

## FAIR APPORTIONMENT OF RISKS BETWEEN THE PRODUCER AND THE CONSUMER IN THE EVENT OF UNKNOWN RISKS

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### Abstract

#### Purpose

The main and most important legal act in the European Union (EU), which establishes “strict” civil liability for producers, is the Council Directive on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (hereinafter referred to as the Directive). Article 4 of the Directive states that the producer could be held liable if all of the following conditions are present: the damage caused, the defectiveness of product and the causal relationship between defect and damage. Generally, it is agreed that one of the main objectives of tort liability is to strike a balance between the interests of the victim and the debtor. The Directive also strives to achieve an appropriate balance between the consumer and the producer by introducing a liability system for producers (and, when appropriate, this system provides for the apportionment of liability for other persons involved in the production and distribution chains of the product). Considering the inherent features of new technologies, as well as the fact that the Directive was adopted 35 years ago and was only slightly amended in 1999, it could reasonably be questioned whether the fair distribution of risks enshrined in certain provisions of the Directive is also adequate in cases of products, when new technologies were involved in the production of the product or are incorporate in the product itself, with an assumption that the use of such products could create new unknown risk and lead to potentially hazardous situations that could cause harm to the user of such products.

**Purpose** – This article has two objectives: (1) present the content of the fair apportionment of risks between the producer and the consumer enshrined in the Directive 85/374/EEC, and (2), following examination of the concept and cases of unknown risks, determine whether in case of new technologies the balance of risk

established in the Directive remained unchanged and consistent with the objective of protecting the consumer.

**Approach** – The object of this study is the interpretation and application of the provisions laid down in the Directive 85/374/EEC used by the European Court of Justice, the analysis of the relevant legal doctrine and risk theory. Systematic, teleological and comparative law methods were applied.

**Finding** – The general principle of legal certainty in the EU requires the rules to be clear and precise, which makes their consequences foreseeable. In accordance with Article 168 (1) of the Treaty on the Functioning of the European Union and Article 35 of the Charter of Fundamental Rights of the European Union, a high level of protection of human health must be ensured by defining and implementing all EU policies and activities, including in the area of liability for defective products. Taking into consideration the new risks emerging from new technologies, the need to ensure a high level of consumer protection is one of the relevant objectives of the EU legislature (and the representatives of the legal science doctrine), which could be achieved by the creation of an appropriate security and liability framework that could guarantee a high level of safety and become an effective mechanism (COM(2018) 795 final Annex p. 18) to provide redress for victims. The European Parliament resolution (2015/2103(INL)) states “< ... > that the future legislative instrument should be based on an in-depth evaluation by the Commission determining whether the strict liability or the risk management approach should be applied”.

**Research limitations/implications** – This paper analyses the application of tort liability for the producer based on the strict liability approach. The aim of the paper is not to identify what should be considered as new technologies, provide and describe in detail their characterizing properties, adaptability or benefits. In this paper, the notion of new (or emerging) technologies is primarily used in order to emphasise their distinctiveness and novelty when compared to the “standard consumer products” used in society, while highlighting the additional new risks posed by such new technologies and their potential impact on existing legislation. The notion of new technologies is used in this study in the context of the Directive on product safety and other related sectoral legislation on EU products and the Directive on producer responsibility, that is, new technologies are defined primarily as a specific product for consumers.

**Practical implications** – The analysis of the producer’s liability, as well as the current assessment of the legal acts concerning the liability of the producer in the context of new technologies, is likely to benefit both: the legal science doctrine and legislature.

**Originality/Value** – The issue analysed in this article has not yet been studied in Lithuanian scientific literature. In foreign literature, the producer’s liability system has been extensively analysed by the following scholars: D. Fairgrieve, C. van Dam, P. Machnikowski, G. Howells, H. C. Taschner and other authors.

**Keywords:** product liability, civil liability, tort, risks, unknown risks, consumer protection.

**Research type:** general overview.

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