLD is thus rather theoretical. Such platforms stand more chances of being made liable based on Article 7(3) of the Draft PLD in their capacity as fulfilment service providers, provided they operate under the FRM model. However, this still leaves many cases where persons suffering damage caused by a defective product will have no accessible defendant against which to bring an action.

2. Moving Forward

If the PLD is to grant effective avenues of redress to those suffering damage caused by defective products, radical steps need to be taken in terms of who must answer for such products. Unless EU product liability should remain a dead letter, the PLD cannot stick to the idea that having a defendant in the EU is enough. Reaching a defendant in another Member State can be an ordeal. What a claimant needs is an *accessible* defendant.[130]

The equation for providing those suffering damage caused by defective products with an accessible defendant is rather simple. They should be allowed to seek redress from the person from or through which they bought the product. If they were able to make contact with that person to buy the product, the chances are that it will be reasonably easy for them to make contact again if they seek redress. Admittedly, this is not true for bystanders, ie those injured by a product which they did not themselves buy or own. However, bystanders usually have some kind of proximity to the owner of the defective product, if only physical or geographical, meaning that if the defendant is easily accessible to the buyer of the product, and if that product caused damage to the bystander while in the buyer's use, the defendant should also be within reasonable reach of the injured bystander.

Products are very often bought from distributors or, nowadays, through online platforms.[131] Therefore, if the PLD is to provide potential claimants with accessible defendants, it should tighten both the liability of distributors (a) and the liability of online platforms (b).

a. Liability of Suppliers

The liability of suppliers stands as a last resort in both the PLD and the Draft PLD. It should be the contrary. Those suffering damage caused by a defective product should be allowed to seek redress from the supplier of the product, whenever there is such a supplier. The liability of the supplier should apply regardless of whether there is an identified manufacturer or any other potential defendant established in the EU.

The reasons for this solution were clearly set out by Justice Traynor in the landmark US case *Vandermark v. Ford Motor Co.*: 'Retailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products. In some cases, the retailer may be the only member of that enterprise reasonably available to the injured plaintiff. In other cases, the retailer himself may play a substantial part in insuring that the product is safe or may be in a position to exert pressure on the manufacturer to that end; the retailer's strict liability thus serves as an added incentive to

130. On the importance of accessibility for consumer-redress mechanisms, based on an empirical study, see C. Hodges, 'Consumer Redress: Ideology and Empiricism' in K. Purnhagen and P. Rott (eds), *Varieties of European Economic Law and Regulation. Liber Amicorum for Hans Micklitz* (Springer 2014) 793, 815-18.

131. It is estimated that, in 2022, 68% of individuals aged 16-74 in the EU purchased at least one item online (but not necessarily through an online retail platform): Eurostat, available at <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:Table1-Internet_use_and_online_purchases,_2022_(%25_of_individuals_aged_16_to_74).png> accessed 12 June 2023.

safety. Strict liability on the manufacturer and retailer alike affords maximum protection to the injured plaintiff and works no injustice to the defendants, for they can adjust the costs of such protection between them in the course of their continuing business relationship.'[132]

In the United States, the strict liability of professional suppliers for defective products became a common feature of product liability as of the 1960s.[133] It was accepted in the Restatement (Second) of Torts[134] and reaffirmed by the Restatement (Third) of Torts: Products Liability.[135] Such liability also existed in some Member States before the transposition of the PLD.[136] Admittedly, in the last decades, many US States have passed legislation limiting the liability of non-manufacturers for defective products.[137] Whatever the motivation behind these statutes (which was probably at least partly a desire to protect local companies), they have resulted in depriving those injured by defective products of any practical chance of being compensated when these products are manufactured in foreign countries, especially China, and sold by US sellers which do not inspect them or put their name on it, as is often the case. This has resulted in calls to reinstate the strict liability of suppliers, at least under certain circumstances.[138] As was explained earlier, products manufactured abroad are equally a problem in the EU and the need for sellers' liability is as strong in Europe as it is in the US.

The objections that are commonly brought against the strict liability of suppliers or sellers for defective products are not convincing. The most rehearsed one is that suppliers typically have no possibility to inspect the products they sell, and therefore to identify or avoid the defects in them.[139] This is true, but it simply means that the liability of suppliers for defective products is truly strict.[140] Besides, in the EU context, importers can already be made liable even though they typically have no possibility to inspect the products they sell, and the Draft PLD wants fulfilment service providers, which have even less control over the characteristics of the products they handle, to be liable as well under certain circumstances. If importers and fulfilment service providers can be made strictly liable, why not suppliers and distributors?[141] Besides, distributors can choose which products they sell and would thus have an incentive to select safe products, should they be made liable for the defective products they sell. By contrast, fulfilment service providers are probably not always in a position to select the products they store or dispatch, meaning that their liability may not result in fewer defective products being put on the market.

132. *Vandermark v. Ford Motor Co.*, 391 P.2d 168 (Cal. 1964) at 8 (citations omitted).
133. F. J. Cavico, 'The Strict Tort Liability of Retailers, Wholesalers, and Distributors of Defective Products' (1987) 12(1) Nova L. Rev. 213.
134. See supra fn. 7.
135. Restatement (Third) of Torts: Products Liability § 1 (1998), stating that '[o]ne engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect'.
136. See supra III.A.1.
137. For an inventory and typology of this legislation, see A. Feeney, 'In Search of Remedy: Do State Laws Exempting Sellers from Strict Product Liability Adequately Protect Consumers Harmed by Defective Chinese-Manufactured Products' (2009) 34(2) J. Corp. L. 567.
138. Loc. cit.
139. J. Cavico, 'The Strict Tort Liability of Retailers, Wholesalers, and Distributors of Defective Products' (1987) 12(1) Nova L. Rev. 213, 227; A. Feeney, 'In Search of Remedy: Do State Laws Exempting Sellers from Strict Product Liability Adequately Protect Consumers Harmed by Defective Chinese-Manufactured Products' (2009) 34(2) J. Corp. L. 567, 571.
140. The strictness of this liability is of course tempered by the fact that the supplier will normally have a recourse against the manufacturer; see infra.
141. The same is true concerning the argument that because non-manufacturers did not cause the defect, they are ill-equipped to defend against a lawsuit.

A third reason to reject suppliers' liability is allegedly that making suppliers liable leads to indemnification claims, which 'is needlessly circuitous and engenders wasteful litigation',[142] in comparison with direct claims against manufacturers.[143] This reason was specifically put forward by the CJEC when it found that France was not allowed to loosen the conditions under which suppliers can be liable for damage caused by defective products when transposing the PLD.[144] Undoubtedly, since there are currently almost no direct cross-border claims against manufacturers, making suppliers liable should result in more claims being brought than there are now, both against suppliers and between suppliers and manufacturers. It is also true that it might be cheaper for manufacturers to directly answer claims brought by those injured by their products, as they might otherwise have to bear at least part of the transaction costs associated with the recourse and earlier claims.[145] However, the extra costs associated with recourse claims by suppliers (or other non-manufacturers) are the price to pay if those injured by products are to be given effective means of redress. Besides, in the current situation, the absence of direct claims against foreign manufacturers means that, unless an intermediary can be made liable under the PLD, these manufacturers will never have to pay for damage caused by their products and will therefore not have this incentive to eliminate defects in their products. From an economic point of view, it is likely much preferable to have manufacturers answer for damage caused by defects in their products, even if this involves at least two claims (by the injured person against the suppliers, and by the supplier against the manufacturer), rather than no liability of manufacturers at all.

There are therefore no convincing reasons to refuse the strict liability of suppliers for damage caused by the defects in the products they sell, or to limit it drastically as both the PLD and the Draft PLD do. Quite to the contrary, such liability is necessary both if those injured are to be granted effective means of redress, and if foreign-based producers are to answer for the defects in their products. In other words, the liability of suppliers is needed to achieve better consumer protection, both in the weaker sense (compensation) and in the stronger sense (deterrence).

For buyers of defective products, the suppliers from which they bought the product (assuming there is one) are often the most accessible defendants. When the product was bought in a shop, the buyer usually remembers what shop it was, and that shop will in many cases be close to where they live. Seeking redress from the person running that shop is therefore comparatively easy in practical terms and does not involve cross-border proceed-

142. *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 463, 150 P.2d 436, 442 (1944). The opinion was written by Justice Traynor, who later changed his mind as was made clear in *Vandermark v. Ford Motor Co.*, 391 P.2d 168 (Cal. 1964).

143. J. Cavico, 'The Strict Tort Liability of Retailers, Wholesalers, and Distributors of Defective Products' (1987) 12(1) Nova L. Rev. 213, 229; R. A. Epstein, *Modern Products Liability Law: A Legal Revolution* (Quorum Books 1980) 62. These two authors put forward another argument, very close to this one, which is that 'manufacturers will sense the same, if not greater, pressure to make safe products if the manufacturers are sued directly for injuries caused by their own product defects' (Cavico, 228), rather than face recourse claims by sellers. While this may be true when the injured person has a real possibility to sue the manufacturer directly, the argument fails to convince in the EU context when the claimant and the manufacturer are not located in the same country, given the lack of cross-border claims.

144. C-52/00 *Commission v. France* [2002], ECR 2002 I-03827, ECLI:EU:C:2002:252 at 40: 'it should be pointed out that the possibility afforded to the supplier under that law of joining the producer has the effect of multiplying proceedings, a result which the direct action afforded to the victim against the producer under the conditions provided for in Article 3 of the Directive is specifically intended to avoid.'

145. I. Schwenzer and M. Schmidt, 'Extending the CISG to Non-Privity Parties' (2009) 13 Vindobona J. of Int'l Com. L. & Arbitration 109, 116.

ings (unless the product was bought while travelling or residing in another country). Many products are obviously bought online nowadays, but even then, the supplier is often established in the country where the product is being bought.[146]

Suppliers can then bring recourse claims against the manufacturers of defective products for which they have had to answer, or against intermediaries higher up the marketing chain. Being professionals, with potentially greater financial resources, easier access to legal services and fewer emotions than those directly injured by the products, they are typically in a much better position to bring claims. Contracts entered between manufacturers and suppliers will often provide a framework for such claims, and even if they bar or limit them,[147] the supplier can still act as a gatekeeper by deciding to stop distributing products that are defective and cause damage for which it must answer. To put things in more economic terms, suppliers are very often the 'cheapest cost avoiders' when it comes to minimising the costs associated with defects in products, because it is them 'who, through their ongoing relationship with the manufacturers and through contribution and indemnification in litigation, combined with their role in placing the product in the consumer's hands, [are] in the best position to pressure the manufacturers to create safer products'.[148]

b. Liability of Online Marketing Platforms

However necessary, the liability of suppliers is not enough to ensure that those injured by defective products will always have an effective means of redress. There are cases where there is no (accessible) supplier and no other accessible defendant under the PLD or the Draft PLD. In some of them, it would probably be impossible to think of an accessible defendant anyway (for example if the defective good was manufactured by a non-EU producer and bought from a local distributor while on a trip outside the EU). However, there are also cases where the position of those injured could be improved by making online retail platforms liable for damage caused by defective products sold through them.

Online retail platforms have been aptly described as 'the missing link' in EU product liability law.[149] The reasons for making them liable are manifold. They include but are not limited to those justifying the liability of distributors. They have been very convincingly put forward in two recent high-profile decisions by the California Court of Appeal, *Bolger*[150] and *Loomis*,[151] which have found that Amazon could be made liable for damage caused by defective products sold through it.[152] Only a few points need to be stressed here.

146. This is the case, for example, where products are bought online from a national retail company, as often happens.
147. Assuming that a contract can bar an indemnification claim when the distributor has been subrogated in the rights of the injured person and steps into the latter's shoes (as is possible in some legal systems).
148. C. M. Sharkey, 'Products Liability in the Digital Age: Online Platforms as "Cheapest Cost Avoiders"' (2022) 73(5) Hastings Law Journal 1327, 1334.
149. V. Ulfbeck and P. Verbruggen, 'Online Marketplaces and Product Liability: Back to the Where We Started?' (2022) Eur. R. of Priv. L. 975, 987.
150. *Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601 (Cal. Ct. App. 2020).
151. *Loomis v. Amazon.com, Inc*., 277 Cal. Rptr. 3d 769, 789 (Cal. Ct. App. 2021).
152. These and other product liability cases involving online retail platforms have attracted considerable attention from US legal scholars; see eg A. R. Bullard, 'Out-Techning Products Liability: Reviving Strict Products Liability in an Age of Amazon' (2019) 20 North Carolina J. L. & Tech. 181; A. Doyer, 'Who Sells? Testing Amazon.com for Product Defect Liability in Pennsylvania and Beyond' (2019) 28 J. L. & Pol'y 719; E. J. Janger and A. D. Twerski, 'The Heavy Hand of Amazon: A Seller Not a Neutral Platform' (2020) 14(2) Brook J. Corp. Fin. & Com. L. 259; C. M. Sharkey, 'Products Liability in the Digital Age: Online Platforms as "Cheapest Cost Avoiders"' (2022) 73(5) Hastings Law Journal 1327; R. Sprague, 'It's a Jungle Out There: Public Policy Considerations Arising From a Liability-free Amazon.com' (2020) 60 Santa Clara L. Rev. 253. In Europe, see esp. E. Büyüksagis, 'Extension of Strict Liability to E-Retailers' (2022) 13(1) J. Europ. Tort ➤

First, and this is essential for consumer protection in the weaker sense of the term, the online platform through which a product has been bought is very often the most accessible potential defendant. This was very clearly expressed in *Bolger* in relation to Amazon: 'Amazon, like conventional retailers, may be the only member of the distribution chain reasonably available to an injured plaintiff who purchases a product on its website. (…) Because imposing strict liability on Amazon would help compensate some injured plaintiffs who would otherwise go uncompensated, Amazon's inclusion within the rule [of strict liability] would promote its purposes.'[153] This holds true of any platform. As a matter of fact, bringing claims against online retail platforms is probably easier than against most other potential defendants. The identity of the platform through which a product was bought is normally known to the buyer (unlike the identity of the fulfilment service provider, if there is one, and even unlike the identity of the producer, which may be difficult to ascertain). Admittedly, many platforms are based outside the EU. However, they sometimes do business in the EU through an EU subsidiary. Even if they do not, it is easy to contact them, which is not the case of many other economic operators. Besides, platforms have a strong interest in being responsive to customers' claims, since they thrive on the frequency of purchases and since good customer experience is an essential part of their business model. In that respect, online platforms are very different from many manufacturers which are unlikely to sell their products twice to the same person and can therefore afford to treat post-sale claims offhandedly (subject to their reputation vis-a-vis future clients not being threatened).

The second reason why online retail platforms should be held liable is that they are often best placed to act as gatekeepers (and therefore to enhance consumer protection in the stronger sense of the term). As was noted by the Court in *Bolger*, and again in *Loomis*: 'Just like a conventional retailer, Amazon can use its power as a gatekeeper between an upstream supplier and the consumer to exert pressure on those upstream suppliers (here, third-party sellers) to enhance safety.'[154] This applies to all online marketing platforms, and not just Amazon. They can act at the 'upstream' level, by setting up requirements or controls which limit the risk of defective products being sold through them; and they can act at the 'downstream' level, by taking effective measures if defective products are nevertheless sold through them. Platforms can demand proof of compliance with safety regulations before they market a product and they can ban products which turn out to be defective (and which they are often in a very good position to identify, through their handling of customers' complaints). This role is crucial, given the number of unsafe products sold on the internet.[155] Making online platforms liable for defective products is a good way of encouraging them to take it seriously.

Online platforms are furthermore in an ideal position to pass on the costs of defective products. Their contractual relationship to sellers allows them to secure their right of recourse, should they have to compensate those injured by the defective products sold through them. They can therefore achieve 'a fair apportionment of the risks in the distribution chain', as was noted by the European Parliament in a 2021 study on the liability of

L. 64; C. Busch, 'When Product Liability Meets the Platform Economy: A European Perspective on Oberdorf v. Amazon' (2019) 8 J. Eur. Consumer and Market L. 173 (2019); V. Ulfbeck and P. Verbruggen, 'Online Marketplaces and Product Liability: Back to the Where We Started?' (2022) Eur. R. of Priv. L. 975, 982-87.

153. *Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601, 617 (Cal. Ct. App. 2020) (citations omitted).

154. ibid 618. This statement was later quoted in *Loomis v. Amazon.com, Inc*., 277 Cal. Rptr. 3d 769, 784 (Cal. Ct. App. 2021).

155. See supra II.B.

online platforms.[156] In *Loomis*, the Court rightly stated (and the statement holds true of other online retail platforms than Amazon): 'Amazon can adjust the costs of consumer protection between it and third party sellers through its fees, indemnity requirements, and insurance.'[157] By contrast, refusing to make online platforms liable for defective products creates a serious risk (which has probably already materialised) that manufacturers of unsafe products established outside the EU will deliberately market them in the EU through online platforms, in order to avoid being made liable.[158] These manufacturers know that they run almost no risk of being directly sued in their own country by those injured by their products (or to have foreign judgments enforced against them), and the fact that platforms cannot be made liable means that they will not have to face recourse claims either. As the European Parliament put it in a Resolution on the DSA, there is currently a 'legal loophole which allows suppliers established outside the Union to sell online to European consumers products which do not comply with Union rules on safety and consumer protection, without being sanctioned or liable for their actions and leaving consumers with no legal means to enforce their rights or being compensated by any damages'.[159] The liability of online platforms is needed to fill that loophole.[160]

The counterarguments that have been raised against the liability of online platforms fail to convince. The objection according to which they have no possibility to inspect the products sold through them has already been disposed of when discussing the liability of distributors.[161] It has also been argued that they cannot be made liable because they never hold title to the products. While this formalistic line of reasoning has apparently had some success in the US,[162] it cannot be accepted under EU law, where the Draft PLD wants to make fulfilment service providers liable for the defective products they handle but do not own. Another argument could be that all platforms are not as powerful as Amazon and may not be able to 'control' third-party sellers as Amazon does, meaning that 'across-the-board' liability of platforms would be more difficult to bear for smaller platforms and would create a comparative advantage for the greater ones.[163] This may be true but is not a reason to reject the liability of online marketing platforms for defective products. Inequality in economic power and bargaining strength exists everywhere and affects all categories of economic operators, including manufacturers, importers, fulfilment service providers or suppliers. It seems unlikely that holding online platforms liable for defective products sold through them would prevent small platforms from developing; and even if it did, the platforms most

156. As was noted in European Parliament, Liability of Online Platforms, PE 656.318, February 2021.

157. *Loomis v. Amazon.com, Inc.*, 277 Cal. Rptr. 3d 769, 784 (Cal. Ct. App. 2021).

158. Pointing to this risk in the context of US law: E. J. Janger and A. D. Twerski, 'The Heavy Hand of Amazon: A Seller Not a Neutral Platform' (2020) 14(2) Brook J. Corp. Fin. & Com. L. 259, 271; C. M. Sharkey, 'Products Liability in the Digital Age: Online Platforms as "Cheapest Cost Avoiders"' (2022) 73(5) Hastings Law Journal 1327, 1335.

159. European Parliament Resolution of 20 October 2020 with recommendations to the Commission on the Digital Services Act: Improving the functioning of the Single Market (2020/2018(INL)), § 62 <https://www.europarl.europa.eu/doceo/document/TA-9-2020-0272_EN.html#title1> accessed 12 June 2023, cited by E. Büyüksagis, 'Extension of Strict Liability to E-Retailers' (2022) 13(1) J. Europ. Tort L. 64, 66.

160. See also ibid 64, 75.

161. See supra III.A.2.a.

162. See C. M. Sharkey, 'Products Liability in the Digital Age: Online Platforms as "Cheapest Cost Avoiders"' (2022) 73(5) Hastings Law Journal 1327, 1335, and the cases cited. Sharkey describes this approach as anachronistic.

163. C. Busch, 'Rethinking Product Liability Rules for Online Marketplaces: A Comparative Perspective' (2021) 6-9 and the authors cited <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3897602> accessed 20 June 2023.

affected would be those through which too many defective products are sold, and which the EU has no interest in supporting at the expense of consumer protection.

On a more general level, the liability of online platforms for damage caused by the defective products sold through them appears as a legitimate counterpart to the role they play in the distribution process of products. Online marketing platforms are doing their best to establish themselves as the sole interlocutor of their customers, who often cannot have any direct contact with the seller.[164] Platforms also try to shape consumer expectations, including in relation to product safety.[165] Importantly, most of the reasons that have been put forward to justify that online platforms should be shielded from liability (and which have resulted in the protective provisions of the E-Commerce Directive[166] and the DSA) do not apply in relation to the dissemination of defective products.[167] Online marketing products typically play an active role in the marketing process of products and are not simply 'passively' hosting content or 'merely' conveying information.[168] Damage caused by defective products is also usually much more serious than the type of damage ordinarily caused by illegal contents accessible on platforms. Violations of privacy and intellectual property rights, damage to honour and reputation are by no means trivial matters, but bodily injuries are normally worse. Finally, there are no issues about freedom of speech involved in product liability.

The liability of both distributors and online marketing platforms thus appears as a necessary feature of an effective product liability regime. The PLD should be modified accordingly, so that those suffering damage caused by a defective product are allowed to seek redress from the supplier of the product or from the online platform through which the product was marketed, whenever there is such a supplier or platform, and regardless of whether there is an identified manufacturer, or any other potential defendant, established in the EU.[169]

164. For a demonstration of the potential omnipotence of online retail platforms, in the specific case of Amazon, see E. J. Janger and A. D. Twerski, 'The Heavy Hand of Amazon: A Seller Not a Neutral Platform' (2020) 14(2) Brook J. Corp. Fin. & Com. L. 259.

165. This was noted by the Court in *Bolger* in relation to Amazon: *Bolger v Amazon.com, LLC*, 267 Cal. Rptr. 3d 601, 617 (Cal. Ct. App. 2020).

166. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [2000] OJ L 178/1.

167. On which see eg G. Wagner, 'Haftung von Plattformen für Rechtsverletzungen', GRUR 2020, 329 and 447. See also M. C. Buiten, A. de Streel and M. Peitz, 'Rethinking liability rules for online hosting platforms' (2020) 28 Int'l J. L. Information Techn. 139.

168. E. Büyüksagis, 'Extension of Strict Liability to E-Retailers' (2022) 13(1) J. Europ. Tort L. 64, 83-84, who, however, focuses on platforms operating under the FRM model.

169. For more cautious proposals in the same direction, see C. Busch, 'Rethinking Product Liability Rules for Online Marketplaces: A Comparative Perspective' (2021) 38-43 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3897602 accessed 20 June 2023; ELI, 'ELI Model Rules on Online Platforms' (2020) Art. 20 <https://www.europeanlawinstitute.eu/projects-publications/completed-projects/online-platforms/> accessed 20 June 2023; European Parliament, 'Liability of Online Platforms, PE 656.318, February 2021, 63; BEUC, Product Liability 2.0 – How to make EU rules fit for consumers in the digital age', 19 <https://beuc.eu/publications/beuc-x-2020-024_product_liability_position_paper.pdf> accessed 9 June 2023.

B. Striking a Better Balance between the Interests of Consumers and Those of Producers

Enlarging the range of potential defendants under the PLD should be an absolute priority. However, the limited reliance on the Directive by those injured by defective products is probably explained not only by the difficulty to find an accessible defendant. A deeper problem is the balance struck by the PLD between the interests of injured persons and those of producers and other potentially liable persons. The stated objective that this balance should be fair can hardly be disputed. The problem with the PLD as it stands is that it is grossly unbalanced to the detriment of injured persons. Having such a low proportion of those injured by defective products being compensated thanks to the PLD means that producers are to a large extent immune to product liability as established by the Directive. However, correcting the existing imbalance should not result in the balance being tipped the other way. The challenge is to make it easier for injured persons to rely on the PLD without sacrificing the interests of producers and other potentially liable persons. In order to do so, the two main elements on which this balance is based should be considered, namely the requirement that the product be defective (1) and the defences available to the producer (2).

1. Defect

The major ingredient in the balance which the PLD strives to achieve between the various interests at stake in product liability is the choice of defect as the basis for liability. Even though this is not said explicitly, liability based on defectiveness can be considered as a middle ground between liability for fault, often thought to be too unfavourable to those injured, and purely causal liability,[170] which would presumably impose too heavy a burden on producers and other potentially liable parties.[171]

Liability based on defect is regarded as a form of strict liability,[172] and there have been endless discussions about the justifications for such liability in the context of damage caused by products. Although some authors still challenge the very idea that product liability should be strict and not simply based on fault,[173] the discussion in Europe has generally focused on which theory can best account for the imposition of strict liability, rather than on the adequateness of such liability. It is difficult to find one's way through all the arguments and reasoning put forward both in academic literature and in case law, but the predominant justification seems to be the internalisation of risk.[174] A defective product is basically a product creating an abnormal risk of damage,[175] and producers should be made

170. Such 'purely causal liability' has received different names: D. More, 'Re-Examing Strict Products Liability's Goals and Justifications' (1989) 9 Tel Aviv U. Stud. L. 165, 172. It is understood here as a liability regime where the product's mere participation in the occurrence of damage would be enough to make the producer liable, without any requirement that a defect in the product be proven.

171. On the idea of a middle ground in product liability (but reacting to some perceived excesses on the part of US courts), see R. A. Epstein, 'Products Liability: The Search for the Middle Ground' (1978) 56(4) NC L. Rev. 643.

172. See supra fn. 4.

173. See supra (n 22).

174. For a presentation and tentative synthesis of the existing views, see J.-S. Borghetti, *La Responsabilité du fait des produits. Étude de droit comparé* (LGDJ 2004) 587-636.

175. As has been accepted by Cases C-503/13 and C-504/13 *Boston Scientific Medizintechnik GmbH v. AOK Sachsen-Anhalt – Die Gesundheitskasse and Betriebskrankenkasse RWE* [2015] ECLI:EU:C:2015:148, at 40 and 54.

to bear this abnormal risk which they have created. Product liability based on defectiveness is thus seen as a form of enterprise liability.[176]

While there is no room in this contribution to discuss this view, it does seem rather convincing. However, even if one accepts that strict product liability based on defectiveness constitutes a satisfactory compromise between liability for fault and purely causal liability, and that the theory of enterprise liability provides an adequate theoretical justification for it, the compromise reached by the PLD is not as good as was initially thought.

The first problem with the notion of defect is the vagueness of its definition in the Directive.[177] Basically, a product is defective 'when it does not provide the safety which a person is entitled to expect'. Admittedly, the law is fraught with vague terms and notions. They play an essential role by granting the courts some amount of discretion and by bringing flexibility into the system, but one may wonder if the PLD has not gone too far.[178] As Jane Stapleton observed, the definition it gives of 'defect' is circular.[179] To say that a product must offer the safety which one is entitled to expect amounts to answering a question (what is a defect?) with another question (what is the safety which one can legitimately expect?), the answer to which should ideally have been given by the Directive. It is hard, however, to define 'defect' more precisely. A definition that applies to all types of products and all types of defects, in any context, is necessarily open-ended. The Draft PLD is therefore right to basically keep the current definition of defect.[180] Changing for another test would not have made the content of defectiveness any clearer but would have fuelled endless discussions about the continuity or discontinuity between the 'old' and the 'new' concept of 'defect'.[181]

A second problem with defect is that its main benefit for claimants, namely the strict nature of the liability it establishes, is somewhat of a *trompe-l'œil*. As has been shown by

176. On which see eg G. L. Priest, 'The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law' (1985) 14 J. Leg. Stud. 461.

177. Article 6 provides: '1. A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including: (a) the presentation of the product; (b) the use to which it could reasonably be expected that the product would be put; (c) the time when the product was put into circulation. 2. A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.'

178. On the costs of vagueness in product liability law, see eg D. More, 'Re-Examing Strict Products Liability's Goals and Justifications' (1989) 9 Tel Aviv U. Stud. L. 165, 167-68, 202.

179. J. Stapleton, *Product Liability* (1994) 234: 'The core theoretical problem with the definition, however, is that it is circular. This is because what a person is entitled to expect is the very question a definition of defect should be answering.' See also S. Whittaker, 'The EEC Directive on Product Liability' (1986) 5 Yearbook of European Law 233, 242.

180. Article 6(1) of the Draft PLD reads: 'A product shall be considered defective when it does not provide the safety which the public at large is entitled to expect.' At first glance, it might be doubted if the test is the same as in the current PLD, since the latter speaks, in its English version, of 'the safety which a person [and not the public at large] is entitled to expect'. However, it has long been accepted that the test for defectiveness is an objective one and does not depend on the expectations of a specific person or user. The new wording is intended to reflect this, as is confirmed by Recital 22 of the Draft: 'The assessment of defectiveness should involve an objective analysis and not refer to the safety that any particular person is entitled to expect.'

181. Another improvement over the current Directive is that the Draft PLD extends the (non-exclusive) list of factors that should be considered when assessing the legitimate expectations of the 'public at large', thus making the characterisation of defectiveness hopefully more predictable. However, it is unfortunate that, unlike the ELI Draft (Art. 7(1)), the PLD draft does not refer to the safety which the product should provide according to its design, since comparison between the actual product and its intended design is a practical and most common way of assessing manufacturing defects.

many authors, liability based on defectiveness is not always true strict liability.[182] It depends on the type of defect at stake. Although the PLD adopts a unitary conception of defectiveness, in practice, a distinction must inevitably be made between three types of defects: manufacturing defects, design defects and instruction defects.[183] Manufacturing defects consist in a (dangerous) discrepancy between the actual product and its intended design.[184] They normally affect only certain items of a product. Design defects, as indicated by their name, are due to a flaw in the product's design and therefore affect all items of the product. Both manufacturing and design defects can be called intrinsic defects, as opposed to instruction defects, which are extrinsic to the product. An instruction defect arises when it is not the intrinsic characteristics of the product that make it unreasonably dangerous, but the (lack of) information or instruction provided with the product that makes its use more dangerous than it should be.

Manufacturing defects are typically proven by comparing the product that caused the damage with its intended design. The claimant thus does not have to demonstrate that the defendant breached a duty to behave in a certain way, meaning that liability for manufacturing defects is truly independent from fault, ie strict. By contrast, proof of a design or instruction defect normally requires demonstrating that the product was not designed as it should have been or that the required information or instructions were not provided, ie that someone (though not necessarily the producer) did not behave as they should have and breached a duty to take reasonable care. Liability for design and instruction defects is thus not substantially different from liability for fault, even though the fault that the claimant needs to demonstrate need not be attributed to the producer (or the defendant, if different from the producer).

Defect as a ground for liability is therefore not a panacea. It comes at a heavy administrative cost,[185] due to the difficulty in defining the notion, to the need to distinguish between several types of defects, and to the difficulty in establishing defectiveness in practice, which often amounts to proving fault.

On the other hand, imposing purely causal liability for damage caused by products is clearly not on the agenda and seems unreasonable. It would require a complex set of defences.[186] Furthermore, a general no-fault compensation scheme for all accidents, as was created in New Zealand in 1972, is out of the question, for political reasons and because the EU has no competence to impose such a system on the Member States.[187] A weaker version of causal

182. For a clear and convincing demonstration, see eg J. Stapleton, 'The conceptual imprecision of "strict" product liability' (1998) 6 Torts Law Journal 260. The literature on this issue has long been very abundant, as is apparent from the references cited by J.-S. Borghetti, *La Responsabilité du fait des produits. Étude de droit comparé* (LGDJ 2004) 471.

183. This distinction became a basic feature of US product liability law long ago; see J. G. Fleming, 'Of Dangerous and Defective Products' (1989) 9 Tel Aviv U. Stud. L. 11, 13ff.

184. They are called 'manufacturing' defects because this discrepancy typically originates in the manufacturing process, though this is not necessarily the case.

185. J. G. Fleming, 'Of Dangerous and Defective Products' (1989) 9 Tel Aviv U. Stud. L. 11, 13.

186. Specific defences would be needed to avoid producers being made liable for damage caused by the known and unavoidable risks of their products. For instance, it would make no sense to have the producer of a 'normal' knife be made liable for every single injury caused by its product.

187. New Zealand famously established a no-fault compensation system for all injuries with the New Zealand Accident Compensation Act 1972. That system attracted wide attention and praise among tort law scholars in the 1970s and 1980s, but interest in it has now declined, partly due to a shift away from strict liability and no-fault compensation schemes in academic legal thinking. For a presentation of the New Zealand Compensation Scheme, as now governed by the Accident Compensation Act 2001, see C. Hodges and S. MacLeod, 'New Zealand: The Accident Compensation Scheme' in C. Hodges and S. MacLeod (eds), *Redress Schemes for Personal Injuries* (Hart Publishing 2017) 33.

liability would be to switch the burden of proving defect, so that defectiveness would be presumed whenever a product causes damage, and the producer would have to demonstrate that the product was not defective or that damage was not caused by the product's defect. Such a rule has sometimes been advocated, especially by consumer associations or associations of victims of pharmaceuticals. It may be well suited for certain types of products or situations, but it is too radical to be applied across the board. Since the PLD is a general instrument that is potentially applicable to all types of products and situations,[188] the best solution is probably to keep defectiveness as the basis for liability, and to leave the burden of proving defect on the claimant as a matter of principle.

This is what the Draft PLD does, while at the same time making it easier to prove defect or causation by creating a disclosure procedure (Article 8) and reversing the burden of proof of causation and/or defect in certain cases (Article 9). These two provisions have been analysed in detail elsewhere and need not be discussed at length here.[189] Suffice to say that they go in the right direction, by making it easier for injured persons to claim compensation in some cases without radically upsetting the balance of interests at the expense of producers.

However, it should be stressed that the combination of defect as the ground for liability under the PLD and the proximity between defect and fault has potent consequences on the interaction between the Directive's regime and other liability regimes. This interaction is governed by Article 13 of the PLD according to which: 'This Directive shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability system existing at the moment when this Directive is notified.' The rule in this provision was interpreted restrictively by the CJEC and can be restated as follows:[190] within its scope of application, the PLD bans the application of national liability regimes based on the same ground (defectiveness),[191] but it does not preclude the application of other systems of contractual or non-contractual liability based on other grounds, such as fault or a warranty in respect of latent defects. The Draft PLD intends to carry the rule over (Article 2(3)(c)).

Where a product has a design or instruction defect, and assuming that defect can be proven, the injured party will often be able to demonstrate the producer's or someone else's fault as well. They will then have an option between relying on the PLD regime and relying on the applicable national fault-based liability regime to seek compensation. The product's defect in the sense of the PLD may also coincide with a latent defect in the sense of the warranty for latent defects, as exists in certain Member States, the application of which was

188. The generality of the PLD may be criticised. There are good reasons why pharmaceuticals should be subject to specific liability rules, as is the case in Germany with the 1976 *Arzneimittelgesetz* (AMG), or even to a no-fault compensation system, as seems to be the case in Scandinavian countries (see C. Bloth, *Produkthaftung in Schweden, Norwegen und Dänemark* (Verlag Recht und Wirtschaft 1993) 325-42). However, despite recognising that pharmaceuticals raise specific difficulties, especially as far as causation is concerned (see COM (2018) 246 final, passim), the European Commission has eventually decided to keep them within the scope of the PLD.

189. See eg see J.-S. Borghetti, 'Adapting Product Liability to Digitalization: Trying Not to Put New Wine Into Old Wineskins' in S. Lohsse, R. Schulze and D. Staudenmayer, *Liability for AI* (Nomos 2023) 129, 159-63; E. Dacoronia, 'Burden of proof – How to handle a possible need for facilitating the victim's burden of proof for AI damage?' in S. Lohsse, R. Schulze and D. Staudenmayer, *Liability for AI* (Nomos 2023) 201; G. Wagner, 'Liability Rules for the Digital Age – Aiming for the Brussels Effect' (2022) 13(3) J. Europ. Tort L. 191, 216-18.

190. See esp. C-183/00 *María Victoria González Sánchez v. Medicina Asturiana SA* [2002] ECR 2002 I-03901, ECLI:EU:C:2002:255, at 31.

191. Unless it is a special liability system that existed when the PLD was modified. In practice, this exception only covers the German strict liability regime applicable to pharmaceuticals (AMG, see supra fn. 188), also based on defectiveness.

expressly accepted in the context of product liability by the CJEC.[192] In such cases, and where the claimant can sue the producer based on the warranty,[193] there will also be an option between the PLD and a purely national regime.

It is therefore often the case that someone having suffered damage caused by a defective product can prove the existence of another ground for liability than defect and can rely on at least one purely national liability regime to claim damages against the producer or another person potentially liable under the PLD.[194] As a result, relying on the Directive's regime is interesting for claimants only if the other features of this regime, apart from the ground for liability, are more favourable to them than those of purely national regimes. This, however, is not always the case. First, some types of damage may be covered by a national liability regime, but not by the PLD, in which case the injured party has no choice but to rely on the former (possibly in addition to the latter) if they want to be fully compensated.[195] Second, the many defences available to producers and other defendants under the PLD result in that regime being sometimes less favourable to claimants than national fault-based regimes, let alone strict liability ones. As a result, in many Member States, those suffering damage caused by products keep invoking purely national rules, either cumulatively with the PLD regime or on a stand-alone basis. If the PLD is to successfully 'compete' with other liability regimes based on other grounds, it is therefore necessary to address the issue of defences, which will be discussed in the next section, and that of damage.

Article 9(1) defines 'damage' as death or bodily injuries and damage to property other than the defective product itself, with a lower threshold of € 500, provided the item of property (i) is of a type ordinarily intended for private use or consumption, and (ii) was used by the injured person mainly for his own private use or consumption. The CJEC took the position that damage not covered by the definition given at Article 9, such as damage to professional property, is outside the scope of the PLD.[196] This is a source of complexity, as there can be doubts as to whether a given harm falls with the definition of 'damage' in the

192. C-183/00 *María Victoria González Sánchez v. Medicina Asturiana SA* [2002] ECR 2002 I-03901, ECLI:EU:C:2002:255, at 31.

193. This is the case in France, where the warranty for latent defects cannot be set aside and is transferred along with the product sold, so that the end-buyer can sue the producer based on the warranty arising out of the initial sales contract entered into by the producer; see J.-S. Borghetti, 'Breach of contract and liability to third parties in French law: how to break deadlock?' (2010) Zeitschrift für europäisches Privatrecht 279, 284-85.

194. The CJEC ruled that only 'operators who have taken part in the manufacture and marketing processes' of the product (such as producers, importers and suppliers) are included within the PLD's scope: C-402/03 *Skov Æg v. Bilka Lavprisvarehus A/S and Bilka Lavprisvarehus A/S v. Jette Mikkelsen and Michael Due Nielsen* [2006], ECR 2006 I-00199, ECLI:EU:C:2006:6. By contrast, the liability of service providers is not covered by the PLD and a national law can make a service provider liable for damage caused by a defective product used to perform that service, as is the case in France: C-495/10 *Centre hospitalier universitaire de Besançon v. Thomas Dutrueux and Caisse primaire d'assurance maladie du Jura* [2011] ECLI:EU:C:2011:869.

195. This used to be the case for example in German law until 2002, when the compensation for non-pecuniary losses was possible under the ordinary rules on fault liability, but not under the (officially) strict liability rules transposing the PLD.

196. C-285/08 *Moteurs Leroy Somer v. Dalkia France and Ace Europe* [2009] ECR 2009 I-04733, ECLI:EU:C:2009:351. As a result, Member States are free to deal with that type of damage as they wish, including by having it covered by the PLD regime; but this latter option seems to have been adopted only in France (Article 1245-1 of the *Code Civil*).

Directive.[197] More importantly, by not covering damage to professional property,[198] which has rightly been described as the most important issue in relation to property damage,[199] the drafters of the PLD have deliberately limited the harmonising effect of the Directive.[200] This choice runs directly against the PLD's primary policy objective, which is the harmonisation of product liability for the sake of the achievement of a truly common market. It cannot be explained by the consumer protection objective.[201] Its motivation was likely the desire to limit the potential financial burden on producers, as well as the idea that such damage is best handled through contract law and the specific terms agreed upon by those providing and those using the products causing damage. This makes sense but cannot be reconciled with the PLD's stated aim.

Unfortunately, the Draft PLD basically sticks to the same solution,[202] and even makes it clear that damage caused to legal persons is not within the Directive's scope of application (Articles 1 and 5). Yet, if the PLD is to truly harmonise product liability across the EU, it should be made applicable to all types of property damage (except damage to the defective product itself), including damage to professional property, regardless of whether it is owned by a natural or a legal person.[203] This would increase the burden on producers and other potential defendants, but only to a limited extent, since liability under the PLD often comes very close to liability for fault, to which they are subject anyhow. Limitation and exclusion clauses should also be accepted in relation to damage to professional property, subject to the same conditions as those normally applicable under national law.[204] Besides, there is no reason why insurance would not be available.[205]

197. For an example, see C-203/99 *Henning Veedfald v. Århus Amtskommune* [2001] ECR 2001 I-03569, ECLI:EU:C:2001:258. The case concerned a defective product that had caused the loss of a kidney intended for transplantation.
198. The drafters of the PLD have also limited its scope of application by leaving non-pecuniary losses out (Article 9(2)). However, this has a smaller impact in practice than the exclusion of damage to professional property.
199. I. Schwenzer, 'Products Liability and Property Damages' (1989) 9 Tel Aviv U. Stud. L. 127, 129.
200. Damage to property can be extremely important in practice. For instance, the fire that broke out in 1999 in the Mont-Blanc Tunnel (connecting France and Italy) caused several casualties but also tens if not hundreds of millions of euros of damage to professional property (and consequential losses). Assuming that it was caused by a defective engine, as has been surmised, the liability of the producer would have fallen only partially within the PLD's scope and its damage to property limb might have been decided differently depending on whether it was governed by French or by Italian law.
201. Admittedly, the fact that the PLD covers damage caused to goods intended and used for private purposes, but not damage caused to professional property, stresses the importance of consumer protection by contrast. However, including damage to professional property within the Directive's scope would not take anything away from consumers.
202. Article 4(6). The provision slightly extends the scope of recoverable primary harm, by broadening the definition of bodily injuries, by suppressing the €500 threshold in case of damage to property and by including damage caused to property used only partially for professional purposes as well as loss or corruption of data. The other possible types of primary harm, including damage to professional property and pure economic loss, are not mentioned and presumably remain outside the Directive's scope; see J.-S. Borghetti, 'Adapting Product Liability to Digitalization: Trying Not to Put New Wine into Old Wineskins' in S. Lohsse, R. Schulze and D. Staudenmayer, *Liability for AI* (Nomos 2023) 129, 140-43.
203. G. Wagner, 'Liability Rules for the Digital Age – Aiming for the Brussels Effect' (2022) 13(3) J. Europ. Tort L. 191, 209.
204. The latter solution has been adopted in France (Art. 1245-14(2) of the *Code Civil*), where the provisions implementing the PLD cover damage to professional property: see supra (fn. 196).
205. Insurance comes at a cost, of course, but it is doubtful if this extension of product liability would entail a significant rise in insurance premiums, the share of which in producers' cost structure seems rather low.

2. Defences

Defences are an essential part of any liability regime and play a crucial role in balancing the interests of potential claimants and defendants. They are also a major factor of complexity, and a major fuel for litigation. The more defences are available to defendants, the more occasions there are for discussion and disputes. A balance therefore needs to be struck between preserving the legitimate interests of defendants and accumulating grounds for discussion and/or litigation at the expense of the injured parties. Examples in national legal systems confirm that limiting the number of defences is an effective means of containing litigation and promoting settlements, including in strict liability regimes.[206]

With its six specific defences (Article 7), coming on top of comparative fault (Article 8(2)) and two distinct limitation periods (Articles 10 and 11),[207] the PLD stands out as a very and probably too sophisticated liability regime. The Draft PLD continues in this vein and contains basically the same defences (at Articles 10, 12(2) and 14), with an additional factor of complexity arising out of the necessity to consider possible updates and upgrades of products with a digital element (Article 10(2)).[208] Yet, if the PLD is to be a reasonably consumer-friendly regime, it should limit the defences available to manufacturers and other potential defendants. Two of them will be discussed here, which stand out as sources of unnecessary complications and litigation: the development risk defence (a) and the ten-year long-stop period (b).

a. The Development Risk Defence

The development risk defence has given rise to endless discussions and debates, especially during the PLD's adoption and the transposition process, and its political and symbolic importance cannot be underrated. Many see it as the symbol and condition of the preservation of the producers' interests in European product liability. However, a closer analysis suggests that the costs associated with it greatly exceed any benefit it can bring in terms of protecting producers against unfair claims.

Only in exceptional cases has the development risk defence been accepted by the courts. In France, there is only one judgment by the *Cour de Cassation*[209] where the defendant was able to escape liability by relying on it,[210] and it is open to criticism since it concerned a manufacturing defect and the applicability of the defence to such defects has been disputed.[211] There are also a few French appellate court cases in which the defence was accepted in relation to a pharmaceutical, but they all concern the same product and appear to have been justified on mostly procedural grounds, due to the claimants failing to challenge the

206. For instance, in France, simplification of liability for traffic accidents has been achieved not so much by switching from fault-based to strict liability, as by reducing the number of defences available to defendants: see J.-S. Borghetti, 'Extra-Strict Liability for Traffic Accidents in France' (2018) 53(2) Wake Forest L. Rev. 265.

207. While Article 11 sets out a ten-year 'long-top' limitation period, discussed in the section above, article 10 provides for a three-year limitation period, which starts to run from the day on which the claimant became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer.

208. The Draft also suppresses the possibility for Member States to set aside the development risk defence.

209. France's highest court in civil and criminal matters.

210. Cass. 1re civ., 5 May 2021, n° 19-25102.

211. The debate on this issue is still ongoing in several countries: see the comparative overview in D. Fairgrieve and R. Goldberg, *Product Liability* (3rd edn, Oxford University Press 2020) §§ 13.110-13.124.

defendant's arguments as to the existence of a development risk.[212] Nowhere in the EU does there seem to be a significant number of cases where the defence was accepted.

This is hardly surprising. Proving that 'the state of scientific and technical knowledge at the time when [the producer] put the product into circulation was not such as to enable the existence of the defect to be discovered' is not easy, especially in the age of the internet (and sophisticated automated translators), where information is so readily available. Also, to assess the development risk defence, judges must put themselves in the situation of the producer at the time the product was put into circulation, which is very difficult. With the benefit of hindsight, they probably tend to consider that the risk which eventually caused the damage could have been known at the time when the product was put into circulation, even if that was not the case. The relevance of the development risk defence is further weakened by the fact that it is the moment when the precise item that caused damage was put into circulation which must be considered to assess whether the defect could be discovered, and not the moment when the product type was first put into circulation. Besides, many national legal systems recognise some sort of duty to monitor risks after the product has been put into circulation.[213] As a result, even if the defect could not be discovered when the product was put into circulation, the producer may still be liable based on fault if it failed to adequately monitor the product between that moment and the time when the product was used or consumed by the victim.

The policy arguments in favour of the development risk defence also fail to convince. It has sometimes been written that defects caused by unknown risks cannot be insured because they are not predictable,[214] but this sounds more like a play on words. Design or instruction defects caused by risks that could have been identified by the producer may be predictable in theory,[215] as opposed to defects caused by risks that were unknowable, but, in practice, none of these defects is ever predicted in advance by the insurer – or it would have refused to insure the producer in the first place. The existence of a given design or instruction defect always comes as a surprise to the insurer. Besides, if one is to judge based on published cases, the number of defects attributable to undiscoverable defects is so low in practice that extending liability to such defects could not have a significant effect on insurance premiums.

It is also sometimes said that making producers liable for unknown risks would deter some companies from developing products, or from marketing them in certain countries, for fear of being made liable. This would be the case especially in the pharmaceutical industry and in new technologies. The argument may be received with a certain amount of scepticism. There is not much evidence suggesting that companies seriously consider the applicable liability rules before developing a product or entering a new market. As has been seen earlier, the risk of incurring civil liability probably has a very limited impact on the behaviour of economic operators generally.[216] This must be even truer of the risk of not being

212. See J.-S. Borghetti, 'La Cour de cassation admet pour la première fois le jeu de l'exonération pour risque de développement' (2021) 4 Revue des contrats 27, 31. In an earlier case concerning the same pharmaceutical, the *Cour de Cassation* had confirmed the rejection of the development risk defence by the appellate court, and some claimants had apparently taken the rejection of the defence for granted in later cases.

213. P. Machnikowski, 'Producers' Liability in the EC Expert Group Report on Liability for AI' (2020) 11(2) J. Eur. Tort L. 2020 137, 141.

214. See eg P. Trimarchi, *La responsabilità civile: atti illeciti, rischio, danno* (Giuffrè Editore 2017), § 18.3.

215. There may be cases were manufacturing defects are predictable, for instance if it is known that the manufacturing process will statistically result in one out of N items of the product not conforming to its design.

216. See supra II.A.1.

able to *escape* liability in the future if a defect which is by definition hypothetical at the time of the decision materialises at a later stage.[217] Finally, the example of vaccines against Covid-19 has shown that, when a product is considered as vital for the community, there are ways to shield producers from potential liability.[218]

While the dangers of suppressing the development risk defence are not obvious, the costs associated with it are quite clear. Even if the defence has very rarely been accepted by the courts, it is often put forward by defendants (at least in France) and gives rise to lengthy discussions and disputes. This may not get better in the future, since 'the objective state of scientific and technical knowledge at the time when the product was placed on the market', to which Article 10(1)(e) of the Draft PLD refers, will never be easy to ascertain, especially in retrospect. Even when the defect was in fact not undiscoverable, the development risk defence can be brandished as a threat to dissuade victims from claiming or suing.

A further reason to suppress the defence is the development of AI and 'self-learning' products, and the possibility that some products will behave in a way that was totally unpredictable at the time when they were put on the market. When unpredictability is a consubstantial feature of a product, the manufacturer should bear the risk associated with it, which is a typical risk of the product, and should not be allowed to escape liability by arguing that the product's uncontrolled evolution resulted in the occurrence of a defect that could not be known when the product was put on the market.[219]

Getting away with the development risk defence would therefore simplify the PLD regime and suppress a pretext for delays and chicanery, without significantly increasing the burden on producers.

b. The Long-Stop Period

The ten-year 'long-stop' limitation period which starts to run with the product being put into circulation (Article 11 of the PLD) is a major obstacle for claimants, especially in cases involving pharmaceuticals, where side effects may occur a (very) long time after the patient was exposed to the product and where establishing a causal relationship between the use of the product and these effects can also be a lengthy and difficult process. This long-stop is officially justified by the fact that 'higher safety standards are developed and the state of science and technology progresses', so that 'it would not be reasonable to make the producer liable for an unlimited period for the defectiveness of his product' (Recital 11). Both the mechanism and its justification have been carried over into the Draft PLD (Article 14(2) and Recital 43). Yet, the justification fails to convince. Under both Article 6 of the PLD and Article 6 the Draft PLD, defectiveness must be assessed at the time the product was put into circulation and a product must not be considered defective for the sole reason that a better product is subsequently put into circulation. The existence of a defect is thus independent from the moment at which it is appreciated, and there is no reason why the increase in safety standards or the progress of science should influence this moment.

217. On the equivocal conclusions of economic analysis as to the desirability of the development risk defence, see M. Faure, 'Economic Analysis of Product Liability' in P. Machnikowski (ed.), *European Product Liability. An Analysis of the State of the Art in the Era of New technologies* (Intersentia 2016) 619, §§ 87-88.

218. D. Fairgrieve, P. Feldschreiber, G. Howells and M. Pilgerstorfer, 'Products in a Pandemic: Liability for Medical Products and the Fight against Covid-19' (2020) 11 Eur. J. Risk Regulation 565.

219. P. Machnikowski, 'Producers' Liability in the EC Expert Group Report on Liability for AI' (2020) 11(2) J. Eur. Tort L. 2020 137, 146, reflecting on 'Key Finding 14 of Expert Group on Liability and New Technologies – New Technologies Formation, Liability for Artificial Intelligence and Other Emerging Digital Technologies' (2019) <https://data.europa.eu/doi/10.2838/573689> accessed 30 May 2023.

The real reasons for the long-stop period are elsewhere. It is intended above all to limit the liability of producers, especially in the pharmaceutical industry, and the problem is that it does it too well. When a product has long-term negative effects, applying a ten-year bar to liability amounts to granting immunity to the producer. This can hardly be regarded as a 'fair balance' between the interests of injured persons and those of producers. The PLD is not applicable *ratione temporis* to Thalidomide/Contergan-related damage, but even if it were, the women suffering from medical problems due to *in utero* exposure to the product could never be compensated under it because of the ten-year long-stop period. The unfairness of this ten-year limit has been confirmed, though somewhat indirectly, by the European Court of Human Rights. In its *Howald Moor* judgment, the Court took the view that the application of a ten-year limitation period expiring before it was scientifically possible for a person to know that they were suffering from a certain disease, and thus to bring a claim for compensation, violated their right to a fair trial as established by Article 6(1) of the European Convention on Human Rights (ECHR).[220] While the judgment was based on a Swiss case unrelated to the PLD, there is no doubt that the application of the ten-year long-stop period of the PLD could likewise lead to such a violation.

The other reason put forward to justify the long-stop period is insurability. Only if liability is limited in time can it be adequately covered by insurance, or so the argument goes. This, again, is not obvious. Insurance practices vary between countries, but claims-made insurance policies do seem to be rather common, and they apply to any claim reported during the policy period, regardless of the moment when the insured event occurred. In some countries like France, long-stop periods did not exist until recently and this did not hamper the availability of insurance for producers (nor the development of a thriving insurance market). Besides, even assuming that a long-stop period is needed or at least helpful for insurance purposes, it need not be as short as ten years. A longer long-stop period would presumably result in (slightly) higher premiums but would not lead to an impossibility for producers to get insurance.

The awareness that a ten-year long-stop period is very short for products like pharmaceuticals and the risk that the application of the PLD should result in a violation of the ECHR have resulted in the Draft PLD extending the long-stop period to 15 years where an injured person has not been able to initiate proceedings within 10 years 'due to the latency of a personal injury' (Article 14(3)). However, the solution is hardly satisfactory, since the latency period of a personal injury can be much longer than 15 years, as the Thalidomide/Contergan cases demonstrate.

To avoid any contradiction between EU law and the ECHR, and for the sake of consumer protection, the best solution would be to suppress the long-stop period altogether in case of bodily injuries. This would increase the burden on some economic operators, but the example of those Member States that have refused, abolished, or extended long-stop periods in case of personal injuries, demonstrates that it is a manageable burden, for which insurance can be found.

Both the development risk defence and (for bodily injuries only) the long-stop period should therefore be abolished. This would have a positive impact on consumer protection without imposing an unfair burden on producers or other economic operators. If a choice had to be made between these two measures, the suppression of the long-stop period in case of bodily injuries should be favoured. This would avoid pharmaceuticals (or other products) with long-term side effects being in effect liability-proof. However, the PLD is currently

220. *Howald Moor and Others v. Switzerland*, App nos 52067/10 and 41072/11 (ECtHR, 11 March 2014).

applied so sparingly that the combination of both measures could hardly result in an unfair pressure on producers.

Conclusion

There is a huge gap between the relevance of the PLD for European private law from a theoretical point of view and its practical effects. The Directive is a wonderful legal topic, raising many fascinating issues, but it is a very disappointing instrument when it comes to achieving a truly common market and enhancing consumer protection, which are the objectives officially assigned to it. The problem is deep-rooted. Harmonising product liability is simply not helpful for the establishment of a common market and it cannot have a significant effect on consumer protection in the stronger sense of the term (ie deterring producers from putting dangerous products on the market). The only useful thing which the PLD could do would be to enhance consumer protection in the weaker sense of the term by making it easier for those injured by defective products to be compensated than is the case under purely national rules. Unfortunately, the Directive does not even do that, and the features of the liability it establishes make it in practice quite difficult for those injured to find an accessible defendant that will compensate them. The figures we have, however patchy, confirm that the PLD has little practical relevance. The most worrying observation is that there are almost no cross-border claims based on the Directive. This means that, in practice, many producers are immune to liability and innumerable consumers are left without a remedy under the PLD.

This can be neither ignored nor accepted and must be considered when reforming the PLD. The Draft that is currently under discussion is a unique occasion to address the Directive's shortcomings, and it cannot be concerned only with adapting product liability to software and digital products generally. The digitalisation of the economy is a major issue, but simply extending the scope of application of an ineffective instrument makes little sense. Some of the PLD's current features must be revised so that the instrument can effectively enhance consumer protection by making it easier for those injured by defective products to be compensated. This can be done without upsetting the balance between the interests of the various stakeholders. Defectiveness can be retained as the ground for product liability, but a couple of defences need to be revised or suppressed. More importantly, the range of potential defendants needs to be broadened. The PLD as it stands does not meet the challenges of Europeanisation and globalisation, because it rests on the false assumption that it is enough for those injured by defective products to have a defendant against which to turn somewhere in the EU. However, claimants and claims do not cross borders as easily as products. The common market may be a reality, but the EU is still far from being a unified jurisdiction. Those injured by defective products must therefore be allowed to sue the suppliers of these products as well as the online retail platforms through which they were sold as a matter of principle. Only then will the PLD truly benefit consumers and justify the vast amount of time, intelligence and efforts which European lawyers and institutions have invested in product liability for almost five decades.