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The EU Origin of the Albanian Legal Regime on Product Liability

Nada Dollani *

Abstract

The liability for defective products was for the first time introduced in 1994 by the new Civil Code. It widely reflects the liability regime provided by Directive 85/374 on product liability. In order to analyse the Albanian system on product liability as a special regime of extra-contractual liability, one should look at the Product Liability Directive, which is the source of inspiration for the Albanian regulation. Before the adoption of the Civil Code in 1994, no special regime of liability existed for the defective products due to the special features of economic and social order, based on centralised economy, on state property on the means of production, social and health insurance for all citizens and medical services provided by the state. The new regulation incorporated into the torts chapter of the Civil Code is not a full transposition of Product Liability Directive. However, it is considered as sufficient for the transposition duties of Albania under Stabilization and Association Agreement. When the Albanian legislator transposed a series of European directives on consumer protection, by adopting a separated legal act, Consumer Protection Law, it was assumed that this special area of tort did not need any amendment to bring it into consistency with the new regime of consumer protection and fully compatible with the Product Liability Directive. Considering the difficulties of law enforcement in South East European countries, this discussion paper aims at drawing a comparison between the European regime and the Albanian one so as to explain the specific features of the objective liability regime and identify the deficiencies in transposition, considering that the Product Liability Directive requires maximum harmonisation.

Key words: consumer expectation test, defective product, producer, risk development defence, strict liability.

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1. Introduction

The liability for defective products, for the first time introduced in 1994 by the new Civil Code, broadly reflects the liability regime provided by Directive 85/374 on product liability.¹ In order to analyse the Albanian system on product liability as a special regime of extra-contractual liability, one should look at the Product Liability Directive (PLD), which is the source of inspiration for the Albanian regulation. Before the adoption of the Civil Code in 1994, no special regime of liability existed in Albania for defective products due to the special features of economic and social order, based on the centralised economy, on state property on the means of production, social and health insurance for all citizens and medical services provided by the state. The new regulation provided by the Albanian Civil Code is a partial transposition of the PLD, which is considered sufficient for the transposition duties of Albania under the Stabilization and Association Agreement (SAA)². When the Albanian legislator transposed a series of European directives on consumer protection, by adopting a separate legal act (Consumer Protection Law), it just stated that "the producer is liable for the damage caused by the defects of his goods, according to the provisions of Civil Code of the Republic of Albania and other laws in force",³ assuming that such regulation did not need any amendment to bring it into consistency with the new regime of consumer protection and fully compatible with the PLD. Considering the difficulties of law enforcement in South East European countries,⁴ this discussion paper aims at drawing a comparison between the European regime and the Albanian one so as to explain the specific features of the objective liability regime and identify the deficiencies in transposition, considering that the PLD requires maximum harmonisation. The underlying rationale of the EU Directive regime is considered helpful to better understand the present Albanian legal regime, which did not originate from a political, economic and legal tradition shared with the EU. Albania adopted the EU regime, based on the assumption that under new economic and legal order, during transition and development, it could eventually face the same legal problems regulated by the PLD. A detailed analysis is given for each individual

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, Official Journal (OJ) L 210, 7.8.1985, 29–33, amended by Directive 1999/34/EC, OJ L 141, 4.6.1999.

² OJ L 107 of 28.4.2009, pp. 166-502 SAA Ratification Act No. 9590 of 27.7.2006, *OJ RAI* No. 87/06.

³ Art 6 of Law No. 9902 dated 17.04.2008 'On Consumer Protection', amended by Law No 10444 of 14.7.2011, *OG RAI* No. 103/2011 and Law No. 15/2013 of 14.02.2013, *OJ RAI* No. 29/2013.

⁴ Miric 2013.

aspect of the PLD; i.e. the definition of products, the personal scope of application of the PLD, the definition of producers, the burden of proof, the heads of damage, the central concept of defects, and the cases of defence by the producers.

Special focus is dedicated to the definition of damage and remedies provided for the purpose of this special kind of liability, which the Albanian Civil Code fails to transpose. No heads of damage are delineated and no damage caps are provided for death and personal injuries, and no limits are set on household value, thus the general provisions on compensation of damages are applied. Other important aspects to be dealt with are considered the concept of defect and exonerating circumstances from liability. To understand those aspects of the objective liability of producers, some comparative surveys are conducted in other European regimes.

It seems that the inspiration of the Albanian legislator to establish rules originating from consumer directives into the Civil Code resulted from continuous cooperation with the EU and political aspiration to become a European Union member state. Since the beginning of the 1990's, the European Union (EU) has been quite active in assisting Albania and all the East European countries in the long process of political and economic transformation. In 1993, the Delegation of the European Commission was established for the first time in Tirana. Economic relations between Albania and the EU were established in 1992, the year when the first Agreement for Trade and Economic Cooperation⁵ (Trade Agreement) was signed between the two parties. The Trade Agreement aimed at establishing rules for economic and commercial cooperation between Albania and the European Economic Community. It was based on the Most Favoured Nation principle and the elimination of various forms of discrimination. One of the objectives of the Trade Agreement was to open the way for an association agreement in due course. It required also the harmonisation of Albanian legislation with the Community laws, mainly in the economic and trade area. The Trade Agreement contemplated the creation of supervisory authorities for its implementation, such as the Joint Committee, consisting of representatives of both parties.⁶ However, slow progress on the strengthening of democratic

⁵ OJ L 343, 25/11/1992 pp. 2-10. The Trade Agreement was ratified by Law No. 7617, dated 6.10.1992, Official Journal of Republic of Albania No. 6/1992.

⁶ Euralius: The Process of Integration of Albania into EU, Brochure 2, Tirana, 2007. After the entry into force of the Trade Agreement, Albania became eligible for the EU PHARE Programme, an important step towards restructuring

institutions led to an economic and political collapse in 1997, due to fraudulent pyramid financial schemes.

Currently, Albania has the status of a potential candidate country and the most important agreement with the European Union is the Stabilization and Association Agreement. It entered into force in April 2009. The SAA provides a detailed regulation of the relationship between Albania and the European Union, which defines the rights and obligations of both parties and sets out the main aim of association, inter alia supporting the efforts of Albania in developing its economic and international co-operation, also through the approximation of its legislation with that of the Community.⁷ In order to achieve approximation of laws, on-going efforts by the Albanian side as regards such harmonization is still important so as to overcome the shortcomings of inadequate transposition of the EU law, and in the case of omission of transposition, implement the missing parts of consumer acquis.⁸ By offering an observation with a special focus on the European Court of Justice (ECJ) case-law (now: The Court of Justice of the European Union)⁹, one could get a better understanding of what is required by the EU legislation, and what are the policy reasons of the legal solution adopted.

The aim of this paper is to clarify adoption into Albanian law of the product liability regime provided by Directive 85/374. Even though, in the last decades, Product Liability has established itself as a subject in its own right in many parts of the world,¹⁰ in Albania it is not widely discussed either in legal academic circles or other sectors of trade and economy. From the wording of the provisions on product liability, one can easily distinguish that it is modelled after the PLD, however a few omissions from the PLD make necessary a legislative revision of such liability.

EU assistance to Albania in key reform areas.

⁷ Art 1, 70 and 76 SAA.

⁸ Micklitz 2012, p. 11.

⁹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306 of 17 December 2007, which entered into force on 1 December 2009, amended the name and the structure of the ECJ, introduced changes concerning appointment of judges and Advocate-Generals, concerning competences etc.

¹⁰ Reimann, Product Liability in a Global Context: The Hollow Victory of the European Model 2003.

Considering the political development of the time and following ratification of the Trade Agreement, the Albanian legislator might have intended to create a friendly environment for international trade and foreign investment, through the adoption of legislation familiar to European investors and harmonised to *acquis communautaire*. There are few traces of partial implementation of consumer directives into Civil Code, i.e. off premises contracts,¹¹ unfair terms¹² and misleading advertising.¹³ Regarding product liability, it is considerably adopted into the Civil Code, while limited to the legal understanding of the time. One should keep in mind that many functions of private law were taken over by public law, considering that private property did not enjoy the same protection as state-owned property, the state played the role of both producer and controller,¹⁴ and the Civil Code served mainly to regulate economic relations between state enterprises.¹⁵ The shortcomings will be discussed in detail *infra*.

Before that, a few words about product liability law are necessary. Product liability in its present state is an American invention.¹⁶ It is a legal response to the new social phenomena of mass production¹⁷ and the risk inherent in society from high technological development. The American learned judges and scholars established product liability as a separate significant concept,¹⁸ and its underlying policies were first articulated in the US. The three major policies are loss spreading through the market, maximization of safety incentives for manufacturers, and simplification of judicial procedures.¹⁹ European lawyers, who visited the US, were introduced to American law through courses on the development of product liability, and brought home this novel concept.²⁰ At that time Europe was struck by a number of disasters, such as the thalidomide scandal in Germany²¹ responsible for death and malformation of children, and later

¹¹ Art 672 Civil Code.

¹² Art 686 Civil Code.

¹³ Art 635-639 Civil Code.

¹⁴ Djurovic 2013, p. 271.

¹⁵ It is obvious even from the textbooks of the time; i.e. see Sallabanda 1962.

¹⁶ Hondius 1989, p. 38.

¹⁷ Bruder 2012, p. 1353.

¹⁸ I.e. Justice Traynor with his concurring opinion in *Escola v Coca Cola Bottling Co.* 24 Cal. 2d 453, 150 P.2d 436 (1944), and William Prosser, who inspired the inclusion of strict products liability in the Second Restatement on Torts, Section 402A.

¹⁹ Reimann, *Product Liability in a Global Context: The Hollow Victory of the European Model* 2003, p. 133 fn. 28

²⁰ Hondius 1989, p. 38; Wagner 2010, p. 121.

²¹ See also Caemmerer 1969.

on colza oil in Spain,²² which caused the death of many consumers. The American law on product liability was developed from commercial sale contract liability,²³ while Europe opted for a tort liability regulation, by introducing for the first time the draft Directive on product liability in 1976.²⁴ It apparently blurred the success of the European Convention on Product Liability in Regard to Personal Injury and Death,²⁵ which never came into force.²⁶ After long discussion, the PLD was approved in 1985 with the aim to regulate functioning of the internal market by preserving undistorted competition, facilitating free movement of goods and harmonising the degree of consumer protection with regard to damage caused to health or property by defective products.²⁷ The PLD became an international leading blueprint for the rest of the world, but many scholars questioned its 'success in the law on action',²⁸ while others were enthusiastic about the practical impact of the PLD in the risk management solution offered by industrial companies nowadays.²⁹

The Product Liability Directive introduces a strict liability, which is theoretically simpler and cheaper to operate, concentrating on whether a product provides the level of safety that should be expected of it. The liability for defects in products is placed essentially on producers. The financial burden may be facilitated through the mechanism of insurance, where the cost of premiums passes on to the ultimate consumers in the price of the product.³⁰

The main notions and concepts of the Product and Liability Directive, as well as its analogue counterparts in the Albanian Civil Code, will be analysed in turn.

2. The definition of 'product'

By virtue of Art 631 of the Albanian Civil Code 'product' comprises all movables, with the

²² Taschner 2005, p. 165.

²³ Reimann, Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard? 2003; Kessler 1966/67.

²⁴ COM (76) 372 final; OJ 1976 C 241.

²⁵ The Convention was signed in Strasbourg, 27 January 1977, but never entered into force.

²⁶ Bruder 2012, p. 1356.

²⁷ Recital 1 to the Preamble of the PLD. The Directive is based on Art 100 EEC Treaty, now Art 114 TFEU.

²⁸ Reimann, Product Liability in a Global Context: The Hollow Victory of the European Model 2003

²⁹ Taschner 2005, p. 165-6.

³⁰ Hodges 1998.

exception of primary agricultural products, even though incorporated into another movable or into an immovable. Following the wording of the original Product Liability Directive, the Civil Code specifies that 'Primary agricultural products' means the products of the soil, of stock-farming and fisheries, excluding products which have undergone initial processing. As in the previous version of the PLD,³¹ the Civil Code excludes agricultural products. The exclusion of these products, which anyhow may cause harm to the consumer, has been attributable to the power of the farming lobby in Europe.³² However, the Product Liability Directive provided that Member States (MS), by way of derogation, could include such products within the scope of their implementing measures.³³

The definition of product given by the Civil Code explicitly includes electricity, but does not reflect the amendment made to Directive 85/374, which gives a broader definition stating that 'product' means all movables even if incorporated into another movable or into an immovable. Directive 1999/34 eliminated the exemption of agricultural products, once allowed by the original text of the PLD. The Preamble to Directive 1999/34 states that bringing primary agricultural products within the scope of the Product Liability Directive would contribute to a greater harmonisation of legislation among Member States and functioning of the internal market in agricultural products. Such amendment would also 'help restore consumer confidence in the safety of agricultural products', which had been endangered, in particular, by the mad cow disease.³⁴ The Preamble also observes that the requirements of a high level of consumer protection are served by facilitating claims for compensation for damage caused by defective agricultural products.³⁵ Taking into consideration the objectives of amendments to the PLD, as well as the maximum harmonisation required thereof, the Albanian legislator has to repeal the waiver of agricultural products in order to align it with the consumer *acquis*.³⁶ Furthermore, the *acquis communautaire* does not force a distinction between food and non-food safety. The

³¹ Recital 3 and Art 2 thereto of PLD 85/374, stated that it is appropriate to exclude liability for agricultural products and game, except where they have undergone processing of an industrial nature, which could cause a defect in these products.

³² Reimann, *Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?* 2003, pp. 766-7; Weatherill 2005, p. 137.

³³ Art 15 (1) (a) of Directive 85/374, expelled.

³⁴ Weatherill 2005; Micklitz 2012, p. 38.

³⁵ Recital 7 of 1999/34 Directive.

³⁶ Micklitz 2012, p. 39.

provisions concerning public health and consumer protection also do not oblige legislators to make the distinction between food and non-food in product safety law matters.³⁷ Moreover, the inclusion of 'electricity' is superfluous in Art 631 of the Civil Code, as it already enjoys the status of a movable by virtue of Art 142 of the Civil Code.

There are debates whether the concept of 'product' covers blood and body parts³⁸ on the one hand, and intellectual product, such as the information within a book, or computer programming supplied in a physical computer, on the other.³⁹ There is a general agreement among scholars that blood constitutes a product and the PLD regime may be applied to transfusion of contaminated blood. The issue has also been discussed in the English Case *A v National Blood Authority*.⁴⁰ Regarding body parts, the PLD is silent, however the French legislator has implicitly included elements of body parts while transposing the PLD.⁴¹ A similar provision is found in the Swiss *Produkthaftungsgesetz* regarding the exclusion from exoneration of the producer in respect of transplant products, although Switzerland is not an EU Member State.⁴² Considering that the Commission did not challenge such a provision before the ECJ in the series of cases against France, it implies that the Commission accepts that elements of human body or by-products thereof could be considered products under the meaning of the PLD. Even cases brought before the ECJ for preliminary ruling, such as *Danish kidney*⁴³ or *Sánchez*,⁴⁴ although discussed in certain other aspects of the PLD, on their merits were concerned with human body components.

Regarding intellectual products, the PLD does not make any distinction between corporal and incorporeal movables, but some Member States have explicitly provided in their legislation, transposing the PLD, that product liability applies only to tangible products.⁴⁵ Having in mind

³⁷ Brack 2009.

³⁸ *Ius Commune Casebooks for the Common Law of Europe* 2010, p. 444-7.

³⁹ Howells e Pilgerstorfer 2010, p. 263.

⁴⁰ *A v National Blood Authority* [2001] 3 All England Law Reports (All ER) 289.

⁴¹ Art 1386-12 Code Civil: A producer may not invoke the exonerating circumstance, where damage was caused by an element of the human body or by products thereof.

⁴² Art 5 (1 bis) of 221.112.944 Bundesgesetz vom 18. Juni 1993 über die Produkthaftpflicht (Produkthaftpflichtgesetz, PrHG).

⁴³ Case C-203/99 *Veedfald* [2001] ECR I-03569.

⁴⁴ Case C-183/00 *González Sánchez* [2002] ECR I-03901.

⁴⁵ Belgian Product Liability Act 25 February 1991, MB 22 March 1991, Art 2.

the provisions of the PLD, it is hard to imagine how such provisions may be applied to the intangible universe. Applying the concepts employed by the PLD to an intangible item, such as information contained in a book, would raise a number of issues regarding interpretation of, for example, 'raw material', 'component part', importer, etc. Regarding computer software, the Commission believes that as long as Art 2 of the PLD does not make any distinction, it means that it applies to software and moreover to handcrafts and artistic products.⁴⁶ The issues become more complicated when it comes to the proof of defects.

In France, a court of first instance found a publisher liable for the damage caused by the content of a book, which described some fruits and plants as edible. The publisher failed to warn that one of the plants was similar to another toxic plant, and as a consequence a family was made ill by eating the toxic plant. Therefore, the publisher was found liable for negligence, but not for the book's defectiveness.⁴⁷

3. Subjective scope of application: who is the 'producer'?

Following the definition of product, Article 631 of the Albanian Civil Code contemplates the definition of the 'producer', which quite faithfully reflects Art 3 (1) and (2) of the PLD that define the producer as the manufacturer of a finished product. Such concept is based on the idea that the main reason for strict liability is the risk created by the industrial production, and the manufacturer is the person who controls and absorbs the risk.⁴⁸ Labelling obligation facilitates identification of the producer, i.e. with regard to cosmetics or pharmaceutical products.

However, the notion of producer is broader, as it means also the producer of any raw material or the manufacturer of a component part. Thus they risk a wide extension of liability if the defective component part renders the entire product defective.⁴⁹ In that case, the law assumes the producer of the final product and the producer of the component part to be jointly and severally liable.⁵⁰

⁴⁶ OJ C 114, 8 May 1989, 42. See also Hans-W. Micklitz 2009, p. 233.

⁴⁷ Ius Commune Casebooks for the Common Law of Europe 2010, p. 447.

⁴⁸ Reimann, Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard? 2003, p.764.

⁴⁹ Hans-W. Micklitz 2009, p. 234.

⁵⁰ Art 633 CC transposing Art 5 of the PLD.

Furthermore, a producer is considered also to be any person who, by putting his name, trademark or other distinguishing feature on the product presents himself as its producer. This rule helps the claimants to rely on the information written about the products or on their packaging, otherwise they would face formidable obstacles.

In addition, importers of a product for sale, hire, leasing or any form of distribution in the course of business are considered producers and have the same responsibility as them. Within the scope of application of the Albanian Civil Code, such provision *prima facie* suggests that it means importers within Albanian boundaries, while the PLD intends importers to the EU. Following ratification of the Stabilisation and Association Agreement, which defines that one of the aims of association is to develop gradually a free trade area between the Community and Albania,⁵¹ one should interpret the 'importer' in the light and wording of the SAA, especially the provisions on free movement of goods. The PLD excludes product liability of 'importers' within EU borders. In the internal market, the role of the importer no longer applies so as to link special legal consequences to his activities,⁵² and so has to be the role of the importer within the free trade area between Albania and the EU established by the SAA in order to achieve another aim of association, the development of economic cooperation through approximation of legislation. The 'importer' from the free trade area shall be subject to secondary liability, like any other supplier under certain circumstances. The aim of this provision is to provide a facility for the claimants to seek justice within the EU boundaries.⁵³

Article 632 of the Civil Code transposes the first sentence of art 3 (3) of the PLD, providing that the supplier of the product shall be treated as producer, where the producer of the product cannot be identified and where the supplier fails to inform the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product. The Albanian legislator, by remaining faithful to the PLD wording, fails to set a certain length of time within which the supplier shall inform the injured party, unlike the implementing domestic legislation of

⁵¹ Art 1 of Stabilisation and Association Agreement between the Republic of Albania, of the one part, and the European Communities and their Member States, of the other part, - OJ L 107 of 28.4.2009, pp. 166-502-Ratification Act No. 9590 of 27.7.2006 - *International Agreements of the Republic of Albania OJ RAI* No. 87/06.

⁵² Hans-W. Micklitz 2009, p. 234.

⁵³ *Ius Commune Casebooks for the Common Law of Europe* 2010, p. 453

some other Member States, i.e. the Italian Code of Consume prescribes a three month period,⁵⁴ German legislation one month,⁵⁵ while the ECJ has clarified that the supplier should inform the injured person on its own initiative and promptly, especially for the purposes of limitation periods of the claim.⁵⁶ By this provision, the EU regime of product liability diverges widely from its mother system in the US which, reflecting the influence of warranty and based on contractual liability, holds liable for the defective product the whole chain of participants in the manufacturing and distribution process. Reimann explains three policy reasons for that solution: “First, everybody who participates in putting the product into market also participates in creating the risk of harm. Second, if the manufacturer is not available as a defendant, victims should be able to turn to others. Third, holding everyone involved liable increases safety, because it 'creates incentives on the part of downstream sellers to exert pressure on the manufacturer to produce safer goods.’”⁵⁷

Contrary to US product liability, in the EU the PLD renders the supplier liable only on an ancillary basis, where the producer is unknown.⁵⁸ The policy reasons for this solution are presented by the Commission in the proposal for a PLD⁵⁹ and summarised by the ECJ in the *Bilka* case⁶⁰, as follows: 'acknowledging that the possibility of holding the supplier of a defective product liable in accordance with the provisions of the PLD would make it simpler for an injured person to bring proceedings, but there would be a high price to pay for that simplicity, inasmuch as, by obliging all suppliers to insure against such liability, it would result in products becoming significantly more expensive. Moreover, it would lead to a multiplicity of actions, with the supplier seeking recourse in turn against his own supplier, back up the chain as far as the producer. Since, in the great majority of cases, the supplier does no more than sell the product in the state in which he bought it and only the producer is able to influence its quality, it was thought appropriate to concentrate liability for defective products on the producer.’⁶¹

⁵⁴ Art 116 (4) Codice del consumo, Decreto legislativo 6 settembre 2005, n. 206.

⁵⁵ Produkthaftungsgesetz of 15 Dezember 1989 (BGBl. I S. 2198), as amended § 4 (3).

⁵⁶ Case C-358/08, *Aventis Pasteur SA v. OB*, [2009] ECR I- 11305.

⁵⁷ Reimann, *Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?* 2003, p. 764.

⁵⁸ Case C-52/00 *Commission v. France* [2002] ECR I-03827 §36.

⁵⁹ COM(76) 372 final; OJ 1976 C 241, p. 9.

⁶⁰ Case C-402/03 *Skov Ag v. Bilka Lavprisvarehus A/S* [2006] ECR I-00199.

⁶¹ *Ibid.* §28.

The ECJ has interpreted strictly the provisions of the PLD, observing that it requires a complete harmonisation in regard to matters that it regulates.⁶² In two consecutive cases of *Commission v France*, the ECJ held that since the EU legislature had competence to harmonise laws of MS in the field of product liability, it is also competent to determine the person liable and conditions of that liability.⁶³ Although in the first case, the ECJ confirmed that France had incorrectly transposed Art 3(3) of the PLD by affording to the supplier the possibility of joining the producer, thus creating the effect of multiple proceedings, a result which the direct action afforded to the victim against the producer under the condition provided for in Art 3 of the directive is specifically intended to avoid.⁶⁴ The ECJ restated its arguments in the following case against France, which specifically dealt with the incorrect transposition of Art 3 (3) of the PLD by the French legislation.⁶⁵ The ECJ did not accept the argument posed by France that the fact that the supplier is not exempted from liability where he informs the injured person of the identity of his own supplier is of no great consequence in practice and therefore does not constitute an infringement of the directive, and held that non-compliance with an obligation imposed by a rule of Community law in itself constitutes a failure to fulfil obligations and the fact that the non-compliance has had no adverse effects is irrelevant. Consequently, by recalling the argument of the previous case, C-52/00, the ECJ found that France did not correctly transpose the PLD and did not fully comply with case C 52/00.⁶⁶ The ECJ held the same position in the latter case of *Bilka*, where it stated that the class of persons made liable by the PLD must be regarded as exhaustive, since the directive aims at complete harmonisation.⁶⁷ By holding the suppliers liable, where the producers are liable as the suppliers have the right of recourse to the producer, the Danish legislation in substance extends the class of persons defined by the PLD. Thus the PLD precludes national legislation from holding liable suppliers without the restriction provided for by that directive. Although Art 13 provides that the PLD is not to affect any rights which an injured person may have according to the rules of the law of contractual or non-

⁶² Case C-52/00 *Commission v France* [2002] ECR I-03827 §24; Case C-154/00 *Commission v. Greece* [2002] ECR I-03879 § 20; Case C-402/03 *Skov Ag v Bilka Lavprisvarehus A/S* [2006] ECR I-00199 §23.

⁶³ Case C-52/00 *Commission v France* [2002] ECR I-03827 §39.

⁶⁴ *Ibid.* §40.

⁶⁵ Case C-177/04 *Commission v. French Republic* [2006] ECR I-02461.

⁶⁶ *Ibid.* §52-54.

⁶⁷ Case C-402/03 *Skov Ag v. Bilka Lavprisvarehus A/S* [2006] ECR I-00199 §33.

contractual liability, the ECJ recalled its ruling in previous cases⁶⁸ and reiterated that Member States could not maintain a general system of product liability different from that provided for in the directive. However, the system of rules put in place by the PLD does not preclude the application of other systems of contractual or non-contractual liability based on other grounds, such as fault or a warranty in respect of latent defects.⁶⁹ The ECJ answered to Denmark that the Member States could maintain a legal regime where supplier is answerable without restriction for the producer's fault-based liability.⁷⁰ Following the case-law of the ECJ, we should understand that the no-fault product liability legal regime established by the directive requires complete harmonisation only in matters it regulates. The PLD does not seek exhaustively to harmonise the field of liability for defective products beyond those matters,⁷¹ thus it represents a sectorial complete harmonisation regime. Contractual liability, as well as fault-based liability, even in defective products, are subjected to national rules and are not affected by the PLD. However, the MS are not prevented from providing in other matters, outside the scope of the directive, an analogue system of liability which corresponds to that of the PLD.⁷² Considering the case-law of the ECJ, which calls for a full harmonisation, the Albanian legislator should consider the transposition of the second sentence of Art 3(3) PLD, which is omitted by Art 632 of the Civil Code.

Unlike suppliers, service providers are not considered as producers by the PLD. Therefore, in a more recent case regarding the liability of a service provider for using defective products in the course of providing services, the ECJ held that such liability does not fall within the scope of the PLD. Nevertheless, the ECJ held that the PLD does not prevent the MS from applying rules which make a service provider liable for damage caused, even in the absence of any fault on its part, provided, however, that the injured person and/or the service provider retain the right to put at issue the producer's liability on the basis of the PLD when the conditions laid down by the latter are fulfilled.⁷³

⁶⁸ *Commission v France* § 21; *Commission v Greece* §17; *González Sánchez* §30; *Bilka* §39.

⁶⁹ *Commission v France* §22; *Commission v Greece* §18, and *González Sánchez* §31.

⁷⁰ *Bilka* §48.

⁷¹ Case C-285/08 *Moteurs Leroy Somer v Dalkia France and Ace Europe* [2009] ECR I-04733, §25.

⁷² *Ibid.* §30.

⁷³ Case C-495/10 *Centre hospitalier universitaire de Besançon v Thomas Dutruieux and Caisse primaire d'assurance maladie du Jura* [2011] ECR I- 00000 § 39.

4. No-fault liability and the burden of proof

One of the essential features of the liability regime established by the PLD is the no-fault principle. This was the response of EU authorities to the peculiar problems of risk distribution in the age of increasing technology. Product liability represents a departure from the long-held dogma, by which liability was always found on fault of the tortfeasor.⁷⁴ It is impossible to find fault in every adverse situation and in some cases the fault is simply inexistent since the 'damage is an inevitable companion to common progress and lifestyle of a modern man'.⁷⁵ The preamble of the PLD states that liability without fault on the part of the producer is the sole means of adequately solving the problem of a fair apportionment of the risks inherent in modern technological production. The explanatory report to the first draft of the PLD explains the allocation to the producer of the risk of defectiveness as efficient and fair in light of the producer's capacity to buy insurance against loss and thereby to spread the costs of compensating a small number of injured consumers among all purchasers by reflecting insurance costs in a slightly higher price.⁷⁶ Weatherill summarizes that 'fault-based liability systems typically leave the consumer injured in the absence of fault without redress, which attracts criticism for its inequitable allocation of risk. Moreover, the difficulty and cost of showing fault in private litigation often deters a consumer from pursuing a claim even where there are chances of success.'⁷⁷ In the light of that rationale, Art 4 PLD provides that the injured person shall be required to prove the damage, the defect and the causal relationship between defect and damage. Surprisingly, the Albanian legislator has not transposed this provision, which establishes the core characteristic of product liability. However, that result is implied in the wording of Art 631 of the Civil Code, which asserts that 'the producer shall be liable for damage caused by a defect in his product, except when:' ... (it lists the exonerating circumstances set by Art 7 PLD - *infra*).

According to the general rules of Civil Procedure, the claimant is required to prove the facts set as the hypothesis part of the legal norm,⁷⁸ while exclusion from liability needs to be proven by

⁷⁴ Perovic 2010, p. 282.

⁷⁵ *Ibid.* 283.

⁷⁶ COM(76) 372 final; OJ 1976 C 241, pp. 13-14.

⁷⁷ Weatherill 2005, p. 136.

⁷⁸ Art 12 of the Code of Civil Procedure states that 'the party which claims a right has the obligation to prove, in conformity with the law, the facts on which it supports its claim'.

the person who claims that exclusion. The burden of proof for the constitutive facts of a legal relationship falls on the plaintiff, while prohibitive, altering or extinguishing facts must be proven by the defendant.⁷⁹ Under the civil procedure rules, the lack of obstructive facts is the rule, while their existence is the exception; therefore the burden of proof for the existence of exceptions falls on the defendant.⁸⁰

One reason to explain the omission of the content of Art 4 of the PLD into the Civil Code might be that even general tort liability is based on the presumption of fault, which means that the defendant must disprove his fault. Such a characteristic has its origin from the old Civil Code based on the Russian Civil Code, inherent also in the tort liability rules of other east European countries.⁸¹ Probably the drafters of the Civil Code might have assumed the same situation for product liability, but in this case the defendant must not disprove the existence of fault, but the existence of all exonerating circumstances provided by Art 7 of the PLD, incorporated in Art 628 of the Civil Code.

The PLD obviously introduced the 'strict' liability standard, limited by the notion of defect, into the East European product liability regimes, however in many respects even this seemingly profound transformation of the basis of liability (fault – strict liability) did not mean many changes in reality.⁸² As it is observed *infra*, there is an on-going debate whether the notion of fault is hidden behind the notion of defect in product liability. Some explain that the elements of strict liability are simply inevitable side effects of overcoming the particular proof problems allegedly suffered by product victims.⁸³ Wagner asserts that a closer examination of the PLD reveals a negligence-based liability wrapped in strict liability language.⁸⁴ However, from a law and economics perspective both ways have been criticised for not permitting the differentiation of product safety to be in accordance with consumer preferences. The lack of information and underestimation of risk thereof on the part of the consumer would be sufficient to give rise to an

⁷⁹ Flutura Kola 2013, p. 388.

⁸⁰ *Ibid.* 391. See also Lamani 1962, p. 121-2.

⁸¹ For this special characteristic see Brüggemeier LAW 2012/29; Tulibacka 2008, p. 219-20.

⁸² Sengayen 2005, p. 271.

⁸³ Stapleton 1994, p. 219.

⁸⁴ Wagner 2010, p. 136.

efficient liability of producer for product safety.⁸⁵

Nevertheless, the Albanian legislator needs urgently to provide as black letter law to clarify the situation on the burden of proof; otherwise the lack of that provision undermines the whole rationale behind the product liability regime.

5. The heads of damage

Another great deficiency of Albanian legislation is the lack of transposition of Art 9 of the PLD on damage. A policy reason behind special regimes of liability is to establish a balance between the interests involved. While they favour plaintiffs by imposing stricter liability, they also protect defendants by restricting the available damages.⁸⁶ The PLD defines that ‘damage’ is under its scope and enlists exhaustively, as confirmed by the ECJ⁸⁷, the heads of compensation for damage, which have not been incorporated into the Albanian Civil Code, but general rules on damage apply.⁸⁸ Under the current legal situation, it means that the damage resulting from defective products is subject to the general rules on tort, and according to the Civil Code the damage which is compensated is composed by *damnum emergens* and *lucrum cessans*.⁸⁹ The claimant may ask compensation also for the reasonable expenses incurred to avoid or diminish the damage, those necessary to establish the liability and value of damage, as well as reasonable expenses incurred for out of court settlement.⁹⁰ This result goes completely contrary to the aims of the PLD, which has précised the heads of damage in its Art 9. The PLD aims, as stated in the first recital to the Preamble, to achieve an equal degree of consumer protection against damage caused by a defective product to health or property across the internal market.⁹¹ To that purpose, the Preamble states that the protection of the consumer requires compensation for death and personal injury as well as compensation for damage to property. Art 9 of the PLD sets out the heads of damage compensable under the PLD as follows:

⁸⁵ Ott e Schaefer 2004, p. 227-8

⁸⁶ Reimann 2003, p. 782

⁸⁷ Case C-203/99 *Veefald* [2001] ECR I-03569.

⁸⁸ Micklitz 2012.

⁸⁹ Semini 1998, p. 238.

⁹⁰ Art 640 Civil Code.

⁹¹ Although in strict constitutional terms, consumer protection comes as an incidental consequence of the PLD principal objective. See Weatherill 2005, p. 135.

i. damage caused by death or personal injuries. Upon death cases the dependants are entitled to claim compensation for the loss of consortium as well as ceremonial expenses.⁹² In personal injury cases, compensation typically covers all direct consequences such as medical expenses, cost of long term care, rehabilitation and lost income.⁹³

ii. damage to property, which is subject to certain limitations. It comprises the damage to or destruction of any item of property. The item compensable should (i) be of a type ordinarily intended for private use or consumption, and (ii) should have been used by the injured person mainly for his own private use or consumption.

The value of the defective product itself is not included within the meaning of compensable damage. Furthermore, only damage which exceeds the value of 500 € is compensable. The reason for that solution is to be found in the Preamble to the PLD, which states that damage should be subject to a deduction of a lower threshold of a fixed amount in order to avoid litigation in an excessive number of cases. The minimum set by the PLD is a result of a complex balancing of different interest.⁹⁴ So, in order to avoid litigation for small amounts of damage and trivial claims, the European legislator has established a threshold. In the event of minor material damages, the victims of defective products must bring an action under the ordinary law of contractual or non-contractual liability,⁹⁵ or probably they will find a solution in the near future under the on-going development of a collective action system in Europe.⁹⁶ France and Greece were condemned by the ECJ for not having transposed that threshold. Nevertheless Italy has set that amount to 387 €⁹⁷ National legislators have interpreted the 500 € threshold differently. Most consider it as only the damage to property in excess of that sum that is ever recoverable, treating it as an insurance excess, while the UK and the Netherlands allow the full amount to be recovered so long as the threshold is exceeded.⁹⁸ Such a threshold set by the PLD in strict

⁹² I.e. Art 643 CC.

⁹³ Art 641 CC.

⁹⁴ *Commission v Greece* §29.

⁹⁵ *Ibid* §30.

⁹⁶ COM(2013) 401/2.

⁹⁷ Art 123 (2) Codice del consumo.

⁹⁸ *Ius Commune Casebooks for the Common Law of Europe* 2010, 497.

interpretation of the ECJ has been subject to criticism, in favour of better consumer protection.⁹⁹

iii. non-material damage, which must be compensated under the rules of the national legal system. The PLD provides in its Preamble that the PLD should not prejudice compensation for pain and suffering and other non-material damages payable, where appropriate, under the law applicable to the case.

The ECJ has held that the PLD contains an exhaustive list of heads of damage, which qualify for compensation under its regime.¹⁰⁰ Nevertheless the ECJ, in the Danish kidney case, has made it clear that the national courts are required, under the PLD, to examine under which head the circumstances of the case are to be categorised, namely whether the case concerns damage covered either by point (a) or by point (b) of the first paragraph of Article 9, or non-material damage which may possibly be covered by national law.¹⁰¹ The national courts may not decline to award any damages at all under the PLD on the ground that, where the other conditions of liability are fulfilled, the damage incurred is not such as to fall under any of the foregoing heads.¹⁰²

Other types of damage do not fall within the PLD typology, i.e. damage to commercial or business property, pure economic loss, loss of chance, or damage to the defective product per se. However, the ECJ, being less strict than in other cases, on one occasion has held that although the PLD does not cover compensation for damage to an item of property intended for professional use and employed for that purpose, it does not preclude the application of domestic law, which establishes a corresponding liability system to that of the PLD, where the injured person simply proves the damage, the defect in the product and the causal link between that defect and the damage.¹⁰³ Thus, national law regulates other types of damage. Nevertheless, Howell observes that 'the Product Liability Directive cannot claim to be the forerunner for a paradigm shift from fault to strict liability in European tort law more generally. It is largely isolated to its own particular context - something which is symptomatic of many areas of tort law

⁹⁹ Howells, *Product liability – a history of harmonisation* 2005; Taschner 2005.

¹⁰⁰ Case C-203/99 *Veefald* [2001] ECR I-03569 §32.

¹⁰¹ *Ibid.* §33.

¹⁰² *Ibid.* §33.

¹⁰³ Case C-285/08, *Moteurs Leroy Somer v Dalkia France and Ace Europe*, [2009] ECR I-04733 §32-33.

and may hinder the development of overarching principles.¹⁰⁴

However, Albanian law, in compliance with the PLD, provides for the diminution of damage or exclusion of liability in the cases of contributory negligence, providing that the liability of the producer may be reduced or disallowed when, having regard to all the circumstances, the damage is caused both by a defect in the product and by the fault of the injured person or any person for whom the injured person is responsible.¹⁰⁵ That provision is included to deter moral hazard, which might occur otherwise, so that if the consumer is fully insured for all losses, he will have no incentive to keep the extent of damages as low as possible.¹⁰⁶

Maximum liability

The PLD allows MS to provide for financial ceilings with regard to damage resulting from death or personal injuries caused by design defects. MS that wish to derogate from the unlimited liability may provide for an amount of a total liability not less than 70 million €¹⁰⁷ As a result also based on the Preamble the total liability of the producer for damage resulting from a death or personal injury and caused by identical items with the same defect should be established at a level sufficiently high to guarantee adequate protection of the consumer and the correct functioning of the common market.

It is important to note that this potential limitation of liability applies only to 'damage resulting from death or personal injuries', rather than to property damage. Thus, property seems better protected than physical integrity.¹⁰⁸ The financial ceiling was introduced to the PLD due to German delegation pressure, as it has been alleged that unlimited liability would not be insurable.¹⁰⁹ Some authors propose that such a model on liability cap should not be followed; on the contrary, the possibility to introduce a liability ceiling should be taken out of the PLD.¹¹⁰ The Albanian legislator has not made use of this possibility, although with the growing power of

¹⁰⁴ G. Howells 2011.

¹⁰⁵ Art 8 (2) of the PLD is transposed fully in Art 629 of the CC.

¹⁰⁶ See Ott e Schaefer 2004, p. 233.

¹⁰⁷ Art 16 of the PLD.

¹⁰⁸ Ius Commune Casebooks for the Common Law of Europe 2010, p. 497.

¹⁰⁹ Taschner 2005, p. 162.

¹¹⁰ *Ibid.*

insurance business, one must observe what might happen in the future.

6. The concept of 'defect'

Liability under the PLD is premised upon damage caused by a defect in a product. The concept of 'defect' is defined in Art 6 and is almost verbatim included in Art 630 of the Civil Code;¹¹¹ at its heart is the issue of whether a product 'does not provide the safety which a person is entitled to expect.'

The determination of what constitutes a 'defect' is a difficult task. In theory there are identified and discussed two basic tests and three main categories of defect.¹¹² The first test is based on consumer expectations: generally a product is defective if it is more dangerous than the average consumer has reason to anticipate. It has its origin in contract law. This test is codified by the PLD, thus applied in the majority of European states. Here, the vast majority of jurisdictions rely on reasonable consumer expectation rather than employing a cost-benefit analysis.¹¹³ The second test concerns risk-utility analysis. It deems a product defective if its risk outweighs its utility. More simply: there is a defect if the product is more dangerous than absolutely necessary in light of its purpose.¹¹⁴ Vice versa, the more beneficial the product, the lower the tolerable level of safety.¹¹⁵ This test tends to dominate in the United States, where it lies in the heart of the Third Restatement.¹¹⁶ Although both tests are interchangeably combined in both parts of the world for the purpose of a better scientific analysis, with their appraisal and criticism, the risk-utility test prevails in the US, while the consumer expectation test prevails in the EU. The risk-utility test appears controversial because it can easily slide into a negligence type of analysis. That might not be the case if it is seen as part of a composite test establishing what consumers are entitled to

¹¹¹ A product is defective when it does not provide the safety which is expected from it, taking all circumstances into account, and especially: (a) the presentation of the product; (b) the use to which it could reasonably be expected that the product would be put; and (c) the time when the product was put into circulation. A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.

¹¹² Reimann, *Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?* 2003, p. 767.

¹¹³ Reimann, *Product Liability in a Global Context: the Hollow Victory of the European Model* 2003, p. 140.

¹¹⁴ Reimann, above at fn 111, p. 768.

¹¹⁵ *A v National Blood Authority* [2001] 3 All England Law Reports (All ER) 289.

¹¹⁶ Restatement of the Law, Third, Torts: Products Liability §2.

expect.¹¹⁷ Mildred proposes reconciliation between the two tests, stating that the safety of the product should remain the focus of the inquiry, but risks and benefits should be taken into account without triggering an examination of the producer's conduct.¹¹⁸ The PLD seems to favour the consumer expectation approach, while the General Product Safety Directive,¹¹⁹ which provides for the public regulations of safety of goods, seems to favour risk utility analysis.¹²⁰

Regarding the categories of defects, legal science distinguishes three types of defects. The first category comprises the so-called 'manufacturing defect', in which are grouped those products manufactured in series, where one of these fails to correspond to what makes a product non-detrimental.¹²¹ Manufacturing defects arise from something going wrong in the production process, possibly because of poor-quality raw materials, an error of a production line worker or product contamination.¹²² The second category consists of products in which the entire series has been designed in such a way that all products have the same deficiency. That is called a 'design defect'. The third category contains products of perfect manufacture and design, but with potentially dangerous properties in the hands of inadvertent users. Therefore, instructions need to be given to warn them of these properties. If the warning is insufficient, one speaks of 'instruction defect'.¹²³ Actually, it is necessary to understand the different functions of instruction and warnings. Instructions serve to use the product safely, while warnings help consumers avoid the risk, or at least be aware of the inevitable risk posed by the product. Warnings provide the producers the opportunity to avoid liability for unavoidable harm caused by a product.¹²⁴ However, a blanket warning does not justify the exclusion of liability for defective products. The liability arising from a defective product may not be limited or excluded by agreement.¹²⁵ The Albanian Civil Code does not transpose this provision under the product liability chapter, but a general provision applicable for the whole tort liability system states that any agreement, which

¹¹⁷ Ius Commune Casebooks for the Common Law of Europe 2010, p. 463.

¹¹⁸ Mildred, *Pharmaceutical Products: The Relationship between Regulatory Approval and the Existence of a Defect* 2007.

¹¹⁹ PLD 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety OJ L 11, 4-17.

¹²⁰ Ius Commune Casebooks for the Common Law of Europe 2010, p. 463.

¹²¹ Taschner 2005.

¹²² Ius Commune Casebooks for the Common Law of Europe 2010, p. 461.

¹²³ Taschner 2005, p. 157.

¹²⁴ Ius Commune Casebooks for the Common Law of Europe 2010, p. 475.

¹²⁵ Art 12 PLD.

limits or excludes liability of a person that has caused damage by fault, is null and void.¹²⁶

Taschner claims that the three categories are clearly distinguishable and are not just academic theory. They are accepted in product liability discussions in Europe and were taken over by the Third Restatement,¹²⁷ while Reimann observes that the three types of defects are not everywhere recognized by black letter law and the PLD applies the same rules to all defect types, as do the many statutes modelled after it in many parts of the world.¹²⁸ Nonetheless, the German Supreme Court in the Mineral Water Bottle II case made a distinction between the rules applicable to different defects, by stating that the risk development defence is not applicable to manufacturing defects.¹²⁹

In the English case, *A v National Blood Authority*,¹³⁰ Justice Burton, by referring to the PLD and after carrying out a great work on comparative law, observed that there was no need to use the US distinctions of manufacturing and design defects; instead a more useful terminology is standard and non-standard products. A non-standard product is one which is different, obviously because it is deficient or inferior in terms of safety, from the standard product. Regarding of the proof of defect, national courts follow different approaches. The Commission in its Fourth Report observed differences in terms of the evidence needed to prove a defect: 'In some courts, for example, in Belgium, France, Italy or Spain, it is enough for the plaintiff to prove that the product did not fulfil the function for which it was intended. In other countries, such as Germany or the United Kingdom, the plaintiff must prove the precise nature of the product's defect in more detail. The same information also shows that the Austrian Supreme Court has developed a body of settled case-law which reconciles these two positions.'¹³¹ The position is not uniform, however, some continental Courts have demanded proof of the nature of the defect and not relied

¹²⁶ Art 610 Civil Code.

¹²⁷ Taschner 2005, p. 157.

¹²⁸ Reimann, *Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?* 2003.

¹²⁹ 1995 NJW 2162. See also Mildred, *The development risk defence* 2005, p. 171.

¹³⁰ *A v National Blood Authority* [2001] 3 All England Law Reports (All ER) 289.

¹³¹ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee Fourth report on the application 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 amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999, COM/2011/0547 final, p. 7.

on the mere fact that a product failed.¹³² Thus the concept and proof of defect is quite difficult and not yet standardized at the EU level. De novo there is an American and a European approach. The US approach is essentially that the claimant bears the burden of proof for all conditions, unless the judge in some cases could facilitate that burden. To that purpose serve the doctrine of *res ipsa loquitur* (the thing speaks for itself), which basically means that if under the circumstances of the case, common sense strongly suggests that things were as the claimant contended, the court may presume their verity, even if the claimant cannot really prove them.¹³³ The EU approach is more categorical. The PLD divides the conditions of liability into two groups and points out clearly the burden of proof accordingly. Art 4 of the PLD states that the claimant shall prove the damage, the defect and the causal relationship between defect and damage. While Art 7 of the PLD provides a list of exonerating circumstances, which shall be proven by the defendant. Some scholars claim, that although technically, this legal rule is one of strict liability, substantially it represents one of negligence. At least to the design and warning defects, apparently the principle of negligence is reformulated in the language of defectiveness.¹³⁴

Products that carry some inherent risk could not pose liability only because they have caused damage, unless they were defective in the sense of posing an additional unjustified risk. For example, a knife might cause hurt, tobacco, alcohol, fatty food, etc. might damage health, but they are not considered defective products under the PLD. The producer is required to provide safety within reasonability.¹³⁵ If a person knows or should have known of the inherent risk contained in the product, he shall take the measures to protect himself by not consuming excessive amounts of that product. In that event, it is not the place of law to protect consumers from their own excesses.¹³⁶

¹³² Howells, *Is European Product Liability harmonized?* 2008, p. 130.

¹³³ Reimann, *Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?* 2003, p. 773.

¹³⁴ Ott e Schaefer 2004, p. 236; Wagner 2010, p. 136.

¹³⁵ Hein Kötz 2010, p. 245.

¹³⁶ See *Pelman v MacDonald's Corp.*, 237 F. Supp. 512 (S.D.N.Y. 2003).

7. Exonerating circumstances

One of the differences between strict liability and absolute liability is the availability of defences under strict liability regimes. The PLD provides for certain specific exonerating circumstances, where the burden of proofs lies with the defendant:

Art 7 of the PLD - The producer shall not be liable as a result of this directive if he proves:

- (a) that he did not put the product into circulation; or
- (b) that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect came into being afterwards; or
- (c) that the product was neither manufactured by him for sale or any form of distribution for economic purpose nor manufactured or distributed by him in the course of his business; or
- (d) that the defect is due to compliance of the product with mandatory regulations issued by the public authorities; or
- (e) that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered; or
- (f) in the case of a manufacturer of a component, that the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product.

All the defences are implemented verbatim in Art 628 of the Civil Code.

According to ECJ case-law, the cases exhaustively listed above by which a producer may exempt himself from liability are to be interpreted strictly. Such an interpretation seeks to protect the interests of the victims of damage caused by a defective product.¹³⁷

7.1. Putting the product into circulation

Two of the defences have been brought before the ECJ: 7(a) and (e) in the Danish kidney case. The wording of the PLD is rather unclear. The explanatory memorandum simply states: 'it was

¹³⁷ Case C-203/99 *Veefald* [2001] ECR I-03569 §15.

not considered necessary to define the term put into circulation since this is self explanatory in the ordinary meaning of the words. Normally an article has been put into circulation when it has started off on the chain of distribution'.¹³⁸ The intention of this particular defence in article 7 (a) seems to have been to assure that the producer put the product into circulation of his own free will and to exclude accidents happening within the production process and cases where third parties, such as thieves, put the goods into circulation. Some authors claim that more precise wording might have been helpful.¹³⁹ However, the ECJ has taken the issue of 'putting into circulation' twice in its case law. In the first case, the ECJ held that exemption from liability because the product has not been put into circulation covers, primarily, the cases in which a person other than the producer has caused the product to leave the process of manufacture. Uses of the product contrary to the producer's intention, for example where the manufacturing process is not yet complete, and use for private purposes or in similar situations are also excluded from the scope of the PLD.¹⁴⁰ The ECJ also pointed out that it is irrelevant, in the course of activity of a service provider, to establish whether the service provider produced the product in-house, or the product was supplied by a third party. It held that whether a product used in the provision of a service was made by a third party, by the service provider himself or by an entity linked to the service provider, cannot of itself alter the fact that the product was put into circulation.¹⁴¹ In the second case, the ECJ scrutinized the meaning of 'having been put into circulation' in the light of Art 11 of the PLD, and concluded that a product must be considered as having been put into circulation when it leaves the production process operated by the producer and enters a marketing process in the form in which it is offered to the public in order to be used or consumed.¹⁴²

7.2. Non-economic purpose

In the Danish kidney case, the ECJ discussed also the question whether Article 7(c) of the PLD, providing for the exemption from liability where a product was not manufactured by the

¹³⁸ COM/95/617 final, 11.

¹³⁹ Howells, ECJ 10 May 2001, *Henning Veed fald v Århus Amtskommune*, C-203/99 (Danish product liability kidney case) 2002.

¹⁴⁰ Case C-203/99 *Veedfald* [2001] ECR I-03569 §16.

¹⁴¹ *Ibid.* §17.

¹⁴² Case C-127/04 *O'Byrne* [2006] ECR I-01313 §27.

producer for an economic purpose or in the course of his business, extends to the case of a defective product which has been manufactured and used in the course of providing a specific medical service, financed entirely from public funds, for which the patient is not required to pay any consideration. The ECJ answered in the affirmative and held that the fact that products are manufactured for a specific medical service for which the patient does not pay directly but which is financed from public funds maintained out of taxpayers' contributions cannot detract from the economic and business character of that manufacture. The activity in question is not a charitable one, which could therefore be covered by the exemption from liability, provided for in Article 7(c) of the PLD. Besides, the defendant admitted at the hearing that, in similar circumstances, a private hospital would undoubtedly be liable for the defectiveness of the product pursuant to the provisions of the PLD.¹⁴³

7.3. Development risk

The defence provided by Art 7 (e), known as the development risk defence, which means that the producer is not liable if the state of art was not such as to enable the discoverability of the defect, is the most controversial one. Some view its inclusion as undermining the whole rationale of strict liability by reintroducing the elements of fault and foreseeability. To others, it is a necessary safeguard, especially for innovative and research industries.¹⁴⁴ The defence was included due to pressure by the UK, however Art 15 of the PLD allows for an omission of such defence. Only Finland and Luxemburg have omitted this defence, while other countries such as Germany, Spain, etc. have reserved that omission only for special strict liability regimes due to the catastrophes that occurred before the PLD came into force, respectively thalidomide and the colza oil tragedies.

The development risk defence as provided by the PLD was subjected to the scrutiny of the ECJ in the *Commission v UK* case, where the Commission challenged the implementation of provision 7 (e) of the PLD by the UK Consumer Protection Act of 1987, as too subjective. The ECJ, although not finding a violation alleged by the Commission, gave some consideration with

¹⁴³ Case C-203/99 *Veefald* [2001] ECR I-03569 §19-22.

¹⁴⁴ See Hodges 1998; Mark Mildred 1998.

regard to the development risk defence. The ECJ recalls that in accordance with the principle of fair apportionment of risk between the injured person and the producer set forth in the seventh recital in the preamble to the PLD, Article 7 provides that the producer has a defence if he can prove certain facts exonerating him from liability, including 'that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered'.¹⁴⁵

The ECJ, acknowledging the opinion of the Advocate General, observed that 'since Art 7 (e) PLD refers to "scientific and technical knowledge at the time when [the producer] put the product into circulation", it is not specifically directed at the practices and safety standards in use in the industrial sector in which the producer is operating, but, unreservedly, at the state of scientific and technical knowledge, including the most advanced level of such knowledge, at the time when the product in question was put into circulation. Second, the clause providing for the defence in question does not contemplate the state of knowledge of which the producer in question actually or subjectively was or could have been apprised, but the objective state of scientific and technical knowledge of which the producer is presumed to have been informed. However, it is implicit in the wording of Article 7(e) that the relevant scientific and technical knowledge must have been accessible at the time when the product in question was put into circulation.¹⁴⁶ In regard to accessibility the Advocate General gave a plain example referring to the impossibility of fast dissemination of information contained i.e. in a Manchurian language article published in a local scientific journal, which does not go outside the boundaries of the region. In such a situation, it would be unrealistic and unreasonable to take the view that a producer could be held liable on the ground that at the time at which he put the product into circulation the brilliant Manchurian researcher had discovered the defect in it.¹⁴⁷

The ECJ concluded that, "in order to have a defence under Article 7(e) of the PLD, the producer of a defective product must prove that the objective state of scientific and technical knowledge, including the most advanced level of such knowledge, at the time when the product in question was put into circulation was not such as to enable the existence of the defect to be discovered.

¹⁴⁵ Case C-300/95 *Commission v UK* [1997] ECR I-02649, §24.

¹⁴⁶ *Ibid.* §26-28.

¹⁴⁷ *Ibid.* Opinion of Advocate General Tesauro delivered on 23 January 1997 OJ L 1985 210, 29. §23-24.

Further, in order for the relevant scientific and technical knowledge to be successfully pleaded as against the producer, that knowledge must have been accessible at the time when the product in question was put into circulation.”¹⁴⁸ This judgment has been criticised for failing to articulate and clarify the ambiguous meaning of Art 7 (e), which is why Milred proposes that the separation of the concepts of state of knowledge and discoverability may appear to give substance to both the narrow and the wide interpretations of the defence.¹⁴⁹

National courts of Member States have followed diverging approaches with regard to the risk development defence. The most relevant cases are often explained in the legal literature on product liability¹⁵⁰ as follows:

The development risk defence does not apply where the generic risk is known even if not discoverable in individual product (National blood).¹⁵¹ Burton J retorted in *A v. National Authority* that expectations were relevant in assessing defectiveness, but not the availability of the development risk defence. Thus it remains unclear whether the defence applies to knowledge which is known of but cannot be used to discover the defect. Art. 7 (e) of the PLD talks of knowledge enabling the existence of the defect to be discovered; it is ambiguous whether this means existence in the abstract or concrete sense.¹⁵² In other words, some other scholars suggest a distinction between the capacity of scientific knowledge to understand the existence of a defect and the inability of technology to permit discovery of that defect.¹⁵³

The development risk defence does not apply where a risk was known about, but had not yet materialized in that context (*Cosytoes*).¹⁵⁴ Here, the High Court in the UK argued that where it was possible to discover the defect by virtue of a simple practical test, the defence was lost; the fact that no manufacturer had thought to perform the simple test was nothing to the point.

Only the impossibility of determining that a known property or feature of the product amounts to

¹⁴⁸ *Ibid.* §29.

¹⁴⁹ Mildred, *The development risk defence* 2005, p. 179.

¹⁵⁰ The cases are summarised in *Ius Commune Casebooks for the Common Law of Europe* 2010, p. 488.

¹⁵¹ [2001] 3 All ER 289.

¹⁵² Howells, *Is European Product Liability harmonized?* 2008, p. 131.

¹⁵³ Newdick 1988, p. 472.

¹⁵⁴ *Abouzaid v Mothercare* 2000] All ER (D) 243.

a defect can give rise to the development risks defence (Coffee Machine). The Austrian Supreme Court¹⁵⁵ rejected a manufacturer's appeal to the development risks defence in a case concerning a defective coffee machine that caught fire and burned down a house. The court saw the defence as available only in respect of 'typical development risks': risks whose central feature is that the danger of a particular attribute of the product was not discoverable at the point when the product was placed into circulation.¹⁵⁶

The development risk defence applies where there is no way of knowing that a product contains a risk (Hiv-infected blood).¹⁵⁷ The Amsterdam District Court permitted the defence to succeed in respect of blood made defective by the presence of the HIV virus. Given the PLD's maximum harmonisation agenda, this decision deviates grossly from *A v. National Authority* and the guidelines given by ECJ.¹⁵⁸

The development risk defence can be available when the medical evidence is not sufficiently advanced to justify a warning (*Pentasa*). The Paris Court of Appeal¹⁵⁹ applied the defence to exonerate a drugs manufacturer, by relying on a 'limited' state of knowledge of side-effects of the drug in question. The court also pointed to a lack of consensus at an international level of the need to warn of the risk. The court's judgment was subsequently overturned.¹⁶⁰

7.4. Limitation of action

The PLD provides for two types of time barred action: the first is a limitation period (prescription) and the second an extinction period (preclusivity). The Albanian legislator has implemented Art 10 and 11 of the PLD into Art 634 of the Civil Code, which states that "the claims against a producer for compensation for damage, ..., must be brought within three years, starting from the day when the injured person became aware, or should reasonably have become

¹⁵⁵ OGH 22.10.2002, 10 Ob 98/02p.

¹⁵⁶ Duncan Fairgrieve 2013, p. 13.

¹⁵⁷ *Hartman v Stichting Sanquin Bloedvoorziening* (1999) Nederlandse Jurisprudentie (NL) 621 (Amsterdam District Court).

¹⁵⁸ Duncan Fairgrieve 2013, p. 13.

¹⁵⁹ *Pentasa* no 02/1671323 September 2004(CA Paris).

¹⁶⁰ Cour de Cassation (CCass)1, 15 May 2007, no 5–10.234 (*Pentasa*).

aware, of the damage, the defect and the identity of the producer.” While § 2 provides that “the claim of injured person against the producer for the compensation of damage, under the first paragraph of article 628 of this Code, extinguishes upon the expiry of a period of 10 years from the date on which the producer put into circulation the actual product which caused the damage”.

The ECJ has held that the date of putting the product into circulation is considered to be the date when it leaves the production process operated by the producer and enters a marketing process in the form in which it is offered to the public in order to be used or consumed.¹⁶¹ The ECJ has had the opportunity to analyse Art 11 of the PLD on extinction of action under the *OB v. Aventis Pasteur* case, where it held that Article 11 of the PLD has a neutral character. Its purpose is to place a time limit on the exercise of the rights conferred by the PLD on the victim. As is clear from the 10th recital in the preamble to the PLD, the aim of that provision is to satisfy the requirements of legal certainty in the interests of the parties involved. The establishment of the time limits within which the victim’s action must be brought must therefore satisfy objective criteria.¹⁶² This was particularly important to suppliers who wished for a finite time for record keeping and risk management.¹⁶³

In the case when the victim has mistakenly commenced proceedings against the wrong defendant on the belief that he was the producer, then it is for the national court to examine the condition of procedural succession. However, in order to establish the time when the product was put into circulation it is irrelevant whether the product was bought directly from the producer or other intermediaries in the distribution chain, even when the latter have a close link such as principal-subsidary companies. It is important for the national courts to examine the functions of those companies in the production and distribution chain. When the subsidiary company acts only as a distributor, and has no function in the manufacturing process, then the product is considered to have been put into circulation when it leaves the mother company. However, the national courts must have regard to the personal scope of application of the PLD as defined in Art 3.¹⁶⁴ When the same case returned again to the ECJ, it observed that Art. 11 of the PLD would be infringed

¹⁶¹ Case C-127/04 *O’Byrne* [2006] ECR I-01313, §27.

¹⁶² *Ibid.* §27.

¹⁶³ Duncan Fairgrieve 2013, p. 14.

¹⁶⁴ *Ibid.* §30-39.

if a producer is procedurally replaced in proceedings brought, or replacement is required after the elapse of a 10-year period.¹⁶⁵ Nevertheless in the concrete case, the ECJ strongly hinted that the principal company, the producer, still retained control until its subsidiary supplied the goods, leaving open the possibility that the case against the producer was in fact brought within the ten year period.¹⁶⁶

Some authors have criticised the 10-year extinction period, because “the ten year period runs not from when the product was supplied to the end consumer, but rather from when it was supplied by the producer. The injured party will often be left having to take an educated guess at the time elapsing between supply by producer and final end sale. Particular problems associated with the effects of transactions between groups of companies have given rise to litigation regarding the applicability of the ten year long-stop.”¹⁶⁷

8. Concluding remarks

The Product Liability Directive, introducing a strict liability on producers of defective goods, requires maximal harmonisation on the matters it regulates. Notwithstanding the extensive discussions among scholars, academics and professionals in the field of product liability, the European Commission is of the opinion that it is premature to propose a review of the Directive at this stage. It has expressed its opinion through four reports to date, and has found no need for new amendments to the Product Liability Directive. In the view of the Commission, the directive contributes to maintaining the balance between the producers’ interests and consumer interests as regards liability for defective products, and the differences that may arise do not create significant trade barriers or distort competition in the European Union. The Commission also believes that the provision for defences or the 500 Euro thresholds provides a common level of consumer protection and a common basis for the producers’ liability for defective products.

From analysis of the Civil Code provisions on producer liability for defective products, read in comparison with the Product Liability Directive, the following conclusions could be drawn:

¹⁶⁵ Case C-358/08 *Aventis Pasteur SA v OB* [2009] ECR I- 11305, §61.

¹⁶⁶ Howells 2010.

¹⁶⁷ Duncan Fairgrieve 2013, p. 15.

Firstly, the Albanian legislation has not reflected the amendment to the directive, which includes even agricultural products in the definition of product, once excluded from the scope of the PLD. The definition of product in Art 631 of the Civil Code should simply read: "'product' means all movables even if incorporated into another movable or into an immovable". It is superfluous to include electricity in the definition of 'product', as far as any natural energy is recognised as a movable under Art 142 of the Civil Code.

Secondly, the fair apportionment of risk between the injured person and the producer does not come out of black letter law, as the Civil Code fails to clearly implement separation of burden of proof. It does not indicate, explicitly, who should prove what. Although that separation is achieved through means of interpretation of the procedural and the material law, it is better to have a situation of *in claris non fit interpretatio*.

Thirdly, the heads of damage are omitted from the text of the Civil Code. Although at first sight one might think that not limiting the damage might offer a better protection to the victims, one should keep in mind that the ECJ has on several occasions held that the Directive should be interpreted strictly, as it strikes delicate balances among interests involved. Considering that under the Stabilisation and Association Agreement the gradual creation of a free economic zone is required, the Albanian legislation should be aligned with that of the *acquis*.

Fourthly, prohibition of agreements excluding tort liability is explicitly provided for liability based on fault, but not provided under the section on product liability. That situation needs clarification. The word 'fault' should be taken out of Art 610 of the Civil Code, as far as Art 11 of the PLD excludes the defence of *volenti non fit iniura*.

The experts assisting the Albanian institutions on the harmonisation of Albanian law with the *acquis* propose that for the sake of having a more comprehensive and consistent legislation on consumer protection, the provisions on product liability should be incorporated into the 2008 Consumer Protection Law (or any new Law on Consumer Protection) in future amendments of the law.¹⁶⁸

¹⁶⁸ Micklitz 2012, p. 39.

It is absolutely true that the present state of the legislation on product liability and consumer protection is unsatisfactory, just like the partial and incorrect transposition of EU Directives amount to gross inconsistency, but a plausible comprehensiveness and consistency could be achieved through revision of the Civil Code, and even inclusion of consumer contract law into the Civil Code. That might contribute to a serious development of a judicial corpus of case law, which might safeguard a better balance of the interests involved in respect of the principles set by the *acquis communautaire*. Furthermore, it is only the Civil Code, as the most important legal act regulating private parties' relationships, which might contribute to the rise of awareness among 'conservative' lawyers to familiarise themselves with the new concepts on product liability and consumer protection. It is enormously important that the harmonised rules be implemented in practice and have real meaning in the real world through the right incentives and enforcement mechanisms.

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