

LIABILITY FOR DEFECTIVE PRODUCTS IN EU LAW: STRENGTHENING CONSUMER PROTECTION IN THE CONTEXT OF TECHNOLOGICAL RISKS

Savanets L. M.

INTRODUCTION

Currently, approaches to liability for defective products in European Union law are undergoing significant transformation. 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for defective products,¹ that became a flagship instrument in the European regulation of tort liability is being repealed and replaced by a new Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products² (hereafter – Directive (EU) 2024/2853 on liability for defective products). Directive (EU) 2024/2853 on liability for defective products entered into force on December 8, 2024 and is subject to implementation into national legislation by December 9, 2026. The aforementioned act is the result of the European Union’s new policy of conducting a large-scale reform on liability for defective products and is associated with changes in technological progress and product design. The reform on liability for defective products is due to the emergence of new technologies, including artificial intelligence, circular economy business models and global supply systems, which have led to inconsistencies and legal uncertainty, in particular regarding the content of the concept of “product”, and corresponds to far-reaching technological and market transformations changing both the nature of products and the risks associated with them.³

Previous 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 was developed during the period of dominance of analogue technologies and failed to address liability for software, digital services, or artificial intelligence-based systems. Modern

¹ 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. URL: <https://eur-lex.europa.eu/eli/dir/1985/374/oj/eng>

² Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products and repealing Council Directive 85/374/EEC. URL: <https://eur-lex.europa.eu/eli/dir/2024/2853/oj/eng>

³ Mirić M.K. From burden to balance: causation in the new EU product liability Directive. *Journal of European Consumer and Market Law*. 2025. Issue 5. P. 217.

digitalization has transformed every stage of the full product cycle, from production and marketing to maintenance and remote updating. At the same time, the principles of the circular economy contribute to sustainable development through product repair, reuse and recycling, which leads to new legal challenges in regulating liability for modified, refurbished or autonomous products, as well as those that operate in close interaction with digital services or are integrated into complex technological systems.⁴

The European Consumers Association, while generally welcoming the reform, noted that defects can now be caused by a software bug, biased artificial intelligence, loss of connection, or cybersecurity vulnerabilities.⁵

1. The updated regulatory approach of the Directive (EU) 2024/2853 on liability for defective products

The basic principles of Directive (EU) 2024/2853 on liability for defective products can be called the following: the producer is obliged to compensate for the damage caused by the defective product; the injured party must prove the defectiveness of the product, the damage that was caused, and establish a causal link between this damage and the product defect itself.⁶

A new regulation of tort liability for damage caused by a defect in a product in Directive (EU) 2024/2853 on liability for defective products is the expansion of the concept of product by including software in it. According to paragraph 13 of the preamble to the Directive, software, such as operating systems, firmware, computer programs, applications or artificial intelligence systems, is actively spreading on the market and plays an increasingly important role in product safety. It is sold on the market as a separate product or integrated as a component in another product, and is capable of causing harm during use. Software is covered by the concept of products regardless of the method of its delivery or use, as well as storage on a device, access to it via a communication network or cloud technologies, delivery under the software as a service model. However, Directive (EU) 2024/2853 on liability for defective products, by not including information in the broad concept of a product, excluded it from its scope. Accordingly, the provisions on liability

⁴ Mirić M.K. From burden to balance: causation in the new EU product liability Directive. *Journal of European Consumer and Market Law*. 2025. Issue 5. P.218.

⁵ BEUC. The European consumer organisation. Revision of the Product Liability Directive. Time to ensure effective and comprehensive protection for consumers damaged by defective products. 2023. P.4. URL: https://www.beuc.eu/sites/default/files/publications/BEUC-X-2023-023_Revision_of_the_product_liability_directive.pdf

⁶ Плюта А.В. Відшкодування шкоди споживачу, що завдана внаслідок дефекту в продукції, за законодавством України та ЄС. *Часопис цивільстики*. 2024. № 55. С. 83. DOI <https://doi.org/10.32782/chc.v055.2024.14>

for damage caused by a product defect should not apply to the content of digital files, such as media files, e-books, or simple software source code.

Taking into account the modern capabilities of artificial intelligence, the problem of distinguishing between services and products is extremely relevant. We support the position expressed in the literature that its practical solution will be carried out by the Court of Justice of the European Union. It is difficult to predict the court's position in individual cases, especially given the continued existence of Directive (EU) 2024/2853 on liability for defective products in tangible form and the exclusion of information from it. Taking into account legal policy, the latter is a rather controversial decision, since services and information can entail similar risks. The extension by the European legislator of the provisions of Directive (EU) 2024/2853 on liability for defective products to defective software would provide legal certainty and consistency in European harmonisation of liability for damage caused by defects in products, information and services.⁷ There is also a position in the literature according to which the concept of a product in terms of liability for damage caused by defective products should be understood as a good, work or service that is produced, performed or provided to satisfy both commercial and social needs.⁸

2. The concept of strict liability for damage caused by defective products in EU law

Taking into account the existing legal, political and social prerequisites, Directive (EU) 2024/2853 on liability for defective products introduces the principles of objective liability of producers of defective products,⁹ and significantly expands the category of producers, including software developers or producers, and suppliers of artificial intelligence systems. After all, it is the responsibility of product producers to control the risks associated with it, taking into account their knowledge of the design, composition and performance of the product. In addition, they are the main beneficiaries of its economic value and have objective opportunities to internalize or redistribute the costs associated with the occurrence of liability, in particular through pricing and insurance mechanisms. The large-scale introduction into circulation and use of mass consumer goods significantly increases both the

⁷ Gsell B., Mayrhofer A.-K. The new product liability Directive 2024: missed updates or upgrades for the interplay with national liability rules and for service liability. *Journal of European Consumer and Market Law*. 2025. Issue 5. P. 216.

⁸ Черкасов Д.О. Щодо співвідношення понять «недолік товару» та «дефектна продукція». *Науковий вісник Херсонського державного університету. Серія Юридичні науки*. 2018. Випуск 4. Том 1. С.79.

⁹ Unification of tort law: strict liability / B.A. Koch, H.Koziol (eds). The Hague, London, New York: Kluwer, 2002. PP. 402-403.

risk of harm and the scope of possible negative consequences, in particular in cases related to serial product defects.¹⁰ The traditional approach developed in European law was to apply liability for damage caused by a defect in a product only to defective goods and not to services. It is the result of the so-called orthodox theory, according to which liability for damage caused by the inadequate quality of services provided is subject to a different legal regulation than liability related to a defect in a product.¹¹ The analysis of the provisions of the Directive (EU) 2024/2853 on liability for defective products gives grounds to conclude that although it still retains the aforementioned approach, and services are not subject to its regulation, it has been somewhat transformed. Given that digital services are increasingly integrated into products or interconnected with them in such a way that their absence makes it impossible for the product to perform one of its functions, and also determines the safety of products equally as physical or digital components, the European legislator extends the concept of liability without fault to such integrated or interconnected digital services. They become components of the product in which they are integrated or interconnected if they are controlled by the producer. Products interconnected services include the continuous delivery of traffic data in a navigation system, a health monitoring service with sensors to track the user's physical activity or health indicators, a temperature control service for a smart refrigerator, or a voice assistant service that enables the control of one or more products using voice commands. The legislator excludes Internet access services from the category of "ancillary services" because they cannot be classified as part of the product under the control of the producer, and therefore it would be unreasonable to hold producers liable for damage caused by defects in Internet access services. However, products that depend on Internet access services and do not provide security in the event of loss of connection may be considered defective under Directive (EU) 2024/2853 on liability for defective products.

The concept of strict liability for damage caused by defective products provides the most simplified mechanism for holding a producer liable without fault for damage caused by defective products. This is explained by the fact that the victim is usually the weaker party, and therefore requires greater guarantees of compensation for the damage caused to him as a result of a defect in the product. At the same time, imposing additional risks of liability to the victim on the producer is carried out in order to stimulate more prudent

¹⁰ Mirić M.K. From burden to balance: causation in the new EU product liability Directive. *Journal of European Consumer and Market Law*. 2025. Issue 5. P.218.

¹¹ Wagner G. Next generation EU products liability – for digital and other products. *Journal of European Tort Law*. 2024. Vol.15. Issue 2. PP.184-185; Howells G., Fairgrieve D. The new product liability Directive: steadily expanding liability or business as usual? *European review of private law*. 2025. Issue 3. P.558. doi: 10.1515/jetl-2024-0011

and proper behavior on his part, ensuring the introduction of only high-quality and safe products into circulation. As D.O. Cherkasov notes, absolute no-fault civil liability for damage caused by defective products is actually the only legal mechanism and the only model for protecting the civil rights of injured persons in Ukraine, however, this model is far from the only one used in other countries of the world.¹²

A key feature of Directive (EU) 2024/2853 on liability for defective products is to establish a prohibition on Member States from derogating from its provisions in terms of regulating tortious liability for damage caused by a defect in a product (Article 3). This approach is aimed at ensuring full harmonisation of this area of relations within the European Union, and is the result of the established practice of the Court of Justice of the European Union regarding the relevant legislative restrictions of the Member States. The Court has repeatedly stressed that Article 13 of 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 precludes the possibility of maintaining or introducing national general product liability regimes different from those provided for by the Directive. At the same time, the existence of legal mechanisms based on grounds of liability other than product defects, including errors or warranties regarding hidden defects, is allowed.¹³

According to paragraph 9 of the recitals of Directive (EU) 2024/2853 on liability for defective products, the victim, in accordance with the national legislation of the Member States, retains the right to claim compensation for contractual or non-contractual damage, provided that it is not caused by a defective product as defined by the Directive. Such grounds include warranty, fault or strict liability of operators for damage caused by the characteristics of the organism resulting from genetic engineering. Such provisions of national

¹² Черкасов Д.О. Щодо співвідношення понять «недолік товару» та «дефектна продукція». *Науковий вісник Херсонського державного університету. Серія Юридичні науки*. 2018. Випуск 4. Том 1. С.78.

¹³Judgment of the Court of Justice of the European Union of 25 April 2002 in Case C-52/00 Commission of the European Communities v French Republic. URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62000CJ0052>; Judgment of the Court of Justice of the European Union of 25 April 2002 in Case C-183/00 María Victoria González Sánchez v Medicina Asturiana SA. URL: https://infocuria.curia.europa.eu/tabs/document/C/2000/C-0183-00-00000000RP-01-P-01/ARR_COMM/53721-EN-1-1.html#1; Judgment of the Court of Justice of the European Union of 25 April 2002 in Case C-154/00 Commission v Greece. URL: <https://infocuria.curia.europa.eu/tabs/affair?jurisdiction=&searchTerm=C-154%2F00&date-type=intro&sort=SCORE-DESC&lang=en&intro-date-start=&intro-date-end=>; Judgment of the Court of Justice of the European Union of 10 January 2006 in Case C-402/03 Skov Aeg v Bilka Lavprisvarehus A/S and Bilka Lavprisvarehus A/S v Jette Mikkelsen and Michael Due Nielsen. URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62003CJ0402>.

law, aimed, inter alia, at achieving the objective of effective protection of consumers and other individuals, remain unaffected by this Directive.

The legal doctrine quite reasonably points out the need to equate all digital and analog design specifications to products, and to establish liability for damage caused by a defect in the product in the event that software generates information that is subsequently implemented by a person.¹⁴

The Directive (EU) 2024/2853 on liability for defective products also introduced the concept of liability for defective components. According to Article 8(1)(b), in addition to the producer of the defective product, the producer of a defective component integrated or interconnected with a product controlled by the producer that caused the defect in that product is also liable. Components also include ancillary services (Article 4 (4)). The term ancillary service is defined in Article 4 (3) as a digital service integrated or interconnected with the product in such a way that its absence would prevent the product from performing one or more of its functions.

3. A new approach to defining a product defect in EU law

Directive (EU) 2024/2853 on liability for defective products significantly expanded the definition of a product defect contained in the previous 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 product. A product is considered defective if it does not provide the safety that a person has the right to rely on or that is required by European Union regulations or national law (Article 7(1) of the new directive). Based on this, the assessment of product defects should be carried out based on the verification of product safety, which the person has the right to rely on, as well as product safety, which is required by European Union standards or national legislation. European Union law and national legislation form a mandatory minimum standard for product safety.¹⁵ Article 7 of Directive (EU) 2024/2853 on liability for defective products does not refer to the concept of reasonable expectations, unlike the approach taken in the previous regulation. Accordingly, the application of this criterion does not involve a judicial assessment. Under such conditions, the establishment of the fact of violation of the relevant norm may in itself indicate the presence of a product defect. As a result, it will be much easier for plaintiffs to substantiate claims within the framework of such a defect check, given the absence of an

¹⁴ Gsell B., Mayrhofer A.-K. The new product liability Directive 2024: missed updates or upgrades for the interplay with national liability rules and for service liability. *Journal of European Consumer and Market Law*. 2025. Issue 5. P.214.

¹⁵ Howells G., Twigg-Flesner C., Wilhelmsson T. *Rethinking EU consumer law*. London: Routledge, 2017. P.274. DOI:10.4324/9781315164830

internal restrictive element associated with establishing reasonable consumer expectations. Therefore, the discussion regarding the criteria for such an assessment such as consumer expectations or “risk-benefit” loses practical significance.¹⁶

Based on an analysis of Ukrainian legislation, the legal doctrine notes that the concept of defective products is much broader than the concept of safe products. Therefore, the victim has the right to compensation for damage even if the product, despite its compliance with certain standards and terms of the contract, turned out to be dangerous and caused damage to his health or property.¹⁷ At the same time, the Law of Ukraine on liability for damage caused by a product defect¹⁸ enshrines the narrow concept of “products”, and therefore claims for compensation for damage caused by improper provision of services or poor-quality performance of work cannot be made within the scope of this Law.¹⁹ According to Article 5 the Law of Ukraine on liability for damage caused by a product defect product is defective if it does not meet the level of safety that the consumer or user has the right to expect based on all circumstances, in particular those related to the development, production, circulation, transportation, storage, installation, maintenance, consumption, use, destruction (disposal, recycling) of this product, as well as the provision of warnings and other information about such products, including: presentation of the product to the consumer or user, including its appearance, composition, packaging, labeling and other information about the product, its consumption, use and destruction (disposal, recycling); use of the product that can be reasonably foreseen; the time when the product was put into circulation.

A product cannot be considered defective solely because a product of better quality was put into circulation after it was put into circulation. The injured party must prove: the existence of damage; the existence of a defect in the product; the existence of a causal relationship between the defect in the

¹⁶ Howells G., Fairgrieve D. The new product liability Directive: steadily expanding liability or business as usual? *European review of private law*. 2025. Issue 3. PP.561-562. <https://doi.org/10.54648/erpl2025059>

¹⁷ Мамедова С.М. Правовий механізм відшкодування шкоди, завданої внаслідок дефекту в продукції. *Правничий часопис Донецького національного університету імені Василя Стуса*. 2025. № 2. С.87. DOI:<https://doi.org/10.31558/2786-5835.2025.2.9>.

¹⁸ Про відповідальність за шкоду, завдану внаслідок дефекту в продукції: Закон України від 19.05.2011 № 3390-VI. URL: <https://zakon.rada.gov.ua/laws/show/3390-17#Text>

¹⁹ Димінська О. Ю. Особливості цивільно-правової відповідальності за шкоду, завдану дефектом у продукції, за законодавством України та ЄС. *Університетські наукові записки*. 2014. № 4(52). С. 62. URL: https://old.univer.km.ua/statti/dyminska_o.yu._osoblyvosti_tsyvilno-pravovoyi_vidpovidalnosti_za_shkodu_zavdanu_defektom_v_produktsiyi_za_zakonodavstvom_ukrayiny_ta_yes_12.pdf

product and the damage. The injured party has the right to demand from the producer the provision of documentation on the product, due to the defect of which the damage was caused, to the extent necessary to prove all circumstances.

The producer shall be liable for damage caused by a defect in the product. Any person who has imported a product into the customs territory of Ukraine for the purpose of its sale, rental, leasing or distribution in any other form in the course of conducting economic activity shall be liable as a producer. If the producer of the product cannot be identified, each supplier (seller) of the product shall be liable as a producer if he fails to notify the injured party within 30 days of the name and location of the producer or the person who supplied him with the product. The effect of the specified norm shall also apply to products imported into the customs territory of Ukraine if the name and location of the person specified in part two of this article are not indicated on the product, even if the name of its producer is indicated on the product.

Where several persons may be held liable to the injured party for the same damage, the injured party is entitled to seek compensation either from all such persons jointly or from any one of them individually. In such cases, the provisions of civil law governing shared liability for damage, as well as the right of recourse (regress) against the person responsible for causing the damage, may be applied.

In order to protect the health and property of individuals, the defectiveness of a product is determined not from the standpoint of suitability for use, but from the perspective of the lack of safety that a person has the right to expect or that is required by national or European Union law. The assessment of product defects is carried out through an objective safety analysis that meets societal, rather than individual, expectations. Its criteria include intended purpose, rationally foreseeable use, presentation, objective characteristics and properties, including the established period of operation, as well as the needs of users that the product is intended to satisfy. Certain products, such as medical devices that support vital functions of the body, carry an increased risk of harm to humans, which, in turn, requires particularly high safety requirements. In order to meet such expectations, the court is entitled to declare a product defective without establishing its actual defect if it belongs to the same production series as a product whose defect has already been proven (paragraph 30 of the preamble to the Directive).

According to Article 7(2) of Directive (EU) 2024/2853 on liability for defective products, when assessing the defectiveness of a product, the presentation and characteristics of the product, including its labelling, design, technical characteristics, composition and packaging, as well as instructions for its assembly, installation, use and maintenance, the reasonably foreseeable

use of the product, the impact on the product of any ability to continue learning or acquire new functions after it has been placed on the market or put into service, the reasonably foreseeable impact on the product of other products that are expected to be used together with the product, in particular by interconnection, the moment the product is placed on the market or put into service or, if the producer retains control of the product after that moment, the moment the product is removed from the producer's control, the relevant product safety requirements, including cybersecurity requirements related to safety, any product recall or any other relevant intervention related to product safety by a competent authority or the economic operator, the specific needs of the group of users to whom the product is intended to be applied, in the case of a product intended to prevent damage, any failure of the product to fulfil that purpose. Thus, Article 7 of the Directive sets out criteria that allow for a holistic assessment of products taking into account technological developments, in particular artificial intelligence is covered by the assessment of the ability of products to learn or acquire new functions (Article 7 (2(c)), the internet of things is taken into account by instructing the court to consider the reasonably foreseeable impact on other products, in particular through interconnection (Article 7 (2(d))), a defect may be due to the fact that a product intended to prevent damage, for example a fire alarm, does not perform this task (Article 7(2(i))). A defect may also arise due to the lack of software updates, if this is under the control of the producer (Article 11 (2(c)).²⁰

As follows from the analysis of Article 7 of the Directive (EU) 2024/2853 on liability for defective products, information about the product is important in establishing its defect. However, the preamble to the directive specifies the admissibility of the information provided in order to prevent product defects. Thus, recital 31 states that a warning or other information accompanying a product cannot in itself be considered sufficient to declare a product that is otherwise defective safe. The rationale for this approach is that defectiveness should be determined by reference to the level of safety that society expects. Accordingly, the Directive explicitly states that liability under this Directive cannot be avoided by simply listing all possible side effects of a product.

CONCLUSIONS

Directive (EU) 2024/2853 on liability for defective products introduces a major reform of the product liability system, replacing the 1985 regime with a modernised system adapted to the requirements of the digital and green transitions. By replacing Directive 85/374/EEC on the approximation of the

²⁰ Howells G., Fairgrieve D. The new product liability directive: steadily expanding liability or business as usual? *European review of private law*. 2025. Issue 3. P. 563. <https://doi.org/10.54648/erpl2025059>

laws, regulations and administrative provisions of the Member States concerning product liability, it aligns the liability rules with modern technological realities and challenges in enforcement practice.

Directive (EU) 2024/2853 on liability for defective products aims to modernise liability for damage caused by a defect in a product in European Union law by clarifying the concept of defectiveness, extending the definition of ‘product’ to include software and digital files, and adapting the whole mechanism to the modern realities of the digital and circular economy. Product defects are no longer linked solely to consumer expectations or product characteristics, but to legal rules on product safety at European and national levels. Directive (EU) 2024/2853 on liability for defective products continues to regulate liability for damage caused by a product defect on the basis of strict liability established in European law, and at the same time introduces a more consumer-friendly approach and a technologically adapted liability system in European Union law.

The changes introduced by the new Directive (EU) 2024/2853 on liability for defective products affect key aspects of the liability regime, including the extended concept of products, the concept of defect, compensable damage, the burden of proof and related evidentiary issues.

SUMMARY

The article examines the reform of product liability in European Union law introduced by Directive (EU) 2024/2853 on liability for defective products. The new Directive replaces the long-standing Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products and establishes a modernised liability framework adapted to technological and market developments. The reform responds to challenges arising from digitalisation, artificial intelligence, circular economy business models, and global supply chains. Unlike the 1985 regime, the new Directive explicitly extends the concept of a product to include software and certain digital files. It also updates the notion of defectiveness by linking product safety assessments to applicable European Union and national safety requirements. The study highlights that defects may now result not only from physical flaws but also from software errors, cybersecurity vulnerabilities, connectivity failures, or biased artificial intelligence systems. Directive (EU) 2024/2853 on liability for defective products retains the principle of strict liability while introducing a more consumer-oriented and technologically responsive regulatory approach. Particular attention is paid to the liability implications of repaired, refurbished, modified, and digitally connected products. The article further analyses the revised rules on compensable damage, burden of proof, and evidentiary requirements. It concludes that the new Directive significantly

strengthens the effectiveness and relevance of the European product liability regime in the context of the digital and green transitions.

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Information about the author:

Savanets Liudmyla Mykhailivna,

Candidate of Law Sciences, Associate Professor,
Head of the Department of International and European Law
West Ukrainian National University
11, Lvivska street, Ternopil, 4601, Ukraine