

CONSUMER SAFETY.

EU CONSUMER PROTECTION LAW

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	<p>CONSUMER SAFETY.</p> <p>•</p> <p>READING LESSON</p> <p> 40 MINUTES</p>	<p><i>Dr. Kitti Bakos-Kovács PhD.</i> <i>assistant professor</i></p> <p>University of Szeged</p> <p>Faculty of Law and Political Sciences</p> <p>Institute of Civilistic Sciences</p>
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1. Product liability.
2. Product safety.

1. Product liability.

Harmonization of national rules of liability of producers for damages caused by defectiveness of products was necessary in order to avoid the distortion of competition in the common market. Beyond that product liability is the main field of consumer protection policy in the European Union as also regards the risk inherent in modern technological production.

As principle it can be stated that defective products can cause financial and physical harm to consumers. Businesses are obligated to protect persons from physical damage to their person or property.

As main source of law the Directive 85/374/EEC concerning liability for defective products was adopted in 1985, but Commission presents report and evaluation in every five years about enforcement of this directive. It introduced a strict liability regime if damage in assets or personal injury arises from the defect of the product. Discuss about updating and extending the directive to digital content products of services was pursued and expert groups worked, because consumers should always be protected if digital content or services cause harm or damage to their property, including in the digital environment. In the light of new modern technologies, it should be interpreted how legal instruments and achievements of directive concerning liability for defective products can be extended *for new developments of digital single market* or contribute to safety operation of digital common market.

Member States were obligated to implement provisions of this directive into national laws. **In some fields and definitions**, the directive follows the regulation method of **full harmonization** in order to institute uniformed framework for product liability, but **some aspects of regulation are left to the legal systems of the Member States**. *For example*, Member States cannot differ from the conditions of defect or liable persons for damages caused by defectiveness product; these essential cores of product liability are regulated on compulsory way at EU level. Other side, Member States are entitled to regulate the total amount of compensation that producer is obligated to reimburse for injured person. Product liability claims must be brought in the courts of Member States and are governed by national procedural rules of those courts.

Other directives regarding consumer rights also contains liability statements, but these legal rules establish fund for application of legal consequences of lack of conformity where the trader is liable for compatible compliance of contract in accordance with the law and contractual provisions. **Product liability differs from legal consequences of lack of conformity**, because **(1)** these provisions obligate the producer and not the trader or distributor. Producer is not typically contractual partner of

consumer, so the directive declares non-contractual liability of producers and other liable persons. **(2)** The producer is liable for damage which was caused by the defectiveness of the product. Per se, defectiveness of product is not enough to state the liability of producer, occurrence of damage in assets or personal injury is necessary. Causal relationship is required between the defect of the product and the damage. **(3)** Different time limits are valid for product liability to bring claim in the court.

The directive also aims to establish the high level of consumer protection, because the injured person can demand compensation by such material damages where the item of property is ordinarily intended for private use or consumption and the injured person was used the damaged item of property for his own private purposes.

Directive concerning liability for defective products is not applied for supplying services (for example repairing). In this case the injured person can demand claim from the service provider according to the rules of lack of conformity, contractual or non-contractual liability or other special liability statements.

The producer shall be liable for damage caused by a defect in his product.
The producer has to provide compensation irrespectively of whether there is negligence or fault on their part.

Individuals injured by defective products. Consumer can demand compensation **not from his or her contractual partner but from the producer** of the defective product in the distribution chain. According to the essential core of this provision it can be stated that **the cause of the damage was the defect that appeared in the product. This rule established a harmonized substantive non-contractual and non-fault civil liability statement in national private laws.**

** Member States cannot differently regulate key definitions and main principles of product liability in domestic law.*

The **product** means all movables in the meaning of the directive.

Product liability obligates **all producers** involved in the production process if the manufactured finished product or component of the product was defectiveness. Any person or undertaking can be qualified as producer who presents himself or herself as producer of the product by using his or her name, trade mark or other distinguishing feature on the product (**'own brand'**). If the producer of the product cannot be identified, **each supplier (retailer, wholesaler, distributor etc.)** of the product shall be treated as producer and they are also liable for damage caused by defective product. Exception is regulated in the directive, because the supplier has right to inform the consumer about the identity of the producer or the supplier can designate the person who supplied him with the product. **First importer of the product into the European Union** are also liable for damages caused by the defective product. The directive prescribes the **jointly and severally liability** of regarding persons or undertakings in the distribution chain where two or more people are liable for the same damage. *It is prohibited to exclude or reduce the product liability of producers in contracts or in other ways.*

Product is considered defective when it doesn't provide the safety which a person is entitled to expect, taking all circumstances into account.

Some features are set out in the text of the directive such as the presentation of the product, the use to which reasonably be expected that the product will be put, the time when the product was put into circulation. It is an essential foundation of the regulation that a product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.

On the one part, **damage means death or personal injuries caused by the defective product**; further conditions are not required to demand compensation in this case. From the other side, **damage can realise as material damage in other assets or item of property of consumers other than defective product. The directive determines a threshold**, under which compensation can be demanded only in that case if the amount of the damage is **more than 500 euro**. It is required that *the damaged item of property is used ordinarily for private use or consumption and the injured person used this item for own private purposes*.

The **burden of proof** in relation to the elements of liability (damage, defect, causal relationship between the defect and the damage) **is on the injured person**. *Member States are entitled to determine the procedural evidentially rules*. The injured person is entitled to demand full compensation if rules of national law doesn't contain divergent threshold or limits for maximum amount of compensation.

This **strict liability** is not equating with absolute liability, because the producer is not liable for damage if he furnishes proof as to the **existence of certain exonerating circumstances** regulated in the directive. **Negligence or fault of producers is not examined** during the judgement, so product liability is a **non-fault liability**. By success evidence of either defences the producer and other obligated person is not liable for the damage. Rules of exculpation share risks between the producer and consumer; if the injured person proofs the damage, the defect and the causal link, the producer can refer to existence of either exonerating circumstances:

- (a) he or she did not put the product into circulation;
- (b) that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect came into being afterwards;
- (c) that the product was neither manufactured by him for sale or any form of distribution for economic purpose nor manufactured or distributed by him in the course of his business;
- (d) that the defect is due to compliance of the product with mandatory regulations issued by the public authorities;
- (e) that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered;
- (f) in the case of a manufacturer of a component, that the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product.

Time limits are regulated uniform to bring claim into courts at EU level. Three-years limitation period applies to claims that begins from the day on which the consumer becomes aware or should reasonably have become aware of the damage, the defect and the identity of the producer. **The right to action extinguishes after ten years from putting the product into circulation.**

2. Product safety.

Economic and practical importance of legal regulation of product safety is not disputable. Product safety rules aim primarily the protection of human life, corporal integrity and health as public interest. This protected public interest goes beyond the border of consumer protection, because requirements of product safety have to be also fulfilled in each relationship between undertakings. Norms of product safety cut across the whole production and distribution chain, included the technological developments. Through product safety regulation, technological and qualitative features of products

are granted by governmental forced assets and market surveillance is built up in order to effective execution of law in that case if dangerous product is placed on the market.

Scope of regarding legal acts cannot be reduced to relationships between consumers and undertakings; the engineering and technical provisions support expectations against the producers, distributors or importers of products. Product must **be safe also in that case if the product is used for industrial purposes**, because the labour safety, included the protection of life, corporal integrity and health of employees has to be granted. Environmental aspects also confirmed existence of technological and qualitative requirements prescribed by law in order to ensure product safety. Otherwise, *consumer protection gives border rights for consumers with obligatory information requirements, unfair contractual and commercial practices etc.* National competent authorities for consumer protection have competence to control unsafe products only in that case if the dangerous product is produced or used as consumer goods for private purposes. Misleading information on the product can be qualified as unfair commercial practices.

Product safety regulation provides **complex** approach also in system of regarding legal acts too in role of national authorities. The cause of the extremely **heterogenic** and **detailed** regulation method is the *multivarious economic processions* and the *wide range of manufactured, distributed products and components*. **Also regulations too directives** prescribe common rules for product safety at EU level, so legislative competence of Member States is limited in this field. Labelling rules aims not only providing adequate information for consumers or buyers but also contributes to grant safety use of product.

All products placed on the EU market must be safe. A product is safe if it meets all statutory safety requirements under European or national law.

Common framework of product safety is defined in **general product safety directive** that has **horizontal scope**. **Sectorial rules** are valid for **specific categories of products**, including toys, cosmetics, foodstuffs, pharmaceutical products, medical devices, building industry, agriculture, vehicles, intelligent networks, machines, textile products and bio-based products. Safety requirements of **some type of products** are regulated in special legal acts, for example baby carriers. *Application method of rules of product safety is the following:*

- Product safety has **public law characteristics**, so parties **cannot avoid from obligatory rules** of product safety. From the viewpoint of private law, **infringements of legal requirements of product safety can be evaluated in the framework of lack of conformity and civil liability**. Lack of conformity means when the obligor's performance at the delivery date is not in compliance with the quality requirements laid down in the contract or stipulated by law; in the latter includes the norms of product safety.
- **Where safety requirements are not covered by sectorial or product-specific rules, principles of general product safety directive have to be taken into consideration according to the principle *lex specialis derogate legi generali*.**
- According the type and main features of product it can be necessary to **apply jointly more sectorial or product-specific rules**. *For example*, by manufacturing of textile products regulation on textile fibre names and related labelling and marking of the fibre composition of textile products is applied and beside these requirements provisions of chemical safety are valid for using colouring matters and chemical agents. If the textile product is used by babies and kids, norms of children safety have to be taken into consideration.
- **A product shall be deemed safe, if it conforms to national rules of Member States in whose territory the product is marketed.** Acceptable is also **the conformity to voluntary national**

standards transposing European standards. The European Union favours standardization efforts. Standards are voluntarily applied, but can be relevant as references in judicial combats. The general product safety directive determines the adaptation procedure of European standards.

- **If there are no regulations or EU standards, the product's compliance is determined according to other reference documents such as national standards, Commission recommendations, codes of practice, the state of art and technology, reasonable consumer expectations concerning safety.**

Safe product means if the product does not present any risk or only the minimum risks compatible with the product's use under normal or reasonably foreseeable conditions of use. Some circumstances are mentioned in the text of the directive that are taken into consideration to judge about safety of product:

- a) the characteristics of the product, including its composition, packaging, instructions for assembly and, where applicable, for installation and maintenance;
- b) the effect on other products, where it is reasonably foreseeable that it will be used with other products;
- c) the presentation of the product, the labelling, any warnings and instructions for its use and disposal and any other indication or information regarding the product;
- d) the categories of consumers at risk when using the product, in particular children and the elderly.

In the framework of **market surveillance** national authorities are entitled to monitor and control dangerous products placed on the market. Each Member State must appoint the competent authority in charge of market surveillance. Regulation 765/2008/EC setting out the requirements for accreditation and market surveillance relating to the marketing of products unified criteria of market surveillance and cooperation and communication between national authorities of Member States.

Market surveillance is the activity carried out by authorities to ensure that products on the market are conform to the applicable laws and regulations and comply with the existing EU health and safety requirements. National authorities are responsible to take the appropriate measure if they find dangerous product on the market. They organise checks on products even after they had been placed on the market, can require all information about the product from the parties, take sample products and subject them to safety check and order the immediate *withdrawal or recall* of dangerous product. If it is necessary, national authority organises the destruction of unsafe products. As legal consequences, depending on the risk identified, products can be rejected already at the borders by customs, a sales ban can be imposed or warning messages can be circulated. National authorities can also fine sanctions and penalties by infringement of rules of product safety.

Rapid alert system operates in the European Union where information can be shared quickly by the Commission or national authorities about unsafe products found on the market. The system is available every time. The European Union cooperates with other countries on product safety at international level.

Models of safety assessment procedure, accreditation via conformity assessment and operation of authorized audit bodies is also settled in this regulation in the European Union. Each Member State shall appoint a single national accreditation body. This regulation provides a framework for **controls on products from third countries** and this legal act lays down the general principles of the **CE marking**.

EXERCISE

1. Please find some alerts in the rapid alert system of the European Union.
2. Please read the attached study about selected decisions of courts of the European Union.
3. Answer for the following questions:
 - a) What is CE marking? Search legal provisions in the regarding regulation. Please introduce CE marking shortly.
 - b) What does conformity assessment mean?
 - c) Please introduce the method of application of product safety rules by affixing of CE marking on the product.
 - d) Mention practical examples for infringement of rules of labelling from the case law of courts of the European Union.
 - e) Summarize what is the correlation between product safety and product liability in the light of judgments or decisions of courts of European Union.
 - f) What is the role of standards?

QUESTIONS

- What does product liability mean?
- What are the main features of product liability?
- By which conditions is producer obligated to pay compensation on the ground of product liability?
- Who are obligated to reimburse damage caused by defective products?
- What does defect and damage mean in the light of product liability?
- What are the exonerating circumstances that exclude the liability of producer for damage caused by defective products?
- Which time limit is valid for bringin claim into national courts on the ground of product liability?
- What does product safety mean?
- What are the differences between product safety and consumer protection?
- How can structure of law be summarized in the field of product safety?
- What are the main application principles in the field of product safety?
- In which case is the product dangerous or unsafe?
- What does market surveillance mean in the field of product safety?

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