



Northern Ireland
Assembly

Windsor Framework Democratic
Scrutiny Committee

OFFICIAL REPORT (Hansard)

Directive (EU) 2024/2853 on Liability for
Defective Products and Repealing Council
Directive 85/374/EEC

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commerce platforms. It has expanded, in line with the type of products that consumers are buying, the type of harms that those defective products can cause to include medically recognised psychological harm and the loss and corruption of personal data. Within that expanded context, where a consumer has purchased a defective product that has caused them damage, they can seek compensation under the directive.

The Chairperson (Mr McGuigan): Thank you. The Committee has a specific role in trying to ascertain impact. We have the updated explanatory memorandum (EM), but, from a consumer point of view, this is good news.

Dr Trimble: Yes. I am reiterating the policy expertise of my consumer affairs branch colleagues, who were clear that the directive is a positive for Northern Ireland consumers. I have not seen the updated EM.

The Chairperson (Mr McGuigan): OK, fair enough. You have no issue with the first EM and no issue with the policy. Have you anything to add on the issue of potential divergence?

Dr Trimble: Again, I defer to my consumer affairs branch colleagues. If they feel that it is of benefit to NI consumers, I will not question that. With regard to divergence between GB and Northern Ireland, in the event of GB not introducing equivalent measures, the primary impact of any divergence would be that GB consumers would not have the same recourse as NI consumers. They would not be able to seek compensation for damage caused by defective products on the same basis as NI consumers.

The Chairperson (Mr McGuigan): I am reading from the updated EM:

"Respondents to the consultation were in favour of updating the UK's product liability regime to reflect developments in technology".

It would be a presumption to say that the legislation across the water will move in advance. Can you comment on that?

Dr Trimble: I really cannot comment on the intentions of the UK Government (UKG) in that context. If they were going to introduce a similar regime, the primary impact would be that GB consumers would be able to seek compensation for damage caused by defective products on the same basis as NI consumers.

The Chairperson (Mr McGuigan): We received the EM only 10 minutes before the meeting, so I am reading another part:

"The Government is considering the product liability legislation as it applies in England, Wales and Scotland, as we also believe it necessary to update it to bring it in line with recent technological developments."

They say that they will set out their intention. Is there any negative impact for the North?

Dr Trimble: I cannot speculate on whether there will be a negative impact or, if there is, what that will be. What I can do is defer to the comprehensive analysis that the EU conducted in its impact assessment. It highlighted that, overarchingly, the directive will be of benefit to consumers and businesses because it provides legal certainty. For consumers, it provides certainty on when they can claim compensation, and, for businesses, it provides certainty on when they will be liable. The analysis highlighted that, for some businesses, that could result in increased costs and, where they had product liability insurance, an increased policy premium. In the event that a company or business did not have product liability insurance, if they produced defective products that caused damage, they would potentially have increased compensation payments. The EU's assessment was that 80% of manufacturers already had product liability insurance and that the 20% of companies that did not would probably be small to medium-sized enterprises (SMEs). However, it was felt that SMEs would benefit from not having inflated legal costs: the legal certainty would streamline any claim against them for liability for damage.

One point that the EU was keen to make in the context of its impact assessment was that increased costs to business, if they transpired, would not result in the maintenance of the status quo. Those increased costs to business would be balanced out by increased compensation to consumers. I am

conscious that, in some instances, we see increased regulation to enable businesses to continue to access the markets that they already access, but that is not the case here. On the other hand, it will benefit consumers.

The Chairperson (Mr McGuigan): That is clear. Thank you.

Members want to ask questions.

Mr Brooks: You said that, for some businesses, the new directive will create legal certainty and, therefore, reduce costs. Surely, the status quo is that the consumer would not take a case forward if it was not viable or it was not in their interests to do so. The effect of that legal certainty will, basically, be the business losing the case from the off, except for —.

Dr Trimble: Under the status quo, where products are already covered by the existing directive, the consumer can use that recourse. The new directive seeks to expand liability for producers of new products. Where we are talking about AI systems, software and refurbished or recycled items, the recourse for the consumer will be via civil law claims for breach of contract or for negligence.

Mr Brooks: Some of those companies, presumably, are the middlemen for those products. At the moment, if the products come from outside the EU, those people are not legally responsible for the manufacture. The directive gives everybody a company in the EU against which they have recourse. I understand that that may be a positive thing from a consumer's point of view.

I am not saying that the balance will go this way, but something to consider is the fact that there will always be a positive argument for anything that comes from the EU. In this case, it is about consumer rights, and the EU will say, "We are strengthening consumer rights". That is great. The flip side to finding that balance with consumer rights is how it will affect businesses. Naturally, our concern is about any potential rise in cost, particularly for businesses that sell into Northern Ireland from GB. Those businesses might be put off selling into that market, because of the extra requirements that will be placed on them.

We have only just had sight of the updated EM, but, in it, as you mentioned, the Government say that the directive is "unlikely" to have "substantive financial implications", but they also say that they are keeping it "under review". There is no certainty around much of it, and that concerns me.

Dr Trimble: It goes back to, as you said, the potential that GB will introduce equivalent measures. If that is the case, there will be no disincentive for businesses to supply the NI market, because they will not be subject to increased costs to meet any potential expansion in liability.

I will go back to a point that you made about the complexity of supply chains and the businesses that may be held liable in that context. The new directive expands that liability. The term "economic operator" can include the manufacturer, the distributor, the importer and the fulfilment service provider etc. However, the directive is also clear that there is a cascade of liability and a presumption that the manufacturer should be held liable. After that, it would be their importer or their authorised representative. Fulfilment service providers would be held liable only in a context in which those prior parties have not been.

Mr Brooks: If the manufacturer is in Asia, the person who brings the product into the wider UK market, including Northern Ireland, may take the view that selling it in Northern Ireland is not worth the risk, because if there were to be some defect of which they were unaware and a recall of the product elsewhere in the world, they would become the body responsible, not because they are deliberately selling dodgy products but because they have sold a legitimate product that they did not realise had that defect. They become legally responsible for that.

Dr Trimble: Consumers can use the legal framework only when they have purchased or received a defective product that has caused damage. I am conscious of the point that you make about the disincentive to access the market, but there would be a similar disincentive to no longer access the EU market and, if GB introduced equivalent measures, the GB market.

Mr Brooks: It is a case of where you want the divergence. There is the potential to have a disincentive for GB companies to sell into Northern Ireland, thereby reducing the choice for the Northern Ireland consumer.

Dr Trimble: That goes back to something on which we do not have clarity: the measures that GB intends to introduce.

Mr Brooks: There is that uncertainty across not just this but so much of what we do.

You said that many of the businesses in the 20% are SMEs. Look at the number of businesses in Northern Ireland and throughout the UK that are SMEs. My concern, which we raised with the Northern Ireland Affairs Committee when we met it earlier this week, is that many of those small businesses do not have the wherewithal to have a public affairs officer, much less a team, working on some of the stuff to respond to us in time. You acknowledged the tight timelines that we have. Is there proactive engagement between the Department for the Economy and any partners that you have in the home Civil Service so that, when you identify new regulations that are coming forward, you ask SMEs to consider how they may be impacted and to feed that back to you, just as we would seek them to do, in a much more condensed time frame?

Dr Trimble: My understanding is that there are a number of different consultation processes in place. My understanding is that the EU impact assessment's attempt to focus on SMEs failed due to a lack of response from SMEs, so its assessment of the impact on SMEs could be limited as a result. Last week, my consumer affairs branch colleague spoke to the Department for Business and Trade (DBT) consultation on the product safety framework. They have expertise in understanding how that attempted to ensure that it received an adequate number of regional responses and responses from across the spectrum of businesses, including SMEs and even microbusinesses, in Northern Ireland.

My team in DFE is working with Invest NI on a dual market access stakeholder forum, the primary purpose of which is to promote the opportunities associated with the Windsor framework. However, we are conscious that the regulatory framework can be incredibly complex and difficult for businesses to navigate. The feedback that we received from stakeholders highlighted the fact that UKG are doing quite a lot of consultation on a lot of the regulatory changes and that they want to really focus on how to develop the materials and programme of work to promote Northern Ireland. However, we are really conscious that there could be situations in which we have a significant piece of EU law coming down the line. If stakeholders are concerned about a regulation, they have the option of coming to us, and we can seek to consult them and explore the impacts for Northern Ireland. On the other hand, where we come across something that will be quite significant, we have said to stakeholders that we would welcome the opportunity to engage with them on that basis. That would be a subgroup of the stakeholder forum, and it would be convened on that basis.

Mr Brooks: Thank you very much for that. Setting aside the promotion of Northern Ireland and so on — that is outside the remit of the Committee — I am heartened to hear that there is work going on. The Executive and Departments will have to look much more seriously at how we proactively do that work.

I understand that you are trying to cover for colleagues today, so I appreciate your answers.

Mr Buckley: David has largely covered a lot of my points. He summed it up well. A lot of the issues are about the "what if" for GB businesses and whether they will turn their back on supplying Northern Ireland. That is the potential impact of a number of EU regs that may sound quite functional and practical on the surface.

Even on the general product safety regulations (GPSR), there is commentary about small businesses in GB that will no longer supply Northern Ireland on the basis of cost and uncertainty. It is not that they cannot supply; they are choosing not to. Similarly, I am interested in the regulatory divergence here. Talk me through it. This EU reg will expand the scope of liability to reflect more modern consumer spending habits. What divergence will there be from GB in the areas that are not covered by the original EU reg?

Dr Trimble: In Great Britain — again, if it does not seek to align with the new regulations — the product liability directive (PLD), which this directive seeks to update, already applies. It was transposed into British law because we were a member of the EU in 1985 when that regime was created. That covers all moveable products. The only consumer products that it does not cover are primary agricultural products, and it includes electricity. GB consumers already have access to that existing directive and framework. However, the expanded remits that I highlighted — the expanded scope of the products, the expanded scope of harm and the expanded scope of businesses that could be liable — are not in place in GB.

I will go back to the point that you made about businesses that may no longer service Northern Ireland because the scope of their liability has expanded. It is important to add that there may still be liability for the type of product, the type of business and the harm caused. That will not be within the new framework but will be by the domestic, fault-based framework, whether it falls within the tort of negligence or the claimant has demonstrated breach of contract. It is not that those businesses will not be liable if they have produced a defective product that has caused damage but that they will be found liable via a different legal framework. The directive is a no-fault strict liability framework, whereas a lot of the civil law claims are based on the claimant demonstrating fault.

Mr Buckley: You mentioned that there may well be increased costs, whether for liability cover or for insurance. Do we have any indication of what those costs would look like for an average business in GB that supplies to Northern Ireland?

Dr Trimble: That would be speculative, because it will depend on the damage that the defective product causes. There could be an almost limitless chain of causation, or a defective product could cause a very minor —

Mr Buckley: That is the difficulty: not knowing what that would ultimately be.

My final question relates to fulfilment service providers — companies such as Amazon — which have been a subject of conversation when I have been looking at the general product safety regulations. What traceability or liability is there for logistics companies like Amazon and DPD?

Dr Trimble: My understanding is that logistics companies do not fall under the definition of "fulfilment service providers". In the replacement act, a fulfilment service provider — I am sorry that I have to read from my notes — provides two or more:

"of the following services: warehousing, packaging, addressing and dispatching"

of a product. The directive states that liability sits with an "economic operator", which breaks down into manufacturer, authorised representative, importer, fulfilment service provider and distributor. However, where an e-commerce site fulfils any of those activities or functions, it will be held liable on the same basis. Where it merely performs an intermediary role, it is unlikely to be held liable.

Mr Buckley: Just to clarify, then, that the fulfilment service providers do not include logistic companies such as Amazon, DPD or others.

Dr Trimble: It depends on the interpretation of what functions those companies provide. It would be an interpretation of the directive. For example, where Amazon performed the function of a fulfilment service provider, as defined in the directive — that would be a legal question — it would be held liable on that basis. For DPD, it would depend on what service it was providing. Postal services are sometimes excluded from this context. Again, if we are getting into the complexities of supply chains, a lot of those companies have expanded the services that they provide. It would be interpreted very much on a case-by-case basis.

Mr Buckley: I know that it may not be your area of expertise, nor is it mine, but, given the reach of companies like Amazon now, I would imagine that there is a legitimate reason to suggest that some of its business falls under "fulfilment service provider".

Dr Trimble: Yes, and, just going back, there is that presumption of a cascade of liability in the directive. For the fulfilment service provider, the presumption is that the manufacturer should be liable in the first instance, then its importer or authorised representative. The fulfilment service provider is liable only if those individuals are not identifiable.

Mr Brooks: Or in the EU.

Dr Trimble: Yes.

Mr Buckley: OK. Thank you.

Dr Aiken: Thanks very much, Victoria. I want to go back a couple of questions, and I apologise that I have just read through this and am trying to get up to speed.

To go back to Jonathan's point, the likes of Amazon, DPD and the others are already being told, under the GPSR and the parcels directive, that they are deemed to be "whole-chain liable" or whatever terminology that is, so I cannot see why they would not be liable for this. I suspect we might need to get some clarification on that. The Department would probably need clarification.

Dr Trimble: That would be a legal question.

Dr Aiken: You are the Department that is responsible for this.

Dr Trimble: Well, the Department for Business and Trade is the responsible Department. When DBT is transposing the directive into national law, the issue will be exploring how those elements of the directive are reflected in national law.

Dr Aiken: I am referring specifically to Northern Ireland, because I think it says that member states' national law must achieve the same level of consumer protection as is laid out by the PLD. That means that, if this goes through, by December 2026, Northern Ireland will be, for all intents and purposes, in the EU framework. For any of the groups that are likely to do that, anything that is moved, sold or sent to Northern Ireland for whatever reason has to comply with this directive, or else we are against that directive. If that is the case and bearing in mind that the directive includes differing definitions that do not exist in GB law at the moment — we cannot really go into examples because it is vast, basically — what would be the penalty? Bearing in mind that Northern Ireland is part of the United Kingdom and we are not supposed to have any impediments to inter-UK trade, what would be the impediment if we were in a situation where everything in Northern Ireland needed to apply to this directive by December 2026, including things such as computer software and the rest, which are not classified at the moment but will be under this? What happens if they do not meet the directive? Does it mean we cannot buy it from GB?

Dr Trimble: No. This directive creates a legal framework under which consumers can gain compensation. It does not prevent —.

Dr Aiken: Just to go back to what Jonathan said. We are talking about the chilling effect of people who want to sell into Northern Ireland but think Northern Ireland is too difficult to be part of.

Dr Trimble: Again, I cannot comment on how businesses will make the decision, which will be based on commercially sensitive information. Colin Jack last week commented that a lot of the products are marketed globally.

Dr Aiken: Yes, but not all.

The Chairperson (Mr McGuigan): You raised a point that I had written down here. This legislation deals with products that have markets that are global; you have just confirmed that. We had the first EM and have received the second EM. I know that you have not seen that, but the consultation was open to business, and it says that respondents were in favour of updating the legislation, not even just in the North but across the water. Have no negative issues come to the fore yet from businesses?

Dr Trimble: I am sorry. I cannot comment, because it was our consumer affairs colleagues who were engaged with DBT on that consultation.

The Chairperson (Mr McGuigan): Fair enough. I presume that it would have been noted in the EM if that had been the case.

Mr Brooks: Chair, it is important that they are in favour of updating the procedures on a UK basis, but that does not necessarily mean that they think the UK version should be exactly the same. They may well do.

Mr Martin: Thank you, Victoria, for your evidence. I am a newbie; this is my first day. I was not here to hear last week's discussion on this.

Picking up on what Steve said about Amazon and the impact of the directive, I imagine that a lot of what Amazon sources and distributes from centres in GB is sourced outside the EU. On the liability chain that you mentioned on the way through, is it possible that, if companies supply goods that are

being distributed in GB, the companies will ask whether they should send those on to Northern Ireland, because there is the additional chance that a case could be taken against them? We have all witnessed the problems that we have, albeit from a different piece of law, in getting some products from some of the distribution companies. I do not expect you to comment on there being a chilling effect, but is it possible that this could limit either Amazon or companies that distribute through Amazon in sending goods to Northern Ireland?

Dr Trimble: Again, that would be based on an individual business's decision based on commercially sensitive information and, I suppose, a cost-benefit analysis. Again, I would be speculating.

This does not create liability. Where a business has manufactured, imported, distributed or been involved in the supply chain of a defective product, there could already be circumstances where a consumer will hold it liable where that defective product has caused them damage. This does not create liability; it creates a no-fault framework under which that liability can be administered. Businesses already have to account for the potential that they would have to pay costs in the event that a defective product that they have been involved in the manufacture or distribution of has caused damage. Again, it would be speculative to say that the introduction of the directive will result in GB businesses no longer servicing NI. It is something that I really cannot speak to. I am sorry.

Mr Martin: I understand that, and I understand the concept of widening liability. I am simply reflecting what we have all seen in terms of some of the impacts of some of the regulations. I see it all the time, or my wife sees it when she buys something from a distributor in GB and it is not available to Northern Ireland. Perhaps you go onto eBay and a product is not available to Northern Ireland. I am very conscious that the Committee is about scrutinising this thing and making sure that what comes through does not widen that and limit choice further.

I understand that this piece covers new levels of liability and manufacturing defects. I get that, but I am concerned about what the impact of this might be. You described them as commercial interests and so forth and said that businesses make those decisions; I am just concerned about this being one more thing that might tip some of those businesses into saying that it is not worth it and that they will put a rider on to say that they will not send the product to Northern Ireland.

Dr Trimble: A colleague mentioned the general product safety regulations. In contrast to that, there is nothing in this that would stop a business placing goods on the market —

Mr Martin: I understand that.

Dr Trimble: — in terms of actual requirements. It would be further down the line of causation in the event that there was a defective product.

Mr Martin: I get that, but, equally, businesses have to make those decisions. I get your legal point that there is nothing in this that says, "Don't send this stuff to Northern Ireland". That is fine; I fully accept that. The point that I am making, Victoria, is that this would impact on businesses in GB that are considering where to distribute their products geographically. It is up to businesses — I get that — to make those decisions. However, I am just noting my concern that we have seen how other legislation has already had an effect and that putting this in place could further limit choice.

Dr Trimble: It could also — I refer to the EU's assessment — assist businesses by providing them with legal certainty. They will know when they will be liable, whereas, when you work against an almost amorphous, unknown civil law framework, you do not necessarily know in what circumstances you could be liable to a consumer or who would be liable. At the moment, fulfilment service providers know that there is a cascade of liability and at which point liability for them will kick in. Similarly, for distributors, outside the framework they do not have that certainty.

Mr Martin: I certainly understand that. My preference is for what is set out in point 14 of the EM, which is to have the same legislation in England, Scotland, Wales and Northern Ireland. That would take away all of what we are debating here. That is my preferred option. However, as set out in point 14 of the EM, we do not know whether that will happen or when it will happen. I will stop there.

Chair, thank you very much. I never get that sort of time on the Education Committee. You have been very gracious. That is very kind.

The Chairperson (Mr McGuigan): Thank you.

Dr Aiken: You will not get it again. *[Laughter.]*

The Chairperson (Mr McGuigan): Nobody else has indicated that they want to speak. Victoria, thank you for coming along and taking our questions.