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**COMMISSION PROPOSAL TO EXTEND THE  
DIRECTIVE ON LIABILITY FOR DEFECTIVE PRODUCTS  
TO PRIMARY AGRICULTURAL PRODUCTS**

(COM(97)0478-C4-0503/97-97/0244(COD))

**UNICE POSITION PAPER**

UNICE is closely following the discussion taking place on the proposal to extend directive 85/374/EEC concerning liability for defective products to primary agricultural products and would like to voice its concerns on the following aspects of the amendments suggested in the draft report presented by the rapporteur in the Committee on Environment, Public Health and Consumer Protection.

**I. GENERAL COMMENTS**

**1. Cost assessment**

In its 24 April 1997 resolution, the European Parliament called for an extension of the impact assessment system whereby every proposal for an EU legislative instrument should be screened for probable substantial effects on business. The Parliament urged the Commission to prepare such an impact assessment before deciding whether or not to adopt a legislative proposal (points 5 and 6 of the resolution).

The European Parliament no doubt intended this measure to apply to the whole legislative process, and not only to the initial version of Commission proposals. UNICE is therefore surprised that the draft report presented by the rapporteur makes hardly any mention of industry or of insurability for product liability, which would be a key element.

**2. Lack of justification**

The explanatory memorandum of the draft report lacks any justification for the suggested amendments. In UNICE's view, the general objective of strengthening consumer protection is not in itself sufficient justification for radically extending the scope of the Commission's initial proposal.

The European Parliament has repeatedly spoken out in favour of greater competitiveness in European industry, promotion of innovation and job creation. It is difficult, therefore, to reconcile these general requirements with proposals whose result would be to impose further costs on industry even though there is nothing to indicate the practical need for change.

**3. *Commission report on implementation of the 1985 directive***

In its report (COM 95/617) of 13 December 1995 the Commission saw no need to amend directive 85/374/EEC. Nothing to alter this view has occurred in the last two years.

This is hardly surprising since there is still very little case law based on the new product liability regime. Although the directive was adopted in 1985, only three countries had implemented it by the 1988 "deadline". Most countries implemented it only in 1990 or even later (Germany, Belgium, Finland, Ireland, Netherlands, Austria, Sweden, Spain). It is therefore difficult to assess whether the directive has in fact proved to have practical shortcomings.

UNICE therefore believes that it would be premature to amend a directive which many countries introduced only very recently, and which still does not apply at all in one large Member State, namely France.

**4. *Consequences on non-EU countries***

It must also be borne in mind that the directive has become the model for product liability legislation in non-EU countries: Iceland, Norway, Switzerland, Japan and Hungary have taken over the EU model. If European companies were confronted with different rules from their competitors, the level playing-field would once more cease to exist with those countries.

**II COMMENTS ON SPECIFIC PROPOSALS**

**1. *Article 4 paragraph 2 - Burden of proof***

The proposed amendment intends to change the rules governing the burden of proof by allowing the victim to prove only the damage, removing the need to prove the defect and the link between the two where, on the basis of the typical course of events of the damage that occurred, the existence of the defect or of a causal relationship between defect and damage may be inferred. This is an unacceptable departure from the regime set out in directive 85/374/EEC.

This would imply that the manufacturer would have to prove that a product which is not even in his possession is free of defect. This regime which does not exist even in American law would have the consequence of affecting virtually all Member States' laws when there is no evidence of significant problems with current burden of proof arrangements.

**2. *Article 7e - Development risk***

UNICE believes that Member States had good reasons for excluding liability for the development risk of their companies (Japan has also done the same). They did not want to put up any additional barriers to innovation, and in that concur with the wishes of the European Parliament which has always spoken out against such obstacles.

Even though industry in Finland and Luxembourg is liable for development risk all other EU countries have decided otherwise with good reason.

**3. Article 9a - Inclusion of mental damage**

UNICE believes that this inclusion lacks justification. The directive speaks about "physical injury". It is important to study how this has been transposed into national law. The German product liability law speaks about "injury to the body or health", which clearly includes mental damage insofar as it is caused by a product defect.

UNICE is of the opinion that it should be determined whether this is also the case in other countries before amending the directive, which may be totally unnecessary.

**4. Articles 9b and 16 - Financial limitation of liability**

If the threshold for damage were deleted, insurance costs would probably rise. UNICE believes that it would be advisable to ascertain the views of the insurance industry on this point.

Furthermore, it must be borne in mind that the regime introduced by the EU "product liability" directive applies alongside other liability provisions in national laws. In most cases these are fault-based liability regimes with reversed burden of proof and, under these provisions, it is perfectly possible to make small claims - as frequently happens.

Germany, Greece, Portugal and Spain have made use of an upper limit for liability. Fortunately, this has never been invoked, given that the limit is extremely high. But it should be a signal to European industry that the situation will not develop in Europe as it has in the United States. These limits have not led to distortions of competition.

In UNICE's view, the references to victims who do not receive full compensation if the upper limit is invoked are theoretical. Firstly, it must be noted that there have so far been no such cases. Secondly, the additional provisions of national law referred to above (i.e. fault-based liability) would still apply and these do not, as a rule, contain such upper limits.

**5. Article 10 and 11 - Limitation and exclusion period**

UNICE would like to recall that the *limitation period* has two objectives. First, after a given period the risk of court proceedings should be removed; second, the reliability of evidence reduces over time (especially from witnesses, whose memory fades). The limitation period does not start when the damage occurs but only when the injured person is aware of the damage and of the defect, and has identified the manufacturer. Once all these elements have been collected, the injured person should be in a position to decide whether or not to lodge a complaint.

Three years is a long time for this and UNICE is of the opinion that it is not unreasonable to demand that the injured person make his/her intentions clear within such a period.

The *exclusion period* relates to no-fault liability. Such liability is very stringent and advantageous to users of products. In exchange for the burden this imposes on him, the manufacturer can be certain that after ten years he will no longer be liable under the directive if his product has not caused any damage during that period. This makes it easier to insure such risks. For damage that occurs subsequently, clearly the manufacturer continues to be liable, but then only under other national provisions, usually for negligence with reversed burden of proof. There are no indications that this legal situation has become disadvantageous to consumers.

In the light of the above remarks UNICE urges the European Parliament to examine the economic consequences of these proposals. In recent years product safety has undoubtedly improved as a result of fierce competition. Accordingly, the need for amendments has reduced.

The manufacturer should definitely be liable for defective products. UNICE has no objections to that, that should be self-evident. But it would be harmful to change, without adequate justification, a legal situation which was introduced in most EU countries only very recently, whose effects are therefore still largely unknown, and which does not even apply in one large Member State.

Insurability of product risk continues to be of particular importance for small and medium-sized enterprises. At the moment it is possible to insure this risk, but this situation would probably be put in jeopardy if the proposed amendments were adopted.

The amendments proposed by the rapporteur in the Committee on Environment, Public Health and Consumer Protection go far beyond the initial aim of the Commission proposal to extend the scope of the directive concerning liability for defective products to primary agricultural products. UNICE therefore urges members of European Parliament to support the Commission's proposal as it stands.

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