

2 The new EU product liability regime for defective products⁴⁴

This EU document is legally and politically important because:

- it seeks to amend the EU’s 1985 Directive on strict liability, to make it easier for consumers to claim compensation for damage or injury caused by a defective product without having to prove the manufacturer’s negligence. New EU rules would also seek to make it easier for individuals harmed specifically by Artificial Intelligence (AI) systems to obtain compensation under national tort laws; and
- EU strict liability law continues to apply in Northern Ireland under the terms of the Northern Ireland Protocol, but the precise implications of the new Directive for Northern Ireland consumers under the Protocol are not yet clear.

Action

- Write to the Minister for Enterprise, Markets and Small Business (Kevin Hollinrake MP) to obtain more information about the potential implications of the EU product liability proposals for the UK under the Protocol.
- Draw the draft EU liability legislation to the attention of the Business, Energy and Industrial Strategy Committee, the Northern Ireland Affairs Committee and, in relation to liability for AI in particular, the Science and Technology Committee.

Overview

2.1 In September 2022, the European Commission [published](#) new draft EU legislation relating to product liability, which would set out certain rights for consumers on making claims for compensation against businesses for damage or injury caused by defective products.

- The first, a new ‘[Product Liability Directive](#)’ would update rules around ‘strict liability’, where consumers can claim compensation for defective products without having to prove fault on the part of the manufacturer. Its primary aim is to enhance consumers’ access to compensation, for example by clarifying the application of liability rules to electronic goods that operate using software, such as autonomous vehicles. It also aims to ensure consumers have a liable party to pursue if damage or injury is caused by a faulty good they bought online from outside the EU.
- The second proposal in the package is an ‘[AI Liability Directive](#)’, which would make changes to the national tort laws of EU countries for fault-based liability

⁴⁴ [Proposal for a Directive on liability for defective products](#); COM number: COM(2022) 495; Legal base: Article 114 TFEU; Department: Business and Trade; Devolved Administrations: Consulted; ESC number: 42125.

cases involving Artificial Intelligence (AI) technology, by easing the burden of proof on consumers when trying to evidence the link between AI technology and negligence on the part of the developer.

2.2 Both proposals are now with the European Parliament and the EU’s Council of Ministers for consideration, which must agree on the final legal texts before the Directives can enter into force and become EU law. That legislative process is likely to take well over a year, meaning the new rules would take effect in 2024 or 2025 at the earliest.

2.3 Even after Brexit, the draft EU product liability regime is still of relevance to the UK, primarily because of the Northern Ireland Protocol. The EU’s [1985 Product Liability Directive](#),⁴⁵ which the first of the two new Directives proposed by the Commission would replace, is listed in the Protocol and as such still applies in Northern Ireland as a matter of EU law. Under the terms of the Protocol, that Directive would therefore also take effect automatically there in due course, potentially requiring significant amendments to the relevant domestic legislation as it applies to consumers and businesses in Northern Ireland. However, we are mindful of the fact that the Government has [proposed](#) significant changes to the operation of the Protocol.⁴⁶ This includes a ‘dual regulation’ regime, under which companies putting goods on the market in Northern Ireland could choose to follow either UK or EU rules. It is not clear how that approach would apply in the context of product liability claims, especially if UK and EU law in this area diverge and the rights of consumers begin to vary between the two.

2.4 The new rules will also affect British businesses who export goods or components to the EU, as they will become subject to the new rules governing when they might be liable to pay compensation for damage or injury caused by their products in that market. The Commission proposals may also provide a relevant policy comparator to the UK Government’s own [Product Safety Review](#).⁴⁷ This may lead to proposals in the near future for reform of domestic law in this area, potentially including in relation to product liability.

2.5 Given the above, we have considered the context and substance of the EU’s product liability proposals in more detail in the remainder of this chapter, including how the new EU Directive might interact with UK law in Northern Ireland (and with the Government’s proposals for a ‘dual regulation’ regime there).

EU product liability legislation

2.6 Product liability laws govern the circumstances under which businesses have to provide compensation for damage or injury caused by a faulty product.

2.7 At EU-level, the 1985 [Product Liability Directive](#) (PLD) established a statutory right across the EU, irrespective of any contractual terms, for a person who has been injured by a defective product.⁴⁸ It allows them to claim financial compensation in such cases from the manufacturer for death, personal injuries or damage if they can prove it was linked

45 Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

46 HM Government, ‘Northern Ireland Protocol: the way forward’ (CP 502, July 2021).

47 Office for Product Safety and Standards, [‘UK Product Safety Review: Call for Evidence Response’](#) (November 2021).

48 A product is considered ‘defective’ if its safety fails to meet the level of safety that persons “are generally entitled to expect”.

to the defect.⁴⁹ The Directive applies to practically every physical product, including medicines, foodstuffs, cars and machinery. It uses a ‘strict liability’ approach (namely, liability of the manufacturer of a defective product or component without having to prove fault or negligence). In this way, the PLD may help incentivise manufacturers to comply with substantive EU product safety rules which determine whether a good is considered ‘safe’ for sale (for example under the EU’s General Product Safety Directive⁵⁰ or the bloc’s proposed new Cyber Resilience Regulation for software products).⁵¹

2.8 However, the right to compensation laid down in the Directive is limited by certain restrictions. In particular, the PLD:

- only covers damage to personal—rather than commercial⁵²—property, where the damage amounts to more than €500 (currently approximately £440);⁵³
- does not apply where damage or injury is caused by a service provider;⁵⁴ and
- applies only to claims brought within a statute of limitations, which in particular releases companies from liability 10 years after first putting a product on the market.⁵⁵

2.9 Manufacturers can also be exempted from liability in certain other cases, for example if the defect probably emerged after the product was sold (the ‘later-defect defence’), or that the fault was ‘undiscoverable’ based on the state of scientific and technical knowledge when the good was placed on the market. Cases brought under the framework created by the Directive can be settled in or out of court, for example through insurance or alternative dispute resolution (ADR) mechanisms.

2.10 When it was a Member State of the EU, the UK implemented the Product Liability Directive in England, Wales and Scotland via Part 1 of the [Consumer Protection Act 1987](#) (CPA 1987).⁵⁶ While the Act remains in force after Brexit as ‘retained EU law’, without substantive amendment,⁵⁷ the UK is now free to change or replace the relevant provisions of the 1987 Act in Great Britain in ways that would not be permitted under the Directive. In Northern Ireland, the Directive was transposed by means of the [Consumer Protection \(Northern Ireland\) Order 1987](#). However, the PLD itself—and any new EU legislation to ‘amend or replace’ it—also still apply there as a matter of EU law. This follows from the

49 Under the 1985 Directive, a product is defined very broadly as “any movable, even though incorporated into another movable or into an immovable, including electricity”.

50 Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety. The EU has recently agreed a comprehensive revision of that legislation in the form of a new General Product Safety Regulation, which we consider in a separate chapter of this Report.

51 We will consider the EU’s proposed ‘Cyber Resilience Act’ separately in due course.

52 The EU Directive is limited to cases of personal injury and of damage to property “of a type ordinarily intended for private use or consumption, and [which] was used by the injured person mainly for his own private use or consumption”.

53 In the UK, the limit under Part 1 of the Consumer Protection Act 1987 is lower, standing at £270.

54 While the PLD does not cover the liability of service providers, it does apply to products used while providing services.

55 This is sometimes known as the “limitation longstop”. In addition, claimants must start legal proceedings within three years of identifying the damage, the defect and the producer.

56 As the Directive was implemented via primary legislation in England, Wales and Scotland, the retained EU law contained in the Consumer Protection Act 1987 it is not subject to the ‘sunset’ provisions of the Retained EU Law (Revocation and Reform) Bill.

57 The 1987 Act was amended by the Product Safety and Metrology etc. (Amendment etc.) (EU Exit) Regulations 2019, made under the European Union (Withdrawal) Act 2018, to remedy some technical deficiencies ahead of the UK’s withdrawal.

terms of the Northern Ireland Protocol, part of the Withdrawal Agreement governing the UK's exit from the EU in 2020, which aims to avoid a 'hard' border on the island of Ireland by keeping EU law relating to goods in place in Northern Ireland.⁵⁸ Due to the Protocol, the UK is still under an obligation to adhere to the EU Product Liability Directive, and any successor legislation, in Northern Ireland (as we discuss further below).

2.11 Given its limitations in scope, the EU Directive was explicitly designed to exist alongside national, "fault-based" product liability regimes as set out in the domestic tort law of individual Member States.⁵⁹ These can allow for a broader range of compensation claims not covered by the PLD, but typically require the injured party to demonstrate a fault on the part of the liable party, in the form of a "negligent or intentionally damaging act or omission" (which is not necessary to obtain compensation for claims within the scope of the Directive).⁶⁰ For example, in the UK individuals or businesses who suffer damage as a result of faulty products may also have certain rights under either contract law or the common law of tort, in addition to those provided for under the 1987 Act.⁶¹

The proposals for a new EU product liability framework

2.12 The current EU Product Liability Directive was agreed in 1985 and had to be 'transposed' by all Member States, including the UK, into national law by 1988. It was last updated in 1999, when a [supplementary Directive](#) was adopted that removed an exemption for agricultural products from the scope of the PLD.⁶² However, the overall structure, scope and approach used in the original legislation have not been revisited since the 1980s. In 2018, the European Commission [published an evaluation](#) of the Directive which concluded that, "on the whole", it had been "an effective and relevant instrument" but also had "several shortcomings".⁶³ In parallel, it carried out an analysis of legal issues around civil liability for damage caused by products using emerging technologies such as AI and robotics, which were not relevant in 1985.⁶⁴

2.13 On the basis of these reviews, the Commission identified several areas where it believed EU law on product liability should be updated.⁶⁵ These include notably:

- removing certain barriers that consumers face when making claims under the PLD (notably by extending the statute of limitations for certain claims; addressing difficulties in proving defects in complex cases, such as those

58 See in particular Articles 5 and 13(3) of the Northern Ireland Protocol.

59 European Commission, 'Impact Assessment' [SWD\(2022\) 316](#) (28 September 2022), p. 6.

60 European Commission, '[Proposal for a Directive on adapting non-contractual civil liability rules to artificial intelligence](#)' COM(2022) 496 (28 September 2022), recital 3.

61 See House of Commons Library [Research Briefing Number 8211](#), 'Product safety' (13 December 2022). This notes, for example, that "In some cases, a common law claim for negligence may succeed where a claim would not be available under the CPA 1987".

62 Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. A consolidated version of the Directive including the 1999 amendments is [available on the EU's EUR-Lex website](#). The amending Directive was implemented in England, Scotland and Wales by means of the [Consumer Protection Act 1987 \(Product Liability\) \(Modification\) Order 2000](#).

63 European Commission Staff Working Document [SWD\(2018\) 157](#) (7 May 2018).

64 European Commission, '[Report on safety and liability implications of AI, the Internet of Things and Robotics](#)' COM(2020) 64 (19 February 2020).

65 *ibid.*

involving pharmaceuticals; and remedying the lack of recourse where consumers buy defective goods directly via the internet from a supplier outside the EU and there is no legal entity within the European Union to pursue for liability);

- clarifying in legal terms the application of the no-fault PLD scheme to modern products that incorporate software, such as AI technology, and the new types of damage they can cause (such as personal data losses); and
- addressing “AI-specific problems” in fault-based liability claims under Member States’ domestic tort laws, to address the fact that Artificial Intelligence systems have characteristics that can “make it prohibitively difficult or even impossible for victims” to attribute the damaging output of an AI system to the action or omission of a liable person.⁶⁶

2.14 Based on these evaluation exercises, and a [public consultation](#) in 2021, the European Commission published a proposal for a [new EU Product Liability Directive](#) in September 2022. If formally agreed by the EU institutions (see below), this would repeal and replace the 1985 Directive in its entirety and update its provisions in a bid to address the issues identified in the evaluation. In parallel, the Commission also tabled a [proposal for a Directive](#) on civil liability for damage and injury caused by AI systems in national tort systems. As it is a separate piece of legislation, we consider this proposal separately in paragraph 16.

The proposed EU Product Liability Directive

2.15 The overall aim of the proposed new Product Liability Directive is to “ensure liability rules reflect the nature and risks of products” in the modern economy and improve the ability of consumers to claim compensation for defective products. Its core principle, namely that “any natural person who suffers damage caused by a defective product [...] is entitled to compensation”, would be retained.⁶⁷ However, the proposal would introduce a number of significant amendments compared to the 1985 Directive, in particular:

Claims, damage and burden of proof

- To ease the burden of proof for consumers seeking compensation for damage or injury, the new Directive would amend the existing rules in a number of ways. In particular, the new law would set rules around mandatory disclosure by companies of technical information to the injured person in court (such as “clinical trials data concerning a drug” or “data logs from an autonomous vehicle”).⁶⁸ In addition, goods would be subject to a rebuttable ‘presumption of defectiveness’ in national courts in certain cases, for example if the product in question did not comply with legal requirements under EU product safety legislation, or it “clearly malfunctioned”.

⁶⁶ *ibid.*

⁶⁷ Article 5 of the proposed Product Liability Directive.

⁶⁸ We considered EU regulation of autonomous vehicles in more detail in our Twelfth Report of Session 2022–23 (HC 119–xi), [chapter 1](#) (17 January 2023).

- Where defectiveness is legally established, the new Directive states that a causal link between the defect and the damage suffered by a claimant must then also be presumed as a legal fact where “the damage caused is of a kind typically consistent with the defect in question”.
- The types of damage for which the Directive would permit claims for compensation would remain limited to personal injury and damage to consumer property. However, the Commission has proposed to clarify in the legal text that material loss resulting from damage to digital property (such as “digital content wiped from a hard drive”) would fall within that scope. The revised Directive would also state explicitly that medically diagnosed psychological damage is covered by the concept of “personal injury”.
- Some of the bars to making claims under the 1985 Directive would be modified in favour of consumers. In particular, the €500 minimum threshold for property damage before a no-fault claim can be made would be removed. Claims for “latent personal injury” would be permissible within 15 years rather than 10, provided the injury “did not become apparent in the first 10 years”.

Digital products, software and refurbishments

- Manufacturers of products with digital elements, like autonomous vehicles, would explicitly become liable for damage or injury caused by post-sale updates to operating software and or by digital services that are *necessary* for a product to operate.⁶⁹ This would include decisions made by AI systems⁷⁰ or an “unreasonable failure to provide a [cyber] security update”.⁷¹ The European Commission has recently proposed an EU Regulation to establish a ‘Cyber Resilience Act’, which would introduce new cyber-security requirements for manufacturers of digital products and software.⁷²
- For damage resulting from defects resulting from software or digital technology that are necessary for the operation of a product, a victim of harm would be able to seek compensation directly from the software provider, *or* from the manufacturer of the overall product (under ‘joint and several’ liability).⁷³
- In addition, the new Directive would recognise software “as a product in its own right” for liability purposes, where it influences the behaviour of a product but is not necessary for it to operate. That would cover, for example, a third-party

69 An example of a “digital service” necessary for a product to operate would be an autonomous vehicle’s reliance on continuous geolocation connectivity. See also Article 4(4) of the proposed Product Liability Directive.

70 The ‘development risk defence’ of the 1985 Directive, which exempts producers from liability when a product’s defective nature was not discoverable according to state-of-the-art knowledge at the moment it was put into circulation, would also be adapted to take account of “producer control beyond that moment”. For example, if a producer “has provided a software update for an AI-enabled robot, then that should be the moment taken into account when applying the defence”.

71 A prominent example cited in the Commission’s 2018 evaluation of the PLD is damage caused by cyber-security defects introduced by a post-sale software update to an electronic product, for which manufacturers can escape liability under the Directive’s “later-defect defence”.

72 European Commission, “[Proposal for a Regulation on horizontal cybersecurity requirements for products with digital elements and amending Regulation \(EU\) 2019/1020](#)” COM(2022) 454 (15 September 2022).

73 The European Commission notes in its Impact Assessment that applying “joint and several liability” in this way “would ensure a victim of harm does not have to seek compensation from both parties”. The software provider would legally speaking be treated as producer, like any manufacturer of a physical component.

application downloaded onto a smart phone that somehow causes damage or injury. Again, the producer of such “add-on software” *and* the manufacturer of the overall tangible product on which it runs (in this case, the smart phone) would be jointly and severally liable for harm caused by defective software. However, in these cases the manufacturer of the product would be able to use the “later-defect defence” to avoid liability, if they can show that that add-on software was “outside of its control”.⁷⁴

- The new legislation would make it explicit that economic operators that make a substantial modification to a product and place it back on the market, such as re-furbishers, would fall within the concept of “producer” and therefore have liability for damage or injury.⁷⁵

Goods bought online from outside the EU

- The new PLD also aims to provide consumers with a better chance of obtaining compensation in liability cases involving defective goods bought online directly from a producer outside the EU Single Market (for example from China or Great Britain). Non-EU producers would be given the option to appoint, at their own cost, an “authorised representative” within the EU to assume liability.
- However, in light of the difficulty in forcing non-EU manufacturers who sell directly to consumers to do so, the revised Directive would allow EU-based “fulfilment service providers” to be pursued for compensation in the absence of another liable party. These are the logistics companies involved in the “warehousing, packaging, addressing [or] dispatching of the product” within the EU,⁷⁶ often the fulfilment branch of the online marketplace intermediating the sale (like Amazon).⁷⁷

The proposed EU Artificial Intelligence Liability Directive

2.16 As noted, alongside the new PLD, the European Commission also published a separate [proposal for a Directive](#) specifically on liability relating to damage or injury caused by AI technology.⁷⁸

2.17 This proposal would require all EU Member States to amend their national tort laws for fault-based liability cases involving AI (in other words, for cases where claimants

74 Article 4(5) of the draft PLD defines “manufacturer’s control” as existing where the manufacturer of a product “authorises a) the integration, inter-connection or supply by a third party of a component including software updates or upgrades, or b) the modification of the product”.

75 The original manufacturer would remain jointly and severally liable for its contribution, in the same way that component manufacturers are liable for flaws in their components that make a product defective under the current Directive.

76 For the avoidance of doubt, companies providing postal, parcel delivery or freight forwarding services are not included in the definition of a “fulfilment service provider”.

77 The European Commission Impact Assessment [notes](#) that “fulfilment service providers are often the fulfilment branch of an online marketplace (e.g. Amazon has over 40 fulfilment centres in Europe), or have contracts with producers directly”.

78 European Commission, ‘[Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence](#)’ COM(2022) 496 (28 September 2022).

cannot rely on the strict liability regime under the PLD).⁷⁹ This second Directive would create certain reductions in the burden of proof, to address the perceived imbalance in the position of claimants and defendants because the former—as noted above—may struggle to meet demonstrate the links between damage, the output of an AI system and the legal ‘fault’ of a liable party.

2.18 More specifically, the AI Liability Directive would require EU countries to adjust their national fault-based liability laws in the following ways:

- To address the difficulties that claimants may have in establishing a causal link between the output of an AI system and fault-based liability of a particular legal entity (see above), the Directive aims to alleviate the burden of proof by creating a “targeted, rebuttable presumption of causality”. If certain conditions are met, a national court hearing a liability claim involving AI would have to presume “the causal link between the fault of the defendant and the output produced by the AI system”.⁸⁰ This would be the case, for example, if a developer of an AI technology can be shown not to have met a product safety requirement under the EU Artificial Intelligence Act that was “meant to prevent the damage that occurred”. In that case, the court can presume that the non-compliance by the liable party with the relevant duty of care led to the damage by affecting the output of the AI system, even if that specific causal link has not been proven.
- There would also be a right for persons claiming injury or damage as a result of “high-risk” AI systems⁸¹ to obtain information to support their claim, by allowing courts to order the disclosure of evidence from the relevant manufacturer or user of the system (like a company or public authority) under certain conditions.
- Lastly, where a relevant defendant did not comply with a court order to disclose such evidence, the proposal would create a presumption of non-compliance with a duty of care owed by the liable party to the claimant. In other words, where the requested information is not disclosed, there is a (rebuttable) presumption that the withheld data would have been in support of the claim for compensation.

2.19 The Commission acknowledges in the [Impact Assessment](#) accompanying this Directive that the problem the proposal is intended to address is not yet quantifiable, because “AI-enabled products and services with the specific characteristics challenging [existing] liability rules are for the most part not yet on the market”.⁸² The legislation is therefore specifically intended to be “future-oriented”, with “the additional advantage

79 That might be the case for example where the damage was sustained in the course of the provision of a service; where the claim is against a company that used an AI system but did not produce it; or where the injured party is a commercial entity and not a consumer. Since tort-based liability claims are separate to the ability to claim compensation created by the PLD for strict liability, the two draft Directives proposed by the Commission would apply in different legal scenarios. In other words, the new PLD also covers damage or injury caused by products with AI technology, but only in strict liability cases within its scope.

80 See European Commission Impact Assessment [SWD\(2022\) 319](#) (28 September 2022), p. 149. These conditions are, broadly speaking, that the claimant has demonstrated the fault of the defendant (namely the non-compliance with a relevant legal duty of care); that it can be “considered reasonably likely” that the fault has influenced the output produced by the AI system; and that the claimant has demonstrated that the output produced by the AI system gave rise to the damage for which compensation is claimed.

81 The definition of “high risk” AI systems would be [taken from the EU’s proposed Artificial Intelligence Act](#), itself still being negotiated, and is likely to include for example AI systems used for recruitment or identification purposes.

82 European Commission Impact Assessment [SWD\(2022\) 319](#) (28 September 2022), p. 7.

that they give all those involved in activities related to AI systems an additional incentive to respect their obligations regarding their expected conduct” under the [EU Artificial Intelligence Act](#) which is being negotiated separately to regulate the performance of AI technology.

The legislative process towards adoption of the proposed EU Product Liability Directives

2.20 The European Commission’s proposals to establish the updated EU product liability regime can only become EU law with the approval of the European Parliament and the Council of Ministers. Those two institutions must jointly agree on the legal texts of the Directives and can make amendments to them before they are adopted. As the Commission only published the proposals in September 2022, the legislative process is currently at an early stage. It is likely the new legislation will have to be transposed into Member States’ domestic law from 2024 or 2025 at the earliest.

2.21 The draft Directives described in this chapter should also be seen in the context of a much broader process of reform of EU product safety legislation. There is already an extensive body of EU law with substantive product safety requirements for various different types of goods. While these establish under which conditions goods are considered ‘safe’, but they do not themselves create liability regimes; instead, they typically refer back to the Product Liability Directive.⁸³ The EU institutions are currently also considering amendments to a number of these product safety laws, which we have reported to the House on various occasions over recent years.⁸⁴

The potential implications of the new EU Product Liability Directive for the UK

2.22 Although the UK left the European Union on 31 January 2020, the new EU PLD and, to a lesser extent, the AI Liability Directive are still of direct interest to the UK. This is, broadly speaking, for three reasons: the continued application of the 1985 EU PLD in Northern Ireland after Brexit under the Northern Ireland Protocol; the implications of the European Commission proposals for British businesses that export goods covered by the draft Directives to the EU market; and the relevance of the Commission’s evaluation of the EU’s product liability rules for the UK’s own Product Safety Review.

2.23 We will cover these latter two issues first.

2.24 Both the PLD and the AI Liability Directive could affect British businesses that supply the EU market, because the rules will apply to damage or injury caused by their products if they are defective. Given both proposals aim to make it easier for consumers to pursue producers for liability, the overall impact might be a greater possibility of compensation claims. In addition, there are changes around how enforcement of such liability against non-EU companies will be exercised. The main change the new PLD would introduce is potential liability for the fulfilment service provider involved in getting goods bought

83 European Commission Impact Assessment [SWD\(2022\) 316](#) (28 September 2022), p. 8.

84 They include notably a new EU General Product Safety Regulation (which we consider separately elsewhere in this Report, as agreement was recently reached on the final legal text), and proposed new EU Regulations on [Artificial Intelligence](#), [machinery](#) and [construction products](#). Further sector-specific EU product safety proposals on toys, cosmetics and pharmaceuticals are in the pipeline.

online from outside the EU to the consumer within the bloc.⁸⁵ This could mean that British producers who sell directly to EU customers via the internet could face higher costs in engaging EU-based fulfilment providers to cover the latter's potential liability, or appoint—at their own expense—an “authorised representative” within the EU Single Market to assume the liability instead.⁸⁶

2.25 Second, the analysis that underpinned the European Commission's proposed legislative changes may also be relevant to the UK's own [Product Safety Review](#). The Government's Office for Product Safety and Standards (OPSS), which is conducting that Review, said in November 2021 that it intends to “consult on an ambitious and multi-faceted reform programme” for the UK product safety framework, including in relation to liability.⁸⁷ Its proposals are now expected at some point in early 2023, although they were initially due to be published before the end of 2022.⁸⁸ The 1985 Directive, in substance, still applies across the UK; and both the EU and UK are considering how liability rules should apply to AI technology. The European Commission's draft Directives will therefore provide a direct policy comparator for the OPSS' upcoming proposals insofar as they cover product liability issues.

2.26 If the Product Safety Review leads to legislation amending its product liability regime that are substantively different from those that apply in the EU, this could also have particular ramifications in Northern Ireland specifically because of the Protocol. We consider this aspect in more detail below.

The Northern Ireland Protocol and EU product liability laws

2.27 The [Northern Ireland Protocol](#) is an integral part of the 2020 [Withdrawal Agreement](#) governing the UK's exit from the EU. To keep the land border between Northern Ireland and Ireland free of customs and regulatory infrastructure after the UK's departure from the EU Single Market and Customs Union, that Protocol foresees continued alignment by Northern Ireland with a range of EU laws listed in its Annexes relating to the production of, and trade in, goods. Article 13(3) of the Protocol also foresees that references to EU laws made applicable in Northern Ireland should be read as ‘amended or replaced’ by future EU legislation. In respect of the two draft EU Directives on product liability discussed above, that means the following.

- The 1985 Product Liability Directive is [listed in Annex 2 to the Protocol](#), and therefore still applies in Northern Ireland. This means the UK would be in breach of its obligations under the Protocol if it amended the [Consumer Protection \(Northern Ireland\) Order 1987](#) in a way that would be inconsistent with the

85 For traditional import routes via wholesalers, Article 3 of the current 1985 Directive already attaches strict liability for faulty goods imported from outside the EU into the bloc to the importer. If neither the producer or importer can be identified, the supplier—for example the seller—of a good can be held liable instead. Since the UK left the Single Market on 1 January 2021, this arrangement also applies to companies importing products into the EU from Great Britain (but not from Northern Ireland, due to the provisions of the Protocol).

86 The European Commission's own Impact Assessment for this aspect of its proposal notes that “third-country producers” could expect to face an increase in the cost of fulfilment services to cover this exposure liability”, for example through product liability insurance.

87 Office for Product Safety and Standards, ‘[UK Product Safety Review: Call for Evidence Response](#)’ (November 2021).

88 Although the then Minister told us in February 2022 that the consultation was due “later this year”, the Government has not yet published its detailed product safety proposals as of 8 February 2023. See [Letter](#) from Paul Scully MP to Sir William Cash MP, dated 23 February 2022.

PLD. In addition, as per Article 13(3), the proposed *new* EU Product Liability Directive—which would replace this earlier legislation—will automatically take effect in Northern Ireland after it is adopted by the EU institutions. At that point, barring any changes to the operation of the Protocol, the UK would be under an obligation to transpose it into domestic law in respect of Northern Ireland (but not the rest of the UK).

- However, the proposed AI Liability Directive by contrast will *not* automatically apply in Northern Ireland under the terms of the Protocol. This separate piece of legislation does not ‘amend or replace’ an EU law that already applies under the Protocol, and so falls outside the ambit of Article 13(3). It is possible that the EU could *request* for this Directive to become applicable in Northern Ireland because it considers it to fall “within the scope of the Protocol”, a possibility foreseen by its Article 13(4). To our knowledge, it has made no such request to date.⁸⁹ In any event, a formal Decision to add the Directive to the Protocol would require the UK’s consent in the EU/UK Joint Committee established by the Withdrawal Agreement, meaning the Government has a veto.⁹⁰

2.28 As things stand therefore, the UK could be under a legal obligation to transpose the new EU Product Liability Directive in Northern Ireland in due course. While the precise ramifications of the updated PLD for the product liability regime in Northern Ireland are impossible to determine at this stage because the substance of the Directive itself is still being discussed in Brussels, we can make some general observations about the Commission proposal.

2.29 First, the expansion of liability to fulfilment service providers for goods bought online by EU consumers from suppliers outside the Single Market could also have similar ramifications for goods purchased by Northern Ireland customers from online shops based in Great Britain. We will be seeking clarification from the Government on whether, if the new Directive were implemented in Northern Ireland as proposed by the European Commission, fulfilment service providers operating in the Northern Irish market could find themselves liable for product defects relating to goods supplied by British companies. Secondly, we recall that the purpose of the continued implementation of EU law on goods in Northern Ireland under the Protocol is to avoid a ‘hard’ border for goods crossing with Ireland.⁹¹ In that context, it is not clear why it would be necessary for any changes to the EU PLD that relate to expanding its scope to damage or injury caused by stand-alone, “add-on software”, such as applications on smart phones, to take effect in Northern Ireland.⁹²

89 We note that the Northern Ireland Protocol deals primarily with physical products, while the AI Liability Directive is focussed on AI technology (which is by definition intangible, although it can be incorporated into physical products).

90 If the EU requested the AI Liability Directive be added to the Protocol but the UK did not consent, the EU would be entitled under Article 13(4) of the Protocol to take “remedial measures”.

91 The recitals of the Protocol recall “the commitment of the United Kingdom to protect North-South cooperation and its guarantee of avoiding a hard border, including any physical infrastructure or related checks and controls”.

92 As an intangible product, software itself by definition cannot give rise to the need for physical customs or regulatory controls that the Protocol is meant to avoid on the land border.

The Northern Ireland Protocol Bill and the ‘dual regulatory regime’

2.30 In addition, the possible consequences of the new EU Product Liability Directive in Northern Ireland is complicated further by the Government’s objectives for a proposed renegotiation of the Protocol, as set out in a [Command Paper](#) in July 2021.⁹³ Instead of the current arrangements, Ministers have proposed the creation of a “dual regulatory regime” under which goods would “be able to circulate within Northern Ireland if they meet either UK or EU rules”. Companies placing goods on the Northern Ireland market could choose to do so via either the EU or UK regulatory ‘route’, in other words in compliance with either British or European requirements applicable to the product in question.⁹⁴

2.31 The Government introduced the [Northern Ireland Protocol Bill](#) in June 2022, which—among other things—would create the legal basis for the ‘dual’ regime in Northern Ireland described in the Command Paper (either with or without the EU’s agreement). The wording of the Bill, and the [accompanying Explanatory Notes](#), appear to suggest that the dual regulatory approach *could* also apply to EU product liability rules applicable under the Protocol, although it is not made explicit.⁹⁵ In any event, at this stage the Government has not yet implemented the ‘dual’ regime in Northern Ireland, either in agreement with the EU or unilaterally through UK domestic law.

2.32 It is possible that, even if strict product liability rules are technically within the scope of the dual regulation regime, the UK could still legislate for a single legal framework in Northern Ireland so there would be no overlapping EU and UK statutory rules applicable. If the UK did simultaneously maintain the effects of the EU Directive in Northern Ireland but also introduced a separate strict liability regime UK-wide, it could create a scenario where a Northern Irish consumer might have different rights in the same strict liability case under EU law and UK law respectively. It is not clear which legal framework would take precedence in such a scenario.⁹⁶ In this context, we have already noted the on-going work on the Government’s own Product Safety Review, which may lead to changes to the UK product liability regime in parallel to the discussions within the EU on a new Product Liability Directive.⁹⁷

93 HM Government, ‘Northern Ireland Protocol: the way forward’ (CP 502, July 2021).

94 A product might also meet both UK and EU regulatory requirements simultaneously where the respective laws make this possible.

95 Clause 7 of the Bill, which creates the dual regulatory regime, states that it “allows for the option to choose compliance with a UK regulatory route or the EU regulatory route (or both) as respects regulated classes of goods [...] and it is for the person complying to choose which regulatory route or routes are to be complied with”. For the purposes of this section, the Bill says a class of goods is “regulated” if “any provision of Annex 2 to the Northern Ireland Protocol [...] applies to regulation of goods of that class”. As noted, the 1985 Product Liability Directive is listed in Annex 2 of the Protocol, and clause 10 goes on to state that references to “regulation of goods” include “any matter that is relevant to regulation of goods, which may include matters that occur [...] after goods are made available on the market, put into service or produced”.

96 In the absence of a dual regulatory regime, divergence between EU and British law in this area would instead create a gap between the rights of consumers in Northern Ireland and Great Britain, respectively.

97 Clauses 9 and 11 of the Northern Ireland Protocol Bill would allow Ministers to modify the application of the dual regime by means of regulations, but to our knowledge the Government has not given specific examples of where it intends to do so.

The UK Government's position on the proposed EU Product Liability Directive and the Northern Ireland Protocol

2.33 As the proposed new EU PLD would take effect automatically in Northern Ireland under the terms of the Protocol, the then-Secretary of State for Business, Energy and Industrial Strategy (Rt Hon. Jacob Rees-Mogg MP) submitted an [Explanatory Memorandum](#) with the Government's view on the proposal on 25 October 2022.

2.34 The Memorandum did not provide any assessment of the potential implications of the new EU PLD in Northern Ireland as identified above. While the Minister confirmed the Directive would in due course apply there under the Protocol (notwithstanding the Government's on-going efforts to change its operation), it made no attempt to provide an analysis of the potential legal consequences for consumers and businesses in Northern Ireland. Similarly, taking into account the 2021 Command Paper and the Northern Ireland Protocol Bill, the Memorandum failed to indicate how the Government's proposals for reform of the Protocol, including the dual regulatory regime, would impact on the application of the EU Product Liability Directive in Northern Ireland. In a subsequent letter dated 12 December 2022, addressed to our counterpart in the Lords, the new Secretary of State (Rt Hon. Grant Shapps MP) reiterated that the Government, for reasons not specified, is unable to provide further detail at this stage regarding the impact of [the PLD] proposal on Northern Ireland".⁹⁸

2.35 With respect to the views of Northern Ireland stakeholders, the Explanatory Memorandum confirms the Government has engaged in discussions with officials in the Northern Ireland Executive but only to note that it is "discussing the proposal with them" in the absence of Ministers in the devolved administration. No indication is given of any substantive concerns raised or comments made by those officials.

Conclusions and action

2.36 The proposed new EU PLD could apply in respect of Northern Ireland in due course and require implementation there. This would raise a number of important issues about the balance of the rights between consumers and businesses in that market. Moreover, the Government's own proposed 'dual regulatory approach' for Northern Ireland raises particular questions about legal certainty in the context of product liability legislation. It is not unambiguously clear from the Northern Ireland Protocol Bill if both UK and EU strict liability regimes for faulty products could apply concurrently in Northern Ireland if the Government's proposals are implemented as described, and if so how it would be decided in individual cases which regime applied where the UK and EU statutory frameworks diverge in the future.

2.37 In this context, it is disappointing that the Government's Explanatory Memorandum provided no substantive assessment of what the new EU PLD might mean for Northern Ireland. As part of the parliamentary scrutiny process, the Government has for years routinely provided its assessment of proposed new EU legislation relevant to the UK in stages, from the initial Commission proposal through to the end of the legislative process. It is not clear why that approach could not be applied to this particular draft Directive.

98 Letter from Rt Hon. Grant Shapps MP to Lord Jay of Ewelme, dated 12 December 2022.

2.38 In light of the above, we have written to the Minister for Enterprise, Markets and Small Business (Kevin Hollinrake MP) to emphasise the Committee’s need for further information with respect to the potential impact of the proposed EU PLD in the areas we have identified as particularly relevant in our assessment. A copy of that letter is included below. In the meantime, we draw our initial conclusions to the attention of the Business, Energy and Industrial Strategy Committee, the Northern Ireland Affairs Committee and, in the context of its inquiry into the regulation of Artificial Intelligence in particular, the Science and Technology Committee.

Letter from the Chair to the Minister for Enterprise, Markets and Small Business (Kevin Hollinrake MP)

The Committee today considered the European Commission’s recent proposals for a new EU Product Liability Directive (PLD) on strict liability for defective products. As the Explanatory Memorandum submitted by the previous Secretary of State on 25 October 2022 confirmed, under the Northern Ireland Protocol this new Directive may apply to compensation claims for damage caused by faulty goods in Northern Ireland in due course.

However, the Memorandum did not contain any substantive analysis of the potential legal and policy implications of the draft Directive for the product liability regime in Northern Ireland. We note the letters from both yourself and the Secretary of State to our counterparts in the House of Lords dated 26 January 2023 and 12 December 2022 respectively, both of which essentially state that the Government is “unable to provide further detail at this stage regarding the impact of this proposal on Northern Ireland”. No further reason is provided for this.

Based on our own initial assessment of the EU proposal (which will be set out in our 14th Report), we would ask that you provide additional information on the basis of the following questions.

- Can you confirm the Government has made an initial assessment of the potential implications of the proposed new EU PLD for the strict liability regime as it currently applies in Northern Ireland? If not, why not? If it has, why can its overall preliminary analysis not be shared?
- Are the EU product liability rules that still apply under the Protocol in scope of the dual regulation regime for Northern Ireland proposed by the Government? If so, is it the Government’s intention even so that there will only be a single strict product liability framework in Northern Ireland, notwithstanding its proposed ‘dual regulation’ regime under the Northern Ireland Protocol Bill? What, if any, specific modifications would the Government envisage making in relation to the dual regime as it applies to product liability, for example under clauses 9 and 11 of the Bill?
- If the Government envisages different UK and EU strict product liability regimes could apply in parallel in Northern Ireland, what would happen if the UK and EU statutory frameworks produce different rights for the consumer in a given case, and how would the applicable legislation be determined?

- The Commission proposal foresees that, where consumers buy a defective good directly from a producer outside the EU, a liability claim could be made against a relevant ‘fulfilment service provider’ (FSP) within the Single Market instead, if the manufacturer has no ‘authorised representative’ there. If the Directive as proposed were implemented in Northern Ireland, would FSPs there potentially face liability for faulty goods bought by consumers via the internet from the rest of the UK?
- Northern Ireland’s alignment with EU goods legislation, including the current Product Liability Directive, is to avoid a ‘hard’ customs and regulatory border with Ireland for physical goods. In that context, what is the Government’s view on whether the proposed extension of the scope of the new PLD to intangible add-on software products, such as damage caused by the defective cyber-security of a smartphone app, should apply in Northern Ireland under the Protocol?

We look forward to receiving your reply by 8 March 2023. We will consider the potential implications of the proposed EU Product Liability Regime further on the basis of your reply and any other relevant developments, including the Government’s own upcoming proposals for product safety reforms.