



Developers Alliance's position on the European Commission's proposal for a Directive on liability for defective products

The proposal is revising the legal framework provided by the Product Liability Directive (PLD), extending the scope in regard to software, types of damages and changing the burden of proof and conditions for compensation claims. The legal regime imposed by the directive is one of strict liability for defective products. We are concerned about the application of such a regime for software, disregarding its specific characteristics in contrast to physical products.

We are calling on the EU co-legislators to:

- *Reject a generalized inclusion of standalone software in the definition of 'product'. Ensure legal clarity regarding the notions of standalone software, software as a component of a product, software as a service, and digital services.*
- *Exclude immaterial harms, such as psychological harms and loss of data, from the definition of damage, to avoid legal uncertainty.*
- *Clarify the disclosure obligations and the burden of proof, in order to protect software developers from excessive litigation.*

Imposing a strict liability regime on software in a generalized way will have a significant impact on software development and availability in the EU. Developers with limited resources (e.g. startups) will be particularly discouraged by increased legal risks and costs associated with litigation and indemnity to platforms, device manufacturers and distributors.

On the Scope and Definitions

The generalized inclusion of **standalone software** in the definition of 'product' is not justified. The vast range of software applications, with various features and functions, provide a multitude of situations with very different levels of risk, as well as control from software developers. In general, the nature of software makes it more akin to services.

The proposal doesn't clearly **delineate between products and services**. The proposed definitions of 'component' (art.4.3) and 'related services' (art.4.4) are intended to cover 'digital services', as indicated in recital 15. While in certain cases software might qualify as a component of a product (e.g. operating systems), in respect of the aforementioned definition, many software applications run as a service provided to users (e.g. apps for mobile devices, web apps). Recital 12 presents an imprecise description of types of software presumed hazardous, alongside an unclear justification for the proposed approach. This gives rise to confusion and legal uncertainty, in contradiction to the declared objective of the proposal.

The strict liability regime is intended for high risk situations like those directly affecting the life and physical integrity of persons. The nature of software and computer processing needs to be considered, in particular with regard to reliability. There is no 100% foolproof software, even for military and telecom grade systems. **Software will always include flaws, bugs are inherent** and subject to constant code review for fixes. Treating software defects as careless is inconsistent with how software development works. Software should only be implicated where negligence is involved. Strict liability is inappropriate because perfection is unachievable in software development.

Software is covered by specific requirements in certain sectoral regulation, to address the high risk specificity of certain sectors (e.g. medical devices). Defective products, not compliant with relevant harmonized requirements can produce harm, but it's inevitably the case that **software is embedded in or enabled through hardware**. It is not the software itself that is considered a defective product, but the software-enabled product can be defective as a result of a malfunction of software.

Contractual and national tort liability covers a broader range of damages, including from services. Consumers can rely on these regimes for situations involving standalone software as well.

The definition of '**damage**' includes "medically recognised harm to psychological health" and "loss or corruption of data that is not used exclusively for professional purposes" (art. 4.6.a and c). Concerning **psychological harm**, even medically attested, this could lead to excessive litigation based on legal uncertainty. Psychological suffering is a subjective experience, and considering the proposed generalized qualification of software as a product, different categories of software developers would be under constant risk of litigation (e.g. mobile application developers, game developers). Similarly, with regard to **loss or corruption of data**, this also significantly increases legal uncertainty, as the notion is extremely broad and risks being interpreted in very different ways across jurisdictions. Recital 16 offers insufficient clarifications and justifications. The legal frameworks for data protection, privacy and cybersecurity are highly relevant and more appropriate to respond to consumer issues related to data. Furthermore, the provisions on liability for data loss could be in conflict with the necessity to take cybersecurity measures or even comply with legal obligations regarding content curation.

The exemptions for open source software mentioned in recital 13 should be included in the operative part of the directive. The exemptions should be strengthened, taking into

consideration that the definitions of ‘making available on the market’, and respectively ‘putting into service’, include circumstances when products are placed on the market and distributed free of charge.

It is worth noting that, given the prevalence of open source in software development, a strict liability regime for software in general will defeat any incentive to utilize open source resources for commercial applications. Software developers use open source code in building different applications, as reusing code is saving time and money. In the context of strict liability they would be forced to review in detail each piece of code and duplicate such efforts and relative costs for any application reusing the same snippets of open source code. Writing code from scratch and relying on proprietary software will be thus the obvious choice to limit liability risks.

On the Specific Provisions on Liability for Defective Products

The obligation to disclose evidence (art. 8) could prove very burdensome for software developers and expose them to fishing expeditions and frivolous litigation. The conditions for obtaining documentation are quite indulgent with the claimants, while the types of documentation that can be obtained are very broad. The obligation is to be considered in strict correlation with the presumption of defectiveness (art. 9.2.a).

The presumption of defectiveness “when the damage was caused by an obvious malfunction of the product during normal use or under ordinary circumstances” (art. 9.2.c) needs further clarifications. The notion of ‘obvious malfunction’ should be specified at least in the preamble, to offer proper interpretation, especially in relation to the notion of ‘defect’, but also ‘the reasonably foreseeable use and misuse of the product’.

The alleviation of burden of proof in the case of scientifically or technically complex cases (art. 9.4) should benefit from stricter conditions, in order to avoid a de facto reverse of burden of proof.

The proposal relies on a presumption of harm for products embedding AI systems or advanced software solutions, which would be requiring a specific legal treatment compared to other types of products. Similarly to the proposal for a directive on AI Liability (AILD), such approach is based on an extreme precautionary approach which will act as a disincentive to the development and uptake of AI in the EU.

We welcome the proposal to ensure uniform application of **the development risk defense** across the Single Market (art.10.1.e).

On the General Provisions of Liability

In the case of software, **the limitation period** of 10 years (art. 14) is not appropriate. In the spirit of legal coherence the period should be aligned with the warranties provided by the Directive (EU) 2019/770 ("Digital Content Directive") and the Directive (EU) 2019/771 ("Sale of Goods Directive"). This should be considered from the perspective of the obligation and the

relative liability for providing software updates or upgrades (art.10.2) . The proposal specifies that the limitation period should restart after a product has been substantially modified. It should also be clarified that software updates or upgrades are not substantial modifications, which would trigger new limitation periods for a resulting indeterminate time.

[Developers Alliance](#)'s mission is to advocate on behalf of software developers and the companies that depend on them, support the industry's continued growth, and promote innovation.