

POSITION PAPER
PRODUCT LIABILITY DIRECTIVE (PLD)

April 10, 2024

The American Chamber of Commerce in Belgium (“AmCham Belgium”) applauds the Belgian EU Presidency for focusing its six-month priorities on, inter alia, **the rule of law and competitiveness**, as well as **coherent, predictable and simplified regulatory frameworks**. Prior to the beginning of the Belgian EU Presidency, **several legislative initiatives at the EU level were, however, hastily negotiated and concluded in dialogues in December 2023** and are now in their final stages. One such legislative initiative is **the proposal for a new directive on liability for defective products (the “Product Liability Directive” or PLD)**.

Significant concerns have been raised regarding the major changes introduced by the proposal for a new PLD by the largest business organizations in Europe, including the American Chamber of Commerce to the European Union (“AmCham EU”), which represents the largest outside investors in the EU economy. Members of AmCham Belgium are also concerned by these new rules which would **trigger major changes to the European legal landscape**, having an **adverse impact on companies doing business in Belgium and the EU at large**.

Despite such vocal business concerns, COREPER approved a compromise PLD text in January 2024 that is now being submitted to the European Parliament and ultimately to the Council for formal adoption.

As the Belgian EU Presidency puts forward the PLD for adoption, AmCham Belgium strongly encourages **a discussion in the Council about the adverse consequences** its roll-out will have for business in Europe, the need to ensure **careful transposition** and a plan to **track its impact**. We also **urge the Council to call on the European Commission to provide guidance to Member States regarding safeguards** to mitigate the risk of abuse of Member States’ court systems.

We are concerned by opportunities the new PLD rules will create for the profit-seeking litigation industry, a rapidly increasing number of plaintiff law firms and third-party litigation funders¹. We fear that the new PLD, coupled with the ongoing roll-out of a class action system in Europe, will be particularly fertile ground for frivolous and vexatious litigation simply aimed at obtaining “blackmail settlements.” We are also concerned that actors in litigation may use these new rules to illegitimately gain access to sensitive business information, which would cause great **harm to the EU’s economic security**.

¹ Commercial third-party litigation funding (TPLF) consists of private investors (litigation funders), who are not parties to a dispute, investing for profit in legal proceedings and paying costs and other legal fees, in exchange for a share of any eventual award (such as damages, compensation, etc.). Currently TPLF is unregulated in the EU but the European Parliament recommended the Commission to propose a Directive on this topic. It constitutes a rapidly growing market that can generate extremely high returns for investors. While it is difficult to pin down exactly how much is annually invested by third parties funders in U.S. lawsuits, it could be between \$2.3 and \$5 billion and an estimated \$13 billion in assets is thought to be under management in the US. See <https://www.lexisnexis.com/community/insights/legal/capitol-journal/b/state-net/posts/state-lawmakers-wade-into-third-party-litigation-funding>

Furthermore, **the PLD's benefits to European consumers are questionable.** Businesses may refrain from offering their newest innovative products in Europe for fear that they could be associated with higher litigation risks. Businesses will incur significant costs (insurance, settlements, etc.), which will inevitably be shifted onto consumers. **This will impact investment and EU competitiveness.**

Why do we say this? The new PLD rules substantially lower the evidentiary threshold to be met by plaintiffs and jeopardize companies' confidential data and business secrets.

More specifically, Articles 8 and 9 of the proposal raise these concerns (see the text in Annex 1). The new rules include legal presumptions of defectiveness where:

- o The defendant has failed to disclose "relevant evidence" further to the claimant having presented "facts and evidence sufficient to support the plausibility of the claim for compensation";
- o The claimant demonstrates that the product does not comply with mandatory product safety requirements existing at EU or national level that are intended to protect against the risk of damage suffered by the claimant;
- o The claimant demonstrates that the damage was caused by an obvious malfunction of the product during normal use or circumstances;

These new PLD rules further set a presumption of a causal link between the defectiveness of the product and the damage "*where it has been established that the product is defective and the damage caused is of a kind typically consistent with the defect in question.*"

Finally, the new PLD rules provide that national courts shall presume the defectiveness of the product and/or the causal link between its defectiveness and the damages where, taking into account all relevant circumstances of the case the claimant: (i) faces excessive difficulty particularly due to technical or scientific complexity to prove the defectiveness of the product and/or the causal link between its defectiveness and the damage, and (ii) demonstrates that it is likely that the product is defective and/or that there is a causal link between the defectiveness and the damage.

In other words, the new PLD **de facto shifts the burden of proof** by requiring a defendant to prove that its product is not defective. This raises serious questions under the evidentiary rules currently applicable in many EU jurisdictions, including in Belgium, where a plaintiff in principle bears the burden of proof. Furthermore, the **discovery system** introduced by the new PLD, and whereby the manufacturer may, under certain conditions, be required to disclose "relevant evidence", including confidential information and trade secrets, is **very broad and constitutes a major threat for companies.** There is a legitimate fear that this system will be abused to obtain confidential data from EU companies.

AmCham Belgium holds that **the new PLD rules do not strike the right balance** between, on the one hand, the right of consumers to be adequately compensated in case of damages resulting from defective products and, on the other hand, the legitimate expectation of the industry to continue doing business and offering innovative products without being subject to risk of **vexatious and profit-seeking actors in the litigation market**, as well as the risks of disclosure of confidential business information to competitors.

For the reasons above, AmCham Belgium respectfully requests that the **new PLD rules be amended to ensure adequate protection for the continuity and the development of businesses in Europe and that EU guidance be provided to avoid abuses** to Europe's judicial systems.

* * *

About AmCham Belgium

Founded in 1948, the American Chamber of Commerce in Belgium (AmCham Belgium) is a dynamic non-profit organization dedicated to improving business and investment opportunities for the US-Belgian business community. Supported by more than 400 member companies, AmCham Belgium plays a pivotal role in an evolving business environment by focusing on three key areas: advocacy, networking, and knowledge-sharing. To learn more about AmCham Belgium, visit www.amcham.be.