Introduction

The European Justice Forum (EJF) is a coalition of businesses with associated individuals and organisations who are working to promote fair, balanced, transparent and efficient civil justice laws and systems in Europe. EJF adopts a holistic approach and looks at the entire process from dispute detection, out-of-court dispute resolution to in-court dispute resolution, to ensure the legal environment in Europe protects both consumers and businesses alike, and that those with a legitimate grievance have access to as well as delivery of justice. EJF promotes systems in which innovation and companies can flourish and which enhance the international competitiveness of Europe.

As such, EJF wishes to share some general considerations on how a future regulatory framework may ensure swift and satisfactory redress in situations where complex relationships and responsibilities exist. As such, **this input mainly focuses on questions 90-103 of the Questionnaire "Targeted consultation: Impact Assessment study" and does not provide feedback on all the questions**.

Key considerations

The following elements have been recognized by many stakeholders, including the EC[1], as important in the discussion relating to liability for new technologies:

- Over the past years, the Product Liability Directive has proved its worth as a framework which created legal certainty while enabling technological innovations that thrive thanks to its technology-neutral provisions.
- The Product Liability Directive still fulfills its goal to significantly strengthen consumer rights while at the same time providing a balance with the interests of the producers and more generally European competitiveness.
- Technology has developed and continues to develop at high speed and even though generally the Product Liability Directive is structurally fit for purpose for damages caused by a defective product, its effectiveness can be improved through adoption of interpretation guidelines concentrating on the following clarifications:
    - inclusion of digital content & services, including algorithmic systems under the term "products" while also so-called AI systems are nothing else but algorithms (see questions 75-77, 80-84 of the Questionnaire "Targeted consultation: Impact Assessment study");
    - hence assigning liability to the persons who have created and are in control of such high-autonomy algorithmic systems and not to any non-human entity (at times erroneously anthropomorphed as a "digital person" or similar ideas on taking responsibility away from human actors) as only human behaviour counts;
    - the importance to determine in contracts the liability regime which is most appropriate for particular types of products, digital content as well as services in full respect of the interpretation guidelines to be developed (e.g. confirming recommencements of the 10 year liability duration until the producer/controller clearly informs about the date for the end of support of the product);
    - an advanced prevention through (near) real-time monitoring;
    - how delivery of justice could be done through best practice in dispute resolution.
- New provisions (in a Directive or national legislation) on liability as such, however, would for the time being not appear to be on the agenda as there is a logical priority for the definition of responsibility spheres and for a review of product safety legislation, technical norms and standards with regard to innovative digital technologies. These provisions are the obvious filter

[1] COM/2018/246 final.

for liability and are key and instrumental to defining whether a product can be considered as defective under the PLD. E.g., liability for product defects appearing after a product has been placed on the market and being result of self-modifying software, of provision of updates or a failure to provide them, or of product specific data feeds need to be taken care of in specific safety rules. There, room will be found, as well, to take care of certain elements of dynamising to some reasonable extent the development risk defences which will have to take on some extent of updating responsibility of the manufacturers. It must be a primordial objective of Union level legislation to create a consistent body of legal provisions which are well thought through and do not create ambiguities or even contradictions.

- In this perspective, consistency and coherence between the various legislative instruments suggests to continue dealing with infringements of personal rights like data protection, discrimination and privacy exclusively by the existing dedicated EU legislation such as the GDPR.

A successful responsibility enforcement for the benefit of fair risk allocation with those parties involved which can control the respective risk best could be facilitated by taking the following ideas on board, and that not within but outside of the Product Liability Directive – which is, as mentioned above, inextricably intertwined with the rules on product safety which need to be tackled as a logical priority:

- Monitoring & Admission:
  Providing infrastructure for neutral data trustees, reducing need for "discovery" in court, supporting a standardized register as part of the public infrastructure (rule of law) capturing and clustering issues (potential disputes) from early on with feedback loops first to producers themselves, to authorities, ombuds entities, and courts for later stages if escalation is necessary, rather than introducing a reversal of the burden of proof in the PLD which would appear a too coarse instrument;

- Delivery of justice:
  Building based on the aforementioned infrastructure efforts a fair and effective/efficient civil justice system in Europe with prioritizing out-of-court mechanisms (dispute resolution primarily by ombuds entities) and using courts only as a means of escalation.

- This approach has been described as the current best practice in **Dispute Resolution = DR** (quotation from Christopher Hodges, Emeritus Professor of Justice Systems, University of Oxford):

  Current best practice for almost all consumer and small disputes is a 'facilitated early resolution model'. The consumer records the complaint on a platform, or details are recorded by the trader or an Ombuds entity, by phone or online, in any event overseen by the Ombuds entity. The details are only entered once, so there is no need to repeat entry of details in any subsequent stage. The single file is created and can be passed on. When the Ombuds entity becomes involved, the expert case handler can identify further details that may be needed from either party (ignoring those that are irrelevant), and facilitate informed communication and negotiation between the parties, under the scrutiny of this independent expert third party. The experience is that most cases settle through this 'early facilitated resolution' process swiftly and with little cost.

  The wider picture is that the vision and functions of a dispute resolution system (and certainly ADR) have been transformed and replaced by their position in, and contribution to, market and behavioural systems, involving identification and prevention of issues and reduction of risks. Hence, their design and functions have to change radically.

There is a clear evolutionary trajectory across Europe from arbitration-based ADR schemes to Ombuds bodies. This is occurring for several reasons, each of which is compelling. Unlike traditional courts and arbitration or mediation schemes, an advanced Ombuds entity is able to deliver the following functions:

(a) Having a **single Ombuds entity per sector** (or covering several sectors, together with a 'residual' Ombuds entity [as in Belgium]) with a unified **single portal** provides a simple architecture in which consumers and businesses know where to go for information, advice, support and resolution, and have confidence in the quality and independence of the third party.

(b) The Ombuds entities are able to **evolve** and improve their processes and IT and have developed advanced processes. Private bodies have greater flexibility than public bodies here.

(c) Ability to **integrate the functions** of impartial advisers (able to replace consumer advice and lawyer services), mediator services, and independent decision-making functions (quasi-judge or arbitrator).

(d) Ability to compile a **single authoritative database** of market issues in almost real time by aggregating information from issues raised (in questions as well as formal complaint cases) that provides invaluable information that can be fed back to traders, regulators, consumers and others on market issues, issues for individual traders, and evidence-driven intervention and enforcement. This facility has proved to be invaluable for sectoral regulators, and it is an untapped resource in some sectors and for Trading Standards. The database has to be as large as possible if it is to maximise its utility at low cost. This factor drives the need for a *single* Ombuds entity per sector: the dispersal as well as failure to capture data through having even two dispute resolution (DR) schemes in a sector significantly undermines the function. Further, the data should be held by a trusted entity that has public sector values, and not sold for profit, as some private for-profit platforms and ODR schemes have always done. That consideration also points to the necessity for having an Ombuds entity as data controller, who is either statutory or regulated not-for-profit.

(e) **Intervention to support changes** in the practice and culture of traders based on the database, so as to improve performance and reduce risk of recurrence or other future risks. Traders usually prefer to talk to Ombuds entities rather than regulators because the former have no enforcement powers, and can offer what are effectively expert consultancy services at not-for-profit prices. This support function cannot be provided by courts, arbitrators or mediators.

(f) A point that is frequently overlooked is that the basis of an Ombuds entity's decision practice is typically a **Code of Ethical Practice**. Thus, the Ombuds entity is the guardian not only of fair DR but also of ensuring ethical behaviour in a regulated sector. Almost all rules and guidance in regulated sectors are based on the requirement that traders should observe ethical standards. This powerful requirement is missing from unregulated sectors. If it were to be introduced as a core requirement for all traders, it could form the basis of an extremely powerful force for good market behaviour, improvements in performance, differentiating good from unacceptable trading behaviour, supporting consumer confidence and driving vibrant markets based on trust.

Replying to questions raised by EU COM specifically with EJF:

- *Does the current PLD ensure access to justice?*
  The reduction of a claimant's burden of proof to a defect of a product, waiving the need of most national liability frameworks to also provide proof of fault, still convinces as an approach enabling a fair distribution of spheres of responsibility. This distribution, however, is not an issue of product liability legislation but of specific product admission and surveillance legislation which indeed needs to be given a fresh look in the perspective of recent technological developments (see "Key considerations" above).

- *Do non-court solutions have a role to play, especially for lower value claims?"*
  They certainly have a role to play as outlined above in that they can, with creation of proper public infrastructure for the capturing of problems and complaints, go a long way to assist in monitoring market developments, feeding potential for improvements back to industry and regulators and thus contribute to prevention and avoidance of damage which still is the very best result and highest objective of product admission and surveillance legislation. Liability legislation cannot fix what rules on safety and product admission have neglected. The EU legislator should take his responsibility in respect of product admission and surveillance legislation very seriously.

- *Are the time limits and the EUR 500 threshold justified?*
  Time limits need a fresh look depending on the products concerned. This boils again down to a clear definition of the spheres of responsibility. Consumer expectations can only be based on legitimate time horizons which again need to be defined in product admission and safety rules, up to respective contractual frameworks which should be required to define them where appropriate. As for the EUR 500 threshold, it still appears to be a legitimate threshold to keep issues of minor financial importance away from clogging courts. As proposed above, with a suitable infrastructure Ombuds entities – specific to industries, and in the absence of industry specific bodies the Residual Ombudes entity required to exist in each Members State – appear well placed to take up such issues and contribute to feeding them back into the respective industry and to regulators/admission bodies in charge in order to create a faster learning system for the benefit of consumers and society as a whole. Such investments will be all the more beneficial as they will assist in informing and possibly accelerating courts procedures in countries where these appear to constitute a major obstacle to adequate redress[2].

[2] See COM/2018/246 final (Fn. 1), point 5.2.