



Law Society  
of Scotland

# Consultation Response

European Commission Consultation on the rules on liability of the producer for damage caused by a defective product

April 2017



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest,<sup>1</sup> a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom governments, parliaments, wider stakeholders and our membership.

We welcome the opportunity to consider and respond to the European Commission's Public Consultation on the rules on liability of the producer for damage caused by defective products. This response has been prepared on behalf of the Law Society by members of our Consumer Law Sub-Committee.

### General Comment

The Committee considered the questions contained in the European Commission's consultation. However, we felt that many of these were targeted more directly at consumers or producers. We would therefore like to offer the following comments which give a more detailed response to two of the areas of questioning.

### Aspects of the judicial proceeding for recovering damage and burden on the consumer<sup>2</sup>

It is not really possible to take a general view on whether a particular aspect of proceedings will or will not be burdensome for a consumer seeking compensation: much depends on the facts of each individual case. However, there are certain areas where we consider that consumers are likely to face greater practical difficulties when pursuing a claim.

<sup>1</sup> Solicitors (Scotland) Act section 1

<sup>2</sup> See question 11

Proving that a product was defective or proving the link between the defect and damage caused may be reasonably simple in some cases but could be problematic in others. In particular where technical knowledge is required to assess whether a particular product was defective, this may be problematic, even before proof of the defect and a causal link to damage require to be demonstrated. Similarly, if the fault is in, eg a complex electrical product, it may be difficult to identify exactly where the fault occurred.

It may also be difficult to attribute liability to a specific person or entity, particularly where the product was a gift, or companies have changed hands.

Proving the damage is likely to be easier as there will be physical evidence to put forward.

The *de minimis* requirement that compensation is granted only for property damage of at least €500 may be burdensome in terms of the costs of invoking a judicial remedy.

The difficulty of proving that the defective product was intended and used for private purposes and that the damage was caused by the product and not by a related service are both dependent on the facts of a particular case.

Proving that damage was caused by the product and not by installed software is likely to be particularly difficult for a consumer.

The three year period for the injured party to start the proceedings for the recovery of damages seems reasonable from a consumer perspective, so long as it remains possible to seek compensation under other national law rules (whether as a result of a contract or non-contractual obligations).

The expiry period of ten years might or might not be burdensome consumers, again depending on the nature of the product in question and the context of the other facts relevant to the case.

### **Advantages and disadvantages of having a Directive on liability of defective products**

From a consumer perspective we consider it is a strong advantage that consumers can be certain that they enjoy the same rights in terms of compensation wherever they are in the EU, provided that those rights are enforceable.

We support the principle that national producers and those from other countries should be subject to the same product liability rules, both in terms of offering the same level of protection to consumers and ensuring fair competition between product manufacturers.

Finally, we recognise the benefit to producers of complying with a single regime in being bound by the same product liability rules in each member state.

**For further information, please contact:**

Carolyn Thurston Smith

Policy Team

Law Society of Scotland

Transparency Register: 80169287043-57

DD: 0131 476 8205

[carolynthurstonsmith@lawscot.org.uk](mailto:carolynthurstonsmith@lawscot.org.uk)