

Summary of the document

The new means of legal protection available to any European consumer actually damaged by a product sold in Europe that in fact, in light of the existing law, may be labelled as defective.

The objective of this document is to establish and to examine the legal means, laws, legal procedures and ways of production which, in compliance with the European Directives on

Liability for Defective Products

General Product Safety

are available to any European consumer, claiming to have been actually damaged by a product legislatively defective (i.e. not in conformity with the "Community Harmonization Legislation"), purchased during the 10 years following the offer for sale, and willing to seek recovery for damages from the manufacturer of that product.

As consequence, the manufacturer in light of the existing laws and interpretation of the same, has a high probability to be found liable for damages in any possible procedure in a court of law.

The aim of this document is to examine how that could happen and to evaluate the extremely serious and heavy commercial and financial consequences for the manufacturer.

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Authors of this summary

Ing. Alberto PASQUALI

Past Member of ISO (International Organisation for Standardisation) in the International Technical Committee ISO TC176 / SC2 / SPOTG, responsible for the emission of the International ISO 9001 Quality Standard

Prof. Dott. Benito MELCHIONNA

Past Deputy Attorney General of the ITALIAN CASSATION COURT

The discovery and the consequences

Recently, c/o the Engineering faculty of University of Bologna, a technical scientific committee of professors, international experts and international lawyers, has discovered a new way (defining each legislative, legal, normative and productive aspect) for the operational application, in a court of law, of the European legislation concerning the ***Liability for defective products***.

The legal procedure above mentioned will allow any consumer, claiming to have been damaged by a defective product, to appeal in a court their producer and to obtain from the judge, rapidly and with almost certainly, a favourable sentence against the manufacturer.

Such a sentence will imply for him :

- an obligation to reimburse the consumer for the damages caused by its defective product;
- an absolute prohibition to continue the sale of this typology of products in the market, unless and until the producer can prove, to the competent authorities, to be able to realize products totally in compliance with the existing laws and rules concerning the ***Community Harmonization Legislation***.

The discovery of this new legal procedure, is putting an end to the previous existing procedure (that actually lasted over thirty years) during which the European Directive was substantially not enforceable by any European citizen damaged by a product during the 10 years following its purchase.

The reason for such incapacity of the damaged consumer, was always the same, i.e. his impossibility to prove that for the product, at the time when it was put in the market, it was not valid the ***presumption of conformity*** to the Community Harmonization Legislation.

The laws and the legal aspects considered by this approach to the problem

The legal aspects as above described, and considered by the technical-scientific committee, can be summarized as follows:

- European Directive on the “*Liability for Defective products*” (very similar to the American law *Consumer Protection Act*, 1963), approved by the European Union on 25 July 1985.

The Directive introduces the principle of liability without fault on the part of producer, whereby the producer of a defective product must compensate any damage caused to the physical wellbeing or property of a consumer by its product, to leave his possible negligence on consideration.

- Even if such Directive was approved in order to supply the European citizen with an efficient and effective legal instrument of protection, in the twenty years following the approval, only rarely a decision of a court of law has gone against the manufacturer.

The reason for such trend of European court decisions, was due to fact that the judges used to give a literal interpretation to Directive text below evidenced :

- *the injured person shall be required to prove the damage, the defect and the causal relationship between defect and damage,*
- *the producer shall not be liable if proves his “non responsibility” for the damage occurred to user of his product, proving that the defect evidenced from damaged it did not exist at the time when the product was put into circulation.*

But in order to prove the existence of defect in the product, the consumer must have a good knowledge of the technical-industrial way with the product has been manufactured in order to determine, with adequate accuracy, the cause or set of causes with have produced the defect, information extremely difficult to achieve (not to say impossible) from the consumer.

- But during 2007, such interpretation of the law, in Italy, completely changed by the decision of the Court of Cassation (III Civil Section) n° 20985 of 8 October 2007, which has introduced this new interpretation of the law :

*The **product's unusual performance** becomes sufficient to act, as legally binding evidence, that the product was already objectively faulty when it was launched on the market.*

In other words, according to such decision of the Italian Court of Cassation, the consumer does not have any more to prove with technical accuracy the defect of the product, but has only to prove its unusual performance.

This is legally sufficient to establish the existence of the defect when the product was launched on the market.

Such interpretation of the law, in addition to the Italian Court of Cassation, has been also adopted by the courts of other states of European Community, like France, Belgium and Spain, as it has been acknowledged by the 4th Report of the European Commission on implementation of the European Directive on the Liability for defective products.

Once in a court of law and the damaged consumer has proved the existence of the defect as above indicated, just few manufacturer presumably will be in the position to prove the presumption of conformity of their product to the Community Harmonization Legislation, as it is also requested by the **harmonized standard ISO 9001**, which literally states :

a quality system must be in compliance with the prescriptions of the rules, statutory and regulatory governing the matter

An eventual negative decision by a court of law would cause, in many customers of the company, an image so unfavourable of the producer to establish to purchase at other manufacturers, with all serious negative financial and commercial consequences for the producer involved.

Apparently, also the European Commission seems to be convinced of the extreme difficulty, for the producer, to prove his “non liability” of the damage achieved to the consumer, considering that in its 4th Report on the implementation of the Directive, states :

In cases where liability is not called into question in the definition of defect, damage and causal link (i.e. the demonstration that the law ask to damaged), these claims are settled out of court, which contributes to the injured party being compensated quickly for the damages sustained.

- In the Directive on the Liability for defective products the legislator requires that the damaged consumer must prove the existence of the defect, also states that :

A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account

It is also true that so far, lawyers and judges have not really realized the importance of the above illustrated part of this law, and so it is never provided for its operational use in the court of law.

The Technical Scientific Multidisciplinary Committee

The close connection between the “defective product” and the “lack of safety”, in order to comply with the Directive on the Liability for defective products, necessarily involves also the European legislation on **General Products Safety**, basic conditions of reference for the work of the Technical Scientific Multidisciplinary Committee, formed in the Engineering School of Bologna University and whose members are listed at the end of this document.

The positive work of the Committee has been possible also for the strong cooperation with the :

- Law School of Urbino University
(Professor Elisabetta RIGHINI and Doctor Novella IEZZI)
- Economy, Society and Politics School of Urbino University
(Professor Tonino PENCARELLI and Doctor Linda GABBIANELLI)

The fundamental aspects of the “General Product Safety”

The fundamental aspects of the European legislation on General Product Safety, of primary interest for the consumers, can be summarized as follows:

- 1) *Council Directive 85/374/EEC of 25 July 1985 concerning liability for defective products is applied, inter alia, to products not in conformity with Community harmonisation legislation.*
- 2) *Producers shall be obliged to place only safe products on the market, that is when it conforms the specific Community provisions governing its safety,*
- 3) *The products may be placed on the market only if they do not endanger the safety of persons, domestic animals or goods when properly installed, maintained and used for the purposes for which they are intended (condition which legislatively define the non acceptance of an “unusual performance” of the product).*
- 4) *The Community harmonisation legislation foresees the use of the “harmonized standards” is giving the “presumption of conformity” to “essential safety requirements” established by European Union. The manufacturers shall ensure that their products have been designed and manufactured in accordance with the requirements set out for them in harmonized standards.*
- 5) *Member States shall ensure that any measure taken to prohibit or restrict the product's being made available on the market, as well as to withdraw it from the market or to recall it, shall be promptly withdrawn or amended upon the economic operator's demonstrating that he has taken effective action.*

The complete document issued by the Technical Scientific Committee

For other aspects, also important in order to have a complete understanding of the legislative, normative, juridical, legal and productive issues concerning the Liability for Defective Products, among which:

- *The possibility to consider, as producer, also the importer and any other person involved in the trading chain to consent the purchasing of that product by the consumer.*
- *The important and possible reference to be done in a court of law to the regulations listed into the harmonized standard ISO 9001.*
- *The operational way to be taken by any law firm on the best legal steps and procedures in order to achieve the best results for the benefit of the damaged person.*
- *The possibility, for the guilty manufacturer, to sue for damages the quality consultants and the offices that have certified the quality system of his organisation, in compliance with the ISO 9001 standard.*

Any interested person must refer to the complete document issued by the Technical Scientific Committee on June 16, 2016 and that can be downloaded from the European Association E.L.I.T.E., to the following Internet address:

<http://www.elitelaboratory.eu/documenti-integrativi-della-tematica/>

The European Commission intervention

On 13 December 2016 the above illustrated document has been submitted to the attention of the European Commission which, on 10 January 2017, has launched a “public consultation” on the Liability for Defective Products with argument:

The rules on liability of the producer for damage caused by a defective product

Through this public consultation the European Commission intends to achieve more accurate information about the existing adequacy of the legislative text, the possibility or difficulty of its operational use, as well as its capacity to assure a right balance between the interest of the manufacturers and that one of the consumers.

Our document, supplying to the above illustrated questions adequate and detailed solutions, should be highly useful to the European Commission not only to define an efficient overall vision of these problems, but also in selecting what would need to be done in order to select the more helpful decision to warrant the S.M.E.s the best defenses and to protect their competitiveness in the European market.



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Laboratoire européen pour l'excellence industrielle et territoriale

The members of the Technical Scientific multidisciplinary Committee

Prof. Eng. Mario RINALDI

President AEIT (Italian Association of Electrical, Electronic, Automation, Computer Science and Telecommunication)

Vice-President of the CEI (Italian Electrical Committee)

Member of the General Council of the Italian Association IMQ (Quality Assurance Institute)

Eng. Alberto PASQUALI

Past Member of ISO (International Organisation for Standardisation) in the International Technical Committee ISO TC176 / SC2 / SPOTG, responsible for the continual upgrading and emission of the International ISO 9001 Quality Standard

President of the MACROSISTEMI Society (Research Laboratory agreed to Ministry of University and the Scientific Technologic Research)

Prof. Dott. Benito MELCHIONNA

ITALIAN CASSATION COURT - Past Deputy Attorney General

URBINO University – For more 10 years Professor of “Constitutional Law” at Environmental Science Department

Prof. Eng. Lorenzo PERETTO

BOLOGNA University – Professor of “Electrical and Electronic Measurements” and “Quality Control and Reliability” at Electric Engineering Department

Prof. Eng. Roberto TINARELLI

BOLOGNA University – Professor of “Electrical and Electronic Measurements” and “Quality Control and Reliability” at Electric Engineering Department

Avv. Gian Piero RINALDI

Head of the law firm RINALDI, Office in Bologna (Italy) and New York (United States)

Attorney at Law in the United States (District of Washington D.C.)

Member of the Italian and Washington D.C. Bars

M.C.L. (Master Comparative Law) George Washington University

M.A.I.A. (Master Arts International Affaires) Johns Hopkins University

Prof. Eng. Emilio FERRARI

BOLOGNA University – Professor at Industrial Engineering Department

President of CINECA (Computer Science University Consortium)

Mr. Angelo CARRARA

President of CONFARTIGIANATO of the Bergamo County

Eng. Eliana GROSSI

FEDERMANAGER President of the Bologna County

Eng. Franco BOCCIA

Industrial Management Consultant

Member of FEDERMANAGER Directive Council of Bologna County

Member of FEDERMANAGER National Commission for new digital technologies “Industry 4.0”

Brigadier General Eng. Gennaro DI LAURO

Manager (up to December 2014) of the Military Factory “Re-establishment and Recuperation of Ammunitions”, of the Defence Industry Agency, industrial organisation of the DEFENCE MINISTRY