**Product Liability Directive – position document for national AmChams**

**Background**

* In September 2022, the European Commission published a proposal to review the Directive on liability for defective products (Product Liability Directive [PLD]).
* The proposal aims to tackle challenges linked to the digital age, the circular economy and the globalisation of value chains.
* However, the radical changes to fundamental principles of established law go far beyond the original intent of the legislation that was to introduce limited refinements that would address the objectives mentioned above..
* As corporate citizens and as members of the EU community, AmCham EU is firmly in favour of any consumer within the EU receiving appropriate and adequate redress for any harm that has been caused by a product-related injury; however, we are also firmly in favour of a balanced system that respects and protects the rights of both defendant and claimant under any new product liability regime.

**Key areas of concern**

1. *Unintended consequences of the ‘alleviation’ of the burden of proof*

The shift in the burden of proof is a radical and unwarranted change to a fundamental principle of law that has been established and functioned well for almost 40 years. The balanced approach to plaintiff’s and defendant’s rights that is carefully achieved by the current law would be swept away by the proposal. The change is not supported by the case-law of the European Court of Justice and, if adopted, the EU would likely be the only major jurisdiction worldwide that would install such a reversed burden of proof in product liability cases.

1. *The removal of existing thresholds*

Removing the thresholds is another unnecessary change that will lead to increased litigation across the EU. The thresholds should be updated but not eliminated within the PLD.

1. *New disclosure rules should be considerably tightened.*

The new disclosure rules are front-loaded and represent a huge and costly legal risk for defendants that would be targeted by frivolous and vexatious claims in order to force unwarranted disclosure of vast amounts of data, records and other sensitive information. Therefore, the drafting of Article 8 should be tightened to, as a minimum, provide a much more appropriate balance that respects also the defendant’s legitimate rights, to better protect trade secrets and to ensure that mandatory disclosure should not be ordered at the pre-trial phase.

1. *State of the art defence*

Removing the state of the art defence would erode even further the legitimate rights of defence of companies and suppliers involved in product liability cases. The state of the art defence, another feature of the current product liability regime that has functioned well for almost 40 years, should not be altered.

1. *Unnecessarily broad scope and definitions leading to additional legal uncertainty and complexity*

The definitions within the PLD should be clarified and aligned with existing product safety legislation, and the forthcoming General Product Safety Regulation, in order to avoid unnecessary and costly legal uncertainty. The extension of types of damage to include ‘data loss’ and ‘psychological harm’ are broad and create uncertainty.

**Consequences - Concerns on interaction with other legislation**

* The combined impact of the above changes would bring about a wholesale sweeping away of defendants’ rights in product liability cases and the introduction of a new one-sided, claimant-friendly regime.
* The Product Liability proposal should be considered in the context of the introduction of ‘class actions’ in the EU through the Representative Actions Directive. These developments will significantly raise the litigation risks, as well as legal complexity and uncertainty for industry in Europe. The most likely beneficiaries of these developments will be plaintiff lawyers and litigation funders rather than consumers in the EU.
* In addition to the risks of abusive litigation, forum shopping and currently inadequate protection for trade secrets and IP rights, we believe that policymakers overlook the enormous costs linked to the discovery obligations that are proposed in the directive.
* Due to the high costs involved, the new disclosure rules could force industry players to opt for early settlements of cases brought under the PLD instead of investigating the root cause of the alleged defective product. Such discovery obligations could also distort domestic legal systems in continental Europe by adding Common Law specific rules to Civil Law legal systems.

**Impact on R&D**

* The proposed changes could ultimately result in legal uncertainty and the reassessment by companies of the risks of doing business in the EU which will hinder innovation in emerging technologies and other R&D-intensive industries.

**Call for action – reconsideration of pace**

* The new PLD should be carefully re-considered by the EU Council and its full impact assessed rather than being hurriedly approved in interinstitutional negotiations.
* For the reasons stated above, we strongly recommend local ministries and Permanent Representations to the EU to take their time in assessing the consequences of the new provisions on local businesses and on the competitiveness of EU industry.

**Letter template for national AmChams based on messaging**

Dear Minister XXX,

As the representatives of American business in [COUNTRY], the American Chamber of Commerce in [COUNTRY] (AmCham [COUNTRY]) would like to stress our alarm at legislative developments at the European Union (EU) level regarding the revision of the product liability directive (PLD). Industry in [COUNTRY] is extremely concerned about the long-term implications of the proposed changes for communities in [COUNTRY], as well as the EU as whole. The revisions appear likely to overturn long-standing rules on the burden of proof required in litigation and on disclosure of evidence. Such revisions will have a negative impact on the commercial appetite for innovation and they could be to the detriment of consumer choice.

The changes that are designed to facilitate recourse to damages through litigation could lead to unintended and unforeseen consequences – and they are unlikely to benefit consumers.

The current framework, which acts as a safety net for consumers when things go wrong, has worked well since 1985 because it successfully balances the interests and rights of businesses and consumers. It has enabled consumers harmed to seek redress, while balancing the role that business has in pushing forward innovation for the benefit of the wider society. We support updating the framework to keep pace with technological developments so citizens have trust in the digital age and companies have the legal certainty to invest and innovate.

Unfortunately, the proposed revision to the PLD would significantly raise the risk of litigation against companies without the desired benefits of accountability necessarily reaching consumers and the wider community. It would also create legal complexity owing to the changes to the disclosure of evidence rules and uncertainty for European businesses that may conclude that the risk of litigation owing to the presumption of liability is too great to justify further investments in R&D.

Businesses fear that there will be immense pressure, particularly for smaller companies, to simply settle cases rather than fight unmeritorious claims due to the risk of damaging their commercial reputation and their financial viability. The primary beneficiaries of the far-reaching changes in PLD will likely be lawyers and profit-seeking, unregulated litigation funders rather than [COUNTRY] consumers.

The expanded scope to include digital products, combined with the new presumptions of liability, upending of disclosure of evidence provisions and removal of the compensation thresholds, present a real concern for the business community.

As trilogues begin, we urge you to intervene with policymakers in Brussels and other Member States to rethink their approach to private enforcement in order to achieve an effective and more balanced modernisation of the product liability framework:

* **Limit the instances of presumption of liability:** A cornerstone of the current PLD is that the claimant must prove the damage, the defect and the causal link between the two. This is a vital part of our European civil justice system. We are deeply concerned about the impact of a *de facto* reversal of the burden of proof under this proposal. Should the presumption of liability be maintained in instances of novel or complex products, this could significantly stifle the appetite for innovation in sectors such as technology and healthcare - sectors where citizens benefit from innovators pushing the boundaries of knowledge.
* **Safeguards for disclosure of evidence:** The new disclosure rules lack sufficient safeguards to protect businesses against so-called fishing expeditions, abusive discovery exercises or disclosure of commercially sensitive data or trade secrets. They represent a huge and costly legal risk for businesses even before they get to trial. There is a real risk that businesses will be pressured into settling weak claims in order to avoid these costs. Therefore, disclosure of evidence must be limited to only what is strictly necessary and proportionate.
* **Scope fit for purpose:** Including software in a strict liability regime brings new questions, such as applying the concept of defectiveness. We believe more investigation into the effects of this extension is needed, as there is now greater legal exposure for software developers. Expanding the definition of damage to include data loss or corruption is a significant shift in the concept of safety, creates potentially open-ended liability for economic operators, and will drive up prices. Likewise, the concept of ‘psychological harm’ is broad and creates uncertainty A threshold should be introduced to prevent frivolous claims, and it should be clarified what should be compensated.

To safeguard innovation in [COUNTRY] and across Europe for the benefit of wider society as well as for the financial viability of businesses – in a period of significant economic, climatic and geo-political uncertainty and in light of the recent Granada declaration by the European Council that emphasizes the need to ensure the competitiveness of the EU economy – we ask that you, on behalf of [COUNTRY] urgently seek a re-evaluation of the heavy-handed approach that PLD takes to the introduction of increased private enforcement in the EU.

Please do not hesitate to contact us with any questions which AmCham (COUNTRY) will be happy to address in collaboration with our colleagues at the American Chamber of Commerce to the European Union.

Yours sincerely,

*On behalf of AmCham [COUNTRY]*